



**Republic v Mangiti & 22 others (Anti-Corruption and Economic Crimes Appeal 4 of 2018)  
[2022] KEHC 12688 (KLR) (Anti-Corruption and Economic Crimes) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 4 OF 2018**

**EN MAINA, J**

**JULY 28, 2022**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**PETER OGANGA MANGITI ..... 1<sup>ST</sup> RESPONDENT**

**ADAN GEDOW HARAKHE ..... 2<sup>ND</sup> RESPONDENT**

**HENRY NYONGESA PILISI ..... 3<sup>RD</sup> RESPONDENT**

**HASSAN NOOR HASSAN ..... 4<sup>TH</sup> RESPONDENT**

**JOHN MUSYOKA MUNYWOKI ..... 5<sup>TH</sup> RESPONDENT**

**RUTH NJERI KIIRU ..... 6<sup>TH</sup> RESPONDENT**

**HEZBOURNE MACKOBONGO ..... 7<sup>TH</sup> RESPONDENT**

**MICHAEL WESLEY OJIAMBO ..... 8<sup>TH</sup> RESPONDENT**

**JAMES M KIRIGWI ..... 9<sup>TH</sup> RESPONDENT**

**SALIM ALI MOLLA ..... 10<sup>TH</sup> RESPONDENT**

**SAMUEL MNDANYI WACHENJE ..... 11<sup>TH</sup> RESPONDENT**

**SAMUEL CLOYD ODHIAMBO ..... 12<sup>TH</sup> RESPONDENT**

**FRESHIAH W KAMAU ..... 13<sup>TH</sup> RESPONDENT**

**MOSES OSORO OGOLLA ..... 14<sup>TH</sup> RESPONDENT**

**KENNEDY NYAMAO ..... 15<sup>TH</sup> RESPONDENT**

**FLORENCE BETT ..... 16<sup>TH</sup> RESPONDENT**



BETTY NJOKU MURIITHI .....	17 <sup>TH</sup> RESPONDENT
JENNIFFER MUHTONI KINOTI .....	18 <sup>TH</sup> RESPONDENT
STEPHEN LAITITI MUTUNGA .....	19 <sup>TH</sup> RESPONDENT
PETER MAHUNGU MURITU .....	20 <sup>TH</sup> RESPONDENT
FRANCIS KARANJA .....	21 <sup>ST</sup> RESPONDENT
TIMOTHY NDEKERE .....	22 <sup>ND</sup> RESPONDENT
REGINAH NYAMBURA MUNGAI .....	23 <sup>RD</sup> RESPONDENT

*(Being an Appeal from the original conviction and sentence by  
Hon. K Bidali, in Milimani Anti-Corruption Chief Magistrate’s  
Court at Nairobi Case No. 26 of 2016 delivered on 9th March 2018)*

## JUDGMENT

### Introduction

1. The Director of Public Prosecutions filed this appeal against the acquittal of the respondents under section 210 of the *Criminal Procedure Code* by Hon K Bidali in Milimani Chief Magistrates Court Anti-Corruption Case No 26 of 2016 *vide* a ruling delivered on March 9, 2018.
2. The charges against the respondents pertained to the alleged unlawful disposal of public funds in the sum of Kshs 47,600,000 from the Ministry of Devolution and Planning in respect of a which was awarded to Blue Star Enterprises for the procurement of training materials for the National Youth Service Automotive Engineering Faculty.
3. The respondents were at the material time employees and suppliers respectively of the Ministry of Devolution and Planning. The 1<sup>st</sup> respondent was the principal secretary and accounting officer of the ministry, the 2<sup>nd</sup> respondent the AIE holder, the 3<sup>rd</sup> respondent was a supply chain management officer at the National Youth Service, and the 4<sup>th</sup> to 15<sup>th</sup> respondents were members of the Ministerial Tender Committees of December 16, 2014 and January 30, 2015, that ultimately awarded the tender, the 17<sup>th</sup> and 18<sup>th</sup> respondents are charged in their capacity as suppliers, being directors of Blue Star Enterprises. The 19<sup>th</sup> to 23<sup>rd</sup> respondents were charged as members of the Tender Evaluation Committee while the 24<sup>th</sup> respondent was a supply chain assistant at the National Youth Service.
4. The appellant has listed eight (8) grounds of appeal as stated on the petition of appeal dated March 23, 2018 and reproduced below:
  - “ 1) That the learned trial magistrate erred in law and fact in failing to find that the prosecution had established a *prima facie* case against the respondents to warrant them being put on their defence.
  - 2) That the learned trial magistrate erred in law and in fact in acquitting the respondents by not taking into consideration the principles as to what a *prima facie* case is as set out in *Bhatt v R* (1957) EA 332 – 335.



- 3) That the learned trial magistrate erred in law and in fact by holding that the process of procurement had complied with and was in accordance with the law, despite the overwhelming evidence indicating otherwise.
- 4) That the learned trial magistrate erred in law and in fact in acquitting all the respondents on all the counts without analyzing the overwhelming evidence against each respondent and the roles they played leading to the commission of the offences charged.
- 5) That the learned trial magistrate erred in law and in fact by holding that the user department initiated the procurement process despite the testimony of PW6 and PW12.
6. That the learned trial magistrate erred in law and in fact by holding that the use of restricted tender was justified despite the provisions of the law.
- 7) That the learned trial magistrate erred in law and in fact by holding that there was a proper evaluation undertaken without any evidence in support and the prosecution evidence indicating otherwise.
- 8) That the learned magistrate erred in law by failing to consider the weight of the evidence against the respondents.”

### **The Charges**

5. In count 1, the 1<sup>st</sup> to the 18<sup>th</sup> respondents were charged with conspiracy to commit an offence of economic crime contrary to section 47 (a)(3) as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act*, 2003. The particulars of the offence were that on diverse dates between December 16, 2014 and September 28, 2015 within Nairobi City County in the Republic of Kenya being the principal secretary, Ministry of Devolution, State Department of Planning, accounting officer, National Youth Service, members of the Ministerial Tender Committee, and signatories to the account of Blue Star Enterprises respectively, jointly conspired to commit an economic crime namely unlawful disposal of public money Kshs 47,600,000.00 from the Ministry of Devolution and Planning to Blue Star Enterprises.
6. In count 2, the 1<sup>st</sup> respondent, Peter Oganga Mangiti was charged with the offence of Abuse of office contrary to section 46 as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003. The particulars were that on or about February 2, 2015, within Nairobi City County in the Republic of Kenya, being the principal secretary, Ministry of Devolution and Planning, State Department of Planning used his office to improperly confer a benefit to Blue Star Enterprises, by irregularly executing a contract between the Ministry of Devolution and Planning and Blue Star Enterprises, for the sum of Kshs 47,600,000/= for supply of automotive engineering training materials to National Youth Service without following procurement procedure by appointing members of the Evaluation Committee after the tender had already been awarded by the Ministerial Tender Committee.
7. In count 3, the 2<sup>nd</sup> respondent, Adan Gedow Harakhe was charged with abuse of office contrary to section 46 as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003. The particulars were that on diverse dates between March 3, 2015 and April 10, 2015, within Nairobi City County in the Republic of Kenya, being the accounting officer of the National Youth Service used his office to improperly confer a benefit to Blue Star Enterprises, by executing a local purchase order



