

THE REPUBLIC OF UGANDA
HIGH COURT OF UGANDA
ANTI-CORRUPTION DIVISION HOLDEN AT KOLOLO
HCT-00-AC-SC 0047-2012

UGANDA ===== PROSECUTOR

VERSUS

A1. JOHN KASHAKA MUHANGUZI
A2. HENRY BAMUTURA
A3. ROBERT MWEBAZE
A4. SAM EMORUT ERONGOT
A5. TIMOTHY MUSHERURE
A6. ADAM ALUMA
=====ACCUSED

BEFORE HON. LADY JUSTICE CATHERINE BAMUGEMREIRE

JUDGMENT

THE FACTS

Accused No.1,2,3,4, and 6 were at all times material to this case gainfully employed by the Government of Uganda under the Ministry of Local Government (MOLG) while A5 Timothy Musherure was consulting with the Government of Uganda. A1 John Muhanguzi Kashaka was the Permanent Secretary (PS) of the Ministry of Local Government while A2 Henry Bamutura was the Principal Accountant of the same Ministry. A3 Robert Tumwebaze was the Principal Procurement Officer and Head of the Procurement and Disposal Unit (PDU) while A4 Sam Erongot Emorut was the Assistant Commissioner Policy and Planning. A5 Timothy Musherure was a Consultant in the MOLG while A6 Adam Bond Aluma was Assistant Secretary and Administrative Officer Class II.

The Prosecution case was that the Government of Uganda conceived the idea of providing every Local council (LC) Chairman at village and parish level in the country with a bicycle as a means of transport to effectively carry out government programmes and activities. To this end the Government mandated the Ministry of Local Government (herein referred to as the MOLG) to procure seventy thousand (70,000) bicycles. During financial year 2010/2011, the MOLG planned and made budgetary provisions for the purchase of Seventy (70,000) bicycles. A₁, A₂ and A₄ were vital to the initial planning. A₄ headed the policy and planning which was the user department for this procurement. In order to implement the budget, Robert Mwebaze (A₃) who was Head of the Procurement and Disposal Unit (the PDU) for the MOLG initiated the procurement process by drafting the necessary paper work. In parallel, a Contracts committee was set up by John Muhanguzi Kashaka (A₁). The membership of the Contract's Committee consisted of; Yasin Sendaula as Chairman, Charles Olaker as Secretary and Verina Kakira as a member. It was an agreed fact by both sides that the members of the evaluation committee were highly experienced people with various specialties. It was further agreed that Robert Mwebaze A₃ being Head of the procurement and disposal unit (PDU) of the MOLG prepared the solicitation documents. After preparation of the solicitation documents, Robert Mwebaze submitted the Solicitation Documents to the Contracts Committee for approval. Upon review of the documentation, the Contracts Committee

approved the procurement of the 70,000 bicycles. On 9th September 2010 The New Vision, a National Daily, run an advertisement for the bids.

The Evaluation Committee recommended Amman Industrial Tools and Equipment Limited (hereinafter referred to as AITEL) as the best evaluated bidder on grounds that it had minimum capacity and past experience for supply of Seventy (70,000) bicycles as a single lot. The Contract was worth **Four Million Eight Hundred Ninety Six Thousand Five Hundred United States Dollars USD 4,896,500.**

AITEL opted to use letters of credit as its payment option and demanded to have a ninety percent down payment before receipt of goods. This was negotiated down to forty percent (**USD 1,719,454.54**) and an Letter of Credit worth **Four Million Eight Hundred Ninety Six Thousand Five Hundred United States Dollars USD 4,896,500** (hereinafter referred to as an LOC) was opened. Under this arrangement Banks were expected to effect payment upon sight of shipping documents. Indeed the Bank of Uganda received shipping documents from Stanbic Bank on which payment was based.

The prosecution alleged that the Evaluation Committee did not properly evaluate the bids and thus recommended AITEL. The Prosecution further submitted that the evaluation committee improperly approved that AITEL had passed as the best evaluated bidder on the premise that they had minimum experience and passed capacity whereas not. In addition, the prosecution submitted that

AITEL's bid was a joint venture whereas there was no joint venture agreement and neither was there intent to form a joint venture. Prosecution in addition alleged that the evaluation committee failed to disqualify AITEL's bid at the preliminary stage whereas it did not appear on the PP Form 30 (Exh P18 (2)). In her submissions Principal State Attorney Ms Jane Frances Abodo assisted by State Attorney Ms Caroline Marion Acio submitted that amendments were made on both the solicitation documents and the final contract without the approval of the contract's committee.

The Evaluation Committee decided that AITEL was the best evaluated bidder and went ahead to recommend so. The Contracts committee awarded AITEL the Contract for the supply of 70,000 bicycles which had been promised to all LC1 and LC2 chairmen throughout Uganda.

Regarding payment terms, the said AITEL opted to use letters of credit as its payment option and demanded to have a ninety percent down payment before sight of goods. This was negotiated down to forty percent. An LC was opened and all that was required was for sighting of shipping documents.

Additionally, it was an agreed fact that Bank of Uganda received shipping documents from Stanbic Bank on which forty percent payment of **USD 1,719,454.58** was based. However, the prosecution averred that the payment process was flouted when payment by letter of credit was introduced and then irregularly amended. In their defences the accused persons denied the offences against them.

I will draw on the Defence of A1 as a summary of the defence case. A1 Muhanguzi Kashaka in his defence testified that the Government intention was to supply bicycles to all Local Council One and Local Council Two Chairmen in every village and parish in the country. In order to achieve this, the Ministry of Local Government was required to conduct the procurement process. As the Permanent Secretary to the Ministry of Local Government A1 Muhanguzi Kashaka confirmed the availability of funds set aside for the stated purpose. A1 set up the Contract's Committee and kicked started the procurement process which in his view, was allowed to run independently and without interference from him. A1 disregarded the discrepancies on the documents saying he was advised by his technical team (A2-A6) that some of the changes made on the documents were necessary. He in particular pointed out the change in the delivery term which had required the successful bidder to deliver the bicycles to every LC1 and LC2 village and that it was done to enable the payment of taxes at the Port of entry. Mr. Kashaka stated that he did not see any discrepancies.

A Detailed Fact Line

I took time to set out in great detail, the evidence of Prosecution witnesses PW11 to PW9 and the defences of A1, A2, A3 and A4 for the following reasons:

1. This is a fact-sensitive matter.
2. The evidence of each of the witnesses is of a technical nature

3. The evidence straddled areas of general criminal law, anti corruption law, employment, international business and procurement laws which required special attention.
4. The background and flow of the case would be lost without exhaustive analysis of the evidence.
5. This case ought to provide good fodder for future procurement proceedings of a criminal nature.

Following the amendment of the charges the subsequent indictment contained 12 Counts. When asked about the suitability of the assessors, A1, A2, A3, A4, A5 and A6 stated that they had no reason to object to the Court - selected assessors, Oliva Nakayima (22years old) and Silva Kakumba (49years old).

The six accused persons John Muhanguzi Kashaka, A1, Henry Bamutura, A2, Robert Mwebaze, A3, Sam Emorut Erongot, A4, Timothy Musherure, A5 and Adam Aluma A6, were indicted on twelve counts which relate to three main offences namely Causing Financial Loss contrary to section 20 (1) of the Anti Corruption Act 2009, Abuse of Office contrary to 11(1) of the Anti Corruption Act and Neglect of Duty contrary section 114(1) of the Penal Code Act Cap 120. The details of their individual indictments are spelt out in the Indictment and summary of case dated 4th of September 2012. In brief however they are outlined as hereunder:

1. In Count No. 1 John Muhanguzi Kashaka, A₁, and Henry Bamutura A₂, were each indicted for Causing financial loss contrary to s. 20(1) of the Anti Corruption Act 2009.
2. In Count No.2 John M Kashaka and Henry Bamutura were each indicted for Abuse of Office c/s 11(1) of the Anti Corruption Act.
3. Similarly in Count No. 3 and Count No.4 John M Kashaka and Sam Emorut Erongot were each indicted for Abuse of Office c/s 11(1) of the Anti Corruption Act.
4. Further in Count No.5 and No. 6 Robert Mwebaze was indicted for Abuse of Office c/s 11(1) of the ACA.
5. Whilst in Counts No. 7 and No.8 Robert Mwebaze was further indicted for Neglect of Duty c/s 114(1) of the Penal Code Act Cap 120;
6. Furthermore in Counts no. 9, No. 10 and No.11 Robert Mwebaze A₃, Sam Emorut Erongot A₄, Timothy Musherure, A₅ and Adam Aluma, A₆ were indicted for Abuse of Office c/s 11(1) of the ACA;
7. Finally in Count No.12 Robert Mwebaze, A₃, Sam Erongot Emorut, A₄, Timothy Musherure, A₅ and Adam Aluma, A₆ were indicted for Neglect of Duty c/s 114(1) of the Penal Code Act Cap 120.

The Prosecution called 12 witnesses and the Defence relied on five witnesses. Accused No. 1, 2, 3 and 4 made sworn defences and were cross examined while Accused No. 5 and 6 elected to remain silent, a

right to which they are entitled. While the Learned defence lawyers made oral submissions and replied to the Prosecution by written submissions, the Learned Principal State Attorney Jane Frances Abodo assisted by Learned State Attorney Marion Acio made only written submissions. The style of submissions adopted by the Defence was that Mr Didas Nkurunziza Learned Defence Counsel for A5 made general submissions in regard to the indictment, the facts and the law. His brothers, Mr. Mohammed Mbabazi for A1, Mr Edward Kato Sekabanja for A2, Mr. Richard Mwebembesa for A3, Mr, Tibaijuka Ateenyi for A4 and Mr. Komakech for A6 supplemented on the submission of Mr. Nkurunziza taking particular interest in the finer issues of law as they pertained to each of their respective clients.

Summary of Witnesses

The Prosecution presented a total of 12 witnesses.

Prosecution called its first witness (**PW₁**), **Mr. Samuel Eitu**, the Principal Personnel Officer in the Ministry of Local Government. The Principal Personnel Officer moved to the Ministry of Local Government in August 2010.

PW₁ testified that among his many duties, he was responsible for keeping subject files which were records of various specific issues in the Ministry and then personal files which contain particulars of staff and confidential files of staff too.¹ Mr. Samuel Eitu (PW₁) testified that he knew all the accused persons and identified them as Mr. John

¹ See Exh P16 Schedule of duties for A1, A2, A3, A4 and A6. A5's status was that of Consultant.

Kashaka Muhanguzi as Permanent Secretary and Accounting Officer of the Ministry of Local Government.² A2 was identified as Mr. Henry Bamutura, the Principal Accountant and Head of Accounts unit in the Ministry of Local Government.³ He identified A3 as Mr. Robert Mwebaze as the Principal Procurement Officer also Head of the Procurement and Disposal Unit in the Ministry of Local Government.⁴ About A3, PW1 confirmed that he had been transferred to the Office of the Prime Minister in March 2011. PW1 then identified A4 as Mr. Sam Emorut Erongot⁵ as the Assistant Commissioner in charge of Policy and Planning Division in the Ministry of Local Government. A5 was identified as Mr. Timothy Musherure and as the Consultant with the programme support team under the Local Government Service delivery programme which was being implemented in the Ministry of Local Government. A6 was identified as Mr. Adam Bond Aluma and as the Assistant Secretary and Administrative Officer Class II in the Ministry of Local Government⁶.

² Exh P2(1) Renewal of Local Contract Mr. Mitala's Letter 27th April 2010 Renewal of Kashaka Muhanguzi's Local Contract as PS for thirty six months; Exh P2(2) Chris Kassami , 1st June 2010 Appointment of Accounting Officer Vote 011 MOLG Financial Year 2010/2011

³ Exh P3 Secretary to Treasury Appointment Letter dated 31st January 1995 RE Henry Kanyaihe Bamutura, Principal Accountant

⁴ Exh P3 Letter of appointment to Principal Procurement Officer MOLG later transferred on 12th April 2006, to Mulago Hospital then Back to MOLG. 21st March 2011 transferred to Office of Prime Minister.

⁵ Exhibit P5 Appointment Letter of Sam Emorut Erongot Senior Economist Accelerated Promotion dated 4th October 1999 to Assistant Commissioner MOLG, Letter 9th September 2010 Appointment as Contract Manager for the Supply of 70,000 Bicycles for Local Councils

⁶ Exhibit P6 Kinalwa Appointment Letter of Adam Bond Aluma dated 29th April 2005 with Posting Instructions from Office of the President to MOLG

With regard to Mr. Musherure's employment status, PW₁ stated that Mr Musherure was a Consultant with the Ministry of Local Government who was employed on full time basis by the MOLG. His evidence was that Mr. Musherure's contract was between him and the Government of Uganda represented by the Ministry of Local Government and that the person who appointed him was the Permanent Secretary of Ministry of Local Government.

To amplify on Mr Musherure's employment with the MOLG, PW₁ stated that Mr. Musherure's initial appointment was to the position of procurement specialist in the year, 2003 when he joined Ministry of Local Government, Mr. Samuel Eitu (PW₁) testified that Musherure's Contract had been signed by the then Permanent Secretary, Mr. Ssekkono.⁷ PW₁ identified the one year contract dated 1st January, 2010 and stated that it was between the Government of Uganda represented by the Ministry of Local Government and Mr. Musherure and he explained that the latter contract was signed by Mr. John Kashaka Muhanguzi, the Permanent Secretary, Ministry of Local Government⁸. Mr. Eitu(PW₁) also identified the letter renewing Mr. Musherure's one year contract. PW₁ then asserted that all the documents presented had been certified by him as authorized by the current Permanent

⁷ Exhibit P15 (1) V.B Ssekkono's (10th October 2003) Letter Appointing Timothy Musherure to position of Procurement Specialist. The appointment was subject to the Public Service Standing Orders and Administrative instructions issued from time to time.

⁸ Exhibit P15 (2) Contract for Consulting Services in which the Government of Uganda was client while Musherure was consultant. The contract ceiling was USD 66,000 and the consultant was to meet own tax obligations. Payment was to be made not later than thirty days following the submission of an invoice to the Coordinator.

Secretary Mr. Patrick K. Mutabwire who based his authority on his knowledge that PW₁ was the one responsible for keeping staff records.. Asked how the schedule of duties are allocated to the officers in the Ministry of Local Government, Mr. Eitu stated that every employee's schedule of duties was based on the specifications of their job descriptions.

Mr. Eitu (PW₁) identified the Schedule of Duties in relation to A₁, A₂, A₃, A₄, A₅ and A₆ see Exh P16.

During cross- examination, Mr. Richard Mwebembesa, Counsel for A₃ (Robert Mwebaze) asked whether the Principal Procurement Officer performs all the obligations (on A₃'s schedule of duties) alone. In response, PW₁ testified that the Principal Procurement Officer was the Head of the Public Procurement and Disposal Unit (Head PDU) in the MOLG.

Mr. Eitu (PW₁) further testified that every staff member under the Procurement Unit had a schedule of duties which fed into the responsibilities of the Head of the Unit and when broken down formed activities for members of the team. PW₁ further stated that when members of the team carry out their tasks, responsibility for the outcome were solely with the head of the Procurement Unit. PW₁ further stated that when performing their duties, the staff under the Procurement unit were responsible to the Principal Procurement Officer. He added that they were responsible to the Ministry of Local Government. PW₁ further testified that even the officers who worked

with A₁, A₂ and A₃ were also responsible to the Ministry of Local Government since they collectively work as one MOLG team.

In further cross examination by Mr. Didas Nkurunziza, Counsel for A₅ and 6 Mr. Samuel Eitu, (PW₁) testified that the Contract for Consulting Services was between the Government of Uganda and Mr Musherure and confirmed that the designation of the Ministry of Local Government was that of the client while Mr Musherure was the Consultant. He further stated that the relationship between the Ministry of Local Government and Timothy Musherure was that of client and consultant.

In his testimony, PW₁ testified that the Ministry of Local Government was not designated as the employer in that contract for consulting services and again that Mr. Musherure was also not designated as an employee. PW₁, Mr. Eitu also confirmed that Mr. Musherure was to be paid costs for his contract and that he was supposed to be paid profits computed in that sum. He also confirmed that Mr. Musherure was to be liable for his own tax obligations.

Mr. Eitu further testified that the consultant could only be paid upon his submission of an invoice which invoice was supposed to be presented to the co-ordinator designated. Deducing the same from paragraph 4 of the contract, PW₁ informed Court that Mr. Musherure would not be paid if the co-ordinator engineer Kasule Mukasa declined to approve Musherure's invoice.

In further cross examination by Counsel for A5 and A6, Mr. Eitu testified that the termination clause in the contract did not refer to public service regulations.

In Re-examination PW₁ stated that the main responsibility of the head Procurement and Disposal Unit was to the Head the Unit and ensure its smooth running.. He further stated that the Head PDU was an advisor to the whole Ministry on procurement process and was responsible for instituting proper mechanisms, procedures, systems for procurement process in the Ministry. Mr. Eitu further informed Court that under the Head PDU, there was a Senior Procurement Officer who was his immediate deputy and a procurement officer and that both have separate schedules of duties.

In further re-examination Eitu stated that Mr. Musherure was a Government employee. PW₁ explained that Mr. Musherure was working in a project which was a Government programme in the Ministry of Local Government and so he was regarded as a Government employee

PW₂ (PROTESTANT) – YERUSA NYANGOMA, the Principal Procurement Officer of Ministry of Local Government had only joined the Ministry in 2011.

PW₂ identified A₃ was her immediate predecessor. PW₂, Ms. Nyangoma further stated that when she took over office the Senior Procurement officer, Mr. Job Odongo Bamwesigire inducted her into the job.

In her testimony, Ms. Nyangoma testified that she perused the file on the procurement of the 70,000 bicycles. She further testified that she did not play any role in the procurement of the said bicycles because by the time she joined the unit, the procurement had been concluded. PW2 further stated that when she took office there was a lot of documentation of the file which included:

- i) Correspondence relating to the procurement⁹, A requisition form, a minute explaining the requirements, a record of submission of requirements of the Contracts Committee, a record of approval by the Contracts Committee for the procurement to proceed¹⁰, A record of the issuance of the solicitation document, copy of the solicitation documents¹¹, a record of bid opening, A record of receipt of goods, a record of Evaluation Report¹² which showed that there was a Contracts Committee's approval of the Evaluation Report¹³, a minute on the Evaluation Committee's meeting¹⁴, a record of appointment of

⁹ See Exh P1 Letter from Robert Mwebaze A3 dates 16th August 2012

¹⁰ See Exh 10(1) Minutes of Contracts Committee dated August 2010

¹¹ See Exh P7(2),

¹² See Exhibit P18 Evaluation Report

¹³ Minutes of Contracts Committee Meeting dated 12 November 2010

¹⁴ See Exh P9 Minutes of the Evaluation Committee Meeting

the contract manager, a record of the contract¹⁵, A record of the clearance of the contract by the solicitor general¹⁶.

Yerusa Nyangoma (PW₂) informed Court that by the time she took over office, the contract of the 70,000 bicycles had expired yet no deliveries had been made and the Ministry was trying to make sure delivery was made. PW₂ testified that advice from the Solicitor General was vital because the Ministry of Local Government needed to know how to proceed in order to get the bicycles delivered since the contract had expired on 25th April, 2011 and that there was an obligation to recover the money that had already been paid. She further stated that the money had been paid on presentation of the shipping documents.

PW₂, Ms. Nyangoma testified that she found the matter had already been reported to Police and that in August, 2012, she had been consulted by a Police officer who wanted documentation regarding the procurement of the 70, 000 bicycles. She made a statement and gave some of the documentation on the file to the Police. She also stated that police came with a specific list of the documentation they wanted.

Ms. Nyangoma (PW₂) further stated that the Police requested for several documents and she handed to them, among others, a

¹⁵ See Exh P13 (2) Contract between AITEL and Government of Uganda.

¹⁶ See Exh P13(1) Letter dated 25th November 2010 from Solicitor General

letter from the Office of the president communicating the need for procurement to the Ministry of Local Government, the requisition of the procurement, the approvals of the Contracts Committee and the award of the contract, solicitation documents, receipts of the bids from the bidders, opening of the bids, Evaluation Report, the copy of the contract.

In her testimony, PW₂ testified that form PP₂₀ was the procurement requisition and that it bore the details of the entity and that it had been initiated by Mr. Musoke Andrew, approved by Mr. Sam Erongot. PW₂ added that confirmation information regarding funding was supplied by Mr. John Kashaka Muhanguzi. PW₂ identified form PP₁ as the Contracts Committee submission on the method of procurement. She stated that it was submitted by Mr. Robert Mwebaze on 16th August 2010. Ms. Nyangoma also identified form PP₂₀₉ as the contracts committee decision on the procurement commencement. She further stated that there was Addendum No.1 to the bidding document for the supply of 70,000 bicycles and that it was signed by Mr. John Kashaka Muhanguzi¹⁷. That Addendum O dated 15th September, 2010 was signed by Mr. Robert Mwebaze¹⁸. That there was a copy of the bid Evaluation

¹⁷ See Exh P46 Addendum 1 signed by A1 Mr Kashaka and earlier identified by this witness as Prsecution Identification Exhibit No. 4 PID4.

