



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC PETITION NO. E009 OF 2021

CHARLES KIPROTICH TANUI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

CHIEF MAGISTRATE – ANTI-CORRUPTION COURT AT NAIROBI.....3RD RESPONDENT

JUDGMENT

Introduction

1. Before the Court for determination is a Petition by Charles Kiprotich Tanui dated 23rd August 2021 and later amended on 6th October 2021. The amended Petition which is expressed to be brought under **Articles 22, 23, 27(1), 29(a) and 50(2)(n)** of the **Constitution**, the **Public Procurement and Disposal Act No. 3 of 2005** and the **Public Procurement and Disposal Regulations 2006** seeks the following reliefs: -

“a) An order be issued staying the hearing and proceedings in ACC No. 17 of 2020.

b) A declaration be issued that the charges in ACC No. 17 of 2020 against the petitioner violates his rights under article 27 of the constitution.

c) A declaration be issued that the charges violate or threaten the petitioner’s rights under Article 50(2).

d) An order of prohibition be issued prohibiting the 1st respondent from charging or recharging the petitioners with the same charges in Criminal Anticorruption case 17 of 2020.

e) The Petitioner be awarded costs of the petition and interest”

2. In opposition to the Petition the 1st Respondent filed Grounds of Opposition dated 21st October 2021 while 2nd Respondent filed a Repling Affidavit sworn by its Forensic Investigator, Andrew Lekamparish on 4th October 2021.

Petitioner’s Case

3. As can be discerned from the Petition, the Supporting affidavit and written submissions of Learned Counsel for the petitioner the petitioner’s case is that he was the Chief Executive Officer of Kenya Pipeline company Limited when he was charged in CM AC No. 17 of 2020. He was specifically charged with:-

“COUNT ONE: ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48 OF THE ANTICORRUPTION AND ECONOMIC CRIMES ACT, NO.3 OF 2003

PARTICULARS OF THE OFFENCE

" On 18th February 2014 at Kenya Pipeline Company Offices in Industrial

Area within Nairobi City County, being the Managing Director of Kenya

Pipeline Company used your office to improperly confer a benefit to Redline Limited, by authorizing payment of Euros 8,695.65 in respect of tender SU/QT/3097F/13 for SUPPLY INSTALLATION AND COMMISSIONING OF LINE 2 STATION AUTOTRANFORMER (3N0) without installation, testing and commissioning of the auto-transformers "

COUNT FIVE: WILFIJLL FAILURE TO COMPLY WITH LAW RELATING TO PROCUREMENT CONTRARY TO SECTION 45(2) (b) AS READ WITH SECTION 48 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003.

PARTICULARS OF THE OFFENCE

"On 18th February 2014 at Kenya Pipeline Company Offices in Industrial

Area within Nairobi City County, being the Managing Director of Kenya Pipeline Company wilfully failed to comply with the law relating to procurement to wit Section 75(c) of the Public Procurement and Disposal Act of 2005 by authorizing payment of Euros 261,070.42 to Redline limited for the Supply INSTALLATION and COMMISSIONING OF LINE 2 STATION AUTOTRANSFORMER(3 NO) without a written and signed contract. "

4. It is his case that the direct procurement of three Auto transformers which procurement is the subject of the prosecution was approved by the Tender Committee of Kenya Pipeline Company Limited in accordance with **Section 74(1) (2)** a of the **Public Procurement and Disposal Act 2005**; That The contract between the Kenya Pipeline Company and Redline Limited was founded on the authority of resolutions of the Kenya Pipeline Company Tender Committee, Tender opening committee, the Evaluation committee and the Negotiation committee which awarded Tender No. Quotation No. SU/QT/3097F/13 to Redline Limited for the supply and installation of Line-2 auto-transformers at the quoted price of EURO 261,070.42 (Kes.29,239,887.04); That A Local Purchase Order was drawn on 4th September 2013 and the supplier acknowledged its receipt on 5th September 2013 and that the LPO is a written contract. It is the Applicant's case that the Kenya Pipeline Company's Inspection and Acceptance Committee received the goods, noted they were in good condition and made an inspection report where it stated that the works had been completed successfully; that thereafter the Finance Department processed the payment and wrote a letter reference number Fl/BA/6/3 dated 18th February 2014 addressed to the Manager Commercial Bank of Africa Nairobi Instructing the bank to pay Redline Limited Euro 260,809.55; That the Petitioner signed the letter brought to him from the Finance Department after going through all the documentation availed to him by the Finance Department confirming that the work had been completed successfully. It is his case that he relied on the reports prepared by all the committees that took part in the tendering and procurement process including by the Head of the Technical and the Finance Department and that he established the procedures and systems envisaged under Section 26 of the Public Procurement and Disposal Act 2005 to provide for the making of decisions on behalf of the public entity relating to procurement were followed.

