

Commission rejects Bowry plea

■ Eliud Miring'uh
and Biketi Kikechi

Lawyer Pravin Bowry was yesterday accused of contempt of the Goldenberg Commission of Inquiry.

Consequently, the commission rejected his application to continue appearing for his two clients.

The Vice-Chairman, Mr Nzamba Kitonga, delivered the ruling only a day after assisting counsel John Khaminwa and Gibson Kamau Kuria were readmitted.

"It is the view of the commission that the events you referred to constituted contempt that has to be purged," said Kitonga.

Bowry and the two assisting counsel were suspended indefinitely on October 10, 2004, after they engaged in bitter exchanges.

Bosira ordered them out under Section 3 of the Commission of Inquiry Act that provides for restoration of order in the proceedings.

Bowry was in the process attempting to establish some alleged professional misconduct by Kuria, Khaminwa and CID boss Joseph Kamau.

He represents former President Moi's aide Joshua Kulei and former Chief Justice Bernard Chunga at the inquiry.

Meanwhile, witness Charles Stephens Mbindyo yesterday blamed a former Commissioner of Mines and Geology, Mr Collins Owayo, for arbitrarily licensing a gold jewellery export company.

He said Owayo licensed Aurum Ltd in 1985 on interim basis without the authority of the Government.

"He acted hurriedly and without any expert advice from other important arms of Government," said Mbindyo.

That, he explained, was one of the earliest irregular decisions taken by Owayo, long before Goldenberg came into the picture.

The former PS said he could not reprimand Owayo for writing letters to all and sundry in government without informing the Minister of Natural Resources and his PS. Owayo wrote many letters to senior officers in Treasury, including the Minister for Finance at the time, Prof George Saitoti, without informing the minister in charge of his department.

Mbindyo told the commission that political decisions interfered with professional work at the Ministry of Finance that is why some decisions were taken hurriedly.

He retold how he advised Saitoti to terminate the Goldenberg scheme in 1991 in vain.

Excerpts:
Oduor: before we proceed, my senior learned colleague Mr Bowry has an application. He has something to say.

Bowry: My lords, firstly in view of the orders of October 15, 2004, I seek a right of audience before your lordships. [Commissioners consult for a few seconds].

Kitonga: You are asking for audience to do what?

Bowry: I desire to make an application that I be restored into the proceedings.

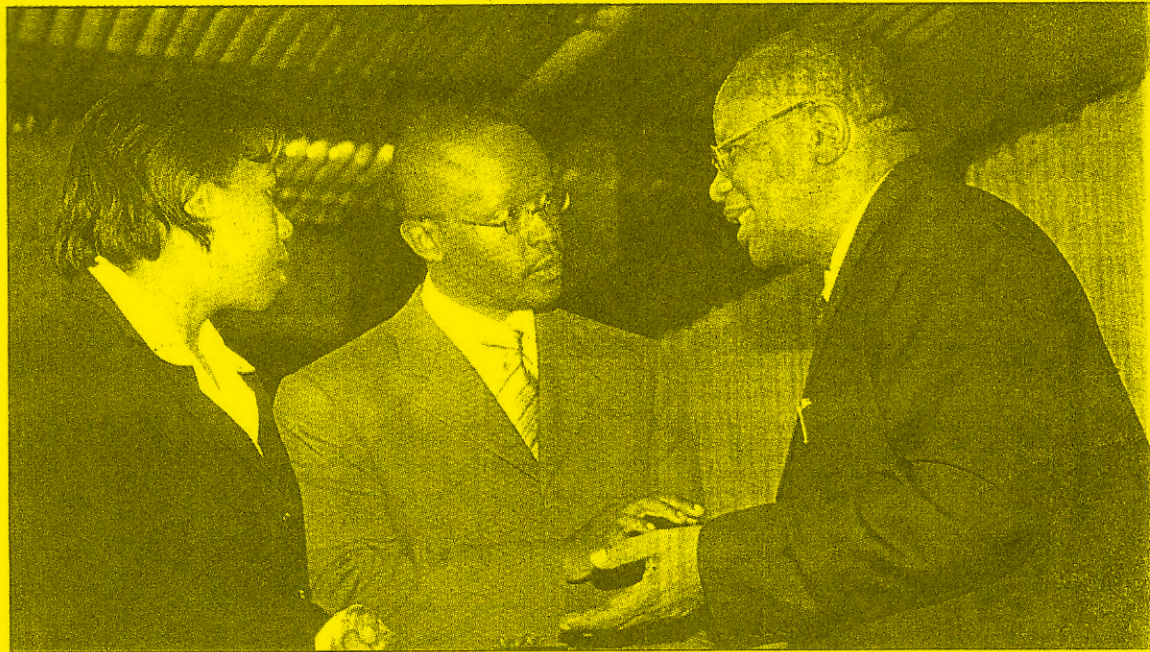
Kitonga: You may make the application.

