

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

ANTI-CORRUPTION DIVISION AT KOLOLO

SESSION CASE 12 OF 2015

UGANDA.....PROSECUTOR

VERSUS

- 1. HON. ENG. ABRAHAM BYANDALA (A1)**
- 2. ENG. BERUNADO KIMEZE SSEBBUGA (A2)**
- 3. JOE SSEMUGOOMA (A3)**
- 4. MARVIN BARYARUHA (A4)**
- 5. APOLLO SENKEETO (A5)**
- 6. ISAAC MUGOTE (A6)**
- 7. WILBERFORCE SENJAKO (A7).....ACCUSED**

BEFORE GIDUDU, J JUDGMENT

There are seven accused persons on this indictment. For brevity I shall refer to them in

the order indicated above as A1 to A7. They are charged individually in some counts and jointly in others for various offences as shown below.

- 1. Count One:** A1 is charged with Abuse of office C/S 11(1) ACA, 2009. He is accused of abusing the authority of his office by irregularly directing the immediate signing of a contract between UNRA and Eutaw Construction Co Inc before due diligence was concluded.
- 2. Count Two:** A1 is charged with Abuse of office C/S 11(1) ACA, 2009. He is accused of abusing the authority of his office by irregularly directing the formalization of the illegal sub contract between Eutaw Construction Co Inc and CICO (U) Ltd.
- 3. Count Three:** A1 is charged with Disobedience of lawful Orders C/S 35(c) IGA, 2002. He is accused of refusing or failing to comply with the directive of the IGG of 17th July 2014 halting all transactions on road works relating to Mukono- Katosi/ Kisoga -Nyenga Road, without reasonable excuse.
- 4. Count Four:** A2 is charged with Abuse of office C/S 11(1) ACA, 2009. A2 is alleged to have communicated the award of the contract to Eutaw Construction Co Inc without complying with Procurement Laws.
- 5. Count Five:** A2 is charged with Abuse of office C/S 11(1) ACA, 2009. He is alleged to have irregularly signed a contract between UNRA and Eutaw Construction Co Inc in abuse of authority while he was aware of the short comings of the company in the due diligence report.
- 6. Count Six:** A2 and A3 are jointly charged wit

causing financial loss C/S 20 ACA, 2009. The two are alleged to have irregularly approved and caused payment of UGX. 24,790,823,522= to Eutaw Construction Co Inc while aware of the short comings in the due diligence report on the company knowing or having reason to believe that loss would occur.

7. Count Seven: A2 and A3 are charged with Abuse of office C/S 11(1) ACA, 2009.

They are accused of irregular approval and causing payment of UGX. 24,790,823,522= to Eutaw Construction co Inc in abuse of authority while aware of the short comings in the due diligence report.

8. Count Eight: A4 is charged with causing financial loss C/S 20 ACA, 2009. He is accused of misadvising UNRA to sign the contract with Eutaw Construction Co Inc before carrying out due diligence on the company knowing or having reason to believe that financial loss would occur.

9. Count Nine: A4 is charged with Abuse of office C/S 11(1) ACA, 2009. He is accused of tendering advice in abuse of authority before due diligence was done which caused financial loss of UGX. 24,790,823,522= to the GOU.

10. Count Ten: A3 and A7 are charged with causing financial loss C/S 20 ACA, 2009. The two are accused of omitting to properly verify a performance guarantee and an advance payment security from HFB Ltd knowing or having reason to believe that financial loss would occur.

11. Count Eleven: A3 and A7 are jointly charged with Corruption C/S 2(i) ACA, 2009. The two are accused of neglecting to properly verify a performance guarantee and advance payment security allegedly issued by HFB presented by Eutaw Construction Co Inc to UNRA.

12. Count Twelve: A5 is charged with Theft C/S 254(1) and 261 of the PCA, Cap 120. He is accused of stealing UGX. 24,790,823,522= the property of the GOU.

13. Count Thirteen: A5 is charged with obtaining money by false pretence C/S 304 and 305 of the PCA. He is accused of falsely presenting himself to UNRA as a Country representative of Eutaw Construction Co Inc of Mississippi, USA and fraudulently obtained UGX. 24,790,823,522= the property of the GOU.

14. Count Fourteen: A5 is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering false performance guarantee for UGX.

16,528,0,000= to UNRA purporting that the same had been issued by **HFB Ltd** whereas not.

15. Count Fifteen: A5 is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering a false payment advice security for UGX. 24,790,823,522= to UNRA purporting it was issued by **HFB Ltd** whereas not.

Count Sixteen: A5 is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering a false advance payment bond for UGX. 24,790,823,522= to UNRA purporting it was issued by **SWICO** whereas not.

16. **Count Seventeen: A5** is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering a false performance bond for UGX.24,790,823,522 to UNRA purporting it was issued by **SWICO** whereas not.
17. **Count Eighteen: A5** is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering a false bid guarantee for UGX. 16,528.000,000 to UNRA purporting it was issued by **KCB (U) Ltd** whereas not.
18. **Count Nineteen: A5** is charged with Uttering false documents C/S 351 and 347 of the PCA, Cap 120. He is accused of knowingly and fraudulently uttering a false bank guarantee for UGX. 1,900,000,000 to UNRA purporting it was issued by **KCB (U) Ltd** whereas not.
19. **Count Twenty: A5** is charged with obtaining the execution of a Security by False Pretences C/S 306 of the PCA, Cap 120. He is accused falsely pretending that no advance payment had been received by Eutaw Construction Co Inc from UNRA and with intent to defraud **induced ICEA** to execute and issue a performance bond for UGX. 16,527,215,618= in favour of UNRA
20. **Count Twenty One: A5** is charged with obtaining the execution of a Security by False Pretences C/S 306 of the PCA, Cap 120. He is accused of falsely pretending that no advance payment had been received by Eutaw Construction Co Inc from UNRA and with intent to defraud **induced UAP Insurance (U) Ltd** to execute and issue advance payment bond for UGX. 24,790,823,522= in favour of UNRA.
21. **Count Twenty two: A5 and A6** are charged with Conspiracy to defraud C/S 309 of the PCA, Cap 120. The two are accused of fraudulently conspiring to defraud UNRA of UGX. 24,790,823,522= the property of GOU for upgrading Mukono-Katosi/ Kisoga-Nyenga Road.
22. **Count Twenty three. A6** is charged with abetting the offence of causing financial loss C/s 52(c) of the ACA, 2009. He is accused of abetting the offence of causing financial loss when he fraudulently confirmed to A7 that the performance guarantee and advance payment security were authentic and from **HFB Ltd** whereas not.

PROSECUTION CASE

The prosecution adduced evidence of 23 witnesses. Their evidence is essentially circumstantial. It is heavily reliant upon documents and human conduct of the accused persons. The gist of their evidence is that a company called **Eutaw Construction Company Inc of Florida** was awarded a contract for the construction of Mukono- Katosi-Kisoga - Nyenga Road yet the bidder for the job was **Eutaw Construction Company of Mississippi** both found in USA. The prosecution contends that this was illegal since the bidding company was different from the one awarded the contract.

The prosecution evidence is that this discrepancy between the bid and the final award was the subject of due diligence which was not concluded.

Further, that the securities which were supposed to secure the advance payment were fake as well as forged.

An advance payment of UGX 24,790,823,522= was made against forged or unenforceable securities.

This money was withdrawn and spent. A company called **CICO** was given half of the funds and mobilized to start construction of the road.

When the **IGG** learnt that the bidding company was different from the one awarded the contract and that the company executing the works was also different from the one awarded the contract, coupled with information that the securities provided by the bidder were not genuine, she stopped further works until investigations were conducted.

The prosecution contends that this order was disobeyed. The prosecution further contends that the money paid as advance was lost since it was paid to a different company that never bid for the job. Since the security guarantees were false it meant that the money was not recoverable.

The prosecution contends that the accused persons are culpable in facilitating the award of the contract to a wrong company against false securities. It is also alleged that as a result, this advance payment was stolen.

DEFENCE CASE

Each of the accused persons denied the charges and gave their own version of what happened or what did not happen. The common thread in the defence case is outright denial of the charges. A brief version of the defence case is given below.

A1 denied acting arbitrarily when he wrote a letter dated 14th November 2013, **(D3)** to **A2** directing that the contract be signed while due diligence is done later. His testimony is that **UNRA** was supposed to implement that letter following the law. It was his evidence that he wrote the letter after the Solicitor General and the Legal Counsel had advised that the contract be signed.

He also denied acting arbitrarily when he directed his Minister of State to follow up the formalization of the sub-contract to ensure that road works continue. It was his evidence that this road had been promised for so long and people were rioting after information leaked that construction had stopped.

Finally, he denies receiving the letter dated 17th July 2014(P.130) from the **IGG**

stopping the works. It is his evidence that he could not disobey an order he had not received. He testified that Matilda who received the letter was not his secretary and that the letter was not directed to him. He was just copied in.

A2 denied acting arbitrarily by communicating the award in five days instead of ten days because he was authorized to do so by **PPDA as per exhibit D36**.

He also denies acting arbitrarily when he signed the contract with Eutaw Construction Company Inc reasoning that he acted on the advice of **A4** and the directive of **A1**.

Further, he denied causing financial loss of **24,790,823,522=** because the payment was meant to be secured by guarantees which it was not his duty to verify. Both the directive and legal advice had assured him that due diligence could be done after the signature on the contract.

A3 also denied causing financial loss contending that the payment was originated by the project manager **Eng Olwa, PW4**, through **exhibit P9** which assured that the advance had been guaranteed and that once it was approved by A2, he never saw the paper work again. In his own words he denied participating in the payment segment.

It was his evidence that verification of securities to secure the payment was supposed to be done by A7. He denied acting arbitrarily in endorsing the payment process on **exhibit P9** because it was an agreed position that due diligence could be done anytime.

A4 denied acting arbitrarily when he advised that the contract could be signed as due diligence is done on the identity of the contractor because it is permissible under the law. **(Reg. 31 of SI 2014 No 7)**

It was his defence that his advice was perfectly legal and there could be no risk of financial loss because the payment was secured by guarantees whose verification was not his duty.

A5 denied stealing money from **UNRA** contending he was just a courier for the contractor. He just delivered documents for the directors of **Eutaw Florida** and that he interacted with **UNRA** because he was resident in Uganda.

He admits signing off the money in the bank account on instructions from the contractor and paying for goods and services as directed by the directors of **Eutaw**

Construction Company, Florida.

As regards the various securities presented to support the advance payment, it was his evidence that he did not forge or believe the same to be forged. He asked **Mayimuna (PW.13)** to procure securities which she did only to be told they were forged.

He contacted **MARSH Insurance** brokers who provided other securities from ICEA and UAP Insurance companies.

Except for **SWICO, UAP and ICEA** securities, he denied presenting the others to **UNRA**. It was his evidence that **Eutaw Florida** had an office on plot 85 Jinja road with staff who must have delivered the other questioned securities.