¹⁸ See Exh P45 An Addendum signed by PW3 earlier identified as PID3.

Report. PW₂ stated that all those copies had been certified by her.

Ms. Nyangoma explained to Court that a bid Evaluation Report contained the findings of the Evaluation Committee. PW₂ stated that there was an award of procurement of 70,000 bicycles for chair persons at a total price of USD 4,896,500 US Dollars, [Four Million Eight Hundred ninety Six thousand Five Hundred]. According to her (PW₂), the award was signed by all members of the Evaluation Committee. She further testified that there was an attachment to the Evaluation Report PP form 30¹⁹ which was the Issuance of Record of Solicitation Documents. She further stated it was signed by Robert Mwebaze and that 14 companies were registered.

Ms. Nyangoma (PW₂), testified that Amman Impex was not among the Fourteen (14) companies that were registered. PW₂ further stated that Court that the PP Form 30 is a standard one used for recording details of the bidders who pick the bidding document and that PP Form 30 is paid for by the bidders. Ms. Nyangoma further informed Court that there is no instance where a company can bid and its details do not appear on the said PP²⁰ Form 30.

¹⁹ See Exh P18 (2) 1-3 the Issuance of Record of Solicitation Documents

²⁰ PP Forms stands for public procurement standard forms

PW2, Ms. Nyangoma also identified PP form 32²¹, the record of bids and she explained that it had seven (7) companies and that Amman appeared on it as No.5. It was signed by the then Head PDU, Mr. Robert Mwebaze. PW2 identified the other form as form PP35²², record of bid document and that it had seven (7) bids, Amman inclusive and signed by Mr. Robert Mwebaze and the late Andrew Kiiza who was a member of the Contracts Committee. She also stated that there was an attendance list of the representatives who attended the bid opening. PW2, Ms. Nyangoma stated that Amman Impex was represented by Burunde Hellen. She stated that the Ministry of Local Government was represented by the then Head PDU, Mr. Robert Mwebaze, the secretary Contracts Committee, Mr. Charles Olaker and the late Engineer Kiiza.

In her testimony, Ms. Nyangoma identified the next document as table2 and that that it was the summary of the detailed commercial evaluation. She made reference to PP Form 41²³, the Evaluation Report, initialled by all members of the Contracts Committee and described PP form 41 as the Evaluation Report. She further informed court that the last document was table4, a

²¹ Record of Receipt of Bids

²² See Exh P18(4) PP Form 35 Record of Bid Opening

²³ See Exh P18 (5) PP Form 41 Table 1 Preliminary Examination and Assessment of Eligibility , Table Two Summary of Detailed Commercial Evaluation for Only bids that are eligible and compliant, Summary of Detailed Technical Evaluation, Table 4 Summary of Financial Comparison for bids that are eligible, compliant and substantially responsive

summary of the financial comparison initialled by all members of the Contracts Committee.

All the documents identified by PW₂ Ms. Nyangoma were certified by her before she gave them to Police.

During cross examination by Muhamad Mbabazi, Counsel for A₁, Ms. Nyangoma informed Court that she joined Ministry of Local Government in May, 2011. She further stated to Court that from the records, the procurement in question started in August 2010 and the award of the contract was made by December, 2010.

Further into cross examination by Mr Kato Sekabanja, Counsel for A₂, she stated that the contract did not specify where the inspection was supposed to be done but later stated that it was supposed to be by Ministry of Works and Transport. PW₂ further stated to court that the bid prices included taxes and that the common practice was that ascertainment was done by URA. She also explained that payment of the taxes would be done when the goods were still in the bonded warehouse.

Ms. Nyangoma clarified that 40% payment was to be paid on presentation of shipping documents and that the goods did not have to have arrived for that payment to be made.

Again during further cross examination by Mr Richard Mwebembesa, Counsel for A₃, PW₂ told court that in her department she was working with the senior Procurement officer, a procurement officer and an office attendant. She also stated that a

senior procurement officer also takes part in procurement processes and that his/her role is to handle to completion of procurement process assigned to them. He stated that the assignment was undertaken by the Head PDU. Ms.

Nyangoma testified that the Senior Procurement Officer, on a daily basis, engages in preparation of bidding documents, preparation of submissions to the Contracts Committee to conclude the relevant forms that have to be submitted to the Contracts Committee. Ms. Nyangoma further testified that the Secretary and the Office Attendant handled the solicitation of documents.

Ms. Nyangoma (PW₂) testified that she knew the signature of A₃ and that it was his signature that appeared on PP form 30-the record of issuance of solicitation documents. But she again stated that the signature of the Officer who issued the solicitation documents was not that of A₃ (Robert Mwebaze) and that she could not identify it.

Further during cross examination, PW₂ testified that the receipt from URA was evidence that Amman Industries purchased the bid documents.

According to PW₂ the Contracts Committee received a recommendation of the Evaluation Committee. She further stated that the contract committee was an independent committee but did not have the power to alter the terms of the initial draft contract. PW₂, Ms. Nyangoma further testified that the Contracts Committee

had the power to adjudicate over a contract and that in so doing; they could either accept or reject submissions from the Evaluation Committee. She added that the Head PDU could not make adjustments to a contract without approval of the Contracts Committee. But again, Pw2 clarified that when and if the Head PDU made any adjustments they were submitted to the Contracts Committee and that if the Contracts Committee was satisfied, they approved it.

Ms. Nyangoma further testified that according to the PPDA guidelines, there must be a pre-bid meeting in every meeting.

During cross examination by Mr Tibaijuka Ateenyi, Counsel for A4, PW2, testified that there are instances where a bidder meets all the requirements but does not deliver. She further testified that the Ministry of Local government did not receive the one thousand two hundred bicycles that were delivered in their warehouses. Asked why they did not receive the bicycles, she explained that the Ministry of Local Government was still in consultations with the Solicitor General as the bicycles were delivered after the expiry of the contract. She testified that the shipping documents indicated that they were delivered by Amman Impex. PW2, Ms. Nyangoma further testified that she received a copy of the shipping documents from Mr. Sam Emorut (A4) who then was the contract manager.

In further cross examination by Mr Didas Nkurunziza, Counsel for A5 and A6, Ms. Nyangoma testified that a recommendation by the

Evaluation Committee is not binding on the Contracts Committee but added that the Contracts Committee considers the same just like it does any other submissions sent to it. She also stated that when a Contracts Committee approves a recommendation, it issues a contract decision-the award of a contract decision. Ms. Nyangoma testified that even after the award of a contract decision, there is no obligation created on the procurement and disposing entity.

During re-examination by Principal State Attorney, Jane Frances Abodo, Ms. Nyangoma stated that bidders who pick bidding documents are recorded on PP30 and she further testified that IDD1 was not a standard form provided by PPDA. She also stated that a Contracts Committee can reject a submission from the Evaluation Committee when they are not satisfied with the contents there-in. She further stated that contracts above the value of two Million shillings have to be referred to the Contracts Committee.

In her testimony, PW2 testified that the contract for the procurement of 70,000 bicycles was between the **Government of Uganda and Amman Industrial Tools and Equipment Ltd** but that the shipping documents indicated that it was **Amman Impex** that had delivered the one thousand two hundred bicycles.

PW2 added that decisions of the Contracts Committee or the Evaluation Committee affect contracts because they are prerequisites for any contract to be signed.

PW3- John Bosco Rujagata Suuza, Principal State Attorney a.k.a Mr. Suuza, testified that he works with the Ministry of Justice and specifically in the Directorate of Legal Advisory Services. He stated that it is a requirement that any contract involving the Government of Uganda with a value above Fifty (50) million Uganda Shillings should be forwarded to the Attorney General's office for perusal and clearance. He further stated that the contract in issue-the procurement of 70,000 bicycles was also forwarded to his department.

Mr. Suuza stated that he received a contract between the Ministry of Local Government and a firm called Amman Industrial Tools and Equipment Ltd and that like any other contract, it had both general and special conditions. He further stated that attached to that contract were minutes of the Contracts Committee and a copy of the bid submission sheet but PP form 209 was not attached and was later forwarded. He testified that after satisfying himself, he recommended clearance to the Solicitor General²⁴.

Looking at the Contract²⁵ which the Directorate cleared, PW3 stated that Special Condition²⁶ indicated that the structure of payment was supposed to be by an irrevocable letter of credit allowing access

²⁴ Exh P13(1) Solicitor General's The Letter of Clearance of the Contract dated 25th November 2010.

²⁵ See Exhibit P13(2) A Copy of the Contract made between Mssrs Amman Industrial Tools and Equipment Ltd (AITELE) and The Government of Uganda, GOU.

²⁶ Clause 16.1 of exhibit P13(2) Which is the General Condition under which a special condition stated specified the payment terms between AITELE and GOU.

to 40% of the funds upon presentation of shipping documents and the 60% was to be paid upon delivery and acceptance. Mr. Suuza, PW₃ testified that he regularly handles such contracts where payment is by letter of credit. He explained that payment by letter of credit was an old and legitimate time tested method of payment but that if parties agree to it, then the Directorate would have no reasons to object to it.

Mr. Suuza added that the use of letters of credit by Government is a matter of choice by the procuring and disposing entity. He also stated that besides using letters of credit, parties can use payment by cash through electronic funds transfer.

In his testimony, PW₃ Mr. Suuza, stated that after the suppliers failed to supply the bicycles he received information from an official of the MOLG although he did not clearly remember whether it was from the Permanent Secretary, but the Ministry of Local Government was seeking guidance on the way forward after the stated that failure of the contract on the part of the suppliers.

During cross examination by Mr. Mohammed Mbabazi, Counsel for A₁, Mr. Suuza explained that LOCs were used when parties agree that it shall be the mode of payment. That one party opens a letter of credit with a bank in favour of the supplier who is paid upon presentation of certain documents.

PW₃ stated that the clearance given by the Solicitor General is statutory backed and that they derive that authority from the 1995

Constitution of the Republic of Uganda which states in Article 19 that the Attorney General shall be the Principal Advisor of Government. Mr. Suuza testified that before such clearance is given, they make sure that it is in line with the PPDA.

During further cross examination, PW₃, Mr. Suuza testified that it would not have been wrong for the Permanent Secretary to pay the 40% upon receipt of bills. He confirmed that the 40% payment did not require the physical goods to be in Uganda.

Upon failure to perform on the contract, PW₃ stated that all remedies were available to the parties and their office had chosen to sue the insurance company (NICO Insurance Company Ltd) because the company refused to pay contrary to the terms of the insurance bond.

Further into cross examination by Richard Mwebembesa, Counsel for A₃, Mr. Suuza, PW₃ testified that the contract was cleared by their office basing on the minutes presented to them by the Contracts Committee. He also stated that the best evaluated bidder was Amman Industrial Tools and Equipment Ltd.

PW₃ stated that with regard to partnerships, partners are jointly and severally liable but that one of them signs to bind the firm and that that must be indicated on the documents that create the partnership.

During cross examination by Mr Tibaijuka Ateenyi, Counsel for A4, the witness stated that suing NICO Insurance was an option the Attorney General chose to handle the matter.

In re-examination by Principal State Attorney Jane Frances Abodo, PW₃ repeated the position that the contract was cleared because the Solicitor General assumed that the process had gone through the right hands. He explained that the process starts with the procuring and disposing unit. He testified that the User Department indicates the need for a particular item to the Procurement and Disposal Unit which determines the method of procurement. That the Procurement and Disposal Unit proposes the same to the Contracts Committee, which either accepts, rejects or modifies the proposal. After that bidders are invited to submit their bids.

He further stated that in this particular case, the method was open bidding. Mr. Suuza stated that after the closing date evaluation takes place. That evaluation is done by the Evaluation Committee whose members are proposed by the Procurement and Disposal Unit and approved by the Contracts Committee.

Mr. Suuza testified that as a Directorate they are not in position to tell whether something went wrong with the contract because they assume everyone did their job. He stated that for example they do not go into the details of how the best bidder was arrived at. PW₃ also stated that in handling contracts, matters of law are handled by

the Attorney General's office while matters of procurement and facts are regulated by PPDA.

PW₄, Ssendawula Yasin, Assistant Commissioner in the Ministry of Local Government stated that the issue of procurement of the 70,000 bicycles was brought to his attention around August 2010 when the Contracts Committee was asked by the Procuring and Disposal Unit to approve solicitation documents, to approve the procurement method and to approve an advert and also to approve the Evaluation Committee, a duty they were obliged to perform and did perform.

PW₄, Mr. Ssendawula testified that while approving solicitation documents, the Contracts Committee looks at the terms provided and that in this particular contract they had approved that payment be made after full delivery of the bicycles. He also stated that delivery was to be done in the respective districts by the supplier.

PW₄ testified that PID6 indicated the Evaluation Committee they had approved and that it was composed of Robert Mwebaze (who was the Head PDU) now A3, Sam Emorut (Assistant Commissioner) now A4, Alum Adam now A6, Timothy Musherure now A5 and one Engineer Robert Kakiza from the Ministry of Works, now deceased. He also stated that in that decision they approved open international bidding method, the bid documents and the advert.

Mr. Ssendawula testified that the second time he handled the contract was in November, 2010 when the Contracts Committee

received an Evaluation Report from the Head PDU for approval and to award a contract to Amman Industrial Tools and Equipment as was recommended by the Evaluation Committee. PW₄ stated that the meeting for that cause was attended by himself (Ssendawula Yasin), Charles Olaker and Verinah Kakira and the Head PDU, then who was to give technical advice and to make some clarifications on the report.

PW₄ (Mr. Ssendawula) testified that they asked the Head PDU whether he had any reservations on the report and he told them that he had none. PW₄ testified that during the meeting the Head PDU confirmed to them that trading licenses, income tax clearances, bid securities, had all been verified. He stated that everyone else in the meeting had no reservations with regard to the report and so it was approved.

In court, Mr. Ssendawula identified the Evaluation Report they approved and stated that it had annexes attached to it, that is; the record of issuance of solicitation documents, record of receipt of bids, record of bid opening, primary examination and summary of detailed technical evaluation, summary of financial comparison, the spread sheet showing the application of conditional discounts, a copy of solicitation documents and a copy of all bids²⁷.

²⁷ See Exhibit P18 Already referred to by PW2

PW₄ however testified that the copy of solicitation documents and the copy of all the bids, were not availed to them but that he was told by the Head PDU that they were available.

Asked whether Amman Industrial Tools and Equipment Ltd appeared on PP form 30, which was the record of issuance of solicitation documents, PW₄, testified that Amman was not on that list but he stated that the Head PDU then, Mr. Robert Mwebaze (A₃) presented to the Contracts Committee a receipt showing that Amman had paid the required fee and had therefore picked the document only that they used a separate sheet other than PP form 30. PW₄ stated that with those reasons, the committee was convinced.

Presented with PP form 34, the record of receipt of bids, Mr. Ssendawula stated that Amman Industrial Tools and Equipment Ltd appeared as No.5 and that it also appeared as No.1 on form P35, the record of bid opening. He stated that Amman emerged the best bidder with **Four Million Eight Hundred and Ninety six thousand five hundred United States Dollars USD [4,896,500]**.

Mr. Ssendawula (PW₄) stated that the 3rd time the contract for the procurement of the 70,000 bicycles, came to his attention, was when he received communication from the Head PDU (Ms. Yerusa Nyangoma) asking to approve a recommendation to black list Amman Industrial Tools and Equipment for failure to supply the bicycles.

In his testimony, PW₄ testified that there had been a contract between the Ministry of Local Government and Amman Industrial Tools and Equipment but that though they were supposed to receive the final contract, the last of the contract to be seen by the Contracts Committee was the dummy contract which was in the solicitation documents.

PW₄, Mr. Ssendawula further testified that although some amendments were made to procurement in question but that the Contracts Committee never received any communication on the same. Asked whether he knew the accused persons, the witness acknowledged that he knew all of them.

On cross examination by Mr. Mohammed Mbabazi Counsel for A₁, PW₅ testified that he made two police statements. That he made a charge and caution statement and signed it. He stated that in the charge and caution statement he was charged with Neglect of duty as Chairman Contracts Committee in the procurement of the 70,000 bicycles for villages and parishes by the Ministry of Local Government. He however, stated that that he was not arraigned in Court.

PW₄ testified that the Contracts Committee received a draft copy of the solicitation documents and they recommended that it be adopted. He noted though that where necessary, changes can be made to the solicitation documents and that even in this case, there were some changes that were made. Mr. Ssendawula further

informed Court that solicitation documents are standard contracts and that some clauses are adopted the way they are. He stated that when they not applicable, the Contracts Committee advises the Head PDU to draft them (the solicitation documents) and delete those clauses that are not applicable.

Once again, PW₄ testified that the solicitation documents did not indicate the price and that he did not see the main agreement till after the procurement. He stated that he saw it out of curiosity.

Mr. Ssendawula stated that he saw the contract sum. And asked what type of contract it was, he stated that it was a lump sum contract and he further explained that a lump sum contract is where the total quantities and total contract amounts are stated and the period is also stated.

PW₄ also confirmed to Court that the Contracts Committee made specific instructions that the bidder should supply 70,000 bicycles and the requirement for payment to be made 30 days after delivery of the goods.

As regards inspection, Mr. Ssendawula testified that inspection for the bicycles was supposed to be done the moment the bicycles were brought into the country and that it was supposed to be done at the bidder's premises. He also testified that he was not aware that any delivery had been made.

Asked whether they make recommendations as to mode of payment, PW₄ testified that that recommendation is done in the

solicitation documents. And in this particular case, PW₄ reluctantly, testified that the Contracts Committee recommended the certified payment.

In further cross examination by Richard Mwebembesa, Counsel for A₃, Mr. Sendawula (PW₄) testified that the evidence he saw with regard to Amman's payment for the bid document, was part of the Evaluation Report and not as a solicitation document.

PW₄ testified that the Contracts Committee is independent in its functions. He further stated that the Contracts Committee does not approve bid securities. Mr. Sendawula stated that there was an amount approved for the bid security in the solicitation documents and that that amount also appeared in the advert which was approved.

In his testimony, Mr. Sendawula stated that there is no requirement that Contracts Committee should get back the final contract as executed between the parties. Asked whether they approved the bid submitted by Amman, Mr. Sendawula explained that they approved the evaluation for the bid of Amman. He also stated that they did not evaluate the bid of Amman. He also stated that they did not look at the bid presented by Amman.

Challenged by Counsel Richard Mwebembesa as to what they based on to award the contract to Amman, PW₄ testified that they based on the report from the Evaluation Committee.

In response to a challenge as why he had been made a suspect in the issue in contention, PW₄ testified that it was a recommendation of Parliament.

In his testimony, Mr. Sendawula testified that the only correspondence he saw from the President's office was for the procurement of seventy thousand bicycles for villages and parish Councils in Uganda and not any referring to the procurement as a matter of emergency.

In cross examination by Mr Charles Tibaijuka, Counsel for A₄, PW₄ responded that the Contracts Committee did not approve the Evaluation Report on the day it was submitted by the Evaluation Committee and he denied that he ever told Police that it was approved on that day.

Mr. Sendawula also testified that the Contracts Committee did not have members who also served on the Evaluation Committee. He further stated that when the Evaluation Report was submitted, the Contracts Committee was satisfied with the clarifications made by the Head PDU then.

PW₄ testified that the first time he heard of any irregularity concerning the procurement was when complaint came in that Amman had failed to deliver the bicycles.

During cross examination by Mr Geoffrey Komakech, Counsel for A₆, Mr. Sendawula (PW₄), stated that by the time the award was made to Amman, the Contracts Committee had satisfied itself that

everything was in order. He further stated that the solicitation documents were presented to the Contracts Committee and that they went through them and were satisfied that they measured up to international standards. PW₄ also testified that they were satisfied that Amman passed the test as laid down.

In re-examination, PW₄ testified that it was unacceptable for notifications that are supposed to be made to the Permanent Secretary to be made to another office other than that of the Permanent secretary. He further stated even though the solicitation documents indicated that the stated that notifications were supposed to be addressed to the Head PDU, it is in everyone's knowledge that all correspondence to the Ministry of Local Government are received in the first instance by the Permanent Secretary.

PW₄ also testified that any changes made to the contract, which were not in the solicitation document or in the Contracts Committee's minutes were supposed to be referred back to the Contracts Committee for approval.

Mr. Sendawula(PW₄) also clarified to Court that the contract sum was not indicated in the solicitation document because it is determined when the composition of the evaluation board is approved. He further stated to Court that only terms of payment were indicated in the solicitation document were the.

PW₄ testified that the decision as to mode of payment was made by the Head of Accounts - the Principal Accountant and that the decision was made at the time of drafting the contract. He added that the Head PDU liaised with the parties concerned to reach that decision.

Mr. Sendawula also stated that where a bidder did not state the terms of payment in the bidding documents, the Evaluation Committee should have considered them none responsive. He also stated that though the Contracts Committee was supposed to receive status of the contract report, they received none. He testified that the status of the contract report was supposed to be sent to the Contracts Committee on a quarterly basis.

