In principle, no bail is admitted in respect of felonies[50]. In this research, only one case has been found whereby the court accepted the release on bail[51]. Given the difficulties that are related to assets recovery in the cases of corruption and related offenses, such as embezzlement, it would be useful to extend the possibility of release on bail to all crimes, regardless of their gravity. For example, for the offense of embezzlement, the money paid on bail would be used to refund embezzled money in case of conviction without relying on other enforcement procedures such as assets recovery.

After assessing all of these criminal procedure matters surrounding the cases on corruption and related offenses, the research also looked into substantive criminal matters in order to assess how anti-corruption laws are substantively applied.

II.1.2. Substantive criminal matters

In order to assess how anti-corruption laws are substantively applied through the case law, the study focused on constitutive elements of corruption and related offences (II.1.2.1), the factors that influence the court's decision (II.1.2.2), the distribution of sentences faced by defendants (II.1.2.3), disparities in sentencing (II.1.2.4), reference to case law (II.1.2.5), confiscation of seized assets (II.1.2.6) and cross-examination of witnesses (II.1.2.7).

II.1.2.1 Constitutive elements of corruption and related offences

For an offense to be qualified as such, there must be absolutely constitutive elements as stated by the law. Failure to determine those elements, an accused person is not prosecuted. Those elements are the material element (*actus reus*), moral element *(men rea)* and legal element. This section discusses constitutive elements of corruption and related offenses.

Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code has been replaced by the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general. Furthermore, corruption and related offenses are now regulated by the law n° 54/2018 of 13/08/2018 on fighting against corruption. Please, keep in mind that the text below is based on the laws which were in force during the research.

[50] A felony is defined as an offence punishable under the law by a main penalty of an imprisonment of more than five (5) years (see article 22 of the Penal Code). Article 110, para. 3, of the law on criminal procedure states that "No bail shall be accepted in respect of offences punishable with imprisonment of more than five (5) years".
[51] See High Court/Kigali, *Rubingisa Pudence vs Prosecution*, case n° RDPA 00469/2017/HC/KIG, 03/10/2016.

1. Constitutive elements of corruption

A. Actus reus: material element

a) What is *actus reus* in corruption cases?

The assessment of the case law has identified the following acts of the offense of corruption:

- demanding illegal benefit in order to accomplish an illegal act;
- receiving an illegal benefit in order to accomplish an illegal act;
- demanding illegal benefit in order to refrain from carrying out required duties;
- receiving an illegal benefit in order to refrain from carrying out required duties,
- giving bribe;
- receiving a gift for a service to be rendered;
- offering a gift for a service to be rendered.

From the above acts, the persons involved in corruption are either the act of giving, offering, bribing, receiving or soliciting something to perform or refrain from perform an activity.
The analyzed cases show that the *actus reus* is proven in most of the instances, by the act of demanding or receiving an illegal benefit in order to accomplish an illegal act or refrain from carrying out required duties, the act of giving bribe; the act of receiving a gift. For the public officials and individuals, the qualification of the action element seems to be the same, apart from the fact that for public officials, the aspect of committing an act supported by the type of the position occupied enters into play.

For example, in the case of RPA 00428/2017/HC/ NYZ, the Executive Secretary of Cell was convicted with a sentence of 4 years of imprisonment after he has demanded and received 25,000 frws from a citizen whom he put his name illegally on the list of beneficiaries of Girinka Munyarwanda Program[52]. In this case, corruption was defined as the act of demanding and receiving 25,000 Rwf in order to perform an illegal act (putting someone who is not eligible on the list of the beneficiaries of *Girinka Munyarwanda*).

[52] See High Court of Nyanza, Masabo *Innocent vs Prosecution* , case n° RPA 00428/2017/HC/ NYZ, 18 September 2018.

Interesting thing in this case is that the person who gave the money to the Executive Secretary to be given a cow under Girinka program was not prosecuted. The act committed was a conventional corruption because the corruptor was aware that he was going to illegally appear on the list of the beneficiaries. Consequently, he should have been prosecuted.

Furthermore, the judicial decisions are often based upon unclear or insufficient reasons. For example, flaws in the reasoning are related to the manner of presentation and evaluation of the evidence and it is not assessed in light of *actus reus* element of the crime[53].

b) How to prove the *actus reus* in corruption cases?

This study found that the prosecutions has to prove the commission of the crime of corruption "beyond a reasonable doubt" in order to convince the court. Some of the evidence produced by the prosecution include:

- Confessions (pleading guilty) by the accused. Confessions are either oral or written[54];
- Accomplice's confessions against the accused[55];
- Seized material used in the commission of the crime[56];
- The report drafted by the Traffic Police Officer[57].

The report drafted by the Traffic Police Officer was rejected by the court as evidence because the court considered that Traffic Police Officer who claimed that the driver tried to bribe him should not be the one to draft a report. Rather, this police officer should report the case to another judicial police officer who could conduct independent investigations[58].

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[53] See High Court of Nyanza, Masabo *Innocent vs Prosecution* , case n° RPA 00428/2017/HC/ NYZ, 18 September 2018, para 8: The court considered the letter of 31/08/2015 granting illegally a cow to Habimana Emmanuel in Girinka program whereas he was not on the list of beneficiaries. This means that the court assessed the letter as evidence but the fact of demanding and receiving 25,000 frw by the Executive Secretary of the Cell were not assessed

[54] See RPA 00428/2017/HC/ NYZ.

[55] Intermediate Court of Huye, *Prosecution vs MBASIGIYIMANA Janvier and BAMPORIKI Jean Claude*, Case n° RDP 00143/2017/TGI/HYE, 25 September 2017

[56] See Intermediate Court of Muhanga, *Prosecution vs NSENGIYAREMYE Innocent*, case no R.P 00209/2017/TGI/MHG: 50,000 frws given by the accused to the traffic police was seized and used as evidence in the court.

[57] See Intermediate Court of Muhanga, *Prosecution vs MANZI Jean Claude*, case n° R.P 00028/2017/TGI/MHG, 3 December 2017.

[58] Intermediate Court of Muhanga, *Prosecution vs MANZI Jean Claude*, case n° R.P 00028/2017/TGI/MHG, 3 December 2017, para.8: The court did not consider the report produced by AIP NDUNGUZA Placide and CPL RUDAHUSHA Jean de Dieu which accused Jean Claude of giving corruption because the report was made by the

In the other similar cases, the court based immediately on the report produced and the seized money and the court motivated its decision that *" there was no previous conflict between the accused and the traffic police officer or they did not even know each other before prosecuting the accused but in this case"*[59].

In summary, in the case law analyzed, the *actus reus* of the crime of corruption is the act giving, demanding, soliciting, offering a benefit in order to get an illegal service or refrain from doing a legal duty. All these acts must proven by any means and in a convincing way (beyond reasonable doubt).

B. *Mens rea*: intent to commit the crime of corruption

For the *mens rea*, it is worth mentioning that it is shown when the court refers to the willfulness or the intent to commit the act on the side of the accused. In the case law analysed, the courts distinguished the *mens rea* of principle authors and accomplices.

a) Principle authors

Mens rea for principle authors was defined as the knowledge of the illegal act, willingness or intention to commit a crime[60].

b) *Mens rea* for accomplices

In some cases, the courts speculated about *personal intention, plan* and *full intent of the accomplice* in order to sentence them. For example, the case RP 00111/2016/TGI/MHG, an accomplice (helper to the car driver) of the principal author (driver) was asked by the driver to give to the police 5,000 frws in order not to fine the driver because the car did not have some documents. The court sentenced the accomplice with 6 years of imprisonment and a fine of 50,000 frws. At this level, the court considered the commission of act of corruption with knowledge that it was illegal.

