

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**An Analysis of the Anti-Corruption Division of the High Court of
Uganda**

**Thesis submitted in the partial fulfilment of the requirements of
the LLM degree**



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Table of Contents

Declaration	iv
Acknowledgments	v
List of Acronyms and Abbreviations	vi
Key Words.....	viii
Chapter One.....	1
Introductory Remarks.....	1
1.1 Background of the Study	1
1.2 Objectives of the Study	3
1.3 Scope of the Research.....	3
1.4 Research Question	4
1.5 Adjudicating Corruption	4
1.6 Structure of the Paper.....	5
Chapter Two.....	6
History of the Anti-Corruption Court.....	6
2.1 Introduction	6
2.2 Post-Independence Crisis in Uganda.....	6
2.3 NRM and Political Change	8
2.4 Reforms of the 1990s.....	9
2.4.1 Economic Reforms	10
2.4.3 Shift in Corruption.....	10
2.5 Social and Legal Reforms.....	11
2.5.1 The 1995 Constitution	11
2.5.2 Adoption of UNCAC and the AU Convention.....	13
2.5.3 The Anti-Corruption Act.....	14
2.6 Role of the Media	14
2.6.1 Criminal Division of the High Court	15
2.6.2 Need for Specialisation	16
2.7 Creation of the Anti-Corruption Court.....	16
2.8 Conclusion	18

Chapter Three	19
Institutional Resources of the Anti-Corruption Court.....	19
3.1 Introduction	19
3.2 Uganda’s Judicial Structure	19
3.3 The Anti-Corruption Division.....	21
3.3.1 Jurisdiction of the ACD.....	21
3.3.2 Composition of the ACD.....	24
3.4 The High Court of the ACD	24
3.4.1 Role of the Judge.....	25
3.4.2 Court Registry	26
3.4.3 Staff Members of the ACD	27
3.5 The Magistrates’ Court of the ACD	28
3.5.1 Jurisdiction of the Magistrates’ Court	28
3.5.2 Role of the Magistrates’ Court.....	30
3.6 Other Role Players.....	30
3.6.1 The Prosecution	30
3.6.2 The Defence	31
3.6.3 Plea Bargaining.....	31
3.6.4 Funding the Court	32
3.7 Conclusion	32
Chapter Four	34
Adjudicating Corruption	34
4.1 Introduction	34
4.2 Corruption in Uganda.....	34
4.2.1 <i>Uganda v Teddy Szezi Cheeye</i>	36
4.2.2 <i>Flight Captain George Michael Mukula v Uganda</i>	37
4.2.3 <i>Uganda v Professor Gilbert B Bukenya</i>	37
4.2.4 <i>Uganda v Geoffrey Kazinda</i>	38
4.2.5 <i>Uganda v Engineer Lugya Godfrey and Another</i>	39
4.2.6 <i>Balikowa Nixon v Uganda</i>	40
4.3 Procedural Flaws in the Adjudication of Corruption in Uganda	40
4.4 Investigations and Prosecutions	41

4.5	Traditional Evidential Requirements.....	42
4.6	The ACD and White-Collar Crime	44
4.7	Impact of the ACD Judgments.....	45
4.8	Conclusion	47
Chapter Five		49
Concluding Remarks and Recommendations.....		49
5.1	Introduction	49
5.2	Closing Comments.....	50
5.3	Recommendations	51
5.3.1	Witness Protection.....	51
5.3.2	Conducting Research	52
5.3.3	Capacitating Court Staff	53
5.3.4	Public Participation	53
5.3.5	Burden of Proof.....	54
BIBLIOGRAPHY		55



Declaration

I, **Brenda Nanyunja**, declare that **An Analysis of the Anti-Corruption Division of the High Court of Uganda** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:

Date:

Supervisor: Professor RA Koen



Signature:

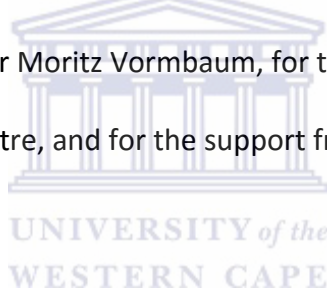
Date:

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To the DAAD class of 2015, for your friendship.

And lastly to Berlin and Cape Town, always.

List of Acronyms and Abbreviations

ACA	Anti-Corruption Act
ACC	Anti-Corruption Court
ACD	Anti-Corruption Division
AMLA	Anti-Money Laundering Act
AU Convention	African Union Convention on Preventing and Combating Corruption
CHOGM	the Commonwealth Heads of Government Meeting
CIID	Criminal Investigations and Intelligence Directorate
DPP	Director/Directorate of Public Prosecution
FIA	Financial Institutions Act
G I	Grade One magistrate
G II	Grade Two magistrate
GAVI	Global Alliance Vaccines and Immunisation
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
ICD	International Crimes Division
IG	Inspectorate of Government
IGG	Inspector General of Government
IMF	International Monetary Fund
IT/ICT	Information Technology/ Information and Communication Technology
JLOS	Justice Law and Order Sector
MCA	Magistrates' Courts Act
NGBS	National Governance Baseline Survey
NGO	Non-Governmental Organisation
NRM	National Resistance Movement
OECD	Organisation for Economic Co-operation and Development
OPM	Office of the Prime Minister
PCA	Penal Code Act
TI	Transparency International
TIA	Trial on Indictments Act

UBC	Uganda Broadcasting Corporation
UBOS	Uganda Bureau of Statistics
UNCAC	United Nations Convention against Corruption
ULII	Uganda Legal Information Institute
USAID	United States Agency for International Development
WB	World Bank
WPA	Whistleblowers Protection Act



Key Words

Adjudication

Anti-Corruption Division

Burden of Proof

Constitution

Court

Criminal Procedure

Evidence

Political Corruption

Political Will

Prosecution

Grand Corruption

Petty Corruption

Uganda



Chapter One

Introductory Remarks

1.1 Background of the Study

“The Anti-Corruption Court: Where the rich meet justice”, was the headline of the *Daily Monitor*, one of Uganda’s mainstream newspapers, on 7 February 2013.¹ This was a release shortly after Captain Mike Mukula was sentenced to a four-year jail term by the Chief Magistrate of the Anti-Corruption Court. On the judgment day, Mukula’s supporters camped at the court’s premises, chanting in support of their leader. One could have mistaken the situation for the return of a hero. Focus was shifted from the real matter that led Mukula to court – corruption – and instead the entire process was blamed on politics.

Corruption is no longer dismissed as “grease for the wheels” as in the past.² Today, corruption and the fight against it top the agenda of international organisations and institutions, especially as regards community development.³ Corruption may be defined as “the abuse or complicity in the abuse of private or public power, office or resources for personal gain”.⁴ The strong opinions against corruption derive from its impact on the economy and human rights. Indeed, corruption has been blamed for most of the world’s problems. Uganda has joined the international fight against corruption through its adoption of the United Nations Convention against Corruption (UNCAC),⁵ and of the African Union Convention on Preventing and Combating Corruption (AU Convention).⁶

The history of Uganda is marred by political turmoil. After independence in 1962, the economy of Uganda transitioned into mismanagement and politics was marked by violations of human rights. Between 1972 and 1986, during the dictatorship of Idi Amin and Obote II, foreign investment in the country all but ceased, resulting in steep economic decline. There was insecurity of both property and person and corruption became a way of life.⁷ The

1 Abimanyi *Daily Monitor* 7 February 2013.

2 Carson (2015) 13.

3 Carson (2015) 14.

4 Chihamo & Shumba (2007) 1.

5 Uganda adopted UNCAC on 9 December 2003 and ratified it on 9 September 2004.

6 Uganda adopted the AU Convention on 18 December 2003 and ratified it on 30 August 2004.

7 Inspector General of Government (2015) 1.

economic and political turmoil left real challenges for the new revolutionary National Resistance Movement (NRM) government which took power in 1986. Among these were the challenges to put the economy back on track, to draw people back into the formal economic sector,⁸ and to re-establish confidence in the rule of law. Each successive regime attempted its own reforms to tackle corruption, but no lasting solution was found due to the weakness of the institutions at the time.

The NRM, headed by Yoweri Kaguta Museveni, took power through a guerrilla war. The five-year war had devastated the economy.⁹ Chaos and corruption were rampant throughout the country, especially in the public sector, which Museveni's government vowed to combat with zero tolerance. Following the adoption of the Ten Point Programme,¹⁰ the Inspectorate of Government (IG) was set up in 1986 as a department in the Office of the Presidency to develop a culture of accountability, transparency, integrity and good governance.¹¹ This was a sign of political will in the struggle against corruption. However, it did not yield much, and corruption in the public sector continued to thrive. What is more, there was no designated body to combat corrupt activities in the private sector, save the Director of Public Prosecution (DPP). The laws against corruption were embedded in the Penal Code Act and the Prevention of Corruption Act, but they were weak in relation to the growing trends of corruption, and hence corruption remained unchecked.

Uganda's membership of the international and regional anti-corruption bodies required domestication of their provisions and recommendations. An Anti-Corruption Bill was tabled before Parliament in 2003. Prior to its enactment in 2009, an Anti-Corruption Division (ACD) of the High Court was created by the judiciary in 2008 to deal with cases under the forthcoming Anti-Corruption Act, as a back-up to the existing provisions on corruption in the Penal Code Act.¹²

The establishment of the ACD came with mixed attitudes. Some people had faith that the court was a sign of judicial intolerance for corruption, while others saw it as a move by the government to fight political opponents or to prosecute poor people as corruption

8 Flanary & Watt (1999) 517.

9 Uganda: The U.S. Library of Congress Report (1990).

10 Point No 7: The U.S Library of Congress (1990).

11 The Inspectorate of Government Report (2010-2014).

12 Nsambu & Bugembe *New Vision* 2 July 2008.

scapegoats. However, the court surprised many. It started off its operations with a grand corruption case, which raised hopes about the future fight against grand corruption, since politicians, as perpetrators of grand corruption, till then had been seen as untouchables.

1.2 Objectives of the Study

As noted above, in 2008 the Ugandan judiciary established the ACD within the High Court of Uganda. Thereafter, in 2009, parliament passed the Anti-Corruption Act that defined and provided for a number of corruption offences. While ACD has done its part over the years, it is viewed by many still as underperforming. In particular, it is accused of focussing on minor offences instead of the major corruption cases that have an impact on the economy.

The purpose of this paper is to assess the work of the ACD. It concentrates on the institutional structure of the court and how it conducts its operations as a specialised division of the High Court. The paper also details some of the decisions of the court and how it arrived at them. It further considers the allegations that the ACD is really a “poor man’s” court, concerned with convicting accused in matters that involve small sums while the prosecution of grand corruption matters tend to end up in acquittals.

1.3 Scope of the Research

It is argued that strong and well-functioning institutions are central to the fight against corruption. These institutions may include accountable organisations, a strong legal framework, an independent judiciary and investigating bodies. Whilst a country contemplates its anti-corruption strategies, these kinds of institutions should be at hand.¹³ For the purpose of this paper, an independent judiciary is a key anti-corruption institution.

The paper considers the establishment of the ACD as part of an independent judiciary in Uganda. It discusses the reasons for its establishment, its structure and institutional resources, and its operations and decisions. In order to make a concrete assessment of the ACD, I shall compare it to the International Crimes Division (ICD) of the High Court. The ICD is chosen because, like the ACD, it is a specialised division of the High Court and started

13 Consultative Group for the Reconstruction and Transformation of Central America (1999).

operations in 2008. Both deal with sophisticated crimes and both have special statutes that enforce offences that are unique to them.

The paper is concerned with grand corruption and petty corruption. Grand corruption, also known as political corruption, is taken to be “any transaction between private and public sector actors through which collective goods are illegitimately converted into private-regarding payoffs”.¹⁴ Grand corruption is distinguished from petty corruption, also known as bureaucratic corruption, which is understood as “the everyday corruption that takes place at the implementation end of politics, where the public officials meet the public”.¹⁵ The people who commit grand corruption are usually high-ranking politicians. However, for the purposes of this research, grand corruption is taken to include embezzlement by any official, regardless of the rank, involving the squandering of large sums of money.

1.4 Research Question

The Anti-Corruption Division of the High Court was established with the sole purpose of fighting graft in the country. The question, therefore, is whether this court, as a specialised arm of the judiciary, has lived up to its obligation to the public, government and the international bodies to fight corruption in Uganda. This question is framed against the background of persistent allegations that the court concentrates on petty offences rather than confronting grand corruption committed by people of power, especially the politicians.