Mr. Sendawula (PW₄) explained to Court that the final contract which the Contracts Committee is supposed to receive is that which has been drawn but not yet signed and not yet submitted to the Solicitor General. It is at that stage that the Contracts Committee is required to approve it. However, this did not happen in the instant case.

PW5 Dr. Fixon Akonya Okonye, 47 years, Commissioner responsible for internal audit and Inspectorate Ministry of Finance, Planning and economic Development.

Mr. Okonye explained his role as a Commissioner Internal Audit and Inspectorate in the Ministry of Finance as being, one who oversees the internal audit of Central Government Ministries. He stated that that he also coordinates the inspectorates of both local and central Government. He also supervises staff in all Ministries to ensure that they perform their duties according to the internal audit standards. He testified that in audit, they do planning, then execute that plan, make a report and then follow up. He stated that the report is made to the Secretary to the Treasury and the Accountant General. The report is produced on annual basis report.

Asked by the Jane Abodo, State Attorney, how and whether his office played any role in the procurement of the 70,000 bicycles, PW5 stated that that the Ministry of Finance has a mandate to manage public finances. He stated that where big procurements are concerned, the Government uses letters of credit whereby the Bank of Uganda issues one and gives a guarantee to the service providers and suppliers that funds will be available to pay them when they fulfil the terms of their contracts.

Mr. Okonye categorically stated that his office is involved in such procurements at the time of additional verification for purposes of payment. Explaining what involves additional verification, he

testified that when an Accounting Officer is satisfied that the supplier has met certain conditions and is ready to pay, a file is submitted to the Ministry of Finance, specifically to the Accountant General who passes the file onto the Commissioner Internal Auditor and Inspectorate.

PW₅(Mr. Okonye), stated that in this particular case, the file was forwarded to the Ministry of Finance in March, 2011 and that on that file, there were Memos for purposes of payment, a contract signed by the Accounting Officer and his team. He also testified that the Solicitor General's clearance was also on file. He further testified that on studying the file, he got to know that payment was for 40% on the presentation of shipping documents. He added that the shipping documents were a Bill of Lading, an insurance bond, pictures of the bicycles to be procured, a packaging list to confirm that the goods have been packed and shipped.

In his testimony, Mr. Okonye stated that initially he saw all those documents except the packing list which was missing on the file. He stated that he then wrote to the Permanent Secretary Ministry of Local Government on 25th march, 2011 asking for the packing list. He further stated that the purpose of the letter was to ask for the packing list so he could be sure that all the conditions were being complied with before clearance by Ministry of Finance could be given. He further stated that a reply was given by the Accounting Officer on 1st April, 2011, who sent a copy of the packing list and also

informed him that the original of the same was with Bank of Uganda.

PW5 further testified that basing on that information and confirmation given (on standard form A) by the Permanent Secretary, the Head of Accounts and the Head of Internal Audit, of Ministry of Local Government, clearance was given on 5th April, 2011.²⁸ He testified that the clearance was to the effect that they were satisfied with the documentation and that hence the supplier should be paid the 40% as was requested by the Accounting Officer. He stated that the clearance was signed by him-Fixon Akonya Okonye and another, Ssemakula Lawrence who signed for the Accountant General.

Mr. Okonya (PW5), however testified that subsequent information that came in indicated that even at the time he was asking for the packing list, payment had already been effected. He also testified that Bank of Uganda emphasized to them that they did not require clearance from Ministry of Finance. He further stated that the information provided by Bank of Uganda indicated that for purposes of foreign letters of credit, the Bank relies on UCP 600²⁹.

²⁸ Exhibit P19 Confirmation by Accounting Officer (Application for Audit Authorisation by Henry Bamutura (A2), Jenny Owechi Internal Auditor and Kashaka signing as Accounting Officer (A1)

See Also Ex P20 Audit Clearance dated 5th April 2011 signed by Dr Fixon Akonya Okonye for Accountant General PW9

²⁹ UCP 600 is the Uniform Customs and Practice for Documentary Credits.

PW5 further testified that the contract had been signed by the Accounting Officer in the Ministry of Local Government (the Permanent Secretary), Mr. Kashaka Muhanguzi and the suppliers, Amman. He stated that he saw the signatures of Permanent Secretary, Kashaka Muhanguzi, the Assistant Commissioner, Mr. Emorut Sam and a representative of Amman. He further stated that the Solicitor General's clearance they relied on was dated 25th November, 2010.

Mr. Okonye stated that the contract was signed by John Kashaka Muhanguzi, Sam Emorut Erongot, the Assistant Commissioner Policy and Planning in the Ministry of Local Government and Nshitah Maini, Director of Amman Industrial Tools and Equipment Ltd.

Explaining what Form A entailed, PW5, Mr. Okonye testified that the form is designed to give assurance that conditions in a contract have been met and that the service provider should be paid. He further stated the form was issued by Ministry of Finance to Accounting Officers of Government of Uganda to be used for purposes of letters of credit.

Recognizing the said Form A, Mr. Okonye also stated that Form A in this particular procurement was addressed to the Accountant General of the Ministry of Finance and that it was in respect of the letter of credit No.99/LC and that the number of the LC was FC103570007. He also stated that it indicated that it was

confirmation by the Accounting Officer. He further stated that the form was signed by Head of Accounts - Mr. Bamutura Henry, the Head of Internal Audit - Hellen Owech Jane and the Accounting Officer, John Kashaka Muhanguzi.

Still in regard to Form A, PW5 testified that two similar forms had been issued but that the first one had been signed by one person on behalf of the Head internal audit, yet signatures of the three heads are required. He however pointed out that the form they relied on was the one that was signed by the three heads. He also stated that the form which was signed by the three heads was dated 3rd March, 2011 while the one which was signed by the Head Internal Audit was dated 10th March, 2011.

Mr. Okonye testified that in general information on Form A originating from the Ministry of Local Government provided confidence that it was safe to effect payment.

PW5, Mr. Okonye further stated that the audit clearance was only given following confirmation by the Accounting Officer Ministry of Local Government and by the Head Internal Audit and Head of Accounts, payment of the 40% should be made by Bank of Uganda. The witness also identified the letter and confirmed that it was addressed to the Director Banking and that it was signed by himself and Mr. Lawrence Ssemakula.

Mr. Okonye also testified that when they receive such documents, they do not have mechanisms for verification of genuineness. He

stated that they simply trust that the documents are true copies of the original which are in the custody of Bank of Uganda.

PW₅, Mr. Okonye further testified that the audit clearance is one of the control methods used by the Accountant General to ensure that Government finances and resources are secure and well managed.

Asked whether he knew the accused persons, he stated that he knew the Permanent Secretary John Kashaka (A₁), Henry Bamutura (A₂), Sam Emorut (A₄) and that he had seen the rest of the accused persons before.

During cross examination by Mr Mohammad Mbabazi, Counsel for A₁, PW₅ testified that in their Accounting system they have one control system based on one law. He also stated that every Ministry has an Internal Auditor and that Internal Auditors report to the Accounting Officers of their ministries and that functionally they report to the Audit Committees.

He also testified that the Head of Accounts and the Head of Internal Audit posted by the Ministry of Finance, Planning and Economic Development but are accountable to the Accounting Officer of the respective Ministry to which they are deployed.

Explaining the need for three people sign a document, Mr. Okonye (PW₅) stated that the Accounting officers are not expected to perform all the tasks by themselves; they rely on other technical officers for support.

PW5 reiterated that the first Form A he received was signed by three people but that the third signatory was not the Head of Internal Audit as required yet no explanation had been given for the absence of the Internal Auditor's signature.

In giving clearance for the price to be paid, Mr. Okonye stated they (Ministry of Finance) relies on the work of the Internal Auditor of the requesting Ministry.

Mr. Okonye testified that the confirmation in Form A was in respect of the 40% payment and that payment of the 40% did not require physical delivery of goods in Uganda.

Regarding the UCP 600, PW5 stated that before the procurement of the 70,000 bicycles, he did not know it but that he had since tried to understand it. He stated that even though it was already in place, it was not within the provisions of the Public Finance and Accountability Act nor the regulations there under.

Challenged as to the fact that the Ministry of Finance controls were not consistent with the UCP 600, Dr. Okonye testified that the Ministry of Finance applied guidelines provided by the Public Finance and Accountability Act in section 7(3)(g) which give the Accountant General the responsibility to advise on ways of improving the custody and safety of public finances. The said guidelines came into force in June 2010.

Dr Okonye added that the Letters of credit were to guarantee to the suppliers that when they supply, funds would be available at the

time of payment. He also stated that the guidelines were meant to improve control and not to guarantee payment.

Mr. Okonye further testified that he received information from the Head Internal Audit regarding the procurement process. He also added that he made a statement to Police in July 2011 and September 2011.

Further into cross examination by Sekabanja Kato, Counsel for A2, Mr. Okonye stated that Internal Auditors carry out verification in the Ministries but that depending on the subject matter, non Auditors could be co-opted into verification processes.

PW5 testified that the verification by the Internal Auditor in this procurement process raised a presumption that the bicycle procurement had been preceded by a contract award, that the Evaluation Committee sat and there are minutes to that effect, that the contract was signed by the authorized persons, that there was clearance by the Solicitor General and that the documentation relating to the contract was in place.

PW5 admitted that by the time they gave their clearance they were satisfied that payment should be made. He further stated that, they relied on the confirmation given by the Accounting Officer. He also stated that the Accounting Officer's confirmation comes at the end and that at that time every document required on the file must be in place.

Challenged that by the time the Head Accounts signed off the Internal Auditor he must have verified the documents, Mr. Okonye testified that even Bank of Uganda had reservations about this procurement but they were convinced by the Accounting Officer and the Principal Accountant that payment should be made.

PW5, Mr. Okonye testified that he received a copy of the Treasury Instructions dated 16th June 2010 and that they were in respect of payments of foreign letters of credit and they were addressed to the Director Payments and settlements in the Bank of Uganda.

Mr. Okonye confirmed that under the June 2010 directive, the Bank of Uganda could only make payment after satisfying itself that the terms under those guidelines were satisfied. He stated that what would give the Bank of Uganda absolute confidence would be the presentation of the certificate from Ministry of Finance in addition to other documents.

PW5 also testified that under the law, the Accounting Officer can authorize payment.

PW5 clarified that the purpose of the guidelines was to improve management of public finances but not to replace the provisions of law. He stated that Bank of Uganda is the Government's Bank with which the Ministry of Local Government holds a separate account and any payment would be effected through the Bank of Uganda.

Mr. Okonye Akonye testified that at the time of authorizing payment, the funds have been secured and would be available on an

account in Bank of Uganda and the letter of credit would only be awaiting performance.

Asked by Richard Mwebembesa, Counsel for A₃ whether he saw anything on the contract that would cause loss or prejudice to the Government, PW₅ stated categorically that the Government of Uganda had always used advance payments and the procurement of the 70,000 bicycles was no exception.

He further stated that under the law, the Accountant General should have control over Government payments through Bank of Uganda. He stated that one of the functions of Bank of Uganda is to be Bank of the Government and that the role of the Accountant General is to be Accountant General of Government. Mr. Okonye also stated that the Accountant General has control over public finances and that when he issues guidelines they ought to be respected and that the Bank of Uganda ought to have respected the June 2010 guidelines. He further stated that if the guidelines are not followed and there is loss, to some extent the Bank of Uganda would have caused the loss.

Mr. Okonye stated that at the opening of the letter of credit, the Bank of Uganda charges a commission but that he was not sure at what point payment was made. He also stated that the commission paid stands at about 1% of the value.

Asked who was supposed to verify the authenticity of the documents with regard to the letter of credit, Mr. Okonye (PW₅)

testified that one needed the originals of the stated that documents to be able to verify and that in this case, the originals were with Bank of Uganda.

During cross examination by Charles Tibaijuka, Counsel for A4, Mr. Okonye testified that the procuring entity did not conduct a pre-audit. PW5 however stated that before payment there is an independent review conducted by officers in his office. Asked the difference between that kind of review and verification, PW5, Mr. Okonye testified that verification is done against underlying records but that a review can be done on one document.

PW5 testified that the procurement in issue was budgeted for in the 2010/2011 National Budget.

Mr. Okonye stated that a follow-up is not necessarily a function but an audit process. He also explained that when they make recommendations, they follow-up to establish whether their recommendations have been implemented by the Accounting Officer. He stated that in essence they are following up on actions should have taken place and a report on actions not implemented would be issued.

Looking at exhibit P13(2) –the contract, Mr. Okonye testified that the first person signed on behalf of the purchaser, who in this case was the Government of Uganda through Ministry of Local Government. He also stated that the second person, Sam Emorut,

then the Assistant Commissioner Policy and Planning in the Ministry of Local Government, signed as a witness.

In re-examination, PW5 reiterated that the Permanent Secretary relies on people under him to carry out some duties because he cannot do everything on his own. He also stated that though those people work as a team, at the end of the day it is the Accounting Officer who is accountable.

He also confirmed that he would not have issued the audit clearance had all the required three signatories not signed. PW5, Mr. Okonye also testified that from the information they later received, payment had been made way before clearance was given. That payment had been made on 14th March, 2011 yet the clearance was given on 5th April, 2011.

Giving further clarity on Form A, PW5 testified that the form is addressed to the Accountant General and it gives particulars of the letters of credit; thus; the letter of credit number, the date on which the letter of credit was opened, the person to be paid, the amount to be paid and that it also shows whether payment is partial or final. He also stated that on that form there is confirmation by the Accounting Officer concerning the status of the contract-whether payment was ever made or not.

Mr. Okonye (PW5), testified that in this particular form A there was; the words, Ministry of Local Government, the reference number of Local Government, the date of that form, the serial

number, the credit number of the letter of credit and amount, the date on which it was opened, the amount to be paid, the signatories and the specific Bank to be paid. And that all that was inserted in by the Ministry of Local Government.

PW5 also stated that before the three heads append their signatures, they should be satisfied that everything is okay.

Mr. Okonye also testified that internal auditors in a Ministry audit all activities in that Ministry including procurement. Asked what role the Internal Auditors played in this procurement, he stated that when they review documents relating to payments, they are supposed to satisfy themselves that the payment is proper.

PW5, Mr. Okonye testified that before the documentation asking for clearance, they never received any communication from internal audit. He further stated the Permanent secretary informed him that the documents were being queried by the Bank of Uganda. He however stated that as the Commissioner he does not have input in the procurement processes of the Government Ministries.

In regard to the June 2010 guidelines, PW5 testified that for a long time the Ministry of Finance has processed many letters of credit mostly foreign LCs and issued guidelines and that the Bank of Uganda has always complied. He also stated that the issue of the UCP600 arose when the bicycles were not delivered. And that before that the Ministry of Finance was using its own forms and Bank of Uganda honored them. That it was never was brought to

his attention that the Bank of Uganda was not honoring their signatures.

Asked who was supposed to verify the documents, he stated that if the originals of those documents were in his possession, then he would be the one to verify them although in the instant case the original documents were with the Bank of Uganda.

PW6, Anthony Musumba, Head of Quality Control, Bank of Uganda in Payment and Settlement department testified that as Head Back office in Payment and Settlement Department his duties involved, inter alia, making foreign payments for Bank of Uganda customers and processing letters of credit.

Mr. Musumba stated that Letters of Credit is a payment option used by Bank of Uganda and that it is governed by **UCP-600 Rules** which are **Uniform Customs and Practice for Documentary Credits**.³⁰ He further stated that LOC deal with documents used in the Contract of Sale.

³⁰ The **Uniform Customs and Practice for Documentary Credits** (UCP) 600 are the International Chamber of Commerce (ICC's) new rules on documentary credits, which are used for letter of credit transactions worldwide, were approved by the ICC Commission on Banking Technique and Practice on 25 October 2006. UCP 600 is the first revision of the rules since 1993 and represents more than three years of work by the commission. UCP is a set of rules on the issuance and use of [letters of credit](#). The UCP is utilized by [bankers](#) and commercial parties in more than 175 countries in international business transactions. Some 11-15% of [international trade](#) utilizes letters of credit, totaling over a trillion dollars (US) each year. Historically, the commercial parties, particularly banks, have developed the techniques and methods for handling letters of credit in international business. This practice has been standardized by the ICC ([International Chamber of Commerce](#)) by publishing the UCP in 1933 and subsequently updating it throughout the years. The ICC has developed and moulded the UCP by regular revisions, the current version being the UCP600. The result is the most successful international attempt at unifying rules ever, as the UCP has substantially universal effect. The implementation date was 1 July 2007. - See more at:

PW6 testified that previously when the Government needed to use letters of credit, the Accounting Officer would write to the Accountant General but that had been abolished. Following a change in policy, the Accounting Officer could write directly to the Bank indicating the amount involved, the supplier, terms and conditions of that letter of credit and the account number of the user Department. He further informed the Court that the applicant for LOC had to attach the contract, a pro-forma invoice and the letter should be signed by a minimum of two of the signatories to that account.

PW6 stated that once Bank of Uganda was satisfied with documents attached and were sure that the money was on the account, then they would open a letter of credit.

Mr. Musumba (PW6) confirmed that Bank of Uganda was involved in the procurement of the 70,000 bicycles. He described BOU's involvement. He testified that in December 2010, Bank of Uganda received an application from Government signed by the Accounting Officer and the Principal Accountant Ministry of Local Government and another signed by the Accountant General and the Commissioner Treasury Office of Accounts, Ministry of Finance.

According to Mr. Musumba, the application was requesting Bank of Uganda to open a letter of credit for the purchase and delivery of 70,000 bicycles. He stated that the application indicated the terms of the letter of credit, the amount and the beneficiary³¹.

PW6 testified that the beneficiary in this case was Amman Industrial Tools and Equipment Ltd. He stated they attached a contract and a pro forma invoice. Mr. Musumba stated that the application also indicated the account where the local cover equipment would come from. PW6 further testified that on 23rd December, 2010, Bank of Uganda opened the letter of credit with City bank New York. He further testified that on 27th December, 2010, MOLG requested Bank of Uganda to amend the letter of credit. He stated that the request was in writing and signed by the Permanent Secretary Ministry of Local Government and the Principal Accountant.

In his testimony, Mr. Musumba testified that the amendments were effected by the Bank as requested.³²

³¹Exh P21 PS MOLG Application for Letters of Credit dated 30th November 2011. A request to open foreign letter of credit worth UDS \$4896500 in favour of Amman Industrial Tools and Equipment Ltd whose terms were irrevocable and transferrable.

See Also Exh P22 Semakula of Accountant General's Office directed the opening of Letters of Credit dated 14th December 2010

See Also Exh P23 Opening of Letters of Credit Application made by Kashaka Muhanguzi and Henry Bamutura

³² See Exh P28 Statement of Account Re MOLG Forex Transfer and further showing payment details of Amman Industrial Tools and Equipment Limited.

Mr. Musumba (PW6) testified that after opening the letter of credit, the Bank received documents from Stanbic Bank Uganda Ltd, which included, the invoice, the packaging list, the Bill of Lading, certificate of origin, insurance certificate and photographs of the bicycles. He stated that he examined the documents according to UCP 600 Article 14 and that their major interest was to see whether the documents attached to the letters of credit were the required ones.

PW6 further testified that the confirming bank was City Bank and that the issuing bank was Bank of Uganda. He further that Stanbic Bank was the advising bank.

Mr. Musumba stated that when the documents were presented for payment the Bank found that the documents were not in compliance with the terms of the letter of credit which the bank had issued. He further testified that when he realized that the documents were not in conformity with the terms, he wrote to MOLG informing them of the discrepancies and seeking their authority as to whether they should pay or not.³³ PW6 testified that the Ministry of Local Government wrote authorizing the Bank of Uganda to waive all the discrepancies and effect payment of the money the 40% **amounting to USD 1,719,454.54.**³⁴

³³ See Exh P26(1) A letter from Musumba (PW6) to the PS MOLG (A1) spelling out discrepancies in the letters of credit

³⁴ See Exh P26(2) Kashaka Muhanguzi's letter authorising payment of the 40%.

PW6 (Mr. Musumba) further testified that when he received the letter from the PS MOLG asking him to waive the said discrepancies, he verified the signatures and made a phone call to confirm this with the Principal Accountant who gave him a go ahead to pay. The confirmation was by phone. Mr. Musumba stated that the Principal Accountant at the material time was Henry Bamutura and that Mr. Kashaka was the Permanent Secretary. He further stated that the payment was by letter of credit and that the signatories to that account were the Principal accountant and the Permanent Secretary.

Mr. Musumba further testified that after making the payment on 14th March, 2011, City Bank gave them confirmation of the same.³⁵ He stated that the confirmation was in form of a swift message. PW6 testified that payment was debited from the Local Government Account.

Mr. Musumba testified that after payment he received an audit warrant from the Accountant General whose effect was to confirm the transaction that had been carried out.