- No 2481900 and authorizing payment of Kshs 47,600,000.00 to Blue Star Enterprises, for a tender that was irregularly awarded before the Evaluation Committee, was appointed.
8. In count 4, the 4<sup>th</sup> to 12<sup>th</sup> respondents were charged with willful failure to comply with the law relating to procurement contrary to section 45(2) (b) as read with section 48 of *Anti-Corruption and Economic Crimes Act*, 2003 (cap 65). The particulars were that on December 16, 2014 within Nairobi City County in the Republic of Kenya, being members of the Ministerial Tender Committee authorized use of restricted tender to the Ministry of Devolution and Planning, National Youth Service, for the procurement of training materials in the Automotive Engineering Faculty without ascertaining if the threshold for such the method had been satisfied.
  9. In count 5, the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> (deceased), and 15<sup>th</sup> respondents were charged with willful failure to comply with the law relating to procurement contrary to section 45(2) (b) as read with section 48 of *Anti-Corruption and Economic Crimes Act*, 2003 (cap 65). The particulars were that on January 30, 2015 within Nairobi City County in the Republic of Kenya, being members of the Ministerial Tender Committee awarded tender to Blue Star Enterprises for the supply of training materials in the Automotive Engineering Faculty, at the Ministry of Devolution and Planning, National Youth Service, without a technical evaluation having been undertaken.
  10. In count 6, the 17<sup>th</sup> and 18<sup>th</sup> respondents were charged with fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48 of the *Anti-Corruption And Economic Crimes Act*, 2003 the particulars being that on or about September 28, 2015, within Nairobi City County in the Republic of Kenya, being holders of account No xxxxxxxxxxxx in the name of Blue star Enterprises at Paramount Universal Bank Koinange Branch unlawfully and fraudulently acquired Kshs 45,137,931.05 from the Ministry of National Devolution and planning, National Youth Service, being proceeds of supply of training materials in the Automotive Engineering Faculty that was irregularly awarded.
  11. In count 7, the 17<sup>th</sup> to 21<sup>st</sup> respondents were charged with willful failure to comply with the law relating to procurement contrary to section 45(2) (b) as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act*, 2003. The particulars were that on or about the January 30, 2014 within Nairobi City County in the Republic of Kenya, being members of the Tender Evaluation Committee at the Ministry of Devolution and Planning, National Youth Service, jointly failed to undertake technical evaluation on Tender No: NYS/RT/29/2014-2015 for the supply of training materials in the Automotive Engineering Faculty, contrary to section 66 of the *Public Procurement and Disposal of Assets Act*, 2005 and regulation 49 and 50 of the *Public Procurement and Disposal Regulations*, 2006 as read with section 45(2) (b) as read with section 48 (1) of *Anti-Corruption And Economic Crimes Act*, 2003.
  12. Count 8 against Selesio Karanja, the 24<sup>th</sup> accused in the trial court and not a party to this appeal. He was charged and convicted of the offense of fraudulent practice in procurement contrary to section 40 as read with section 137 of the *Public Procurement and Disposal of Assets Act*, 2005. A subsequent appeal against the conviction was dismissed by this court in a Judgment delivered by Onyiego J. in HC ACEC Appeal No. 1 of 2019 Salesio Karanja v Republic.
  13. The court takes cognizance of the submission by counsel that the 14<sup>th</sup> respondent passed away in November 2020. The appeal against the 14<sup>th</sup> respondent abates for that reason.

### **Submissions by the Appellant**

14. The appellant adopted their written submissions dated February 7, 2019 which were highlighted orally on November 29, 2019.



15. The written submissions dated February 7, 2019 were drawn by prosecution Counsel Sigei. Learned prosecution counsel submitted on each count separately. On count 1 counsel relied on the definition of conspiracy in *Arch bold: Writing on Criminal Pleadings, Evidence and Practice* on pages 2589 and 2590 and the holding of Lord Bridge in *Republic v Anderson* cited in the case of *Republic v Hussain*. To submit that to prove the offence of conspiracy the prosecution had to establish that the accused persons together with others agreed common mind to unlawful disposal of public money from the Ministry of Devolution and Planning. Counsel submitted that the inference must be made both from the actions of the accused and the evidence tendered and the evidence tendered in court. She contended that the prosecution had established a prima facie case against the Respondents in respect to that count.
16. On count 2 learned counsel submitted that the prosecution had established that the 1<sup>st</sup> respondent abused his office by failing to ensure that section 27(2) of the *Public Procurement and Disposal of Assets Act* of 2005 and regulations 7 and 8(3) (g) of the *Public Procurement and Disposal of Assets Regulations*, 2006 were followed in regard to the impugned order. Counsel stated that the prosecution demonstrated through Pexh B 3 – the tender opening register dated January 29, 2015, that tender opening for tender No NYS/RT/29/2014-2015 was conducted in the absence of a tender opening committee which lawfully would have been appointed by the 1<sup>st</sup> respondent. Counsel stated that the opening of the six tenders was confirmed by Felista Ndinda Kinyati (PW3). Counsel submitted that the prosecution also proved through a letter dated February 2, 2015 (Exb P 20) that the 1<sup>st</sup> respondent appointed a tender evaluation committee for that tender after the evaluation had already taken place as evidenced by the minutes produced as Exb P 9 which are dated January 30, 2015. Counsel contended that the minutes are proof that there was no tender evaluation committee in place on the day it is alleged the tender was evaluated. Counsel pointed out the evidence of PW6 that he received his letter of appointed to the Tender Evaluation Committee on February 11, 2015 after the evaluation of the tender NYS/RT/29/2014-2015 had already taken place. Counsel also pointed to the evidence of Collins Ngesa (PW10) and a memo dated January 27, 2015 (Exhb P 2) to affirm that the names for constitution of the tender committee and evaluation committee were proposed after the bids had already been opened. Counsel contended that the 1<sup>st</sup> respondent ought to have been placed on his defence in count 2.
17. In regard to count 3 counsel submitted that the prosecution established a *prima facie* case against the 3<sup>rd</sup> respondent Adan Gedow Harakhe for issuing an LPO No 2481900 dated March 3, 2015 (EXB P 27) in favour of Blue Star Enterprises yet the goods had not been factored in the procurement plan and the budget; that the prosecution also established that the 3<sup>rd</sup> respondent was involved in proposing the agenda for discussions in the meetings of the Ministerial Tender Committee as demonstrated in the internal memo dated January 9, 2015 (Exb 41) counsel submitted that as the AIE holder for the financial year 2014-2015 the 3<sup>rd</sup> respondent had a duty to ensure that the expenditure was lawful and that all expenditure accorded the law.
18. On counts 4 and 5 counsel stated that the prosecution established a *prima facie* case against the 4<sup>th</sup> to 15<sup>th</sup> respondents who were members of the Ministerial Committee for authorizing and allowing use of a restricted tender for procurement of training materials without ascertaining if the threshold for that method had been satisfied; that it is the prosecutions' case that the Ministerial Tender Committee failed to review the selection of that procurement method in accordance with section 27 of the *Public Procurement & Disposal of Assets Act, 2005*, the regulations 10(2) (a) of the *Public Procurement and Disposal Regulations*, 2006. Counsel contended that there was evidence by PW5 and PW12 that the user department which was the Vocational Training and Social Transformation, Research and Development at the National Youth Service was not involved in the procurement and was not aware of any requisition for the materials. Counsel further submitted that no urgency was satisfactorily