1.5 Adjudicating Corruption

The anti-corruption movement has been documented well. Several authors have addressed the issue of corruption by trying to define what the offence is and understand its causes and effects, while many have proposed ways to address it. The ways of fighting corruption include prevention and criminalisation.¹⁶ However, when it comes to criminalisation, the literature often is limited to investigation and prosecution, with barely any regard being given to adjudication.

14 Byrne (2009), available at <http://elaine.ie/2009/07/31/definitions-and-types-of-corruption/> (accessed on 7 September 2015).

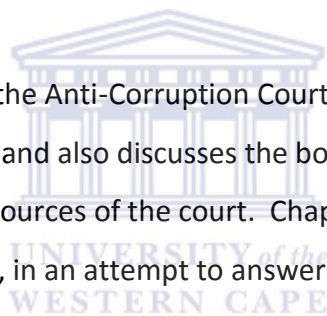
15 Byrne (2009), available at <http://elaine.ie/2009/07/31/definitions-and-types-of-corruption/> (accessed on 7 September 2015).

16 Chapters II & III of UNCAC.

It is significant that there is hardly any literature on the performance of the ACD, as a court adjudicating corruption. Adjudication ought to be highlighted as a vital aspect of combating corruption. If prosecution is to be done, it can be done only in courts of law. If agencies that deal with prosecutions and investigations are equipped with sophisticated skills, courts too should be prepared for the task of adjudication. The leading anti-corruption instruments, such as UNCAC, the AU Convention and the OECD Convention, all make recommendations to check corruption and are very enthusiastic about fighting it, but they ignore, for lack of a better word, the adjudication process. This has produced an imbalance in the anti-corruption movement. The prosecution of corruption will remain problematic unless there are skilled judicial offices to interpret the documents and evidence presented in court.

1.6 Structure of the Paper

Chapter Two gives the history of the Anti-Corruption Court. It provides an in-depth analysis of why the court was established and also discusses the bodies that preceded it. Chapter Three discusses the structural resources of the court. Chapter Four analyses the court's record of adjudicating corruption, in an attempt to answer the research question. Chapter Five concludes the study.



Chapter Two

History of the Anti-Corruption Court

2.1 Introduction

Uganda has a national judicial system which is provided for under the Constitution of 1995.¹ Among the courts of judicature, as constitutionally stipulated, is the High Court with unlimited original jurisdiction in all matters, save for the interpretation of the Constitution which is reserved for the Constitutional Court.²

Traditionally, as in many common law countries, the court system in Uganda was divided into Civil and Criminal Divisions. All criminal cases, ranging from the traditional crimes to white-collar crimes, were handled by the Criminal Division of the High Court. The jurisdiction of the Criminal Division was extensive, and a High Court judge who heard murder and rape cases also would hear cases on fraud and cyber-crime. As part of the reforms of the judicial system, it was fitting to introduce specialist divisions.³

The creation of a specialised Anti-Corruption Division (ACD) of the High Court, commonly known as the Anti-Corruption Court, was a result of demands from the government and civil society upon the judiciary to take drastic action against corruption by strengthening judicial apparatuses.⁴ The judiciary responded by establishing the ACD as part of but separate from the general Criminal Division, which was encumbered with a huge case backlog.

2.2 Post-Independence Crisis in Uganda

Uganda was plagued by a series of corruption scandals in the period immediately after attaining its independence from the British colonial rulers in 1962.⁵ The post-independence era was characterised by strife, especially when it came to changes of power. It was not

1 Chapter IV of the Constitution.

2 Kiryabwire (2009) 349.

3 Kiryabwire (2009) 350.

4 The Judiciary of the Republic of Uganda, available at http://www.judicature.go.ug/data/smenu/19/Anti-Corruption_Division.html (accessed on 10 May 2015).

5 Flanary & Witt (2010) 515.

until 1996 that Uganda had a democratically elected president.⁶ All the previous presidents had usurped power through military coups. With such discord came high levels of poverty, economic breakdown and escalating corruption.⁷ The turbulent situation in the political arena at the time bred weak institutions. Usually corruption has a link to weak institutions,⁸ making it almost impossible to use the one in the fight against the other.

The most alarming era, involving a total collapse of the rule of law, was the reign of Idi Amin Dada. In 1972, Major General Amin overthrew the government of Apollo Milton Obote, and declared himself president for life. As if that was not enough, Amin went ahead and declared himself the supreme law of the land.⁹ During his rule Amin used fear to suppress his political opponents. His cabinet ministers and judicial officers were promised and, many a time, were subject to military discipline.¹⁰ Because of the fear that Amin inspired in people, institutions could not function as expected. He and his close officials were engaged in several corrupt activities, using an appeasement policy to keep a strong hold on military power. In order to consolidate his power, Amin used the national treasury to buy his soldiers luxury goods, ignoring their implication in corruption scandals. Amin's dictatorship strangled democracy¹¹ and gave real meaning to the definition of corruption as "the abuse of public office for private gain".¹²

Amidst all this chaos of impunity, corruption remained a crime. Notwithstanding the abrogation of the Constitution during Amin's regime, the Penal Code Act¹³ and the Prevention of Corruption Act¹⁴ were in operation still. The offences of corruption included in the Penal Code Act were: false claims by public officials; abuse of office; false certificates

6 The Library of Congress Country Studies; CIA World Fact book (1990), available at http://workmall.com/wfb2001/uganda/uganda_history_independence_the_early_years.html (accessed on 18 September 2015).

7 Flanary & Witt (2010) 516.

8 Johnson (2010) 12.

9 The Library of Congress Country Studies (1990), available at http://workmall.com/wfb2001/uganda/uganda_history_military_rule_under_amin.html (accessed on 18 September 2015).

10 The Library of Congress (1990), available at http://workmall.com/wfb2001/uganda/uganda_history_military_rule_under_amin.html (accessed on 18 September 2015).

11 Tangari & Mwenda (2006) 4.

12 The World Bank Group, available at <http://www1.worldbank.org/publicsector/anticorrupt/corrupt/cor02> (accessed on 19 September 2015).

13 Chapter 120, Laws of Uganda.

14 Chapter 121, Laws of Uganda.

by public officers; unauthorised administration of oaths; false assumption of authority; and threatening public officials to obtain a service.¹⁵ The Prevention of Corruption Act was a more detailed enabling statute. Its provisions were wider than those of the Penal Code Act in the sense that they included as corrupt practices gifts given to public officials and their agents.¹⁶ The Prevention of Corruption Act defined corruption but also included penalties and provisions as to what was to happen to the properties of corrupt officials after they had been identified.¹⁷

The political climate changed in 1986 when the National Resistance Army (NRA) of the National Resistance Movement (NRM) under Yoweri Kaguta Museveni came to power and made an attempt to restore the rule of law.¹⁸

2.3 NRM and Political Change

One of the major declared goals for the NRM government was to fight corruption.¹⁹ The new revolutionary president promised to establish democratic rule based on a Ten Point Programme. The Ten Points encompassed organisation of democracy from the village level up; elimination of insecurity; consolidation of national unity; ending foreign interference in Uganda's domestic matters; construction of an independent, integrated and self-sustaining national economy; extending basic social services to the people; elimination of corruption; solving the problems of victims of past government; co-operation with other African countries in the use of resources; and maintaining a mixed economy. Point Seven of the Programme contained an anti-corruption commitment. This was because corruption, particularly in the public service, promoted economic distortion and the government had to attempt to eliminate it in order to solve Uganda's economic problems.²⁰

The Inspectorate of Government (IG) was formed in 1986 on the basis of Point Seven of the Ten Point Programme of the NRM. It was established formally under Statute No 21 of

15 Chapter IX of the Penal Code Act.

16 Section 2 of the Prevention of Corruption Act.

17 Sections 6 & 7 of the Prevention of Corruption Act.

18 Flanary & Watt (2010) 516.

19 Byrnes (1990) 2.

20 Byrnes (1990) 2.

1988.²¹ Headed by the Inspector General of Government (IGG), the IG was a unit in the office of the presidency created to help instil a culture of good governance. Part of its mandate was the elimination of corruption and abuse of office. Putting the IG in the office of the presidency, however, was a disadvantage in itself. It would be working under the executive, with no independence. This was a problem because the major corruption culprits were suspected to be members of the executive, specifically of the cabinet, who would be able to influence the activities of the IG to their own advantage.

The IG's office was merely an anti-corruption agency with no powers to prosecute and convict parties about whom it had gathered incriminating evidence of corruption. It had to refer such matters to the office of the Director of Public Prosecution (DPP), which was mandated to carry out prosecution of all criminal offences.²² At the time, corruption cases, since they were misdemeanours, were dealt with by Magistrates' Courts.²³ The Magistrates' Courts have no specialisation for cases whatsoever. They handle all cases that occur in a localised magisterial area. Only one Magistrates' Court was designated to hear criminal cases, and not specifically corruption. This court, the Buganda Road Magistrates' Court, was located in Kampala. It suffered from a huge case backlog. The Criminal Division of the High Court had jurisdiction to hear all criminal cases,²⁴ including corruption cases. The DPP had a right to file indictments in the High Court,²⁵ but this court too had a backlog since it too handled all forms of crime.²⁶

2.4 Reforms of the 1990s

In 1990s, Uganda's economic landscape underwent rapid change as a result of the government's adoption of privatisation and liberalisation.²⁷ Several other non-economic reforms were introduced also to regulate the development rate and to create an economy

21 Uganda Gazette Supplement (1988) 37.

22 Section 88 of the PCA.

23 Wagona (2004) 133.

24 Kiryabwure (2009) 349.

25 Article 120(3)(b) of the Constitution.

26 Wagona (2004) 134.

27 Kiryabwire (2009) 350.

free of corruption. It was at this time, too, that Uganda received a new Constitution.²⁸ The changes needed to be accommodated in the legal system.

2.4.1 Economic Reforms

The major reforms concerned privatisation and liberalisation. By 1990, Uganda's economy was heavily reliant on foreign aid, to the extent of 50 per cent of its budget and 80 per cent of its development programme.²⁹ This meant that donors had a great impact on the economy. All donor money was paid over to government institutions responsible for the planning and developing the economy. However, large amounts of this money ended up being embezzled and, at times, the government had to overspend to reach the targeted development plans. The donors made recommendations and suggested guidelines to reduce the chances of public corruption by removing state agencies from the running of the economy.³⁰

The economic reforms, which included privatising public property and joining international financial institutions, were meant to control the level of corruption in the public sector and reduce the spending of public resources. By 1990, Uganda had more than 150 parastatals.³¹ These increased the level of spending by government, as well as the concentration of corruption in state-owned institutions. The recommendations pertaining to joining international financial institutions and privatisation were made by donors such as the International Monetary Fund (IMF) and the World Bank (WB) in order to regulate government control of the economy.³² The government responded by selling off parastatals to private ownership.³³

2.4.2 Shift in Corruption

Privatisation caused a shift in corruption from the public to the private sector. The outstanding pointer to this is the fact that former public officials went into the private

28 Constitution of the Republic of Uganda, 1995.

29 Tangari & Mwenda (2006) 104.

30 Tangari & Mwenda (2006) 107.

31 Tangari & Muweda (2001) 118.

32 Tangari & Mwenda (2005) 450.

33 Tangari & Muweda (2001) 118.

sector with sensitive information that would favour them when competing for business with the government. Some of the actors in the private sector also had influence in the public sector, and some of their corrupt activities, such as tax evasion, would lead to loss of revenue for the government. The correlation between the private and public sectors regarding corruption was strong, as each had an impact and influence on the other. Some authors believe that it is important to focus on private corruption, which is growing faster compared to the public sector.³⁴ At the time, the IG had a mandate to fight corruption in the public sector only. Reforms had to be made in the legal framework to capture these new developments and check corruption in the private sector also.

The reforms were adopted in a new law, the Anti-Corruption Act of 2009, which addresses corruption in the private sector. It repealed and replaced the Prevention of Corruption Act while amending the Penal Code Act and the Leadership Code Act.³⁵

2.5 Social and Legal Reforms

The creation of the IGG did not bring any changes in the adjudication of cases. It was more of a “new wine in old bottles” approach, because the aim was to combat corruption using the same courts with the existing procedures for adjudication. It was not until 1995, when the new Constitution was passed and mandated several goals to be achieved, that a ray of light fell onto the judicial system.