Bowry: Much obliged. My lords, I humbly request that your lordships allow me to continue representing my two clients in the inquiry. That is my application. [Commissioners consult briefly].


Kitonga: It is the view of the commission that the events that you referred to constituted a contempt that has to be purged. To the extent that your application has not been accompanied by any attempt of purging that contempt, the application is refused.

Bowry: Much obliged. (Bowry then packed his papers and walked out.)

Kitonga: You are still on oath Mr



Central Bank lawyer Agnes Murgor and Deposit Protection Fund Board lawyer Cecil Miller Jnr chat with former Treasury Permanent Secretary Charles Mbindyo at the Inquiry yesterday.



Mbindyo

HIGHLIGHTS

- Now Kulei lawyer, Pravin Bowry is locked out of the inquiry for contempt.
- Mbindyo taken to task over the decision to pay Pattni extra 15 per cent export compensation beyond 20 per cent that was provided by the law.
- Mbindyo says former Mines Commissioner Collins Owayo and others were the authors of enhanced export compensation scheme by Goldenberg.

THE COMMISSION

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| Commission Chairman: Justice Samuel Bosire | Commissioner: Mr Peter Le Pelley | Assisting Counsel: Dr John Khaminwa, Ms Dorcas Oduor, Mr Waweru Gatonye and Dr Kamau Kuria |
| Vice Chairman: Nzamba Kitonga | Joint secretary: Mr George Kegoro | |

Mbindyo.

Mbindyo: Yes, my lords. Assisting counsel Dorcas Oduor's earlier examination-in-chief was as follows.

Oduor: You knew that you required money to pay for export compensation and yet you made no effort to allocate it a vote?

Mbindyo: Yes, my lords I will explain that further when we come to how this de facto matter was handled.

Oduor: Okay.
Mbindyo: What I want to say is that I discussed that matter with the Vice-President, and he assured me that he was going to stop the export compensation scheme when he came back from Bangkok.

Oduor: Yes?
Mbindyo: I asked him, "Vice-President, please note these remarks" and (he) wrote there "noted". If he wished to continue with the scheme, he should have convened a meeting between Treasury and Central Bank to review the whole situation, since they considered that the monopoly was legal without the minister exclusively excluding Goldenberg from the provisions the restricted practice of Monopolies and Control Act. All he needed to do was just to draw a line and say, "exempted". That would have been final, they would have been exempted and it would also have become the law, but they didn't do so.

Kitonga: I thought you would have also used stronger language in your communication?

Mbindyo: Which one?
Kitonga: You just said, "please note the remarks". You should have used stronger language, like, "I agree with it fully".

Mbindyo: We had discussed my lords.

Oduor: Or that this matter is very embarrassing to the ministry?

Mbindyo: It was very embarrassing. We discussed and I told him to note. That is how operations are done at that level.

Bosire: Or you were using slanted language. You here what I'm saying?

Mbindyo: Yes, my lords.

Bosire: Slanted in the sense that you didn't want to be direct.

Mbindyo: It is very helpful my lords when you are dealing with woves.

Bosire: At least it is good for you to

In any organisation we have systems of operation. In matters of money, the systems are even stricter — Mbindyo

admit.

Mbindyo: Yes, my lords.

Bosire: Thank you.

Oduor: My lords, we can have a short break.

Kitonga: Why don't you first complete that area?

Oduor: Mr Mbindyo, please tell the commission what happened after that memo.

Mbindyo: After that, the Vice-President returned from Bangkok and there was now a new initiative mooted by the Commissioner of Mines under which he wanted first to exempt duty and VAT (Value Added Tax) on imported gold for anybody who was bringing it from outside and buying goods from Kenya in a controlled manner and sending them out.

Mbindyo: With the confidence that I had with the minister, I informed Mr Njeru Kirira to inform the Commissioner of Mines and Geology that it was not possible. That was when gold from Bunia came to Wilson airport. At that time hell broke loose in the Treasury and I left my lords.

