



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 54 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

ABU GODANA DAE.....1ST RESPONDENT

FELIX MUMBA KADZITU.....2ND RESPONDENT

MOHAMED MOHAMUD GURACHO.....3RD RESPONDENT

THOMAS CHULA MOYO.....4TH RESPONDENT

MWAMESO JUMA NYAMBU.....5TH RESPONDENT

JEREMIAH KIDOWE KOKANI.....6TH RESPONDENT

ABBAS GOBU BUTE.....7TH RESPONDENT

ABASHORA SWALEH SALAD.....8TH RESPONDENT

ABDULE MUSTAFA ABDIRHAIMAN.....9TH RESPONDENT

AYAN MOHAMUD KHALIF.....10TH RESPONDENT

REGIONAL DRILLING AND

TRADING LIMITED.....11TH RESPONDENT

(Being an Appeal against the ruling and acquittal by Hon. Julie Oseko, delivered on 6th September, 2019 in EACC No. 2 of 2018 at Malindi Chief Magistrate's Court).

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the State

Kilonzo Advocate

Ms. Kenga Advocate

Gekanana Advocate

Jengo Advocate

Otara Advocate for the Respondents

JUDGMENT

BACKGROUND

The Respondent's listed above were charged jointly and severally before the trial court with offences relating to procurement under the Anti-corruption and Economic Crimes Act 2003 and the penal code chapter 63 of the Laws of Kenya respectively. They were arraigned in court on the 3rd of August 2018.

Count 1

1st respondent (**Abu Godana Dae**) was charged with the offence of 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 Economics Crimes Act 2003 by approving the Procurement of 100 collapsible tanks whereas the procurement was not factored in the budget.

Count 2

4th respondent (**Thomas Chula**), 6th respondent (**Jeremiah Kidowe**), 5th respondent (**Mwameso Juma**) and 7th respondent (**Abbas Gobu Bute**) were charged with the offence of willful failure to comply with the law relating to the Procurement contrary to Section 45(2) (b) as read with Section 48(1) of the Anti-corruption and Economics Crimes act 2003. By failing to adhere to the evaluation criteria tender number TRCG/051/2016-2017.

Count 3

8th respondent (**Abashora Swaleh Salat**) was charged with the offence of willful failure to comply with the law relating to the Procurement contrary to Section 45(2) (b) as read with Section 48(1) of the Anti-corruption and Economics Crimes act 2003. By failing to issue a professional opinion to the accounting officer in relation to tender number TRCG/051/2016-2017.

Count 4

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) and 11th respondent (regional drilling and trading limited) were charged with fraudulent practice in procurement proceeding contrary to section 66 as read with section 176(1) (i) of the Public Procurement and assets Disposal Act. By influencing the procurement outcome for tender number TRCG/051/2016-2017 misrepresented facts relating to previous works at the Kenya School of Law to prove experience and capacity to perform work.

Count 5

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) ANT 11th respondent (Regional drilling and trading limited) were charged with fraudulent practice in procurement proceeding contrary to section 66 as read with section 176(1) (i) of the public procurement and assets disposal act. By influencing the procurement outcome for tender number TRCG/051/2016-2017 misrepresented facts relating to previous works at the Bomet Agricultural Training Centre to prove experience and capacity to perform work.

Count 6

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) ANT 11th respondent (Regional Drilling and Trading Limited) were charged with fraudulent practice in procurement proceeding contrary to section 66 as read with Section 176(1) (i) OF THE PUBLIC Procurement and Assets Disposal Act. By influencing the procurement outcome for tender number TRCG/051/2016-2017 misrepresented facts relating to previous works at the Ewaso Nyiro North development to prove experience and capacity to perform work.

Count 7

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) ANT 11th respondent (**regional drilling and trading limited**) were charged with uttering false documents Contrary to Section 353 of the penal code they knowingly and fraudulently uttered to the County Government of Tana River a false document that is a letter of award that is KSL/PC/ID/CONF. VOL.IV (124) by Kenya School of Law purporting to be genuine.

Count 8

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) ANT 11th respondent (Regional Drilling and Trading Limited) were charged with uttering false documents Contrary to Section 353 of the penal code they knowingly and fraudulently uttered to the County Government of Tana River a false document that is a letter of award that is BMT/HSE/Vole/no/103 by Bomet Agricultural Training Centre purporting to be genuine.