established to warrant employment of that method of procurement; that the Ministerial Tender Committee did not conduct due diligence in approving the use of restricted tendering because if it did it would have established that the goods sought to be procured did not meet the threshold set in section 73 of the *Public Procurement and Disposal of Assets Act* 2005 and further that given the tenders were opened on January 29, 2015 and the award made on January 30, 2015 there was evidence that no technical or financial evaluation was undertaken.

19. In regard to count 6 counsel stated that the prosecution proved that Blue Star was awarded the tender through a fraudulent and unlawful procurement process in breach of the *Public Procurement and Disposal of Assets Act* 2005 and *Public Procurement and Disposal of Assets Regulations* 2006. Counsel submitted that a report by the Financial Reporting Centre which was produced by Mark Ndiema (PW16) showed that Blue Star Enterprises which was owned by one Betty Njoki Mureithi operated an account at Paramount Universal Bank Ltd, Koinange Branch which has been dormant for a year before it received Kshs 45,137,931.05 on September 24, 2015. Counsel submitted that Blue Star Enterprises was not a pre-qualified supplier for goods and services to the Ministry in that year and that because the goods were also not requisitioned for by the user department the 17<sup>th</sup> and 18<sup>th</sup> respondents fraudulently received a benefit through an unlawful procurement process and were therefore culpable.
20. On count 7 counsel asserted that the prosecution established that the Evaluation Committee was constituted on February 2, 2015 after the impugned award to Blue Star Enterprises on January 30, 2015; that this was proved through the evidence of Charles Mulandi (PW4 and Ann Mureithi (PW14) who testified that the Ministerial Tender Committee met on 30<sup>th</sup> January and awarded the tender. Counsel stated that the prosecution also adduced evidence that the request to use the restricted tender method was presented to the Ministerial Tender Committee on December 16, 2014 yet membership of the Tender Opening Committee and the Tender Evaluation Committee was proposed in a memo dated January 27, 2015 (Exhb P.2). Counsel submitted therefore that no sort of evaluation was conducted and there was no report placed before the Ministerial Tender Committee for evaluation. Counsel stated that indeed the purported evaluation report being undated it cannot be ascertained when the meeting if any took place.
21. Placing reliance on the case of *Ramanlal T Bhatt v Republic* [1957] EA 332 counsel stated that the evidence adduced by the prosecution established a *prima facie* case against the respondents and this court ought to grant the orders in the petition of appeal and order that the respondents be placed on their defence.

### **Submissions of the 1<sup>st</sup> Respondent**

22. The 1<sup>st</sup> respondent opposed the appeal and relied on his written submissions dated April 18, 2019.
23. The 1<sup>st</sup> respondent submits that the learned magistrate was well within the parameters of law in acquitting the respondents under section 210 of the *CPC*. That the prosecution failed to adduce evidence against the 1<sup>st</sup> respondent to warrant his being put on his defense.
24. They submit that the *PPDA* 2005 at section 29(3) allows for restricted tendering or direct procurement provided that the conditions, thereof were met. That the 1<sup>st</sup> Respondent as the accounting officer appointed the Tender Opening Committee and Tender Evaluation Committee in compliance with regulation 7, 8 and section 27(2) of the *Public Procurement and Disposal of Assets Act* 2005. Once appointed, it was not his responsibility to supervise the committees and the procuring entities.
25. In respect of the awards of tenders, the 1<sup>st</sup> respondent submits that he only implemented the awards made by the Tender Committee and had no responsibility to audit the minute; that section 138 of



the *Public Procurement and Disposal of Assets Act* grants him immunity in discharging his statutory duties in good faith. He cited two authorities: *Rebeccah Mwikali Nabutola & 2 others v Republic* [2016] eKLR and *Charles Kizito Wanjala Masinde v Republic* [2018] eKLR in support.

### Submissions of the 2<sup>nd</sup> Respondents

26. The 2<sup>nd</sup> respondent was represented by the firm of Sagana, Biriq & Company Advocates.
27. Learned counsel for the 2<sup>nd</sup> respondent submitted that the trial court correctly applied itself to the law when it arrived at the conclusion that a *prima facie* case had not been established against the 2<sup>nd</sup> respondent to warrant him to be put on his defence. Counsel submitted that the evidence required to be so water-tight that it would lead to a conviction on its own. Relying on the case of *Christopher Wafula Makokha v Republic* [2014] eKLR counsel submitted that there was no evidence that an agreement existed between the 2<sup>nd</sup> respondent and some other person to do the act complained of; that it was confirmed by even the investigating officer Mark Ndiema (PW16) and by PW15 that the 2<sup>nd</sup> respondent was appointed the AIE holder on February 19, 2015 and that he was not the accounting officer. Counsel submitted that by the time the 2<sup>nd</sup> respondent became the AIE holder the events complained of had already taken place and hence the trial court was correct when it held that the prosecution did not even attempt to explain how the 2<sup>nd</sup> respondent had conspired in a process for which he was not a part thereof. Counsel stated that prosecution witnesses testified that as far as they were aware the tender conformed to the law; that subsequent to the contract, an LPO was raised, goods were delivered and received *vide* S13 form and delivery notes and a certificate issued by the Inspection and Acceptance Committee appointed by the accounting officer. Counsel pointed out that the trial court rightfully found that the 2<sup>nd</sup> respondent signed the payment voucher on September 10, 2015 as the expenditure had been incurred for that authorized purpose and was charged to the items supplied. Counsel contended that the evidence did not point to any impropriety on the part of the 2<sup>nd</sup> respondent; that the 2<sup>nd</sup> respondent acted within the law and there was no conspiracy on his part.
28. In regard to count 3 learned counsel for the 2<sup>nd</sup> respondent submitted that the 2<sup>nd</sup> respondent has clearly shown that he was not part of the National Youth Service at the time the impugned tender was initiated, was not part of the committees that proved it and hence he cannot be held liable. To support his submissions learned counsel cited the case of *Joram Mwendwa Guantai v The Chief Magistrate, Nairobi* [2007] eKLR. Counsel urged this court to invoke section 178 of the *Public Procurement and Disposal of Asset Act*, 2015 and article 236 of the *Constitution* to find that the 2<sup>nd</sup> respondent cannot be held culpable and to uphold the decision of the trial court and hence dismiss the appeal.