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same persons who arrested him and took him to the police station and the same persons said that they have been given the money. The court questioned the veracity of this report (…).

[59] See Intermediate Court of Muhanga, *Prosecution vs NSENGIYAREMYE Innocent*, case n° R.P 00209/2017/TGI/MHG, para 9: (…) The court considered that, the fact for the accused, to argue that the police officer got the 50,000 frws from his pocket was a pure pretext and, in addition to that there was no conflict between them and that the police officer had no interest to act as such (…).

[60] *Ibidem*.

The accomplice appealed against this sentence and in the case RPA 00161/2017/HC/NYZ (appeal level)[61], the appellate court considered that, even if the appellant committed the act of giving the money to the police, the act itself was not steaming from ***his personal intention*** **or** ***plan***. The court concluded that the ***fully intention*** was of the driver because the appellant was the accomplice.[62] Therefore, the court reduced the sentence to 2 years of imprisonment and a fine of 10,000frws. So why the accomplice was convicted while the court concluded that he did not have the intention to commit a crime?

In principle, the accomplice is not subject to the same penalty as the offender or co-offender. He/she can only incur the same penalty as the offender when the judge, in his/her discretion, finds that the accomplice's responsibility in the commission of the offence is the same as or greater than that of the principal offender[63]. In fact, the Penal Code allows the judges to appreciate the role played by the accomplice in the commission of the crime, *not the degree of intent* in the commission of the offence. Reducing the punishment by saying the accomplice did not have *full intent*, as if fully and not fully intention have to be taken into account, is not really convincing.

The analysis should have been rather to know whether the accomplice knew or did not know the purpose of the money he gave to the police officer at the request of the driver of the vehicle. Furthermore, otherwise, the accomplice would have either been acquitted because the intent to commit the offence was missing or convicted in accordance with the role played.

In summary, in the case law analyzed, the *mens rea* element in the crime of corruption is defined as willfulness or intent to commit the corruption. On one side, the court considered the intent to commit the act but also, on the other hand, the court happened, in a discretionary way, to appreciate the degree of the intention of the accused. Thus, the case law is not consistent because

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[61] High Court/Nyanza, *UTAZIRUBANDA Jean de Dieu vs Prosecution*, case nº RPA 00161/2017/HC/NYZ, 30 June 2017.

[62] The court realized, as explained above, that there was no doubt that UTAZIRUBANDA Jean de Dieu was the one who gave 5.000 frw to the traffic police in order not to consider the faults of the vehicle they were driving in ; that was not a plan perpetrated by himself because as the assistant to the vehicle, he could not be liable of the vehicle's faults neither be punished for it but rather as explained above he has been an accomplice of the driver who asked him to give the gift of money to the traffic police and he accepted . The fact that he acted as accomplice would constitute a mitigating circumstance because his role was minor comparing to the driver's role (RPA 00161/2017/HC/NYZ, page 7).

[63] Organic Law nº 01/2012/OL of 02/05/2012 instituting the Penal Code, article 99 states:" The accomplice is not subject to the same penalty as the offender or co-offender, except in cases where: (…)the judge in his/her discretion finds that the accomplice's responsibility in the commission of the offence is the same as or greater than that of the principal offender.

if there is a proven intention on the side of the accused or accomplice, the criminal liability is there, irrespective of the intent is fully or not. The essential factor to look at is to assess whether the accused committed the act knowing that this act is prohibited by the law and knowing the consequences it entails.

C. Legal element

The offense of corruption has the legal basis in articles 633-651 of the Penal Code. In this research, it was found out that the main challenge is the legal qualification of the crime of corruption. It was found that the qualifications of the act committed varies from one case to another whereas the facts are the same. For example, in the case of corruption involving car drivers bribing traffic police officers so that the latter does not consider the illegal act posed, the article 640 and 641 Penal Code[64] have been referred to as the legal basis by the prosecutor. In a very similar case, article 641 Penal Code was referred to alone[65].

This shows that there is a room for confusion between the content of the article 640 and 641 of the Penal Code. For the article 640, the name of the offense is "offering a gift for a service to be rendered" which the driver did when giving the money to the police. Then, article 641 PC, the offense is "offering a gift in order to get an illegal service." The offenses provided for by both articles are almost the same and this induces the prosecution to use them *mutatis mutandis*.

In another similar case, a new qualification emerged. For example, in the case R.P00028/2017/TGI/MHG[66] the accused, a car driver, was charged to have corrupted the traffic police officer by giving 2,000 frws not to consider the faults the driver was liable to. The legal basis provided was the article 634 PC. This article states about the offense qualified as "*demanding or receiving an illegal benefit in order to offer a service*". This is a wrong qualification considering the way the facts were presented. The accused did not demand or receive anything but instead, he was charged with having given the money to the police.

In brief, the penal code provides a strong legal basis for the criminalization of corruption. However, this research found out that prosecutors and judges still have difficulties when it comes

[64]Intermediate Court of Musanze, *Prosecution vs NIYOYITA Alphonse*, case n° RP 00132/2017/TGI/MUS, 21 April 2017
[65]High Court/Musanze, *HITIMANA Dominique vs Prosecution*, case n° RPA 0122/15/HC/MUS, 23 October 2015
[66]Intermediate Court of Muhanga, *Prosecution vs MANZI Jean Claude*, case n° R.P 00028/2017/TGI/MHG, 3 December 2017.

to confrontation of the *actus reus* (material acts) of the crime and the legal element in order to come up with the qualification of the crime to be charged the accused.

2. Constitutive elements of corruption related offenses

In the case law analysed, it was found that the court dealt with embezzlement, illicit enrechiment and the award of unjustified advantages.

A. Constitutive elements of embezzlement

a) *Actus reus*: material element

It is worth to remind that, in the Rwandan legislation, the offence of embezzlement is punished as an offence not related to corruption, contrary to the UNCAC and AU Convention on corruption which consider embezzlement as an offence related to corruption. The penal code does not define the embezzlement but rather enumerates material acts susceptible to be considered as embezzlement, such as[67]:

- fraudulent misappropriation of property by a person *to whom it was entrusted*
- fraudulently destroying or embezzling negotiable instruments under *his /her care* or which have been *communicated to him/her by virtue of his/her office*.
- Embezzling public or private property, funds, documents, or movable property which are *entrusted to him/her, by virtue of his/her office*

In this research, it was found that he qualification of the *actus reus* may cause confusion when comparing embezzlement with other offences such as theft, and the breach of trust.
For example, in the case of RP 0191/16/TGI/HYE[68], the *actus reus* of embezzlement were

- the fact the accused did not make any list of materials;
- the accused did not show the one he handed the materials to;

In this case, the court decided that the fact that the materials were entrusted to the accused and he did not make a hand over to anyone, it was a form of fraudulent misappropriation.

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[67] See article 323 Penal Code.
[68] Intermediate Court of Huye, *Prosecution v Murekezi Jean Paul and others*, case n° RP 0191/16/TGI/HYE, 18 April 2017.

b) *Mens rea*: intent element

The criminal intent is complete when there is a *complete fraudulent conversion of property* of funds without the owner's consent.

As for the *mens rea* in embezzlement, corruption and other related offences, abuse of trust and theft, there must be a criminal intent, which means that the accused should be willful to pose the act and know the related consequences as stated by the law. The prosecution has to prove "beyond reasonable doubt" and therefore, the fraudulent misappropriation has to be proven by supportive evidence.

c) Nexus between embezzled object and the embezzler

The property embezzled must be connected to the embezzler either as a trustee, under his/her care or by virtue of his/her office. In the case of RP 00083/2016/TGI/MUS[69], the court found that, even if the accused was not the storekeeper of the cement, "*he was the chief of all security Guards in the Company and therefore, the safety of the company property was entrusted in him. Consequently, he had committed embezzlement*"[70].