Count 9

9th respondent (**Abdulle Mustafa Abdurahman**), 10th respondent (**Khalif Ayan Mohamud**) ant 11th respondent (Regional Drilling and Trading Limited) were charged with uttering false documents Contrary to Section 353 of the penal code they knowingly and fraudulently uttered to the County Government of Tana River a false document that is a letter of award that is ENNDA/CONTR/007/2014-2015/LOT49 by Ewaso Nyiro North Development Authority purporting to be genuine.

Count 10

2nd Respondent to 11th respondent **Felix Mumba Kadzitu, Mohamed Mohamud Guracho, Thomas Chula Moyo, Mwameso Juma Nyambu, Jeremiah Kidowe Kokani, Abbas Gobu Bute, Abashora Swaleh Salad, Abdule Mustafa Abdirhaiman, Ayan Mohamud Khalif**, Regional Drilling And Trading Limited were charged with the offence of conspiracy to commit an economic crime contrary to section 47a (3) as read with section 48(1) of the Anti-Corruption Crimes Act NO. 3 by having conspired to commit an economic crime to wit, awarding tender no. TRCG/051/2016-2017 to Regional Drilling And Trading Limited for Kshs. 30,000,000 despite not the evaluation criteria.

Count 11

3rd Respondent **Mohamed Mohamud Guracho** and the 1st Respondent **Abdu Godana Dae** were charged with the offence of willful failure to comply with the law relating to procurement Contrary to Section 135(30 and (176) (2)(a) and Section 176(3) of the public procurement and disposal act by entering the contract the Regional Drilling And Trading Limited on behalf of the County of Tana River just 3 days after issuance of notification of award of tender no. TRCG/051/2016-2017 for delivery and supply of collapsible tanks to the Tana River County Government instead of 14 days as required by law.

The matter went through the trial court from the date of arraignment on 3rd august 2018 to 5th September 2019 when judgment was delivered. The prosecution in a bid to prove its case, called 21 witness and produced 102 documents. The defence on the other hand, had all the respondent's testify on oath and all called witnesses to rebut the prosecution's case.

Prosecution Case

Pw1 **Shem Ombati Kongo** was an employee with KRA as investigator of financial fraud from August 2018. That at the time of investigation of this matter were taken, he was investigator with Ethics and Anti-Corruption Commission whose scope of work was to advice on laws, procedures and practices of public finance management, crimes among other duties. In a nutshell, he has an expert in matters of public finance and procurement.

In relation to the instant case, he recounted that he had received anonymous complaint regarding tender number TRCC/51/2016-2017 on the supply and delivery of 100 collapsible water tanks in Tana River County. The allegations were that the tender was irregular and flawed and that were awarded to the highest bidder who had quoted Kshs. 300,000 per tank while the lowest bidder had quoted 98,500 per tank.

That in carrying out investigations, he sought to answer the following questions; -

- (i) Whether he said that collapsible tanks had been budgeted for*
- (ii) How the tender was awarded.*
- (iii) Whether the county government officers followed procedure in processing the tender.*
- (iv) The actual market price of the tanks.*

That vide a letter dated 10/10/2016 which was produced as exhibit 1 addressed to the county government secretary Tana River county. He requested the following documents; -

- (a) Purchase requisition from user department*
- (b) Procurement plan and approved budget.*
- (c) Tender documents for all bidders.*
- (d) Confidential questionnaires from the companies*
- (e) Appointment letters for the opening and evaluation committee.*
- (f) Minutes of the tender opening committee evaluation and tender award committee*
- (g) Tender register.*
- (h) Letter of notification to successful bidder and debrief letters to the other bidders (unsuccessful bidders)*
- (i) Letter of acceptance of award.*
- (j) Contract documents signed by their supplier and county government and all correspondence between supplier and the county government.*

(k) Inspection and acceptance certificate.