He denied conspiring with A6 to defraud **UNRA** contending that A6 only opened the account for Eutaw construction company Inc in Housing Finance Bank as relationship manager. Their relationship was that of customer/banker only.

A6 denied conspiring with A5 to defraud UGX 24,790,823,522=. He just acted as a relationship manager for the account opening for which he was credited and applauded by his employer for bringing in good business.

He denied providing A5 with any blank bank forms and also denied communicating with A7 to give false assurances about the securities from **HFB Ltd.**

A7 denied causing financial loss and neglect of duty. It was his evidence that it was not his schedule to verify securities. He contended that his contract appointment did not include verification of securities.

He denied communicating with A6 about the HFB securities and denied owning the emails found in **UNRA** attributed to him on grounds that his **IP address** was not traced on the offending electronic mails nor was his computer imaged to identify the disputed communications. He also denied using the email address on **exhibit P53** because he does not use upper case addresses yet **exhibit P53** contained upper case addresses.

BURDEN OF PROOF

Once the Accused persons deny the charges, the Prosecution assumes the duty to prove the guilt of the Accused.

STANDARD OF PROOF

The Prosecution is required to prove all the essential elements of the offence against each of the accused persons beyond reasonable doubt. *Beyond reasonable* doubt means that the evidence adduced must carry a reasonable degree of probability of the accused's guilt leaving only a remote possibility in his favour.

INGREDIENTS OF THE OFFENCES CHARGED

1. Abuse of office C/S 11(1) ACA, 2009: The prosecution is required to prove the following elements against each accused.

- (a) Employment in a public body or a company in which the Government has shares.
- (b) Doing or directing an arbitrary act to be done in abuse of his/her authority.
- (c) The arbitrary act must be prejudicial to th

ii

interests of his/her employer.

2. Disobedience of lawful Orders C/S 35(c) IG Act 2002: The prosecution is required to prove the following elements of the offence.

- (a) The issuance of an Order by the Inspectorate
- (b) Service of that order upon the accused
- (c) Refusal or failure by the accused to comply without reasonable excuse.

3. Causing Financial Loss C/S 20 ACA, 2009: The prosecution is required to prove the following elements.

- (a) That the accused are employees of government. (This has been admitted.)
- (b) That in the performance of their duties, the accused did an act or omission knowing or having reason to believe that it will cause financial loss to employer.
- (c) That actual loss occurred.

4. Corruption C/S 2(i) ACA, 2009: The prosecution is required to prove the following elements of the offence.

- (a) That there was a duty to be performed.
- (b) That the accused neglected to perform that duty.
- (c) Loss, damage or injury resulted.

5. Theft C/S 254(1) and 261 PCA: The prosecution is required to prove the following elements.

- (a) The fraudulent taking and without a claim of right or fraudulent conversion to the use of any person other than the owner.

6. Obtaining money by false pretences C/S 304 and 305 PCA. The prosecution is required to prove the following.

- (a) A representation by words, writing or conduct of a fact past or present.
- (b) That the representation is false in fact.
- (c) Knowledge that the representation is false or lack of belief in its truth.

7. Uttering false documents C/S 351 and 347 PCA: The prosecution is required to prove the following elements.
- (a) Presentation of a false document with knowledge that the document is false or
 - (b) Fraudulently presenting a false document.
8. Obtaining execution of a security by false pretence C/S 306 PCA. The prosecution is required to prove the following elements.
- (a) That the accused by false pretence and with intent to defraud induced another to-
 - (b) Execute a valuable security
9. Conspiracy to defraud C/S 309 PCA. The prosecution is required to prove the following elements.
- (a) An agreement by two or more persons
 - (b) The intent to commit an unlawful act.
10. Abetting the offence of causing financial loss C/S 52(c) ACA, 2009. The prosecution is required to prove the following elements.
- (a) That the accused encouraged or assisted another to commit a crime.
 - (b) That as a result a crime was committed.

LEGAL REPRESENTATION

M/s Sarah Birungi, Brenda Kimbugwe, Claire Ninsiima and Thomas Okoth appeared for the prosecution while the defence team comprised M/s Nsubuga Mubiru for A1; Ivan Engoru for A2; William Were for A3; David Mpanga and Dickens Kagarura for A4; Peter Mulira for A5; Norah Kaggwa for A6 and Bwengye Andrew for A7.

ANALYSIS OF THE EVIDENCE AND THE LAW

The employment status of all the accused except A5 is not in issue. It is an admitted fact. A1 was a minister of works in the government of Uganda. A2, A3, A4 and A7 were all employees of **UNRA** which is a government entity charged with construction and maintenance of public roads. At the time the alleged offences were committed, **UNRA** did not have a board of directors. The Authority was, therefore, under the direct supervision of the Minister of Works.

The prosecution case is essentially based on circumstantial evidence. That is evidence of surrounding circumstances. The case originates from procurement for the construction of the Mukono-Katosi-Kisoga-Nyenga road. Bids were called in 2010. The process was halted because

of lack of funding. Funds became available in 2013 and the process was revived with a request to **Eutaw Construction Company Inc of Florida** to express interest in reviving an earlier bid. Once it did, negotiations commenced with a further request for the company to revalidate the securities supporting the 2010 bid.

The case is heavily reliant on documents sourced from **UNRA**, banks, Insurance companies, IGG, Attorney Generals Chambers, **PPDA** and Eutaw construction company Inc of Florida.

In a case depending exclusively upon circumstantial evidence, court must find before deciding upon conviction that inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Another principle laid down is **TEPER V R (2) (1952) AC 480 at 489** is that

*“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.” See **SIMON MUSOKE V R (1958) EA 715 at .P718***

Circumstantial evidence consists of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of the facts required to be proved, is admissible as making the facts in issue probable by reason of its connection

with or in relation to them. It is evidence at times regarded to be of higher probative value than direct evidence which may be perjured or mistaken.

It is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. See: **Akbar Hussein Godi Vs Uganda Criminal Appeal 3 of 2013 (SC)**.

In this regard I shall examine the following circumstances in relation to the respective defences raised against them by each of the accused on each count and draw conclusions based on the standard required of circumstantial evidence explained above. I consider the following species of circumstantial evidence.

- (i) Letters written by A1 to sign the contract and to proceed with the sub-contract.
- (ii) Letter written by A4 advising that the contract be signed.
- (iii) Decision by UNRA to proceed with the contract and do due diligence concurrently with execution of works.
- (iv) The causal manner in which securities were handled resulting in the receipt of several invalid securities to secure one bid.
- (v) The relationship between A5 and A6.
- (vi) The electronic mails attributed to A6 and A7
- (vii) The conduct of each of the accused persons in this procurement.
- (viii) All efforts made to execute this contract. Was in good faith or was it for criminal intentions?

Count One.

A1 is accused of abuse of office for writing a letter **exhibit D3** which directed the immediate signing of the contract.

The prosecution submission is that A1 had no business directing **UNRA** on what to do except in abuse of his authority. It contends that what followed was signing of a contract with a fictitious company.

A1 denied any wrong doing. His testimony is that he was mandated to supervise UNRA in absence of the board and as a politician he wanted the road done now that funds were available. This road had been promised to the people for a long time. It was his view that the UNRA technocrats were supposed to follow the law while implementing his orders. He also stated that he was comforted to write the letter because the Solicitor-General had cleared the contract and legal counsel, A4, had advised that due diligence

can go on anytime.

In the circumstances of this case, did A1 act arbitrarily in asking A2 to sign the contract or not?

An arbitrary act is an action, decision or rule not seeming to be based on reason, system, or plan and at times seems unfair or breaks the law.

Ms Sarah Birungi, the Director legal Affairs in the Inspectorate of government submitted that the act of writing **exhibit D3** directing A2 to sign the contract was arbitrary because A1 was aware that the identity of the contractor was questionable. It was her view that a due diligence mission commissioned by A2 was supposed to clear the air but before it could be done A1's letter triggered the signing of the contract prematurely. This, she submitted was an act of abuse of office.

Mr Nsubuga Mubiru learned counsel for A1 countered that in absence of the board, **A1** was mandated to supervise **UNRA** and was in order to write **exhibit D3** directing the contract to be signed. This directive was not unique to A1 because the contract had been cleared by the Solicitor general and that legal counsel of **UNRA** (A4) held the same view.

To understand the relationship between A1 and **UNRA** we have to look at the **UNRA Act, 2006**. This Act creates three centers of power, namely the Minister for roads, the board and the Authority under the Executive Director.

Section 5(3) of the Act provides that the Authority shall be under the general supervision of the Minister. Similarly, **section 14(2)(a)** of the same Act mandates the board to oversee the operations of the Authority. These two provisions mean that the Minister and the board supervise the Authority and where there is no board; the Minister interacts with the Authority quite regularly to fill the void caused by absence of the board. It is, therefore, with respect, not correct to say that A1 had no business writing to A2 about the contract as the prosecution submitted. The act of writing was not arbitrary. It is a mandate A1 derived from a statute that placed A2 under his supervision.

The prosecution faults A1 for directing the immediate signing of the contract before due diligence was concluded to clear the doubts about the identity of the contracting party.

In A1's defence it was submitted that his letter was not

arbitrary. It was informed by several factors such as the long wait for the road by

residents of the area; availability of funds for the road; legal advice that due diligence can be done at anytime and the fact that the Solicitor General had cleared the contract. These factors on the available evidence are factual. It was submitted that since due diligence could be done anytime, there was nothing wrong with A1 demanding for the contract to be signed as the line Minister.

Regulation 31 of SI 2014 number 7 provides that a procurement entity may at anytime during a procurement process carry out a due diligence test on a bidder or a bid. This is the law governing procurements. To fault A1 for writing suggesting that due diligence be done as the contract is performed would be contrary to law and cannot be a basis for sustaining criminal charges.

The charges seem to stem from the fact that the securities that were presented to secure the advance payment were false. This meant that **UNRA** could not demand payment from the alleged guarantors. But the guilt or innocence of A1 cannot be measured against the falsity of the securities without evidence suggesting he was party to their sourcing in the course of his duties.

It has not been established that A1 was aware of or had reason to believe that the securities were fake in order to be held responsible for triggering the process of signing the contract.

Having reviewed the circumstances of this delayed procurement and the mandate of A1 under the **UNRA Act** as sector Minister, I do not find his letter contained in **exhibit D3** to be arbitrary. The explanation by the defence weakens the inference of guilt that the prosecution sought to rely on. The charge in count one has not been proved beyond reasonable doubt. I find A1 not guilty on count one.

Count Two

A1 is accused of directing the formalization of an illegal sub contract between **CICO** and Eutaw Florida. This directive is contained in exhibit **D4**. It is addressed to Hon Byabagambi the Minister of State.

It was submitted for the prosecution that A1 issued D4 on 27th August 2014 after the **IGG** had stopped further works on 17th July 2014 (**P130**) until investigations were done. It was their view that A1 was defiant and was aware of the consequences.