For the accused to be charged with embezzlement, the prosecution must prove that the embezzled property was linked to the embezzler. For example, the prosecution must prove that the property was *entrusted to* the embezzler, the embezzler had access to it by *virtue of his/her office* or he/she was in *charge of taking care of* it.

c) Legal element

The offence of embezzlement or destruction of property is stated in article 325 of the Penal Code. This article does not define the offense of embezzlement. It only enumerates that acts that are punished as constituting the offense of embezzlement, such as embezzle public or private property, funds, negotiable instruments, documents, or movable property which are entrusted to him/her, by virtue of his/her office or under his/her care or which have been communicated to him/her by virtue of his/her office.

This article also provides for the sanctions of the embezzlement for a term of imprisonment of seven (7) years to ten (10) years and a fine of two (2) to five (5) times the value of the embezzled property.

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[69] Intermediate Court of Musanze, *Prosecution vs NIRINGIYIMANA Innocent*, case no RP 00083/2016/TGI/MUS, 6 June 2017.

[70] *Ibidem*, para. 3.

In summary, when assessing the quality of court judgments in this regard, it is important to note that in many cases the court has analyzed some of the constitutive elements mentioned above. For example, in the case of RP 00083/2016/TGI/MUS, it was not mentioned that the accused had an employment contract with the employer, but the court invoked some of the elements mentioned above to charge the accused with the offense of embezzlement:

"*the fact that the accused was the Chief of all the Company Guards could not waive his responsibility to safeguard all the materials of the Company at any site they are because it goes in line with his terms of reference to safeguard the Company materials and make sure that all Guards behave professionally on their duties. The fact the accused did not comply with his obligations and instead, took the cement by virtue of his office (being a Chief Guards) that he was responsible to safeguard, the act posed is qualified as fraudulent misappropriation of property*". [71]

For the offence of embezzlement to be criminalized, the case law analyzed shows that the prosecution must prove the existence of the property subject to fraudulent misappropriation and the linkage between the property in question and the accused and, finally prove the criminal intent as *mens rea* (fraudulent intention). The case law shows that the prosecution had to prove the following ingredients, even though it was not discussed separately:

- the proof of the employment;
- theft, misappropriation, conversion of property (money, funds, negotiable instruments)
- if the property belonged to the employer ;
- if the accused had access by virtue of his office.

The UNCAC criminalises the embezzlement as an offense related to corruption. Since Rwanda is a signatory of UNCAC, the offense of embezzlement should be criminalized as an offense related to corruption not only to harmonize with the convention, but also to avoid the attempt to confuse it with other crimes (i.e. theft and breach of trust). Indeed, when looking at the criminalization of corruption by the UNCAC[72], the acts that states parties are not obliged to necessary criminalize include the embezzlement within the private sector. This should attract the attention of Rwandan legislator to only maintain this offence in the public sector.

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[71]Intermediate Court of Musanze, *Prosecution vs NIRINGIYIMANA Innocent*, case no RP 00083/2016/TGI/MUS, 6 June 2017, para. 6.

[72] Chapter III of the UNCAC, articles 15-25

B. Constitutive elements of illicit enrichment

a) *Actus reus*: material element

The conventions and legislation are not explicit with regard to the criminal conduct (*actus reus*) that constitutes the basis of the offence of illicit enrichment. The law does not target conduct, but the omission. According to article 20[73] of UNCAC and article 636[74] of the Penal Code, the *actus reus* of this offense seems to be the possession of wealth coupled with the omission to justify it in accordance with one's lawful income. A suspect is required to explain the fact of wealth alone, failure to which would mean that he must have acquired it illegally. The prosecution needs to prove the fact that the wealth is not legitimately acquired.

In one of the analyzed cases[75], the accused was convicted for illicit enrichment because it was proved that he possessed a house but he could not justify the source of income he used to build it. Thus, the material element in illicit enrichment is the unjustified *increase in the assets of a public official* or *any other person.*

b) *Mens rea*: intent element

Unlike article 636 of the Penal Code which does not state whether the offense of illicit enrichment entails liability when it is intentionally committed, article 20 of UNCAC explicitly puts *intention* as an essential mental element of this offence. Moreover, article 96, para. 2, of the Penal Code also stipulates that "(…) *only a person who intentionally commits an offence shall be liable to a penalty*". From the above provisions, it appears that only intentional commission of illicit enrichment entails criminal liability and punishment.

It is to be noted that intentional commission of crimes embraces knowledge (awareness) and intent (volition or desire). With regard to the offence of illicit enrichment, the requirement of

[73] Article 20 of the UNCAC states that "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, *illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income*".

[74] Article 636 of the Penal Code states that "Any civil servant or any other person who enriches him/herself without indicating the justification of honest and legal source shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of two (2) to ten (10) times the value of the property the legal source of which, he/she is not able to justify.

[75] See Intermediate Court of Huye, *Prosecutor vs NSABIHORAHO Jean Damascène*, case n° RP.0082/16/TGI/HYE, 30/12/2016, para .12 -13.

intention relates to the increase in assets. The *mens rea* element of illicit enrichment pertains to the knowledge (awareness) and volition of the accused in respect of the extra wealth or asset that is beyond his lawful income.

For instance, in the above mentioned case of illicit enrichment from the Intermediate court of Huye[76], the Court finds that the fact that the accused, who was under the duty to declare his assets to the Office of the Ombudsman, did not mention the house in his declaration of the year 2013 and 2014, the time the house was built, and the fact that he did not proceed to the transfer of the property from the previous owner, hence not registering it in his own name, proves that **he knew** that what he had acquired was beyond his legal income and that is why he was concealing it.

c) Legal element

The offence of illicit enrichment has been defined in international and regional anti-corruption instruments to which Rwanda is party[77]. UNCAC, for instance, defines it to mean "*a significant increase of the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income*"[78]. It further explicitly includes the requirement of intention (*mens rea*) for the crime to be committed[79]. In addition, the scope of UNCAC seems restricted to the wealth of the public official while the AU Convention transcends such limitation by including the term "any other person"[80]. This term was incorporated because assets can be transferred easily to third parties who are affiliated with public officials in one way or another. This is the approach that article 636 of the penal code has adopted in stating that: "*Any civil servant or any other person* who enriches him/herself without indicating the justification of honest and legal source shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of two (2) to ten (10) times the value of the property the legal source of which, he/she is not able to justify".

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[76] See Intermediate Court of Huye, *Prosecutor vs NSABIHORAHO Jean Damascène*, case n° RP.0082/16/TGI/HYE, 30/12/2016, para. 12.
[77] Article 20 of UNCAC and article 4 (g) and 8 of African Union Convention
[78] Article 20 of the UNCAC.
[79] *Ibidem*
[80] Article 4 of African Union Convention.

C. Constitutive elements of the offense of award of unjustified advantages during the performance contract

As the embezzlement, the awarding of unjustified advantages is not criminalized as an offense related to corruption.

a) *Actus reus*: material element

The following conducts constitute *actus reus* element of the offense of award of unjustified advantages during the performance contract[81]:

- amending unlawfully public contract provisions in a bid to increase the value of the tender
- reduce the assignment of the tender without a corresponding decrease of the tender value, revising
- updating prices not provided by the biding documents
- approving or paying unexecuted, substandard, non-existent works
- paying an amount exceeding the amount of the tender.