That he did receive the requested documents and proceeded to prepare an inventory which was signed by the 3rd respondent and himself plus another witness, one **Lucy Njau**. The inventory was produced as exhibit 2. After analyzing the documents, he noticed that the county government water department had prepared an annual procurement plan which was produced as exhibit 3. That indeed there was a plan for collapsible water tanks however, in his analysis the entry had been entered twice in which was irregular. In his testimony, the process was flawed as the 10th respondent did not meet the requirements of the tender.

PW2 Moses Nyamawi was the procurement officer Tana River county having worked since 2015 and had previously worked on a contract basis. That his duties included tender opening, requisitioning of goods, and receiving goods among other duties. In relation to the tender opening committee which letter was produced as exhibit 16. On 22/9/2016 the appointed members to the tender committee met for the opening and closing of the tender box and he wrote a tender register (exhibit 15). The tender in question had attracted two bidders namely Bayusuf Auto Care limited who had quoted 98,500 and Regional Drilling and Trading Limited who had quoted 300,000 (exhibit 12). He did sight the tender documents (exhibit 12 and 14). Further he had recorded the minutes of the meeting which were produced as exhibit 11. The witness did not comment on tender process (regularity/irregularity of the tender process)

PW3 Salim Salim Abdirahman was a procurement officer working with Tana River County appointed on 1st July 2015. His duties among others included; tender opening, tender evaluation and receiving of goods. As regards to the tender in question, he received a letter dated 21/9/2016 (exhibit 6) appointing him as a tender opening committee member. The task of the committee was to open the tender box and reckons that the tender had attracted two bidders. The secretary (pw-2) made entries in the tender register and the bidders were not present and did not sign. The two bidders he recognized were Bayusuf Auto Care and Regional Drilling and Trading Limited. He further stated that (pw2) prepared minutes which he (pw 3) did not sign. On 6th April 2017, he received a letter appointing him as a member of the inspection and acceptance committee. He confirmed that they received 100 collapsible water tanks and a report to that effect was prepared (EX. 27) which report he acknowledged to have signed. Upon cross examination by **Mr. Jengo** for the 7th respondent he confirmed that he accepted the goods because to the best of his knowledge everything had been adhered to. During cross examination by **Mr. Otara** for the 9th, 10th and 11th Respondent he stated that the report confirmed that the goods were in conformity with the specific tender requirements.

PW4 David Simiyu Wafula was a supply chain management officer since July 2015. His duties included; floating quotations, sitting in tender opening committees, issuing LPOs among others. That regarding the tender on question, he had chaired the tender opening committee. Together with pw2 and pw3 they opened the tender box and consequently pw2 prepared a tender register together with the minutes which he (PW4) did sign.

PW5 Mumina Dullow was a procurement officer 11 special programs with Tana River County. His duties included, requisition, data entry among others. In regards to the tender in question, he was appointed to attend the evaluation committee as a secretary vide the letter dated 26/9/2016. That he did not attend the evaluation as he was off duty.

PW6 Thomas Odhiambo Otieno was working with Public Procurement Regulatory Authority as Public Procurement expert. That he was a manager in charge of complaints, investigations and enforcement at the authority. The authority received a letter from EACC (Ex 81) requesting the authority to attend the trial court and give an independent procurement expert information on public procurement process to enable the court to reach an informed decision. He produced a report dated 15/10/2018 Ex 82.

Pw7 Nassir Guyo worked with the county government under the procurement department as a senior support staff in the stores department. That vide a letter (Ex. 16) from the 8th Respondent who at the time was the Acting director for procurement appointing him as a member of the tender opening committee. His responsibility was to fold the tender documents after the details had been captured. That he was indeed the one who had wrapped the documents with a rope afterwards signed the minutes (Ex. 11). His role was basically limited to providing support services. Upon Cross examination by **Mr. Kilonzo** he confirmed that no bidder had participated in the tender opening process.

Pw8 Salim Juma at the time of testifying he was working at Tana river on secondment with the department of water. His duties included operations and maintenance of equipment. His testimony was that he received a call from one Abbas informing him that he had been appointed to the evaluation committee which responsibility he turned down and did not participate in the said exercise. Therefore, his knowledge as regards the tender remains limited.

Pw9 Saleh Rahim Ahmed a businessman who operates hardware's at Garrisa and Bura selling construction and irrigation materials.