2.5.1 The 1995 Constitution

Paragraph XXVI of the Constitution is concerned with accountability and states, in part, that “all lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices”. This provision, which enunciated the beliefs of the people, showed determination on the part of the drafters and a willingness to fight corruption using all legal means.³⁶ There is no doubt that adjudication was at the back of the minds of the drafters, though an anti-corruption court was not mentioned expressly.

34 Webb (2005) 213.

35 Preamble to the Anti-Corruption Act.

36 General Chapter to the Constitution.

Alongside accountability, there were other subtle reforms contained in the Constitution that, although not pointing towards the creation of a specialised anti-corruption court, did not support the operations of the general Criminal Division of the High Court and the Buganda Road Magistrates' Court. Thus, for example, the Constitution required that justice not be delayed in the way that the judiciary presided over and deliberated matters.³⁷ The Constitution also provided that a person involved in criminal proceedings was entitled to a fair and speedy trial before an independent and impartial court established by law. This was addressing the issue of the case backlog in the Criminal Division.³⁸ The Constitution further empowered the Chief Justice of Uganda, under Article 133(1)(b), to issue orders and directions to the courts necessary for the proper and efficient administration of justice. This was empowering the judiciary to make justice available to the people. The Chief Justice's authority to issue the Practice Directions³⁹ that established the Anti-Corruption Court was premised on this constitutional provision.

The 1995 Constitution included the IG's office as a constitutional body.⁴⁰ Before then, the IG was subsumed under the executive and was answerable and accountable to the executive for all its works and duties. The new Constitution granted the IG some independence by allowing it prosecutive powers over corruption cases, which powers formerly were held by the office of the DPP.⁴¹ The previous need to obtain approval to prosecute from the DPP had denied corruption matters the priority they needed, given the busy schedules of the office of the DPP.

Article 225(1)(b) of the Constitution spells out the functions of the IG, including the function to eliminate and foster the elimination of corruption. Article 230(1) imposes on the IG the duties to investigate, make arrests in and prosecute cases of corruption. The IG's office actually pursued these functions. Unlike the busy DPP's office, the IG's office was prompt but was being delayed by the slow adjudication process at the time. The IG's office joined the government to press for an expeditious adjudicatory mechanism from the judiciary.

37 Article 126(2)(a) of the Constitution.

38 Article 28(1) of the Constitution.

39 Legal Notices No 9 of 2009.

40 Chapter XIII of the Constitution.

41 Section 88 of the Penal Code Act.

2.5.2 Adoption of UNCAC and the AU Convention

These two Conventions were adopted around the same time: the United Nations Convention against Corruption (UNCAC) was signed by Uganda on 9 December 2003 and ratified on 9 September 2004,⁴² and the African Union Convention on Preventing and Combating Corruption (AU Convention) was signed on 18 December 2003 and ratified on 30 August 2004.⁴³ The Conventions introduced standards that, if implemented by member states, would strengthen the capacity of their legal system to regulate corruption.⁴⁴ They require states parties to legislate and take measures to strengthen their control of corruption in their countries. UNCAC and the AU Convention inspired the Anti-Corruption Act and many of their provisions were incorporated in it. The criminalisation of corruption in the public sector⁴⁵ and the crimes of influence peddling⁴⁶ and illicit enrichment stand out in this regard.⁴⁷

Adjudication, however, seems to have been left behind, with the focus being on other anti-corruption methods. Not even UNCAC, the major global anti-corruption instrument, identifies adjudication as one of its methods to combat corruption. While the institutionalisation of anti-corruption has been centred on investigations and prosecution, the idea of adjudication as an anti-corruption measure barely is mentioned. New mechanisms and ideas had been devised for the anti-corruption bodies and agencies to prosecute corruption, but the courts which have to hear corruption cases continued to be mired in the traditional court system and practices.⁴⁸ With the enhanced methods of white-collar criminality, it would have been natural to bring the judiciary up to speed in its approach to crime. It is rather disturbing to know that courts of the 21st century, facing a fast growing crime, persist with out-of-date practices. The adjudication of corruption needed to be adapted to respond to the developing trends in the field. Fortunately, the adoption of the provisions of UNCAC and the AU Convention into the Anti-Corruption Act also paved the way for the creation of the Anti-Corruption Court.

42 UNCAC Signature and Ratification Status (2015).

43 African Union, available at <http://www.au.in> (accessed on 15 June 2015).

44 Chapter I of UNCAC.

45 Preamble to the Anti-Corruption Act.

46 Section 8 of the Anti-Corruption Act.

47 Section 31 of the Anti-Corruption Act.

48 Carson (2015) 13.

2.5.3 The Anti-Corruption Act

The Bill that led to this Act was tabled before Parliament for the first reading in 2003. The law would provide for the definition of corruption and for a wider range of offences to be prosecuted as corruption. It was passed into law in 2009.⁴⁹ The Act identifies and defines a range of corruption offences:

“Any solicitation by a public official, or offering to a public official of any goods of monetary value; the diversion or use of resources; the offering or giving, promising, soliciting or accepting, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for any other person, for him or her to act, or refrain from acting, in breach of his or her duties; the fraudulent acquisition, use or concealment of property; the participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner in the commission or attempted commission of, or in any collaboration or conspiracy to commit corruption.”⁵⁰

The Act covers acts of embezzlement, misuse of office and nepotism both in the private and public sectors. It was a significant addition to the arsenal against corruption.



2.6 Role of the Media

The media were instrumental in disclosing corruption by disseminating information about the manner in which public funds were mismanaged, and by updating the public with knowledge of government agendas. The most remarkable crusade by the media concerned the enforcement of the Codes of Conduct. Media dissatisfaction was rooted in the government’s failure or hesitation, depending on the interpretation of the facts as they stood at the time, to implement the Leadership Code Act. This law had been passed in 1991 but had not been enforced yet by 1997. It required designated public officials to declare their assets. The media demanded the enforcement of the law, stating that Ugandans have a right to know where their leaders’ assets were, if only because it is the people who, through taxes, contributed to the leaders’ welfare. Hailing President Benjamin Mkapa of Tanzania, who had declared his own assets, the media argued that the Ugandan public officials were required to follow suit, proclaiming that:

“declaring assets is one form of inspiring confidence in the people. It seals the social contract that the people are ruled by a government committed to the principles of

49 Uganda Gazette No 42 Volume CII (2009).

50 Part II of the Anti-Corruption Act.

democracy, so the people will respond by being loyal to the government. If we are not conscious, Uganda will miss out on this".⁵¹

The media call involved demands for action by the government to devise mechanisms for fighting corruption, reporting on the implementation of such mechanisms by the government and reporting cases of corruption to the public.⁵² The role of the media inspired the concerns of other stake-holders. The government, along with civil society and NGOs, pressed for the creation of a special court to adjudicate corruption cases.

The idea of an anti-corruption court was glossy and appealing as a specialised forum with a record-keeping system to tackle the sensitive situations of politicised corruption. This meant that trends of corruption were to be documented both in judicial books and in the eyes of the public. It was premised also on the proposition that an independent, professional judiciary is critical to the development and implementation of law enforcement and criminal justice measures,⁵³ the same virtues that were viewed as a major priority in anti-corruption strategies.⁵⁴

2.6.1 Criminal Division of the High Court

The criminal court was charged with the duty of handling all criminal cases. The cases were handled primarily by the Magistrates' Court, a role that weighed so heavily on the magistrates. The judiciary, overwhelmed by the case backlog, derailed the war on corruption through constant adjournments and regular postponements.⁵⁵ The criminal court, as a forum for adjudicating corruption cases, was seriously wanting. The backlog was extreme. By 2004, the pending cases of the court stood at 33 132.⁵⁶ The delays were in contradiction to the constitutional provision for the speedy administration of justice as a right to a fair hearing⁵⁷ and as a principle of exercising judicial powers.⁵⁸

51 *New Vision* 27 November 1995.

52 Langseth *et al* (1997) 10.

53 Saryadzi (2012) 503.

54 Saryadzi (2008) 27.

55 Uganda: Directorate of Ethics and Integrity (2008-2013) 8.

56 Kaweesa (2002) 4.

57 Article 28(1) of the Constitution.

58 Article 126(2)(b) of the Constitution.

There clearly was a need for an independent and uncompromised body with specialised skills to adjudicate corruption. Such a body had to be located within the judiciary, as an independent arm of the government, and not within the executive. Besides, the work of adjudication could not be performed by any other agency or body. The drive for a specialised court expressed the impact of corruption and the concern about how to handle it.⁵⁹ Given that white-collar crime is complex to investigate and given the lack of political will on the part of existing entities, there was a need for an independent judicial forum to focus on corruption.

2.6.2 Need for Specialisation

The power to establish a court specialised in handling matters of corruption was solely in the hands of the judiciary, as represented by the Chief Justice.⁶⁰ The judiciary's decision to deploy its administrative powers to establish the Anti-Corruption Court was based on several factors. These included the fact that it was not a cheap process to set up a court and to sustain one. Further, a specialist staff possessing knowledge on how to handle corruption matters was required. Adequate resources were needed both in the form of human capacity and funds. However, the idea of establishing a specialised division of the High Court was not novel to the judiciary. The High Court system of Uganda at the time already was divided into various divisions which included the Family Division, the Civil Division, the Land Division, the Commercial Division and the Criminal Division.⁶¹

2.7 Creation of the Anti-Corruption Court

The idea of an anti-corruption court is neither new nor unique to Uganda. Countries such as Indonesia, Pakistan and Bangladesh have established their own anti-corruption courts,⁶² while other countries, such as South Africa,⁶³ have dedicated specialised commercial crime centres with jurisdiction to deal with white-collar crime, a category under which corruption falls. Nigeria and Kenya also have embarked on the road to establishing specialised anti-

59 Carson (2015) 15.

60 Article 133(1)(b) of the Constitution.

61 Judiciary (2015).

62 Hakobyan (2003) 2.

63 Kiryabwire (2009) 351.

corruption courts.⁶⁴ The desire to create a corruption-free state and hence an anti-corruption court in Uganda was driven by changes in the social, political and economic arenas.

The ACD of the High Court was created in July 2008 by way of a Practice Direction issued by the Chief Justice.⁶⁵ Principal Judge, James Ogoola, who officiated the opening ceremony remarked:

“The establishment of the ACD was a deliberate step by the Judiciary, in response to demands by government and other institutions engaged in fighting corruption, to take drastic action against the corrupt by strengthening the adjudicatory mechanism for fighting corruption with an objective to provide an orderly mechanism for the adjudication of corruption cases based on merit, speed, efficiency and fairness. The Chief Justice would like to formally establish the ACD through a Practice Direction.”⁶⁶

The judiciary set aside 1 900 000 000 Ugandan Shillings towards the establishment of the ACD. The court was to exercise powers under Article 133 of the Constitution, not as a new court but as a specialised division of an existing High Court.

Commonly referred to as the Anti-Corruption Court, the ACD commenced its operations with the consensus of the Criminal Division.⁶⁷ This consensus was meant to determine which of the cases before the Criminal Division could be transferred to the ACD. It started off by adjudicating cases under the Penal Code Act, as its enabling Anti-Corruption Act was going through the legislature still and was passed only in 2009. The ACD’s mandate was to dispose of matters of corruption expeditiously, in an orderly and cost effective manner.⁶⁸

Located in Kampala, and holding sessions across other parts of the country, the ACD began hearing cases in December 2008.⁶⁹

64 Hakobyan (2003) 2.

65 Legal Notices No 9 of 2009.

66 Mugisha & Nsambu *New Vision* 2 June 2008.

67 Mugisha & Nsambu (2008) *New Vision* 2 June 2008.

68 Legal Notices 4 of the Practice Directions.

69 USAID (2010) 38.

2.8 Conclusion

It has not been an easy journey to the realisation of a specialised court to fight corruption in Uganda. The major idea was not the formation of a specialised court but a reliable judicial institution, dedicated to combating corruption in both the public and private sectors. Much of the effort to combat corruption has been vested historically in an agency. The agency, however, was impeded by the absence of a dedicated specialised court. On the whole, the idea of a specialised anti-corruption court is a viable idea and serves a noble purpose. The court is believed to be making a difference in the struggle against corruption. Having such a court eases the prosecution of the offence as well. Corruption cases should not have to queue up along with other criminal cases. They need special attention, which the ACD can provide.