PW6 testified that the next time he heard about the payment was when Henry Bamutura rang him informing him that the Permanent Secretary needed to talk to him. He stated that Mr. Bamutura

³⁵ See exh P27 Swift message dated 15th March 2011 showing they had honoured the claim for USD 1,719,454.54 from Stanbic Uganda Ltd

requested for his (Musumba's) number so he could give it to the Permanent Secretary who wanted to talk to him.

Mr. Musumba stated that following his conversation with Mr. Bamutura, officials from MOLG including the Permanent Secretary and the Principal Accountant went to his office. PW6 testified that they met him to discuss the Letter of credit. That they wanted to see whether Bank of Uganda could help them recover the money or see to it that the goods are delivered. Asked what had brought about that concern, Mr. Musumba testified that the people from MOLG stated that they had not received goods and yet the suppliers were not picking their calls. He further stated that they asked the MOLG team to put the request in writing because they themselves had ordered Bank of Uganda to pay.

As if it was of any consolation, Mr. Musumba confirmed to Court that 40% of the stated price was paid but that the 60% was with the accounts of Bank of Uganda.

In cross examination by Mohammad Mbabazi, Counsel for A1, Mr. Musumba stated that letters of credit are documents agreed on by the supplier and the importer. He stated that they are generated by the exporter through Banks. He further stated that there was an agreement between the applicant and the issuing bank.

Mr. Musumba testified that letters of credit can be irrevocable and that in the case of the 70,000 bicycles, they were irrevocable. PW6 further testified that the confirming bank before amendment was,

City Bank and after the amendment, it was Stanbic bank. He noted that Stanbic bank was also the advising bank.

Mr. Musumba (PW6) testified that Bank of Uganda was paid by Ministry of Local Government for that transaction. He stated that they were paid 1% of the value. That it was a commission. Payment by commission was a method agreed upon by Government of Uganda and Bank of Uganda.

Asked what the Bank does if they find that the documents are a forgery, Mr. Musumba answered that they were not supposed to see beyond what the documents said. He however, maintained that if the documents were not compliant, they write to the applicant.

PW6 testified that some documents such as the original delivery note were not received neither was the acceptance certificate of goods. He further stated that the discrepancies in the documents were the final destination, the bill of lading, packing list and that the certificate of origin was indicating Kampala Uganda instead of parishes and village councils in Uganda. He also stated that, there was an alteration on the certificate of origin which was not authenticated.

Mr. Musumba testified that it is possible to have a delivery note and a Bill of Lading at the same time in a letter of credit transaction.

PW6 testified Looking at P21 (application to open a letter of credit by PS), P22 (application to open letters of credit by Accountant general) and P24 (the letter of credit) that there was no

requirement for a delivery note nor for an acceptance certificate. However he still maintained that the documentation was required. In further cross examination, Mr. Musumba testified that the 40% payment did not require a delivery note. When challenged as to what discrepancy existed, PW6 maintained that where partial shipment was allowed, delivery and certified copies of acceptance were required.

Asked whether his office had the power to reject the amendment that they rejected, Mr. Musumba testified that it did not but that they did so because the amendment was indicating that Amman was the exporter and the importer at the same time. Challenged by Counsel Mbabazi as to whether they prevail over their customers, he stated that where it is necessary they do.

PW6 (Mr. Musumba) testified that there was no provision in the UCP 600 allowing for Banks to be negligent. He also stated that the UCP 600 did not provide for dispute resolution. He asserted that by using the UCP 600 which gives guidelines on how to handle letters of credit, Mr. Musumba stated that the Bank acted professionally.

Asked whether they sent the original documents back to the customers, Mr. Musumba explained that the originals remain with the Bank of Uganda. He stated that they neither gave the originals to Ministry of Local Government nor the Police.

PW6 further stated that when delivery was not made, Bank of Uganda did not contact the corresponding bank because it does not

deal in goods. He also stated that there was nothing wrong with seeking for waiver under the UCP 16(b) and that it was on the basis of the response that was given that the Bank proceeded to pay. Mr. Musumba stated that that was the standard practice.

Mr. Musumba stated that if the client had asked them not to pay then they would not have paid and that they would inform the other bank that they had not got response from their client. He maintained that the bank does not pay when the documents are not in order even if the letters of credit are irrevocable.

In re-examination PW6 maintained that the final destination was supposed to read, parishes and local councils.

PW7 Allan Atuhaire, the Head of Business and Finance, Stanbic Bank Forest Mall Branch, testified to the effect that Stanbic Bank was the Advisory Bank for the Letter of Credit in respect of Amman Industrial Tools and Equipment Ltd. Atuhaire's evidence was that in December 2010 he was approached by two Directors of AITEL, Nishta Maini and Mohindah Singh who informed him that they had won a contract with the MOLG. They further informed the banker that they were seeking financial support in form of working capital. Mr Atuhaire stated that the Bank declined to assist them due to lack of sufficient collateral.

PW7 informed this Court that as a Bank they later received communication from the MOLG to confirm that a LOC worth Four Million Two Hundred Dollars had been opened in favour of AITEL.

PW7 stated that their role as the Advising Bank was simply to inform AITEL of their rights under the LOC. Atuhaire further stated that it was not their duty to check if the documents were proper. He further stated that no bank was nominated to be a negotiating Bank. He stated that on 15th March 2011 Amman Industrial Tools Ltd was credited with a sum of 1.7M Dollars. Shipping Documents had been presented prior to the money being credited.

In cross Examination DW7 informed this Court that the Bank got instructions not to contact the Confirming Bank. The witness could not identify who delivered the Shipping Documents but they were delivered by someone who was not a Bank Signatory. Further in cross examination by Mr. Mwebembesa for A3, PW7 confirmed that there was no stamp of receipt on the Bill of Lading. When cross examined by Mr. Tibaijuka Ateenyi for A4 PW7 further stated that they received instructions to block the account of one Bagarukayo, an action they immediately undertook. In re-examination the witness stated that the Applicant (MOLG) chose the issuing Bank (Bank of Uganda) and nominated the Confirming Bank (Citi Bank NY). The witness told this Court that he had no information regarding the whereabouts of Nishta Maini. PW7 added that Arjunan Rajasekaran had left town while Mohinda Singh was reported dead.

PW8 Uthman Ismail Ssegawa, a Legal Officer for the PPDA testified that he was assigned by Mrs Cornelia Sabiiti to put together a team of three in order to conduct an investigation into the procurement of Seventy Thousand Bicycles by the MOLG. He nominated Candy Sabiiti and Benson Turamye. PW8 stated that the terms of reference were to investigate whether the procurement for the supply of seventy thousand bicycles to the MOLG was conducted in accordance with the PPDA Act and Regulations. The PPDA Audit became the main Audit document in this trial.

Mr Ssegawa stated that upon receiving the instructions he developed an investigation plan³⁶ which was approved by the ED, Cornelia Kakooza Sabiiti and a report there from issued in November 2011³⁷.

PW8, Ssegawa stated that he received the documentation on the procurement file from the MOLG after writing to the PS. He further stated that they interviewed A1, the Accounting Officer, A3, the Head PDU, A4 Emorut, A5 Timothy Musherure and Mr Yasin Sendawula the Chairman of the Contracts Committee. He further stated that got further information from Uganda Registration Services Bureau and URA.

³⁶ Exhibit P42 An Investigation Plan by Uthman Ssegawa (PW8) dated 21 September 2012

³⁷ Exhibit P43 The PPDA Investigation Report on the Procurement of Seventy Thousand Bicycles dated 11th November 2011.

Ssegawa told this Court that he discovered that the evaluation Committee did not adhere to the evaluation criteria which were stipulated in the Bidding documents specifically relating to the capacity of the bidder. It was imperative that the best evaluated bidder had to have previously supplied seventy thousand bicycles in one single lot. He further discovered that the contract signed had different terms from the one which had been approved by the Contracts Committee and added that the addenda was not issued in accordance with the Law.

Ssegawa further stated that the evaluating committee did not exercise due diligence when evaluating the bid of AITEL. He stated that whereas the best evaluated bidder was found to be AITEL, the documentation submitted in the Bid Document related to the past experience and performance of Amman Impex. His evidence was AITEL was only two months old when they submitted their bid to the MOLG.

Ssegawa testified that there were anomalies in the Contract Management process which led to failure to bring to the attention of the contract's Committee the issue of extension of the contract term. He further noted that there was no pre-bid meeting conducted. He stated that for a Contract of over fifty Million shillings a pre-bid meeting should have been held. He also noted that the record of issue of solicitation documents did not contain AITEL as one of the providers who had picked up solicitation documents.

In Cross Examination Mr. Ssegawa stated that the use of LOCs was not part of the solicitation conditions and was not approved by the Contract's Committee. He further added that use of LOCs was introduced by the client and improperly customised by the PDU. Mr Ssegawa stated that he would have advised against LOCs and would have suggested electronic transfer of funds after the receipt of goods.

Ssegawa further stated that an Accounting officer can decline to sign a contract even when it is cleared by Solicitor General if he finds that it deviates from the Contract approved by the Contract's Committee.

PW9 Gustavo Orach Lujwero Bwoch the Accountant General testified that it was the PS and the Principal Accountant who authorized Bank of Uganda to make the payment of USD 1.7 Million to the Contractor by signing of Form A³⁸ indicating that the bicycles had been received and were in good order, were the correct quantity.

Mr Gustavo Bwoch stated that the procedure adopted was wrong indicating that under normal circumstances the Accounting Officer would have written to him, Accountant General, asking for an Audit warrant and it is his office which ought to have forwarded the audit warrant to the Bank of Uganda for payment. Mr Bwoch added that

³⁸ See Exh 19 Letter from MOLG dated 3rd March 2011 signed by Henry Bamutura (A2), Hellen Owechi, and Kashaka Muhanguzi (A1) RE: Letter of Credit No. 99/ LC FC103570007 Confirmation by Accounting Officer. See also Exh P20 In Response the MOFPED gave an audit clearance dated 5th April 2011

the LOC clauses were substantially altered by the Accounting Officer. Mr Bwoch confirmed that his office issued an authorisation for payment after Bank of Uganda had already paid out the money.

In Cross Examination Mr Bwoch confirmed that his office authorized the opening of the letters of credit. He stated that Form A was no longer in use because the Bank of Uganda stated that it did not conform to standards of international practice but was only used for internal controls. Mr. Bwoch stated that it was in order to make the 40% payment on sight of the documents. He further stated that had the bill of lading been genuine then the goods would have been received. Mr Bwoch further stated that only Bank of Uganda could have verified whether the Bill of Lading was genuine. He further stated that under the Public Finance Act, the Bank of Uganda is bound to follow the instructions issued by the Accountant General. He however clarified that failure by Bank of Uganda to follow his instructions was not the cause of the loss.

He stated in reexamination that the loss occurred because the MOLG ignored queries brought to their attention by Bank of Uganda.

PW10 Woman Detective Reginah Cherry Mbabazi, a Police Officer attached to the Anti Corruption Department of the CIID testified that she investigated AITEL and retrieved information of the Registrar Generals Department. The woman detective was able to establish that AITEL was incorporated on 14th September 2010,

five days after the bid notice was advertised on 9th of September 2010. Woman Detective Mbabazi further established that within a few days of money being deposited on the account of AITEL, it was all withdrawn. Detective Mbabazi testified that she did not find documents which would prove that AITEL and Amman Impex were a joint venture. In cross examination the Detective stated that she did not inquire from the sea carrier to establish if it existed and further that she did not investigate the anomalies around the Bill of Lading.

PW11 Jane Namatovu Sekitoleko a credit advisor with Stanbic Bank stated that sometime in 2011 she received and acknowledged receipt of documents from one Rajesh of Amman Impex and Patrick Bagarukayo³⁹. She stated that it was her first time to receive shipping documents which included a Certificate of Origin, Commercial Invoice, Packing List, Insurance Warrant and pictures of the bicycles⁴⁰.

The final prosecution witness was **PW12 Detective Superintendent Umar Mutuya** attached to the Special Investigations Unit of the CIID. His evidence was that he interrogated all the suspects and obtained additional police statements from each of them. Detective Mutuya told this Court that in order to verify the authenticity of the shipping documents

³⁹ See Exhibits D6, D7, D8 The Shipping Documents relied on by the Defence and just like the ones relied on by the Prosecution as Exh P25(1-8) appear to be forged documents.

⁴⁰ See Exh P25 the List of Shipping Documents

he wrote to the Commissioner in Charge of Customs at URA. Mr Mutuya informed this Court that he received information from URA indicating that the company which purported to ship the seventy thousand bicycles was nowhere registered in their URA data base and that URA could not verify whether their documents were genuine.

In Cross Examination Mr Mutuya testified that each anomaly stood on its own and could be used as independent evidence. He further stated that CIID the loss was occasioned by relying on fabricated shipping documents. DW₁₂ added that he could not establish if A₁ was involved in fabricating the documents and that he could decide whether the irregularities were part of the fabrications.

While DW₁₂ was no football legend and by no means a Fabrigas, Mr Mutuya's constant use of the word fabricate which I supposed he confused with the verb for forgery earned him a barrage of questions including whether documents were factory made like engineering machinery. A wider extension of the verb 'fabricate' which means concoction or 'cook up' still fails to convey the same meaning as the verb 'to forge'. Being a police detective DW₁₂ is aware how often witnesses concoct or cook up evidence. This usage is clearly distinct from an offender forging or altering documents in order for the documents to appear genuine whereas not. The verbal confusion did not take from the fact that this was the investigating officer who put together the police file and indicted the charged

persons. Hope he will mind his language next time. His work on this investigation is commended regardless.

IN HIS DEFENCE DW₁ JOHN MUHANGUZI KASHAKA testified that he was employed in the Civil Service as a Permanent Secretary in the Ministry of Local Government.

Mr. Kashaka testified that the procurement of the 70,000 bicycles started as a government policy he found already in place when he arrived at the Ministry and that information was passed to him by the Minister for Local Government, Hon. Adolf Mwesigye. He stated that the bicycles were meant for the Local Council Chairpersons of villages and parishes around the Country and were intended to help in the mobilization of the people in implementing Government policies and programmes.

DW₁ (Mr. Kashaka) testified that the first action of implementation was for the Assistant Commissioner and the Head Policy and Planning (Emorut Erongot, A₄) to raise a requisition to the Accounting Officer (Mr Kashaka). He stated that after satisfying himself that the money had been voted for the purpose, he granted the Assistant Commissioner Mr. (A₄) the authority to start the procurement process. DW₁ further testified that he signed the prescribed form confirming the availability of funds for the procurement⁴¹. Mr. Kashaka further stated that after he appointed a

⁴¹ See Exh P50 Procurement Requisition signed by Andre Musoke, Sam Emorut Erongot and Muhanguzi Kashaka

Contracts Committee he let the process to continue without his participation, direction or involvement.

Mr. Kashaka testified that the next point of contact was reception of the minutes of the Contracts Committee and the Letter of clearance (draft contract) from the Solicitor General. He further testified that since the contract had been cleared, he signed it and notified the firm that was awarded the contract⁴².

He stated that he was not involved in the award of the contract because the law (the PPDA Act) provided for the different roles and expected the players to act independent of each other. He further stated that he obeyed the law to the letter and preferred not to be involved.

Mr. Kashaka testified that his role regarding the letters of credit was to sign the application form. He applied together with the Principal Accountant. Mr. Kashaka also informed Court that he looked at the shipping documents which were supposed to be availed for payment. He however, he testified that he never saw the originals. He stated that the originals were with Bank of Uganda. (Given the failure to produce the originals by all parties concerned and the availability of forged copies this Court doubts if the originals ever existed).

He further testified that the role of Bank of Uganda was to look after the interests of Ministry of Local Government because they

⁴² See Exh 13

were their Bankers. He stated that Stanbic Bank was appointed to take care of the supplier's interests.

In his testimony, DW₁ testified that Bank of Uganda was paid 1% of the contract value and that that was approximately One Hundred Million Shillings [Ugx 100,000,000/=]. He noted that the Bank was paid because they were supposed to negotiate, confirm and verify documents on behalf of Ministry of Local Government.

Mr. Kashaka further testified that there were no discrepancies as stated by Bank of Uganda and that instead it was Bank of Uganda which made mistakes from the time of the opening the Letters of Credit. Mr. Kashaka stated that when the letter mentioning the discrepancies came to his attention, he sent it to his technical staff to verify whether there existed discrepancies. He was informed by the Head of Accounts that there were no discrepancies. He gave an example of the discrepancies mentioned by Bank of Uganda as the shipping documents which were supposed to be accompanied by delivery notes and that yet the letter of credit required that the 40% payment was paid on sight of documents only. He further testified that the delivery notes were only necessary for the last shipping and were to be signed by the Chief Administrative Officers at the Districts after receipt of the goods.

Mr. Kashaka further testified that Kampala being a place of delivery instead of the villages and parishes was not a discrepancy as Bank of Uganda stated. He further noted that the Ministry of Works was to

provide an expert to inspect the bicycles upon arrival in Kampala. DW₁ claimed that that information was given to Bank of Uganda in the amendment. He stated that this decision was reached at by the officers in charge for purposes of paying taxes and inspection.

Mr. Kashaka distanced himself from the changes made regarding the point of delivery. He stated that change was made when he was out of office attending a conference in Beijing, China. He further testified that the decision about the delivery point was made by the Commissioner for Local Government and one Mr. Patrick Mutabwire who was then acting as Permanent Secretary and Head of Administration in the Ministry. In that regard, DW₁ stated that there was a loose minute made by DW₅ Obo Ologe, the Under Secretary Finance and Administration.

Mr. Kashaka testified that the discrepancy regarding partial shipment was a mistake made by Bank of Uganda. He stated that the letters of credit allowed for partial shipment, and yet Bank of Uganda insisted that partial shipment was not permitted. He claimed that some of the discrepancies were immaterial and others were imported by Bank of Uganda.

DW₁ stated that there was no abuse of office that resulted from the change in the delivery points because the decision was made by people who had the power to make that kind of decision. He further stated that since the treasury advised that taxes had to be paid, the

Ministry of Local Government had no choice but to change the delivery points.

Mr. Kashaka further testified that the bicycles were never delivered and that the supplier acknowledged that there was forgery on the shipping documents and that the supplier promised to make good their contractual obligations. DW₁ testified that the supplier stated that he had been cheated by his agents.

DW₁ further testified that he panicked when he realized that delivery of the bicycles was not forthcoming. He immediately summoned his colleagues, Sam Emorut (contract manager), Henry Bamutura (Principal Accountant) and Robert Mwebaze (Head Procurement Unit for a meeting with the Solicitor General who was represented by Principal State Attorney, Mr. Suuza. DW₁ testified that the Solicitor General advised him to demand for the goods.

Bank of Uganda informed him that they could not refund the money they told him that the money was not refundable.

Mr. Kashaka further testified that he reported to Interpol and the Uganda Police when he suspected fraud on the part of Amman Industrial Tools and Equipment. He further stated that it was at his instance that Police commenced investigations in the matter.

In his testimony, Mr. Kashaka testified that they contacted the Indian Chamber of Commerce to inquire about the existence of Amman and to find out whether it was a member of the Indian Chamber of Commerce. His efforts were aimed at finding Arjunan

Rajasekaran so he could recover the public funds and also for the Secretary General to order him to honour his contractual obligations. *One would have thought that the Evaluation Committees would have undertaken such due diligence before not after the fact.*

DW₁ testified that on 4th August, 2011, he wrote a letter to the Permanent Secretary Ministry of Foreign Affairs asking to discuss how the Government of Uganda could work with the Indian Government to track down the stated that Arjunan Rajasekaran.

Mr. Kashaka testified that the time of delivery was extended by one month because the supplier requested for the same in order to be able to carry out his part of the contract. DW₁ stated that the power to make the extension vested in the contract manager.

During cross examination by Learned Principal State Attorney, Jane Abodo, Kashaka (DW₁) testified that as the Accounting Officer, he was one of the signatories to the Ministry's Accounts and his position made him accountable for the funds released.

Mr. Kashaka stated that the staff who are posted by Ministry of Finance to the different Ministries are; the Assistant Commissioner Policy and Planning and his/her team, the Principal Accountant and his/her team, the Chief Internal Auditor and his/her team and the Head PDU and his/her team, the staff under him. All these people

were therefore answerable to the Ministry of Finance and to the Permanent Secretary of the Ministry to which they are posted.

He confirmed that as the Permanent Secretary he appointed the Contracts Committee.

Mr. Kashaka further testified that he was informed by the Chief Internal Auditor that the bicycles were procured and that at least one thousand two hundred bicycles were delivered in Kampala at the end of 2011. He further testified that he saw the said bicycles in the last week of October 2011. He testified that the bicycles were sent by Amman Impex and that he witnessed the breaking of the seal but he did not receive them and that the contract with Amman Impex had lapsed.

Mr. Kashaka stated that when he realized the bulk of the goods were not being delivered, he together with his technical staff worked backwards and that that is when it dawned on him that most of the documents were forged. He testified that the documents of sale were mishandled by the Suppliers and the Banks.

DW₁ testified that the procurement process of the 70,000 bicycles started when he was in China that although he was kept abreast verbally, some decisions were made when he was away.