He recalled that he saw an advertisement placed on the Daily Nation of September 2016(Ex. 19) regarding tender number TRCG/51/2016-2016. That he placed a bid attaching all documents contained in Ex. 14. The tendering company was Bayusuf Autocare limited where he was employed as a manager at the time of testifying. He testified that he was the one who had prepared the tender documents as per Ex. 14 quoting a total price of Ksh. 9,850,000. He then placed his tender in the tender box. He did not receive any feedback even after following up until much later when he heard a rumor that the tender had been awarded to someone else. He was not present at the tender opening exercise. He didn't not receive any communication as regards the unsuccess of his bid. Upon Cross examination by **Mr. Kilonzo**, he admitted that he did not read the tender document all of it. Further at page41 of Ex. 14, he had signed clause no. 6 " understand that you are not bound to accept the lowest tender.... " Further he said that he had no complaint regarding the awarding of the tender.

Pw10 Gwiyo Meshack Raymond was working at the county government as a supply chain officer III and had worked for 4 years at the time of testifying. His scope of work included serving in the stores department. That vide a letter (Ex. 28) received on 6/2/2017 he was appointed as a member of the inspection and acceptance committee. On the same day the committee went to the water department to receive the tanks which they inspected by random sampling. Having been satisfied, a report was prepared Ex. 27 which the committee members including him signed. Upon cross examination by **Mr. Gekanana**, he stated that the law was followed, and the tanks were delivered.

Pw11 Sadam Ismael Issa was working as a procurement officer iv having worked there since July 2015. His duties included; receiving and

inspection of goods. That on 6th February 2017, he received a letter (Ex. 28) appointing him to the inspection and acceptance committee and on the same day they inspected the tanks and were satisfied that the tanks were okay. A report (Ex. 28) was prepared. Upon Cross examination by **Mr. Kilonzo**, he stated that the committee was comprised of 5 members but only the 7th respondent was charged.

Pw 12 Geoffrey Kurgat was the Assistant water engineer tana river county. His duties included designing water and sanitation projects, preparing completion certificates, inspection of delivered goods among others. On 6/2/2017, he received a letter (Ex. 28) appointing him as the chair of the inspection committee. On the same day he led the team in inspecting the tanks and that were satisfied with both the quality and quantity of the tanks. On Cross examination, he stated that the committee had performed its duties as required and that he had not heard of any complaint regarding the tender with the procurement tribunal or authority or regulatory authority nor a complaint regarding the highest bidder.

Pw 13-Cornelius Ongweko Wamukoya was a Revenue officer TRCG. Since 2007. In 2017 he was deployed in bridge and planning department. He stated that he was not privy to the tender in question. However, while working under the bridge and planning department. He took part in preparation of a supplementary budget. (Ex44). At page 23 he provided for reallocation of budget lines in a bid to mitigate the drought situation the county was facing. On cross exam by the Respondent's Advocates, he confirmed that the supplementary budget provided for the supplementary budget provided for allocation to the water department with a view to mitigating the drought situation in the county and this was anchored on the recommendation of the emergency county steering group meeting he had attended. The consequent decision was approval that there was no restriction as to the amount be expended.

PW 14-Amos Kabui Mwangi Was an employee of Kenya school of Law until 31/7/2016 where he was Assistant director on charge of finance and Admin which position he held for about 8 years of his duties included being in charge and overseeing procurement. On 23/4/2019 he was approached by an EACC officer with a letter Ex 13 relating to the construction of ultra- modern library. That upon perusal he noted some anomalies which included the positioning of KSL logo, the serial number ended with the number 124 whereas a letter (Ex38) issued to the contractor to construct the library was ending with serial number 313. His conclusion was that Ex 38 was genuine letter and the letter allegedly sent to Regional Trading Ex13 was never issued by the institution. The letter (Ex38) to the contractor Reslos Enterprise was issued on 24/6/2013 under Ref number KSL /EC/ID CONF VOL 5 (313). Upon cross examination by **Mr Otara**, he conceded that he had not come with a register to disprove the alleged fake letter and that the same had only been availed to him by an EACC officer and had not been made aware of its origin. Also noteworthy was the fact that the EACC did not access their Computer systems during investigations

PW 15- Zephaniah Kipkemboi Korir was a retired officer from the Ministry of Agriculture Bomet ATC. Regarding the case before court he had by approached by EACC officers to answer some queries. He was given a letter (Ex13A) letter of acceptance of construction of a hotel at Bomet ATC. According to him the letter resembled one issued to Reslos Construction company. He disowned both the letter and the signature appended to the letter. He also noted that the reference number in (Ex13A) did not match. The actual reference as in Ex35 which he said in Ex13 the reference number was BMT/HSE/VOL 1/110/103. further the fonts were also different.