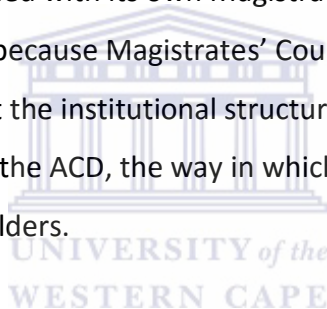


Chapter Three

Institutional Resources of the Anti-Corruption Court

3.1 Introduction

As intimated in Chapter Two, the ACD started its work in July 2008, operating at its own premises with a registry of its own.¹ The ACD is part of the High Court, whose structure it is obliged to follow. The High Court, which is the third highest in the hierarchy of the Courts of Judicature of Uganda, has unlimited original territorial and pecuniary jurisdiction in all criminal and civil matters.² It has 13 circuits established throughout the country, and eight divisions that handle specialised matters. Besides this original jurisdiction, the High Court also has appellate jurisdiction from the Magistrates' Court.³ Although the ACD is a structure of the High Court, it was established with its own Magistrates' Chambers, despite this not being premised constitutionally, because Magistrates' Courts are not defined as Courts of Judicature.⁴ This chapter looks at the institutional structure and resources of the ACD. It also looks at the management of the ACD, the way in which it conducts its business and its relationship with various stakeholders.



3.2 Uganda's Judicial Structure

Uganda's judiciary, as established under Article 129 of the Constitution, comprises a hierarchy of three courts of record.⁵ These are the Supreme Court of Uganda, which is the highest and final court of appeal; the Court of Appeal of Uganda, which also sits as the Constitutional Court of Uganda;⁶ and the High Court of Uganda. The judiciary is headed by the Chief Justice, who possesses supervisory and administrative responsibilities over all courts and quasi-judicial bodies. The Chief Justice also has a mandate and the discretion to issue orders necessary for the appropriate and competent administration of justice by the

1 Mugisha & Nsambu *New Vision* 2 June 2008.
2 Article 139(1) of the Constitution.
3 Carson (2015) 21.
4 Article 129 of the Constitution.
5 Laws of Uganda (2000).
6 Article 137 of the Constitution.

courts.⁷ It is this discretion that the Chief Justice uses to create the specialised High Court divisions and special court circuits.

The High Court is established under Article 138 of the Constitution, which also prescribes its composition. It is headed by the Principal Judge who is responsible also for the decentralised High Court circuits and the Magistrates' Courts. The Chief Registrar of the High Court manages the day-to-day running of the court and is assisted by registrars who are stationed at the premises of every High Court division.

The High Court has circuits that operate in the major districts of the country, hearing all cases with no particular speciality. The High Court often holds sessions in rural areas by constituting itself into an *ad hoc* sitting to clear case backlogs. Circuits are part of the High Court, provided for under Section 19 of the Judicature Act,⁸ as part of the judiciary's attempt to bring justice close to the people. Each circuit is headed by a judge of the High Court. Unlike the specialised divisions, the High Court circuits can hear all matters of law with unlimited original jurisdiction and appellate jurisdiction for matters originating from the Magistrates' Courts in the areas where they are set up.

The High Court is divided into eight specialised divisions, all based in the capital, Kampala. Amongst the divisions is the ACD, which aims at prompt and speedy adjudication of corruption cases. The ACD consists of two courts, which are the High Court and the Magistrates' Court. The Magistrates' Courts are established under Section 2 of the Magistrates' Courts Act (MCA).⁹ These generally handle the bulk of cases in the country, encompassing civil, criminal, land, domestic and commercial matters. Section 29 of the MCA, as revised, provides for three grades of magistrates, namely, the Chief Magistrate, Magistrate Grade One (G I) and Magistrate Grade Two (G II), in that order of superiority.

Uganda is divided into 38 magisterial areas spread throughout the country.¹⁰ Each magisterial area has a Chief Magistrate, a G I magistrate and a G II magistrate, and all are supervised by the Principal Judge of the High Court.¹¹ These magisterial areas are at a

7 Article 133(1)(a) of the Constitution.

8 Chapter 13 Laws of Uganda (2000).

9 Laws of Uganda (2000) Chapter 27.

10 Statutory Instrument No 45 of 2007, Supplement No 26.

11 Article 141(1)(b) of the Constitution.

village level and are easily accessible to the public. Decisions by Magistrates' Courts are not referred to as precedents in any court, because they are not courts of record.¹²

3.3 The Anti-Corruption Division

The ACD has its headquarters in Kampala and is staffed by three judges, a registrar and four magistrates. Unlike other courts, the ACD has a Magistrates' Court attached to it. It also has a prosecution unit of the Director of Public Prosecution (DPP). The ACD is a court of first instance and its decisions are appealable to the Court of Appeal. The High Court is also an appellate court as far as the decisions of the Magistrates' Court are concerned.

The ACD, despite handling sophisticated cases that involve powerful persons, does not provide for witness protection. All testimonies are given in open court, thereby discouraging potential witnesses who might fear for their livelihood and lives. The only protection available is that for whistle-blowers.¹³ This protection applies to whistle-blowers giving information concerning fraud and it covers non-disclosure of the source of information, but does not extend to their being called upon to testify in court. The Witness Protection Bill is in the legislative pipeline at the moment.¹⁴ The anticipated law seeks to protect witnesses in cases of corruption, organised crime, arms smuggling, drug trafficking and terrorism. Once passed into law, the Witness Protection Act is expected to form an integral part of the operations of the ACD, and more so of the work of the prosecutors.

3.3.1 Jurisdiction of the ACD

It is well-known that the international anti-corruption instruments have not put enough emphasis on the role of the courts or adjudication generally.¹⁵ For that matter, UNCAC has little advice on the how the ACD ought to conduct its business.

The ACD operates as both a trial court and an appellate court.¹⁶ It has jurisdiction over cases that arise from the Anti-Corruption Act, the Penal Code Act, the Leadership Code Act

12 Section 161 of the MCA.

13 Whistleblower's Protection Act of 2010.

14 Labeja *New Vision* 4 August 2015.

15 Carson (2015) 16.

16 Section 51 of the Anti-Corruption Act.

or any other statute linked to corruption.¹⁷ Other statutes that provide for corruption-related offences are the Whistle-Blower's Protection Act (WPA),¹⁸ and the Anti-Money Laundering Act (AMLA).¹⁹ The jurisdiction of the ACD covers corruption and matters associated with it that may arise during the course of a trial.²⁰ This jurisdiction is purely criminal, but may involve civil matters of asset recovery pertaining to confiscation,²¹ seizure and freezing and forfeiture.²² The criminal jurisdiction extends to all corruption cases, as well as money laundering and victimisation of whistle-blowers. Corruption in the Anti-Corruption Act covers a range of transactions, to wit: bribery; gratification; influence peddling; conflict of interest; abuse of office, sectarianism and nepotism; false impersonation and embezzlement; causing financial loss; fraudulent disposal of trust property; false accounting; and illicit enrichment.²³

The crime of money-laundering is prosecuted in so far as its predicate offences are crimes under the Laws of Uganda.²⁴ The AMLA considers all crimes under the Laws of Uganda to amount to predicate offences for money laundering.²⁵ The WPA contains an array of offences to protect not only the whistle-blower, but also the employer who might be affected by a biased informer. The offences for the protection of a person who renders insightful information about the unscrupulous activities in a particular organisation are directed at the person whom the disclosed information is likely to affect. Generally, the WPA protects against victimisation of the person of a whistle-blower, as well as securing his or her employment at a work-place which happens to be the subject of the disclosure. The protection extends to the identity of a whistle-blower and the WPA criminalises the disclosure of his or her identity.²⁶ The offence created against a whistle-blower pertains to frivolous and vexatious allegations against the employer.²⁷

17 Legal Notices 8(1) of the Practice Directions.

18 Whistle-Blower's Protection Act of 2010.

19 Anti-Money Laundering Act of 2013.

20 Legal Notices 8(2) of the Practice Directions.

21 Part IV of the Anti-Corruption Act.

22 Part V of the AMLA.

23 Parts II and III of the Anti-Corruption Act.

24 Section 5 of the AMLA.

25 Section 5(a) of the AMLA.

26 Part VI of the WPA.

27 Part VII of the WPA.

The ACD has the power to impose penalties in regard to the offences within its jurisdiction. The penalties can reach 12 years of imprisonment or a fine not exceeding 5 700 000 Ugandan Shillings or both. The court also can banish someone from working as a public servant.²⁸ Further, penalties can take the form of compensation in cases of gratification where the value can be ascertained.²⁹

The court hears corruption cases from both the public and private sectors.³⁰ It was a big step by the legislature to include corruption in private sector. Both the Penal Code Act and the Prevention of Corruption Act³¹ did not include private corruption. Its inclusion in the Anti-Corruption Act was an adoption of the recommendation contained in UNCAC.³² Prior to this Act, only corruption in the public sector was criminalised, while corruption in the private sector thrived with impunity.

It is important to control private corruption which is growing faster than public corruption and will be bigger soon.³³ Its growth was accelerated by the liberalisation and privatisation of the 1990s which saw the transfer of government parastatals to the hands of individuals. Further, private bodies, if not regulated, may engage in tax evasion and fraud in many forms. Public sector corruption involves theft of tax-payers' money meant for the basic necessities of human life. Its loss to corruption impedes economic development and undermines the protection of human rights. However, private corruption also indirectly has an impact on these same rights, by promoting tax evasion and unfair competition. Due to unfair competition, which is common in the private sector and which is inspired by profit maximisation, corruption may discourage honest investment. This is disadvantageous to fair trade. Hence, the preamble to the Anti-Corruption Act refers to its providing "for the effectual prevention of corruption in both the private and the public sector".

28 Section 26(2) of the Anti-Corruption Act.

29 Section 27 of the Anti-Corruption Act.

30 Preamble to the Anti-Corruption Act.

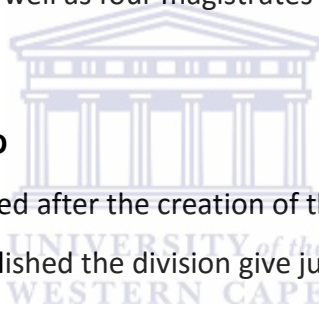
31 Chapter 121 Laws of Uganda (2000).

32 Article 12 of UNCAC.

33 Webb (2005) 213.

3.3.2 Composition of the ACD

The ACD is run by the head of the division who is assisted by a deputy. Both are judges.³⁴ The head is responsible for the administration of the court. This administrative role involves supervising the court's engagements. Both the head and the deputy are accountable for exercising administrative powers and responsibilities that formerly were the preserve of the Principal Judge,³⁵ given that the division operates under the supervision of the Principal Judge. The head is also entrusted with monitoring case backlogs,³⁶ and liaising with stakeholders, especially the members of the executive, to perform their duties concerning the judiciary, such as providing funds for sessions to clear old cases. According to Legal Notices 5(1) of the Practice Directions, the ACD is supposed to have two judges to hear high profile cases, a registrar and three magistrates. Today, however, the court has three judges who hear the high profile cases as a matter of first instance and appeals from the Magistrates' Court of the ACD, as well as four magistrates and a registrar.



3.4 The High Court of the ACD

The Anti-Corruption Act was passed after the creation of the ACD under section 51,³⁷ and the Practice Directions that established the division give jurisdiction over its operations to both the High Court and to the Magistrates' Court. Section 51 of the Anti-Corruption Act does not stipulate criteria for the distribution of cases between judges and magistrates. However, the High Court hears cases of grievous impact and, as a matter of procedure, hears cases after their committal from the Magistrates' Court. On the inception of the court, the then Principal Judge, Justice James Ogoola, remarked that high profile cases would be allocated to the High Court.³⁸ The rationale was that, because of their complex nature, high profile cases could take up to seven years to prosecute and, therefore, advanced and specialised skills were required to deal with the evidence presented in such trials. The judges are trusted to possess both the required skills and the integrity not to be manipulated and intimidated.

34 Legal Notices 6(1) of the Practice Directions.

35 Ogoola (2006) 3.

36 Ogoola (2006) 4.

37 Laws of Uganda (2010) Act No 6 of 2009.

38 Mugisha & Nsambu *New Vision* 2 June 2008.

The Anti-Corruption Act came into force in 2009, a year after the ACD started operating. However, the court was not rendered redundant merely because the law it was supposed to enforce was non-existent as yet. It should be noted that corruption cases were being prosecuted, even before the creation of the ACD, under the Penal Code Act and the now defunct Prevention of Corruption Act in the Criminal Division of the High Court. The ACD started off its activities with a survey of all the corruption cases³⁹ that had been handled before the Criminal Division of the High Court.⁴⁰ With this census, the ACD sorted out the cases that were to be transferred to it and those to continue in the Criminal Division.