In one of the analyzed cases[82], although it was at the level of preventive detention, five public officials in the Gakenke district were charged with the offense of awarding unjustified advantages for having paid an amount of 1,775,000 Frw for works which were not executed in the building of a health center and for having disbursed an amount of 6,241,550 Frw for maintenance works, which works were not provided for in the contract.

b) *Mens rea*: intent element

To be liable for this offense, the prosecutor needs to prove that the suspect/accused committed it intentionally. For example, the accused knew that he was awarding an advantage that was not in the contract or he was paying for unexecuted works or he intended (volition) to. In the above mentioned case of award of unjustified advantages during the performance contract, Musanze Intermediate Court of Musanze finds that there were not serious ground to suspect the accused of having committed the offense by the fact that the amount of 1,775,000 Frw that was paid for

[81] See article 630 of the Penal Code.
[82] Intermediate Court of Musanze, *Prosecution vs Kansiime James and others*, case n° RDP 00132/2017/TGI/MUS, 23 June 2017.

unexecuted works was recuperated when they discovered that it was *paid by error*[83] and the same was decided about the 6,241,550 Frw that was paid for maintenance works which were not provided for in the contract because it was found that it was from *a decision made by the Executive Committee of the district, an organ in which none of the suspects is member*[84].

However, one would wonder why the members of the Executive Committee of the District, who ordered the accused to pay 6,241,550 Frw which were not provided for in the contract, were not prosecuted while article 630, para. 3, of the Penal code sanctions "*a superior who orders his/her subordinate*" to commit one of the acts which constitutes this offense.

c) Legal element

The offense of awarding unjustified advantages in the performance contract is stated in article 630 of the Penal Code. This provision provides punishment for any person who

- *makes a contract amendment disregarding the provisions of the law and public procurement regulations and increases the value of the tender or reduces the assignment of the tender without a corresponding decrease in the tender value;*
- *revises or updates prices that are not provided by the bidding documents or in violation of its requirements;*
- *approves or pays unexecuted, substandard works, or incomplete consultancy services or non-existent works or pays these works or services or pays an amount exceeding the contractual amount.*
- *This article punishes an agent who commit this offense and a superior who orders his/her subordinates to commit this offense.*

By also assessing the case law, some factors that influence the judges' decisions have been identified. The following sections provide the details.

II.1.2.2 Factors influencing the court's decision

By assessing different courts' decisions, one finds out there that are many factors that influence judges' final decisions, such as mitigating and aggravating circumstances, concurrence of

[83] Intermediate Court of Musanze, *Prosecution vs Kansiime James and others*, case n° RDP 00132/2017/TGI/MUS, 23 June 2017*Idem*, para. 24.
[84] *Idem*, para. 26.

offenses and the absence of previous criminal conviction of the accused. The table below shows how the cases analysed are classified according to those factors.

Table 4: Classification of cases according to different circumstances retained by the judges

Name of the Court	Mitigating	Aggravating	Suspension of sentence	Other	Total
IC Nyagatare	5	2	0	3	10
IC Ngoma	4	0	0	6	10
IC Rubavu	5	0	0	5	10
IC Rusizi	1	0	1	6	10
HC Rwamagana	8	0	0	2	10
HC Kigali	4	0	0	13	17
HC Nyanza	4	0	2	0	6
IC Huye	4	0	0		4
IC Muhanga	8	0	0	0	8
IC Musanze	8	0	0	0	8
HC Musanze	1	0	0	0	1
IC Nyarugenge	8	0	2	0	10
IC Gasabo	12	0	0	0	12
IC Gicumbi	4	0	0	0	4
HC Rusizi	5	0	1	0	5
Supreme Court	1	0	1	0	1

1. Mitigating factors

Mitigating circumstances are factors which preceded, accompanied or followed an offence for which the judge can be called to reduce the gravity of the punishment to be inflicted to the offender. The Rwandan criminal code enumerates various factors which may lead the judge to apply mitigating circumstances. In accordance with article 77 of the law on criminal procedure, the judge may among others reduce penalties when:

> *1° the accused, before the commencement of prosecution, pleads guilty and sincerely seek forgiveness from the victim and the Rwandan society and expresses remorse and repairs the damage caused as much as expected;*
> *2° the accused reports him/herself to a competent Court before or during the pre-trial proceedings;*
> *3° at the outset of the trial in the first instance, the accused pleads guilty by a sincere confession;*
> *4° the offence has minor consequences.*

Beside these mitigating circumstances, the law provides also for mitigating excuses such as minority and provocation[85].

In assessing the quality of judgments on corruption and other related offences, it was realized that the most mitigating circumstances accepted by judges are the following:

- The fact for the offender to plead guilty[86];
- The experience of the offender in his/ profession[87];
- Being a primary offender[88];
- The consequence of the offence[89];
- The fact that the offender returned an embezzled property[90]

In brief, this research found out that, in applying these mitigating circumstances, judges have much discretional powers in appreciating the possibility of reducing penalties. It was found that two offenders may all plead guilty, one being inflicted the minimum punishment provided by the article 78 of the penal code in case of mitigating circumstances, whereas the other being condemned to imprisonment equals to the half, 2/3, etc[91].

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[85] Article 72 says that when an offender or an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of the commission of an offence and if the sentencing appears necessary, the following penalties shall apply:
1° if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (15) years;
2° if he/she would be subjected to a fixed-term imprisonment or a fine, he/ she shall be liable to penalties not exceeding half (1/2) of the penalties he/she would receive if he/she was aged eighteen (18) years. The code in its article 73 adds that Penalties shall be reduced for offences committed under provocation. This law, however, obliges judges to state elements that constitute provocation by the victim and which mitigate the gravity of the offence.

[86] See Intermediate Court of Rubavu, *Prosecution vs Nzeyimana Jean Claude*, Case n° RP 00019/2016/TGI/RBV, 13/02/2017.

[87] In TGI Nyagatare (RP 00100/2016/TGI/ NYG), the judge has accepted to reduce the penalty to be inflicted to the offender because the later had no working experience and consequently he was influenced by his mates.

[88] See in Intermediate Court of Nyangatare *Prosecutor vs Zaribwende Emmanuel*, case n° RP 00057/2017/TGI/NYG, 16/03/2017; see also Intermediate Court of Nyangatare, *Prosecutor vs TUYISENGE Jean Claude*, case n° RP 00090/2017/TGI/NYG, 22/03/2017.

[89] Intermediate Court of Nyangatare, *Prosecutor vs RUKUNDO Joseph and MUSABYIMANA Olive*, case n° RP 00100/2016/TGI/NYG, 19/07/2017.

[90] This is a principle provided in the article 77(4) of the Penal Code where the consequence of the offence is seen as a mitigating circumstance.

[91] For example, in RP 00019/2016/TGI/RBV, the offender has pleaded guilty and he was condemned to an imprisonment of one year after being found guilty of corruption of 10,000. In the same court, in the case RP 00567/2017/TGI/RBV, the offender was condemned to imprisonment of two years after also being found guilty of corruption of 1000. See Intermediate Court of Rubavu, *Prosecution vs Nzeyimana Jean Claude*, Case n° RP 00019/2016/TGI/RBV, 13/02/2017; Intermediate Court of Rubavu, *Prosecution vs Nyiransabimana Patricie*, Case ° RP00567/2017/TGI/RBV, 03/01/20018.

The application of mitigating circumstances reveals that it is not consistent and that there are no clear guidelines on how they should be applied. In principle, in reducing penalties, the judge should not go below the minimum punishment. However, it was realized that, in all cases analysed, judges have inflicted punishments which are between 1 to 6 years, even in the case where there were no mitigating circumstances, in the offense of embezzlement, while the minimum is 7 years[92].