PW 16- Martin Kadii Karakok Worked at Kenya Bureau of Standards JKIA station. His duties included carrying out inspections of imports, verification of import documents and drafting inspection reports. In May 2017, EACC officers handed a letter dated 10/5/2017 Ex83 requiring information pertaining a custom entry number 3305337 the importer being Regional Drilling Company Limited Ex48 seeking the status of collapsible tanks in a bid to ascertain if they had undergone a pre- shipment inspection in the country of origin. They also sought to know whether the shipment had been inspected before being released into the country. From the KEBS system as explained by pw-16, the same was pending approval therefore meaning that the collapsible tanks had not been approved. Upon cross examination by **Mr Otara**, he stated that Regional Trading Company Limited had imported collapsible tanks in 2017 a certificate of conformity issued to the 11th accused meaning that the shipment conformed to the Kenya Standards as the same had been issued by KEBS

Pw 17 Josiah Mulwa Worked for **Ewaso Nyiro** North development Authority as a chief technical services and operations manager based at Isiolo. At the time, his duties included; advising and on project implementation alongside project coordination. He received a letter from the EACC (Ex. 41) requesting for all information relating to Ex. 13D dated 128/2017 which was relating to tender no. ENNA/... 007 2014-2015 LO7 49 for supply and delivery of water tanks worth Kshs. 125,900,000. He disowned the letter alleged to have awarded the tender to the 11th respondent.

Pw18 Stanley Wabithi Kihethu Worked with equity bank Kenya limited as head of credit for a period of 8 years at the time of testifying. He received a letter from EACC officers who one investigating accounts based on Misc. Cr. Application number 115 of 2017(Ex.58). the application sought to investigate the following accounts belonging to Regional Drilling;

(a) 10280264825051- (EX. 62)

(b) 1280166860320 opened on 18/2/2016 (Ex. 61)

(c) 128170885563.

The 11th respondent was given a loan offer letter (Ex.59) for a loan to fund the purchase of collapsible tanks. The bank transferred 959,000 USD (Ex. 60) paid to a bank in Germany code no. COMMERZBANKAG on 7/12/2016. The loan was since paid off by the directors who had given personal guarantee by providing a charge. **Pw 19 Philip Kipkoskey Koech** Worked with the Kenya revenue authority at the customs and border control at JKIA. His duties amin other included supervision and verification. He received a letter from EACC (Ex. 46) requesting for documents reporting to imports allegedly made by the 11th respondent **IDF (Ex. 49), Form C17B (ex. 49), Airway bill (Ex. 47), Invoice copy (Ex.51), Screenshots of the lodged documents (Ex. 56) and Verification report by KRA (Ex.54)** His testimony was that the goods had been undervalued and an extra tax of Kshs. 312,615 (Ex. 36) was paid on 1/2/2017 and the goods were released on the same day.

Pw 20 James Githinji a registered valuer pursuant to cap 532 Laws of Kenya and a duly appointed valuer by EACC. He is also a forensic

investigator and a member of the surveyors of Kenya. In the instant case he was tasked by the EACC between 20th -23rd to undertake valuation of collapsible tanks that had been bought by Tana river county government. Upon his valuation, he prepared a report (Ex.78) whose conclusion was that the 100 collapsible tanks ought to have cost Ksh. 6,000,000 and that Kshs. 24,000,000 had been lost. Upon cross examination, he stated that methodology was an assumption and the tender at hand was on a willing buyer, willing seller basis. Further he had not sought a catalogue from Turkey where the tanks were bought and as such he would not know the price of the tanks.