On the contrary it was submitted for A1 that no offence was committed because there was no evidence that Hon Byabagambi had acted upon A1's directives. Besides the sub contract was not formalised. I was asked to consider that in absence of evidence from Hon Byabagambi that he acted on this instruction, **D4** remains redundant as an

internal communication between Ministers.

The prosecution holds A1 culpable for directing the formalization of a sub contract between Eutaw Florida and CICO. Hon Byabagambi did not testify to confirm not only receipt of the letter but also if he took action.

The prosecution evidence through **PW22**, Ms Mwangale, is that she found a copy of **D4** at the construction site when **CICO** waved it saying they were mandated to continue road works.

With respect, a signed “**sub contract**” exhibited by the prosecution as **exhibit P108** is dated 15th July 2014. **Exhibit D4** which is the accusation in this charge is dated 27th August 2014. This means that the “sub contract” was signed before the directive rendering the accusation false. This “sub contract” was not endorsed by the consultant and not approved by **UNRA** as required by the main contract. It is not binding on **UNRA**. There was no evidence that a formal or approved **sub contract** was signed after A1 had written the letter to Hon Byabagambi.

Without the testimony of **Hon Byabagambi** that he formalized a sub contract following the letter of A1 and without evidence from **Michael Fiaco** to tell court where he got a copy of the letter addressed to a Minister which was not copied to the contractors, there is no basis for holding A1 culpable for abuse of office?

During cross examination of **PW22**, Ms Mwangale, the investigating officer, she admitted that only Hon Byabagambi can tell if he acted on A1’s letter in exhibit **D4** or not. She was not sure if A1’s instructions were carried out. Investigation on this count was not complete. It is trite law that where a party fails to call a vital witness who is available, the inference that the evidence of that witness would be adverse to its case. It is a fact that Hon Byabagambi is still a Minister in the government of Uganda. If he was hostile, he should have been summoned and declared so in court.

There is no sub contract signed after 27th August 2014 upon which the charge in count two can stand. A1’s directive to have the sub contract formalized did not materialise for which he cannot be convicted. The charges were misplaced. There was no proof. A1 is not guilty on count two.

Count Three

A1 is accused of disobedience of lawful orders. He is faulted for writing **exhibit D4** on 27th August 2014 well aware that the IGG had issued an order stopping works on the road on 17th July 2014 (**P130**).

A1 denied receiving the order of the IGG. PW22 testified that A1 received the order through his secretary. The defence contended that the said secretary did not testify to confirm that A1 actually received and read this order. The defence also submitted that there was no evidence that the addressee of **exhibit D4** received it or indeed acted on it. The evidence of PW22 is that **CICO** was waving **exhibit D4** to justify continuation of the road works. PW8 testified that he got D4 from one **Michael Fiaco** and that it was an internal letter not copied to **CICO**.

The charges in count three are linked to count two because they revolve around **exhibit D4**. The defence rightly in my view challenged the failure of the prosecution to adduce evidence of Hon Byabagambi to explain if he acted on A1's letter or not. Failure to adduce evidence of Matilda who is said to have received the copy of the **IGG's** letter (**exhibit P130**) weakened the prosecution case. Failure to adduce evidence of **Michael Fiaco** to explain where and from whom he got the copy of a letter not copied to him rendered the allegations mere hearsay.

To hold A1 culpable for disobeying an order without evidence that he received it would be speculative. This falls short of the standard of proof required in criminal cases.

Whilst there is evidence that an order stopping the road works was issued, there is no evidence that the same was served upon A1. He cannot be held to have disobeyed an order not served upon him.

A1's testimony that he never received the letter which was addressed to A2 and merely copied to him and that Matilda was not his secretary creates reasonable doubt in the case against him. It is our law that any reasonable doubt in a criminal trial is resolved in favour of the accused.

The circumstances surrounding A1's actions are in my view informed by his mandate at the time as Minister for the sector. The road project had been promised to the people of Mukono-Katosi for a long time. The procurement had gone on for too long since 2010.

The money was now available to pay the contractors. The road was politically sensitive according to the testimony of PW1, Eng Luyimbazi. The stoppage of the works had generated riots and descent from the population affected. These circumstances required interventions which A1 made. There was no evidence that he was motivated by criminal intentions or fraud. I am unable to find incriminating evidence against A1. Circumstantial evidence against A1 is so weak that his explanation destroys any inference of guilt. I find him not guilty and acquit him of the charges in counts one, two and three.

Count Four

A2 is accused of Abuse of office for communicating the award (P44) of the contract to Eutaw construction company Inc within five days instead of ten days.

It was contended by the prosecution that this was illegal.

The accused tendered **exhibit D36** which granted a waiver by **PPDA from 10 to 5 days**. The letter from PPDA (**exhibit D36**) dated 7th November 2010 granting the waiver renders charges in count four to be misconceived. If **exhibit D36** had been produced before A2 gave his defence, the charges would have collapsed at the closure of the prosecution case. A2 is not guilty on count four.

Count Five

A2 is accused of abuse of office by signing the contract before doing due diligence an act the prosecution considered prejudicial to the government.

It was submitted for A2 that signing the contract was inevitable because it was urgent. The procurement had stalled from 2010 and now that funds were available in 2013 it was necessary to kick start the work.

Further, it was A2's defence that he was alive to the need for due diligence that is why he set up a committee to do both the preliminary and the detailed due diligence.

I was asked to consider that the identity of the contractor had been an issue from 2010 even before A2 became acting Executive Director. Whilst **Eutaw Mississippi** was the bidder, a letter (**D15**) by **Ayelew Belew**, the director procurement UNRA, was addressed to **Eutaw Florida instead of Eutaw of Mississippi**.

Indeed the bid documents of 2010, particularly Form ELI-1.1 called the *Applicant Information Form* copies of which are found in exhibits **P8 and P13** contain the following info.

(i) **Legal Name: Eutaw Construction Company Inc.**

(ii) **Country: USA**

(iii) Legal address in USA: Commercial Street 109W
Aberdeen Mississippi, USA

(iv) Authorized Rep: Apollo Senkeeto of 622 Beach

Land Blvd Suite 201 Vero Beach, **Florida**, USA All correspondences after the submission of the bid were to **Florida** at the address of **A5**, who was the authorized representative.

It was submitted that by the time **A2** was appointed Ag Executive Director in June 2013, the discrepancies in the identity of the bidder was already known to **UNRA**. The Minutes of the contracts committee that awarded the contract contained in **exhibit D23** advised that due diligence should be done concurrently with the progression of the contract.

On this basis and given this history A2 denied acting arbitrarily. He also relied on the

legal advice of **A4** and directive of **A1** to sign. That is his defence.

I have already examined the circumstances of this procurement in respect of the actions of **A1** in regard to signing the contract and found that there was nothing illegal or criminal about the decision to sign it and continue with due diligence after. This is based on the fact that due diligence is permissible under the law to be done concurrently with performance of the contract. Further, any payments under the contract are supposed to be secured by guarantees for advance payment.

A2's decision to sign the contract was proper in law. I accept the submissions that **A2** tried his best to do due diligence. He set up a team to investigate the contractor and made consultations including chairing meetings to sort out this matter of identity. It has not been shown to me that **A2** was reckless or even arbitrary. He inherited a confused procurement that had dragged on for three years. He upon getting advice from **A4** and a directive from **A1** put pen to paper. He did not act alone or criminally with others. As accounting officer **A2** does not sit on the contracts committee to select or even evaluate bidders. He is prohibited to do so.

The submission that he signed a contract with a company that did not bid is not for him to answer but the procurement director, Eng Ayelew and the contracts committee.

The Courts have in cases such as **Eng Samson Bagonza Vs Uganda Cr App 2 of 2010 (COA)** held that where an accused implements decisions taken after consultative meetings, such a person cannot be held to have acted **arbitrarily or capriciously** because meetings are by their nature consultative and decisions arising out of meetings are collective rather than individual. There is abundant uncontroverted evidence by **A1 and A2** that they held several meetings to discuss this matter. The decision to sign the contract and continue with further due diligence was a result of those meetings. Even the contracts committee reached a similar decision. Meetings bring in transparency and collective decision making. Meetings are a vital tool in the management of public affairs. The prosecution evidence from witnesses such as **PW1, PW3 and PW5** is that those meetings were held. The signing was a culmination of those meetings. In absence of evidence that those meetings were for conspirators held with intent to defraud, **A2** has not been proved to have acted arbitrarily. **A2** could be a victim of taking over a manipulated procurement. The director procurement and the contracts committee should be held responsible for awarding a contract to a wrong bidder and not **A2**. He is not guilty of abuse of office on count five.

Count Six

A2 and A3 are jointly accused of Causing Financial Loss for approving and causing payment of **UGX 24,790,823,522=** while aware of the identity issues of the contractor contained in the preliminary due diligence report. (Exhibit **P8**)

The prosecution contends that the two had knowledge or reason to believe that such approvals of payment would cause financial loss to government.

The prosecution case is that the two should not have endorsed the advance payment until the final due diligence report had been made.

In their defence, A2 contends that the memo written by the project manager, PW4, in **exhibit P9** was clear that the payment was not only due but was secured by guarantees. This means that if anything went wrong **UNRA** would enforce the securities against the guarantors.

For **A3** it was submitted that he was not aware of the preliminary due diligence report because it was not shared with the finance department. Further, it was submitted that A3 was not an accounting officer to approve payments. It was the contention of learned counsel for A3 that there was no proof of actual loss because some work had been done on the road amounting to approximately **6.1 billion** before they stopped the contract. That means it cannot be true that **UGX 24,790,823,522=** was lost when PW22, the investigating officer and **PW8**, the actual contractor on the ground agree that some work was done on the road but was not valued. This would mean that there was no evidence to determine the actual loss.

I have already held that the act of signing the contract before due diligence was completed was not criminal because the law in **SI 2014 number 7** specifically regulation 31 permits it. What is permitted by law cannot become criminal.

The prosecution premised its case on the proposition that when you sign the contract you trigger obligations to pay and since the securities were false loss was the natural result. Granted, the signing of the contract obligated payments to be made but these payments were conditional in that they were supposed to be secured by advance payment guarantees and performance bonds. Was **A2 and A3** positioned to verify advance guarantees? For **A2** it was not his duty. As **CEO** he acted through other people to verify securities. As for A3 it was his directorate of finance responsible for verification. Indeed he signed the letter of verification which was relied on to support the request for advance payment. A3 gave assurance that the payment was secured. Did he have knowledge that by forwarding exhibit P9 to A2 for payment financial loss would occur?

I will resolve this issue later when dealing with charges involving securities.

It is prudent to first resolve the issue of loss. Is there proof of actual loss of **UGX. 24,790,823,522= or not?** The evidence adduced by the prosecution is that there was no audit of the road works to determine the value of work done. State witnesses such as **PW4, PW8 and PW22** put the value of the works to between **5.8 billion to 6.1 billion** out of the advance payment of **24,790,823,522=** What, therefore, was the actual loss? There is no definite answer in absence of an engineering audit report. The prosecution seems to suggest that the whole **24,790,823,522=** was lost yet it adduced evidence that road works to the value of between **5.8 and 6.1 billion** was done. That would mean the loss is less than **24.7 billion**.