2. Aggravating circumstances

Rwandan penal code does not provide for the legal definition of aggravating circumstances. The doctrine has, however, defined them as those circumstances expressly determined by the law which, attached to the infraction or the author, leads to the raising (elevation) of the nature of the sentence normally incurred, or to the modification of the nature of the sentence attached to the infraction[93]. In the offence of corruption, the Rwandan legislator has provided for aggravating circumstances in case the person accepts corruption in order *to accomplish an illegal act* or if the person accepts corruption in order *to refrain from carrying out his/or her duties*[94].

In this research, we have found that all cases which have been brought before courts concern the seeking of the undertaking of an illegal act and consequently, have been heard at the first instance by Intermediate Courts. It has been realized that punishments which have been inflicted to offender vary between 1 to three years of imprisonment even when the judge could apply the maximum.

In the offence of embezzlement, some aggravating circumstances have been applied. For example, like the embezzlement of VUP money was considered as aggravating circumstances because that money was to be used in poverty reduction[95]. Another circumstance which is

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[92] See for example, Intermediate Court of Ngoma, *Prosecutor vs HABANABAKIZE Patrick*, case n° RP 0079/16/TGI/NGOMA, 01/03/2016; Intermediate Court of Ngoma, *Prosecutor vs Havugimana*, case n° RP 0149/2016/2016/TGI/NGOMA, 15/04/2016; Intermediate Court of Rubavu, *Prosecutor vs Bibutsuhoze Jean Bosco*, RP 0451/2016/TGI/RBV, 17/11/2017; Intermediate Court of Rubavu, *Prosecutor vs Nyiransabimana Patricie*, case n° RP 0567/2017/TGI/RBV, 30/01/2018.

[93] See FindLaw Legal Dictionary, "Aggravating Circumstance", available at https://dictionary.findlaw.com/definition/aggravating-circumstance.html, acceded on 07/09/2018.

[94] Article 635 of the Penal Code states that "Any person who explicitly or implicitly demands or directly or indirectly receives gifts or any other illegal benefit for him/herself or another person or accepts it as a promise in order *to accomplish an illegal act or to refrain from carrying out his/or her duties*, shall be liable to a term of imprisonment of more than five (5) years to seven (7) years and a fine of two (2) to ten (10) times the value of illegal benefit demanded".

[95] See Intermediate Court of Rusizi, *Prosecution vs Bayizere Isaie*, Case n° RP/ECON 0001/2017/TGI/RSZ, 13/02/2018, par. 30.

considered as aggravating is the recidivism. The law says that recidivism occurs when a person who was previously sentenced to imprisonment of at least six (6) months, commits another felony or misdemeanor within a period of five (5) years after completion of the penalty. In case of recidivism, the convict shall receive the maximum penalty provided by law and the penalty may be doubled.[96]

In this research, we did not find any case of recidivism. All offenders were judged as primary offenders. One may wonder whether judges or prosecutors have a reliable system whereby they check the criminal background of all offenders. This will be aberrant if they rely only on what has been said by offenders themselves.

Another situation which confuses people is the combination of circumstances of different nature. The penal code states that "*in the event of combination of aggravating, excusable, recidivism and mitigating circumstances, courts shall apply the penalty taking into account these factors in the order set out under this law*".[97] However, there are no guidelines on how those combined circumstances are applied.

In brief, this research found out that the most applied aggravating circumstances applied by judges are, for the cases of corruption, the act of accepting, receiving, soliciting corruption in order to accomplish an illegal act or to refrain from carrying out his/or her duties. For other offenses, such as embezzlement, the judges appreciates the impact of the offense to the society, for example, the use of the money which was designated to poverty reduction programs.

3. Application of concurrence of offences

Article 84 of the Rwandan penal code provides that in case of concurrence of offences, the judge must apply the following principles:

- *If an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty.*
- *Any additional penalty shall be applied even if it is only provided for one of the concurrent offences. The most severe penalty shall be the one whose maximum range is*

[96] Article 79 of Penal Code.
[97] Article 82 of Penal Code.

the highest. When two (2) penalties have the same maximum range, the most severe penalty shall be the one with the higher minimum range.

- *When two penalties have the same maximum and minimum range, the most severe penalty is that one accompanied by a fine. A fine shall always be less severe than an imprisonment penalty.*

In the case of concurrence between embezzlement and the use of forged documents, the judge should combine article 325 which punishes the offender to a term of imprisonment of seven (7) years to ten (10) years and a fine of two (2) to five (5) times the value of the embezzled or destroyed property and the imprisonment provided by article 611 which says that:

" *If a public servant or any other person in charge of public service counterfeits a document in the exercise of his/her duties, he/she shall be liable to a term of imprisonment of seven (7) years to ten (10) years and a fine of five hundred thousand (500,000) and five million (5,000,000) Rwandan francs. Basing on the principle laid down by article 84, the punishment in case of concurrence between embezzlement and counterfeit by a public servant would be ten years which can even go to fifteen(15 years) depending on circumstances".*

It is abnormal that in all cases where there is concurrence of offences, judges have ignored the formula provided by article 84 which says that "*if an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and the judge can increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty*". Instead, they have only applied the maximum of the most severe penalty only.[98]

4. Absence of previous criminal conviction: suspension of penalties

Suspension of penalties allows the judge when all the conditions provided for by the law are met, to grant a stay of execution of a sentence, by a motivated decision, of all or part of the main or accessory sentences pronounced against an offender whose guilt is established. The law says that the suspension of penalty is a judge's decision to order the stay of execution of a penalty of imprisonment not exceeding five (5) years if the convict has not been previously sentenced to

[98] See for example, Intermediate Court of Rusizi, *Prosecutor vs NSANZAMAHORO Emmanuel*, case n° RP 00129/2017/TGI/RSZ, 19/01/2018; High Court/Rwamagana, *Prosecution vs DIYAKA Innocent*, case n° RPA 00086/2017/HC/RWG, 23/10/2017; High Court/Rwamagana, *Prosecution vs Bagabe Godfroi and Rucogoza Jean Marie Vianney*, case n° RPA 00029/2016/HC/RWG-RPA 00031/2016/HC/RWG, 18/04/2017; Intermediate Court of Rubavu, *Prosecutor vs Mpayimana Francois and Mbarushimana Samuel*, case n° RP 00125/2017/TGI/RBV, 31/05/2017.

imprisonment or to community service as an alternative penalty to imprisonment of more than six (6) months as a result of a final judgment.[99]

Various conditions must be met in order to suspend the sentence. These conditions are, firstly, the absence of a previous conviction to a sentence of imprisonment of over 6 months or sentenced to community service as an alternative penalty to imprisonment of more than six (6) months as a result of a final judgment. Secondly, the main sentence must be imprisonment of not exceeding 5 years. Thirdly, the judge must give the reasons for the decision of application of the suspension (motivation for the decision).

It is to be noted that the judge has the discretion to accept or refuse the application of a suspension of the sentence. Given the fact that other conditions are not provided by the law, judges have used this discretionary power to decide whether the penalties will be suspended or not. In this research, it was found that most of the accused persons have raised the issue of being involved in the commission of offences for the first time. This reason has been accepted by some judges whereas it was rejected by others[100].

It was also found that an offender, before the Intermediate Court of Rusizi, has requested the suspension of his penalties on the reason that he was arrested when he was organizing his marriage and this was granted.[101] It is also to mention that in some cases, mitigating factors have

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[99] Article 85 Penal Code.