5. The Petitioner further states that he was initially charged in ACC No. 22 of 2015 together with Ngatia Ndungu, Judy Thuo and Redline Limited but that the trial court allowed the prosecution to withdraw the case under **Section 87 (a) of the Criminal Procedure Code** and they were all discharged. He contends that thereafter the 2nd Respondent filed a suit in this court, to wit **HC ACEC No. 2 of 2017** against all the initial accused persons. It is his contention. In the 2nd Respondent's plaint dated 6th February 2017 it was averred that the 2nd Respondent had established that the contract between Kenya Pipeline Company and the 4th Defendant was founded on the authority of resolutions of the Kenya Pipeline Company Tender Committee which awarded Tender No. Quotation No. SU/QT/3097F/13 to the 4th Defendant for the supply and Installation of Line- 2 at JtO- transformers at the quoted price of EURO 261 KES. 29,239,887.04) but that however the 4th Defendant never installed tested and commissioned the Autotransformer as per the Tender Award. The Petitioner stated that the 2nd Respondent further averred that the 4th Defendant (Redline Limited) neither supplied special tools nor incurred other charges connected with the installation of the said Auto-transformer. The Petitioner contends that it was also the 2nd Respondents contention that the payment of EURO 8695.5 EURO 1 739.1 3 and EURO 5930.29 totalling to EURO 1 6,365.07 (Kes.1,832,887.84) made to the 4th Defendant towards Tender No./Quotation No. SU/QT/3097F/13 for the testing and commissioning, supply of special too s and other charges services was illegal and fraudulent as the said goods and services were never rendered to Kenya Pipeline Company and That the 2nd Respondent therefore contended that the said payments of EURO 1 6,365.07 was fraudulent, illegal, unlawful and against public policy.

6. The Petitioner stated that in line with **Section 56 B(a)** of the **Anti-Corruption and Economic Crimes Act** the 2nd Respondent entered into a consent with the Defendants and following payment by the 4th Defendant (Redline Limited) of the sum claimed the suit was withdrawn and marked as settled against all claims and all the defendants.

7. It is the Petitioner's case that despite that order the 1st Respondent instituted criminal proceedings against him in **CM ACC No. 17 of 2020** in which he was charged with the same offences he had previously been charged with in **CM ACC No. 22 of 2015**. It is his case that the 4th, 5th and 6th accused in CM ACC 22 of 2015 persons were not charged afresh in the current criminal case. He contends that the fresh charges against him are therefore discriminatory unjustifiably selective and in violation of his right to equal protection of the law enshrined in **Article 27(1)** of the **Constitution**. He also contends that it is not proper for the 1st Respondent to continue with the prosecution when the substratum of the case no longer exists for the reason that the 4th Defendant paid the entire amount of Kshs.1,832,887 in **HC ACEC No. 2 of 2017**.

8. In his submissions Learned Counsel for the Petitioner reproduced Count 5 of the charge sheet which states that as the Managing Director

of Kenya Pipeline Company the Petitioner wilfully failed to comply with the law relating to procurement to wit **Section 75(c) of the Public Procurement & Assets Disposal Act 2005** by authorising payment of Euros 261,070.42 to Redline Limited without a formal contract. Counsel stated that there is no prescribed form of contract and that **Section 75(c)** of the **Public Procurement and Assets Disposal Act** on direct procurement only requires that **“the resulting contract must be in writing and signed by both parties.”** Counsel submitted that the Petitioner authorized the payment to Redline Limited based on a Local Purchase Order issued to Redline Ltd which is a contract as per the following authorities:

· **The definition in Black’s Law Dictionary (9th Ed) :**

“A document which has been generated by the buyer in order to purchase products of property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale”

· **Basco Products Kenya Limited vs Machakos County Government (2018) eKLR**

[a] *On whether there was a valid contract:*

[8] *The Defendant took the curious posturing that the LPO that it issued to the Plaintiff was simply an offer and therefore could not constitute an enforceable contract. Curious because it is elementary that a contract is formed when the offer is accepted and acted upon and valuable consideration given. Indeed, Section 3(1) of the Sale of Goods Act, Chapter 16 of the Laws of Kenya, recognizes that:*

“A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”

[9] *And in An Introduction to the Law of Contract, P.S. Atiyah, (3rd Edition) the following view is propounded, which I find persuasive:*

“An offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the ‘price’ of the offer. The price, of course, need not be a monetary one. In fact, in bilateral contracts, ... the mere promise of payment of the price suffices to conclude the contract...”