Courts have held in a number of cases that the prosecution has to prove that there was loss and also state the loss. In **Kassim Mpanga V Uganda Cr App 30 of 1994** the Supreme Court at page **17** of the judgment, adopted the plain meaning of loss to refer to something that reasonable search cannot recover. Something lost for good and not recoverable. In this case between **UGX 5.8 and 6.1 billion** was available in value of the road works. It was recoverable.

Yet in **Godfrey Walubi and another V Uganda Cr App 152 of 2012, the COA** held that the exact loss incurred must be proved and should not be assumed. It should not just be assumed that the accused's actions would cause loss. The actual loss has to be proved. In other words actual loss must be quantified and stated. Loss is not speculative.

Applying the standards set in the foregoing cases, it is clear that evidence must be adduced to quantify the loss and prove that the loss is not recoverable.

Financial loss has, therefore, not been proved in this and other counts drafted in similar fashion as I will

indicate later on in this judgment. The prosecution should have commissioned an engineering audit of the road works or obtained and led evidence from the contract supervising consultant to establish the actual value of work done. It is the actual value of work done plus assets if any, minus the advance payment that would establish the actual loss. Loss is that value that is not recoverable by any measures considering that fake securities were used.

Ms Birungi submitted that as long as there is evidence of loss then loss is proved. With respect to learned counsel, I am unable to accept that argument for two reasons. The first is that the charges speak of loss of 24,790,823,522= yet evidence adduced shows that it is less than that. If evidence adduced is contrary to the charges in court then the case is not proved beyond reasonable doubt. The variance creates doubt which is resolved in favour of the accused.

Secondly, on the authorities of **Kassim Mpaga (supra) and Walubi (supra)** I am unable to accept the argument that loss means any loss. Loss under **section 20 of the ACA, 2009**, means actual loss computed or established by specific evidence. This being a key ingredient which is missing means that the charges in count six have not been proved beyond reasonable doubt.

It is my finding that financial loss has not been proved against **A2 and A3** in count six. They are not guilty of causing financial loss in count six.

Count Seven

A1 and A2 are accused of abuse of office. The prosecution contends that by approving and causing payment of UGX 24,790,823,522= the two acted arbitrarily in abuse of the authority of their office. It is said that these acts were prejudicial to government.

It was submitted that by processing and approving payment before ascertaining the identity of the contractor exposed government to loss.

For A2 it was submitted that at this stage due diligence was not in issue because once the contract was signed, advance payment became due. All that was required were valid securities to back up the payment. **PW4** gave the assurance against which payment was made. It was argued that there was no abuse of office. All they did was what they were expected to do under the contract. For A3 it was submitted that he was led by a draft prepared by A7, his junior to assure that the securities were proper. He relied on A7 as the person charged with verification of securities. I was referred to initials "S.W" on exhibit P131 which A3 signed confirming that the **HFB Ltd** securities were genuine. These initials are said to be the names

of **Senjako Wilberforce** who is A7.

The advance payment became due upon signing the contract. I have found that the mere signing of the contract was not illegal or criminal. Due diligence was not reason enough at the time the contract was signed to stop the procurement. Any risks that would arise would be covered by valid securities.

This particular payment was caused by **PW4** who initiated a claim as project manager for the road works. He wrote **exhibit P9** addressed to **A2**. **PW3** the director Audit raised a red flag about the identity of the contractor. A meeting was held in A2's office on 7th

January 2014 to address that concern. According to the minute of A3 on **exhibit P9**, this meeting agreed that due diligence goes on concurrently with payment. PW3 later cleared the payment which A2 approved as accounting officer.

Exhibit P9 which was written by **PW4** is clear that the payment being sought is secured by authenticated and verified securities. This verification is contained in an assurance letter prepared by **A7** (Identified by his initials SW) and signed by A3. See **exhibit P131** dated 24th December 2013.

Approval is by the accounting officer while causation was by PW4 who initiated the process as project manager. PW3 endorsed it for approval once A3 gave the justification in his minute of 7th January 2014.

It is strange that the prosecution picked out A2 and A3 for charging yet the payment was initiated by **PW4** and endorsed by **PW3** an Auditor. These two were treated as witnesses. The payment was a process involving more people.

Since the payment was secured on the strength of **A3's** letter of 24 December 2013 which lied about the validity of the securities he cannot run away from responsibility. **A2** approved the payment knowing his directorate of finance had secured the payment in case something went wrong. In business processes, risks are insured. **A3** confirmed that the Authority had been insulated from risk by a bank guarantee. His assurance is in **exhibit P131**. A3 testified that he also relied on A7. One would have expected both **A3 and A7** to be on this count. A2 was wrongly joined.

The action of A2 in approving payment was not arbitrary.

It was proper. The action of **A3** in causing the approval was arbitrary because he as the technical financial adviser to **UNRA** and ipso facto to A2 (Executive Director), should have protected the Institution by verifying that advance payments are secured by valid guarantees. It was his duty as director of finance to mitigate the risk of **UNRA** payments. To allow **UNRA** to pay **UGX 24,790,823,522=** without security given the issues discussed in the meeting he attended on 7th January 2014 showed total abuse of his function.

Perhaps I should note that A2 relied on A3 who had written a letter guaranteeing payment. PW4 also relied on the letter signed by A3 confirming that the payment is secured. PW3 also relied on A3's note that payment should go on with due diligence. A3 was the finance professional in this transaction. A3 and A7 should have appeared jointly on this count.

While the decision to pay and do due diligence concurrently was a group decision by top management and the contracts committee, the verification of the security which turned out to be false verification was the responsibility of **A3** as head of finance and **A7** as action officer.

These two failed in their duties and exposed their employer to prejudice. There was no verification of the security from Housing finance bank. If it had been done, this matter would not be in court. The payment would not have been made.

A3 acted unreasonably or deliberately gave a false assurance to allow the contractor dodge paying for the guarantee because a bank guarantee attracts interest

A3 abused the authority of his office by writing a false letter to release a payment of UGX 24,790,823,522=. That was criminal for a director of finance to do. The two gentlemen assessors advised me that A3 like A2 relied on a letter **exhibit P9** written by PW4 assuring that the securities had been verified and so the two are not guilty. With respect the gentlemen assessors did not appreciate that the verification **PW4** was referring to was the letter signed by **A3** which is **exhibit P131** written on 24th December 2013, two weeks before PW4 wrote **P9**.

It is also worth noting that it is A3 who wrote introducing A5 to the bank to open an account for Eutaw construction company Inc on 18th December 2013 (exhibit P90). He was a sort of referee for Eutaw construction company Inc. yet he could not verify the securities which according to PW4 who authored exhibit **P9** were provided by A3's directorate. A3 is guilty of abuse of office on count seven.

I find no proof of incriminating evidence against A2 on count seven. He is not guilty.

Count Eight.

A4 is accused of causing financial loss of UGX 24,790,823,522= for *misadvising* UNRA to *sign* the contract before due diligence was concluded.

The prosecution contended that A4 participated in the negotiations and should have advised better with hind sight about the potential risk if the contract was signed. He is alleged to have been in contact with A5 and matched him to A2. He is said to have bought the idea of a special purpose vehicle (SPV) from A5 based on unverified Powers of Attorney. The prosecution accused A4 for inserting a repudiation clause in an agreement already cleared by the Solicitor General because he was aware that the identity of the contractor was fictitious.

In his defence A4 contended that the advice he gave was the correct common law position. A party who misleads another purporting to be what it is not leads to cancellation of the contract. Further, he cited the law in **Regulation 31 of SI 2014 No 7** which permits doing due diligence at anytime during contract execution. Technically speaking that is the position of the law. However, it was submitted that be that as it may, A4's advice was just guidance to the accounting officer who would be free to take it or leave it.

It was submitted that the insertion of a repudiation clause in the contract was meant to add value and not to alter its terms.

I was asked to consider that whatever advice A4 rendered, there was no evidence to suggest that he knew or had reason to believe that loss would occur.

It was also A4's testimony that if the advance payment had been backed up by valid securities, **UNRA** would have just enforced the guarantee without much ado. His evidence is

that the verification of securities was removed from his docket despite his protest that the finance directorate cannot do the payments and verify the securities without a conflict of interest.

I have already found on the authorities cited when evaluating evidence in count four that the prosecution did not adduce evidence of the exact loss which the accused caused. Various sums were presented by prosecution witnesses such as PW4 (Eng Olwa), PW8 (Eng Nuo Hong) and PW22, Ms Mwangale, investigating officer as the value of work on the ground. Their values ranged from 5.8 to 6.1 billion out of 24.7 billion. None of these witnesses had an audit report of the value of the road works done in order to determine the loss. The cases of **Kassim Mpanga (supra) and Walubi (supra)** require that the loss be total in that it is not recoverable and the amount lost be quantified. It should not be assumed or anticipated. It must have occurred. The most logical way of proving financial loss is to tender an audit report that details what the loss is.

It is not true that **UGX 24,790,823,522=** was lost in this case. The figure is less than that but there is no evidence of what it is. The charges against A4 on this count have not been proved beyond reasonable doubt.

I have also found that signing the contract was not itself illegal or irregular because the procurement laws in **regulation 31 of SI 2014 number 7** permitted contract performance while due diligence continues. No crime can be founded on what the law permits.

A4 was also faulted for inserting a repudiation clause in the contract which stated that if the contract turns to be what it is not then the contract would be repudiated. Frankly, that is the law of contract. A4 just fortified the contract. He did not weaken it. A4 is being prosecuted using hind sight but at the time of the contract unless there was evidence that he knew about the fake securities, there was no reason to stop the procurement process. Risks are part of successful business provided mitigation measures are taken such as demanding advance payment and performance guarantees. A4 is not guilty on count eight.

Count Nine

A4 is accused of abuse of office by misadvising A2 to sign a contract before completion of due diligence. This was said to be arbitrary use of the authority of his office. It was submitted that the context of this case based on the information at his disposal, A4 should have advised that due diligence be completed before the signing the contract. It was the view by the prosecution that since the securities were bogus advice to sign was prejudicial to the government. The time for due diligence according to the prosecution was at the time A4 advised to sign and not the future given the circumstances surrounding this procurement.

A4 denied acting arbitrarily because his advice was sought by A2. It was not voluntary. It was submitted that his advice is the correct legal position and there was no evidence to show that he acted with fraudulent intent to commit a crime.

Did A4 act unreasonably or illegally in the circumstances of this case?

Was A4 armed with information which should have caused him to advise that due diligence be done before contract signing? Was A4 aware of the invalidity of the securities at the time he gave advice?