Mr. Kashaka maintained that the bicycles were not delivered because the documents were forged. He mentioned that the letter written to him by Arjunan Rajasekaran indicated that Arjunan had

been defrauded by his companions and that he had opened a police case in India.

DW₁ confirmed that the decision to extend the time for delivery was not communicated to the Contracts Committee.

He further stated that to his knowledge no office ever objected to the procurement and denied ever receiving any objection from the Principal Accountant.

In re-examination, DW₁ testified that he did not do a vessel search because it was the duty of the Banks.

DW₂ - HENRY KANYAIHE BAMUTURA, 54yrs, Principal Accountant Ministry of Local Government

Mr. Bamutura stated that as a Principal Accountant, he was the head of accounts in the Ministry and made provision in the budget for the planned procurement. He stated that he reserved funds on the ministry's account for the said procurement of 70,000 bicycles which funds were then committed by the Accounting Officer, A₁.

In his testimony, DW₂ testified that when the letter of credit was opened, there were amendments that needed to be made and that he subsequently met with the Accounting Officer and agreed to make changes to allow for partial delivery to be made. He further stated that they wrote to Bank of Uganda about the stated that changes.

Mr. Bamutura stated that after a month he was reprimanded by the Accounting Officer for delaying to open the letter of credit. He also stated that he received a letter disciplining and warning him.

Dw2 testified that the contents of the letter of reprimand were true because he did not want to open a letter of credit that he did not believe in.

Mr. Bamutura testified that on 27th December 2010 he was called by the acting PS to sign the amendment and that in the presence of acting Permanent Secretary, his supervisor and the Accounting Officer he signed the amendment to allow for partial delivery.

He further testified that on 3rd March 2011, he received instructions from the Under Secretary and the Accounting Officer directing him to initiate payment.

In his testimony, Mr. Bamutura stated there were discrepancies raised by Bank of Uganda and he informed the Head Internal Audit about the verification that needed to be done by her.

He further confirmed the verification by the Accounting Officer who also wrote a letter to Bank of Uganda and on Form A wrote to the Accountant General allowing for the delivery of the bicycles to be made in Kampala and for the certificate of origin to be altered.

DW2 testified that the certificate of origin was issued by All India Chamber of Commerce and Industries who also certified a declaration of the same by the exporter which was in turn endorsed by Stanbic Bank.

DW2 denied that he ever received the shipping documents and that the matters of the discrepancies were addressed to the Accounting Officer.

Mr. Bamutura testified that regarding the first discrepancy, the Permanent Secretary informed Bank of Uganda that he had written to the Accountant General informing him that the delivery notes were only required at the payment of the 60%. He further stated that regarding the second discrepancy, the shipper indicated on the Bill of Lading that delivery would be in Kampala.

He further testified that by the time payment was authorized, he was no longer in control of the money because by the time the letter of credit was opened on 23rd December, 2011, all the money had been removed from all the ministry of local Government accounts and transferred to Bank of Uganda's personal accounts in City Bank.

Mr. Bamutura stated he was not the one who wrote the letter to Bank of Uganda amending the conditions for the final destination of the bicycles.

During cross examination of DW2 by Principal State Attorney Jane Abodo DW2 stated that he received instructions from the Head PDU asking him to open the letter of credit. He stated that he did not have the funds and so did not agree with the terms. He stated that the fault of not having funds was the Treasury's.

When challenged about a possible contradiction that the Permanent Secretary had confirmed the availability of the funds, he stated that the Permanent secretary had authorized the procurement process. He further testified that the money became available in December in 2010 after the signing of the contract.

He further stated that the terms he did not agree with was the partial delivery and allowing the supplier to access 90% payment on seeing the shipping documents and paying the 10% on signing delivery notes.

Mr. Bamutura testified that the contract was drafted by the Head PDU and signed on 26th November 2010 by John Kashaka (Permanent Secretary), Sam Emorut (Assistant Commissioner Planning and Policy), Nishita Maini and another person whose signature he could not identify.

DW2 testified that he sought advice from the Accountant General who told him that the treasury could not authorize opening of the letter of credit at 90% and that the contract should be revised.

Mr. Bamutura testified that he was uneasy because he had never seen anyone being paid just at the sight of documents. He further stated that what usually happened was that delivery notes were signed when goods were in the stores and that would be the time the supplier would be given documents and advised to go to his bank.

DW₂ testified that there was enough money on the account from which they told Bank of Uganda to remove the funds and yet Bank of Uganda went ahead to debit other accounts.

He further stated that more money than what was quoted in the letter of credit, was taken. He further stated that the actual amount should have been 9.9 billion yet they removed 9.8 billion as local cover for the letter of credit and 98M as bank charges.

About the cancellation on the certificate of origin, Mr. Bamutura maintained that it was indeed cancelled, stamped and signed. However, looking at exhibit P25 (3), he testified that the one he relied on was not the one exhibited in court because it was not signed.

Mr. Bamutura testified that he signed a corrigenda addressed to the Director Payment and Settlement and that he signed it after he was convinced by Mr. Mutabwire (new PS) and his supervisor. He stated that he signed it in their presence.

Due to the nature of his evidence DW₂ was cross examined by Mohammed Mbabazi, Counsel for John Kashaka. Mr. Bamutura testified that because of the warning letter he received from A₁ he took actions that he ought not to have taken for example the letter he wrote requesting the Bank to pay 40%.

DW₂ testified that he was pressured to authorize Bank of Uganda to pay yet he did not have that authority. He stated that he informed them that he lacked the authority but that the PS rang him asking

him why he was not adding the second signature to authorize the stated that payment.

DW₃ (ROBERT MWEBAZE), the Principal Procurement Officer testified that at the time he was arraigned he was Head PDU of the Office of the Prime Minister. DW₃ testified that as the PDU prepared the solicitation documents⁴³ and Draft Contract among other things.

With regard to this procurement, DW₃ testified that the PDU received a requisition from the user department and that it was fully endorsed by the Permanent Secretary. His evidence was that he advertised, prepared the solicitation documents and nominated the Evaluation Committee. He testified that the Contracts Committee consists of five people appointed by the PS.

DW₃ testified that after approval of the contract by the Contracts Committee, the best evaluated notice was put up and that the winner, Amman Industrial Tools and Equipment was notified of the same.

Asked how the bid of AITEL came to be considered yet it did not appear on the record of issue of solicitation documents, Mr. Mwebaze testified that the law allows for rejection and acceptance of such a bidder. He stated that an investigation is carried out into how the stated that bidder got the solicitation document. And that in this case it was found that AITEL had paid for the solicitation

⁴³ See exh P7

documents and it would be unfair for them to be rejected just because some officer omitted to include the stated that bidder on the record.

He stated that the omission was done by one Richard Achia, a Procurement Assistant in the department of PDU.

Mr. Mwebaze testified that the first solicitation document had two mistakes; one that the bicycles would be of Indian standard and two that, the bid security would be five hundred million shillings, UGX 500,000,000/=. He added that the Contracts Committee made changes to the effect that the bicycles were supposed to be of international standard and the bid security was lowered to three hundred million⁴⁴. DW₃ further testified that the bidders who had already taken the documents were called and the changes were cleared.

DW₃ told this Court that his officer who had not attended the Contracts Committee meeting was the one who drafted Addendum O. Mr. Mwebaze however, stated that that Addendum was not issued because the bidders had already been informed. DW₃ remarked that the Addendum was numbered Addendum 1 and not O and he did not know how it became O.

DW₃ testified that he did not hold a pre-bid meeting because he considered that the procurement had standard specifications and

⁴⁴ See Exhibit P45 the Document which lowered the bid security from Five Hundred Million UGX 500,000,000 Million to Three Hundred Million UGX 300,000,000

yet pre-bid meetings are usually held when the procurement had ambiguous specifications.

In his testimony, DW₃, Mr. Mwebaze told this Court that the Evaluation Committee considered that AITEL had the capacity to supply the seventy thousand (70,000) bicycles because they had previously supplied 65,000 bicycles.

Mr. Mwebaze testified that the Evaluation Committee considered AITEL and Amman as a joint venture even though they were not because the solicitation document did not require a joint venture agreement. He stated that the two companies had a legal relationship as AMMAN held a power of attorney to act for the two companies.

DW₃ further testified that the Solicitation documents allowed Ministry of Local Government and the winning firm to agree on the method and mode of payment.

Mr. Mwebaze testified that though he did not submit the amended contract to the Contracts Committee, the Solicitor General approved it. He also stated that there was no reason to take it back to the Contracts Committee.

During cross examination, Mr. Mwebaze testified that though he supervised, controlled, directed, approved and presented the solicitation documents to the Contracts Committee, he was not the one who drafted them. DW₃ testified that the payment structure

was capable of affecting all the bidders and admitted that it actually affected the bidders.

Mr. Mwebaze (DW₃) denied giving DW₂ (Mr. Bamutura), the Contract which had the contract sum of 90% payment. He denied that he personally followed the payment. In his testimony, DW₃ testified that he did not follow up payment but followed up the opening of the letter of credit and yet again he stated that his duty is to follow up payment.

DW₃ testified that on 30th November, 2010 he sent an internal memo to the Principal Accountant asking him to open the letters of credit but stated that he did not attach the contract because the Principal Accountant could get the copy from other sources.

Mr. Mwebaze stated that his subordinate, Richard Acia, who issued the solicitation documents, told him that he skipped AITEL's bid and therefore it was not on form 30. But he did not have this material fact noted anywhere else.

DW₃ testified that he visited Amman's website but noted that he did not remember what their primary business was and though they stated among other things that they dealt in bicycles, he did not see pictures of the bicycles.

Though Mr. Mwebaze testified that the submission made for AITEL was made on behalf of both companies, the submission itself did not show that it was made for and on behalf of Amman Impex

neither did it show the obligations that each of them was supposed to carry out.

Asked whether the contract which was awarded showed that it was awarded to both Amman Impex and Amman Industrial Tools, he stated that it did not.

DW₄ (SAM EMORUT ERONGOT) was Assistant Commissioner for Policy and Planning in the Ministry of Local Government testified that his unit, Policy and Planning was the user department in this procurement. He stated that he was the Chairman of the Evaluation Committee and was also appointed the Contract Manager.

DW₄ testified that the addendum was not an amendment but a variation and that between the two, it is the amendment that would have required to be taken back to the Contracts Committee. **During cross examination** by the State DW₄ testified that he was involved in the planning of this procurement and those funds were set aside for that purpose.

Mr. Emorut testified that he was not aware of the changes that were made to the contract. DW₄ further testified that he was informed by Robert Mwebaze that the terms of payment had been agreed upon but they had not been communicated to the Contracts Committee.

Mr. Emorut stated that during evaluation, documents of both Amman Ipex and AITEL were presented however, it was AITEL that

had the powers to negotiate submit documents and to sign on behalf of the other. Important to note is the fact that DW4's evidence that Amman Industrial Tools and Equipment Ltd was incorporated on **14th September, 2010 and was less than two months at the time of bidding.**

According to DW4, Mr. Emorut, AITEL and Amman Impex were separate entities but they presented their documents as a joint venture. He further stated that the companies declared in writing that they were a joint venture. DW4 testified that the declaration was addressed to the Head Procurement and Disposal Unit.

Mr. Emorut testified that his role regarding payment was to recommend the payment but that he did not recommend because the Under secretary was asked by the Permanent Secretary to handle that matter.

DW4 testified that the bicycles were supposed to be delivered by February 2011 but that at the request of the suppliers, on 3rd March, 2011, the time for delivery was extended. A5 and A6 exercised their Right to remain silent.

DW5 GIDEON OBBO OLOGE, was the Under Secretary Finance and Administration, He testified that when the PS went abroad, he left him acting as the Accounting Officer.

DW5 testified that while in that capacity, he received a letter from the Deputy Secretary to Treasury advising the PS to remove the tax element and apply for close tax. He further stated that

subsequently, he discussed the same with Mr. Mutabwire who was acting PS and indicated to him the need to change the contract to reflect the new tax position. Mr. Obbo testified that he sent the information to the Head PDU asking him to invite the supplier to inform them of the changes.

DW5 further testified that when the PS returned, he took over his responsibilities and asked the Under Secretary to take action on payment. DW5 stated that he then remitted the same to the Principal Accountant asking him to initiate the payment process.

Mr. Obbo denied having negotiated the 60/40 payment structure. He also denied having advised for letters of credit to be the mode of payment. He stated that he believed the contract already had a mode of payment since the supplier was from outside Uganda.

Mr. Obbo testified that taxes had been taken care of in the contract but the Treasury informed the ministry that it did not have all that money and that the taxes would be paid through the Accountant General's office.

Mr. Obbo (DW5) stated that if one testified that he participated in the negotiation of the terms of payment, that person would be telling lies. In his testimony, DW5 testified that he did not instruct the Head PDU to draft the contract. In his view that was work of the Contracts Committee.

DW5 denied agreeing to trans-shipment and claimed that it was impossible for him to have agreed on the same with the supplier

because he did not even know the supplier. In his testimony, Mr. Obbo denied ever having held a meeting with Mr. Kashaka (PS) and Mr. Bamutura to allow for partial delivery.

Standard and Burden of Proof in criminal cases:

It is a well and long accepted principle of our law that in all criminal cases an accused person is presumed innocent until proved or pleads guilty. It is also a principle of law that the burden of proof rests upon the prosecution throughout the trial, to prove both the charge and the ingredients thereof beyond reasonable doubt. The burden never shifts to the accused persons. An accused person shall not be convicted on the weakness of his defence but rather on the strength of the prosecution case. I have borne in mind all these safeguards. See cases and the law referred to which include: Miller v. Minister of Pensions [1947] 2 All ER 372, Woolmington v DPP 1935 AC 462 HL now SC, Uganda v Oloya 1977 HCB 4, Uganda v DC Ojok 1992 HCB 54 and Akol Patrick and others V Uganda (2006) HCB 6. Okeletho Richard vs. Uganda Sc. Crim. App. No. 26 of 1995 and Article 28(3) (a) of the constitution of the Republic of Uganda. Also see Okethi Okale & others v R 1965 EA 559, Sekitoleko v Uganda 1967 EA 531 and Seuri v R 1972 EA 486.

Resolution of the Counts

In Count No. 1 John Muhanguzi Kashaka, A₁, and Henry Bamutura A₂, were each indicted for Causing Financial Loss c/s. 20(1) of the Anti Corruption Act 2009.

It was alleged by the prosecution that on the 3rd of March 2011 at Ministry of Local Government, A₁ and A₂ being persons employed by the stated that Ministry as Permanent Secretary and Principal Accountant respectively, paid the sum of USD 1,719,454.58 (One Million Seven Hundred and Nineteen Thousand Four Hundred and Fifty Four and Fifty Eight Cents United States Dollars) to M/S AITEL despite being informed by Bank of Uganda that the documents presented by M/S AITEL were not in strict compliance with the letters of credit.

Submissions of Defence Counsel on Count No.1

In submitting on this count Counsel for A1 Mohamed Mbabazi argued that the real issue here was that there was no physical delivery of the seventy thousand bicycles and not that the shipping documents were altered without referring to the Contract's Committee. He contended that had there been a delivery the question of these minor discrepancies in documents would not have arisen. He further argued that the shipping documents being referred to were not genuine and were indeed forged. Counsel referred to the discrepancies in the documents as so grave that the shipping company was found non-existent. He compared exhibits P25 (7)⁴⁵ and Exh D3,⁴⁶ D4,⁴⁷ D7⁴⁸, D10, D11⁴⁹, and D12⁵⁰. Exhibits D9-D12⁵¹ related to evidence that even in

⁴⁵ Exhibit P25 is the purported set of Shipping Documents contained in a Swift message of 28th February 2011 which contained Exh P25(1) The Swift Message, Exh P25(2) Bill of Lading, Exh PP25(3) Certificate of Origin, Exh P25 (4) Commercial Invoice, Exh P25(5, 6) Packing List, Exh P25 (A TATA AIG General Insurance Company Ltd Insurance Certificate, Exh P 25 (8) Amman Impex Warranty Certificate Exh P25 (29) Pictured of Bicycles, parts of bicycles and crates. Apart from the Swift message which was indeed received, all the other documents turned out to be a forgery

⁴⁶ Purportedly Investigation Notes: a set of incomplete handwritten minutes whose origins were not proved. These notes are unreliable. How safe are Government records when these incomplete notes are handed to defence Counsel.

⁴⁷ A strong worded letter from Louis Kasekende, Deputy Governor Bank of Uganda dated 28th September 2011 to the Accountant General Cautioning that Mr Bwoch's guidelines were unenforceable.

⁴⁸ Exhibit D7 Copy of A Certificate of Origin Purportedly relied on by the rogues part of a set of Shipping Documents tendered as Defence Exhibits D3- D7.

⁴⁹ Another Frantic Letter from the Permanent Secretary Ministry of Local Government dated 4th August 2011 to the Minister of State for Local Government Uganda requesting his intervention in Investigations in the matter of the Loss of 70,000 bicycles.

⁵⁰ Communication from Ministry of Foreign Affairs dated 7th September 2011 to Mr. Kashaka Permanent Secretary responding to his responding to Mr. Kashaka's frantic efforts to have the perpetrators of the 70,000 bicycle scam extradited. The Response was that The Republic of India was not a listed Country in the Schedule to the Extradition

India there was an investigation which had found Amani Impex to have been involved in these grave irregularities. The Learned Defence Counsel contended that the discrepancies on documents were so glaring that no eye should have missed them. He compared exhibits Exh D25(7) and Exh D4 which were both insurance certificates relating to the same shipping documents but bore the names of different settling agents⁵² something that should have raised an eyebrow evidence of failure to read the small print by our Banks and Government Agents and Officials Counsel further argued that these fictitious documents had been uttered by one Rajesh and another Bagarukayo. He submitted that A1 was not mentioned to be a suspect in the forgeries. Counsel for A1 blamed Bank of Uganda. He argued that Bank of Uganda ignored the role of the Citi Bank New York, the confirming Bank in all their queries and in so doing failed to get any help. He further submitted that the prosecution failed to make a causal link between the loss and the failure to deliver.

Arrangements Enforcements Instrument SI 117-1. The net implication being that Uganda does not have an extradition arrangement with India. Additionally whereas India is a Commonwealth polity, the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth Harare Scheme would be of Limited Practical Relevance. India's Assistance would only include indentifying and locating persons, serving documents, tracing, seizing and confiscating the proceeds of instrumentalities of crime..."

⁵¹ Communication between All India Chamber of Commerce and Industries and Amman Impex of Coimbatore India dated between 10th August 2011 and the 19th August 2011.

⁵² The Settling Agent on the TATA AIG Insurance Certificate Exh P25(7) was named as Chartis Kenya Insurance Company Limited of Eden Square Complex Ciromo Road Nairobi Kenya while the one of Exh D7 was Chartis Insurance Company Limited Plot 60 Bombo Road Kampala, Uganda.

Counsel for A2 Mr. Edward Kato Sekabanja agreed that Bank of Uganda was to blame for removing the safety nest provided by the Letter of Credit system and referring the Supplier to the customer for payment. He too submitted that only the confirming bank would have verified the authenticity of the Bill of Lading. He relied on the evidence of PW7 who stated that he received a swift message that the confirming Bank had been deleted. Mr. Sekabanja for A2 stated that the evidence of PW6 and PW7 was contradictory and according to Counsel it made PW6 sound untruthful.

Submission of the Learned Principal State Attorney on Count No.

1

In regard to Count No. 1 the prosecution relied on the evidence of PW5⁵³, PW6, PW9, PW10, PW12, , DW1(A1) and Bamutura DW2(A2). They further relied on Exh P26(1), (P26(2) and P26(3)⁵⁴.

Exh P26 (2) was a letter signed by A1 and A2 which authorised Bank of Uganda to pay USD 1,719,454.58. The prosecution submitted that A1 and A2 did not follow the normal procedure laid down by Mr Gustavo Bwoch (PW the Accountant General (PW9) and in the process acted outside the law and laid down procedures. Apparently the Accountant General had issued a circular which listed documents that were

⁵³ PW5 was Dr Fixon Akonye Okonye the Commissioner Investigations in the Department of Audit, PW6 Anthony Musumba Director Payments Bank of Uganda, Mr Gustavo Bwoch, The now retired PW9 Accountant General, PW10 Regina Mbabazi, an investigating Officer, The In charge of the Investigations Umar Mutuya, John Kashaka, A1 and Henry Bamutura A2

⁵⁴ Exhibit P26(1) A letter from Mr Anthony Musumba of Bank of Uganda pointing out the Discrepancies in the LOC and Exh P26(2) The Response by A1 Mr John Kashaka.

expected in Local Letters of Credit and in International Letters of Credit. His evidence had been that these procedures were ignored by A1. It was the Accountant General's submission that had the procedures not been ignored, these grave misdeeds would not have occurred. The prosecution further relied on the conflicting defences made by A1 and A2 in which A2 accused A1 of piling pressure on him to raise Letters of Credit and ordered him to sign off payment against A2's will. **Ingredients of Causing Financial Loss**

The ingredients of the offence of Causing Financial Loss c/s to Section 20(1) were laid down in the cases of Kassim Mpanga v Uganda Criminal Appeal No. 30 of 1994 (SCU), Uganda v Walubi High Court Criminal case No. 30 of 2011 and Alex Oboth v Uganda Criminal Appeal No. 88 of 2011.

