THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CORAM: ***OWINY-DOLLO, CJ; MWONDHA; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA, JJSC***

CRIMINAL APPEALS NOS. 53, 75 & 77 OF 2020

(Arising from Consolidated Criminal Appeals No. 723, 734, 735 & 742 of 2014)

1. JOHN MUHANGUZI KASHAKA
2. HENRY BAMUTURA
3. SAM EMORUT ERONGOT ::::::::::::::::::::: **APPELLANTS**

VERSUS

UGANDA ::: **RESPONDENT**

JUDGMENT

This is a second appeal; it being an appeal from the decision of the Court of Appeal (*Musoke, Obura, with Madrama dissenting, JJA*) sitting as a first appellate Court, in ***Court of Appeal Criminal Appeal No. 723, 734, 735 & 742 of 2014 –John Muhanguzi Kashaka(A1), Henry Bamutura (A2), Robert Mwebaze (A3), Sam Emorut Erongot (A4), Timothy Musherure (A5) & Adam Aluma (A6) vs Uganda.***

Background

The Appellants are public officers who were involved in the procurement of 70,000 bicycles for Chairpersons of village councils and parishes within Uganda. The agreed mode of payment under the contract was by way of Letters of Credit. After several requisite processes were carried out including obtaining the advice of the Attorney General, the contract for supply of the bicycles was signed. Before payment was effected Bank of Uganda sought clarification from the Ministry of Local Government on what it considered to be discrepancies in the letters of credit. They received a go ahead from A1 and A2 by letter to proceed with payment and advance 40% payment made to the suppliers.

However, the bicycles were never supplied. A1 & A2 were charged and convicted with causing financial loss, c/s 20(1) of the Anti-Corruption Act. They were convicted and sentenced to 10 years and 10 days, in addition to an order disqualifying them from holding a public office in Uganda for 10 years. A2, A3, A4 and A5 were charged with offences of abuse of office and neglect of duty. A3 and A4 (now A3) and A6 were convicted of both offences and sentenced to a term of imprisonment and disqualified from holding office for 10 years. A5 was also convicted of abetment and failure to prevent a felony as minor and cognate offences.

All accused persons, except A5, were also ordered to jointly refund to government $1,719,454.58. They all appealed to the Court of Appeal against both conviction and sentence. A5 was acquitted on account of the fact that the offences he was charged with were minor and cognate. A3 died and his appeal abated during the appeal. A4 (now A3) was acquitted on one count of neglect of duty. The rest of the convictions and sentences were upheld; hence this appeal.

For purposes of this Appeal, we shall refer to the appellants in the appeal as A1 (John Muhanguzi Kashaka), A2 (Henry Bamutura) and A3 (Sam Emorut Erongot).

Grounds of Appeal

The First Appellant's grounds of appeal are that:

1. *The Learned Justices of the Court of Appeal erred in law when they upheld a conviction of the offence of causing financial loss contrary to s. 20 of the Anti-Corruption Act Cap 6 in the absence of the requisite ingredients.*
2. *The Learned Justices of the Court of Appeal erred in law when they declined to consider s. 92 of the PPDA Act as a requisite ingredient of causing financial loss contrary to section 20 of the Anti-Corruption Act.*
3. *The Learned Justices of the Court of Appeal erred in law when they upheld that the Appellant in performance of this duties arising in the public procurement transaction knew or had reason to believe that his acts would cause financial loss to the government of Uganda.*

4. *The Learned Justices of the Court of Appeal erred in law when they failed to examine the facts vis-a-vis the law regarding the offence of causing financial loss contrary to section 20 of the Anti-Corruption Act allegedly committed by the Appellant in performance of his duties arising in the Public Procurement transaction.*
5. *The Learned Justices of the Court of Appeal erred in their interpretation of the PPDA vis-a-vis the Anti-Corruption Act and their application thereby arriving at a wrong decision that the provisions of the PPDA Act were repealed by implication.*
6. *The Learned Justices of the Court of Appeal erred in law by upholding a sentence of 10 years while similar offenders under worse conditions had been given a lesser sentence of five years.*
7. *The Learned Justices of the Court of Appeal erred in law and fact when they upheld the learned trial judge's Order of compensation which was omnibus and not in accordance with the law.*

The Second Appellant's grounds of Appeal were as follows;

1. *The Learned Justices of the Court of Appeal erred in law and fact when they adjudged the 2nd appellant case to be similar to that of the 1st appellant and ascribed to him similar duties under the law to dismiss his (2nd appellant's) appeal contrary to the express provisions of the Public Finance & Accountability Act (2003) and regulations thereunder.*
2. *The Learned Justices of the Court of Appeal erred in law and fact when they found and held that the 2nd appellant responsible for cosigning the letter authorizing /approving payment when he*

had no such authority/duty under the law and in the circumstances.

3. *The Learned Justices of the Court of Appeal erred in law and fact when they found and held that the second ingredient, that is the accused person did an act which caused financial loss without scrutinizing and determining what caused the loss of US $ 1,719,454.58*
4. *The Learned Justices of the Court of Appeal erred in law and fact when they held that the 2nd appellant had acted without reason in total exclusion of evidence in his defense.*
5. *The Learned Justices of the Court of Appeal erred in law where they failed to re-evaluate the evidence on record thereby not adjudicating the issue as to whether the trial judge had shifted the burden of proof to the 2nd Appellant.*
6. *The Learned Justices of the Court of Appeal erred in law when they upheld the custodial sentence and made order for refund of US $1,719,454.58.*

The Third Appellant's grounds of appeal were as follows;

1. *The Learned Justices of the Court of Appeal erred in Law when they wrongly interpreted the provisions of the Procurement and Disposal of the Public Properties Act as well as regulations thereunder and wrongly held that:*
   (a) The Evaluation Committee of which the appellant was a member awarded a contract, the subject matter of the prosecution, to AITEL.

(b) *AITEL, the firm recommended by the Evaluation Committee, was not a joint venture because no joint venture agreement was attached to the bidding documents*

(c) *The Evaluation Committee did not have powers to accept a bid that was not listed on the PP Form 30 after investigating how the bidder obtained the solicitation docs.*

(d) *The act of admitting AITEL's bid when it did not appear on the PP Form 30 was therefore arbitrary and prejudicial to the interests of the government.*

2. *The Learned Justices of the Court of Appeal erred in law when they upheld the conviction on count 9 of Abuse of office based on an arbitrary at that AITEL'S bid did not appear on PPF 30 an act which was not stated forming part of the particulars of the offence in Count 9 of the indictment. (sic)*
3. *The Learned Justice of the Court of Appeal erred in law when they sustained the appellant's conviction on counts 9 & 12 relying on the same acts arising from the same evaluation which caused double jeopardy on appellant resulting into harsh and excessive sentences. (sic)*
4. *The Learned Justices of the Court of Appeal erred in law when they held that the appellant was rightly ordered to pay compensation to the Government of Uganda which order was unjustified and harsh in the circumstances of the case.*
5. *The Learned Justices of the Court of Appeal erred in law when they failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion that the order requiring the*

appellant to refund USD 1,719,454.58 jointly and in equal proportions with other convicted persons be upheld.

Representation

At the hearing of the Appeal, the 1st Appellant was represented by Counsel McDusman Kabega; the 2nd Appellant by Counsel Sekabanja Edward; the 3rd appellant, by Counsel Evans Ochieng; and the Respondent by Counsel Namatovu Josephine (Assistant DPP).