### Submissions of the 3<sup>rd</sup> Respondent

29. For the 3<sup>rd</sup> respondent who was represented by the firm of TK Rutto & Company Advocates a preliminary objection was raised that a portion of the learned prosecutor's submissions (page 3 and 10) are *mala fide*, misconceived and not based on facts as the 3<sup>rd</sup> respondent was not charged in count 2. Counsel submitted that the 3<sup>rd</sup> respondent was not the accounting officer of the National Youth Service and he did not confer a benefit to Blue Star Enterprises by executing an LPO No 24819001.
30. In regard to count 1, counsel associated himself with the submissions of the other advocates and citing the case of *Republic v Director of Public Prosecutions and 2 others Ex-parte Pravidis Namoni Saisi* [2016] eKLR submitted that there was no evidence to sustain the charge. Counsel also cited the case of *Ronald Nyaga Kiura v Republic* [2018] to fortify his submission that no *prima facie* case was established against the respondent. Counsel urged this court to disallow and hence dismiss this appeal.



### Submissions of the 4<sup>th</sup> Respondent

31. On behalf of the 4<sup>th</sup> respondent it was argued that the subordinate court correctly applied itself to the law; that the 4<sup>th</sup> respondent at all times discharged his duties in good faith and in view of section 178 of the Public Procurement and Disposal of Asset Act of 2015 and article 236 of the Constitution he cannot be found culpable whether in civil or criminal proceedings and hence his court should uphold the finding of the trial court.

### Submissions of the 5<sup>th</sup> Respondent

32. The submission of the 5<sup>th</sup> respondent are dated April 30, 2019. Leaned counsel for the 5<sup>th</sup> respondent began by pointing out that the evidence on record confirms the tender process was commenced by the Director General of National Youth Service vide a memo dated November 19, 2014, wherein he requested for restricted tender process and further proposed the entities that were to be considered for the said request was presented to the Ministerial Tender Committee which in its sitting of December 16, 2014 considered and allowed that method of procurement. Counsel then submitted on each of the counts facing the 5<sup>th</sup> respondent. Counsel contended that this appeal presupposes that the trial court did not consider the evidence and cases cited before it. Counsel stated that the prosecution's case was premised on the assumption that an offence was committed following payment of the sum of Kshs 45,000,000 into an account which was otherwise dormant and that the Ethics and Anti-Corruption Commission embarked on a fishing expedition testing all aspects of the procurement with the sole intention of criminalizing all acts or omissions they came across. Counsel submitted that the prosecution witnesses confirmed that the law had been followed in all respects but nevertheless the 5<sup>th</sup> respondent was charged although he was not mentioned in the report. Counsel enjoyed immunity under section 138 of the Public Procurement and Disposal of Assets Act and article 236 of the Constitution.
33. In regard to the charge of conspiracy counsel submitted that there was no evidence of meeting of minds or agreement to commit procurement irregularity. For this Counsel cited the following two cases: *Joseph Juma Nyabete & 2 others v Republic* Misc Criminal Appeals No 63, 65, 66 of 2015 (consolidated) *Christopher Wafula Makokha v Republic*.
34. Counsel asserted that the 5<sup>th</sup> accused acted in good faith as a member of the Ministerial Tender Committee and no evidence was adduced to the contrary. Counsel urged this court to dismiss the appeal.

### Submissions of the 6<sup>th</sup> Respondent

35. The 6<sup>th</sup> respondent was represented by the firm of Wandugi & Company Advocates which also represents the firm of the 10<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> respondents. The written submissions for the 6<sup>th</sup>, 10<sup>th</sup> and 15<sup>th</sup> respondents were filed separately and are dated October 2, 2019 while those for the 17<sup>th</sup> and 18<sup>th</sup> respondents are dated April 23, 2019.
36. In summary Mr Wandugi submitted that the appeal lacks merit, is frivolous and a sham intended merely to harass the respondents. Counsel stated that the documents filed in this appeal are incurably defective and must be struck out; that under section 348A of the Criminal Procedure Code the prosecution can only appeal on matters of law and this appeal being one on matters of fact and law it ought to be struck out in its entirety. Counsel also attacked the appeal for being "a composite appeal" and submitted that it offends section 350 of the Criminal Procedure Code.



37. Counsel also argued that the grounds of appeal do not make reference to any one of the respondents but they instead lump them together hence also rendering the appeal incompetent.
38. On the merits counsel submitted that the Chief Magistrate fully analyzed all the evidence and bearing in mind the meticulous nature in which the trial magistrate dealt with the case the entire appeal has no merit. Counsel stated that there was nonspecific ground in regard to the charge of conspiracy although prosecution counsel submitted on it. Counsel described this appeal as one filed without the slightest inclination to the attainment to the ends of justice. Counsel stated that the written submissions of counsel for the appellant did not show which evidence is supportive of the proposition that a prima facie case was established. Counsel argued that the submissions operate and deal with individual counts rather than supporting the grounds of appeal. Counsel submitted that on its part the trial court addressed and delved into the law of procurement and that evidence of urgency was adduced.
39. Counsel submitted that the investigations were shoddy; that the 17<sup>th</sup> and 18<sup>th</sup> respondents having been contracted to supply equipment, it cannot be after they performed the contract that they unlawfully and fraudulently acquired the sum of Kshs 45,137,931.05. Counsel submitted that even the investigating officer admitted that the contract was awarded to them and that goods were supplied to the Ministry of Devolution. Counsel stated that all other witnesses admitted that he government having entered into the contract and having received the goods it was obligated to pay; that the allegation by the investigating officer that the 17<sup>th</sup> and 18<sup>th</sup> respondents only had Kshs 4000 in their account is laughable and deserved no comment.
40. Counsel contended that there is a whole mountain of documents and lots of evidence showing that the process was lawfully executed and there was a binding agreement. Counsel described the charges against the 17<sup>th</sup> and 18<sup>th</sup> respondents as a travesty of justice that his court ought not to countenance. Counsel pointed out that because of the conduct of Ethics and Anti-Corruption Commission the 17<sup>th</sup> & 18<sup>th</sup> respondents did not benefit from the contract despite fully executing it. Counsel noted that there was no evidence that the Ministry of Devolution ever lodged a complaint in regard to the complaint. Counsel reiterated that the appeal is incompetent and bad in law; that given the evidence on record the court would have perpetrated monstrous justice had it placed the 17<sup>th</sup> and 18<sup>th</sup> respondents on their defence and that this court has a duty to correct the manifest injustice perpetrated against the 17<sup>th</sup> and 18<sup>th</sup> respondents by dismissing this appeal.
41. In regard to the 6<sup>th</sup>, 10<sup>th</sup> and 15<sup>th</sup> respondents, Counsel urged this court to find that the trial court properly dismissed the charges. Counsel also urged this court to find that the appeal flouted section 354 of the *Criminal Procedure Code* for not including the proceedings and judgment complained of. Counsel cited the case of *Okethi Okale v Republic* [1965] EA to support his submission that his court cannot in any way look at those documents and hence the appeal should fail. On the merits counsel stated that the grounds lack any substance connecting the respondents. Counsel urged this court to dismiss this appeal.
42. Mr Wandugi, learned counsel for the 6<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> respondents reiterated the above submission during the oral highlighting.