The ACD also applied then, and still applies, the Penal Code Act which provides for offences such as bribery, embezzlement, extortion and obtaining money by false pretence. However, as far as corruption offences are concerned, this law was weak as it prosecuted corruption only as a misdemeanour and only targeted public officials.

3.4.1 Role of the Judge

Judges assume the role of an umpire in disputes over which they preside.⁴¹ The primary role of a judge of the High Court of the ACD is to hear cases concerning corruption,⁴² and make findings of fact. Before corruption cases are sent to a judge, they are committed in the Magistrates' Court as a matter of procedure.⁴³ The idea behind case committal is to encourage efficiency and time allocation by the judge. Only cases worthy of prosecution make it to the High Court after they have been sieved at Magistrates' Court level. The Ugandan court system is a no-jury system. Instead, a judge works with at least two assessors,⁴⁴ who help the court in evaluating facts and in issuing a verdict. The assessors give their opinion in open court after the summing up of the case. It is the role of the judge to sum up the case for the assessors and to direct them on matters of admissibility of evidence and the law. The judge is not bound by the opinion of the assessors⁴⁵ but ought to

39 Nsambu & Bugembe *New Vision* 2 July 2008.

40 USAID (2010) 38.

41 Kiryabwire (2009) 353.

42 Section 51(a) of the Anti-Corruption Act.

43 Section 168 of the MCA.

44 Section 3(10) and the schedule to the Trial on Indictment Act of 2000.

45 Section 82(2) of the Trial on Indictment Act.

give an explanation whenever a different view is taken from that of the assessors.⁴⁶ The judge decides on the innocence and guilt of the accused person as well as ruling on preliminary hearings. The High Court can hear any corruption matter from within boundaries of Uganda, and from without where the law allows.⁴⁷ Judges hear high profile cases which involve large sums of money. A judge is responsible for reducing case backlogs individually, and should not depend on the registrar or the clerk to do so.⁴⁸

When hearing appeals from the Magistrates' Court, a judge sits alone without the assistance of assessors.⁴⁹ The trial process is not repeated and no new evidence is adduced. Only grounds of appeal are entertained at this stage. The appeals may be based on erroneous matters of law and/or facts in the decisions of the magistrates.⁵⁰

3.4.2 Court Registry

The ACD has a registry headed by a registrar who assumes the role of a deputy registrar of the High Court. The registry is the office that is responsible for the daily activities of the court⁵¹ and operates under the supervision of the Chief Registrar of the High Court. The registrar of the ACD is responsible for supervision of magistrates and staff within the area of its jurisdiction.⁵² The jurisdiction of the ACD is wide, in that it is responsible for all corruption matters that arise within the boundaries of Uganda. This means that the responsibilities of the registrar of the ACD are wide.

The registrar is tasked with developing a programme of activities and budget estimates, implementing policy decisions, planning for the court sessions, handling interlocutory matters, taxation bills of costs, and executing court orders.⁵³ The registrar is required also to review the performance of the court against agreed objectives and ensure effective and efficient delivery of services. This is the role of a watch-dog and it is the duty of the registrar

46 Section 8 (3) of the Trial on Indictment Act.

47 Article 139(1) of the Constitution.

48 Ogoola (2006) 4.

49 Section 204(1) of the MCA.

50 Section 204(2) of the MCA.

51 Legal Notices 5(3) of the Practice Directions.

52 Ogoola (2006) 3.

53 Ogoola (2006) 3.

to ensure quality performance, as the entire mandate of the ACD is in the hands of this office.

Since the ACD is a criminal court, the registrar is responsible also for regulating bail. This is achieved by ensuring that the bail requirements are met as per the court order before suspects are released. The bail requirements may include the surrender of the passports of suspects, the provision of sureties, and suspects reporting to the registrar's office periodically during bail time. The suspects on remand are expected to report to the registry every fortnight whenever a hearing date is postponed for longer than two weeks.

The registrar is also in charge of other matters such as allocating cases to particular judges and magistrates, preparing case cause-lists and supervising the entire staff of the division.

3.4.3 Staff Members of the ACD

Every judge is assisted by a research assistant whose role is to work with the judge and give legal opinions on given facts as they arise in each case. A judge is assisted also by other staff members, who include a court clerk, to help handle the files during court proceedings and to attend to witnesses and exhibits; and a secretary who is responsible for transcribing the proceedings in court and preparing hard copies of the recorded court proceedings. The secretary is expected also to prepare a record of the judgments documented in print and to forward them to the division's librarian. The division has an ICT department that helps to update the database of concluded cases on the judiciary website, called Uganda Legal Information Institute (ULII). Though many decided cases go online, it is regrettable that the court does not have published law reports. Being a court of record, it is desirable that the decisions of the ACD appear in official law reports.

The ACD has a library with two librarians to keep records of concluded cases and to provide legal materials for research. This library, however, is not equipped to match the division's research needs. There is a cashier to handle the finances of the division. The court also has other staff members who help in its smooth running and maintenance, such as office attendants, drivers and body guards. All these are under the supervision of the registry.

3.5 The Magistrates' Court of the ACD

The Magistrates' Courts are not constitutionally part of the judiciary and are referred to as other subordinate courts.⁵⁴ Formally, the High Court is the court of first instance, but for the ACD, the Magistrates' Court occupies this position and performs committal proceedings to the High Court.⁵⁵

Ordinarily, the magistrates have a prescribed jurisdiction as prescribed under the MCA, which is different from that of the judges as provided for by the Trial on Indictment Act (TIA).⁵⁶ The ACD had a challenge when the Constitutional Court issued an injunction against the operations of magistrates for six months, pending a petition that challenged their position in the court, as well as its composition.⁵⁷ The injunction was followed by a petition that challenged the jurisdiction of the Magistrates' Court of the ACD.

3.5.1 Jurisdiction of the Magistrates' Court

As noted above, magistrates in the ACD are divided into three grades and each grade has a prescribed pecuniary and territorial jurisdiction. Section 3 of the MCA provides for a hierarchy of Chief Magistrate, G I magistrates and G II magistrates. Their ordinary jurisdiction is spelt out in section 161 of the MCA, which is limited to matters that exclude the death penalty in the case of the Chief Magistrate and to matters that exclude the death penalty and life sentences for the G I and G II magistrates. Section 2 of the MCA provides for magisterial areas and the magistrates are limited to handling matters that arise in those particular geographical areas. The rationale for this was to make justice accessible and also to facilitate the collection of evidence. The court usually is set up in the locality where the matter to be decided arose.

Unlike other High Court Divisions, the ACD has a Magistrates' Court chambers as part of the territoriality of the High Court.⁵⁸ There is only one Magistrates' Court station for anti-corruption, located at the same premises as the High Court, for all matters across the entire

54 Article 129(1)(d) of the Constitution.

55 Section 68 of the MCA.

56 Laws of Uganda (2000) chapter 23.

57 Elunya *Observer* 12 July 2013.

58 Legal Notices 10 of the Practice Directions.

country. It is staffed by a Chief Magistrate and four G I magistrates. This is the reason why the ACD's composition was questioned in the Constitutional Court in the case of *Davis Wesley Tusingwire v Attorney General*.⁵⁹ The Practice Directions that established the ACD was challenged on grounds that the appointment of the magistrates to this court and their unlimited territorial jurisdiction, concurrent to that of the High Court, were unconstitutional. This application was not about the jurisdiction of magistrates to try offences. It was about the appointment of magistrates to the High Court and the exercise of their judicial duties in trying offences in a non-gazetted magisterial area.

The petitioners argued that the location of the Magistrates' Court had caused a structural distortion of the High Court; that the Chief Justice did not have the power to deploy them there; that the High Court is not a gazetted magisterial area and magistrates cannot lawfully be deployed there; and that magistrates and judges do the same work while their pecuniary and territorial jurisdictions do differ.

The petition failed and the court held that the Practice Directions were in conformity with the Constitution, and that the Chief Justice was competent to make such directions. The Constitutional Court stated that the assignment of magistrates to the court was not meant to give them any extra jurisdiction, but to assist in the work of the ACD. The assignment did not constitute their being appointed to the High Court. Further, and most importantly, the court noted that the objective of the impugned Directions was a noble one, namely, to give impetus to the fight against corruption by deploying judicial officers to a special division devoted to corruption cases, and to speed up such trials. The ACD forms part and parcel of the institutional arrangements to address corruption, and constituted the judiciary's initiative and contribution in this regard. Hence the objective of the establishment of the division *per se* did not contravene the Constitution or the Anti-Corruption Act. The Constitutional Court considered the placing of the Magistrates' Court in the ACD to be an administrative arrangement by the judiciary to improve on service delivery by the courts in response to rampant corruption.

In the meantime, while the case was before the Constitutional Court, the Magistrates' Court resumed its duties away from the ACD premises. During the time of the injunction, the four

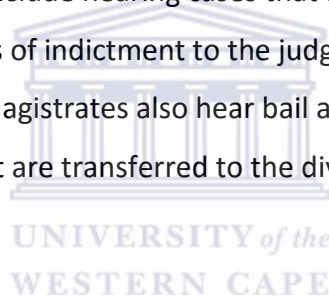
59 Constitutional Petition No 6 of 2013.

magistrates were deployed to other regions and the corruption offences were handled in their respective areas of operation, according to Justice Yorokamu Bamwine, the Principal Judge.⁶⁰ After the Constitutional Court findings, the Magistrates' Court resumed its anti-corruption duties at the ACD premises.

3.5.2 Role of the Magistrates' Court

The Magistrates' Court, as part of the ACD of the High Court, has a mandate to hear corruption cases. As a court of first instance, all cases heard in the High Court go through committal proceedings by magistrates.⁶¹ At the committal stage, a magistrate reads out the indictment and summary of the case to the accused person,⁶² while investigations in the case commence. No plea taking is allowed at this stage.

The usual duties of magistrates include hearing cases that fall within their monetary jurisdiction and committing cases of indictment to the judges,⁶³ which is a procedural requirement in criminal cases. Magistrates also hear bail applications. They have jurisdiction over all the cases that are transferred to the division.⁶⁴



3.6 Other Role Players

The ACD is not a sole actor in dealing with corruption matters. While the adjudication process lies mainly in the hands of the court presided over by judges and magistrates, it involves also the prosecution and the defence.

3.6.1 The Prosecution

The prosecution of corruption offences is done with the authorisation of the Inspector General of Government (IGG) or the Director of Public Prosecution (DPP).⁶⁵ The IGG has power to prosecute all crimes in the public and private sectors,⁶⁶ and the DPP to prosecute

60 Elunya *Observer* 12 July 2013.

61 Section 168 of the MCA.

62 Section 168(3) of the MCA.

63 Section 168 of the MCA.

64 Legal Notices 8(3) of the Practice Directions.

65 Section 49 of the Anti-Corruption Act.

66 Article 120(3)(b) of the Constitution.

all crimes committed by any individual or authority.⁶⁷ However, the mandates of the Inspectorate General (IG) and the DPP overlap. A prosecutor in the DPP's office once remarked to Human Rights Watch that having many people working on the same thing may result in clashes, especially where there is lack of co-ordination. Sometimes it is not known which unit answers to whom.⁶⁸

The prosecution also faces a problem with the decision to prosecute as it often has to rely on testimonies of unwilling witnesses. Further, the nature of white collar-crimes requires expertise and the presumption of innocence needs to be respected. The combination of these factors renders corruption cases hard to prosecute and many end up in acquittals due to lack of evidence to prove the prosecution's case.

3.6.2 The Defence

The ACD is a criminal court. Hence, accused persons have the right to the services of a defence lawyer.⁶⁹ However, the defence lawyers are blamed regularly for using delaying tactics,⁷⁰ such as constant adjournments, which impede the expeditious prosecution of cases by the court, and cause unnecessary backlogs.

3.6.3 Plea Bargaining

There is legislation on plea bargaining under consideration.⁷¹ This may help in the process of adjudication by giving suspects an opportunity to confess in expectation of a lighter sentence as negotiated with the prosecution. Plea bargaining will save time on lengthy trials and mitigate the often difficult duty on the prosecution to prove the case against the accused. It will save the courts and the government a lot of money as it is less costly to dispose of cases. The major point to be noted here is that the court is not as interested in locking up corruption offenders as it is in recovering the money that was stolen through

67 Article 230 of the Constitution.

68 Human Rights Watch (2013) 31.

69 Article 28(3)(d) of the Constitution.

70 Human Rights Watch (2013) 41.

71 The Judiciary (2015) 13.

corrupt practices. A Practice Direction will be enacted to streamline the process and give guidance to all stakeholders involved in negotiating guilty pleas.⁷²

3.6.4 Funding the Court

Funding a court is an expensive venture. The funds are necessary for the maintenance of court operations. These include training staff, conducting research, operating an updated information technology system, facilitating witnesses and assessors, and purchasing supplies. It should be noted that the ACD lacks the requisite infrastructure and is located in rented premises.