Submissions of the 1st Appellant

Grounds 1 and 4

Counsel for the 1st Appellant argued grounds 1 and 4 together. He pointed out that the gist of these two grounds were that the Court of Appeal failed to examine and/or re-evaluate the facts and the law in upholding a conviction for the offence of Causing Financial Loss. Counsel explained that Court failed in its duty as the 1st appellate court to evaluate evidence as a whole, test it against the conclusions of the trial court and come to its own conclusions. He referred to **Okethi Okale v R (1965) EA 555; Mbazira Singh & Anor v Uganda Crim. App 7/2004.** According to Counsel, the issue is whether the Court of Appeal made a holistic and judicious re-evaluation of the evidence that was put before the lower court.

He emphasized that re-evaluation is not mere mentioning of the evidence and conclusions, but rather an independent and in-depth analysis of all the evidence tendered, then arriving at its own conclusion. He submitted that while confirming A1's conviction, the

Court of Appeal only looked at and considered at face value the letter from the Bank of Uganda (BOU) (Exp.26.1); no effort was made to re-evaluate evidence regarding this letter. For instance, they did not consider that the initial payment of 40% did not require delivery notes or that partial shipment was allowed under the agreement as admitted by PW6. They also did not consider the fact that BOU was supposed to verify the documents with Letter of Credit (LOC) on behalf of Ministry of Local Government (MoLG) and it was paid a commission of 1% for its services; it was thus not expected for BOU again to seek guidance from MoLG the client. He submitted that the Bank thus acted in total neglect and breach of its contractual duty. Counsel also set out the evidence of the witnesses that he argued was overlooked. He submitted that indeed PW3 testified that the Solicitor General had cleared the contract and further confirmed on cross examination that it was not wrong to pay 40% before delivery as advance payments are usual in government contracts. He also pointed out that PW5 stated that it was the duty of BOU with original documents to verify the authenticity of the Letters of credit.

Counsel further submitted that the 'discrepancies' were not discrepancies at all. The change in the final destination from villages and parishes to Kampala was not a discrepancy at all since the changes had been made to the contract on the advice of the Secretary to the Treasury for ease of payment of tax.

As regards the alteration in the certificate of origin that was said to be inauthentic, Counsel explained that the alteration was only on mode of carriage of the bicycles from the factory to the place of

Shipment from Road to Rail. In fact, according to Counsel, the BOU should have seen the change and the stamp 'correction approved'.

In conclusion, he went on, there were no discrepancies for the Appellant to deal with contrary to the averments of BOU as well as the trial judge and Justices of Appeal. In that light, PW6 from BOU therefore had no business writing to MoLG since the so called discrepancies therein were misconceived.

In any case, any discrepancy should have been raised to the confirming bank. See trial judge at pg. 1608 Vol. 4. Also curious is Justice Obura at A93 Vol 1 who also blamed the BOU for this though she concludes that failure by the BOU did not exonerate A1 from his statutory duty. Even Justice Obura faults him for the flaws of the Evaluation and Contracts Committee for A1 not exercising his oversight duties at Vol. 1 Pg. A91. She also again blamed A1 for signing a contract that had an advance payment clause without providing for any security. She failed to consider the evidence of PW3 to the effect that the Solicitor General had approved the contract. In conclusion, Counsel concluded that it was clear that they had demonstrated that none of the 2 courts made a proper evaluation of the evidence that was before Court in reaching a decision.

Submissions of the 2nd Appellant

Grounds 1& 2

Counsel for the 2nd Appellant submitted that the learned justices of appeal were wrong in attributing the findings as regards the guilt of A1 as also holding true in respect of the 2nd appellant; that signing

away that money would cause loss. First of all, the letter from BOU was only written to A1 and not the 2nd appellant and it was thus wrong to say it was written to A1 & A2. Secondly, Counsel for the Appellant fully associated himself with the dissenting judgment of Justice Madrama in discussing the elements of causing financial loss that he considered would exonerate the 2nd appellant. Counsel submitted that under the law, an accounting officer is personally accountable to Parliament for expenditure of money under his Ministry, Department and Local government under s. 8 (2) of the then Public Finance Accountability Act 2003 which has since been repealed. Regulation 58(1) also provides that such officer has overall authority over payments under his control. Regulation 58(2) provided that all payments were to be made in accordance with procedure. It is the Accounting officer who has the responsibility of authorizing payment in his or her department and they can do that upon a warrant given by the Accountant General.

The second argument of Counsel was that the 2nd appellant could only act on the instructions of the 1st appellant and in the absence of evidence of collusion, A2 could not be held responsible for causing the loss. Counsel also referred to the defence of the 2nd appellant where the 2nd appellant stated that he requested internal audit to verify the documents originally received from Stanbic Bank about discrepancies: and it is only after internal audit verified that he signed the letter to BOU.

Counsel pointed out that that the cancellation of rail to road by suppliers had been authenticated by the Chamber of Commerce, India, which stamped and initialed on the stamp. In conclusion, he submitted that the 2nd appellant could not authorize payment as that was not in his power to do so under the provisions of the law cited.

Grounds 3, 4 & 5

Counsel did not dispute the 1st and 2nd ingredients of causing financial loss or of being an employee of government and the fact that loss was caused. He disputed the ingredient of 'whether he did any act or omission knowing or having reason to believe that the act or omission would cause financial losses to the government.' Specifically, he argued that he did not do any act that caused the loss. He stated that the trial judge stated that authorizing payment on discrepant documents is what caused loss.

However, the justices did not go on to examine what discrepancies there were and whether they caused the loss in the circumstances. It was clear that the agreed mode of payment was an irrevocable letter of credit. Without knowledge of MoLG, BOU removed the confirming bank and the shipping documents and as a result those documents were never sent to the confirming bank for verification. Instead the BOU wrote the letter to the Accounting officer citing three discrepancies to wit; there were no delivery notes and original acceptance certificates; the destination had been altered from villages and parishes to Kampala; and that the alterations to the bill of lading were not authentic.

Counsel further submitted that the question to be asked is 'could the alterations have led to the loss'. He considered that if the bicycles arrived on a ship, that wouldn't amount to non-arrival in Kampala. It however could indicate that there were problems. According to Counsel, the actual cause of the loss was that the Bill of lading was a forgery- not the discrepancies. He submitted that instead, it is the 2nd appellant that saved government from loss by insisting that the advance payment be reduced from 90% to 40%.

Counsel also submitted that the Court of Appeal neglected to consider evidence of Gustavo Bwoch (PW9), retired Accountant General. Counsel argued that the Bank of Uganda ought to have respected the June 2020 guidelines from the Accountant General since the UP600 was not consistent with the PFAA 2003.

Ground 6

Counsel faulted the Court of Appeal and trial judge for not granting the 2nd appellant the required benefit of the doubt when the Judge said Bwoch contrived to exonerate A2. He argued that if the trial judge had not made that error, she would have found that the evidence of PW5 and PW9 left her no option but to find that the state had failed to discharge its burden of proving A2's guilt and acquitted him.

Ground 7

Counsel submitted that at the time of sentence, the Sentencing Guidelines were already in force which the Judge should have taken into account. He argued that consideration should have been taken

into account that apart from signing the letter, there was no other evidence led to show that A2 was part of an orchestrated plot to cause financial loss.

He prayed that the appeal to be allowed and the sentence and orders to refund set aside.

Submissions of the 3rd Appellant

Ground 1(a)

Counsel submitted that procurement is a process not an event and that the Evaluation Committee never awarded any contract as the Court of Appeal held. They merely prepare an evaluation report and submit it to the Contracts Committee for approval. Additionally, he went on, the Contracts Committee even has the power to reject an evaluation report. Thus, it is the Contracts Committee that awards the contract.