Oduor: Now, did you write your own memo to the VP, apart from what Prof Ryan wrote?

Mbindyo: That was a very adequate memo. That is how it is done. That is how we communicate.

Oduor: So after that you left the Treasury?

Mbindyo: Yes, my lords.

Oduor: How and why did you leave

the Treasury?

Mbindyo: My lords, I served at the President's pleasure and I also left at his pleasure. I also received another appointment and that was quite normal. I left the Treasury to become the Chief Executive Officer at ICDC.

Oduor: So when you left the Treasury who took over from you?

Mbindyo: Mr Magari, my lords.

Oduor: Did you have time to hand over to him?

Mbindyo: Yes, I handed over to him.

Oduor: What did you tell him when you handed over?

Mbindyo: That was his first political appointment. I told him to handle all matters with the minister, because he needed protection. I think I told him 'ujitunze kijana' (watch it, young man).

Oduor: Did you hand over to him that file?

Mbindyo: What file?

Oduor: The Goldenberg International Ltd file.

Mbindyo: Yes, my lords.

Oduor: What did you tell him about that file?

Mbindyo: That is what I told him 'ujitunze'. I also told him that if there was any problem (to) consult me because I will be available.

Oduor: Why were you telling him to watch it?

Mbindyo: Because it was a very sensitive matter. I didn't think we were getting enough political support for our professional efforts.

I also told that here in Treasury, politics, professionalism and patronage merge. In the chain of the Executive arm, my lords, the PS is the weakest link. Whenever there is any hitch, he is the sacrificial lamb. My lords, since I left Treasury 13 years ago, there have been 13 Permanent Secretaries my lords.

Oduor: My lords, that is okay. You have already referred to an original scheme of export compensation since 1985?

Mbindyo: Yes, my lords.

Oduor: And you have also told the commission that the granting of sole rights to a company was not new in Treasury?

Mbindyo: Yes, my lords.

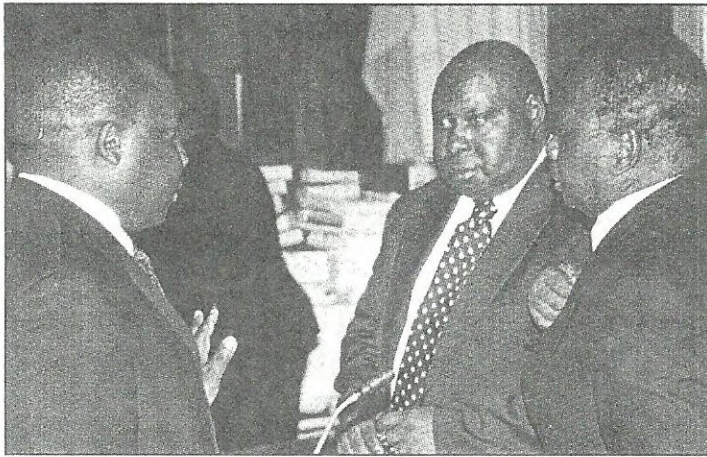
Oduor: You have devoted a whole chapter from Page 127

Former PS taken to task over extra compensation

Mines boss accused of 'arbitrary licensing'

From Page 18

Bosire: Even to the following financial year?
Mbindyo: Yes my lords.
Bosire: And the following financial year?
Mbindyo: Not really. It was stopped in January 1992 but it should have been stopped in June 1991.
Bosire: So in 1991 it was there and in 1991/92 it was also there?
Mbindyo: No, as you will see...
Bosire: (interrupts). Let me take you step by step. The issue arose at the beginning of 1991.
Mbindyo: Yes my lords.
Bosire: Okay. And we had a budget speech of 1991/92?
Mbindyo: Yes my lords.
Bosire: Was a provision made for it?
Mbindyo: No, my lords.
Bosire: Why not?
Mbindyo: Because we expected it would be regularised in 1991/92.
Bosire: And it wasn't regularised?
Mbindyo: It was not regularised, and that is why it is my case that it should have been stopped at that time.
Bosire: When did you leave the Treasury?
Mbindyo: I left in October 1991.
Bosire: And you realised nothing was happening?
Mbindyo: That will be a subject of very detailed discussions.
Bosire: Carry on.
Oduor: Who appoints the Financial Controller?
Mbindyo: My lords, it is the PS Treasury. The Financial Controller is the same person as the Financial Secretary and the PS Treasury appoints him as accounting officer.
Oduor: Now, did you discuss with him before this payment was made?