Pw 21 Jacob Oduor a forensic document examiner attached to EACC. He had also worked with the DCI in the same capacity and had over ten years' experience in the field. On 28/8/2017 he received an exhibit memo dated 28/8/2017 (Ex.84) in regard to the following documents; Ex. 4, Ex. 5, Ex.7, Ex.8, Ex. 9, Ex.85, Ex. 86A, Ex. 86B, Ex.87, Ex.88, Ex.89, Ex. 90, Ex.91, Ex.92, Ex. 93, Ex. 94, Ex. 95, Ex.96. After examining the specimens, he prepared a forensic report dated 29/8/2017 which was produced as EX.97. After hearing the prosecution case, the trial court ruled that all the respondents had a case to answer under and placed on their defence upon compliance with section 211 of the criminal Procedure code.

Defence Case

DW1 Abdi Musa Mahmoud, the County Drought Co-ordinator Tana River County a department of the National Government which coordinates drought nationally. His testimony was that on 20/9/2016 there was a meeting of the County Steering Group meeting of Tana River County. He was the secretary of the meeting whose purpose was to address the imminent drought. The resolution of the meeting was that all budgetary allocations be suspended to address the issue.

DW2 Abdu Godana Daye who was a County Executive Committee member Lamu County in the department of water and sanitation at the time of testifying stated that in the year 2016 he was working with Tana River County as the County secretary. The role of a county secretary being the head of public service and secretary to the cabinet. In regards to count I and II, he stated that he was not an accounting officer to any department and that he did not participate in the tendering process. On count X and XI he stated that he was not part of the tender opening committee upto valuation. He testified that there was no request for review of the tender and that the tender document was prepared by the legal department which he is not part of.

Dw3 Filex Mumba at the time he was charged was working with the Lamu County government as a deputy director. His testimony was that he was not a member of the tender evaluation committee nor did he award any tender and further he was not even aware of what he was being charged with. He stated that he had prepared an assessment report DEX. 2 after carrying out an assessment of the impacts of the drought. It is on that basis that he requested for tanks and the same was allowed through a supplementary budget.

DW4 Mohamed Mahmoud Guracho who at the time of the tender was the Chief officer water Department and the head of administration.

He testified that he was not a member of the tender evaluation team neither did he award the tender. He was not a party to any agreement nor sign any agreement relating to the awarding of the tender.

DW5 Thomas Chuca was the director for Roads and Public works Tana River County. He stated that he had been appointed as a member of the evaluating committee. It was his statement that the evaluation was done by the committee and not by himself. He testified that Bayusuf was disqualified for having given a quotation way before market price, lack of experience and that they did not provide a quote for collapsible tanks. As regards, the 11th respondent, he was the qualified upon evaluation.

DW6 Mwameso Juma Nuamu testified that he was involved in evaluation of the tender. The tender was awarded to the 11th respondent because he had demonstrated financial and technical response to the tender and that due process of the law was followed. The 11th respondent had satisfied the evaluation committee by giving proof of similar works having supplied similar tanks to Wajir County.

DW7 Jeremiah Kiowe Kokani an inspector of roads and bridges. He had evaluated the tender and was satisfied that the 11th respondent was qualified. It was his testimony that he was not actively involved in the tender.

DW8 Abbas Bute who was working with Tana River County and was in the tender valuation committee. He testified that the tender was awarded to the 11th respondent because he met the tender requirements and had proof of similar works therefore there was no irregularity in the process.

DW 9 Salat Swaleh Abashora who was the principal supply chain management officer working with Tana River County. He was charged as the head of procurement for failing to give a professional opinion regarding the said tender. His duties were to handle the procurement planning and coordination of supply chain. Amongst his duties, he was not tasked with offering advice or opinion regarding award of tenders. He testified that he was not the one who had written the various letters which he is alleged to have signed save for the award letter and that he was not the acting director of finance.

DW 10 Mustafa Abdulle a businessman whose company is Regional drilling and trading company. He saw the advertised tender on 10/9/2016 and made a bid for supply of collapsible tanks. He made an application vide a letter dated 22/09/2016 (DEX. 2). He received a reply vide the letter dated 4/10/2016 (DEX. 7) and wrote an acceptance letter (DEX.8) and was given an order to supply the goods vide a letter dated 7/10/2016 (DEX.9). He delivered the 100 collapsible tanks on 5/2/2017 and produced a delivery note dated 5/2/2017 as DEX. 10. The goods were verified and accepted and an acceptance letter dated 6/2/2017 was issued produced as DEX11. He explained that he got the funds from Equity Bank which loaned him Ksh. 9,600,000 and produced DEX 13 which was a bundle of documents for loan agreement. He testified that his company does not deal with construction but deals with water and sanitation and that he had never presented any tender documents to Kenya School of Law, Ewaso Nyiro and Bomet for any construction works as alleged.