Ground 1(b)

Counsel argued that the Learned Justices and trial judge ignored evidence and concentrated on the fact that AITEL had been recently incorporated. The other evidence ignored was that the regulations under PPDA allowed joint ventures to bid; the bid documents actually referred to a joint venture; and there was a power of attorney by Armani Impex to AITEL. These documents referred to were not smuggled in but were part of the bid and thus, when the Committee sat to evaluate, it could not be said to have done an arbitrary act. Other evidence also ignored was that by virtue of its composition, the

Evaluation Committee had no legal person to advise it on the legality of a joint venture which is purely a legal issue. Further the Court did not consider that once this Committee made a decision, it was not as if nothing can be changed or improved. This overlooks the role of the contracts committee.

Grounds 1(c), (d), 2 & 3

Counsel conceded that it was a requirement that a bid received from a bidder not listed on PP Form 30 or as not having bought the solicitation documents from the procuring entity or was not the short list of the Contracts Committee is to be rejected. (R. 147(1)). Counsel submitted however that this requirement was not absolute as envisaged in Regulation 147(2) of PPDA Regulations which provides that if a bid not included on the PP Form 30 is received, an investigation should be launched as to how the bidder obtained the solicitation documents.

It does not mean a bidder needs to be turned away by religiously following 147(1). Indeed, in this case, he argued, the Chairperson of Contracts Committee (PW4) asked Head Public Disposal Unit who was part of the Evaluation team about the anomaly of AITEL not being on the list and was satisfied by the explanation given. There was evidence given by PW2 that there was a receipt from URA and it formed part of the documents submitted by AMANI. They had lawfully purchased the bid and should be evaluated equally with others.

Counsel summed up this ground by submitting that consequently the evaluation process was not flawed but it is the wrong interpretation of PPDA Act and Regulations had led to an erroneous finding that the 3rd appellant committed a neglect of duty. Counsel also submitted that there was double jeopardy arising from the fact that the Court of Appeal record shows that for both count 9 and 12, the transaction of evaluation was the same. This created double jeopardy because A3 was sentenced to consecutively serve 6 years on one count and 4 years on the other amounting to 10 years. Counsel submitted further that at sentencing, no reason was given why the sentences should run consecutively and the Court of Appeal confirmed the sentence without considering this point.

Ground 4 & 5

Counsel submitted that the condition under which compensation may be ordered under Trial on Indictments Act (TIA) is where loss or injury occurs 'in consequence of the offence committed'- it is not for every loss.The Justices of Appeal found that presentation of forged documents to the banks and Bank of Uganda ignoring red flags caused the loss. The cause of the loss was thus not proximate but was too distant and remote from the offences the 3rd appellant was convicted of and the Justices of Appeal should have found so. He explained that the offences the 3rd appellant was convicted of arise out of evaluation which did not cause loss because changes were made were even after the evaluation.

To compound this, he went on, the Director of Public Prosecutions did not charge the 3rd appellant with causing loss. Therefore, ordering the 3rd appellant to pay the compensation moreover in equal proportions was unfair and unjustified. He also submitted that in ordering compensation, the Court also ignored the partial delivery which had been made. (PW2 testified about the bicycles delivered to the warehouse). He also further submitted that the Court of Appeal also ignored the decision in **A.G v NIKO insurance** where the High Court awarded USD 489,650 to government arising out of the same procurement now in question.

Respondent's submission in reply

Reply to A1

Grounds 1 & 4

Counsel for the appellant noted that the rest of the grounds had been abandoned by the 1st appellant. In response to the submissions that the Court of Appeal relied on the trial court's findings without re-evaluating evidence on record, Counsel submitted that the 1st appellant had only predominantly relied on a half sentence excerpt of the Court of Appeal from the trial judge's judgment, to wit; '*...more caution should have been taken before authorizing payment because of the sheer amounts of money involved.*'

According to the 1st appellant, there is no trace of other evidence on record that the Court of Appeal considered. Counsel for the respondent submitted that Counsel for the 1st appellant was however in error because he presented the extract in isolation of the entire

analysis of the Court and out of context creating a wrong impression that it was the basis of the Court of Appeal decision.

He argued that Counsel for the 1st appellant did not mention that it was quoted in the lead judgment after its own exhaustive analysis on pages A26-A30. Secondly, he argued, the Court of Appeal findings were not based on the quotation or the entire judgment of the trial court. Relatedly, though the quotation, though cited, was never the basis for its findings. In addition to a lengthy re-evaluation of evidence in the lead judgment, each of the other Justices of Appeal made a separate detailed analysis of the law and evidence before arriving at the same finding.

As regards the submissions on failure to re-evaluate evidence relating to discrepant documents, Counsel for the respondent submitted that this ground is based on the letter written by BOU to the 1st appellant alerting him to the discrepancies in shipping documents that had been presented to them by the supplier for payment. (PEX 26(1)) P. 1364, Vol 4. The terms of the agreement provided for 40% access to funds on sighting shipping documents governed by UCP 600 Rules as opposed to actual delivery.

In such instances conformity of documents with specifications in letters of credit is vital. Counsel argued that in this case, the 1st appellant opted to waive the discrepancies and instructed Bank of Uganda to pay AITEL 40% of the contract amount. The said evidence is extensively re-evaluated by the Court of Appeal at A27-A28 before the Court correctly concluded that the red flag was raised.

The 1st and 2nd appellant opted to waive all of the discrepancies and authorized Bank of Uganda to pay on the discrepant documents even if it was a red flag. They attached a letter from MoLG to Accountant General as confirmation of delivery by an authorized agent; they allowed a change of final destination; and also allowed alteration of the certificate of origin.

Counsel for the respondent agreed with the 1st appellant that the delivery note was not required for payment of the 40%. However, it was curious that the 1st appellant in his letter confirmed receipt of the bicycles yet none had been delivered. He deduced that these desperate actions of justifying a document that was not required at that stage was a clear demonstration of the 1st appellant's determination to indiscriminately deal with any barriers that appeared to hamper or delay the payments even when it involved giving false assurances to the Accountant General that he had seen the bicycles.

Regarding change of destination, Counsel for the respondent submitted that there was nothing in the letter to the Secretary to the Treasury or the loose minute EXH D.24 & 25 which suggested any amendments. Counsel thus submitted that the Bill of Lading, the Packing List and CoO were discrepant in so far as they indicated Kampala instead of Parishes and villages as the destination.

As regards the submission that the 3rd discrepancy involving an alteration on the CoO is not authentic, Counsel submitted that it was the 1st and 2nd appellants that allowed it though it had an unauthenticated alteration from rail to road.

In conclusion, considering the fact that payment required strict compliance with terms of the Letters of Credit, the 1st appellant ought to have exercised due diligence before waiving. Counsel surmised that if there had been insignificant discrepancies, then AITEL would not have disappeared and bicycles would have been delivered. The Court of Appeal was thus justified in holding that the mode of payment required a critical look at the documents to ensure authenticity before payment. As regards the claims that the loss was caused by the failure by Bank of Uganda to verify the documents, Counsel submitted that as the issuing bank, Bank of Uganda had no responsibility to verify documents under Art 14 of the UCP 600; and since payment is strictly based on documents, Bank of Uganda gave sufficient warning and reason for the 1st appellant to believe that paying on these documents could result into loss to government. He noted that interestingly, the 1st appellant defended documents that did not originate from him. He emphasized that the red flag gave the 1st appellant something to think about as the Court of Appeal Justices concluded in A27 to A28.