Commission Joint Secretary George Kegoro (left) chats with assisting counsel Dr. Kamau Kuria (centre) and Dr. John Khamhwa at the proceedings yesterday.

Mbindyo: Yes my lords.
Oduor: Whom did you discuss with?
Mbindyo: Mr Ali, the Financial Secretary, and we will be seeing some correspondence where we discussed the same subject.
Oduor: I want to refer to page 47 of your statement. Please read it.
Mbindyo: Reads. (Refers to appropriation of expenditure and the role of the accounting officer. Here, the accounting officer is expected to use funds in accordance with items voted by Parliament).
Oduor: Just a minute for clarification. That is what my lord chairman was telling you that this was a foreseen expenditure.

Mbindyo: Yes my lords.
Oduor: Do you remember yesterday saying that the sole rights for gold and diamond exports, and the 35 per cent export compensation was given on experimental basis for a period of 5 years?
Mbindyo: Yes my lords.
Oduor: So it was clear at this point that the 35 per cent (compensation) had not been brought within the ambit of Export Compensation Act?
Mbindyo: Yes my lords.
Oduor: It was also very clear at this time that there was no proper budget allocation for this amount?
Mbindyo: Yes my lords.
Oduor: But the accounting officer, who was your officer, was expected to include it in

the budget and even make some provision for it knowing very well what you expected to reap, that is USD 50 million?
Mbindyo: Yes my lords.
Oduor: What would you say about that?
Mbindyo: What I would say is that given the fact that this was a non-recurrent item (which) we expected to be regularised... If a bill had been there, a separate Finance Bill would have been there starting January 1991 and taken to Parliament as a special Bill. But normally, supplementary estimates are prepared that way and there is only one Finance Bill in June. Now, because we thought it was a non-

recurrent expenditure, is why it was put under 190 series (which) don't happen all the time. I can see now, with the benefit of hindsight, and given the expenditure that arose, a Financial Secretary should have provided more explanatory notes to show that this ex gratia (payment) was actually a subsidy towards export compensation. That is an omission that was not intended in any way to hide (the truth).
Oduor: Now who takes responsibility for such an omission?
Mbindyo: My lords it is the accounting officer.
Oduor: Why do you say so?
Mbindyo: (Takes the commission through the letter of appointment to an accounting officer to show they were responsible for the management of all funds voted by Parliament for that Ministry. The officer is accountable to Parliament and appears before the relevant committee to explain the expenditure).
Oduor: But Mr Mbindyo you realise that when the estimates were taken to Parliament, there was no explanation as to what exactly the payments were for?
Mbindyo: My lords, this is what I am saying. The accounting officer should have provided for this. By the way my lords, this thing came to my knowledge many years after I had left Treasury but with the benefit of a hindsight I would like to say there should have been adequate supplementary notes.

Oduor: So you do agree that when the vote was taken to Parliament, it was passed as customs refund, but the (MPs) did not know that the customs refund was going to pay export compensation?
Mbindyo: Yes my lords.
Oduor: And that was the gist of the Controller and Auditor-General's query in 1990?
Mbindyo: Precisely but there is no ambiguity as to who was responsible.
Oduor: But you remember you are the one who appointed the Financial Secretary?
Mbindyo: Once you appoint an accounting officer, he is personally responsible to Parliament. He is not even responsible to the Minister.

(Justice Bosire took the former PS to task to explain the modality used to pay Goldenberg International an extra 15 per cent export compensation when the law provided only 20 per cent. Justice Bosire said accounting officers should have raised an objection in writing despite orders given by the minister. He said Parliament committed an illegality by approving payment of extra export compensation to Goldenberg International, although this was presented as customs refund. He said the fact that Parliament was forced to pass an illegal vote did not make the payment legal.)