#### **Submissions of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Respondents**

43. The submissions are dated April 30, 2019. Mr Osiemo learned counsel for the respondents submitted on each charge facing the respondents before coming to the conclusion that the evidence adduced by the prosecution only points to the innocence of the accused persons. Counsel submitted that other than the investigating officer, who he described as having a fixed mind, not a single witness incriminated



the respondents to warrant them being put on their defence. Counsel contended that the evidence of those witnesses totally exonerated the Respondents and in the absence of any new evidence there is no reason to interfere with the decision of the trial court. Counsel urged this court to dismiss the appeal.

### **Submissions of the 11<sup>th</sup> Respondent**

44. The submission of the 11<sup>th</sup> defendant are dated October 14, 2019 and similarly learned counsel for the 11<sup>th</sup> respondent submitted that the law was fully followed and hence there was no evidence of a secret plan to commit an economic or any crime; that there was no evidence of a meeting of minds between the 11<sup>th</sup> respondent and the other accused persons and that PW3 and PW4 who were members of the Ministerial Tender Committee led evidence that the committee was not influenced into making the decision they made and hence the ruling of the trial court cannot be impugned.

### **Submissions of the 16<sup>th</sup> Respondent**

45. The submissions of the 16<sup>th</sup> respondent are dated April 23, 2019. Learned Counsel submitted that the 16<sup>th</sup> respondent was not among the persons who were to be arraigned because according to the investigating officer she was not present at the meeting of December 16, 2014 which authorized the use of restricted tender; That her name was only added after the investigation file was forwarded to the Director of Public Prosecution's office.
46. Counsel submitted that the elements of the offence of conspiracy which are the existence of an agreement and intention to defraud the public were not proved at all. To buttress this submission Counsel relied on the definition of conspiracy in *Blacks Law Dictionary* 9<sup>th</sup> edition page 351 and the *Halsbury's Laws of England* Vol 25 Criminal Law paragraph 73. Counsel also adverted to a passage in *Arch bolds Criminal Pleadings, Evidence and Practice*.
47. Counsel asserted that conspiracy can only be proved or disproved from the facts revealed; that the rail leading to the impugned procurement is borne from the evidence of all the prosecution witnesses and that from their testimonies there was an urgent need from the user department arising from the mass recruitment of servicemen and women in National Youth Service. Further that once use of restrictive tendering was granted a number of bidders were approved to tender for the training materials, contracts were drawn and signed, materials were delivered and once they were evaluated and met the standards payments was done.
48. Counsel stated that no evidence was adduced to prove a secret plan or common intention to defraud the National Youth Service and hat evidence that due process was followed was corroborated by all the prosecution witnesses.
49. Counsel contended that the prosecution failed to directly point out how the 16<sup>th</sup> respondent was directly involved in the conspiracy and willful failure to adhere to the procurement law. Counsel argued that mere suspicion that the 16<sup>th</sup> respondent was culpable merely for being a member of the Ministerial Tender Committee is prejudicial and cannot suffice. Counsel stated that the circumstantial evidence relied upon by the prosecution does not meet the test and that therefore the trial magistrate did not err in finding no *prima facie* case had been established.
50. Counsel relied on the following cases:-*Joan Chebichii Sawe v Republic* Crim Appeal No 2 of 2002 (citation not given)*Bhatt v Republic* [1957] EA 332.Malaysian case of *PP v Dato Seri Anwar bin Ibrahim* No 3 of 1999 2C LJ 215 page 274-275.*PP v Mohamed Radzi bin Abu Bakar* [2005] 6 MLJ 399.



Counsel urged this court to find persuasion in the decisions of the Malaysian Courts as that country shares a common law heritage with Kenya. Counsel also relied on the cases of:-

*Woolmington v DPP* [1935] EA 461 at 481 *Sanjil Chattai v The State* [1985] 39 WLR 925 Section 107 (1) of the *Evidence Act*.

Counsel urged this court to dismiss this appeal.

### Submission of the 23<sup>rd</sup> Respondent

51. The submissions of the 23<sup>rd</sup> respondent are dated October 9, 2019. Leaned counsel for the 23<sup>rd</sup> respondent submitted that whereas the respondent was charged in relation to tender No NYS/RT/2014-2015 no evidence was adduced in regard to that tender as the evidence given was in relation to tender No NYS/RT/29/2014-2015. Counsel stated therefore that the charges against the 23<sup>rd</sup> respondent were not supported by evidence. Counsel argued that it remains unclear how and why the evidence in regard to tender No NYS/RT/29/2014-2015 related to the charge against the 23<sup>rd</sup> respondent.
52. Counsel submitted that on the merits the investigating officer (PW16) stated that he never recommended the arraignment of the 23<sup>rd</sup> respondent because in his assessment she was not culpable; that the Tender Evaluation Committee conducted evaluation of the tender as per the criteria set out in the tender as required by the law, prepared a report which the Ministerial Tender Committee then deliberated upon and was satisfied with and the assertions of the prosecution were debunked by its own witnesses.
53. Placing reliance on the case of *Republic v Francis Emmanuel Oyugi* [2018] eKLR counsel submitted that there is a general rule of evidence that there is a presumption of regularity when it comes to actions taken by public entities when performing their official duties. Counsel argued therefore that the evidentiary rule of presumption of regularity should apply and the prosecution has the evidentiary burden to prove the contrary. Counsel contended that no irregularity or misconduct was established against the 23<sup>rd</sup> respondent.
54. Counsel urged this court to find that the trial magistrate was right in coming to the conclusion that no *prima facie* case was established and acquitting the accused. He urged this court to dismiss the appeal. In support of his submissions counsel also relied on the following cases:- *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR. *Republic v Stanley Muthike Tiire* [2018] eKLR. *Bhatt v Republic* [1957] EA. *Republic v Charles Kairu Karanja & 2 others* [2017] eKLR. *Republic v Galbraith* [1981] WLR 1039. *Republic v Benard Obunga Obunga* [2015] eKLR.
55. At the oral highlighting Ms Kimiri learned prosecution counsel replying to the submission of Mr Wandugi submitted that the appeal is competent in view of sections 348A and 350 of the *Criminal Procedure Code*; that section 348A of the *Criminal Procedure Code* allows the Director of Public Prosecutions to appeal on both matters of law and fact and further that each and every respondent was served with the petition of appeal because the grounds therein affected them in their individual capacity. Counsel contended that this court was not told what prejudice the respondents would suffer by having one appeal instead of twenty-three. Counsel urged that the appeal is properly before this court and that article 159 of the *Constitution* enjoins this court to determine cases without undue regard to technicalities. Counsel invited this court to evaluate the evidence before the trial court and arrive at its own independent conclusion. She urged this court to allow the appeal.