I would answer all these questions in the negative. There is evidence that A4 was relieved of his role in verification of securities in 2012 despite his protests in writing. There is evidence by PW4 that the securities were given to him by the directorate of finance and administration. A4 was not proved to have had knowledge of the false securities before advising to sign the contract. Had he known and went ahead to advise that it be signed then he would be guilty. His evidence that the securities verification function was removed from him despite his warning that there would be conflict of interest by the finance directorate was not challenged. No wonder his written warning came to pass.

A4's taking A5 to A2 and buying the idea of a special purpose vehicle are all not material provided there were valid securities. In fact if the securities were valid, UNRA officials would not be in court. The business environment is full of risks. It is imprudent to only transact when very sure that it is safe to do so. That may be true of small proprietors but not for business organizations such as UNRA. What is important is to mitigate risks by requiring guarantees or take out insurance policies.

The advice A4 rendered was solicited by his boss. It was correct. It was not arbitrary. A4 is not guilty of abuse of office.

Count Ten

A3 and A7 are accused of causing financial loss when they omitted to verify the Housing Finance Bank securities thus causing loss of UGX 24,790,823,522= to GOU.

It is not in dispute that verification of securities was the mandate of the Finance and Administration directorate headed by A3. A7 was the action officer. Both A3 and A7 avoided responsibility with each pushing verification roles to the other.

The prosecution faulted the two for accepting securities and failing to verify them even when they are signed by middle level staff.

The prosecution relied on the testimony of PW11 who retrieved electronic mails from the Housing Finance Bank Ltd servers. This evidence showed communication between **A5, A6 and A7**. In that triangle, the prosecution contends that a blank sheet was sent to A5 and verification correspondences are traced between A6 and A7.

The prosecution contended that A7 was acting criminally by purporting to verify securities through electronic mails to A6 who was not a **CEO** of Housing Finance Bank Ltd for such a colossal sum of money.

It was further contended that the whole amount need not be proved to have been lost provided there is evidence that there was loss. PW 22 testified that only 6.1 billion worth of work had been done before tax while PW4 who was the project manager put the value at 5.8 billion. According to the prosecution, out of 24,790,823,522= only 6.1 or 5.8 billion is accounted for leaving the rest as proven loss.

For A3 it was submitted that the actual loss was not proved before court. PW8 admitted to taking 12.2 billion for mobilization and actual construction out of which 6.1 billion according to PW22 or 5.8 billion according to PW4 was expended. It was counsel's view that since what was actually done on the road was not valued and reported upon, there is no evidence of actual loss.

For A7 it was submitted that he could not cause financial loss when he had no role to verify securities. It was contended that the chief accountant was not called to testify about the duties of A7 beyond what is contained in his employment contract.

The two denied the electronic mail in **exhibit P53** claiming their email addresses do not have upper case letters and that their **IP addresses** are not shown rendering the email suspect.

The law is that the prosecution must prove actual loss. I have already faulted the prosecution for assuming that the court should find that there is some loss and find the accused guilty.

The prosecution should lead evidence to prove the amount of loss. The evidence given by PW4 as project engineer was his guess work. The figure of 5.8 billion which he testified about was not a result of an audit. He was clear in cross examination that the consulting engineer did not audit the work done.

On the other hand the figure of 6.1 billion given by PW22, Ms Mwangale, the investigating officer was hearsay which she got from PW8 and others on the site. The manner in which the **IGG** stopped the work and the style of chasing away everybody from the road meant that no audit could be done to establish the value of the road works in order to determine the actual loss.

Financial loss is a technical offence usually requiring expert auditors to establish the actual loss. It is not proven by assumptions or popular beliefs that there must be loss. Audit reports

are usually the basis of proof of loss. This was not done. Even if there is strong suspicion that there was loss, the law is that suspicion however strong cannot prove the guilt of an accused. Investigations in this regard were not adequate. The evidence itself is wanting. It falls short of the standard of proof. A3 and A7 are not guilty on count

Count Eleven

A3 and A7 are charged with Corruption contrary to **Section 2(i) of the Anti Corruption Act, 2009.**

Essentially the two are charged with neglect of duty. The prosecution contends that they had a duty to verify securities which they neglected to perform as a result of which government lost money to a company that had obtained advance payment against invalid securities.

For A7, it was argued that one cannot neglect a duty that is not his. And one must know of the existence of that duty before neglecting it. A3 admits signing letters confirming verification because it was his mandate to sign letters going out of the directorate but the same are prepared by his juniors such as “**SW**” or Senjako Wilberforce.(A7)

For A7 it was submitted that he was not aware of the short comings in the due diligence report and neither was he involved in processing the advance payment. A7 admits only being a custodian of securities which he had no duty to verify.

It is not in dispute that the two accused worked in the finance directorate whose mandate since 2012 was to verify securities as well as process payments against those securities. In court they each shifted blame to one another leaving me curious as to whether there was any verification of securities at **UNRA** at the time.

A7 testified that he was only a custodian of securities but was not responsible for their verification. He did not say who used to give him securities to keep.

A3 admitted writing **exhibit P131** dated 24th December 2013 which confirmed that the securities from Housing Finance bank had been verified. He adds that that letter was drafted by A7 whose initials appear at the bottom as “**sw**”. These initials represent the names Senjako Wilberforce. According to A3’s testimony it was A7’s role to verify securities and once he was done he would draft letters for A3 to sign since it was a policy that only the head of the directorate would send out letters. It was also a policy of UNRA that whoever drafts a letter should put the initials on it for identity of the source. PW16, Hajat Mutalaga, an Insurer from SWICO insurance company stated that A7 went to her office with what turned out to be fake SWICO securities. He was inquiring if they were genuine. She told him they were not. It was PW16’s evidence

that A7 went to her office with exhibit **P54** a letter purporting to come from SWICO which she told him was a forgery. What would be A7's mission if he was not charged with verifying securities? A7's denial can only be as false as the securities in his custody.

I also believe that A7 drafted the letter that A3 signed.

I also believe as a fact based on evidence from witnesses from Housing Finance Bank such as Dorah Kiyaga, **PW10** and Mary Kansiime Nyende, **PW12**, that the Housing Finance Bank Ltd securities which A3 signed confirming to be valid were actually forged.

There is abundant evidence from PW12 that they had guaranteed clients of **UNRA** before and got verification requests addressed to the CEO. Evidence of PW16 also states that they had dealt with **UNRA** verifications before.

Both, **A3 and A7** are qualified accountants. They are educated professionals who just to look the other way to allow Eutaw construction company obtain advance payment using fake securities obtained from the street of Kampala.

The two neglected their duty of care to their employer and caused a huge risk of paying out billions of shillings without security.

It is strange that A3 who said it was his duty to sign all letters going out of the directorate would sign exhibit **P131** which confirmed the securities without checking to find out if he had sent out the original request for verification. The casual manner by which **A3 and A7** conducted **UNRA** business showed how negligent they were. Their conduct was criminal. Neglect is defined in Black's Law Dictionary, 8th edition as the *omission of proper attention to a person or thing whether inadvertent or negligent or willful; the act or condition of disregarding*.

It is my finding that A3 and A7 omitted to perform a very critical function of the finance directorate which was to ensure that securities against which payments are demanded and made are genuine. Genuine securities mitigate financial risk exposure of the Authority. There was total failure of duty by the two and the blame game by the two in court confirms their guilt.

The two gentlemen assessors advised me to find that it was A3's duty to verify securities but advised me not to find him guilty. I was amazed by that advice. I respectfully find it contradictory to the evidence on record. The two assessors did not find A7 culpable. With respect that finding is against the weight of evidence. A7 could not admit to keeping securities he doesn't verify. He was not a store keeper. He was an accountant. He went to PW16 to verify SWICO securities.

It is my conclusion that the prosecution has proved beyond reasonable doubt the charges in

count eleven. I find A3 and A7 guilty of neglect of duty.

Count Twelve

A5 is charged with Theft of UGX 24,790,823,522= the property of Government of Uganda.

A person who without a claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or special owner thereof, anything capable of being stolen is said to steal that thing.

It is the Prosecution's case that A5 was not that person that UNRA contracted with. He had no right or claim to the money that was paid as advance. He only signed the contract as the country representative of Eutaw. He opened an account in the name of Eutaw construction company Inc at Housing Finance Bank and was originally a co- signatory with PW8 before becoming a sole signatory with his wife as a bank agent to that account.

He is accused of stealing the money because he was not the bidder and had no mandate from Eutaw Mississippi to do business in its name. PW 23 Thomas Elmore President of Eutaw Mississippi denied authorizing A5 to do business in their company name.

A5 was not a director of either Eutaw Mississippi or Eutaw Florida. He was a representative of Eutaw Florida but also claimed to be just a courier delivering documents yet he was a signatory to a company account where he disbursed billions of money including

mandating his wife to withdraw cash in millions as a bank agent.

He presented a bid in the name of Eutaw Mississippi but opened an account in the names of Eutaw Florida and signed the contract as a representative of Eutaw Florida. He received UGX 24,790,823,522= into that account and spent it. The prosecution contends that this was a fraudulent scheme to steal.

A5 denies stealing any money. It was submitted that once the contract was signed, what followed were contractual terms governing the parties that signed. Further, that due diligence could be done at anytime and there were powers of attorney mandating persons that transacted for Eutaw Florida.

A5 denies stealing the money because it was money advanced to a company pursuant to a contract. Mr Mulira learned counsel for A5 called it a form of loan to the contractor to mobilize equipment for the site which it did through A5.

Counsel also canvassed the view that A5 could not steal 24,790,823,522= when the prosecution itself called witnesses who testified that 12.2 billion was given to CICO while 4.6 billion was sent to the USA. This totals 16.8 billion out of 24.7 billion. He called this a contradiction. It was submitted that there was no evidence that A5 stole money for his own benefit.

Theft is defined in section 254 of the Penal Code Act

as reproduced below.

254. Definition of theft

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner, and “special owner” includes any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.

(3) A person shall be taken to use money at his or her own will for the purposes of subsection (2)(e), if that person deliberately or recklessly exceeds the limits of authority allowed to him or her, or deliberately or recklessly disregards any rules of procedure, prescribed by the owner in respect of the money.

(4) When a thing stolen is converted, it is immaterial—

(a) whether it is taken for the purpose of conversion or whether it is at the time of conversion in the possession of the person who converts it;

(b) that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.

(5) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner and believes on reasonable grounds that the owner cannot be discovered.

(6) A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

(7) Without prejudice to the general effect of subsection

(6) , a person shall be taken to have moved money if that person moves or causes it to be moved from one account to another or otherwise out of the original account.

To steal one must *take or move* the item from one place to another. The slightest asportation is enough. This movement must be accompanied with a **fraudulent intent**.

The whole procurement process has to be taken into context to determine if A5 stole 24.7 billion from government or not. It commenced in 2010. Eutaw Mississippi put in a bid presented by A5 who also filed particulars as it representative based in Florida.