Thus, having acted on the LPO and supplied valuable consideration in the form of goods that were duly delivered to the Defendant, there can be no doubt that a valid and binding contract was thus created.”

9. Counsel submitted that the charge against the petitioner has no legal or factual basis and that by bringing the charge the 1st Respondent did not consider paragraph 4 (b) (2) of the National Prosecution Policy which establishes the evidentiary test as follows:

“Public prosecutors in applying the evidentiary test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves, would an impartial tribunal convict on the basis of the evidence available”

10. In regard to count 1 which faults the Petitioner for improperly using his office to confer payment to Redline Limited by authorising payment of Euros 8695.65 for supply, installation and commissioning of 2 autotransformers without the same being supplied Counsel submitted that the Petitioner relied on completion documents and payment vouchers brought to him by the technical team to authorize the payment; That the 1st Respondent identified the said documents as forgeries and accordingly charged the 2nd and 3rd accused persons in counts 2, 3, 4, 6 and 7 with falsifying completion documents to aid in irregular payments, Counsel for the petitioner referred this court to **Sections 27(2) and (3) of the Public Procurement and Assets Disposal Act (2005)** which provides:

“27. Responsibility for complying with the Act

1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements

2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1)

3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.”

Counsel submitted that in view of **Section 27(3)** of that Act the Petitioner was not solely responsible for compliance with the procurement regulations and that since he was not charged with falsifying any documents it is illogical to surmise that he would have knowledge of any improper dealings barring him from authorizing payment yet he had been furnished with the requisite completion documents. Counsel submitted that the Petitioner simply performed his duty as an accounting officer in the tail end of a long documented process as prescribed in **Section 26(1) and (2) of the Public Procurement and Assets Disposal Act of 2005** which states:-

“26. Threshold matrix and segregation of responsibilities

(1) For the purpose of ensuring that its decisions are made in a systematic and structured way, a public entity shall establish procedures to provide for the making of decisions, on behalf of the public entity, relating to procurement.

(2) The procedures required under subsection (1) shall be consistent with this Act and regulations”

11. Counsel further argued that the charges against the Petitioner are fatally defective as they do not contain all the essential ingredients of an offence as stipulated in **Article 50(2)(b)** of the Constitution and **Section 134** of the **Criminal Procedure Code**. Counsel contended that the charges lack sufficient detail that would enable the Petitioner to answer to them hence they lack legal or factual basis. Counsel urged this court to allow the prayers sought in the petition with costs to the petitioner. In support of his case Learned Counsel for the Petitioner also cited the following authorities:

· ***Sigilani vs Republic [2004] 2KLR480***

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to the specific charge that he can understand. It will also enable the accused to prepare his defence”

· ***State of Maharashtra & Others vs Arun Gulab Gawali & Others Criminal Appeal No. 590 of 2007*** where

The Supreme Court of India outlined grounds in which orders prohibiting criminal prosecution may be granted:

“(1)Where the institution/continuance of the criminal proceedings against an accused may amount to the abuse of process of the court or that the quashing of the impugned proceedings would secure the ends of justice...

(4) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly that fails to prove the charge”

The 1st Respondent’s case

12. The 1st Respondent sought to have the Petition dismissed on grounds that **Articles 157(6) and (10)** provide that the **Director of Public Prosecutions** exercises State powers of prosecution and does not require anybody’s consent or authority for commencement of criminal proceedings and that the decision to charge in cases investigated by the 2nd Respondent is based on sufficiency of evidence. Counsel for the 1st Respondent submitted that in **ACC No. 17 of 2020** the decision to charge was made based on the sufficiency of evidence with a realistic prospect of conviction; that the prosecution of the petitioner was instituted with reasonable and probable cause devoid of malice and that the 1st Respondent independently reviewed the evidence placed before it and concluded that there was incriminating evidence against the petitioner in regard to the offences for which he was charged in **ACC 17 of 2020**.

13. Counsel for the 1st Respondent also stated that the prosecution of the Petitioner is in the public interest and that in making the decision to charge, the 1st Respondent has not abrogated, breached, infringed or violated any human and fundamental rights of the Petitioner. Counsel asserted that in line with the National Prosecution Policy, the 1st Respondent objectively assessed the totality of evidence for and against the Petitioner before making the decision to charge and that the accuracy and correctness of evidence can only be assessed and tested by the trial court which is best equipped to do so. The 1st Respondent also averred that the Petitioner is guilty of material non-disclosure having previously filed similar applications and petitions which were dismissed Counsel averred that some of the issues raised by the Petitioner amount to a defence which should be canvassed before the trial court. Further, that the Petitioner will not suffer prejudice because he enjoys to the presumption of innocence. Counsel argued that this case is meant to circumvent the trial process. Counsel for the 1st Respondent denied that the 1st Respondent acted ultra vires in instituting criminal charges against the petitioner and stated that the Director of Public Prosecutions is an independent body established under **Article 157** of the **Constitution of Kenya** mandated under **Article 157(6)** to:

a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

14. Counsel stated that the decision on whether to prosecute resides solely in the Office of the Director of Public Prosecutions and the decision cannot be arrogated by the Petitioner. Counsel for the 1st Respondent cited the following cases to support that submission:

· ***David Kipruto Chingi & another v Director of Public Prosecutions & 2 others [2016] eKLR***

“...In the Kenya Constitution, the Office of Director of Public Prosecution is an independent office with clearly defined functions. In principle, it is not the work of the courts to interfere with other State Organs unless it can be shown that they violate the Constitution; each State Organ must be allowed to function without interference.”

· **Thuita Mwangi & Anor vs. The Ethics and AntiCorruption Commission & 3 Others Petition No. 153 & 369 of 2013** “The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)...These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013.”

· **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**

“36. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, Page 5 of 20 and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See *The International and Comparative Law Quarterly* Vol. 22 (1973).

37. A reading of Article 157(4) of the Constitution leads me to associate myself with the decision of the High Court of Uganda in the case of *Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013*, to the effect that:

“...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously...Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP...such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or *amicus curiae* (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP.”

· **The National Prosecution Policy, 2007**

“Public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against Page 6 of 20 the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?”

“In exercising the prosecutorial mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.

The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute.

Each aspect of the test must be separately considered and satisfied before the decision to charge is made The Evidential Test must be satisfied before the Public Interest Test is considered.”....“(vii) Where the case does not pass the Evidential Test it must not go ahead, no matter how serious it may be. Prosecutors can only apply the public Interest Test when the Evidential Test is satisfied” .

15. Counsel further submitted that in exercising the decision to charge, the 1st Respondent considered the public interest and the evidential test, the degree of culpability of each suspect and whether public interest would be served in prosecuting each of the suspects; That contrary to the allegations made by the Petitioner against the 1st Respondent, the decision to charge and consequently prosecute the Petitioner was made in appreciation of the applicable laws and in adherence to applicable guidelines based on an independent and thorough review of the evidence forwarded by the 2nd Respondent upon conclusion of their investigations. Counsel averred that the 1st Respondent is satisfied that the evidentiary threshold has been met hence its actions are not ultra vires and that the Petitioner has failed to prove the contrary.

16. On the allegations of acting in bad faith in institution of the criminal proceedings against the petitioner and that his prosecution is an abuse of the court process Counsel for the 1st respondent stated that the Petitioner has neither outlined nor demonstrated instances where the 1st Respondent has acted in bad faith against him and that these are mere allegations and conjecture intended to plead to the mercy of the court to view the Petitioner through the lens of a victim. On what amounts to abuse of process Counsel cited the following cases: -

· **Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission [EACC] & 3 others [2014] eKLR citing Jago vs. District Court (NSW) 106**

“An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...”

· **MacMillan Bloedel Ltd. v. Galiano Island Trust Committee**

“The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of

legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, and conflict of interest, and discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.”

· **Republic v Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya [2014] eKLR*** citing the decision of the Supreme Court of Fiji in **MATALULU v DPP [2003] 4LRC 712** in which grounds for review of the exercise of the prosecutorial powers were enumerated.

“...It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

i. In excess of the DPP’s constitutional or statutory grants of power such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).

ii. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion-if the DPP were to act upon a political instruction the decision could be amenable to review.

iii. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

iv. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

v. Where the DPP has fettered his or her discretion by a rigid policy - e.g. one that precludes prosecution of a specific class of offences.”

17. Counsel for the 1st Respondent stated that nothing was presented before this court that depicts dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness and conduct that is unreasonable on the part of the 1st Respondent. Further, that the Petitioner has not demonstrated to this court that he was not involved in the case under consideration in the criminal court or that he is innocent of the charges preferred and as such, the trial court ought to be allowed to make a determination on the culpability of the Petitioner.