## Issues For Determination

56. The following issues arise for determination:
- i. Whether the appeal herein is competent and properly before this court.
  - ii. Whether the appeal has merit.
  - iii. What are the appropriate reliefs?

### Issue No (i) Whether The Appeal Herein Is Competent And Properly Before This Court

57. Mr Wandugi, learned counsel for the 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> respondents raised an objection to the effect that the appeal is incurably defective and should be struck out for offending the provisions of section 348A of the *Criminal Procedure Code*. Counsel argued that section 348 A of the *Criminal Procedure Code* confines the powers of the Director of Public Prosecutions to appeal on grounds of law only but not on facts yet the present appeal is against facts and law.
58. Section 348A of the *Criminal Procedure Code* provides:
- "348A Right of appeal against acquittal, order of refusal, or order of dismissal
- (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.
  - (2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately" (underlining mine)
59. It is clear from the wording of the above section that the prosecution can appeal on both a matter of fact and law. The above section was discussed by the Court of Appeal in the case of *Republic v Danson Mgunya* [2016] eKLR where that court stated: -
- "The effect of the new amendment is to enable the Director of Public Prosecution to appeal to the High Court against an acquittal in a trial by a subordinate court and to this court against an acquittal in a trial by the High Court on both matters of fact and law. For the record it is important to point out that the Security Laws (Amendment) Act, 2014 did not repeal or affect section 379 (5) and (6) of the *Criminal Procedure Code*, which continues side by side with the new section 248A of the code" -
- The court proceeded to observe that while the *Security Laws (Amendment) Act* 2014 was the subject of a constitutional challenge in the High Court section 348A was not among the provisions whose constitutionality was challenged. It cannot therefore be gainsaid that in so far as section 348A of the *Criminal Procedure Code* is concerned the appeal before this court is competent and is properly before the court.
60. Learned counsel for the 6<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup> & 18<sup>th</sup> respondents also attacked the appeal for what he described as offending section 350 of the *Criminal Procedure Code*. It was his submission that appeals should be filed singly but in this case the Director of Public Prosecutions filed a composite appeal which makes no reference to any one of the respondents. Learned counsel also argued that the appeal



refers to several aspects of the charges but none touches on the charge of conspiracy (count 1) although counsel for the appellant submitted on the same. counsel also argued that the record of appeal filed is incomplete hence rendering the appeal defective.

61. I have perused the petition of appeal in light of the above submissions and the reply thereto by Ms Kimiri, learned prosecution counsel. i am not persuaded that the same offends the provisions of section 350 of the *Criminal Procedure Code* as alleged. From the petition it is clear that the same challenges the acquittal of the respondents under section 210 of the *Criminal Procedure Code* on all the counts. It is the appellant's contention that the trial court ignored the overwhelming evidence it adduced against the respondents and therefore arrived at a wrong decision both in matters of fact and law. I do not consider that the petition is incompetent for not making reference to each and every count. It is clear from its wording that it challenges the whole decision of the trial court. I am also not persuaded that the appeal is incompetent for lumping all the twenty-three respondents together. Indeed, I find that even had the appeals been filed separately the logical thing would have been to consolidate them as they arise from the same file and ruling. Moreover, as submitted by counsel for the appellant no prejudice has been demonstrated to have been suffered by the respondent by reason of the "composite" appeal. As for the argument that the appeal is incompetent for being incomplete I indeed find that the exhibits in the lower court were not included in the record of appeal. That is not however fatal as in my view as that is cured by the fact that the record of the trial court was forwarded to this court and this court was able to access the exhibits. As for the impugned ruling the same was included in the record of appeal. My finding on this issue therefore is that this appeal is competent and it is properly before this court.

#### **Issue No (ii) Whether The Appeal Has Merit**

62. This appeal challenges the ruling of the trial court which acquitted the respondents under section 210. The appellant contends that there was overwhelming evidence and that the prosecution had established a *prima facie* case against the respondents sufficiently to warrant them to be put on their defence.
63. This being a first appeal, this court is enjoined to reconsider and evaluate the evidence adduced before the trial court so as to arrive at its independent conclusion while bearing in mind that it neither saw nor heard the witnesses testify. (See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336, and *Kiilu & another v Republic* [2005] 1 KLR 174.) I have done this and also considered the grounds of appeal, the rival submissions of learned counsel for the parties and the cases cited therein.
64. On this issue, it is pertinent for the court to consider the evidence adduced by the prosecution witnesses in respect of each of the 7 counts so as to make a finding on whether based on the evidence the court can convict the accused persons should they elect to remain silent when put on their defence. This echoes the finding of the court in the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR

“It is important to note that at the close of prosecution, what is required in law at the stage is for the trial court to satisfy itself that *prima facie* has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of section 211 of the *Criminal Procedure Code*. A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat v Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concerned itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”