The bid was supported by a forged bid security from Housing Finance Bank dated 22nd Sep 2009 (See exhibit P116). More forged securities dated 8th June 2012, 28th Nov 2013 and 9th April 2014 were submitted to support the bid. All of tem forged because most were issued

at a time when Eutaw Construction Company Inc had no account with HFB Ltd. The evidence of PW10 (Dora Kiyaga) and PW12(Mary Kansime) is clear that HFB Ltd never issued those securities contained in P116.

Once the bid was successful, A5 opened an account with Housing Finance bank Ltd. He was co signatory with Michael Olvey and Niu Hong (PW8). See exhibits 56 to 63.

Prior to this Company form 7 had been filed at the URSB on 16th December in which A5 and one Juliana Ndahendikire are stated as directors of Eutaw construction company limited (**See exhibit P91**). Two days later, company form 20 is filed on 18th December 2013 where A5 and PW8 are stated as resident persons authorised to transact business on behalf of Eutaw Construction Company. (**See exhibit P93**). On same day another company form A19 is filed giving names of directors of Eutaw construction company Inc as Timothy Lee McCoy, Michael Olvey and Richard Pratt. (**See exhibit P95**)

When money hits the account, A5 and PW8 start the disbursements. First was **12.2 billion** wired to **CICO** owned by PW8. A5 is said to have approached **CICO** to do the job. Another **4.6 billion** was wired to the USA. After that A5 asked to remain sole signatory to disburse the balance of 7.9 **billion**. He did spend it until 10 million was left at the time of the investigations.

It is clear to me that the role played by A5 to formalize the flow of funds to an account where he was co signatory before becoming sole signatory is not a small one. It was beyond that of a messenger or courier. His

role depended on the task at hand. He would deliver documents such as securities received by PW15, Gertrude Akiiki when it warranted. He would be a company director if it came to operating a bank account or sourcing securities and could be a country representative if a meeting was called by UNRA. His title would be shaped by the task at hand.

I was asked to treat the advance payment as a payment made to the contractor for mobilization. Further, that this money was paid under the terms of the contract and was not stolen by A5.

With respect, technically the money advanced to a contractor is a form of loan but is not free of charge as learned counsel seems to suggest. It is a form of loan but is secured by valid bank guarantee against which the contractor pays interest. The contract was awarded on the false belief that it had a demand bank guarantee from Housing finance bank. This was not true. A5 did not negotiate any security with Housing Finance Bank officials responsible for guaranteeing payments. He knew he was peddling false documents sourced privately. His eyes were on the prize - the advance which he obtained free of charge with the risk that **UNRA** had made an unsecured payment to an account where he had unlimited access.

If the bid had been backed by a valid demand advance payment guarantee, then there would be no claim of theft.

The law about theft which I have quoted in full above defines theft as the fraudulent taking of anything capable of being stolen. Even when you are holding powers of attorney or authority provided you act

fraudulently you commit the crime of theft. See **S.254(4)(b)PCA, Cap 120**

The slightest movement of money from the original account to a different account without the mandate or authority of the owner or special owner is enough to constitute theft. **See S. 254(6)(7) PCA, Cap120** It is irrelevant how the money was used after it had been stolen. **A5** knew what he was doing. He hid under the guise of a company to access funds from UNRA and hire a contractor to do the job at half price as he enjoys the balance. He is a good example of a middleman. He was aided by fraudulent foreigners who posed as directors and engineers to prosecute his scheme. Persons such as **Michael Fiaco, Grant, Michael Olvey, Richard Pratt and Timothy Lee Mccoy** have all vanished since the bubble burst. It is not strange that they cannot return to Uganda. They fear criminal charges for aiding **A5** to execute a fraud on **UNRA**.

I am not persuaded that there was a credible contractor who bid for the Katosi road when it could not even approach a bank to get the requisite demand bank guarantees. No credible contractor could get a job and money but keep away and allow a courier to spend as he wishes. The purported appointment of **PW8** as a representative of Eutaw Florida came in February 2014 when he was already on site. **See exhibit D9**.

PW8 testified that he cut a deal with **A5** to mobilize for the road. His evidence is that he didn't trust **A5** with money so he asked to be a co signatory as a condition to accepting the job. Once he was paid, he ceased operating the account. **PW8** was dealing with an individual who had obtained money fraudulently from

UNRA. **A5** was the controller of these funds. Even his wife was a bank agent to this account and used to draw cash in millions. Is this how a genuine contracting company would operate? **A5** was for all intents and purposes the "contractor." Eutaw Construction Company Inc was a smokescreen used by **A5** to access funds. I do not believe that there was a valid bid that could shield **A5** from liability. No wonder when **PPDA** was asked to review this purported contract it issued a report contained in **exhibit P97**. The report has four findings but the following two are relevant to this

case.

(i) There was no evidence that M/s Eutaw

Construction Company Inc furnished the entity the performance security contrary to sub clause 4.2 of the specific conditions of the contract document

(ii) The entity entered into a contract with m/s Eutaw construction on 15th November 2013 basing on a bid that had expired on 8th April 2011.

Whoever was positioned to receive money under this bid which was not only unsecured but also expired could only be a thief. A5 did position himself to receive it. He did so fraudulently and is guilty of theft of the entire sum. How he spent it is irrelevant (**See S.254(2)(e) PCA**). The offence was committed once A5 received money on the account. He had full control to transact as he wished.

The prosecution has proved the charge of theft against A5 beyond reasonable doubt.

The two gentlemen assessors took the view that the money was paid to a contractor who signed the contract. That it was deposited on the company account meant that A5 could not steal it. They did not lift the veil to see that A5 was the main man in cahoots with some foreigners to steal money using a company as a smokescreen to hide their intentions. If they had considered that the money was obtained fraudulently using fake securities, and read the law as defined in section 254 of the Penal Code which I quoted for them in full, they would have found that it is irrelevant what the money did provided the initial taking was fraudulent.

I respectfully do not follow their advice. It ignores the facts and the law.

Count Thirteen

A5 is accused of obtaining money by false pretence. It is the Prosecution case that A5 pretended to be a representative of Eutaw Mississippi as shown in the bid documents with an address in Florida yet PW23 denied knowledge of him. He also denied mandating A5 or any other person to do any business in their company name. I have already explained in count twelve above in great detail how A5 duped the procurement process to gain access to the advance payment without any valid security using the cover of initially Eutaw construction company Inc Mississippi and later Eutaw construction company Inc of Florida.

Having found that he committed theft, it is not appropriate for me to labour on whether he obtained it by false pretence. This count should have been preferred in the alternative. This was bad drafting. Once the prosecution prefers charges of theft, it can only prefer charges of obtaining the same money by false pretence in the alternative. This is because the two

offences are cognate. Once a conviction is entered on one, no finding is made on the other. I make no finding on count thirteen in view of my finding on count twelve.

Count Fourteen

The prosecution case is that A5 knowingly and fraudulently uttered a false performance guarantee No 00PG078/2013 dated 21st November 2013 for UGX. 16,528,000,000= purporting the same to be issued by Housing Finance Bank whereas not. This security is contained in exhibit P121. There is no dispute that it is false because PW12 denied signing it and also it could not have been issued to a company that did not even have an account with the bank. It was issued on 21st November 2013 yet the company through A5 opened an account on 23rd December 2013. Exhibit P121 is clearly false.

Did A5 knowingly and fraudulently utter the same to UNRA? Night Gertrude Akiiki (PW15) testified that she received the securities from Kenya Commercial Bank and Housing Finance Bank from A5 who she knew as a person that represented Eutaw construction company Inc. While Maimuna Kabasemeza, PW13, testified at pages 643 to 644 of the proceedings thus

“I was at Apollo’s office in Bukoto at 9am to meet Apollo and his wife, after I had received a call from his secretary on 12th may 2014.....After the meeting he asked whether the company where I work offers advance payment guarantees. I told him we don’t. He proposed whether I can contact a friend or colleague from big reputable companies where he can get advance payment bond. I told him I would try and contact colleagues. Before I left his office, he downloaded documents from his computer and gave them to me. I looked at the document and noticed one of them was on a letter head for Housing Finance Bank dated November 2013. It was an advance payment guarantee. It was signed by an official from the Bank. The name of the person was Kansiiime. The second document had 2013 December still signed by the Housing Finance Bank official. I did not take time to read the details but the heading was a performance bond. But he insisted he wanted an advance payment guarantee. From his interaction when he told me - I am replacing with new ones in two days”

In cross examination, A5 did not challenge this evidence instead he dwelled on how he had been fleeced of 75 million by people contracted by PW13 who gave him false SWICO securities and that he reported the matter to the police.

It is plainly clear from the above excerpt that A5 had soft copies of Housing Finance Bank securities on his laptop.

Pw13's evidence when read together with that of PW15 leave no doubt that the person who was in possession of the Housing Finance Bank performance guarantee and presented the same to **UNRA was A5**. There is strong circumstantial evidence to prove that only **A5** and no other person dealt in false securities from Housing Finance Bank. **A5's** denials that the securities were delivered by staff of the company other than him can only be false. He run this scheme personally and contacted persons to do work for him personally. He had his eyes on the prize. He knew these documents were false. That is why much later after he had got the prize he wanted them replaced. Indeed he replaced them with assistance of A3 who advised him to back date them. The advice of the two gentlemen assessors that I find A5 not guilty on count fourteen is against the weight of evidence. The excerpt from the testimony of PW13 leaves no doubt about A5's dubious schemes.

I respectfully disagree. I find A5 guilty on Count Fourteen.

Count Fifteen

A5 is accused of knowingly and fraudulently uttering to **UNRA** a false advance payment guarantee No 00APS047/2013 dated 23rd December 2013 for UGX 24,790,823,522= purporting that the same was issued by Housing Finance Bank whereas not.

Again it is not in dispute that this guarantee is false. PW12 who is said to have issued denied doing so and even the hand writing expert in a report dated 15th October 2014 (**exhibit** 113) confirms that the signature on this advance payment guarantee is forged. On the basis of the evidence adduced by PW13 which I quoted when dealing with count fourteen, it is clear to me that strong circumstantial evidence points to A5 and no other person as the presenter of these false documents. He certainly knew they were false because he never transacted with any authorised official of Housing Finance Bank to secure a guarantee of such magnitude. He was operating from his private place and not the bank premises. I find him guilty. For similar reasons as I gave in count fourteen, I do not accept the assessors' advice to the contrary.

Count Sixteen

A5 is accused of knowingly and fraudulently uttering to **UNRA** a false advance payment bond No. 001/133/1/000162/2013 dated 23rd December 2013 for UGX 24,790,823,522= purporting the same to have been issued by State Wide insurance Company where as not.

PW13, Maimuna Kabasemeza, testified at length at pages **645 to 665** how she connected **A5** to **Michael kintu, one Patrick** and **Joseph** who claimed to work for **SWICO**. They provided the performance bond and advance payment bond which turned out to be false. A5 had coached PW13 how the brokers should respond to the **UNRA** inquiry but it appears the matter went straight to **SWICO** managers who denied issuing the two bonds. The matter ended up with the police while **A5** moved on to other brokers.