In Alex Oboth v Uganda (supra) it was held that to constitute the offence of Causing Financial Loss the following ingredients must be proved beyond reasonable doubt:

1. That the accused was employed by the Government, a Bank or Credit institution, an insurance company or a public body at the material time
2. That the accused did any act or omitted to do an act knowing or having reason to believe that such act or omission would cause financial loss

3. That the Bank or Financial Institution suffered loss
4. That it is the accused who so caused the loss

Findings in Count No.1

This Court did not have to make a finding on the first ingredient since the employment status of A1 and A2 was agreed upon by all parties under s. 66 of the TIA that A1 and A2 were senior public servants employed as Permanent Secretary and Principal Accountant of the Ministry of Local Government respectively⁵⁵.

On the Question as to whether A1 and A2 did or omitted to do an act, this Court found that the main contention here was that A1 and A2 did an act. The Actus Reus of this particular offence was that the two Accused persons agreed to sign off a payment of **USD 1,719,454.58** thereby causing the Government of Uganda Financial Loss. It is not in doubt that A1 and A2 received a notification from Bank of Uganda addressed to A1 as the Permanent Secretary of MOLG which alerted the MOLG about discrepancies in the **Documentary Sale by Letters of Credit** agreed between the MOLG on behalf of Government of Uganda and AITEL which was to supply the seventy thousand bicycles.

Before I rootle into the fine details of this case I will quickly take a brief look at the method of payment which was belatedly adopted by

⁵⁵ Part of the Record of Proceedings was an agreed set of facts signed by both sides in which these particulars were agreed upon.

the two parties in this transaction. The parties in the Final Contract, Exh P13 (1) based on the General Contract Conditions (GCC) 16.1 adopted special conditions which provided for Irrevocable and Transferable Letters of Credit as the mode of payment. The matter was referred to the Solicitor General for legal advice but the Principal State Attorney from the Legal Advisory Directorate did not seem to notice anything odd about a government granting irrevocable and transferrable letters of credit to private foreign nationals. One would expect Government Lawyers to be the last line of defence in transnational business transactions before state resources are committed to the purchase of goods and services from suppliers who are based outside the jurisdiction of the sovereign state of Uganda. I saw none of that in this transaction. This case is a sad tale of Senior Government officials outdoing themselves in opening up Government coffers to fraudsters, rogues, crooks, conmen and by whatever name else called by unconditionally issuing irrevocable and transferrable letters of credit to strangers of untested business experience. Letters of Credit also referred to as documentary credits are indeed frequently used as a reliable mode of payment in international business transactions. However due care must be taken to ensure that all the dots are joined and the Ts crossed before serious commitments by either party are made.

A letter of credit is a promise by the buyer's Bank to pay the sales contract amount to the Seller's Bank when and if the seller produces the documents required by the sales contract. In short the Letter of

Credit primarily protects the Seller. In this case the Letters of Credit No. 99/LC FC 103570007 for a total sum of **USD 4,298,636.46** was authorised by a one L Semakula of the office of the Accountant General see Exhibit P22. While international business and e Commerce are inevitable in this era, inevitability and pressure should not have been a license for letting one's guard down. The Accountant General attempted to put measures in place to protect public funds by issuing new guidelines. However the guidelines were not in sync with International standards. Indeed the guidelines had the effect of promoting worthless red tape which could only worsen the already existing vulnerabilities of the system to corruption.

Banks issue Letters of Credit as a way to assure sellers that they will get paid so long as they perform their contractual obligation. The Bank acts as an uninterested party between the buyer and seller and guarantees that payment will be made if certain conditions are met. In international business transactions importers and exporters regularly use letters of credit to protect themselves. Given that it is normally a documentary sale the following documents, also referred to as shipping documents, when sighted form the basis of payment. These documents include: the Bill of Lading, Commercial Invoice, Packing List, Certificate of Origin and Insurance Certificate. In the instant the listed documents included pictures of the Manufacturers Bicycles.⁵⁶

⁵⁶ See Exhibit P25

The LOC concept is premised on the view that working with an overseas buyer puts the seller at risk because in most cases, unlike this one, the sellers do not necessarily know who they are working with. In cases where the buyer may be honest and have good intentions, he may run into business troubles and fail to pay or political unrest could delay a seller's payment or a buyer could, for no fault of their own, be put out of business altogether. A letter of credit having been entered between the buyer and the Bank ensures that the seller does get paid. Therefore the LC as it is commonly called is primarily in place to protect the seller. Since we have the word the acronym - LC carries several meanings in Uganda, for purposes of this case, we shall refer to the letter of credit as the LOC. The Applicant, is typically the party who applies for the LOC is often the buyer. The Beneficiary is the seller or the ultimate recipient of the funds. The Issuing Bank is the bank that promises to pay. The advising bank helps the beneficiary use the LOC. It is also worth noting that an irrevocable letter of credit cannot be changed or cancelled without permission from everybody involved see **Clive Schmitoff (1990)⁵⁷, and Ralph H Folsom, Michael Wallace Gordon and John Spanogle Jr(2002)⁵⁸.**

The jurisprudence in Ugandan Courts reveals that the Courts have adopted strict interpretation when it comes to explaining shipping documents related to letters of credit. Courts will query the slightest

⁵⁷ Schmitoff's *Export Trade, The Law and Practice of International Trade*, Steven and Sons London, 400

⁵⁸ Folsom, Michael Wallace Gordon and John Spanogle's (2002) *International Business Transactions*, West Group, 55

discrepancy thrown up by the shipping documents. See the case of Uganda Cooperative Union v Uganda Commercial Bank High Court Civil Suit No. 1194 of 1978 (unreported). Courts have held parties responsible for not strictly complying with or scrutinising shipping documents. **Banks are indemnified against any defects found in the letters of credit.** It was held in Uganda Commercial Bank v Makerere University Civil Appeal no. 10 of 1979 (unreported), that it was a correct statement of law to say that Banks dealt with documents and not goods and that they do not concern themselves with the disputes of parties resorting to their credit facilities provided that the Bank has not received special or other instructions to the contrary.

I find that A1 and A2 in this case did write to the Bank of Uganda authorising the Bank to pay **USD 1,719,454.58**. The act of agreeing to pay does not in itself amount to a crime. The next question is whether A1 and A2 knew or had reason to believe that the payment of **USD 1,719,454.58** would cause financial loss to the Government of Uganda.

Prudence would have dictated that more caution than usual was required in this particular transaction since the Bank had queried the destination indicated on the Bills of Lading (meaning there was more than one) and the obvious alterations on the Certificate of Origin which made it appear not to be authentic. It remains a puzzle that Bank of Uganda decided to refer the discrepancies to MOLG instead of referring them to the Confirming Bank which had both the expertise and the duty to confirm the documents.

Equally curious was the fact that both A1 and A2 authorised the Bank of Uganda to pay despite the discrepancies pointed out by the Bank. Besides, there was another reason the two accused ought to have been more cautious to authorise payment - the sheer amounts involved. If indeed A1 and A2 were acting as good custodians of government funds and resources, they should have exercised more diligence prior to effecting payment of public funds to an unknown supplier. Am aware that in his defence A2 stated that he was forced to pay by the threats and warnings issued to him by A1. I have carefully examined the evidence adduced in its totality and found that of the two accused persons, A2 was more financially knowledgeable and was in closer touch with the other actors, A3, A4, A5 and A6 than A1 was. It would appear to me that A2 always ran to his mother department (Ministry of Finance) to help him design schemes to cover up his tracks. I found the testimonies of PW5 Dr Okonye Akonye PW9 Gustavo Bwoch contrived and structured to exonerate A2. The retired Accountant General Mr. Bwoch did not let up any opportunity to try and convince me that A2 was innocent and A1 was to blame for the financial missteps which occurred in this case. I found this evidence biased and unhelpful to this Court. I found Mr. Bwoch's standing instructions on Letters of Credit inconsistent with international standards and practice, inimical to commerce, contrary to the UCP 600 rules which our Banks must adhere to and altogether unhelpful. In view of Mr Bwoch's subjective attempts to save one of his ilk I decided that not much weight would be attached to Mr. Bwoch's evidence.

The position of Permanent Secretary and that of Principal Accountant which A1 and A2 respectively held are very senior in the Uganda Civil Service hierarchy and holders of those roles are expected to exercise a high level of diligence and prudence in managing public affairs. A Permanent Secretary is a Public Officer Appointed by the President to head a ministry. He takes charge of the implementation of policies and programmes of his ministry under the general direction of the Minister responsible. A Permanent Secretary is at the helm and the centre of the running of government machinery. The effective running of government machinery depends on how efficient and able the PS is. The PS has the dual responsibility as an accounting officer and is specifically appointed to this role by the Secretary to the Treasury. The PS's role among others is to be the overall in charge of the general administration and financial management of the Ministry.⁵⁹

The role of the Principal Accountant is equally important given his crucial role in the oversight and supervision of the Accounts Division in the Ministry. Additionally, he is the Bank signatory and is responsible for all cash requisitions from the Exchequer. The Principal Accountant is the technical financial advisor to the PS and maintains the Ministry's account books.

In view of the centrality of their roles, A1 and A2 ought to have known that signing away **USD 1,719,454.58** on discrepant Shipping Documents

⁵⁹ See **Exhibit P16** which spells out the Duties of the PS and further states that the PS is responsible Advising the Minister on policy issues and matters affecting the Ministry. He is also responsible for the expenditure of public funds and accountable to parliament on matters concerning the management of Government funds voted by Parliament for the Ministry. The PS Heads the Ministry Management Team.

was likely to cause financial loss.⁶⁰ I agree with the gentleman assessor in this regard. I find that the prosecution has proved Count No. 1 beyond reasonable doubt and convict each of A₁ and A₂ accordingly.

On the question of Abuse of Office in Count No. 2 Mr Kato Sekabanja submitted that the alteration in the shipping documents was justified because in his view the destination indicated on the shipping documents appeared meaningless when it stated that delivery was to villages and parishes. He noted that there was no such destination in Uganda by the name villages and parishes.

Submissions by Learned Principal State Attorney:

In her submission on Count No. 2 learned State Counsel relied on Exh P26 (2) which was a letter notifying the MOLG that the documents the Bank had received did not conform to the terms of the Letters of Credit since the LOCs bore the destination **villages and parishes** yet this was not reflected in the Contract. In addition the Bank queried the Packing List Exh P25 (5) and an authenticated cancellation on the Certificate of Origin which Exh P25 (3). The destination of the seventy thousand bicycles was a term of the contract. It was the submission of the learned Principal State Attorney that a term of the contract could

⁶⁰ **The following cases are cited with approval: See Uganda v Godfrey Walubi High Court Anti Corruption Div) Criminal case No. 20 of 2011 where it was held that knowing or having reason to believe requires that knowledge is either actual or constructive or even wilful blindness and that a person's normal course of duties should inform his knowledge of the consequences of his line of action or inaction. It was further held that elements of deliberate recklessness, untruthfulness and outright wrong doing remove the level of trust that would forgive inadvertent misstatements or unwitting error of Judgment. See also the cases of Uganda v Jeremiah Kimeze and others High Court Anti Corruption Div) Criminal case No. 19 of 2011, Kassim Mpanga v Uganda Criminal Appeal No. 30 of 1994 (SCU) and Uganda v Prof. Gustavus Ssenyonga and Christine Namuddu Kigundu Criminal Appeal No. 4 of 1997 (SCU).**

only have been altered by the Contract's Committee since it was a term derived from the contract. It was further submitted that the two accused persons, A₁ and A₂ did not consult the Contract's Committee nor did they ask the Procurement unit. The State submitted that it was an arbitrary act for A₁ to accept a payment whose place of delivery was Kampala not **villages and parishes**.

Learned Principal State Attorney laboured to argue that Exh P26 (2) did not amount to an "amendment of the Contract" but rather an amendment of a condition. Counsel further argued that the Exh P26 (2) was valid because the bicycles had to be inspected in Kampala and taxes paid in Kampala and that according to the Contract Exh P13 (2) the place of delivery was the respective villages and parishes.

Resolution:

In order to find if a crime was committed this Court must first identify the Elements of the Offence of Abuse of Office c/s 11(1) of the ACA.

In **Mugisha Gregory High Court Criminal Case No.150 of 2010 (Anti Corruption Division)**⁶¹, a case the Defence constantly referred to, the elements that constitute the offence of Abuse of Office c/s 11(1) of the ACA were spelt out as follows:

1. The Accused was employed in a public office or in a company in which government has shares
2. The Accused did or directed to be done an arbitrary act

⁶¹ The Case of Uganda v Eng Bagonza High Court (Anti Corruption Div) Criminal Session Case No. 9 of 2009 which was referred to by Lead Counsel for the Defence and distinguished.

3. The act was prejudicial to his employer
4. Accused committed the act in abuse of the authority of his office

I found the last argument by the prosecution contradictory and redundant. The Prosecution failed to make the argument whether the alteration of a General Condition of a Contract was a fundamental alteration of the Contract or simply a variation which did not go to the root of the contract. If indeed the Prosecution did not find that a change in a general condition was a major change in the contract then why would the sanction of the Contract's Committee be required? Further but related to the foregoing; why would failure to refer the alteration to the Contracts Committee be an indictable offence?

The Defence put up by Accused No.1 on this issue was quite robust. DW₁ stated that no Abuse of Office resulted from the change in the Final Destination because the decision was made by people who had the power to make that kind of decision and who were doing so by virtue of their offices. He further stated that since the Treasury advised that taxes had to be paid, the Ministry of Local Government had no choice but to change the delivery points to Kampala to enable the payment of taxes. I accept this defence.

The accused refuted the allegation that he had altered the final destination. He pleaded an alibi. A₁ stated that he was far away in Beijing China when that decision was taken. DW₅ confirmed A₁'s account. The Prosecution failed to rebut the Alibi put up by A₁.

Regarding Count No.2 I beg to differ from the advice of the gentleman assessor. His verdict was that of guilt. I find otherwise. I find that in Count No. 2 the Prosecution did not prove beyond reasonable doubt that A1 and A2 acted in any arbitrary manner or that indeed the two were responsible for the change of the Final Destination in the Contract. This Court found that the persons who made the alteration to the final destination did not do so in abuse of their offices. Count No.2 has therefore not been proved beyond reasonable doubt. I accordingly acquit Accused No.1 and No.2 on this Count.

In the Count No.3 of Abuse of Office c/s 11(1) of the ACA, it was alleged that A1 and A4, being employed by the Ministry of Local Government as PS and Assistant Commissioner Policy and Planning respectively, in abuse of the authority of their offices, did an arbitrary act to the prejudice of their employer to wit: they signed a final contract with amended terms of adjusted payment to forty percent on presentation of shipping documents instead of full payment on delivery as had been approved by the contracts committee.

Regarding the issue whether the two accused were public officers, it was never contested and was indeed agreed under s.66 of the TIA that A1 Kashaka being a Permanent Secretary and A2 being the Principal Accountant of MOLG were no doubt public servants within the meaning of s.11 (1) of the Anti Corruption Act.

The Ministry of Local Government is a Public Office within the meaning of Section 2 of the Anti Corruption Act 2009 and therefore a Permanent Secretary and An Assistant Commissioner who are senior Public Servants are public officials employed in a Public Office. This was an agreed fact.

Did A1 and A4 do an Arbitrary Act?

The Prosecution alleged that in abuse of their offices the two accused persons did an arbitrary act to the prejudice of their employer to wit: they signed a final contract with amended terms in which they adjusted payment to forty percent on presentation of shipping documents instead of full payment on delivery as had been approved by the contracts committee.

Submission of Defence Counsel:

Learned Defence Counsel submitted that there was no irregularity with the terms of contract which allowed a forty percent payment on presentation of shipping documents. He further submitted that the initial contract agreed to by the contract's committee had a condition which stated that full payment would be made on delivery of the seventy thousand bicycles. Both counsel for both

accused persons argued that there was nothing arbitrary about the two accused signing the contracts because it was A1's mandate as the Permanent Secretary to sign on behalf of the Government of Uganda and it was equally so when A4 whose office was the user department was asked to witness the contract. He therefore contended that it was not arbitrary of him to sign as a witness.

Submissions by the Learned Principal State Attorney

The learned State Attorney Mario Acio submitted that the terms of the contract approved by the contract's committee were breached when A1 and A4 did not abide by the stipulated terms which provided for full payment on delivery. Counsel added that the terms were altered without approval of the contract's committee which alteration was a fundamental breach of the contract.

Resolution:

In resolving Count No. 3 I found the evidence of PW3 and PW4 essential. The two witnesses laid down in detail the procedure by which a contract was arrived at. PW4 Ssendawula testified that once it was agreed that bidding must commence the Head of the PDU drew up the initial contract whose terms the Contract's Committee

had the duty review and accept or decline. In the instant case, the Contract's Committee accepted the draft contract.

PW₃ stated that the Special Conditions in paragraph 16.1 of the final contract Exh P7 (2) indicated that the structure of payment was to be by an irrevocable letter of credit allowing access to 40% of the funds upon presentation of shipping documents and the 60% was to be paid upon delivery and acceptance. Mr. Suuza, PW₃ testified that they regularly handle such contracts where payment is by letters of credit. Mr. Suuza explained that payment by letter of credit was an old and legitimate time tested method of payment but that if parties agree to it, then the Directorate would have no reason to object to it. PW₃, Mr. Suuza testified that it would not have been wrong for the Permanent Secretary to pay the 40% upon receipt of bills. He confirmed that the 40% payment did not require the physical goods to have arrived in Uganda.

Asked whether they made recommendations as to mode of payment, Ssendawula PW₄ testified that that recommendation was what was originally contained in the solicitation documents. And in this particular case, PW₄ reluctantly, testified that the contracts committee recommended the payment terms⁶².

⁶² See Dr John Mudusu v Uganda Criminal Appeal No. 67 of 1999 where it was found that normal procedure was followed. See also Uganda v Francis Atugonza High Court (Anti Corruption) Criminal Case No. 37 of 2010 where it was held that any action, decision or rule not seeming to be based on reason, system or plan may be considered arbitrary.

Verdict: The Gentleman assessor advised that I find each of A₁ and A₄ guilty as charged in Count No. 3. I have carefully considered the evidence adduced by the prosecution regarding count No. 3 and count no. 4. I have not found any reason to believe that the conduct of the two accused persons in as far as signing of the contract was extraneous, impulsive or out of order. A₁ and A₄'s role in as far as the making and signing of the Contract was concerned was work of a routine nature. Consequently the Prosecution has failed to prove the offence of Abuse of Office contrary to S₁₁ (1) ACA beyond reasonable doubt. I therefore find the two accused A₁ and A₄ not guilty in count No. 3 and acquit them according.

In the Count No.4, A₁ and A₄ were once again charged with the offence of Abuse of Office c/s 11(1) of the Anti-Corruption Act, where it was alleged that in the abuse of the authority of their respective offices, the two signed Addendum 1 the contract in which the delivery period was extended by one month without reference to the contracts committee as required by law and procedure. Again the two accused persons pleaded not guilty to this count.

I carefully considered the evidence for the prosecution and the defences offered by both accused. I found A₁'s Defence compelling on this matter. While there is no doubt that A₁'s overzealousness to have the bicycles delivered at all costs was an unmitigated disaster, his unrestrained appetite to deliver was outmatched by the equally unrestricted technical officers out to make a kill. Unfortunately for A₁ he solely depended on his technical officers for guidance and

advise . Nothing good could come from advice of one such as A4. It is on the record that when Rajasekaran showed up at the MOLG, well after the contract term had run out, A1 chased him away. I found the fact that A1 refused to see Rajasekaran a curious fact. The inference drawn was that there was no relationship between A1 and this fraudster who had passed off as an Investor capable of delivering huge supplies. On the other hand, it was A4 who openly flirted with Rajasekaran and having agreed on a strategy, returned to confuse A1 with what he termed a solution. It was clear at this point that AITEL did not have the financial muscle to perform on the contract for the supply of seventy thousand bicycles. A4 had been Chairman of the Evaluation Committee that found AITEL the Best Evaluated Bidder despite the fact that AITEL was only two months old at the time of contract award. A4 had equally been the Contract Manager and it is clear he did not take any steps to save Government from the financial haemorrhage but instead by his actions and/or inactions aided an unknown foreign company to fleece his mother country - Uganda. I have reason to believe that A1 was surrounded by persons who were hell bent to profit from the contract for the supply of seventy thousand bicycles. I find A1 not guilty of Abuse of Office in Count No. 4. However, given his special technical knowledge, his unique positioning as Chairman of the Evaluation Committee and Contract Manager following the unfortunate the demise of Engineer Kakiza, A4 cannot feign ignorance of the need to have red flagged the expiry of the contract

term before the Contract's committee. I further find that A4 appeared to have a relationship with the fraudsters and had an opportunity to save the government money when he talked to them in his office. He could even have ordered their arrest. He instead advised that the time for their contract be extended informally. I find A4 guilty of the offence of Negligence of Duty c/s 114 (1) of the PCA and convict him accordingly.