Counsel further argued that the 1% commission to Bank of Uganda was a bank charge paid by other clients too and would not confer additional duties on the Bank. (See PW6- Head Quality Control BoU) Indeed Art 34 of the UCP 600 provides that the bank under a letter of credit assumes no responsibility for genuine, falsification, form, legal effect or accuracy of any document.

Counsel submitted that in this case, the Bank of Uganda exhausted its obligations when it notified the 1st appellant of the discrepancies.

On the issue that BoU should have contacted the confirming bank, Counsel submitted that the Court of Appeal rightly held that this did not absolved the 1st appellant from his statutory duty.

Alleged Response of MOFPED to verity documents

Counsel noted that the argument for the 1st appellant here was that verification was role of internal audit. Counsel for the respondent argued however that, from the testimony of PW5, it was clear that their role is only additional verification for purposes of payment. When the Accounting officer is satisfied that the supplier has met certain conditions and is ready to pay, the Accounting officer makes confirmation to pay to them that the conditions have been fulfilled. The 1st and 2nd appellant wrote to Bank of Uganda to pay and wrote to the Accountant General for permission to pay yet the 1st appellant had already authorized payment that had even been paid. From the record, Form A showed that the 1st appellant was satisfied with the goods supplied. Further, during cross examination, the 1st appellant said he saw bicycles October 2011, 7 months after Form A had been given to Accountant General). The Accountant General then wrote on 25/03/2011 requesting for the packing list. Counsel submitted that even when the Letter to Accountant General was mandatory at the time, the 1st appellant had already authorized payment by his letter to the Bank of Uganda. The Court of Appeal actually discharged its duty to e-evaluate its evidence as regards the 1st appellant.

Reply to A2

Ground 1 & 2

Counsel for the Respondent submitted that the Court of Appeal was justified in finding that the case against the Appellant was similar to that against the 2nd Appellant. He argued that they were justified because there is wealth of evidence on the record to that effect. They had joint and supporting roles which he then set out.

Opening the Letters of Credit.

The letters were opened at the joint request of the 1st appellant with the 2nd appellant as the co-initiator. He pointed out that on 27th December 2010, they made a corrigendum to the LoC seeking to change the Letters of Credit that had been opened with Bank of Uganda on the 22nd day of December 2010, about 4 days after opening the Letters of Credit. By this letter, they wanted to change the consignee to AITEL instead of MoLG, contrary to the contract. According to Counsel, this was the first overt attempt at failing the delivery of the bicycles; it is a fact that Bank of Uganda rejected that proposed amendment.

Request for Authority to Pay

Counsel argued that the 2nd appellant gave false assurances to the Accountant General that the bicycles had been delivered whereas not which showed ill intent and bad faith.

Payments

Counsel submitted that the payments were jointly authorized by the 1st and 2nd appellant. The roles of the 2nd appellant in procurement were not specified under the repealed Public Finance Accountability

Act 2003. He argued that if the 2nd appellant had not signed as a co-signatory; no loss would have occurred.

The A2's conduct during the payments

Counsel alluded to the anxious conduct of the 1st and 2nd appellant of going to different government offices to recover money after payment had been made which showed they caused it. There was the common intention referred to under the Penal Code Act.

Grounds 3, 4 & 5

In arguing this ground, Counsel for the respondent adopted his arguments in reply to the 1st appellant in total against the 2nd appellant as well.

Counsel submitted that Art 16.b of UCP 600 allows the issuing bank to approach the applicant if it determines that a presentation of the letters of credit does not comply. He also argued that the Court of Appeal determination that the 1st appellant was not exonerated was not assailed by the 2nd appellant.

Counsel pointed out that the actual issue raised by the 2nd appellant is whether the omission by the Bank of Uganda to submit the documents to the confirming bank could legitimize their ill-intentioned actions. Further, he argued, the existence or absence of the confirming bank did not take away the responsibility of the Bank of Uganda to verify the documents as they did when they sought verification from the 1st and 2nd appellants.

Verification of docs by Accountant General

In reply to arguments as regards verification by the Accountant General, Counsel for the Respondent adopted his arguments in reply to the 1st appellant.

Ground 6

This ground was that the Court shifted the burden of proof to the 2nd appellant. Counsel however submitted that, nowhere is it shown that the Court of Appeal did so. He denied that the Trial judge also shifted the burden of proof. He concluded by stating that there was no miscarriage of justice occasioned to the 2nd appellant as a result of the prosecution evidence that was disbelieved by the trial Court.

Ground 7

Custodial sentence and order of refund

Counsel submitted that there were no arguments made as to the sentencing guidelines. Counsel further submitted that, unlike the assertions of Counsel for the 2nd appellant, the 2nd appellant had other roles other than just signing the letter to Bank of Uganda. He was involved right from the stage of applying for letters of credit. As regards the orders of compensation, he submitted that section 126 of the Trial on Indictments Act gives power to award compensation as does Art 126 (2) (c) of the Constitution.

Reply to the 3rd Appellant

Ground 1

Under this Ground, Counsel for the respondent countered the argument for the 3rd appellant that the Court of Appeal wrongly interpreted the PPDA Act and rules made thereunder as follows:

1(a) the Court wrongly said the Evaluation Committee awarded contract.

Counsel for the respondent submitted that on evaluation of whole evidence, the word 'award' was used to mean 'recommendation of the best evaluation bidder. (See pg. A46 of Record of Appeal, line 9 to 14)

Ground 1(b)

– the Court wrongly found that AITEL was not a joint venture because no joint venture agreement was attached to bidding documents

Counsel submitted that the Letter from Amani Impex was not evidence of a joint venture and no joint venture agreement was attached to the bid documents. He cited Rule 35 (2) (e) which he submitted requires that in a joint venture, each party specifies its proposed role in the supply which was not done.

He submitted additionally that the capacity to deliver 7000 bicycles in a single lot was also requirement that had to be met; even if there was a joint venture, both AITEL and IMPEX had no capacity to deliver 7000 bicycles in a single lot (see R. 35 (2) (c) and R. 35(2) (b) of the PPDA Regulations 2003.

Lastly, he argued that in the Evaluation documents, it is not shown that the Evaluation Committee chaired by the 3rd appellant considered AITEL as a joint venture. Otherwise, the Committee would have 'awarded' the contract to both AITEL and AMANI as a joint venture.

Grounds 1(d), 1(c), 2 and 3

Counsel submitted that it is a mandatory requirement according to r. 147(1) (a) that bids issued *shall* be recorded on PP Form 30. However, AITEL was not on that form and should have been rejected. He disagreed with the submission for the 3rd appellant that the requirement was not absolute.

Counsel also submitted that Counts 9 & 12 were not based on same transaction as argued for the 3rd appellant and as such, there was no double jeopardy. He explained that Count 9 for abuse of office was for recommending AITEL as having capacity to supply 70,000 bicycles in a single lot when it could not. Count 12 for neglect of duty was for failure to disqualify when AITEL did not appear on PP Form 30. According to Counsel, these were entirely different processes with different elements & different evidence to prove each.

Ground 4 & 5

Counsel for the respondent submitted that the conditions for compensation in s. 126 (1) of TIA were met. The 3rd appellant had been convicted and it was proved that loss had been suffered. This loss was not only caused by the 1st and 2nd appellant. The 3rd appellant was one of the gatekeepers of the bidding process and from the evidence of PW5 & PW6, no bicycles were ever delivered. He refuted any claims of part delivery as false which is why the 2nd appellant went to BOU to seek help after no bicycles were supplied.