Initially, the ACD started its work with a budget of 1 900 000 000 Ugandan Shillings as provided by the judiciary.⁷³ However, the entire judiciary receives a miserable 0.6 per cent of the national budget, as opposed to the 4.4 per cent given to other organs, to cover all its financial needs, including salaries and recurrent expenditures.⁷⁴ This money is divided amongst all the departments of the judiciary and is quite insufficient to cater for all judicial needs. Despite its low amount, the budget of the ACD was reduced by 40 per cent in 2012 and the release of the allotted funds was delayed.⁷⁵ This puts serious strain on the functionality of the entire judiciary.

3.7 Conclusion

The ACD is composed of judicial officers and other personnel to ensure effective and efficient disposal of matters. The judicial officers do not work alone, but alongside other stakeholders who contribute financially and otherwise to the fight against corruption. It is not a task that the judiciary can handle single-handedly.

The ACD does not enjoy proper control over its own resources, which poses a hurdle to its performance. The institutional resources of the ACD, as it stands, do not reflect the tough work that it is required to handle. Corruption is a complicated phenomenon to prevent,

72 The Judiciary (2015) 14.

73 Nsambu & Bugembe (2008) *New Vision* 2 July 2008.

74 The Judiciary (2015) 33.

75 Carson (2015) 22.

investigate and prosecute, and even harder to adjudicate. The institution charged with adjudication should be equipped to match the complexity of the crime. The court should be well-resourced, in order that its work is felt in the society that it serves, which is the same society which is infested with corruption and does not look with favour upon the role of the court.



Chapter Four

Adjudicating Corruption

4.1 Introduction

The public repeatedly has accused the judiciary as a whole of favouring the rich. When it comes to the ACD, these sentiments are shared also by human rights organisations and the media, which consider it a court for pursuing the poor.¹ It is seen as being selective in its adjudication, focusing on street corruption involving small matters while letting the “big fish” swim free.² The arguments for the court, of course, have been that its decisions are not based on the status of the persons tried, but on the facts at hand.

It is believed that many cases of corruption involve members of the government. However, there is lack of political will to prosecute them, despite the promises of zero tolerance from the government. This lack of political will has a significant impact upon the work of the judiciary.

This chapter discusses the work of the ACD. It evaluates some of the cases it has handled, looking at the trial process and the decisions reached. This discussion will assess also whether the allegations by the public about political interference in the court’s decisions are justified. To this end, consideration will be given to the role of each party in the proceedings, the laws that are believed by lay-people to be bent towards protecting the rights of suspects, and the role of judge and magistrate in an adversarial judicial system.

4.2 Corruption in Uganda

Before scrutinising the work of the ACD, it is important to look into the nature of the crime which it is adjudicating. Retired High Court judge and former head of the ACD, Justice John Bosco Katutsi, once remarked that:

“The level of graft in the country has gone out of hand to the point that some public officials are out competing [with] one another in the ‘game of shame’ ... the establishment of institutions such as the Anti-Corruption Court and the Inspectorate of

1 Human Rights Watch Report (2013) 9.
2 Human Rights Watch Report (2013) 8.

Government, as well as laws like the Leadership Code, have not significantly improved the country's record in fighting graft. Most of these are instead used to fight political battles and to punish people who have no political godfathers.”³

As demoralising as that may sound, the judge's statement is not news to the public.

Corruption in Uganda has grown tremendously. Transparency International graded Uganda at 142nd out of 174 countries surveyed in the 2014 Corruption Perceptions Index.⁴ Uganda scored 26 on a scale of 0 to 100, with zero being the most corrupt and 100 the least corrupt.⁵

Corruption is prevalent both in the public and private sectors.⁶ Practices that are deemed to amount to corruption in Uganda under the ACA include bribery, extortion, diversion of public resources, influence peddling, conflict of interest, abuse of office, loss of public property, sectarianism, nepotism, embezzlement, causing financial loss, false assumption of authority, fraudulent disposal of trust property, false accounting, false claims, false certificates by public officers and illicit enrichment.⁷ Corruption is found in almost every sector of Ugandan society, ranging from bribery on the streets to embezzlement of public funds to corruption in service delivery.⁸

The ACD is central to the prosecution and adjudication of corruption as a criminal offence in Uganda. However, the question of whether grand corruption prosecutions are authentic trials or merely show trials to divert people's attention from the real issues has been hovering over public opinion since the inception of the ACD. A defence attorney once remarked that “petty corruption is prosecuted beautifully in Uganda”.⁹ The statistics of cases handled by the ACD show that, of the 88 first instance cases before the court, 68 resulted in convictions. However, those convicted were low-ranking public officials and private parties, while the “big fish” cases resulted in acquittals.¹⁰

3 Kigundu *Observer* 14 September 2011.

4 Transparency International (2014).

5 Transparency International (2013), available at <https://www.transparency.org/cpi2014/results> (accessed on 11 September 2015).

6 Human Rights Watch (2013) 2.

7 Inspectorate of Government (2011) 5.

8 Carson (2015) 18.

9 Human Rights Watch (2013) 37.

10 Human Rights Watch (2013) 36-37.

There have been several scandals in the limelight involving corruption and top government officials. These scandals concern the loss to corruption of money meant for primary health care (HIV/AIDS, tuberculosis and malaria), infrastructural development, state expenditure and the like. The culprits are mostly high-level officials, such as cabinet ministers and permanent secretaries. One such scandal involved the former Vice President of the country. It is believed that the ACD has sparked some fears among senior members of government with some of its decisions.¹¹ However, grand corruption continues to flourish and it seems that prosecutions continue to focus on the petty offences. Selected ACD cases are discussed below in an attempt to understand its role in the fight against corruption in Uganda.

4.2.1 *Uganda v Teddy Ssezi Cheeye*¹²

The accused was the head of economic monitoring in the President's office before he was charged with corruption. He fraudulently set up a company that was used to swindle money meant for a project to fight tuberculosis, AIDS and malaria. The project was funded by the Global Fund and was worth 120 000 000 Ugandan Shillings. The funds were channelled through the Ministry of Health. This money was supposed to reach destitute Ugandans through an NGO. The accused seized this opportunity to start up a company which won the tender, and money was deposited into its account in 2005. The account was cleared within 19 days after the deposit, but the prosecution adduced evidence that the company did not carry out a single activity for which it had been contracted. The details of this scandal reached the prosecution through a whistle-blower, who was an insider but who had not benefited from the deal.

This was one of the first cases to be tried by the ACD.¹³ The judge stated that the offence is termed a white-collar crime, which is translated loosely as an unconventional but sophisticated crime undergoing an alarming increase in Uganda. He remarked that the crime-fighting techniques available in Uganda are unlikely to combat such crime effectively enough to satisfy justice. It is the kind of crime that is committed behind closed doors and in circumstances which leave no records or trail which could be followed. Information

11 Kalumiya (2009), available at <http://www.traceinternational.org> (accessed on 19 August 2015).

12 High Court Criminal Case (HCCC) No 1254 of 2008.

13 Mugisa *New Vision* 16 December 2008.

about the crime is exposed only through the efforts of insiders who decide to become whistle-blowers. Without their help, the prosecution would find it difficult to obtain the necessary evidence to proceed against the perpetrators.

The trial resulted in a conviction. This, though, was not a grand corruption case in the sense that the offender was a mere functionary in the presidential office, not a senior government official. However, the amount of money that was swindled does bring the case within the scope of grand corruption.

4.2.2 *Flight Captain George Michael Mukula v Uganda*¹⁴

Mike Mukula was a state minister in the Ministry of Health. He was implicated in the embezzlement of 210 000 000 Ugandan Shillings, constituting funds received from GAVI, the Global Alliance for Vaccines and Immunisation. The money was a gift to Uganda and was credited to the first lady's office through the Ministry of Health. Mukula was in charge of withdrawals. He was implicated along with the Minister of Health, the Honourable Jim Muhwezi. Mukula went through a full trial and was convicted and sentenced to a four-year prison sentence by the Magistrates' Court of the ACD, while Muhwezi never faced trial. Mukula appealed the decision of the Magistrates' Court to the High Court of the ACD. The grounds of appeal were, among others, that the Chief Magistrate erred in law when she failed to analyse properly the evidence as given at the trial, thereby arriving at a wrong conclusion. The appellate court found that the evidence was not scrutinised and evaluated well enough by the trial court. The conviction and sentence therefore were quashed. Mukula later called his trial a political prosecution and condemned it as selective justice.

4.2.3 *Uganda v Professor Gilbert B Bukenya*

This is a corruption scandal that did not lead to a criminal trial. Professor Bukenya was the Vice-President in President Museveni's government from 23 May 2003 until 23 May 2011,¹⁵ and a constituent member of parliament. He was accused of and jailed briefly for abuse of office and fraud in relation to the Commonwealth Heads of Government Meeting (CHOGM)

14 HCCC No 1 of 2013.

15 Wanambwa *Daily Monitor* 24 May 2011.

that took place in Uganda in 2007. The charges against Bukenya alleged that he had profited from a \$3.9 million (£2.4million) deal to supply luxury cars for dozens of heads of states attending the CHOGM in Kampala. He was chair of the cabinet team in charge of events planning.¹⁶

The charges were dropped later by the IG's office due to an on-going parallel case that was based on the same facts. The matter in question was civil in nature and was initiated by a vehicle dealer who sued the government over a tender to supply cars for the same CHOGM. While the investigations into this matter were proceeding, the President declared that his former Vice-President had no case to answer. The President did so in a meeting with his cabinet ministers and the NRM caucus members, basing his announcement on a legal brief he had received from the Attorney General.¹⁷

In the CHOGM saga, Bukenya was implicated along with other cabinet ministers, to wit: Engineer John Nasasira, who was a constituent member of parliament and also Minister for Works and Transportation, a position he held from 1996 to 2011;¹⁸ Honourable Sam Kuteesa, then Minister of Foreign Affairs and an elected member of parliament;¹⁹ and Honourable Mwesigwa Rukutana who served as an elected member of parliament at the time. The charges against this trio did not go ahead as the Constitutional Court ruled that the IGG was not constituted fully and therefore the prosecution of the three defendants could not commence.²⁰

4.2.4 Uganda v Geoffrey Kazinda²¹

Geoffrey Kazinda was Principal Accountant in the Ministry of Finance and stationed in the Office of the Prime Minister (OPM). During his employment, Kazinda was entrusted with the responsibility of heading the accounts section, advising the accounting officers on financial matters, guiding and directing payment processes in the office, supervising staff

16 Uganda drops Gilbert Bukenya CHOGM fraud charges, available at <http://www.bbc.com/news/world-> (accessed on 15 June 2015).

17 Mugerwa *et al Daily Monitor* 6 November 2011.

18 Parliament of Uganda, available at <http://www.parliament.go.ug> (accessed on 7 September 2015).

19 *New Vision Archives* 18 February 2009.

20 Constitutional Petition No 46 of 2011.

21 HCT-00-SC-0138-2012.

and, above all, co-appending his signature to financial audit queries, bank financial reconciliations and the accounts of the OPM. Kazinda was charged with 29 counts of forgery, unauthorised documentation, abuse of office and unlawful possession of government stores. He allegedly committed these crimes in anticipation of defrauding the OPM and causing it financial loss. The prosecution adduced documentary evidence of Kazinda's criminal activities, and the court relied on circumstantial evidence and expert witnesses to convict him. It was argued in mitigation of sentence that a fine be imposed in lieu of a prison sentence, since no money was lost in the fraud. However, the court noted that large sums of money were targeted by Kazinda. In the result, he received a five-year term of imprisonment.

The scandal later came to be known as the OPM fraud and involved 87 criminal counts. As noted, the first 29 counts which were dealt with and concluded in this particular case did not concern any money. However, Kazinda currently is facing charges on the remainder of the 87 counts, involving the misappropriation of over 5 000 000 000 Ugandan Shillings as a result of the forgeries.