Oduor: Much obliged. Can you look at the 1985 scheme and take us through it?
Mbindyo: Yes, my lords. My lords, this chapter is aimed at providing guideline information that I have come across over time and from which I found some striking resemblance with the Goldenberg scheme. My lords, the whole process of developing enhanced export compensation started as an important government policy of earning the country the much needed foreign exchange in 1985. The role of the Commissioner of Mines and Geology, Mr Collins Owayo, in the scheme's policy conceptualisation, promotion, approval and implementation was quite central right from the start. Indeed his role remained critical throughout the various stages of the scheme up to the time that it was terminated in 1993.
Oduor: Yes?
Mbindyo: My lords, this exhibit has been presented to this commission and discussed at length. I just want to refer to it obliquely by mentioning that it appears that is the letter that planted the idea of enhanced export compensation into Owayo's mind. I just want to refer to one paragraph that Mr Epstein was saying that he had identified Aurum as the local agent for providing 25 items of gold jewellery and up to that time trade of gold jewellery was not official, because the local market forces or the price of gold was in shillings in a fixed rate regime. In the 1985/86 budget, Prof Saitoti stated that gold exports would qualify for 20 per cent enhanced export compensation from the 5 per cent that it was and Mr Epstein was saying in that letter, that with the rate, it was now possible to have an overseas investor and take advantage of it.

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From Page 18

about the original export compensation?
Mbindyo: Yes, my lords.
Oduor: If we run through it quickly, you will see that it is similar to the Goldenberg scheme that was put in place in 1990?
Mbindyo: Yes, my lords.
Oduor: My lords, it is important, because some of the players in the 1985 scheme were the same as those in the Goldenberg scheme.
Bosire: Yes.
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The hearing continues today.

to return to inquiry sittings

FORMER Finance Permanent Secretary Charles Mbindyo was yesterday put to task over a decision by the Treasury to pay Goldenberg International an extra 15 per cent export compensation in 1990.

Mbindyo was under pressure to explain why the Treasury awarded businessman Kamlesh Pattni 35 per cent export compensation for export of gold and diamond jewellery, when the law allowed a ceiling of 20 per cent.

Commission chairman Justice Samuel Bosire demanded to know why the Treasury further disguised the payment as "customs refund," knowing the money would be used to pay Goldenberg.

But Mbindyo said the then Finance Secretary, a Mr Ali, and an accounts controller coined the term "customs refund".

He denied any wrongdoing, saying the decision to pay Pattni 35 per cent export compensation was made by the Government without consulting Treasury officials.

However, Justice Bosire said even if the Government acted illegally by passing the vote because the law allowed payment of only 20 per cent and nothing more.

Justice Bosire said payment of extra export compensation under whatever title was illegal because the law had not been amended to allow it.

He said Treasury officials who opposed the decision by the then Finance Minister, Prof George Saitoti,

You should have obeyed the orders but also record your protest — Justice Bosire

to award Pattni 35 per cent export compensation should have recorded their protest in writing.

"You should have obeyed the orders, but also record your protest in writing for the sake of records," Justice Bosire said.

(It is Day 284 of the hearing and the witness is led in evidence by assisting counsel Dorcas Oduor.)

Oduor: May it please my lord commissioners. We are ready to proceed.

Kitonga: We remind you of your cross-examination of Mr Mbindyo.

Mbindyo: Yes my lords.

Oduor: Mr Mbindyo, yesterday my lord chairman asked you about the term "customs refund." First and foremost you know that Goldenberg International made an application to be granted 35 per cent export compensation?

Mbindyo: Yes my lords. **Oduor:** Now when you realised, or when the Commissioner of Customs realised you could not pay 35 per cent export compensation, he consulted with the Attorney-General and the result of those consultations were conveyed to you by Mr Mullili?