## Count 1

65. In count 1, the 1<sup>st</sup> to 18<sup>th</sup> respondents were charged with conspiracy to commit an offence of economic crime contrary to section 47(A)(3) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) cap 65.
66. The [Anti-Corruption and Economic Crimes Act](#) does not define “conspiracy”. The next port of call is the [Blacks Law Dictionary](#) 9<sup>th</sup> edition which defines conspiracy as follows;
- “An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement’s motive and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose.”
67. An essential ingredient of conspiracy is that the accused persons should agree that a course of conduct is pursued in furtherance of a criminal purpose. In the case of [Gichanga v Republic](#) [1993] KLR 143 the Court of Appeal held as follows in that respect;
- “Concerning the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money”.
68. A total of 16 witnesses gave evidence for the prosecution. PW16 a forensic investigator at Ethics and Anti-Corruption Commission testified that tender No NYS/RT/29/2014-2015 for the supply of training equipment was not captured in the 2014-2015 procurement plans. That the entire tender process was irregular; the procuring unit, the NYC did not give proper justification for use of restricted tendering as opposed to open tendering and the Ministerial Tender Committee (MTC) erred in awarding the tender to Blue Star Enterprises through restricted tender when the said company had not been prequalified by the Ministry of Devolution. Also that the supplied goods were grossly overpriced by all the bidders and there was collusion between the officials who represented the National Youth Service at the Ministerial Tender Committee and the Directors of Blue Star Enterprises hence the charge in count 1.
69. The other critical issue was whether the procurement method of restricted tendering employed by the 1<sup>st</sup> to 18<sup>th</sup> respondents was properly used given the provisions of the [Public Procurement and Disposal of Assets Act](#), 2005 (repealed).
70. Section 29(3) and section 73 of the [Public Procurement and Disposal of Assets Act](#) 2005 (repealed) provide for the mandatory conditions for restricted tendering as follows:
- "29.
- (3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity —
- (a) obtains the written approval of its tender committee; and
- (b) records in writing the reasons for using the alternative procurement procedure.
- 73.
- (1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.



- (2) A procuring entity may use restricted tendering if the following conditions are satisfied
- a. competition for contracts, because of the complex or specialised nature of the goods, works or services is limited to prequalified contractors:
  - b. the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and there is only a few known suppliers of the goods, works, or services as may be prescribed in the regulations."

71. The evidence of PW12 Deputy Director National Youth Service was that the procurement was irregular *ab initio*. That the Annual Procurement Plan for the year 2014/2015 PExh 39 did not contain a budget for the purchase of training materials yet there cannot be a procurement without a budget.
72. PW1 the Chief Supply Chain Management Officer at National Youth Service testified that the tendering process requires that bids are submitted to the Tender Evaluation Committee first, which evaluates the bids against the set criteria and submits a report to the Ministerial Tender Committee. He also testified that the award was irregular as Blue Star was not prequalified for the supply of goods to the Ministry of Devolution for the financial year 2014-2015. Regulation 54 of the *Public Procurement and Disposal of Assets Regulations* 2006 provides as follows in respect of restricted tendering:
- 54(3) Where restricted tendering is used under section 73(2) (b) of the *Act*, the procuring entity shall invite tenders from at least ten persons selected from the list maintained under regulation 8 (3) (a).
73. From the minutes of the meetings and attendance registers, the Ministerial Tender Committee sat and deliberated on the tender on December 16, 2014 (Pexh 17 and 19) and subsequently awarded the tender on January 30, 2015, as per PExh 9 and 10. A question therefore arises as to how the tender was awarded to the 17<sup>th</sup> and 18<sup>th</sup> respondents' company before technical evaluation which is a critical process in procurement. Evidence was adduced that the Tender Opening Committee and the Technical Evaluation Committee were appointed on February 2, 2015, 2 days after the Ministerial Tender Committee meeting which awarded the tender to the 17<sup>th</sup> and 18<sup>th</sup> respondents.
74. PW11 testified that the goods were exceptionally overpriced by the suppliers, much higher than the prevailing market prices. PW11 gave an in-depth analysis of his research and market evaluation in respect of the pricing of the goods, which calls for a rebuttal or explanation by the respondents on how the contract price was arrived at so as to rebut the allegation that there was a common intention to defraud the public.
75. Other notable issues that call for a rebuttal by the respondents are that "restricted tendering" was not justified as there was no urgency and even if there was an urgency, the 1<sup>st</sup> respondent and the Ministerial Tender Committee flouted the formal requirements for restricted tendering under section 27, 29 (3) and section 73 *PPDA* 2005 (repealed) and rule 10 (2) of the *Public Procurement and Disposal Regulations* 2006, leading to the payment of an alleged overpriced contract to the 17<sup>th</sup> and 18<sup>th</sup> respondents' joint account.
76. In my view, the prosecution adduced substantial evidence of the concerted efforts by the 1<sup>st</sup> to 18<sup>th</sup> respondents in the award of the tender and the 1<sup>st</sup> to 18<sup>th</sup> respondents should have been placed on their defense by the trial court to explain the irregularities in procurement, the basis of the charge in count 1.



## Count 2

77. Count 2 is a charge of abuse of office contrary to section 46 of the [Anti-Corruption and Economic Crimes Act](#) against Eng Peter Oganga Mangiti, 1<sup>st</sup> respondent who at the material time was the principal secretary and accounting officer of the Devolution Ministry.

78. Section 46 of the [Anti-Corruption and Economic Crimes Act](#) creates this offense as follows:

“46. A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.”

The ingredients of the charge of abuse of office are:

- i. The person must have used a public office to improperly confer something to herself/himself or anyone else.
- ii. The thing conferred must be in the nature of a benefit.

79. Under section 3 of the [Act](#) abuse of office constitutes corruption and is committed by a public officer who uses a public office to improperly confer on himself or another person a gift, loan, fee, favour, advantage, etc which he or that other person was not otherwise entitled to.

80. It is not in dispute that the 1<sup>st</sup> respondent executed the contract with Blue Star Enterprises in his capacity as a public officer/state officer being the principal secretary for Devolution. The prosecution relied on the same evidence as in count 1 and contended that the 1<sup>st</sup> respondent failed to comply with section 27 of the [Public Procurement and Disposal of Assets Act](#) 2005 and his responsibilities as accounting officer under rules 7 and 8 of the [Public Procurement and Disposal of Assets Regulations](#) 2006. PExh 9 is the minutes of the Ministerial Tender Committee meeting held on January 30, 2015, 2 days before the appointment of the Tender Evaluation Committee and the Tender Opening Committee on February 2, 2015 PExh 20. The Ministerial Tender Committee's evaluation of the bids without the deliberations and input of the Tender Evaluation Committee is evident. PW6 testified that although he was appointed to the Tender Evaluation Committee on February 2, 2015, he did not participate in the evaluation as he received the appointment letter on February 11, 2015 after the tender had been awarded. This evidence was corroborated by PW 10 who confirmed that the bids were opened on January 29, 2015.

81. It is my considered view that the 1<sup>st</sup> respondent's alleged execution of the contract with Blue Star despite the procurement irregularities constituted an offence under section 46 of the [Anti-Corruption and Economic Crimes Act](#) and calls for an explanation by the 1<sup>st</sup> respondent. He did have a case to answer in respect of the breaches of the law in rule 7 of the [Public Procurement and Disposal Regulations](#) 2006 as well as section 27, 29(3), and 73 of the [PPDA](#) 2005.

## Count 3

82. Count 3 is against the 2<sup>nd</sup> respondent on a similar charge of abuse of office contrary to section 46 of the [Anti-Corruption and Economic Crimes Act](#). The basis of the charge is his execution of a local purchase order No 2481900 and authorizing payment of Kshs 47,600,000.00 to Blue Star Enterprises by signing a payment voucher on September 10, 2015.