4.2.5 *Uganda v Engineer Lugya Godfrey and Another*²²

Engineer Lugya was a manager of the Uganda Broadcasting Corporation (UBC). The prosecution adduced evidence that he had authorised the use of UBC facilities by a station that was owned by his co-accused, without the approval of the UBC board and management.

Engineer Lugya was charged with abuse of office, while his co-accused, Busingye Harrison Magezi, was charged with fraudulent misappropriation of power, and both were charged with conspiracy to defraud. The acts committed by the two accused, which involved leasing out UBC's equipment such as generators, masts and transmitters without a tenancy agreement, violated the operations of the corporation and resulted in loss of revenue and excessive bills. The money losses were never quantified. Lugya was sentenced to a year in prison while his co-accused was given two years in prison. This was because the conspiracy and the entire fraud were the brain-child of the co-accused.

22 HCT-00-AC-SC-0089-2012.

4.2.6 *Balikowa Nixon v Uganda*²³

The appellant in this case was charged in the lower court with the offences of transacting financial institution business without a licence, contrary to section 4(1) and section 4(11) of the Financial Institutions Act (FIA),²⁴ and with embezzlement contrary to section 268 of the Penal Code Act. He was convicted by the Chief Magistrate, sentenced to a seven years' imprisonment, ordered to pay 3 366 926 390 Ugandan Shillings in compensation to the victims and disqualified also from acquiring a licence under the FIA and any law on taking deposits. This was a private corruption case. The appellant was general secretary and director of Dutch International Limited, a company limited by guarantee, as well as a signatory to its accounts. He and his colleagues had asked members of the public to make deposits, promising to refund them with interest. Most of these promised refunds were never fulfilled.

On appeal, Nixon argued, *inter alia*, that he had been charged with offences committed by the company. The appeal court held that the appellant was one of the directors of the company, which operated outside the business purpose for which it was registered; that charging the company and not its directors would have been superfluous because the offence prohibited persons and not companies, and the scheme was perpetrated by individuals; and that to charge the company and not the directors would mean that the court was protecting fraudsters rather than bringing them to book. The appeal failed and conviction and sentence were upheld.

4.3 Procedural Flaws in the Adjudication of Corruption in Uganda

It is understood that evidence of embezzlement of public funds in Uganda exists in abundance,²⁵ but it does not make it to the prosecutors and thus not to court. That allegation holds true in the case of Bukenya, where the prosecutors simply dropped the charges in favour of the corresponding civil matter. The quality of evidence which is produced during trial proceedings always is reflected in the decision of the court.²⁶ The evidential shortcomings which undermine prosecutions often have been blamed on political

23 Criminal Appeal No 24 of 2013.

24 Act No 2 of 2004.

25 U4 Expert Answer (2013) 3, available at www.u4.no (accessed on 13 June 2015).

26 Human Rights Watch (2013) 37.

interference²⁷ and on corruption itself. The fact that the rich evade prosecution by bribing their way out of trouble while the poor go to prison is of great concern in judicial circles in Uganda. The government strengthened its formal anti-corruption strategies and brought alleged offenders to trial more vigorously between 2009 and 2011 via the operations of the ACD.²⁸

Indeed, more middle and senior public officers, otherwise known as “the big fish”, have been indicted for their corrupt activities since the inception of the ACD than in the past, and more convictions are expected.²⁹ The rich do stand to be prosecuted, but those who have “political god parents” likely will be acquitted.

The lack of political will to convict offenders who are government officials in high places is still the most serious hindrance to the promotion of integrity and corruption reduction among public officials.³⁰

4.4 Investigations and Prosecutions

White collar crimes are often clandestine in nature, causing great harm and leaving no trail for investigation. This makes them very difficult to detect and great resources and expertise are needed to investigate and to prosecute them.³¹

The mandate to carry out investigations is vested in the offices of the IG and the DPP. While the IG’s office is expected to conduct its own investigations, the DPP relies on the findings of the police. The office of the DPP is supposed to carry out its own investigations, but due to limited resources, the police assume this responsibility. This, however, can have a negative impact on the quality of the evidence gathered as the police may not know what is admissible in court as evidence for prosecution. All the evidence that the DPP presents in court depends on what the police provide,³² and the decision to prosecute depends on the

27 Human Rights Watch (2013) 38.

28 Freedom House (2012) 13.

29 Freedom House (2012) 14.

30 Freedom House (2012) 14.

31 Strader & Jordan (2009) 8.

32 Mukiibi *et al* (2015) *Daily Monitor* 22 June 2015.

quality and quantity of evidence gathered by the police. Often, cases are thrown out of court because the police did not do their job as required.

Investigations by the police at times themselves are tainted with corruption. This was the allegation in the “pension scam” investigations, which dealt with the theft of money meant for pension payments. The evidence needed to prosecute this case was tarnished by staff members of the Criminal Investigations and Intelligence Directorate (CIID), a department of the police. It was said that two of the investigating CIID officers took money from the suspects.³³ In return they wrote a report which contradicted the one authorised by the head of the CIID. The fabricated report was handed over to the office of the DPP, which could not proceed with prosecution because of the insufficiency of the evidence. The case was dismissed for want of prosecution.³⁴

The IG and the Office of the Auditor-General, as the primary anti-corruption agencies, generally have been able to maintain their independence. There were concerns in 2011 about the IG dropping a criminal prosecution that involved the former Vice-President Bukonya. Though the grounds for dropping the charges are still unclear, apparently it was feared that the criminal charges would interfere with the civil suit, premised on the same facts, against the government.³⁵ However, this reasoning is indefensible since Ugandan law allows for contemporaneous civil and criminal proceedings arising from the same set of facts, with the criminal proceedings enjoying priority. Simultaneous civil and criminal proceedings do not amount to double jeopardy.³⁶

4.5 Traditional Evidential Requirements

Uganda’s jurisprudence is inclined heavily towards common law practices. The common law rules of evidence are applicable in the court system. Article 28(3)(a) of the Constitution provides that one shall be presumed innocent until proved guilty. The duty of rebutting the presumption of innocence falls on the prosecution. In other words, the prosecution carries the burden to prove the guilt of the accused beyond reasonable doubt.

33 Mukiibi *et al* (2015) *Daily Monitor* 22 June 2015.

34 Mukiibi *et al* (2015) *Daily Monitor* 22 June 2015.

35 Freedom House (2012) 13.

36 Section 18 of the PCA.

The burden of proof is provided for under section 101 of the Evidence Act, which requires whoever wishes the court to believe that facts stated do exist to prove their existence. In criminal proceedings, this invariably means that the burden of proof falls on the prosecution.

In *Uganda v BD Wandera*, an ACD case that involved illicit enrichment, Justice John Eudes Keitirima declined to convict for lack of an explanation in defence, and decided that:

“This is an offence of mathematical calculation and hence the mathematics of the prosecution must be with precision. The prosecution should be able to establish the proper value of the pecuniary or proper resources of the accused, the current or past unknown sources of the accused’s income or assets; ... that the accused’s pecuniary resources are disproportionate to the accused’s current or past known sources of income or assets, ... that the disproportion originates from the unlawful acts of the accused. Building a solid *prima facie* case requires the prosecution to construct a financial profile of the accused from a starting point in time up to the time where the illicit enrichment is identified. The financial profile should be able to demonstrate what the accused owns, owes, earns from legitimate sources of income and spends over a period of time. Selection of the appropriate starting point or baseline for the financial profile is critical. A proper valuation should then be made and assets valued at the cost at the time they were acquired. The burden of proof therefore, still lies with the prosecution to at least establish a *prima facie* case at this stage.”³⁷

This burden placed on the prosecution is rather heavy. The court will convict only where it is convinced, on the facts and supporting evidence, that the accused indeed is guilty. It is up to the prosecutor to prove every fact adduced,³⁸ while the offender may choose to remain silent.³⁹ This is the way of procedural justice, and justice has to be seen done.

Article 20 of UNCAC has special recommendations for the offence of illicit enrichment. The article requires that a suspect should provide sufficient explanation as to the source of his or her wealth. The requirement places an evidential burden on the accused person. An evidential burden is “the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation”.⁴⁰ The evidential burden is not a burden of proof, but a burden to raise an issue as to the matter in

37 *Uganda v BD Wandera* HCAC 12/2014.

38 Section 101 of the Evidence Act.

39 Section 73(2) of the TIA.

40 Tapper (2010) 132.

consideration before court.⁴¹ Though some may find it unconstitutional, the rationale for this view was given in *Bratty v Attorney-General for Northern Ireland*, by Lord Morris of Borth-y-Gest who stated that “the prosecution need not disprove all imaginable defences put forward by the suspect”.⁴²

Article 20, however, is not mandatory. UNCAC allows states parties to implement the provision in accordance with their national constitutions. It is not mandatory because it is controversial, for allegedly violating the right to be presumed innocent and the right against self-incrimination. However, the right against self-incrimination is foreign to Uganda and self-incriminating questions asked during cross-examination have to be answered.⁴³

Article 28 of UNCAC eases the burden for the prosecution in relation to proving the intent required for the commission of all the offences of corruption. It allows for such intent to be inferred from the objective factual circumstances. Article 28 is not mandatory. However, Uganda has incorporated its provisions into the Anti-Money Laundering Act.⁴⁴

4.6 The ACD and White-Collar Crime

The procedures that are followed in prosecuting “common crime” are applicable also to “white-collar crime”,⁴⁵ including corruption and money laundering. However, with corruption it may be said that a judge, in order to do justice, always finds himself or herself in a position of making new law, which might not have been the intention of the legislator. This is because corruption cases are always novel as regards their adjudication. Corruption crimes are evolving continuously as criminals keep devising new ideas to execute their plans. Hence, most corruption matters are unprecedented and have to be decided on a case-by-case, retrospective basis.⁴⁶

A judge in the Ugandan judicial system assumes the role of a referee. Uganda is an adversarial jurisdiction based on the British common law system. The role of the judge

41 *Sheldrake v DPP* [2004] UKHL 43.

42 *Bratty v Attorney-General for Northern Ireland* [1961] UKHL 3.

43 Section 53 of the Evidence Act.

44 Section 4 of the Anti-Money Laundering Act.

45 Strader & Jordan (2009) 5.

46 Strader & Jordan (2009) 7.

involves summing up evidence for the assessors and applying the law to the adduced evidence and exhibits to make an informed decision. The court is guided by the rules of evidence to hear and determine the case.

The performance of the ACD can be assessed with reference to the cases it has handled. The issue here is not who it has convicted or not convicted, nor whether it has bypassed grand corruption suspects to concentrate on petty corruption suspects. The ACD was established to fight corruption, in all its forms, small and big. It is prudent not to blame the court for prosecutorial choices regarding who to charge and which charges to prefer.

4.7 Impact of the ACD Judgments

As noted earlier, one of the very first cases to be adjudicated by the ACD involved embezzlement of funds that were meant for health services to Ugandans.⁴⁷ The money had been given to the Ministry of Health by the Global Fund for the treatment of AIDS, tuberculosis and malaria.⁴⁸ The prosecution secured a conviction, which validated the prospects of the newly founded court.⁴⁹ The trial in question involved low profile officials, but it sent firm signals to all the corrupt officials in the public service.

Some people are corrupt because they expect to evade detection and prosecution. The situations in which corruption occurs in Uganda were identified and discussed in *Uganda v Kashaka*,⁵⁰ with reference to the following propositions:

- “1. Corruption thrives in an environment 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.”⁵¹

The judge sentenced the offenders to ten years’ imprisonment and ordered them to pay a fine of \$1 719 454.58 to make good the loss they had caused.

47 USAID (2010) 38.

48 Kafeero (2013) *The Independent* 5 July 2013.

49 Cablegates, available at <http://www.scoop.co.nz/stories/WL0904/S01031/cablegate-uganda-anti-corruption-court-successfully-tries-two-global.htm> (accessed on 3 September 2015).

50 *Uganda v Kashaka and 5 Others* HCAC No 47 of 2012.

51 Heidenheimer & Johnson (2011) 518.

Tough sentences are given with deterrence in mind. However, it seems that people are willing to brave even jail time as long as they can secure their loot. Courts are cognisant of the need for rehabilitative, restorative and corrective sentences rather than strictly retributive sanctions.⁵² The court likely is more interested in securing the return of stolen money than in locking up the perpetrators. However, the punishment is needed to deter the perpetrators from stealing again. A mere return of the money would be perceived as a slap on the wrist and an invitation to “go sin again”.