In Count No. 5, it was alleged that A3, being employed by the Ministry of Local Government as the Principal Procurement Officer and Head of Procurement Unit, in abuse of the authority of his office signed Addendum O to the solicitation documents for the procurement of 70,000 bicycles in which he advised bidders to ignore technical specifications and reduced the bid security to three hundred million without reference to the Contracts Committee as required by law and procedure.

The Prosecution relied on Exh P45 which was Addendum O. Addendum O was made on 15th September 2010 and signed by A3, Robert Tumwebaze. He advised that the bidders ignore technical specification No.1 which was that the bicycles be of Indian Standard and he reduced the bid security from Five Hundred Million to Three Hundred Million Uganda Shillings. A3 in his Defence told this Court that his officer who had not attended the Contracts Committee meeting was the one who drafted Addendum O. Mr. Mwebaze however, stated that that Addendum was not issued because the bidders had already been informed. DW3 remarked

that the Addendum was numbered Addendum 1 and not O and he did not know how it became O.

Mr Mwebaze further stated in his Defence that the Contracts Committee made changes to the effect that the bicycles were supposed to be of international standard and the bid security was lowered to three hundred million Uganda Shillings. DW₃ further testified that the bidders who had already taken the documents were called and the changes were clarified to them. He added that the changes were made to clear the mistake about Origin and the level of bid security.

Having carefully evaluated presented before me, I find that A₃ Mr Robert Mwebaze's actions with regard to drafting of Addendum 1 were not arbitrary and the facts outlined above did not disclose the offence of Abuse of Office c/s 11 (1) of the ACA and acquit him accordingly.

The Prosecution preferred countless charges for each and every incident that occurred during the procurement of the seventy thousand bicycles⁶³. While indeed the State would like to show indignation for the shoddy and sloppy job performed by the accused persons concerned, it cannot criminalise the every conduct

⁶³ See the case of Guantai v Chief Magistrate EA 2007 at 177 where it was held that "Again we do not agree...that every breach of the regulations (PPDA sic) amount to an abuse of office punishable under the Penal Code.

of public office. If public officers in the course of their work give the form of poor advisory services such as was dished out by Mr. Suuza, the Principal State Attorney of the Ministry of Justice offered or if the only Government Bank, Bank of Uganda, chooses to turn a blind eye on questionable documents, then the conduct of such public servants should not be criminalised unnecessarily.

In Count No. 6 A₃ was indicted for the offence of Abuse of office c/s 11(1) of the Anti-Corruption Act. It was alleged that A₃ drafted the final contract with amended terms of payment to 40% on presentation of shipping documents instead of full payment on delivery as had been approved by the contracts committee in the solicitation documents. The particulars of this count constitute an integral part of evidence adduced before me and for reasons stated above, I acquit A₃ in Count No 6.

In Count No. 7, A₃ was indicted for the offence of Neglect of Duty c/s 114(1) of the Penal Code Act, where it was alleged that he neglected to perform his duty of submitting the final contract for the procurement of 70,000 bicycles to the contracts committee for approval as required by law and procedure. A₃ pleaded not guilty to that count as well.

The particulars of this count should not have constituted a stand-alone count but rather facts to support count 9. For reasons stated above, I acquit A₃ in Count No 7

In Count No. 8, A₃ was once more indicted for neglect of duty c/s 114(1) of the Penal Code Act, where it was alleged that he as Principal Procurement Officer and Head of the Procurement Unit, neglected to perform his duties of holding a pre bid meeting during the solicitation of bidders for the procurement of 70,000 bicycles.

The particulars of this count should not have constituted a stand-alone count but rather facts to support count 9. For reasons stated above, I acquit A₃ in Count No 8.

In Count 9, A₄, A₅, A₆ and A₃ being persons appointed as Chairman, Secretary and members respectively of the evaluation committee for the procurement of 70,000 bicycles, in abuse of their offices did an arbitrary act to wit: they recommended as compliant M/S AITEL's bid as having met the minimum capacity and past experience requirements of having supplied 70,000 bicycles as a single lot as stated in the solicitation document whereas not. **A₄, A₃, A₆ and A₅** all pleaded not guilty to the charge of Abuse of Office c/s 11(1) of the Anti-Corruption Act.

Learned Defence Counsel Submission

Learned Defence Counsel for A₅ who by agreement led the submission for the Defence Team chose to argue counts **9,10** and **11**

together since the charges were all relating to the offence of Abuse of Office c/s 11 (1) of the ACA . He then argued the Count of Neglect of Duty c/s 114 of the PCA separately.

Counsel for A5 commenced by submitting that A5 was not an employee of a public body because he was not an employee of MOLG. He contended that the relationship between A5 and the MOLG and indeed Uganda Government was that of client and consultant. Further that his was not a contract of service but rather a Contract for services. Counsel invited Court to examine Exh P15 of his employment contract which stipulated his responsibility and performance.

Counsel further stated that Counts No. 9, 10 and 11 should be taken together. He further submitted, and quite rightly so in my view, that this case is hinged upon the law of procurement, its procedure and processes.

It was the learned Defence Counsel's submission that the three Counts of Abuse of Office are based on a misconception by the Prosecution about the roles, duties and functions of an evaluation Committee under the PPDA Act.

Referring to Section 71 (2)⁶⁴ of the PPDA Act Defence Counsel submitted that the law requires that all solicitation documents shall

⁶⁴ Regulation 45 PPDA Regulations: All procurement and disposal shall be conducted in a manner which promotes transparency, accountability and fairness. Regulation 71(1) states that The Choice of the evaluation methodology shall be determined by the type, value and complexity of the procurement or disposal. R.71(3) No evaluation procedure other than that stated in the bidding documents shall be taken into account. R.149 (1) A procuring and disposing entity may hold pre-bid meetings to allow potential bidders to seek clarification or access project sites

fully and comprehensively detail the evaluation methodology and criteria.

Learned Defence Counsel further submitted that the Evaluation Committee strictly complied with regulation 168(1, 2), regulation 171 (b) and 172 which provide that the bidding documents must provide the evaluation criteria. Counsel referred to stages of evaluation. These included the preliminary examination to determine eligibility and administrative compliance and then the more detailed evaluation to determine commercial and technical responsiveness, the making of commercial comparisons in which the award of the contract goes to the lowest priced bid that is compliant and responsive. Counsel referred to the PPDA Regulations which allow for an association, a joint venture or consortium to make bids. Counsel offered that in this particular bid it was clear that there was a joint venture in which Amman Impex was the Lead Partner. Counsel argued the solicitation did not require that a Joint venture or Formal Intent thereof be proved. His submission was that had the prosecution fully appreciated these regulations no charges would have been preferred against A3, A4, A5 and A6.

where applicable. **See In the Matter of An Application for an order of Certiorari Gustro Ltd/ Oxford University Press v The Public Procurement and Disposal of Assets Authority (PPDA) Miscellaneous Application No.21 of 2004** where Kiryabwire J as he then was stated that a review of a bid does not expressly provide for a pre-bid conference . It is not clear therefore from a procurement point of view what value to place on such a conference if were held. Lack of bright lines on important requirements means that any doubt of their existence must be decided in favour of the accused persons.

Based on the above regulations and on the bid document in Exh P 8(2)⁶⁵ there was a power of attorney and a cover letter which ostensibly referred to a joint venture between AITEL and Amman Impex. He argued that AITEL had proved that there was evidence of a Joint Venture agreement.

Regarding the evaluation methodology, it was the Defence case that the evaluation methodology and criteria was followed meticulously. Counsel further addressed himself to the evaluation process in which it was stated that in evaluating a bid substantial responsiveness would be considered a pass.

Additionally Counsel submitted that previous experience of supply of 70,000 bicycles in one single lot was considered a pass. He argued that there was evidence that Amman Impex had not only supplied 90,000 but that it had ever supplied Sixty Five Thousand 65,000 bicycles in one single lot⁶⁶. Counsel argued that Amman Impex had proved compliance and substantial responsiveness by 93%. Counsel contended that AITEL was the best most eligible because besides being 93% compliant AITEL was found to be the lowest bidder.

⁶⁵ Exhibit P8 was the Bid submitted by AITEL for the supply of seventy thousand bicycles to the MOLG. A letter dated 25th October 2010 authored by one Rajasekaran Arjunan as Director Amman Impex to the Head PDU MOLG was headed RE: Joint Venture with Amman Industrial Tools and Equipment Ltd in Supply of Seventy Thousand Bicycles Procurement Reference Number MOLG/upplies/010-011/0014 where he purported to say Amman Impex was in a Joint Venture with AITEL and further that Amman Impex was the Lead Partner.

⁶⁶ See Exh P8 Amman Impex of Corporation Building 6th Floor, Corporation B Building Coimbatore, Nadu India, Past Experience table proof that they supplied the Commissioner of Coimbatore Sixty Five Thousand Bicycles in March 2010

Counsel argued that it was for that reason that AITEL was considered the best evaluated bidder.

The payment method adopted by parties was a source of much contention. Counsel was quick to note that that evaluation process does not provide payment method as criteria for evaluation. Further counsel submitted that payments do not feature in the evaluation process. These he argued are agreed upon by the contracts committee before and after the evaluation committee sittings.

Submission by Learned Principal and State Attorneys

The case of the State was that whereas the evaluation committee found Ms AITEL was compliant and whereas MS AITEL's bid was found to have met the minimum capacity and past experience requirements to supply Seventy Thousand bicycles in one Single lot, this was not the case. The Prosecution relied on the evidence of PW8, Uthman Ismail Segawa, a Legal Officer in PPDA whose evidence was that the evaluation Committee did not adhere to the evaluation criteria that was in the solicitation documents which stated that the capacity of the bidder was to be one who had experience of procuring seventy thousand bicycles in one single lot (obviously not seven hundred bicycles in one single lot as stipulated in the submissions for the state). PW8 further stated that the Evaluation Committee did not exercise due diligence while evaluating the bidder or bidders. Ssegawa (PW8) added that he found out that AITEL was only five days old when he entered the

bid, This Court noted that he was as a matter of fact only a few days old when AITEL purported to enter the bid by allegedly paying a bidding fee. The witness testified that it was Amman Impex which had in the past supplied sixty five thousand as a single lot. He referred to Exh P₄₃ (2) the PPDA Investigation Report.

The Prosecution relied on Exh P₈ (2) which was evidence to prove that it was Amman Impex not AITEL which had past capacity experience for supply of sixty five thousand bicycles. The prosecution invited this Court to take as admissions the defences of DW₃ (A₃) and DW₄ (A₄) when they accepted that AITEL did not have the minimum experience or past capacity for the supply of seventy thousand bicycles as a single lot. It was the evidence of A₃ and indeed of A₄ that AITEL and Amman Impex were procuring as a joint venture⁶⁷.

Learned State Attorney Marion Acio stated that Exp P₈ (2) the Bid Submission was evidence that only AITEL entered this bid. She further submitted that there was nothing to show that Aman Impex was involved in the bidding process, save for their name being mentioned casually. It was the submission of the learned state Attorney that Evaluation is the heart of procurement.

⁶⁷ Regulation 35 (2) Where a bidder submits a bid as part of a joint venture, consortium or association the solicitation or contract document shall state where appropriate:(c) that a copy of the joint venture or proposed agreement may be required to be submitted as part of the bid or as a condition of contract effectiveness.

It was the submission of the State that the evaluation Committee should have disqualified Aman Industrial Tool Limited (AITEL) once they realised that AITEL had no minimum past experience.

Findings:

In Count No. 9 this Court finds that Evaluation Committee consisted of :

1. Sam Emorut Erongot (A4) as Chairperson⁶⁸
2. Robert Mwebaze (A3) as Head PDU and Secretary
3. Adam B Aluma (A6) as Member
4. Timothy Musherure (A5) as Specialist Consultant Procurement
5. Engineer Kakiza Contract Manager, now deceased.

It was not disputed that other than A5, Timothy Musherure, the rest of the accused persons were public servants in the GOU under the MOLG serving as Principal Procurement Officer and Head of PDU (A3), Assistant Commissioner Planning (A4) and Adam Bond Aluma A6 was an official of the Ministry and member of the Evaluation Committee.

The sticking issue was whether A5 is a person employed in a public body within the meaning of Section 11 (1) of the ACA?

⁶⁸ Sam Emorut Erongot (A4) was Chairperson Evaluation Committee he later was given the added role of the Contract Manager after the death of Engineer Kakiza

Section 1 which is the interpretation section of the Anti Corruption Act defines a Public Body inter alia as including

- a. “The Government, any department, services or undertaking of the Government”

The interpretation section defines what a public body is but does not define who a public officer is. There is no doubt that a department of government is defined as a public body. A public body is defined in s.2 of the Penal Code as having the meaning assigned to it under section 1 of the Prevention of Corruption Act (1970). The Prevention of Corruption Act was repealed and replaced by the Anti Corruption Act (2009) and its definition of what a public body is, in section 1, includes among many others, the government and its departments. The Ministry of Local Government is therefore a Public Body within the meaning of section 114 (1) of the PCA this being the meaning assigned to it under section 1 of the Anti Corruption Act.

While indeed the section does not interpret who a public officer is this Court is directed by section 11(1) of the ACA to find whether or not this particular officer was an employee. Is a Consultant an employee? The ability to correctly identify people engaged to provide goods or services as either employees or independent consultants is crucial in determining their legal relationships. Determining the correct employment relationship is often an ambiguous and contentious task.

A good place to start is in finding definitions of the terms "employee" and "independent consultant" as this may provide a helpful context within which to make the correct decision. An employee is an individual who performs services that are subject to the will, direction and control of an employer.⁶⁹ He/she is directed on both what must be done and how it must be done. The employer can allow the employee considerable discretion and freedom of action, so long as the employer has the legal right to control both the method and the result of the services.

I have carefully considered Exh P15(1) which is the first appointment contract Timothy Musherure entered with the Ministry of Local Government as Procurement Specialist on 10th October 2003. This Contract was signed by Mr. Ssekkono the then PS of MOLG on behalf of Government. It stated that Timothy Musherure's appointment would be subject to the Public Service Standing Orders and Administrative Instructions issued from time to time. The first Contract was a one year Contract.

While Mr Musherure's engagement with government started in 2003 and appears to have continued unabated this Court finds that his initial contract as a procurement specialist did not indicate anywhere that he was a consultant. Additionally, it made him

⁶⁹ See Charles J Muhl(2002), 2 Monthly Labour Review Journal found at <http://www.bls.gov/opub/mlr/2002/01/art1full.pdf> last accessed 16th July 2014 Also An employee has a boss, the person he or she reports to and takes direction from, usually a manager or supervisor. The employee has a work station or office in which he or she accomplishes the job.

subject to Public Service Standing Orders. I find that initially Musherure was to all intents and purposes a public officer though he was paid Four thousand Dollars per month, unlike his colleagues like Robert Mwebaze, a Principal Procurement Officer, whose gross annual salary was less than Musherure's monthly pay yet they performed similar roles.

Musherure's subsequent contract in Exh P 15(2,3) was a Consulting Services Contract and was markedly different from his initial appointment. In the latter contract, Musherure was not subject to Public Service Standing Orders neither was he under supervision of the Permanent Secretary. He was simply an independent service provider. On the strength of his final Contract therefore I find that he was not an employee of the MOLG and therefore not an Employee of Uganda Government. The link between a person and the commission of offences under the indictable offences is that he is an employee or a clearly a public officer.

Having found that Musherure's subsequent appointment made him a consultant and did not show that he was directed and employed at the will and pleasure of the Government but rather offered a service for which his duty was to provide reports. I find that due to the nature of his employment, A5 cannot be tried for Abuse of Office in this indictment but rather as a joint offender who aided and abetted the commission of the offence.

This Court found as a fact that on 28th July 2010 Mr. Sam Emorut Erongot, who was Assistant Commissioner Policy and Planning, initiated the procurement process. He was Head of the User Department, Planning Development, MOLG.

It was equally a finding of fact that the Permanent Secretary Appointed a Contracts Committee as required by law.⁷⁰ The Contracts committee nominated and approved the membership of the Evaluation Committee.

Upon receipt of the requisition the PDU prepared solicitation Documents⁷¹ including a Draft Contract, an advert and sent the information back to the Contracts Committee. These were readily approved and the advert attracted bidders.

Whereas the accused persons would like this Court to believe that the process was meticulous to a fault, Exh P18 (2) which is PP Form 30 the Record of Issue of Solicitation Documents (entrance on Fee Payable) did not list AITEL as one of the fourteen Companies that signed for up bid forms by close of day on 9th September 2010.⁷² The

⁷⁰ See Regulation 26 (a) of the PPDA Regulations The Accounting Officer of a procuring and disposing entity shall have overall responsibility ...and in particular shall be responsible for establishing a Contracts Committee in accordance with this Act and in T Section 26(b) The Accounting Officer of a procuring and disposing entity shall have ... responsibility... for appointing the members of the Contract's Committee specified in the Third Schedule of the PPDA Act.

⁷¹ Regulation 3 of the PPDA Regulations solicitation documents means bidding documents or any other documents inviting bidders to participate in procurement or disposal proceedings and includes documents inviting bidders to pre-qualify and standard bidding documents

⁷² Regulation 147 (1) of the PPDA Regulations states that A bid shall be rejected during the preliminary examination of bids if it is received from a bidder who a) it not listed on PP Form 30 or 31 as having bought or obtained the solicitation document directly from the procuring and disposing entity... S.147 (2) Where the bid

defence was that this was a clerical error by a PDU support staff, one Acia. This Court finds that the purported payment of the fees at the URA was an afterthought and a way of sneaking AITEL, or AITEL smuggling its way into the procurement process. When the Defence Lawyers argues that it would have been unfair to exclude AITEL from the process I find the use of the word unfair and the sympathy for AITEL misplaced altogether.

Bidding processes are fraught with corruption, conflict of interest and undue influence. Hence it is important to keep a bidding process above board by strictly complying with rules, regulations and guidelines. It can be inferred that AITEL was corruptly included in the bidding process because regulation 147(1) of the PPDA Rules is very clear. A bid which does not appear on PP Form 30 must be rejected.

The Companies which signed as having received bid documents were the following:

1. SINO AFRICA Medicines and Health
P.O. Box 7321 Kampala
2. Road Master Cycles P.O. Box 1335 Kampala

referred to in sub-regulation 91) is received a procuring and disposing entity shall investigate how the bidder obtained the solicitation documents and shall where appropriate recommend measures against the bidder or a member of staff of the procuring and disposing entity found to be in breach of these regulations or refer the matter to the Authority for investigation.

3. AVIC International Holdings Company
4. Panyahululu Co Ltd
5. TATA (U) Ltd
6. Nile Fishing Co Ltd
7. Maritino Agencies
8. Intercross Agencies
9. Supply Masters (U) Ltd
10. TRAL Ltd
11. EDESHA Enterprises Ltd
12. MMACKS Investments
13. Rendan East Africa
14. Shinyanga Emporium

Needless to mention, Amman Industrial Tools and Equipment (AITELE) was nowhere on the list of the 14 companies which formally picked up bid forms and were entered on the Exh P18 as noted above.

It was equally pretty obvious that AITELE was incorporated after the advertisement for the tender was issued. This was an Open International Bid whose advertisement went out on 9th September 2010. The Company AITELE was incorporated on the 14th of September 2014 (See Incorporation Certificate a folio in Exh P8). The company was only five days old when it entered the bid and about six weeks old when it was evaluated on 1st November 2010 (see Exh P9) and entered as the Best Evaluated Bidder who had minimum capacity past experience for the supply of seventy thousand bicycles worth over Four Million Dollars to Uganda Government. How curious!!

On 1st November 2010 seven companies were evaluated starting with the company with the most competitive (i.e lowest) price bid. The evaluated companies were the following:

1. Amman International Tools and Equipment
2. Maritino Agencies Ltd
3. Intercross Agencies
4. Endesha Enterprises
5. Nile Fishing Co. Ltd
6. MMACKS Investments Ltd
7. Shinyanga Emporium

In its report the Evaluation Committee which consisted of Sam Emurut as Chair, Robert Mwebaze as Secretary, Adam Bond Aluma, Timothy Musherure and Robert Engineer Kakiiza made the following recommendation:

“ On the basis of the evaluation methodology and criteria stated in the Invitation it is recommended that:

1. The best evaluated bid for the procurement of seventy thousand bicycles for chairpersons of parish and village councils is from Ms Amman Industrial Tools and Equipment with a total evaluated price of **Four Million Eight Hundred Ninety Six Thousand Five Hundred United States Dollars USD 4,896,500.”**

The recommendation was signed on the 11th of November 2010 and on the 12th November 2010 the Contracts Committee awarded the contract to M/s Amman Industrial tools and Equipment Ltd. A notice of Best Evaluated Bidder was displayed and removed on 19th November 2011. After the Solicitor General had granted clearance on the 25th November 2010 and the Contract for procurement of seventy thousand bicycles was formally entered on the 26th November 2010.