[100] In most of cases analysed, it was found that, even if most of cases analysed offenders have committed the offence for the first time, some judges have based their decisions on this fact whereas others have totally ignored it. See Intermediate Court of Nyarugenge, *Prosecutor vs Urayeneza Angelique*, case n° RPA 00167/2017/TGI/NYGE, 20/04/2017; Intermediate Court of Nyarugenge, *Prosecutor vs Niyombarusha Benjamin*, case n° RP 00269/2016/TGI/NYGE, 8/04/16; Intermediate Court of Gasabo, *Prosecutor vs Nsanzimana Sylivestre*, case n° RP 000464/2017/TGI/GSBO, 31/04/17; Intermediate Court of Muhanga, *Prosecution vs HITIMANA Jean*, case n° R.P 00381/2017/TGI/MHG, 11/10/2017, Intermediate Court of Ngoma, *Prosecutor vs HABANABAKIZE Patrick*, case n° RP 0079/16/TGI/NGOMA, 1/03/2017.

[101] In Intermediate Court of Rusizi, *Prosecution vs Nzeyimana*, case n° RP 00171/2017/TGI/RSZ, 20/10/2017, para. 18: the Judge has said in his motivation " *Urukiko rusanga ariko nanone kuba Nzeyimana yaringinze akanatakambira urukiko ndetse akaba ari umuntu wendaga gukora ubukwe vuba uteganya gutera imbere akoresheje gukora nk`uko n`ubundi yafashwe yari ari mukazi ari nako yakoreyemo icyaha, rusanga ari byiza ko yasubikirwa igice cy`igihano kugira ngo azasubire vuba muri sosiyete Nyarwanda,maze bitume n`abandi cyane cyane abo bakora akazi kamwe bazumva uko yahanwe batazakinisha gukora icyaha nk`icyo,maze rugashingira ku ngingo ya 85 na 86 z`itegeko N° 30/2013 ryo kuwa 24/5/2013 ryerekeye imiburanishirize y`imanza nshinjabyaha,agafungwa gusa muri gereza umwaka umwe,indi myaka 3 akayisubikirwa mu gihe cy`imyaka ine*" The court finds that Mr Nzeyimana has requested the mercy of the court and given the fact that he was preparing his marriage with the intention of prospering using his work as he was arrested when he was in work, the court finds that it is good to spend his punishment in order to quickly go back in the Rwandan society. This will serve as a warning to those who remain in working place who will hear how he was sentenced and prevent themselves from being involved in that very same offence, and then it will base its decision on article 85 and 86 of law n° 30/2013 of 24/5/2013 of the Criminal procedure then serve only one year in jail and other three be suspended for a period of four years.

been applied without being requested by parties. This may confirm that the judges play an active role in criminal matters.[102]

The discretionary power of the judge should be revised in order to avoid arbitrary from judges. Putting into place guidelines containing causes of suspension would be a good way of narrowing the room for arbitrary. The tables below show how the sentences were distributed among the accused.

II.1.2.3 Distribution of sentences faced by defendants

1. Sentences in corruption cases

Table 5: Number of defendants sentenced in corruption cases

Trial sentences	Number of defendants sentenced in corruption cases	Percentage of defendants sentenced in corruption cases
Less than 1 year	0	0%
1 year to less than 2 years	24	25.2 %
2 years to less than 5 years	28	29.4 %
5 years to less than 7 years	25	26.3%
7 years to 10 years	1	1.05%
Acquitted	17	17.8%
Total	**95**	**100%**

The table above shows that the majority of defendants i.e. 80.9 % were sentenced between 1 and 7 years of imprisonment which is the normal range of sentences provided for in the penal code. Judges have not considered aggravating circumstances though in some cases the offense of corruption was committed concurrently with other offences. Only in 1 case aggravating circumstances were retained and the defendant was sentenced to more than 7 years of imprisonment[103]. The above table also shows that 17.8 % of defendants were acquitted after trial. Details of distribution of sentences for corruptions cases in each court are presented in the annex 3.

[102] In Nyanza High Court, *Prosecutor vs Uwizeyimana Ignace*, RPA 00290/2017/HC/NYNZA and in Intermediate court of Ngoma in the case RP 0149/16/TGI/NGOMA, Judges have played active roles and consequently, they have reduced penalties without being requested by the accused.
[103] Details are in the annex 3.

2. Sentences in offences related to corruption

Table 6: Number of defendants sentenced in offenses related to corruption

Trial sentences	Number of defendants sentenced in offenses related to corruption	Percentage of defendants sentenced in offenses related to corruption
Less than 1 year	2	0.3%
1 year to less than 2 years	10	15.15 %
2 years to less than 5 years	12	18.18 %
5 years to less than 7 years	14	21.21%
7 years to 10 years	16	24.24 %
Acquitted	18	18.18 %
Total	**66**	**100%**

The above table shows that around 54.54 % of defendants benefited from mitigating circumstances, that is to say that they were sentenced between 1 and 7 years of imprisonment. Only 24.24 % of defendants were sentenced with the prescribed penalty for offense of embezzlement i.e. more than 7 years of imprisonment. There is a slight increase in the rate of acquittals in embezzlement cases compared to corruption cases, 18.18 % of defendants in embezzlement cases have been acquitted. Details of distribution of sentences for embezzlement cases in each court are presented in the annex 4.

Another observation one could make during the research is that there were many disparities in sentencing from one court to the other.

II.1.2.4 Disparities in sentencing

1. Conflict in sentencing within the same court

Table 7: Sentencing of similar cases in the same court

No	Name of the accuse and the case number	Charges	Trial sentence	Observation
1	*UWIZEYIMANA Ignace vs Prosecution;* case n° RPA 00290/2017/HC/NYZ	Act of giving money to the traffic police (2000 frws) to get illicit service	2 years of imprisonment and a fine of 10,000 rwfs that were suspended in two years	The accused did not plead guilty but the court, *de proproprio motu,* reduced the sentence
2	*DUSABUMUREMYI Jean Bosco vs Prosecution*, case n° RPA 00236/2017/HC/NYZ	Act of giving money to the traffic police (5000 frws) to get illicit service	2 years of imprisonment and a fine of 10,000 rwfs	The accused had pleaded guilty from the preliminary investigations up to the trial phase
3	Prosecution vs Niyoyita Claude , case no RP 00268/TGI / NYGE	Act of giving a gift (5,000 frws) to the traffic police in order not to consider his faults in road traffic	2 years of imprisonment and a fine of 20,000 frws	The accused pleaded guilty
4	Prosecution vs Niyombarusha Benjamin, case no RP0069/2016/TGI/NYGE	Act of giving a gift (3,000 frws) to the traffic police in order not to consider his faults in road traffic	1 year of imprisonment among which 3 months in jail and 9 months suspended in 2 years and a fine of 30,000 frws	The accused pleaded guilty but argued he was induced in the commission of the offense by the police
5	Prosecution vs Twagirimana Eric , case no RP00610/2017/TGI/ GSBO	Act of giving a gift (3,000 frws) to the traffic police in order not to consider his faults in road traffic	6 years of imprisonment and a fine of 30,000frws	The accused was not present during the trial but he had confessed during the preliminary investigation
6	Prosecution vs Nsabimana Emmanuel, no RP00216/TGI/GSBO	Act of giving a gift (6,000 frws) to the traffic police in order not to consider his faults in road traffic	2 years of imprisonment and a fine of 12,000 frws	The accused pleaded guilty

In the case of RPA 00290/2017/HC/NYZ[104], an accused person had been sentenced with 6 years of imprisonment and a fine of 10,000 frws after being guilty of an offence of corruption with a material element to offer a gift to the policeman (2,000) in order get illicit service. The convicted person had not pleaded guilty and even in the appeal, he retained the same attitude. Surprisingly, the court reduced the sentence irrespective that the appellant was not pleading guilty but basing on article 76 of the Penal code which states that *the judge may consider the appropriateness of mitigating circumstances which preceded, accompanied or followed an offence.*

The court added that the appellant did not realize his plan to corrupt the policeman but instead the gift was seized. The court also argued on the status of the gift offered that was not a huge amount of money (2,000 frws) and that it was for the accused the first time to be convicted by the court. Considering all these motives, and basing on article 78 of the Penal Code, the court reduced the sentence to 2 years of imprisonment and a fine of 10,000 frws. In addition to that, the court based on article 85 of the Penal Code to suspend the sentence in two (2) years which resulted in releasing of the accused.