He referred to Art 126 (2) (c) of the Constitution as well as providing powers to the Court to grant compensation.

Lastly, regarding the compensation being harsh and excessive, Counsel submitted that this was never raised in the Court of Appeal and therefore could not be raised at this point. He submitted that Ground 4, & 5 of the 3rd Appellant were thus wrongly included in the memorandum of appeal.

A1's Submissions in Rejoinder

Counsel for the 1st appellant reiterated the argument that Court of appeal failed to re-evaluate evidence in effect relying only on PW6's testimony. If they had made a re-evaluation of PW6 evidence, they would have come to the conclusion that the letter Exp.26 (1) ought not to have been written by PW6 to the 1st appellant.

He submitted that the record showed that PW9 places the cause of loss on the bank as it did not follow Accountant General's instructions; PW3 from the office of the Attorney General admitted that they cleared the transaction; and PW5 said they were satisfied with the documentation before they gave the Bank of Uganda a go ahead to clear the documents for payment.

He maintained that it is the Bank of Uganda that was supposed to verify authenticity of documents. He reiterated that re- evaluation goes beyond restatement of witnesses' evidence.

A2's Rejoinder

Counsel for the 2nd appellant denied the truth in the assertion that the letter of credit was opened at the joint request of the 1st and 2nd appellant as Counsel for the Respondent. According to him, it was only the 1st appellant who did so in a request dated 14 Dec 2010. Counsel also submitted that there is nothing sinister about a corrigendum. It simply meant that errors were found which they sought to be corrected in normal course of business. *'I am satisfied with the quality and quantities of goods/services rendered and they are as per the contract.'* The Court of Appeal imposed the *mens rea* of the 1st appellant onto the 2nd appellant yet it is the 1st appellant who had facts from which a reasonable person would have concluded that financial loss would result. The 2nd appellant cited facts which were only within A1's knowledge *at page 3.*

Counsel argued that the finding that the 2nd appellant is culpable because he ignored a red flag is not backed by law because the authority to authorize was solely vested in the Accounting officer. It was thus not his responsibility. He also argued that the Court of Appeal applied the wrong *mens rea* test of a 'reasonable man' under negligence yet the Anti-Corruption Act requires express knowledge that financial loss would result in establishing criminal liability. According to Counsel, the issue of *mens rea* was further complicated by applying s.12 of Public Service Act 2008 on manner of conduct of Public officers.

Additionally, the onus of proof was wrongly held to be on the 2nd appellant to show that a reasonable person would have acted differently. He argued that that the omission by the 2nd appellant to

register a protest under section F-a1 of the Standing Orders ought not be held against the 2nd appellant. He was required by superiors to sign an unreasonable order and even if it does not amount to duress in law, it negates intention.

He also argued that there is no connection between s. 92 of PPDA on immunity and 20 (1) of the Anti -Corruption Act so as to say s. 92 was repealed. He finally concluded that responsibility for loss is to be shared between the Accountant General, the Auditor General and the Accounting officer: the 2nd appellant was just a scape goat!

Consideration by the Court

Both Counsel referred court to **Kifamunte Henry vs U SCCA No. 10 of 1997, Musoke vs R 1958 EA 715** and **Bogere Moses and Anor vs U SCCA No. 1 of 1997** to explain the duties of the second appellate court.

This duty being to decide whether the first appellate court applied or failed to review the evidence. The first appellate court also has a duty to re-evaluate the evidence adduced at the trial court.

There are three appellants in this appeal. Each appellant raised their own grounds of appeal, each was represented by different Counsel and each Counsel argued their own appeal. Accordingly, we shall handle each appellant's appeal separately.

1ST APPELLANT

The first appellant raised six grounds of appeal.

1. *The Learned Justices of the Court of Appeal erred in law when they upheld a conviction of the offence of causing financial loss contrary to s. 20 of the Anti-Corruption Act Cap 6 in the absence of the requisite ingredients.*
2. *The Learned Justices of the Court of Appeal erred in law when they declined to consider s. 92 of the PPDA Act as a requisite ingredient of causing financial loss contrary to section 20 of the Anti-Corruption Act.*
3. *The Learned Justices of the Court of Appeal erred in law when they upheld that the Appellant in performance of this duties arising in the public procurement transaction knew or had reason to believe that his acts would cause financial loss to the government of Uganda.*
4. *The Learned Justices of the Court of Appeal erred in law when they failed to examine the facts vis-a-vis the law regarding the offence of causing financial loss contrary to section 20 of the Anti-Corruption Act allegedly committed by the Appellant in performance of his duties arising in the Public Procurement transaction.*
5. *The Learned Justices of the Court of Appeal erred in their interpretation of the PPDA vis-a-vis the Anti-Corruption Act and their application thereby arriving at a wrong decision that the provisions of the PPDA Act were repealed by implication.*
6. *The Learned Justices of the Court of Appeal erred in law by upholding a sentence of 10 years while similar offenders under worse conditions had been given a lesser sentence of five years.*

7. *The Learned Justices of the Court of Appeal erred in law and fact when they upheld the learned trial judge's Order of compensation which was omnibus and not in accordance with the law.*

He argued grounds one and four together and then the rest were either abandoned or argued together. We shall consider all the other grounds, apart from grounds One and Four, abandoned by the 1st appellant.

Indeed, learned Counsel for the 1st appellant on page 12 of their written submissions stated as follows:

> *"We pray that these two grounds do succeed and that the conviction, sentence and order against the appellant be quashed or set aside.*
>
> *"In the alternative and without prejudice to the foregoing, we now turn to the grounds in the Supplementary Memorandum of Appeal."*

From this submission, it was clear that learned Counsel did not intend and indeed, did not delve into grounds of appeal Two, three and Five.

Back to grounds one and Four, learned Counsel for the 1st appellant summarized the two grounds into whether the Court of Appeal failed to examine and/or re-evaluate the facts and the law in upholding a conviction for the offence of Causing Financial Loss.

For reasons given in the summary of submissions, learned Counsel contended that the Court of Appeal failed to exercise its duty to reevaluate the evidence as a whole.

Learned Counsel submitted that the issue arising from the two grounds of appeal; ground one and ground four, is whether the Court of Appeal made a holistic and judicious re-evaluation of the evidence that was put before the lower Court.

He submitted that their Lordships only looked at and considered the face value of the letter from Bank of Uganda but made no effort to re-evaluate the evidence.

Learned Counsel for the respondent summarized the gist of the first appellant's complaint against the Court of Appeal. It was her contention that the fulcrum of the first appellant's allegations of failure to re-evaluate the evidence is the extract from the judgment of the Trial Court here under: -

> *"...more caution should have been taken before authorizing payment because of the sheer amounts of money involved."*

She submitted that the excerpt is a half sentence that was quoted out of context.