In view of the above evidence I find that the conduct of the Evaluation Process was flawed from the moment AITEL was smuggled onto the list of eligible bidders. I find that AITEL was only about 6-8 weeks old at the time and did not have any demonstrable experience or capability to deliver on a contract of this magnitude. I further find that the persons who held out as directors of Amman Impex were Rogues and Conmen who should not have been believed without thorough due diligence. I found the alleged due diligence conducted on these companies superficial and meaningless and was not at all intended to be a due diligence but rather was a whitewash passing off as a job well-done. I further find that there was no Joint Venture Contract between AITEL and Amman Impex and any insinuation of the same was an afterthought. Indeed this Court may infer that the person who stealthily shortlisted AITEL knowing that it had been incorporated as a company limited by shares for purposes of entering into this venture did so knowingly and corruptly and that the contract was intended to facilitate a fraud as it did.

I have carefully considered the defences of A3, 4 and 6 and I have pondered several times over the submission of Defence Counsel and the evidence and submissions for the Prosecution. I am convinced and have no doubt in my mind that the evidence adduced provides overwhelming proof that the four accused persons abused each of their offices by the manner in which they processed the bid for the supply of seventy thousand bicycles to village and parish councils. I find that the three accused persons did act arbitrarily in not excluding AITEL from the bid for supply of the seventy thousand bicycles.

I am unable to find Musherure guilty of any of the Public Office offences preferred against the other accused persons since there is no proof that he is an employee of Government. In spite of that, given the level of his involvement, A5 guilty of preparation and abatement of a crime which is a minor offence c/s 52 of the ACA and convict him accordingly.

In Count 10, A4, A3, A6 and A5 were indicted for the offence of Abuse of Office c/s 11(1) of the Anti-Corruption Act, where it was alleged that in the abuse of the authority of the offices as Chairman, Secretary and Members respectively of the evaluation committee for the procurement of 70, 000 bicycles, they recommended M/S AITEL's bid as compliant with payment terms in the solicitation documents for the said procurement whereas not. A4, A3, A6 and A5 pleaded not guilty to the charge.

Having duly applied my mind to the facts, evidence adduced by the prosecution and to the defences of the accused persons. I find Count No. 10 is not fully supported by the evidence on record. The stages of evaluation included the preliminary examination to determine eligibility and administrative compliance and then the more detailed evaluation to determine commercial and technical responsiveness and lastly the making of commercial comparisons in which the award of the contract goes to the lowest priced bid that is compliant and responsive. The criteria for the evaluation of the bids for the supply of seventy thousand bicycles did include price comparisons but did not include an evaluation of the payment terms. I accept the Defences put up by the accused in this regard. Whereas with hindsight a scrutiny of the payment terms of AITEL may have saved this country almost two billion shillings, it was not a criteria for evaluation and therefore the accused persons cannot be accused of evaluating the payment terms when these did not form part of the criteria. Regarding Count 10 I accordingly acquit A14, A3, A5 and A6 of the offence as charged.

In count 11, A4, A3, A5 and A6 were indicted with the offence of abuse of office contrary to section 11(1) of the Anti-Corruption Act. It was alleged that in the abuse of their offices as Chairman, Secretary and Members of the evaluation committee, they recommended M/S AITEL's bid in which there was no joint venture agreement or a formal intent between M/S AITEL and AMANI IMPEX as stated in the solicitation documents.

I have examined the evidence for the prosecution and carefully considered the defence submissions on this Count. The particulars of this count were that the four accused A₃, A₄, A₅ and A₆ in abuse of their offices did recommend M/S AITEL's bid when there was no joint venture agreement or a formal intent between M/S AITEL and AMANI IMPEX as stated in the solicitation documents. I find that the particulars of this Count form part of the evidence required in Count No.12 and acquit the accused persons of Count No. 11 accordingly.

In the 12th count, A₄, A₃, A₆ and A₅ were indicted for the offence of Neglect of Duty c/s 114(1) of the Penal Code Act, where it was alleged that them being persons appointed by the Ministry of Local Government as Chairman, Secretary and Members respectively of the evaluation committee for the procurement of 70,000 bicycles, neglected to perform their duties by not disqualifying M/S AITEL's bids at the preliminary stages when it did not appear on the PP Form 30 issue of bids Exh P18(2).

The Offence of Negligence of Duty is created by Section 114(1) of the Penal Code Act Cap 120 which states as follows:

- (1) Any person who being employed in a public body or a company in which the Government has shares, neglects to perform any duty which he or she is required to perform by virtue of such employment commits an offence and is liable on conviction to imprisonment for a term not exceeding five years.

- (2) It shall be a defence to a charge under subsection (1) that the discharge of the duty in question was impeded by reasonable cause.

The Offence of Neglect of Duty has its roots in the common tort of Negligence. While negligent acts often attract civil sanctions based on the tort of Negligence, there are a few situations when the wrongs are so egregious that only penal sanctions would assuage the people. This Court has to consider whether this offence was one such offence.

Three accused persons, A3, A4 and A6 remain indicted in Count No.12. I earlier found that the conduct of the Evaluation Process by the Evaluation Committee was flawed from the moment AITEL was rigged into the process as an eligible bidder when it was only five days old. I found that AITEL was only about eight weeks old when it was awarded the tender and did not have any demonstrable experience or capability to deliver on a contract of this magnitude. I further found that the persons who held out as directors of Amman Impex were fraudsters who were let through the cracks of the procurement process due to lack of diligence on the part of our knowledgeable Evaluation Committee. I found that the alleged due diligence conducted on these companies was superficial and meaningless and was not at all intended to be a due diligence but rather a whitewash passing off as a job well-done. I further found that there was no Joint Venture Contract between AITEL and Amman Impex and that any insinuation of the same was an afterthought which is disregarded by this Court. Indeed this Court may infer that the person who stealthily shortlisted AITEL

knowing that it had been incorporated as a company limited by shares for purposes of entering into this venture did so knowingly and corruptly and that the contract was intended to facilitate a fraud and it so did.

I find each of the three accused persons, A3, A4 and A6 guilty of Neglect of Duty c/s 114(1) of the PCA and convict each one accordingly.

I did find earlier that A5 was not an employee of the Government of Uganda and he therefore could not be charged under section 114(1) of the PCA. That notwithstanding, his negligence was in failing in his duty as a consultant to give advice, to counsel, guide and warn against the Government entering a Contract in such a slipshod, imprudent and injudicious manner having little or no regard for the sums of tax payers' money involved. By in counsel sitting with the other accused persons and watching them carry out a dubious procurement A5 failed to prevent the commission of a series of felonies. The offence of Neglect to prevent a felony is committed when a person who knowing that another person has designs to commit or is committing a felony fails to use all reasonable means to prevent the commission or completion of a felony. I find A5 guilty of the Offence of Neglect to prevent a felon c/s 389 of the PCA and Convict A5 accordingly.

Catherine Bamugemereire

Judge

15th July 2014

All Six Accused Persons A1, A2, A3, A4, A5, A6 Present

Jane Frances Abodo Principal state Attorney

Assisted by Acio Marion State Attorney

Mr Kato Sekabanja Defence Counsel for A2 holding brief for Counsel for A1

Mr. Richard Mwebembesa Defence Counsel for A3 holding brief for Counsels for A4, 5 and A6

Court: Judgment Delivered in Open Court

My Lord We have no known previous criminal record for all the six convicts. A1 has been found guilty and A2 of Causing Financial Loss. The Maximum Sentence for Causing Financial Loss is

A3 Convicted of Abuse of Office which carries Seven Years

A3 has been found guilty of Negligence which carried 5 years

A4 Abuse of Office and Neglect of Duty which carry seven years maximum or a fine

A5 has been found guilty of Abatement a misdemeanour of two years

Guilty of Neglect 389 of the PCA a felony

A6 was found guilty of Abuse Office of seven years or 168 currency points or both

All the Convicts were senior public servants and were entrusted by MOLG however it is unfortunate that they abused their trust. They has the choice of choosing right or wrong but chose wrong. The amount of money was 1,719,454.54 was paid out to a sham Company. For this there should be a message out to the public that public funds should be handled with a little bit more care and this message can only be sent if stiff sentences are given. We pray for Maximum sentences in all the counts. Sec 46 of the Anti Corruption Act states that if a person is found guilty of abuse of office and Causing Financial Loss they should be disqualified from holding public office A1,2,3,4 and A6. My Lord our prayer is that a maximum sentence is given to all the convicts.

Kato Sekabanja: We require a day or two to prepare.

This matter is adjourned to Thursday 17th of July for the Convicts Allucti.

Bail lapses on Conviction.

Catherine Bamugemereire

Judge

PRE-SENTENCING

17th July 2014

All Six Convicts a.k.a A1, A2, A3, A4, A5, A6 Present in Court

Learned Principal State Attorney Jane Frances Abodo for State

Assisted by Learned State Attorney Marion Acio

Learned Defence Counsels Present:

Convicts Absent

Mohammed Mbabazi for A₁

Kato Sekabanja for A₂ holding brief for Counsel for A₄

Richard Mwebembesa for A₃

Komakech for A₅ and A₆

Mohammed Mbabazi for A₁

A₁ was Convicted of Causing Financial Loss under Section 20 Act 6 of 2009. A Person so convicted is liable to either a term of imprisonment not exceeding years or a fine 336 currency points.

A₁ Pleads for a non custodial sentence of a fine and the reasons are that he is of advanced age of 60 years, it is a mitigating factor.

In your Judgment you stated that the loss was caused by rogues. It was very clear that A₁ was just a victim. Due to his non-participation we pray for leniency.

He had been serving in Public Service since 1978 and his record has been impeccable. His conviction means he will not hold a public office. There is already that sentence under Sec 46 of the ACA. For the Next 10 years he will not be eligible to hold public office. A₁ needs to fend for his big family. Linking 3, 4, 5 we pray for leniency in sentencing. He was a first offender.

There was lack of premeditation in committing the offence.

We pray for a non custodial sentence of a fine.

Convict No. 2

Henry Bamutura A₂ was convicted of Causing financial loss c/s 20 (1) of the ACA. I wish to pray for lenience on the ground of advanced age. He is 56 years old. He has a wife and seven children of school going age as well as ten dependants. He has served Government in same position in four different Ministries. This is the first offence. I submit that it is on record that it was his intervention that loss reduced from 90% to 40%. I would say that goes to show lack of premeditation. I pray he be accorded a fine rather than a custodial sentence.

Convict No. 3

Robert Mwebaze A₃ was convicted of Abuse of Office which attracts imprisonment or fine or both and for neglect of duty contrary to 114(1). We also plead for leniency. He has worked for PS for 15 years and has never been charged or convicted for any offence. He is of good character and since this matter started has shown good behaviour. Has six children and five dependants. A₃ ensured there was a performance bond and government has obtained Judgment in **High Court Civil Suit AG v Niko Insurance** AND Judgment is for USD 489,000 Dollars which Govt has so far recovered. As a result he has been on interdiction and cannot get any entitlement. As a result of s.46 of the ACA he can no longer hold public office for the next ten years. He is now 49 years. This conviction has sufficient punishment which accused has already suffered. He is habitaula to warrant a maxi sentence.

Court has discretion to pass custodial or fine. I pray a lenient sentence is past. I pray for a fine.

For Neglect of Duty the law prescribes a custodial sentence but Sec 108 CAP 120 a person liable to imprisonment may be a fine in addition or instead of a custodial sentence prescribed under sec 114 of the penal code act. The Accused has been punished enough. It is enough punishment. In the premises of the above I pray for a fine.

Kato Sekabanja for Convict No.4

Regarding Sam Emorut Erongot I pray for lenience. He stands convicted on 3 counts 2 of abuse of office and one of neglect of duty. Is a first offender who has worked for Gov for 20 years. Is 50 years has four children all school going and ten elderly Dependants. There is no evidence of premeditation nor that he received any persons gratification or benefit in these unfortunate set of events. He loses his job and personal benefits. In the circumstances, I pray that you afford him a lenient sentence and commit him to a fine in all three counts.

Convict No. 5

Timothy Musherure was convicted on two counts the first being Abatement under s.52 of the ACA and Neglect to Report a Felony under s.389 of the PCA.

He is of advanced age. He is 61 years. He has worked in several departments without any criminal record. Has a family of five. Has 4 Dependants.

In Uganda v Kanshemereire Florence and Nagawa This Court while Exercising leniency gave a fine. The same was in Uganda v Ndyanabo in both cases Court gave a custodial sentence

Convict No. 6

Was convicted of Abuse of Office and Neglect of Duty same as A5. A6 is a very young man only 33 years; this was his first gainful employment. Convicting him here means he will not hold office for ten years. Has a young family so giving him a custodial will scatter young family. This is a first criminal case in his life. No previous record. I pray for the sentence of a fine.

Court: Adjournment of 45 minutes is given for Court to consider each accused person's allocutus and to decide on the most appropriate sentence.

Catherine Bamugemereire

Judge.

Forty Five Minutes Later

SENTENCING

Appearances as Before

Having been found guilty the six accused persons John Muhanguzi Kashaka, A1, Henry Bamutura, A2, Robert Mwebaze, A3, Sam Emorut Erongot, A4,

Timothy Musherure, A5 and Adam Bond Aluma A6 were convicted as follows:

1. In Count No. 1 John Muhanguzi Kashaka, A1, and Henry Bamutura A2, were each Convicted of the Offence of Causing financial loss contrary to s. 20(1) of the Anti Corruption Act 2009. Section
2. In Count No.4 Sam Emorut Erongot was Convicted of Abuse of Office c/s 11(1) of the Anti Corruption Act
3. Similarly in Count No. 9 Robert Mwebaze A3, Sam Emorut Erongot A4, and Adam Aluma, A6 were Convicted for Abuse of Office c/s 11(1) of the ACA while Timothy Musherure, A5 was found guilty and Convicted of Abatement c/s 52 of the Anti Corruption Act 2009
4. Finally in Count No.12 Robert Mwebaze, A3, Sam Erongot Emorut, A4, and Adam Aluma, A6 were convicted Neglect of Duty c/s 114(1) of the Penal Code Act Cap 120. In this Count Timothy Musherure (A5) was found guilty of the lesser offence of Neglect to Report a Felony c/s 389 of the PCA. Section 22 of the Penal Code Act CAP 120 prescribes a general sentence of two years where the specific section does not prescribe the sentence for a demeanour.

I have carefully considered the antecedents of all the A1, A2, A3, A4, A5, and A6 and each person's allocutus. I have taken into account the fact that all the accused persons were first offenders and were remorseful. I further noted that apart from A6, the rest of the accused are of fairly advanced age. I have equally taken into consideration the health and social welfare and social responsibility have in this society. I

am equally cognisant of the need to have rehabilitative, restorative and corrective sentences rather than acting in a retributive manner.

I have considered the meticulous and sophisticated method used in awarding the Contract to a Sham Company going by the names of Amman Industrial tools and Equipment Ltd AITEL which led to of USD 1,719,454.54. The amount of money involved is colossal and led to the deprivation of government funds to other much needed activities. While I agree that A1 and A2 did not seem to have premeditated intentions to jointly cause the loss although they both orchestrated this loss by mindlessly signing away the money, I find that the rest of A3, A4, A5 and A6 acted in a conspiratorial manner in the way they smuggled AITEL into the tendering process.

Bearing all the above in mind I have equally taken a cautious note of the public outcry against corruption, tempering this with the need to act fairly and yet firmly.

The Anti Corruption Act No.6 of 2009 creates offences and acts of corruption which include *inter alia*, Abuse of Office Section 11(1) and Causing Financial Loss under Section 20(1). The selfsame Act equally seeks to punish persons who by their commissions or omissions abet or are involved in a criminal conspiracy to commit an offence under the Anti Corruption Act. A5 belonged to the latter category.

Professors Arnold J Heidenheimer and Michael Johnson (2011)⁷³ stated as follows about corruption in Asiatic countries:

1. Corruption thrives in an environment where opportunities to money and resources abound in abundance, where there is easy access to such funds and resources
2. Corruption flourishes where the probability for detection is low
3. Corruption multiplies where there is low risk of punishment

The above statements are true about corruption in Uganda today.

4. Consequently the Judiciary must wake up, take its mantle and give ear to people's cries. The Judiciary cannot afford to be permissive to high ranking public officials as lenient sentences are a mere slap on the wrist and this attitude only exacerbates corruption

⁷³ Arnold J Heidenheimer and Michael Johnson (2011) *Political Corruption: Concepts and Contexts*: NJ Transaction Publishing, 518

The Verdicts are illustrated as follows:

<u>Convict</u>	<u>Verdict</u>	<u>Sentence</u>
A1. John Kashaka Muhanguzi	1. Count No. 1 Causing Financial Loss Convicted	Sentenced to 10 years and 10 days imprisonment To Jointly Refund together with all the
	2. Count No. 2 Acquitted	five others the USD 1,719,454.58 and make good to the Government of
	3. Count No. 3 Acquitted	Uganda each in equal portions. Section 46 of the ACA states that you
	4. Count No. 4 Acquitted	shall be and are hereby Disqualified from holding Public Office in the Republic of Uganda for ten years
A2. Henry Bamutura	Count No. 1 Convicted	Sentenced to 10 years and 10 days imprisonment To Jointly Refund USD 1,719,454.58 and make good to the Government of Uganda each in equal portions.
A3. Robert Mwebaze	Count No. 5 Acquitted	The Consummate ringleader, I am surprised you were not charged with

	Count No. 6 Acquitted	the more serious offence of Causing Financial Loss. For your Central Role in granting a Contract to a Sham Company and you get:
	Count No. 7 Acquitted	
	Count No. 8 Acquitted	
	Count No. 9 Convicted	Six years Imprisonment in Count No. 9
	Count No. 10 Acquitted	Four Years Imprisonment in Count No. 12
	Count No. 11 Acquitted	
	Count No. 12 Convicted	To Jointly Refund together with all the five others the USD 1,719,454.58 Dollars lost by Government. Section 46 of the ACA states that you shall be and are hereby Disqualified from holding Public Office in the Republic of Uganda for ten years
A4. Emorut Erongot	Count No.3 Acquitted	As Chairman of the Evaluation Committee you played a pivotal role in awarding the Contract for Supply of Seventy Thousand Bicycles to Rogues. You were no doubt the go between the fraudsters and the Government side. One of the ringleaders in this scam.
	Count No. 4 Convicted	For that you get
	Count No. 10 Acquitted	3 years imprisonment in Count No. 4
	Count No. 11 Acquitted	6 Years Imprisonment in Count No. 9
	Count No. 9 Convicted	4 Years Imprisonment in Count No. 12
	Count No. 12 Convicted	To Jointly Refund together with all the five others the USD 1,719,454.58 and make good to the Government of

		Uganda each in equal portions.
		Section 46 of the ACA states that you shall be and are hereby Disqualified from holding Public Office in the Republic of Uganda for ten years
A5. Timothy Musherure	Count No. 9 Convicted of Neglect to Report	Instead of dutifully warning and giving guidance to the errant Evaluation Team, You became a principal offender and a ringleader and master mind
	Count No. 10 Acquitted	Twenty Months in Count No. 9
	Count No. 11 Acquitted	Twenty Months in Count No. 12
	Count No. 12 Convicted of Abatement	To Jointly Refund together with all the five others the USD 1,719,454.58 and make good to the Government of Uganda each in equal portions.
		As a Convicted Felon You are barred from seeking employing with the Government of Uganda or Consulting with the Government of Uganda for ten years
A6. Adam Bond Aluma	Count No. 9 Convicted	Professor Glanville Williams is quoted to have stated that Some people are born Feckless...remiss, mindless, and irresponsible... ⁷⁴
	Count No. 10 Acquitted	
	Count No. 11 Acquitted	
	Count No. 12 Convicted	Your role as proven by the evidence was that you were a water cabbage

⁷⁴ Glanville Williams (1967) Criminal Law: The General Act ... The reason criminal negligence is in place is to compel people to stop and think before they Act.

which flowed wherever three the ringleaders took you. You are so criminally feckless, Negligent, and irresponsible that you do not deserve mercy. For the above reasons you shall be sentenced as follows:

1 year in Count No. 9

Nine Months in Count No. 12

To Jointly Refund together with all the five others the **USD 1,719,454.58** and make good to the Government of Uganda each in equal portions.

Section 46 of the ACA states that you shall be and are hereby Disqualified from holding Public Office in the Republic of Uganda for ten years

Criminal offending is personal and the purpose for the above sentences is not to punish the offenders for the past or future offences of others but rather to castigate each offender's immediate wrong and to make an example of one thing. That Corruption with all its many faces is a risky business and you commit acts of corruption at your peril and to your own detriment.

Right of Appeal Explained. All the Convicted Persons have a right to Appeal Against both the Convictions and Sentence.

Persons of like mind out there stand warned.

Catherine Bamugemereire
Judge
17 July 2014