The prosecution contends that A5 knew these were forged because of the manner he used to source them. He never transacted with State Wide Insurance Company but chose to speak to contacts on phone.

It was further submitted that A5 would carry some of these securities and hand them to **A3 and A7** without registering them at UNRA. For example, the **SWICO, UAP and ICEA** securities were carried and handed over casually to **A3 and A7**. The prosecution contended that by this conduct, A5 knew he was carrying false documents. **A7** admitted to have received the SWICO securities from A5 (see A7's additional statement **exhibit P132**).

In his defence A5 contended that he used to deliver documents prepared by other people and he had no knowledge of the contents of these securities. That **UNRA** never suffered from the falsity of these documents. But the evidence of PW13 is that A5 was put on phone and instructed Patrick and Michael Kintu what should be contained in the bonds. It is A5 who supplied the content. He never challenged PW13 on this testimony which was lengthy and graphic.

The manner in which A5 transacted business to obtain the **SWICO** securities was suspect. He resisted requests by PW13 to go to the insurance company and preferred to deal with contacts that would prepare documents at his dictation.

The gentlemen Assessors advised me that A5 was conned and reported this matter to the police. He was, therefore, innocent. A5 was getting bonds in May 2014 to secure a payment he had already received and disbursed. He was just deceiving everybody. There was no advance payment to secure. He had already been paid. It was not possible any longer under any law or fact to get a genuine advance payment bond after the 24,790,823,522= had been paid.

I am not persuaded to believe that A5 did not know that the bonds from **SWICO** were not genuine. He never paid **SWICO** and never got any receipt from there. He paid street boys and when he learnt that **UNRA** was writing to verify those bonds, he called PW13 asking her to alert **Patrick and Kintu** to respond with the word “**authentic**”.

If they were authentic why would A5 alert PW13 and suggest what the reply should be? A5 orchestrated a scheme to cover the fraud he had committed at **UNRA**. He had already received an advance payment without security. In the process he lost money to fellow fraudsters. If a fraudster loses money to another fraudster does the original fraudster become innocent? PW16 from **SWICO** denied doing business with A5. Two hand writing experts SSP Sebuwufu, PW20 and SSP Chellangat, PW21 confirmed that the signatures on the securities from **SWICO** were forged.

The charges in count sixteen are proved beyond reasonable doubt. A5 is guilty of uttering a false advance payment bond to **UNRA**.

Count Seventeen

A5 is accused of knowingly and fraudulently uttering to **UNRA** a false performance bond No. 010/132/1/000299/2013 dated 21st November, 2013 for UGX 16,528,000,000=
Again by May 2014 when A5 was seeking a performance bond for Eutaw construction

company Inc, it was **CICO** performing the work. Such bonds whether genuinely issued or not could only be false. The reasons I have given in count sixteen apply with equal force to this performance bond. They were received at **UNRA** by **A7**. When verified they were found to be false. As I have already found, **A5** could not get any genuine securities to cover an advance payment he had already received. He could not obtain a valid performance bond for **Eutaw** because it was **CICO** performing the job. **A5** could only lie. **A5** is guilty for uttering false performance bond from **SWICO to UNRA**. He did so knowingly and fraudulently

Count Eighteen

A5 is charged with knowingly and fraudulently uttering to **UNRA** a false bid guarantee No 0101600045 dated 1st December,2010 for UGX 1,900,000,000= purporting it was prepared by Kenya Commercial Bank whereas not.(See exhibit **P117**)

The prosecution referred to the evidence of PW14, Gabura Edward, a relationship manager at **KCB** who testified that neither **A5** nor Eutaw Construction Company had an account with **KCB** in order to qualify to apply for a security. Yet evidence of Akiiki, PW15 is that **A5** delivered the **KCB** securities to **UNRA** at the time of bidding (see **exhibit P123**)

A5 denied presenting the **KCB** securities contending that their staff did so and he only got involved in withdrawing them from **UNRA** once they were found wanting. As regards the evidence of PW15, it was submitted that she concocted it.

The falsity of the **KCB** securities is not disputed. The bank denied issuing them. Besides, Eutaw had no account with **KCB**. Who presented them to **UNRA**? **Exhibit P123** shows **A5** attending the bid opening document on the day this bid security was received at **UNRA**. PW 15 testified that she received it from **A5**. It was her evidence that she even called **A5** and advised him to take back the Housing Finance bank securities. That is when **A5** presented the **KCB** securities to replace the Housing Finance Bank securities. She had also received the Housing Finance Bank securities from **A5**. When **A5** cross examined her, she emphasised that **A5** used to deliver documents to **UNRA** as a representative of Eutaw.

I believe PW15. She did not change her position on who delivered these forged

documents to **UNRA**. There was no material basis for concocting her evidence as was submitted for A5. There is strong circumstantial evidence pointing to A5 as the guilty person. He testified about his earlier association with A6 who worked with **KCB** and when A6 moved to Housing Finance Bank Jinja branch, A5 looked for him and what followed is on record.

Every security submitted to secure Eutaw Construction Company's bid has a connection with **A5**. There is always a witness or two who identifies the security with **A5**. He is notorious for not only sourcing them but also submitting and even withdrawing some of them. It has been proved beyond reasonable doubt that **A5** uttered these documents and the manner he sourced them from outside the entities that purport to issue them proves that he knew they were false. He is guilty of the charges in count eighteen. The two gentlemen assessors did not appreciate evidence that showed that A5 was the source of all the securities in this procurement. He operated from his home office and peddled one false document after another. I do not accept the advice that A5 is not guilty. In fact he is guilty on count eighteen.

Count nineteen

A5 is accused of knowingly and fraudulently uttering a false bank guarantee number 42664 dated 13th December 2011 for 1,900,000,000= purporting it was issued by Kenya Commercial Bank (**KCB**) whereas not.

I have already discussed A5's involvement with exhibit **P117** in count eighteen, above. Exhibit **P118** which is the subject of this count moved with exhibit **P117**. It follows that A5's culpability in presenting exhibit **P117** applies with equal force to exhibit **P118** in count nineteen. I need not repeat that **A5** is by both circumstantial and direct evidence of PW15 proved to have presented the **KCB** securities to **UNRA**. It is not in dispute that exhibits **P117 and P118** are false.

Did **A5** have knowledge the **KCB** securities were false? Did he utter them fraudulently? There is abundant evidence on record from witnesses such as PW13, PW15, PW16 and even A3 that connect A5 to sourcing, presenting and withdrawing securities. Unfortunately, all these securities turned out to be false or unenforceable. PW14, Gabura, was clear that Eutaw as a Company had never opened an account at **KCB**. Any documents purporting to cover the bid from Eutaw using documents from

KCB can only be false and whoever presented them knew or had reason to believe that they were false.

Banks don't issue guarantees for free. Eutaw did not have any account against which a guarantee would be issued and charged interest.

A5 is guilty on count nineteen. The prosecution has proved the charges beyond reasonable doubt. The gentlemen assessors did not find proof of offences in counts 14 to 19 and advised me to acquit the accused. With respect, I differ. If the two had appreciated the role A5 played in securing this contract, they would have advised the contrary. **A5** is a sophisticated, smooth operator whose actions can only be understood after _ intense examination.

Count Twenty

A5 is charged with obtaining execution securities (**performance bond**) from the Insurance Company of East Africa (**ICEA**) dated 19th June 2014 for UGX 16,527,215,618= whereas UGX 24,790,823,522= had already been paid to Eutaw Construction Company.

It is not in dispute that Money was paid to Eutaw in January **2014**. It is also not in dispute that **CICO** a construction company mobilized at the request of **A5** and went on site early **2014**. By June **2014** **CICO** had established itself on site and had started work on the road.

However, the performance bond covers the contractor to perform according to the contract. A performance bond guarantees performance and not the advance payment as the charges preferred in count twenty seem to suggest.

Indeed **ICEA** cancelled this bond for the reason that it was issued to cover **Eutaw** Construction Company whereas the contractor on site was **CICO**. This was the reason that invalidated the **ICEA** bond. It was not because UGX 24,790,823,522= had already been paid. This is the gist of the **ICEA** letter dated 22ⁿ July 2014 exhibited as **P103**. Yet the charge sheet states that the inducement to execute the bond was made after the advance payment. The charge sheet should have stated that he obtained a performance bond for a **Eutaw** Construction Company yet the company performing the work was **CICO**. To this extent, therefore, the charge sheet is at variance with the evidence adduced. The result is that the charges in count twenty cannot stand on account of mis statement of facts. Where the evidence is at variance with the

particulars of the offence, the charges cannot be not proved. **A5** is not guilty on count twenty.

Count twenty One

A5 is charged with obtaining execution of securities from **UAP** insurance companies by false pretence and with intent to defraud

The prosecution contends that by purporting to guarantee money already received and spent, **A5** was acting with fraudulent intent. **UAP** withdrew the advance payment bond upon discovering that they had been misled to issue covers for money already received and spent. See exhibit **P105**.

The Defense maintained that **A5** was only acting as a courier in respect of these securities and did not know of the contents of the same.

Evidence of Solomon Serugga, PW18, an insurance broker, is that **A5** sought their services to provide an advance payment bond and a performance bond. He interacted with him and obtained the relevant documentation from **A5**. This evidence was not challenged.

The submission that **A5** just carried these documents from either **ICEA or UAP** and did not know what was contained there can only be untrue.

A5 physically sourced the **UAP** security in June 2014 long after he had received and disbursed the money. He was fully aware of his actions.

According to PW4, the **UNRA** project engineer, the consultant had refused to clear a certificate for 5,000,000,000=

because Eutaw had not provided a performance guarantee. It could be the reason that A5 was in June 2014 looking for documents he should have supplied before construction started. He wanted to cash on another **5 billion**.

PW18 handed over the documents to **A5**. He was fully aware of the contents. He is guilty of falsely pretending that no advance payment had been made when he sought an advance payment bond from **UAP** through Insurance brokers. The prosecution has proved the charges in count twenty one beyond reasonable doubt. Again the gentlemen assessors found no fault in count twenty one advising that it is PW18 who got the securities from **UAP** and not **A5**. With respect, the two did not appreciate that insurance business is transacted through Insurance brokerage. Cases in this Division are sophisticated. We require assistance of experts to advise court on the nature of evidence adduced.

Count Twenty Two

A5 and A6 are accused of Conspiracy to defraud GOU of UGX 24,790,823,522=.

The prosecution case is that the friendship between the two resulted into an agreement to defraud **GOU** of the above funds through fraudulent means. The prosecution relied on the following species of circumstantial evidence.

- (a) That A5 and A6 had a previous relationship while A6 worked with Kenya Commercial Bank(KCB)
- (b) That A5 went looking for A6 at **KCB** and finally found him At Housing Finance Bank (**HFB**) from where A6 assisted A5 to open a corporate Account.
- (c) That the two exchanged emails regarding account opening documents including requirements for securing a bank guarantee.
- (d) That emails found at **UNRA** regarding verification of securities from **HFB** were traced on the HFB server to have been written by A6.
- (e) That A6 was the relationship manager for A5 during the account opening.
- (f) That A5 was seen in the bank lobby with A6 by HFB staff such as PW10, Dora Kiyaga
- (g) PW9's testimony that HFB blank headed paper was retrieved from the trash folder of A6's private email which is believed to have been used to forge the

securities that secured the payment.