For context purposes, it is important to extract the entire piece in contention: -

> *"The above finding by the learned trial judge points to negligence on the 1st appellant's part, namely, a failure to exercise due diligence in the circumstances given the huge sums of money involved. In view of the above analysis, I form the opinion that there was reason for the 1st appellant to believe that his acts would cause financial loss, and I would, accordingly, uphold his conviction by the learned trial judge."*

Secondly that the excerpt was referred to only after the Court of Appeal had made its own thorough analysis of the evidence. She referred Court to pages 26 to 31 of the Record of Appeal.
Furthermore, each of the concurring Justices of Appeal extensively re-evaluated the evidence in pages 55 to 77 (Madrama, JA) and pages 88 to 93 (Obura, JA), according to learned Counsel for the respondents.
Learned Counsel supported her submissions by extracting the relevant quotation:

> *"In view of the above analysis, I form the opinion that there was reason for the 1st Appellant to believe that his acts would cause financial loss, and I would, accordingly, uphold his conviction by the learned Trial Judge."*

Unfortunately, it has become a bad habit by learned Counsel for appellants, even when there are no grounds of appeal, to jump on the bandwagon of the ground of appeal containing the phrase, *'failed to examine and/or re-evaluate the evidence...'*
Even where it is abundantly clear that the evidence was exhaustively and clearly re-evaluated.
It is becoming a common habit that wastes a lot of court's time which would otherwise have been used to delve into more deserving grounds of appeal.
The second leg of these grounds of appeal rotate around the documents involved in the impugned transaction. These were the Letter from Bank of Uganda, Bills of Lading, Delivery Note,

Commercial Invoice, Packing List, Certificate of Origin, Insurance, Pictures of the Bicycles and Letter of Credit, among others.

It was argued for the first appellant that the Justices of Appeal only looked at and considered the face value of the letter from Bank of Uganda without taking extra effort to re-evaluate the evidence concerning the letter.

Learned Counsel for the appellant submitted that these documents were not required to make the 40% payment. He further argued that if there was any discrepancy in the documents then the responsibility to detect the discrepancy lay with Bank of Uganda. In conclusion he asked court to hold that Bank of Uganda, not his client, was liable for any discrepancy in the documents.

Bank of Uganda, according to the Record, wrote to the first appellant informing him of the discrepancies and the issues cited above.

The issues raised included change of final destination of the bicycles from the villages and parishes to Kampala, alteration of the mode of carriage of the bicycles from road to rail and non-submission of an original Delivery Note and Acceptance Certificate by the applicant.

According to PEX 26(2) the first appellant and the Principal Accountant waived these issues and instructed Bank of Uganda to pay AITEL the 40% value of the Letters of Credit. The money was accordingly paid.

It was disingenuous of learned counsel for the first appellant to deny existence of the glaring discrepancies and to proceed to argue

that if they existed then Bank of Uganda should be held liable. He provided no authority or basis whatsoever to the claim that Bank of Uganda should be the one to be held liable. The only semblance of basis for this claim is that the Bank received a commission of 1% of the contract value. PW6 testified that the 1% charged was standard bank charges whenever the Bank handled transactions of this nature.

We therefore find this claim of shifting responsibility for the loss to Bank of Uganda, diversionary, unsupported by law or fact and without a single iota of merit.

The existence of the discrepancies is well documented and admitted by all the parties.

The party responsible for clarifying or clearing the discrepancies was the Ministry of Local Government. The first appellant, being the Accounting Officer, definitely bears the primary responsibility for the contract. It is indeed him and the Principal Accountant, who, according to PEX 26(2), waived the requirements and discrepancies cited by the Bank, which led to the payment of the 40% of the value of the Letters of Credit.

The Court of Appeal extensively re-evaluated this evidence according to pages 27-28 of the Record of Appeal. They concluded thus: -

> *"In retrospect, the red flag, raised to the 1st and 2nd appellants, was not without merit and could have saved the money from the rogue supplier."*

Indeed, none of the tendered documents from the first appellant indicates that Bank of Uganda bears the responsibility for any liabilities arising from the transaction based on the 1% charge or any other ground.

The attempt to shift blame to Ministry of Finance is equally appalling and without legal basis. Evidence was laid by PW6 that whereas the 1st appellant assured the Accountant General that he had seen the bicycles, this was not true as has been found out. In fact, it was shown by PW5 that by the time the 1st appellant requested for authority to pay on 25th March, 2011, authority had already been given by the 1st appellant to pay.

The 1st appellant in a supplementary Memorandum of Appeal raised an objection to Justice Madrama's failure to recuse himself from handling the appeal.

The basis of this ground being that Justice Madrama handled High Court (Commercial Court) Civil Suit No. 240/2012; **Attorney General vs Niko Insurance Company**, where some of the issues under consideration in the instant appeal were considered.

Learned Counsel submitted that Justice Madrama acted in contravention of article 128(10 of the Constitution by not recusing himself from the appeal process.

Learned Counsel for the respondents objected to this ground of appeal on the basis that it was raised at the wrong stage and against the wrong party.

She submitted that the issue of bias was being raised way after the appeal was heard and determined. The ground was never raised in

the original Memorandum of Appeal. Neither was it raised before the judicial officer against whom the claim of bias was made.
She referred court to Rule 70(1) of the rules of this court and **Sumbu Jean Louis vs Uganda** SCCA No. 17 of 2019 to bolster her argument that matters not raised in the Memorandum of Appeal cannot be considered by court.
The matter of bias was never contained in the original Memorandum of Appeal. In line with Rule 70(1) and the authority of **Sumbu Jean Louis** (supra) this matter cannot be entertained.

However, even if the issue of bias and recusal had been contained in the Memorandum of Appeal, this court would not have entertained it.
Matters of bias and recusal ought to be raised before the judge in question. They cannot be raised for the first time on appeal.
The Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019 provide as follows:

> *'"apparent bias" means a scenario where a judicial officer is not a party to a matter and does not have an interest in its outcome, but through his or her conduct or behavior gives rise to suspicion that he or she is not impartial;*
> *"bias" means inclination or prejudice for or against one person or a group of persons especially in a way considered unfair, whether actual, imputed or apparent."'*

Rule 6(3) of the same Rules (supra) provides:

> *"A judicial officer shall, on his or her own motion, recuse himself or herself in the following circumstances:*

(a) Where it comes to the knowledge of the judicial officer before the date of the hearing that, for any reasonable cause, he or she cannot handle the matter, the judicial officer shall recuse him or herself and shall notify the parties and the matter shall be reallocated to another judicial officer; or

(b) Where it comes to the knowledge of the judicial officer during the course of hearing that for any reasonable cause he or she cannot continue handling the matter, the judicial officer shall state on record, the reasons for recusal, notify the parties, and return the file for reallocation to another judicial officer."

The import of Rule 6(3) above, in my view, is to provide for a situation where a judicial officer, of their own volition, after it has come to his or her knowledge that he or she cannot handle a matter, makes the decision to recuse him or herself.
This rule does not call for other people to prompt the judicial officer to recuse him or herself. The onus lies on the judicial officer not on parties or third parties to point out or prompt the judicial officer to recuse him or herself.

There is no room or provision under this rule for court to determine that the judicial officer should have recused him or herself but did not and therefore irregularly heard a matter.

It is rule 7 of the Directions that gives a party or a third party the opportunity to apply to court asking for a judicial officer to recuse him or herself.
Rule 8 provides the procedure for recusal at the instance of parties.
Rule 8 (2) provides as follows:

"A judicial officer against whom recusal is sought under sub paragraph (1) shall be given an opportunity to respond to the concerns raised by the party."

The import of rules 7 and 8 is that the application for recusal must be made before the judicial officer during the pendency of the hearing. The intention being that the judicial officer must be given an opportunity to respond to the allegations of bias.

Indeed, rule 8 (5) provides for an appeal where a party is dissatisfied with the decision of the judicial officer not to recuse himself or herself.