83. The 2<sup>nd</sup> respondent was appointed as AIE holder (Authority to Incur Expenditure) on February 19, 2015. He contends that his appointment came at the tail end of the procurement when the award had been made to Blue Star Enterprises and the contract with the NYS signed by the 1<sup>st</sup> respondent.



He contends that his signing of the LPO was lawful and regular and there was no impropriety on his part; that he did not have an option to decline to sign the LPO when all the supporting documents were lawful and regular and that his role was to confirm the following documents were submitted: Minutes of the Ministerial Tender committee approving the tender; notification of award; contract between National Youth Service and Blue Star Enterprises; delivery notes and invoices; and inspection and acceptance committee certificates.

84. I respectfully disagree with this submission. As an AIE holder and accounting officer, the 2<sup>nd</sup> respondent did have an obligation to confirm that the contract was lawful as required of him under section 68 of the *Public Finance Management Act* 2012 before signing the local purchase order.

85. The said section 68 states:

"68. Responsibilities of accounting officers for National Government entities, Parliament, and the Judiciary

1. An accounting officer for a national government entity, Parliamentary Service Commission, and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is—

- a. lawful and authorized; and
- b. effective, efficient, economical, and transparent.

2. In the performance of a function under subsection (1), an accounting officer shall—

.....

(d) ensure that all contracts entered into by the entity are lawful and are complied with. [Emphasis mine]

86. In my view, the AIE holder's role in the entire procurement process is very crucial as they single-handedly have responsibility for paying the supplier. The 2<sup>nd</sup> respondent should have been put on his defense to justify the payout of Kshs 47,600,000 first to a supplier who was not prequalified and second, in respect of a restricted tender which was not justified in the circumstances.

#### Counts 4, 5 and 7

87. Counts 4,5 and 7 are all charges of willful failure to comply with the law relating to procurement contrary to section 45(2) (b) made against the 4<sup>th</sup> to 15<sup>th</sup> respondents. The 4<sup>th</sup> to 12<sup>th</sup> respondents attended the MTC meeting held on December 16, 2014, the 4<sup>th</sup>, 5<sup>th</sup>,6<sup>th</sup>,10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> respondents attended the MTC meeting held on January 30, 2015 and the 19<sup>th</sup> to 23<sup>rd</sup> respondents were members of the Technical Evaluation Committee.

88. In count 7, the Appellant reiterates that the Tender Evaluation Committee was appointed on February 2, 2015, 2 days after the award was done. That the evaluation report is undated and it cannot be ascertained if the meeting took place at all.

89. In counts 4 and 5, the Appellant submits that all the members of the Ministerial Tender Committee, that is the 4<sup>th</sup> to 15<sup>th</sup> respondents are culpable as they failed to review the selection of the procurement method in breach of section 27 *Public Procurement and Disposal of Assets Act*. That the Ministerial Tender Committee did not comply with section 74 of the *Public Procurement and Disposal of Assets Act* 2005 on restricted tendering; they failed to undertake due diligence which would have shown that



there was no urgency or specialization of goods satisfactorily established by the NYS to justify the use of this procurement method. That there was no financial or technical evaluation and the bids for the tender were opened on January 29, 2015 and the award was given the next day January 30, 2015.

90. It is my finding that the prosecution raised palpable issues exposing the failures of the two committees to deliberate on the tender and to reject the procurement method as there was no urgency and the goods were overpriced. Accordingly, the trial court should have put the 4<sup>th</sup> to 15<sup>th</sup> respondents on their defense in respect of those charges.

## Count 6

91. Count 6 is a charge against the 17<sup>th</sup> and 18<sup>th</sup> respondents for fraudulent acquisition of public property contrary to section 45(1)(A) of the *Anti-Corruption and Economic Crimes Act*. It is not contested that on September 24, 2015 despite not being a prequalified supplier, Blue Star received payment of Kshs 45,137,931.05 through its Paramount Universal Bank Ltd account held at Koinange Branch Nairobi, an account in the joint names of its directors, the 17<sup>th</sup> and 18<sup>th</sup> respondents.
92. The local purchase order was signed and dated and the payment voucher was authorized by the 2<sup>nd</sup> respondent, yet the said goods had not been budgeted for in the procurement plan for the financial year 2014-2015. This tender was not provided for and neither was the user department involved in this process that involved in this procurement process.
93. It is my finding therefore that the prosecution established a *prima facie* case that the 17<sup>th</sup> and 18<sup>th</sup> respondents received a benefit through an unlawful procurement process. Should the directors of Blue Star Enterprises, the 17<sup>th</sup> and 18<sup>th</sup> respondents fail to defend themselves on this charge, they would be culpable for the fraudulent acquisition of the sum of Kshs 45,137,931.05.
94. In conclusion, the evidence adduced by the prosecution as a whole indicates breaches of the procurement process by the Respondents in their respective capacities. Right from the beginning in the choice of the restricted procurement method where there was no urgency, followed by failures by the Tender Evaluation Committee and the Ministerial Tender Committee in the evaluation of the bids, deliberation, and award of the tender to a supplier who was not prequalified and finally payment by the accounting officer. Whereas the onus of proof in criminal cases lies with the prosecution to prove the guilt of the accused person beyond reasonable doubt section 111 of the *Evidence Act* shifts that burden to the accused persons in circumstances such as are evidence in this case. Moreover, the law of public procurement and Public Financial Management places certain obligations upon public officers and it is incumbent upon them to, once evidence is led that they breached the law, explain that they acted within the law. (See Section 11 (2)(b) of the *Evidence Act*)
95. It was argued that the respondents enjoyed immunity for their actions under section 138 of the *Public Procurement and Disposal of Assets Act* and article 236 of the *Constitution*. My finding however is that the law and the *Constitution* insulates or protects public officers only for actions done in performance of their duties in good faith and in accordance with the law and the *Constitution*. It does not insulate officers who act in flagrant breach or violation of the law.
96. In the upshot, it is my finding that the trial court erred in acquitting the respondents under section 210 amidst the substantial evidence of procurement breaches in the award of the tender to the 17<sup>th</sup> and 18<sup>th</sup> respondents. The issues raised by the respondents in this appeal, in my view amount to defenses which should be raised in the trial court for evaluation alongside the evidence tendered by the prosecution.
97. The appeal is allowed, the order acquitting the 1<sup>st</sup> to 23<sup>rd</sup> respondents is reversed and it is hereby directed that the 1<sup>st</sup> to 23<sup>rd</sup> respondents shall go back to the lower court to enter their defence on counts 1, 2,



3, 4, 5, 6 and 7. The respondents are hereby directed to appear before the Hon Chief Magistrate Anti-Corruption Court on Monday September 5, 2022 for directions.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**EN MAINA**

**JUDGE**