The 2nd Respondent’s Case

18. Relying on an affidavit sworn by Andrew Lekamparish, a Forensic investigator for the 2nd Respondent the 2nd Respondent contends that the Petitioner’s involvement in the flawed tender, where money was paid but no services were rendered, caused him to be charged with abuse of office and wilful failure to comply with the laws relating to procurement contrary to **Section 45(2) (b)** as read with **Section 48** of Anti-Corruption and Economic Crimes Act in ACC No. 22 of 2015. The 2nd Respondent disputed that the prosecution in ACC No. 7 of 2020 was selective, arbitrary and discriminatory against the petitioner and averred that the Commission’s recommendations for prosecution were in respect of persons who according to its findings were liable for the fraud and illegalities that resulted in the loss of public funds. The 2nd Respondent stated that the outcome of the investigations were that the Petitioner’s co-accused, Josphat Sirma came up with an Inspection Report implying that inspection had been done and issued a forged completion certificate purporting that all works had been completed and that subsequently, the said Josphat Sirma by-passed the payment procedure and raised a service entry sheet committing and authorizing payment of EURO 261,070 to Redline which was in turn approved by the Petitioner. It is the 2nd Respondent’s case that ACC No. 22 of 2015 was withdrawn under **Section 87(a)** of the **Criminal Procedure Code** in adherence to the Court of Appeal’s decision in **Eng. Michael Sistu Mwaura Kamau vs EACC & Others Civil Appeal No. 102/2016** which deemed the then Commission improperly constituted for lack of the requisite number of Commissioners. The 2nd Respondent stated that after the Commission was properly constituted the allegations were re-investigated culminating in **ACC 17/2020, Republic vs Charles Kiprotich Tanui & 2 Others** and the institution of the fresh charges was not barred by **Section 87(a)** of the **Criminal Procedure Code**.

19. In relation to civil case HC ACEC No. 2 of 2017 for the recovery of the EURO 16,365.07 (Kshs. 1,832,887.84) paid to Redline Ltd the 2nd Respondent contended that the out of court settlement was initiated by Judy Thuo, the director of Redline which is named as the 4th Defendant and that subsequently led the Commission into entering into a consent dated 2nd March 2018 and subsequently withdrawing the suit against all the defendants. The 2nd Respondent stated that there was no settlement on behalf of the Petitioner and that moreover, there was no Deed of Settlement entered into between the Commission and Redline Limited.

20. The 2nd Respondent further argued that the law envisages concurrent civil and criminal proceedings as provided in **Section 193A** of the **Criminal Procedure Code** and that outcomes of such proceedings are not dependent on one another. Further, that the consent in HC ACEC No. 2 of 2017 was not an undertaking under **Section 56B (3) and (4)** of **Anti-Corruption and Economic Crimes Act** as it did not satisfy the terms of that section as for instance, it did not contain a full and true disclosure by the Petitioner or any other party of their corrupt conduct; That, as a result, there is no evidence that the consent marking **ACEC Suit No. 2 of 2017** as settled discharged the Petitioner from criminal culpability or any subsequent criminal proceedings arising from the same transaction. The 2nd Respondent stated that the refund of the money lost did not compromise the Petitioner’s corrupt conduct and that the elements of the criminal case did not form part of the negotiations and therefore remained for determination before the trial court.

21. Counsel for the 2nd Respondent submitted that the issues raised in the petition are within the purview of the trial court and that this court

should not usurp the trial court's functions. Counsel asserted that the petitioner seeks to invite this court to look into whether an offence was committed and the sufficiency or otherwise of the evidence to be presented before the trial court and in so doing, this court would be morphed into a trial court to determine whether the case is merited.

22. Counsel further submitted that the issue as to whether the LPO suffices as a formal contract as envisaged in **Section 75(c)** of the **Public Procurement & Assets Disposal Act 2005** or whether there would be a requirement that a formal contract be entered into by parties in addition to the LPO are issues for the trial court. Counsel submitted that the same argument applies to the Petitioner's submission that he relied on completion documents and payment vouchers whose forgery he had no involvement in. In relation to Count 5, Counsel for the 2nd respondent cited **Section 68, 75, 85 and 89** of the **Public Procurement and Assets Disposal Act 2005**, and submitted that contrary to the petitioner's submission, the LPO is not the formal contract envisaged by **Section 75(c)** but it is merely a standard procurement document issued alongside others in the procurement cycle such as a notification of an award, inspection and completion certificates. Counsel stated that **Section 75(c)** is couched in mandatory terms and that the resulting contract must be in writing and signed by both parties to curb any instances of abuse of the direct procurement method. Counsel cited the following cases in support of that submission:

· **Multi-Line Motors(K) Ltd vs Migori County Government (2019) eKLR**

"13. The repealed 2005 Act provided for very extensive procedures in any form of procurement. Part IV thereof provided for the general rules for procurement whereas Part V thereof provided for how Open Tendering was to be undertaken and the limited instances where the alternatives to open tendering being Direct procurement, Request for Proposals and Request for Quotations modes of procurement could be sparingly used in procurement processes. Regardless of the mode of procurement used save in direct procurement any successful party was to be provided with a notification letter by the procuring entity which sought for acceptance. Once the procuring entity obtained the acceptance then a contract for the specific procurement was to be executed and performed thereby leading towards the completion of the procurement process."