Rule 5 provides as follows:

> *"A judicial officer may, on application by any of the parties or on his or her own motion, recuse himself or herself from any proceedings in which his or her impartiality will reasonably be in question."*

The Rules (supra) envisage only two scenarios for recusal. Either the judicial officer does so on his or her own volition. Or, a party makes an application asking the judicial officer to recuse himself or herself.

The Rules don't seem to provide a procedure for another court to determine that the judicial officer should have recused himself or herself but did not and therefore wrongly heard the matter. Where a party fails or neglects to raise the matter of recusal before the judicial officer, the rules do not provide a procedure for the party to raise that matter subsequently on appeal. This is understandable because the judicial officer would not be given a chance to defend himself or herself. The rules of natural justice demand that each party is given a chance to defend himself or herself. This principle of natural justice is also extended to judicial officers.

The judicial officer should not, and cannot, be defended by Counsel on the other side, or by the party on the other side. The allegations levelled against him or her are personal in nature. An opportunity must therefore be given to him or her to respond to the allegations of bias.

Having failed or neglected to raise the matter of recusal before Justice Madrama at the time he was hearing the matter at hand, there is no procedure under the Rules (supra) or under the principles of natural justice by which the recusal can be raised.

Having failed on all grounds of appeal, the 1st appellant's appeal hereby fails and is dismissed.

2ND APPELLANT: HENRY BAMUTURA

The case against the second appellant Henry Bamutura, the then Principal Accountant in the Ministry of Local Government, is that he together with the first appellant, knowing or having reason to believe that their action would cause financial loss to the Government of Uganda authorized payment of USD 1,719,454.58 to MS AITEL despite being cautioned by Bank of Uganda that the documents presented in support were not in strict compliance with the terms of the letters of credit.

The second appellant raised seven grounds of appeal. He argued grounds 1 and 2 together, grounds three, four and five together and then grounds six and seven separately.

1. *The Learned Justices of the Court of Appeal erred in law and fact when they adjudged the 2nd appellant case to be similar to that of the 1st appellant and ascribed to him similar duties under the law to dismiss his (2nd appellant's) appeal contrary to the express provisions of the Public Finance & Accountability Act (2003) and regulations thereunder.*
2. *The Learned Justices of the Court of Appeal erred in law and fact when they found and held that the 2nd appellant responsible for cosigning the letter authorizing /approving payment when he had no such authority/duty under the law and in the circumstances.*

Learned Counsel for the 2nd appellant contended that the issue for determination before this court is whether the 2nd appellant knew or had reason to believe that the act or omission would cause financial loss to the government.

Learned counsel for the respondent elaborately showed how the 2nd appellant was involved in opening the Letters of Credit, Corrigenda to the Letters of Credit, Request for Authority to Pay and finally in authorizing the payments.

She referred court to section 20 of the Penal Code to submit that the joint actions of the 1st and 2nd appellant are aptly captured under the law. She contended that to separate the action of the 2nd appellant from those of the 1st appellant simply because the 2nd appellant's role was administrative rather than statutory would be to miss the point.

Indeed, we are persuaded by the evidence and the law that the 1st appellant and the 2nd appellant were like two peas in one pod and their culpability cannot be separated, even if it were to be done surgically.

Indeed, as submitted by learned Counsel for the respondent that if the 2nd respondent had not jointly authorized the payments as co-signatory to the accounts of the Ministry of Local Government, no payments would have been possible. No payments could be made by the sole signature of the 1st appellant. The 2nd appellant had to append his signature for any payments to be made. Neither was he just a rubber stamp. He was the Principal Accountant.

We therefore find that the learned Justices of Appeal correctly evaluated the evidence and rightly came to the conclusion that the 2nd appellant was as culpable as the 1st appellant.

These two grounds of appeal, One and Two, therefore fail.

Grounds Three, Four and Five were argued together and are reproduced here for ease of reference.

3. *The Learned Justices of the Court of Appeal erred in law and fact when they found and held that the second ingredient, that is the accused person did an act which caused financial loss to the government was not disputed.*
4. *The Learned Justices of the Court of Appeal erred in law and fact when they held that the 2nd appellant caused financial loss without scrutinizing and determining what caused the loss of US $ 1,719,454.58*
5. *The Learned Justices of the Court of Appeal erred in law and fact when they held that the 2nd appellant acted without reason in total exclusion of his defence.*

In response to these grounds of appeal, learned Counsel for the respondent submitted that they were similar to the ones raised by the 1st appellant and that therefore her response to them is similar.

Ground six is to the effect that the learned Justices of the Court of Appeal erred in law when they failed to re-evaluate the evidence on record thereby not adjudicating the issue as to whether the trial judge had shifted the burden of proof to the 2nd appellant.

It is indeed trite law that the burden of proof rests on the prosecution throughout the trial and that this burden never shifts.

We agree with learned Counsel for the respondent that this ground is aimed at the trial court rather than the Court of Appeal.
Indeed, on page 9 of their submissions, learned counsel for the second respondent state as follows:

> *"...We submit that that if the learned Trial Judge had not made this error, she would have found that the evidence of PW5 and PW9 left her (no) option but to find that the State had failed to discharge its burden of proving A2's guilt and acquitted him."*

This ground of appeal seems to be misplaced. It is against the Trial Judge and was raised in the Memorandum of Appeal to the Court of Appeal as ground of appeal number 6. Learned Counsel for the second appellant seem to have just reproduced the ground of appeal from the Memorandum of Appeal to the Court of Appeal.
Be that as it may, nowhere in their submissions is it shown how the Trial Judge shifted the burden of proof to the second appellant. If the Court of Appeal was not confronted with such evidence of shift in burden, then it cannot be faulted for failure to re-evaluate.
Ground seven of appeal is to the effect that the learned Justices of Appeal erred in law when they upheld the custodial sentence and made order for refund of USD 1,719,454.58.
Learned Counsel for the second appellant contended that the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 had come into force but were not taken into account by the court.
Further that it was wrong to give a custodial sentence and a Compensation Order at the same time.

Learned Counsel submitted that the issue of the Guidelines was never brought up and canvassed before the Court of Appeal. Consequently, it would be a mis direction to fault the learned Justices of Appeal for not having considered it.

Indeed, the learned Counsel for the second respondent does not show how the learned Justices of the Court of Appeal erred in this regard.

Regarding awarding the Compensation Order in addition to a custodial sentence, learned Counsel for the second appellant do not give any authority for stating that the two cannot be awarded concurrently.

We are persuaded by the law and the authorities presented by learned Counsel for the respondent that court has powers to grant both a custodial sentence and a Compensation Order.

Article 126(2)(c) of the Constitution provides for award of compensation.

> *"In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles-*
> *(c) Adequate compensation shall be awarded to victims of wrongs:"*

Additionally, section 126 of the Trial on Indictments Act also provides for Compensation Orders in addition to a custodial sentence.

> *"(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness*

in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."

This ground of appeal therefore fails.

Having failed on all the grounds of appeal therefore, the 2nd appellant's appeal is hereby dismissed.

3rd APPELLANT SAM EMORUT ERONGOT

The Third appellant, Sam Emorut Erongot, an Assistant Commissioner for Policy and Planning, was also the Chairperson of the Evaluation Committee of the Ministry of Local Government at the material time. He was also the Contract Manager for the supply of the bicycles in question.

The Court of Appeal quashed his conviction on Count 9 but disallowed his appeal on Counts 9 and 12 and therefore upheld conviction and sentence on those Counts.