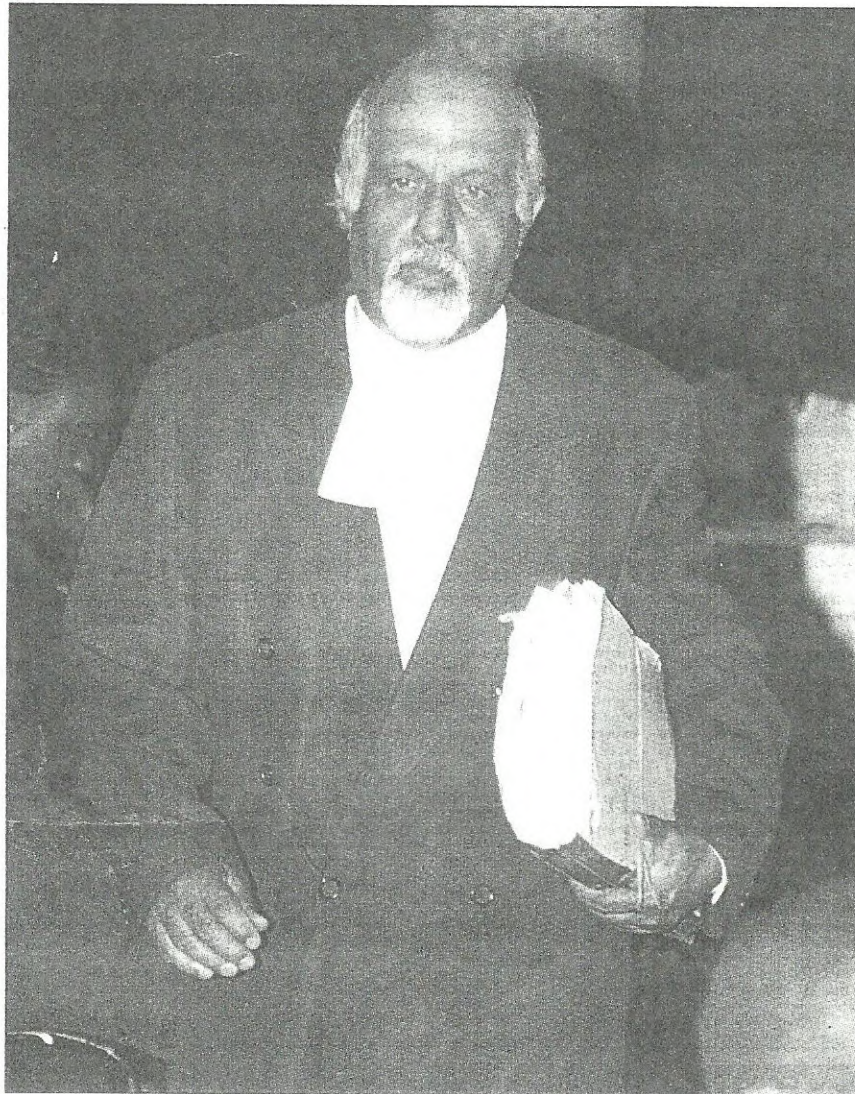
Mbindyo: Yes my lords. **Oduor:** You then decided to pay 15 per cent — that is the Treasury decided to pay this 15 per cent as ex gratia?

Mbindyo: Yes my lords. **Oduor:** I am sure you are familiar with the term "ex-gratia", but Mr Kamlesh Pattni did not apply for this?

Mbindyo: Yes my lords. **Oduor:** When it came to payment, this was treated as "customs refund" in the books of accounts?

Mbindyo: Yes my lords. **Oduor:** Now you are familiar with the term "customs refund"?

Mbindyo: Yes my lords. **Oduor:** And you also know very well this payment did not qualify as customs refund as described in the



Pravin Bopry walks out after his plea to be allowed to continue representing his clients Joshua Kulei and Bernard Chunga was rejected.

Customs Act? **Mbindyo:** Yes my lords. **Oduor:** Who came up with this term "customs refund"? **Mbindyo:** My lords, thank you very much for allowing me to sleep over this issue. I have been able to tell you yesterday. So it is always good to sleep over issues and come up with a more comprehensive issue. My lords, I have noticed that I gave my instructions to the accountant-general, after receiving the instructions from the Minister of Finance (Saitoti). The accountant-general, together with the Financial Secretary decided where the item should be fitted. At that time I did not even think the term "customs refund" was improper. It was the decision of the accounting officer to decide on what item that should have been. And yesterday, after going through my old notes, I came to realise the term "customs refund" was in 190 series. Now, 190 series are miscellaneous items (which) can be applied to any item in various ministries. And you find that it could have been applied to any item. It could have been applied under customs refund, under Miscellaneous Act, and ex gratia payment. The accounting officer is allowed by the law the mandate to determine which item

he will charge as he/she will be the one who will go to defend that decision to Parliament. And so, my lords, that decision was made by the accounting officer, and he later went to Parliament and defended it. Personally, in my time at the Treasury, I never obtained any query either from the accounting officer, the accountant-general, or the Auditor-General sanctioned all this payment without raising any query. I left the Treasury in October (1991) without thinking that there was a problem with the item charged. I only came to realise there was a query after I had left the Treasury and this I learnt from Mr Njeru Kirira's memo as he was trying to brief the Financial Secretary on the decision to pay extra 15 per cent (to Pattni). The issue raised then was why the 15 per cent was paid illegally. My lords, the term "illegal" here is used by the Controller and Auditor-General, and I intend to touch on the whole motion of audit query, how it was treated subsequently. Although I am not the one who dealt with it, I can try to put myself in the feet of accounting officer then. **Bosire:** (interrupts) One moment. We are not going into it that way. The issue I want some clarification on is strictly that (the 15 per cent extra payment) was not a "customs