There are other similar cases whereby the accused person (s) were in the same situation and did not benefit from the reduction of the sentence up to the suspension of the sentence by the court. In the case of RPA 00236/2017/HC/NYZ[105], the accused had appealed against a decision taken in the case of RP 00109/2017/TGI/MHG. In this case, the accused was guilty of the offence of corruption; giving a gift (5,000 frws) to the policeman in order to get illicit service and was sentenced with 3 years of imprisonment and a fine of 10,000 frws. The court based on the amount of the gift offered (5,000 frws) that was not a huge amount of money and the fact that it was the first time for him to be convicted by the court and reduced the sentence up to two (2) years of imprisonment and a fine of 10,000 frws. The accused had pleaded guilty to the preliminary investigations up to the trial which is different from the other case where the accused refused to plead guilty.

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[104]High Court/Nyanza, *UWIZEYIMANA Ignace vs Prosecution*, case n° RPA 00290/2017/HC/NYZ, 27 July 2017.
[105] High Court/Nyanza, *DUSABUMUREMYI Jean Bosco vs Prosecution*, case n° RPA 00236/2017/HC/NYZ, 29 June 2017.

These two cases are quite similar when one considers the acts committed. It was the same offence and the gifts offered are also almost the same: 2,000 frws and 5,000 frws do not present a huge difference. Surprisingly, the accused person who did not plead guilty was the one who benefited a lot from the mitigating circumstances considered by the judge *de Proprio motu* whereas the one who pleaded guilty did not benefit a lot, apart from a reduction of one year and he remained in prison. It is recommendable for the court to treat equal situation on equal footing otherwise it would be considered as a case of discrimination.

2. Conflict in sentencing between the first instance and appeal level

Differences in sentencing may be observed within one case when in appeal the court orders a sentence totally different from the previous one. A question is raised as to know the causes of such attitude of the court to order different sentences to the accused persons

Table 8: Sentencing at different levels of the trial

No	Name of the accused	First instance Judgement	Appeal Judgement	Observation
1	UWIZEYIMANA Ignace	In the case RP 00113/2017/TGI/MHG), he was sentenced with 6 years' imprisonment and a fine of 10,000 frws	In the case of RPA 00290/2017/HC/NYZ, the sentence was 2 years imprisonment and a fine of 10,000 frws. Then the 2 years were suspended for 2 years	Overrule
2	DUSABUMUREMYI Jean Bosco	In the case RP 00109/2017/TGI/MHG he was sentenced with 3 years and a fine of 10,000 frws	In the caseof RPA 00236/2017/HC/NYZ, the sentence was 2 years of imprisonment and a fine of 10,000 frws	Overrule
3	HITIMANA Dominique	In the case RP 0060/15/TGI/MUS, he was sentenced with 5 years and a fine of 20,000 frws	In the case RPA0122/15/HC/MUS, the sentence was with 1 year and a fine of 20,000 frws	Overrule
4	Habarurema Aloys	In the case RP 0237/15/TGI/MHG, he was sentenced with 10 years and a fine of 4,500,000 frws	In the case of RPA 0033/16/HC/NYA, he was acquitted	Overrule

These are some examples where there was a kind of conflict between the court of the first instance and the court of appeal level. In general, it is normal that the court, at the appeal level, may overturn the decision taken at the lower instance when there has been, for example, the breach of the procedure or noncompliance with the existing laws or some of the evidence was not considered whereas they had to shed light on the case. However, it becomes inconceivable when the court, at the appeal level, overturned the decision without any convincing motivation.

For example in the case *Uwizeyimana Ignace vs Prosecution*[106] , the reasons given by the court at the appeal level to reduce and suspend the sentence were hard to understand. In paragraph seven (7) , the court considered that "*the accused deserved to get a lesser sentence though he did not plead guilty. The court based on the fact that the offense committed did not produce any bad effect and his plan was not achieved because the persons to whom he wanted to corrupt were the same persons who caught him and the money was seized. The court added that the status of the money used in corruption could not be ignored while sentencing the accused. The court considered further that the fact the accused was prosecuted before court for the first time could be considered as a mitigating circumstance as it was a sign that he normally behaved well*".

Then, the court based on article 76 & 78 of the penal code to reduce the sentence up to 2 years of imprisonment and a fine of 10,000 rwfs and the 2 years of imprisonment were suspended in 2 years basing on article 85 of the penal code[107]. Certainly, one may consider rather the lack of bad effect caused by the offense and not considering the status of the offer given in corruption. This is because one may offer a little money and achieve completely his/her plan whereas on the other hand, one may offer a huge amount of money and not achieve his/her plan due to the interruption of the act and the seizure of the offer. On this point, we commend the position of the court in the case RP 0004/2017/ TGI / MHG[108] whereby it was underscored *that "what is taken into account while sentencing is not the status of the offer in money whether it is little or a huge amount of money but instead the offense committed and the consequences that it has caused to the society*".

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[106] See High Court/Nyanza, *UWIZEYIMANA Ignace vs Prosecution*, case n° RPA 00290/2017/HC/NYZ, 27 July 2017, para. 7 : The Court realizes that Uwizeyimana Ignace's sentence should be reduced even if he did not plead guilty.

[107] See High Court/Nyanza, *UWIZEYIMANA Ignace vs Prosecution*, case n° RPA 00290/2017/HC/NYZ, 27 July 2017, para 8.

[108] See Intermediate Court /Muhanga, *Prosecution v Karamuka Pierre*, case n° RP 0004/2017/TGI/MHG, 15 February 2017, para. 19.

If it was to accept the reasoning of the court applied in case *Uwizeyimana Ignace vs Prosecution*, the accused persons in all the cases of the same kind would benefit from the same mitigating circumstances irrespective they have pleaded guilty or not. A consistent guideline on how court would appreciate mitigating circumstances in sentencing is highly needed to avoid differences in sentencing for identical cases.

II.1.2.5 Deciding on the seized properties (confiscation)

The cases involving corruption and related offences as well as the embezzlement have given rise to confiscation of seized or embezzled properties subject to the type of offence committed. These properties are mainly used by the prosecution as an evidence to prove the materiality of the act committed. Normally, the court when ruling over such cases, should precise the fate of those properties. However, it has been ascertained that, in some cases, the courts did not decide over the seized properties. A question arises then as to know their fate.

It is known that when the court has taken into consideration this situation, it clearly orders, in its decision that the seized property (money) be deposited in public treasury[109] or be given back to the innocent person[110]. Conversely, in the case RP 00147/2017/TGI/MHG[111], the accused person was guilty of the offence of corruption (offering a gift to police (10,000 frws) in order to get illegal services). The accused was sentenced to 4 years of imprisonment and a fine of 20,000 frws. Surprisingly, in its final decision, the court remained silent on the fate of the 10,000 frws seized! In the same vein, in case RP 00109/2017/TGI/NYGE[112], the court did not decide on the fate of the 20,000 Frw that was seized. In the case the court is silent on the fate of seized assets, one would wonder what would be the fate of that seized assets.