DW11 Ayan Mahmoud a housewife and co-director to Regional Drilling and Trading company chose to adopt the evidence of DW11. In

her analysis of both documentary and oral evidence, the learned magistrate made a finding in favor of the respondent's and found them not guilty as charged consequently acquitting them under section 215 of the penal code.

The Appellant dissatisfied with the finding of the lower court, petitioned this court under section 348A (1)(2) of the Criminal Procedure Code under the following grounds;

- (a) That the learned magistrate erred in law and fact by acquitting the respondents despite the weight of the evidence by the prosecution witness (sic)***
- (b) That the learned magistrate erred in law and fact by relying on extraneous matters to acquit the respondents***
- (c) That the learned magistrate erred in law and fact by misapplying the law and therefore arriving at a wrong decision***
- (d) That the learned magistrate erred in law and fact in failing to utilize the provisions of section 17(2) of the CPC***

Parties filed submissions to the appeal. The appellant submits that; at the trial they proved that according to the Procurement and Disposal Act 2015, that it is mandatory for bidders to attach NCA certificate and the appellant does contend that the two bidders who are the crux of this matter namely BAYUSUF AUTOCARE LTD and REGIONAL DRILLING AND TRADING COMPANY did not attach the said certificate. The appellant further submits that the tender committee never followed the evaluation process as set out in PPOA 2015 as stipulated in section 80(2). Further, the appellants argue that from the supplementary budget produced as PEXH 4 there was amount budgeted for the purchase of 100 collapsible tanks. That according to section 459(3)(a) of PPDA 2015 which requires that all procurement processes to be within the approved budget was not adhered to. The respondents filed their submissions rebutting the prosecution's assertion that the learned magistrate erred in finding favor for the respondent's. In their submissions, the issue is to do with production of the NCA certificate which the respondent's submits that its requisition at the tender advertisement was a mistake that could pass off as a copy paste style of quick doing of thing (sic). That a NCA certificate is only required where a party is required to construct and this was not the position in the instant case.

Issues for Determination

- 1. Whether the learned magistrate erred in law and fact by acquitting the respondents.***
- 2. Whether the learned magistrate erred in law and fact by misapplying the law and arriving at a wrong decision***
- 3. Whether there is an issue of mistrial requiring an order for retrial.***

The task of the 1st appellate Court on first appeal from a conviction or acquittal, was declared by the decision of the Court in **Pandya v R {1957} EA 336 at pg 337** where the Court held as follows:

“On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the Judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate Court has not seen. On second appeal it becomes a question of Law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles.” (See also Shantilal M. Ruwala v R {1957} E.A 570)

- 1. Whether the learned magistrate erred in law and fact by acquitting the respondents and whether the learned magistrate erred in law and fact by misapplying the law.***

In addressing the twin aspects in the question above, I have looked at the evidence tendered in the lower court and how the learned magistrate arrived to her conclusion. The whole dispute is anchored on the tender process. Which process BAYUSUF AUTOCARE LTD did not challenge according to the provided guidelines of the tender process. The question then begs, was the process flawed?

The scoping the prosecution case on all the counts the complaint was based on the willful failure to comply with Procurement Laws, conspiracy to commit an economic crime. There are various issues which arose at that trial. The first was whether the manner in which the respondents were charged and joined together in certain instances was likely to occasion prejudice. The question abounds within the provisions of Section 136 (1) of the Criminal Procedure Code. The circumstance and locality of the crime was zeided down to a tender and call for bids by the interested tenderers.

In supporting the charges, it is on record that evidence articulated was on the ten counts all drawn and couched in a language that each count was distinct and severable from the other. The particulars alleged in most of the counts imparted the doctrine of common intention as defined in terms of Section 21 of the Penal Code. Traditionally, according to Section 10 of the Evidence Act anything said, done or written by any of the persons jointly so charged are deemed to have a common intention in reference to their common intention relevant evidence to support facts of such intention is admissible.