Both A5 and A6 admitted interacting but in an official manner of customer and banker relationship. They deny conspiring to defraud. The prosecution contends that there is circumstantial evidence that A6 provided the bogus bids that A5 presented to **UNRA**.

In cases relying on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused. The offending **KCB** securities are dated 1st December 2010 (**P117**) and 13th December 2011 (**P118**). Exhibit **P117** supported the bid submission and was received at **UNRA** from **A5** by PW15 according to her testimony at pages **694** and **695** of the proceedings.

According to the testimony of A6, in cross examination, he joined **KCB in 2012**. This was after exhibits **P117 and P118** had been made and received at **UNRA**. There was no contrary evidence to suggest that worked at **KCB** prior to that period. The investigation did not retrieve **A6's** appointment letter at **KCB** as it did for the appointment at **HFB Ltd**. The surrounding circumstances do not lead to an irresistible inference that **A6** provided **A5** with the offending securities from **KCB**.

It was submitted for **A6** that the electronic mails relied upon to connect him to the crime are suspect because they don't have the **IP address** of **A6's** computer.

A6 testified that when his computer was examined, it was clean of the alleged electronic mails. It was also the evidence of **A3** and **A7** that the electronic mail addresses attributed to them from A6 contain upper case letters which they do not use at **UNRA**. Another challenge on the electronic mails contained in exhibit **P53** is that there was no examination of the **UNRA** servers to establish if indeed **A6** communicated with **A7 and A3**.

Computers communicate to each other through mediums called servers. Deleted information on a computer is recoverable on the computer hard disk and also on the exchange servers in Microsoft outlook. This is how technology works.

A conspiracy is an agreement of two or more persons to do an unlawful act. This agreement is a mental one which can be discerned from the conduct of the accused. The actions of each conspirator are to promote the conspiracy.

Did A5 and A6 conspire to steal **UGX 24,790,823,522=** from **GOU**?

Miss Norah Kaggwa, learned counsel for A6 mounted a strong challenge on the credibility of the evidence of

PW10 and PW22 in regard to the electronic mails presented in court attributed to **A6**. It was her view that A6 was just suspected to have conspired with A5 but there was no evidence to support that suspicion.

She submitted that A6 had explained how he got a blank Headed paper of the bank so he could work after office hours to recommend a colleague for a job. She submitted that the electronic mails in exhibits **P53** and **P115** are not authentic.

She maintained that A6 helped A5 to open a bank account for Eutaw Construction Company as a relationship manager. The thrust of the defence is that the electronic mails contained in exhibits **P53** and **P115** have been modified by editing. The screen shots in exhibit **P115** appear to be edited in word document form to type the headings. A defence witness called by A6, Mr. Mugisha Solomon Byakutaaga criticised exhibit **P53** claiming it did not have an **IP address** of the computer that generated it. With respect that testimony was not correct. Electronic mails printed off in word form do not contain **IP addresses**. They contain headers showing time stamps, sender and receiver. Electronic mails imaged from hard discs using computer tools like **DD or FTK or EnCase** show all attributes of the equipment on which the data is received, stored and retrieved. Otherwise messages in mail folders printed off the computer in word form such as exhibit **P53** do not carry an **IP address**.

Exhibit P53 was picked from **UNRA** in document form. It was not copied from a computer hard disc. I did not find much value in Mr. Byakutaaga's testimony. His expertise was not relevant.

I also note that the screen shots in exhibit **P115** were first changed to word form before the headings were typed on them after which they were printed out. That amounts to already changing electronic data by way of modification. **See Section 7 of the Computer misuse Act, 2011.**

The manner in which electronic data was sourced and tendered was casual and non compliant with the provisions of the **Computer Misuse Act, 2011**. No digital tools were deployed to retrieve data from the **UNRA and HFB** exchange servers which would have been useful in connecting **A5 to A6** as alleged by PW22, PW10 and PW11. Use of digital tools such as **FTK** ensures that the integrity of data is high. Such data speaks for itself.

For example if the **UNRA** exchange servers had been imaged it would have revealed whether **A3 and A7** use upper case in their email addresses or not. This was not resolved. When PW22 picked exhibit **P53** she just assumed that she had got evidence against A7 by reading his name on that mail. That was too casual. Investigators of digital crimes should deploy digital tools and not analogue methods to gather evidence. When assessing the evidential weight of a data message or electronic record, the court shall have regard to the reliability of the manner in which the data message was generated; and the reliability of the manner in which the authenticity of the data message was maintained. **See Section 29(3)(a)(b) of the Computer Misuse Act, 2011.** Exhibit **P115** was tampered with as far as the screen shots were concerned. The headings are clearly typed in word document form over the screen shots. That diminished their value. It is understandable from the testimony of PW11(Mr Mbabazi) that his support work in generating electronic data and modifying it was because he believed it was an internal audit report.

Indeed it is titled **Internal Audit Report** addressed to the Managing Director of **HFB Ltd.** It was for internal consumption in the bank but the investigating officer picked it up as she gathered all sorts of documents which she placed on the court record. The investigating officer should have done more investigations on the **HFB and UNRA** exchange servers using exhibits **P115 and P53** as leads to generate credible digital forensic data. That is what she should have tendered in court as evidence. Not the hard copies of documents whose sources she did not verify.

Exhibit **P53** was not subjected to examination to establish its source. It was merely assumed that it was a copy of what **A7** sent to **A6**. These assumptions do not pass the test set in **section 29 of the Computer Misuse Act, 2011.**

The other evidence connecting **A6 to A5** is the fact that A5 knew him before while A6 worked with **KCB**. It is also on record that A5 went looking for A6 to help him open a bank account. Indeed A6 provided A5 with the necessary information required to open an account and helped him do so as a relationship manager. A6 was even commended by his supervisors for bringing such a big business to the bank. There is nothing wrong with this relationship. The account opening was normal and approved by A6's supervisors.

After examining the circumstantial evidence relating to the **KCB** securities and the electronic data whose integrity is questionable, I come to the conclusion that the conspiracy theory involving **A6** to steal **UGX 24,790,823,522** was not proved beyond reasonable doubt. **A5** may have conspired with others to steal but the evidence fell short of joining **A6** to the scam. Indeed A6 could have come on board much later but the investigations covering the electronic mails between him and A5 are wanting. The conspiracy theory has not been proved. A5 managed the process and only interacted with persons along the way who were critical to achieving his goal. If there were conspirators then they are Richard Pratt, Michael Olvey, Timothy McCoy, Michael Fiacco and Grant. They exploited the weak procurement directorate supervised by engineer Ayelew to steal money by purporting to bid for road jobs.

Count Twenty Three

A6 is charged with abetting the offence of causing financial loss when he fraudulently confirmed to A7 that the **HFB** securities were genuine whereas not.

It is the Prosecution's case that the act of **A6** sending confirmation electronic mails regarding the authenticity of the securities from **HFB** meant **A6 and A7** had a common intention to abate the offence of causing financial loss.

I have already discussed at length that financial loss was not proved for reasons that the actual loss was not determined by any credible evidence.

Secondly, there was no credible evidence to prove that A6 sent the offending mails to **A7**. The integrity of exhibit **P53** is suspect. More work was needed in investigating its source on the exchange servers. It does not speak for itself.

The result is that the charges in count twenty three have not been proved beyond reasonable doubt.

CONCLUSION

The fraud in the procurement of a contractor for the Mukono-Katosi-Kisoga-Nyenga road started in 2010 when a bid was presented to **UNRA** by **A5** purporting to be a bid for **Eutaw Mississippi** but with **Eutaw Florida** tagged on A5 as its representative.

At the stage of bid opening, the Eutaw bid should have been rejected. The procurement unit allowed this bid to go through to evaluation stage and the contracts committee also strangely allowed it not only to pass but in fact to win the contract. The procurement officials and the contracts committee members are not in the dock. Yet officials such as A1 and A2 who came on board much later in 2011 and 2013 respectively were charged in court. This is long after the plot had been hatched to defraud **UNRA** of money.

It is true that red flags were raised by the preliminary due diligence team in 2013 but by then the process had advanced since a contractor had been selected. A5's manipulative skills and tenacity which ensured that the agreement was sealed and an advance payment made without any security is phenomenal.

After evaluating the prosecution and defence evidence, it is my conclusion that the prosecution case against A1 and A2 has not been proved beyond reasonable doubt. Consequently, A1 is not guilty on counts 1, 2 and 3. He is acquitted on each of those counts accordingly.

A2 is not guilty on counts 4, 5, 6, and 7. He is acquitted on each of those counts

accordingly.

As regards A3, the charges of causing financial loss were not proved beyond reasonable doubt. The reason for this is that no investigation was done to establish the actual loss. That loss that is not recoverable. Consequently, A3 is acquitted on count 6. I however, find A3 guilty of abuse of office C/S 11(1) ACA, 2009 for writing exhibit **P131** on 24th December, 2013 confirming a verification that never was which letter was eventually used to support a payment to the prejudice of his employer.

A3 is however, not guilty of causing financial loss in count 10 because of lack of evidence of actual loss.

A3 is jointly guilty of neglect of duty for failing to verify securities against which an advance payment was made. Securities are the reason money is advanced to a contractor. It is a form of collateral. For a whole director of finance to sign a letter lying that the securities are genuine whereas not is proof that he is guilty of neglect of duty. I convict him on count 11 **A4** is not guilty of causing financial loss for lack of evidence of actual loss. He is acquitted of count 8.

A4 is also not guilty of abuse of office in count 9 because there was no evidence to prove that he was aware about the bogus securities. Advising to sign the contract and do due diligence latter is a perfectly correct legal position. If the securities supporting the payment were genuine as **A3** falsely stated in his letter, then there would be no risk to the advance payment. A4 did not act arbitrarily. He is acquitted on count 9.

A5 is the manipulator of the entire procurement process facilitated by a weak procurement unit and a complicity contracts committee. He navigated around the directorate of finance and administration to present bogus securities and was able to get free money by fronting a company that had no capacity to construct even an inch of a public road on its own.

A5 was a document manipulator with exceptional skills. He could produce any document under the sun which turned out to be fake securities. He is guilty of theft and uttering false documents. He is also guilty of obtaining execution of securities by false pretence.

I convict A5 on counts 12, 14, 15, 16, 17, 18, 19, and 21. He is acquitted on counts 20 and 22.

A6 is not guilty and acquitted on counts 22 and 23.

A7 is guilty and I convict him on count 11.

For avoidance of doubt, A1, A2, A4 and A6 are acquitted and set free. A3, A5 and A7 are convicted and proceed to allocutus.

Gidudu Lawrence

JUDGE

29TH AUGUST, 2018