There is a great hope amongst the public that the decisions and sentences handed down by the ACD will reduce the rate of corruption. However, whether they actually scare people away from corrupt practices is questionable. There are several reasons for people’s response to laws, especially the anti-corruption laws, where the crime itself is believed to be lucrative. People calculate the benefits and the costs of being corrupt. They compare how much they can gain from the venture with the chances of being caught and the losses they will incur from restitution or retribution. The reasons why people refrain from committing corruption could be either personal or institutional and only the personal reasons focus on sanctions.⁵³ This means that sanctions alone cannot bring an end to corruption.

A trial ordinarily takes a period of one year from committal to ruling. This accords with the mandate of the court to handle cases efficiently and effectively. The court has lived up to its mandate of fighting corruption in an expeditious way.⁵⁴ Since its inception in 2008, the ACD has achieved a case disposal rate of 76.7 per cent.⁵⁵ Of 2 042 cases that have been registered with the court since 2008, 1 680 have been completed, with the remaining 362 pending. This is a very productive performance by the court. Also, in regard to compensation as a penalty for the crime of corruption, more than 18 900 000 000 Ugandan Shillings have been recovered from self-enrichment activities.⁵⁶

The ACD is doing well relative to other courts. A good comparator is the International Crimes Division (ICD) of the High Court of Uganda that was established at around the same

52 *Uganda v Kashaka and 5 Others* HCAC No 47 of 2012.

53 Doig (2012) 7.

54 Legal Notices 4.

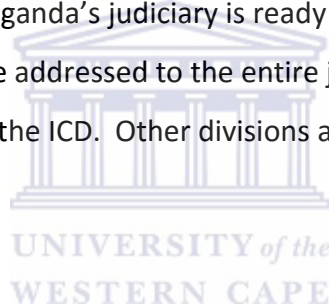
55 JLOS (2014) 103.

56 Kayaga (2014), available at www.radioonefm.com (accessed on 16 July 2015).

time as the ACD.⁵⁷ The ICD was established to try any offences relating to genocide, piracy crimes against humanity, war crimes, terrorism, human trafficking, and any other international crime as may be provided for under the PCA (Cap 120), the Geneva Conventions Act (Cap 363), the International Criminal Court Act (No 11 of 2010) or under any other penal laws.

Despite its wide jurisdiction, the ICD has not registered much success. There have been numerous occurrences of terrorism and war crimes in Uganda, but only nine have been taken to court and these have stalled, pending a Constitutional Court decision.⁵⁸ The ICD's most recent case, involving Dominic Ongwen, was referred to the International Criminal Court.

The ICD's success was assessed by the International Centre for Transnational Justice, giving rise to the question of whether Uganda's judiciary is ready to prosecute serious crimes. Although this scepticism might be addressed to the entire judiciary, its focus is on crimes that fall under the jurisdiction of the ICD. Other divisions are faring just fine.



4.8 Conclusion

In studying the impact of corruption on the Ugandan economy, it is vital to note that petty corruption is rampant in the public sector. It is not only grand corruption that has undermined the economy; petty corruption, too, has contributed significantly to the devastations caused by corruption.

The role of the ACD is to adjudicate cases as they are brought before it. It is not the responsibility of the court to carry out investigations or to produce incriminating evidence. The court acts on such evidence as brought before it by the prosecution and, guided by the rules of evidence as to what is admissible, decides on whether to convict or acquit. Where the prosecution does not adduce admissible evidence, in order to sustain a conviction against the so called "rich suspects", the court has no choice but to acquit.

57 The Judiciary (2015), available at http://www.judicature.go.ug/data/smnu/18/International_Crimes_Division.html (accessed on 1 October 2015).

58 Kasande & Regue (2015) 3-4.

The ACD has performed reasonably well, considering that the people in charge are said to be compromised. The root cause for the lack of prosecutions and their failure lies in investigative conduct and prosecutorial choices, and cannot be blamed on the court. The decisions of the ACD have been strong, with sentences reflecting the importance of the court in the fight against corruption, and judges showing determination not to let offenders off with “light bruises”.⁵⁹



59 *Uganda v Kisembo Moses and 3 Others* Criminal Session Case No 22 of 2014.

Chapter Five

Concluding Remarks and Recommendations

5.1 Introduction

It is vital to keep in mind that the ACD was not envisioned by the NRM government as part of its plans to combat corruption. Instead, the government created the Inspectorate of Government as an anti-corruption institution. However, its establishment under the office of the presidency seemed to have sent out mixed signals. The IG did not enjoy the independence that it required to fight corruption, which often was being committed in the form of misdemeanours by public officials. This made the executive a target of the IG's operations but also robbed those operations of transparency.

The 1990's reforms of liberalisation and privatisation that were proposed by the World Bank and the IMF brought changes in the nature of corruption transactions. Corruption was evolving. It had moved from the exchange of "brown envelopes" to the status of a corporate practice. It was time for drastic measures to attempt to rescue the economy that was tainted with corruption.

The ACD was created by the judiciary as a division of the High Court. It was special only in the sense that it had Magistrates' Court Chambers attached to it. The purpose of this innovation was to ease prosecution of corruption cases and avoid case backlogs. Having a Magistrates' Court specially attached to the High Court speaks volumes. The ACD has a mandate to dispose of corruption cases expeditiously and the Magistrates' Court has provided great support in achieving this goal. Firstly, it deals with the preliminary hearings of committal proceedings before they make it to the High Court. This eases the workload of the judges. Secondly, the magistrates handle matters that are not so grave as to warrant a judge's attention. These are usually the petty offences which outnumber grand corruption cases by far in the Ugandan context.

5.2 Closing Comments

The research highlights the impact of structural resources on the work of the court. Though the ACD is working well, it requires additional resources to function optimally. The lack of witness protection scares off potential witnesses, thereby weakening the work of the prosecution. The failures of prosecution are blamed routinely on the court because it is the court that gives the final verdict.

The success of the ACD can be registered properly, however, only if its impact is felt by the community. This research has tried to draw a link between the law and people's response to the law. It should be noted here that the role of a court in fighting corruption is reactive in nature and should not be confused with the pro-active role of anti-corruption agencies. The ACD, like all other courts, steps in after damage already has been done, to assume a damage control function.

The research also has considered the role of the law of evidence in fighting corruption. Procedural law, of which the law of evidence is part, imposes a heavy burden on prosecution in anti-corruption proceedings, and none of substance on the accused, regardless of how overwhelming the inculpatory evidence might be.

The ACD has been in existence for seven years and during that time it has registered remarkable achievements. The court should be credited for this, especially since, as a specialised anti-corruption court, it has no precedent to follow or model to emulate. The court has managed to adjudicate cases of grand and petty corruption committed by the politicians and cases of petty corruption committed by ordinary persons. In the short period of its existence, the court has registered a total of 2 053 cases, of which 1 512 have been completed.¹ It should be emphasised here that the court is an anti-corruption court that does not classify cases according to the profile of the accused persons that are brought before it.

This paper has attempted to evaluate the perception that the ACD concentrates on petty corruption while ignoring grand corruption. The role of the court, as denoted in its name, is

1 Summary of the cases of the ACD, as of 31 March 2015.

to fight corruption regardless of its nature and form. This means the court is required to fight all varieties of corruption and not only that which is grand.

When it comes to deliberations, the court is not put on notice as to the status of the accused. Besides, the court's hands are tied literally by the applicable laws and evidence adduced. Its role is to be deliberate and find in favour of the side, prosecution or defence, which presents the most convincing argument. However, the performance of the ACD can be improved. This issue will be dealt with in the recommendations which follow.

5.3 Recommendations

Of the recommendations that are made below, some have to do with court directly, while others may be pursued by the court itself through the orders it is competent to make.

5.3.1 Witness Protection

A state witness is any person who, under the laws of criminal procedure, is in possession of crucial information that is beneficial to the prosecution in uncovering crime.² Being a witness can expose the person who takes on that role to grave danger. This means that protection for the person as a witness is needed, encompassing “the protection of a threatened witness or any person involved in the justice system, including defendants and other clients, before, during and after a trial, usually by police”.³ The protection ought to be accorded to all the persons who have it in their power see to it that the necessary information is passed on to anti-corruption authorities. The persons to be protected should include the witness and his or her spouse, direct relatives and foster family, and friends. The protection should warrant their physical safety as well as their livelihood.

Witnesses do not have to appear in court to give their testimony. Those who need to testify in court deserve to be accorded some protection from the public by allowing them to testify incognito. This the court can facilitate by way of video testimony or affidavits which protect their anonymity.

2 Article 1 of the Law on Witness Protection.

3 Article 1 of the Law on Witness Protection.

Uganda's laws on witness protection are wanting. Only whistle-blowers are promised a degree of protection by the IG. There are no provisions at all for safeguarding witnesses who give evidence in open court. The protection could be in form of providing witnesses with personal security inside and outside court, enabling them to give evidence via video conferencing,⁴ and relocating them with their relatives if necessary. However, the latter is a very expensive venture for which the court cannot take responsibility. The court can order it but cannot finance or enforce it.

5.3.2 Conducting Research

There is a maxim by Lord Kelvin that goes, "When you cannot measure, your knowledge is meagre and unsatisfactory."⁵ This maxim foregrounds the relevance of research, the lack of which breeds inefficiency. Judges have knowledge of many matters of the law but they need to keep up with evolving matters in the community.⁶ And unlike the traditional crimes that may remain static, corruption does not conform to customs and routines. It changes constantly and research is needed to keep track of its evolution.

Criminals always develop new tactics, whereas laws and legal practice tend to be inert. Research is needed to remedy any inadequacies and to give direction to the administration of justice.

"[O]ur strength must come mainly from improved methods of adjusting caseloads, dispatching litigation for hearing, resolving complicated issues, eliminating non-essential ones, increasing court-room efficiency and through dispatch in decision making and appeal".⁷

Research is especially important for a specialised court such as the ACD. Coupled with anti-corruption measures, research is crucial to comprehend the complexity of the ever changing crime of corruption.⁸

4 Queensland (2015), available at <http://www.ccc.qld.gov.au/witness-protection> (accessed on 1 October 2015).

5 Pritchett (1948) xi.

6 Wheeler (1988) 43.

7 Warren (1958) 44.

8 Schmidt (2007) 221.

5.3.3 Capacitating Court Staff

In as much as judicial training may be significant, it should be noted that all personnel who work in the judicial system should be trained.⁹ The ACD judicial staff is comprised of judges, a registrar and magistrates. There are also support staff members, such as research assistants (legal clerks), and non-legal staff, such as librarians and ICT professionals. Handling corruption cases requires skills which range from finance, accounting and customs to IT and forensics. The ACD could enhance its performance in this regard by training all its staff members with the necessary skills and empowering them to cope with the evidential and technical demands of adjudicating corruption cases.

5.3.4 Public Participation

Many Ugandans lack awareness of how courts operate and prefer local councils and police to dispense justice.¹⁰ This was a revelation by the Uganda Bureau of Statistics in its National Governance Baseline Survey of 2013/2014 report. The report revealed also that less than 11 per cent of Ugandans are aware of the key offices of the administration of justice. Given that the crime of corruption victimises almost every citizen, people need to know what happens to the culprits.

Courts are avoided because of their complex formalities. However, the ACD needs to explain some of these concepts to the public in order to gain their confidence. After all, it is members of the public who are victims and who are aware of the corruption in the community and who can testify in corruption cases. If citizens were given the opportunity to familiarise themselves with the operations of the court, they would find it friendlier and less formal. This will enable and encourage them to give evidence against corruption offenders.

9 European judicial training, available at <http://ec.europa.eu/justice/criminal/europe> (accessed on 11 October 2015).

10 Walubiri (2014) *New Vision* 8 May 2014.

5.3.5 Burden of Proof

In some offences there needs to be a shift from prosecution having to prove guilt to the defence having to explain certain facts. This is necessary because the law as it stands does not serve justice truly. If justice is about punishing corrupt people and the law grants them the right to silence, then nothing will be heard from this citadel of corruption, which happens to be clandestine. UNCAC has led a way by recommending that in cases of illicit enrichment accused be called upon to explain the source of the extra wealth beyond their known earnings. Measures such as these will fortify the position of the prosecution without violating the fair trial rights of the accused and will enhance the adjudicatory competence of the court.



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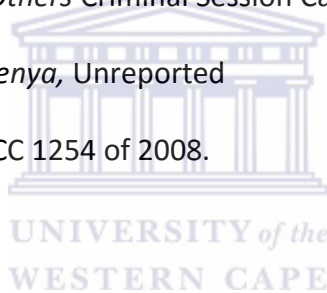
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