· **Royal Media Services vs Independent Electoral & Boundaries Commission & 3 Others (2019)eKLR**

"36. Yet even where there is justification for direct procurement, statute requires that the procedure set out in Section 75 be adhered to. Section 75 reads:-

"The following shall apply with respect to direct procurement—

(a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;

(b) the procuring entity shall not use direct procurement in a discriminatory manner; and

(c) the resulting contract must be in writing and signed by both parties".

37. In addition to that requirement is Regulations 62 as read with Regulation 58 of The PPD Rules. Regulation 62 reads:-

"(1) A procuring entity that conducts procurement using the direct procurement method pursuant to section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 74 of the Act has been satisfied.

(3) A procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.

(4) The procedure for negotiations for proposals set out in regulation 58 shall apply mutatis mutandis to negotiations relating to direct procurement pursuant to Section 75(a) of the Act.

(5) A procuring entity shall not enter into a contract under section 75(c) of the Act unless it is satisfied that the offer—

(a) meets the requirements of the procuring entity as specified under paragraph (2); and

(b) is at the prevailing real market price.

As the above provisions require that negotiations be undertaken between the Public entity and the proposed contractor, Regulation 58 is to be applied in the negotiations. Regulation 58 reads:-

"(1) A procuring entity shall not enter into any negotiations pursuant to section 84 of the Act until the tender committee has approved the successful proposal.

(2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit.

(3) The members of staff conducting the negotiations under paragraph (2) shall prepare a report of the negotiations and submit it to the tender committee for decision making.

(4) The report prepared under paragraph (3) shall form part of the records of the procurement.”

38. Read together, the hallmarks of this procedure include:-

a) The Head of the user Department is the person responsible for initiating the procurement (see the First Schedule referred to in Regulation 62(1))

b) That reasons for adopting the procedure must be clearly spelt out by the public entity.

c) Negotiations with the contractor must be conducted by at least 2 members of staff of the entity.

d) The best prevailing real market price is to be obtained.

e) The resulting contract must be in writing and signed by both parties.

39. It would seem to this Court that the objective of these strict rules is to guard against the abuse of direct procurement. Reasons for adopting the method should be readily apparent and available to scrutiny. The method should not be employed in a discriminatory manner or to avoid competition or to achieve any other collateral reason. In addition, the public entity and by extension the public should get the best deal in the circumstances. These are safeguards that ensure that even in the exceptional circumstances where statute permits direct procurement, the overall objective of sound procurement practices contemplated by Article 227 (1) of the Constitution are not trampled over or defeated. In essence parties to a direct public procurement must ensure an impeccable compliance with the law. Does the transaction under dispute pass that test?

40. The position taken by IEBC was that there was in fact no procurement at all. That as far as it is concerned the offer by RMS was gratuitous and was neither sought nor formally procured. As is apparent from the provisions of Regulation 62 the inception of the process may be an internal affair of the public entity. However having decided to apply that method, the public entity is then required to negotiate with the proposed contractor(Sub Regulation 4).The procedure for negotiations is found in Regulation 58. The negotiations are to be conducted by at least 2 members of staff of the procuring entity. And the language of Regulation 58(2) is mandatory in that respect. It reads;-

“(2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit”.

41. The common evidence is that the meeting of 11th December 2012 was attended by Hon Githae, Mr. Macharia, Mr. Waruru and Mr. Hassan. That was the only meeting that preceded the alleged contract. It is also the case for RMS that it is in the meeting that the terms of the engagement were discussed. There is no evidence of other negotiations! The question to be answered is whether that meeting met the mandatory requirements of Regulation 58. Put differently whether the meeting were negotiations within the contemplation of Regulation 58. As is clear the only representative of the Commission was Mr. Hassan. Yet the law requires at least 2 representatives of the procuring entity. None of the parties addressed this strict requirement of the law and this Court did not receive any suggestions as to the rationale for the requirement. The Court can only surmise that an objective is to minimize the possibility of an individual negotiator either colluding with the proposed contractor or negotiating a bad deal for the procuring entity. Whatever the policy consideration, it is a binding requirement. On this single score the alleged direct procurement was flawed.

42. The transaction may yet be problematic for another reason. By dint of the provisions of Section 75(c) a contract that results from the direct process must be in writing and signed by both parties. Responding to a question posed in cross-examination in this regard, Mr. Waruru answered;

“We never had a written services contract.”