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[109] See for example, Intermediate Court of Huye, *Prosecution vs MUBIRIGI Alexis*, case n° RP 0130/16/TGI/HYE, 6 June 2016; Intermediate Court of Huye, *Prosecution vs NTIYAMIRA Vianney*, case n° RP 00103/2017/TGI/HYE, 23 May 2017; Intermediate court of Huye, *Prosecutor vs MUKAMANA Damarce and others*, case n° RP 00052/2016/TGI/HYE, 21 November 2017.

[110] See for example, Intermediate Court of Muhanga, *Prosecutor vs Dusabeyezu Theophile*, case n° R.P 00108/2017/TGI/MHG, 11 April 201, para 18 & 21: the accused person was not guilty of having committed corruption (give a gift to police in order to get an illegal service) and therefore, the 6,000 frws seized and that was given as a gift not to deliver the stolen bicycle without being paid back the money it has been bought, was ordered by the court to be restituted to the innocent person.

[111] Intermediate court of Muhanga, *Prosecution vs NZAKIZWANAYO Gabriel*, case n° RP 00147/2017/TGI/MHG, 21 April 2017.

[112] Intermediate Court of Nyarugenge, *Prosecution vs Baziyaka Marcel*, case n° RP 00109/2017/TGI/NYGE, 6th April 2017.

Table 9: An overviewof the confiscation status by the courts

Court	Confiscated and inclusive in court decision	Seized and no confiscation mentioned in court decision	Total
HC Nyanza	0(0%)	0 (%)	0 (100%)
IC Huye	3 (60%)	2 (40%)	5 (100%)
IC Muhanga	11(64.7%)	6 (35.3%)	17 (100%)
IC Musanze	3 (33.3)	6 (66.6%)	9 (100%)
HC Musanze	1 (33.3%)	2 (66.6%)	3 (100%)
IC Rubavu	6(60%)	4(40%)	10(100%)
HC Rwamagana	0(0%)	5(100%)	5(100%)
HC Kigali	0(0%)	8(100%)	8(100%)
IC Nyarugenge	13 (81.25%)	3 (6.25%)	16(100%)
IC Gasabo	10 (62.5%)	6(37.5%)	16 (100%)
IC Gicumbi	3(25%)	5 (41.7%)	8(100%)
HC Rusizi	0(%)	8 (88.9%)	8(100%)
Supreme Court	1(50%)	1(50%)	2(100%)
Total	**51 (47%)**	**56 (52.7%)**	**107 (100%)**

Of 200 cases identified and analyzed, only 107 cases were subject to confiscation of property. Among these 107 cases, the court decided on the fate of the seized property for 51 cases whereas for the other 56 cases the court remained silent. The problem was to know how to recover those properties that normally had to be deposited in the public treasury in case the accused is

convicted or to be restituted to the accused person in case he/she is acquitted[113]. The courts would pay much attention to this issue and make sure a decision over such properties is made.

II.1.2.6. Referring to case law

The use of legal reasoning from the case law is very important as it offers the judges to have the opportunity to explore other judges' legal reasoning while ruling over similar cases. In Rwandan legal system, case law, especially from the Supreme Court, is no longer considered as having a persuasive force but a binding force to all lower courts. Article 47 of the Law on Supreme Court states that:" *Judgments and decisions of the Supreme Court shall be binding on all other courts of the country"*[114].

The content of this article came to vest case law, especially those of Supreme Court, with another status among the sources of law in Rwandan legal system. The Supreme Court's judgments bind all the lower courts in Rwandan territory. This means that all inferior courts have to follow the legal reasoning from the Supreme Courts' judgments when it comes to dealing with similar cases.

In this research, it was found out that the reference to the case law of the Supreme Court is not consistent. In the cases analyzed, there is a Supreme Court judgment that has been referred to, especially when deciding over the reduction of sentence in appeal. That is the case RPA 066/08/CS in which the Supreme Court ordered that "*the appellant could not get a reduction of the sentence for the second time at the appeal level under the pretext to continue pleading guilty even if the reduction was a result of another circumstance*". [115]

On the one hand, some courts have refused to reduce the sentence at the appeal level after considering that the lower courts have reduced the sentence after the accused had pleaded guilty and continued to plead guilty at the appeal level[116]. On the other hand, some courts did ignore

[113] See article 162,11° of the Law no 30/2013 of 24/5/2013 on criminal procedure.
[114] See article 47 of the Organic Law n° 03/2012/OL of 13/06/2002 determining the organization, functioning and jurisdiction of the Supreme Court.
[115] See Supreme Court, *Prosecution vs Kabahizi Jean*, case n° RPA 066/08/CS, 6 February 2009; see also as *Prosecution v Mpitabakana*, case RPA0129/10/CS, 7 March 2014; Supreme Court, *Prosecution vs DDUNGU Hasifa* , case no RPA 0036/15/CS , 23 October 2015; Supreme Court, *Prosecution vs Muberuka Gratien* , case n° RPAA 0083/12/CS ,17 June 2016.
[116] See High Court/Nyanza, *MUKUNDABANTU Alexandre, NTAKIRUTIMANA Jean Marie Vianney, NzamukeshimanaJanvière and KAKUZE Marie Rose vs Prosecution*, case n° RPA 0056/16/HC/NYA, RPA 0063/16/NYA, RPA 0093/16/HC/NYA, RPA 00 96/16/HC/NYA, 31 May 2016.

the precedence of the Supreme Court. For example, in the case RP 00109/2017/TGI/MHG[117], the accused pleaded guilty of having committed the offence of corruption by offering a gift (5,000 FRWS to the police) in order to get an illegal service. The court based on his confessions and reduced his sentence, which would 5 years of imprisonment up to 7 years, to 3 years of imprisonment and a fine of 10,000 frws. The accused appealed seeking the reduction of sentence of 3 years of imprisonment and a fine of 10,000 frws. Surprisingly, the appeal court reduced the sentence for the second time and he was sentenced to 2 years of imprisonment and a fine of 10,000 frws regardless of the precedence of the Supreme Court on the matter[118]. The issue is to know whether a lower court shall always be obliged to follow the Supreme Court judgments without making any derogation.

In brief, the Supreme Court has provided guidance on the cases where appellant seeks for reduction of sentence for the second time in appeal whereby the reduction sought cannot be granted. The courts should take the same position as it has been clearly given by the Supreme Court. When courts do not observe the precedence of the Supreme Court, they end up by rendering contradictory judgements. Furthermore, the precedence of the Supreme Court should be communicated to parties once they lodge their appeals seeking a second reduction of sentence at the appeal level in order to avoid wasting their time.

II.1.2.7 Issue of cross-examination of witnesses

In cases of corruption and related offences, such as embezzlement, the testimonial evidence is among the evidence produced by the prosecution and considered, in most instances, by the court. In some cases, parties pointed out that the written testimonies from witnesses are contradictory. This implied that the defence parties would wish to have the witnesses in court and cross exam them. For example, in the case RPA 0539/15/HC/NYA[119], the Appellant had put forth among others, the principle of cross-examination of witnesses that was not respected at the lower instance. The Appellant had been convicted by the court in the case RP 0123/14/TGI/NYBE where she was guilty of embezzlement and was sentenced to 2 years of imprisonment and a fine

[117] Intermediate Court of Muhanga, Prosecutor vs Dusabumuremyi Jean Bosco, case n° RP 00109/2017/TGI/MHG, 6th April 2017.
[118] High Court/Nyanza, *DUSABUMUREMYI Jean Bosco vs Prosecution*, case n° RPA 00236/2017/HC/NYZ, 29 June 2017.
[119] See High Court/Nyanza, *MUKAGASHUGI Agnes vs Prosecution*, case n° RPA 0539/15/HC/NYA, 25 May 2016; see also High Court/Nyanza, *MUSABYIMANA Joseph vs Prosecution*, case n° RPA 0171/16/HC/NYA, 18 October 2016