Five grounds of appeal were raised by the 3rd appellant as hereunder:

1. *The Learned Justices of the Court of Appeal erred in Law when they wrongly interpreted the provisions of the Procurement and Disposal of the Public Properties Act as well as regulations thereunder and wrongly held that:*

(e) The Evaluation Committee of which the appellant was a member awarded a contract, the subject matter of the prosecution, to AITEL.

(f) AITEL, the firm recommended by the Evaluation Committee, was not a joint venture because no joint venture agreement was attached to the bidding documents

(g) The Evaluation Committee did not have powers to accept a bid that was not listed on the PP Form 30 after investigating how the bidder obtained the solicitation docs.

(h) The act of admitting AITEL's bid when it did not appear on the PP Form 30 was therefore arbitrary and prejudicial to the interests of the government.

2. The Learned Justices of the Court of Appeal erred in law when they upheld the conviction on count 9 of Abuse of office based on an arbitrary (at)? that AITEL'S bid did not appear on PPF 30 an act which was not stated forming part of the particulars of the offence in Count 9 of the indictment. (sic)
3. The Learned Justice of the Court of Appeal erred in law when they sustained the appellant's conviction on counts 9 & 12 relying on the same acts arising from the same evaluation which caused double jeopardy on appellant resulting into harsh and excessive sentences. (sic)
4. The Learned Justices of the Court of Appeal erred in law when they held that the appellant was rightly ordered to pay compensation to the Government of Uganda which order was unjustified and harsh in the circumstances of the case.

5. *The Learned Justices of the Court of Appeal erred in law when they failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion that the order requiring the appellant to refund USD 1,719,454.58 jointly and in equal proportions with other convicted persons be upheld.*

The Learned Counsel for the third appellant contended in ground 1(a) of the grounds of appeal that the learned Justices of Appeal erred in holding that the Evaluation Committee 'awarded the contract' to AITEL. He submitted that procurement is a process and not an event and that nowhere in that process does the PPDA or any other law award a contract.

He submitted that under the law, the authority to award of a contract is with the Contracts Committee.

Learned Counsel for the respondent conceded that much in her submission on that ground.

She submitted as hereunder: -

> *"...it is true that the Court of Appeal used the words 'award of contract' in reference to the actions of the Evaluation Committee..."*

She however went ahead to try and explain that what the Court of Appeal meant was "recommendation of the best evaluation bidder" as opposed to award of the contract.

On the issue of the Joint Venture and whether it was legally valid or not, learned Counsel for the Third appellant went to great length to explain and justify the existence of a joint venture between AITEL and AMMAN IMPEX.

He faulted the learned Justices of Appeal for ignoring all the available evidence and holding that there was no Joint Venture Agreement.

Notwithstanding the existence or absence of evidence of a Joint Venture Agreement, learned Counsel strongly contended that ultimately the decision to award or not to award the contract lay with the Contracts Committee and not the Evaluation Committee of which the Third appellant was Chair.

In reply, learned Counsel for the respondent contended that there was no Joint Venture in law, the procedure for handling bids by Joint Ventures was not followed and therefore the Court of Appeal rightly held so.

In resolving this issue, it is important to establish the legal requirements of establishing a Joint Venture. We are persuaded that a Joint Venture did not exist in law between AITEL and AMMAN IMPEX at the time of the bid. Should you not state what the legal requirements are before concluding that a Joint Venture did not exist in law?

It was therefore erroneous of the Evaluation Committee to proceed to recommend award of a contract to a legally nonexistent Joint Venture.

That said, however, we note that legally, the final decision to award a contract rests with the Contracts Committee. The Evaluation Committee as has been agreed by both parties can only recommend the best evaluated bidder to the Contracts Committee which has the mandate to award the contract.

Under the Public Procurement and Disposal of Public Assets Act, the functions and powers of the Contracts Committee are delineated. Section 28(1) provides as follows: -

"(bb) ensuring that before it is approved, a procurement is in accordance with the procurement plan?

"(c) approving bidding and contract documents"

Section 29 provides as follows: -

"A Contracts Committee shall; -

(c) award contracts in accordance with applicable procurement or disposal procedures as the case may be."

From the foregoing provisions the Contracts Committee is the final checkpoint before a contract is awarded. The recommendations of the Evaluation Committee, or any other committee or entity below them, are not binding on the Contracts Committee.

It is our considered opinion that the learned Justices of Appeal erred in holding the Third appellant liable for award of the contract to AITEL when his committee, the Evaluation Committee, does not have powers to award a contract.

Grounds 1(c), 1(d), 2 and 3 were argued together.

On the issue of whether the 3rd appellant was at fault for including AITEL on the list when not listed on PP Form 30 or 31, it was argued that while the provision for inclusion appears mandatory, the proviso under Regulation 147 (2) gives an opportunity for overriding the mandatory nature of Regulation 147(1).

Indeed, the head of the Public Disposal Unit (PDU), PW4 testified that the Evaluation Committee had given them satisfactory answers

when asked why AMANI was not on the list. PDU thereby owned the decision and took the responsibility from the Evaluation Committee headed by the Third appellant.

Once ratified by the PDU and the Contracts Committee, the responsibility of admitting AITEL, amidst the not so perfect process, shifted from the Evaluation Committee to the other entities in the procurement process.

In other words, PDU and Contracts Committee could have rejected AITEL however much the Evaluation Committee may have wanted it included. The procurement process has a system of checks and balances. The entities at the tail end of the process bear the ultimate responsibility for ensuring compliance with the process.

The next question that arises from this set of grounds of appeal is whether by overlooking certain provisions of the process, like including AITEL on the list when they had not fulfilled the legal requirements amounted to abuse of office and/or neglect of duty by the Third appellant.

Having found that there was no responsibility borne by the Evaluation Committee in the procurement process; partly because the error of including AITEL on the list when they seemed not to have paid was sufficiently explained to have been a clerical error and secondly because PDU and the Contracts Committee were the final gate keepers who nevertheless ratified the decisions of the Evaluation Committee, it follows that the Third appellant cannot be culpable for the offence of Neglect of Duty or Abuse of Office or of any other offence.

The discussion of whether the ingredients of Neglect of Duty and Abuse of Office are the same or not, therefore, cannot be appropriately discussed in this vein.

Grounds 4 and 5 of Appeal were also argued together. The two grounds are basically challenging the award of compensation of USD 1,719,454.58 against the Third appellant.

We agree with learned Counsel for the respondent in her submissions regarding the legal basis for the award of compensation where loss or injury has occurred as a result of the offence committed by a convict.

Section 126(1) of the Trial on Indictments Act provides the conditions to be met for court to award compensation.

These conditions are: -

a. A person must have been convicted
b. It must have been proved to the satisfaction of Court that a person suffered loss as a result of the offence with which the convict was convicted.

Having allowed all the grounds of appeal filed by the Third appellant, it follows that the Third appellant was wrongly convicted. Therefore, the conviction, sentence and award of compensation against the Third appellant are hereby set aside.

Consequently, the conviction and sentence of the 1st and 2nd appellant are hereby upheld.

The conviction and sentence of the 3rd appellant is hereby set aside and he is freed accordingly.

Dated at Kampala this --24th-- day of ----October---- 2023

Alfonse Owiny-Dollo

Chief Justice

Faith Mwondha

Justice of the Supreme Court

Tibatemwa.

Prof. Lillian Tibatemwa-Ekirikubinza

Justice of the Supreme Court

Percy Night Tuhaise

Justice of the Supreme Court

Mike J. Chibita

Justice of the Supreme Court

The judgment delivered as directed

Babirye

24/Oct/2023.