This is a concession that the resulting contract intended by statute was not entered. While the Advertising Booking Sheets issued by RMS and duly endorsed by IEBC can in different circumstances be accepted as constituting a contract/s, this court very much doubts that these sufficiently meet the formality required by Section 75(c). Yet still, it can be argued that the exigencies of a situation can be so overwhelming such that there is no time to make and execute a contract. For example, where firefighting services are procured to put off a raging fire. But in the matter at hand it is not said that there was such a pressing urgency that it was impossible to make the contract required by Section 75(c).

43. The evidence at hand is that the law in respect to direct procurement by public entities was not complied with. Unfortunately for RMS, it is in the genre of law that, it bears repeating, must be observed scrupulously.”

23. Counsel submitted that the contract had to be signed by the accounting officer, in this case the Petitioner in accordance with **Regulation 7 of the Public Procurement and Assets Disposal Regulations 2006** and that **Section 62** required the procuring entity to refrain from entering into a contract unless it is satisfied that the offer meets the requirements of the procuring entity and is within the prevailing market rates. Counsel submitted that based on the above statutory provisions the 2nd Respondent was of the view that a contract is a crucial document in the procurement cycle comprising terms inclusive of the time and place of performance, quality and quantity, how delays will

be handled, monitoring for compliance, claims, disputes and appeals, obligations of the parties and basis for payment which are not stipulated in an LPO.

24. Counsel argued that the case of *Basco Products Ltd vs Machakos County Government (2018) eKLR* relied on by the petitioner is inapplicable to this case as it was a decision per incuriam to the extent that it relied on the provisions of the Sale of Goods Act which regulates the sale of goods between private entities and does not apply to public procurement whose applicable law which in this case was the Public Procurement & Assets Disposal Act 2015. Counsel stated that even prior to the repealed Procurement Law of 2005, Public Procurement was regulated by Treasury Circulars, not the Sale of Goods Act.

25. Counsel contended that **Section 27(2)** of the **Public Procurement & Assets Disposal Act 2005** is clear that the buck stopped with the Petitioner as the chief accounting officer owing to his position as the Managing Director of Kenya Pipeline Company; that Pursuant to **Section 27(3)** of the Public Procurement & Disposal Act 2015 the Petitioner bore overall primary responsibility for ensuring compliance with the provisions of the Act and Regulations and he can therefore not shift blame to other employees or committee members.

26. Counsel submitted that the exercise of discretion to prosecute can only be interfered with where the court is satisfied that the discretion is being abused or used to achieve a purpose not geared towards the pursuit of justice in criminal offences and insufficiency of evidence is not a basis for halting a criminal trial. Further, that the charges preferred against the Petitioner were not in contravention of **Article 50(2) (b) and (n) and 157** of the **Constitution**. Counsel asserted that the Petitioner is well aware of the charges levelled against him and has made no complaints that he has not been supplied with the evidence the prosecution intends to rely on at the trial. Counsel reiterated that the offences in the charge sheet are known in law and have prescribed penalties and that whether or not a charge is defective or whether a charge sheet or charges disclose an offence do not raise any Constitutional issue. Counsel placed reliance on the cases of *Republic vs Attorney General & Others ex parte Kenneth Kariuki Githii (2014)eKLR* and *SK Ruto & Another vs Attorney General (2010) eKLR* and urged this court to dismiss this petition.

Analysis and Determination

27. From a reading of the parties' pleadings, submissions and the applicable law the following are the issues arising for determination:

i. *Whether the Petitioner's constitutional rights as enumerated have been violated.*

ii. *What was the effect of the withdrawal of criminal charges in ACC No. 22 of 2015 under section 87(a) of the CPC?*

iii. *What was the effect and tenor of the consent recorded in ACEC Civil Suit No. 2/2017 against the Petitioner and all affected parties in relation to ACC No. 17 of 2020?*

iv. *Is the Petitioner entitled to the orders sought?*

Issue No. (i)

28. From the petitioner's submissions it is evident that his main grievance is that the charges against him lack any legal or factual basis and are discriminatory. The gist of his case is that he was merely executing his duty and that as the person(s) who unlawfully signed the documents that led to the unlawful payment to Redline Ltd were charged the charges against him are an abuse of the court process. He also contends that contrary to the assertions of the Respondents there was a valid contract between Kenya Pipeline Company limited and Redline Limited as evidenced by the LPO that had been issued to Redline Limited by Kenya Pipeline Company Limited. I have considered this issue in light of the rival submissions, the cases cited thereat and the law and my finding is that this court is being asked to delve into issues that ought to be raised at the trial. By asking this court to look into the issue of whether there was a contract or whether the Petitioner was merely executing his duty the Petitioner is asking this court to go into the merits of the criminal case which it ought not to do. To delve into issues of the essentials of a contract would be to usurp the powers of the trial court to hear and determine cases before it. I decline to determine that issue.