refund". **Mbindyo:** My lords, that was not strictly a customs refund. **Bosire:** It was supposed to be a budgetary item. **Mbindyo:** It was a budgetary item, my lords. **Bosire:** And customs refund was not a budgetary item? **Mbindyo:** Customs refund? It was a budgetary item. **Bosire:** Why? **Mbindyo:** Because it was one of the items that was to be considered for payment. **Bosire:** Yes, but you cannot know in advance how much you will be refund. Will you? **Mbindyo:** No, my lords. **Bosire:** It is like a miscellaneous expenditure. **Mbindyo:** It is a miscellaneous expenditure, my lords. **Bosire:** Now being a miscellaneous expenditure, you may not specifically be able to budget for it? **Mbindyo:** Precisely my lords. **Bosire:** Okay. So you were given just a lump sum. It was just a total amount to cater for that eventuality? **Mbindyo:** Yes, my lords. **Bosire:** Alright, just because you don't know how many claims would be lodged for your refund, you are just given a figure? **Mbindyo:** (Silent) **Bosire:** Am I correct in that?

Mbindyo: My lords, the item that the Financial Secretary provided, and I was aware was that it was a stopgap measure (which) we could not determine how much it was. **Bosire:** Okay, that is the point I am making. So we are looking at export compensation of 15 per cent. **Mbindyo:** Yes, my lords. **Bosire:** That was an item on the budget. **Mbindyo:** Yes my lords. **Bosire:** But 15 per cent (extra payment) was not budgeted for, was it? **Mbindyo:** No, my lords. **Bosire:** So you had to find a place for it? **Mbindyo:** Yes, my lords. **Bosire:** You decided that it would be "customs refund" although it wasn't? **Mbindyo:** That is what the accounting officer decided. **Bosire:** But this was with your concurrence? **Mbindyo:** Not necessarily, my lords. **Bosire:** Why not? **Mbindyo:** Because I don't have to have the knowledge of accounts. **Bosire:** Yes, but you were the overall boss? **Mbindyo:** Yes my lords. **Bosire:** And nothing would happen without your blessings, so to speak? **Mbindyo:** My lords, in any organisation we have systems of operation. When it comes to matters of money, the systems are even stricter. You need to wake up one morning and ask somebody, who did this? And on money matters, you need to have someone who says, "I did it." **Bosire:** We are not talking about (pocket) change. We are talking about a large sum of money, aren't we? **Mbindyo:** We could not say it was large or small. We didn't know. It was just a stopgap measure. **Bosire:** This was 15 per cent of an unknown figure? **Mbindyo:** It was 15 per cent of a figure (which) we knew could not exceed USD 50 million. The question of whether it was under customs refund or a miscellaneous Act of another item, was a prerogative of the accounting officer. **Bosire:** Yes, but the anticipation was there that USD 50 million was going to be earned if the contract was to be satisfied. **Mbindyo:** I understand my lords, but USD 50 million was not going to be achieved through this ex gratia (payment). **Bosire:** No, no, no. I am looking at 15 per cent of the USD 50 million. **Mbindyo:** That figure was going to be achieved within a period of one year. **Bosire:** Precisely. **Mbindyo:** And my lords, we are talking about 15 per cent of a stopgap measure between January and March or even June of 1991. **Bosire:** Yes. **Mbindyo:** And that was not.... **Bosire:** (interrupts) So that is half of USD 50 million, approximately? **Mbindyo:** That is if it was going to be achieved. At that time, we were talking of temporary arrangements while plans were being made to regularise that item. At least that is my communication to the Attorney-General. **Bosire:** The point I am making, Mr Mbindyo, is that this is not a one-time payment. It was going to be a regular payment, as and when a claim is submitted depending on the export (made). **Mbindyo:** Yes, but pending regularisation. **Bosire:** Okay, was anything regularised? **Mbindyo:** All the efforts to regularise that item never succeeded and that is why we have this problem. **Bosire:** It never succeeded and the payment continued? **Mbindyo:** Yes my lords.