29. It is also my finding that the issue of whether a charge sheet discloses an offence or whether the charge sheet is defective is also not an issue for this court. **Section 89(5)** of the **Criminal Procedure Code** places that role squarely in the hands of the trial court as was held in the case of *SK Ruto (supra)* cited by the 2nd Respondent:

“In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the CPC for instance Section 89(5) which can be used to address that issue. The applicant only needs to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that a charge is defective/incompetent does not raise a constitutional issue”

30. It is also my finding that the Petitioner has not placed material before this court to persuade it on a balance of probabilities that he charges against him are an abuse of the court process. He has not demonstrated that the charges re actuated by a motive other than public interest and the interest of justice. He has also not demonstrated that the charges are discriminatory as clearly he was charged with two other persons who were accused persons in the initial case. The 1st Respondent gave a plausible explanation as to why that criminal case was withdrawn and also what led to the withdrawal of the civil proceedings. Looking at the consent order it is clear that it affected even the Petitioner. However, it related only to those civil proceedings (HCACEC No. 2 of 2017) but not to any other case. It is also my finding that as **Article 50 (2)** of the **Constitution** provides safeguards to the Petitioner's right to fair trial and as he has not demonstrated that any of the rights set out therein have been threatened then his petition must fail. My so saying finds support in the following cases: -

· *Republic v Director Public Prosecutions & another Exparte Justus Ongera*

“79. The commission has no control over what the Director of Public Prosecutions does. Equally, the Director of Public Prosecutions has powers to decide on who to charge based on the evidence at hand. He cannot be directed on who to charge and who not to charge. In fact, the Director of Public Prosecutions can recommend or discontinue prosecution if he finds it necessary. As to whether the person charged is guilty or not, it is for the court to decide upon conducting full trial.

80. It is common knowledge that the Director of Public Prosecutions can drop charges against a suspect or an accused person or an accomplice and treat such person as a witness against the person charged although an accomplice. It matters not whether the one treated as a witness is culpable like the one charged. However the DPP must justify the reasons for dropping charges against some suspect or suspects facing similar allegations without appearing to discriminate the one charged.

81. Therefore, it is a fallacy for the ex parte applicant to claim that, by absolving some suspects from prosecution and recommending his prosecution together with another was discriminatory. The Director Public Prosecution has powers to decide on who to charge for which offence. He cannot work under direction not even from the court on who to charge save where there is discrimination without justification. In this case the Director of Public Prosecution dropped charges on account that the executive tender committee was misled by the recommendation of the ex parte applicant and one Annette Mwangi. Prima facie, this can be a justification sufficient enough to absolve those that the Director of Public Prosecutions finds are not culpable from the evidence at hand.”

· **David Mathu Kimingi v SMEC International PTY Limited (2021) eKLR**

“The main issue for determination in the application before me is whether the petition raises any issues on violation of the Constitution to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41 (1) of the Constitution as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The Petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR”

· The case of **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** where it was held:-

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).”.....

“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*:-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

46. Moreover, in the case of *Christian Juma Wabwire v Attorney General [2019] eKLR*, the Judge relied on the decision in *Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006* where it was held that:-

“It is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value.”

Issue No (ii)

31. In relation to the second issue **Section 87(a) of the Criminal Procedure Code** provides as follows:

“87. In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is pronounced withdrawn from the prosecution of any person and upon withdrawal:-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts,

(b) if it is made after the accused person is called upon to make his defence he shall be acquitted.”

It is expressly provided that such discharge is not a bar to subsequent proceedings. I am in agreement with the respondents therefore that the institution of fresh charges against the Petitioner was within the law.

Issue No. (iii)

32. The consent dated 2nd March 2018 bears the following terms with regards to ACEC Civil Suit No. 2 of 2017

“1. THAT the suit has been compromised and is hereby marked as settled with no order as to costs.

2. THAT for purposes of clarity, the suit against the 1st, 2nd and 3rd Defendants is withdrawn with no orders as to costs.”

From the wording of the terms of the consent the case against the Petitioner was withdrawn. However, that consent is specific to the civil case and there is no mention of criminal proceedings. It is my finding that this consent does not in any way affect **ACC No. 17 of 2020** and it would be wrong to use it to curtail the 1st Respondent’s decision to charge the Petitioner in ACEC No. 17 of 2020. To import that consent into the criminal proceedings would be a wrong interpretation of the orders of the Judge.

33. In the upshot, I find that the Petitioner has not in any way demonstrated that the current proceedings are a violation of his rights as enumerated in the petition.

Issue No. (iv) Whether the Petitioner is entitled to the orders sought.

I think I have said enough to show that the orders sought are not merited.

34. In the upshot the Petition is dismissed with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2022.

E.N. MAINA

JUDGE