Taking into consideration of all these provisions, I feel on review of the evidence that the burden of proof on this element was not discharged. Further still the particulars of the offences it might be argued were duplex.

In the case of **Omboga v R {1983} KLR 340** the Court held that:

“Injustice will be occasioned where the evidence is called relating to many separate counts all combined in one charge sheet because the accused cannot possibly know what offence exactly he is charged with”

I do feel necessary to refer to the other instances which emerged in the balanced view allegedly taken by the Learned trial Magistrate. The Court of Appeal in **Kinyanjui v R {1988} KLR 76** dealt with instructional error in the charge sheet which may be considered prejudicial to the offenders trial and or subsequent conviction. The Court in that case held as follows:

“We can therefore agree with the Courts below that it is not illegal per se to join an alternative charge of conspiracy; indeed it is not necessary illegal to frame a substantive charge of conspiracy together with substantive charges for charges for specific offences, as Musinga’s case above shows, and more especially R v Cooper & Compton (1947) 2 ALL ER 701. The problem is deeper than simply changing substantive counts of conspiracy to alternative counts. Dealing with counts of conspiracy raises problems which require discretion and complete understanding to the case in hand. It seems to us that the principles summarized in Archbold Criminal Pleading Evidence and Practice, 40th Ed Para 4073 as to the desirability of including a count of conspiracy in an indictment or charge, offers a useful approach. But the question cannot be determined by the application of any rigid rules. Each case must be considered according to its facts. The following points should be considered.

1. As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable. It is not desirable to include a charge of conspiracy with adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence.

2. To this general rule there are exceptions, as for instance: a). Where it is in the interest of justice to present an overall picture, which a series of relatively small substantive offences cannot do; sometimes a charge of conspiracy may be the simpler way of presenting the case;

b. Where there is clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy is justified.

c. Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence, it may be right and proper to include a charge of conspiracy.

3. But a count for conspiracy should not be included if the result will be unfair to the defence, and this has always to be weighed with other considerations.

4. It may be necessary to try a count for conspiracy separately from substantive counts which are only examples of carrying out the conspiracy.

5. Where the evidence discloses more than one conspiracy, it is undesirable to charge all the conspiracies in one count, but it may not be bad in law as Musinga’s case shows.

6. Other factors concern the number and type of conspirators, for instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, may need to be safeguarded as Mulama v Rep {1976} KLR, 24 indicates.

The question which one must then ask is why or in what circumstances it is undesirable to join a count of conspiracy with counts for substantive offences” The main ground is unfairness to the accused, which is a general consideration. That may arise because the accused may not know with what he is charged precisely, or may be embarrassing to be obliged to defend in the alternative

The Court also cited with approval, the practice direction set out in the English case of {1977} 2 ALL E.R. 540 as follows:

“In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the rejoinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

3. A joinder is justified if the judge considers that the interests of justice demand it.”

We may add that election or severance follows from the Court’s inherent powers to see that its process is not abused, in the sense that the accused is guarded against oppression or prejudice. It is for this purpose that the rule is that the objection must be taken at the earliest opportunity; and here we congratulate counsel for trying to safeguard their clients at the right time, a chance missed in Musinga’s case, whether or not their clients are ultimately proved right.”

As given here a finding of acquittal was based on circumstantial evidence. Therefore, each fact alleged in the ten counts which is

essential to complete a set of circumstances in the tendering and procurement procedure necessary to establish the respondents' guilt must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstances on which the inference necessarily rests must be proved beyond reasonable doubt. (**See Ndurya v R {2008} KLR 135, Wambua & 3 others v R {2008} 142**). From the principles elucidated in the cited cases it is also true that if the circumstantial evidence as to any particular count permits two reasonable interpretations one of which points to the respondents guilt and the other to their innocence, the Court must adopt that interpretation that points to the respondents innocence and reject any interpretation that points to the guilt as contemplated by the prosecution.

It is also pertinent that in criminal cases the specific intent with which the criminal act or done be shown and proved by either direct or circumstantial evidence surrounding the commission of the crimes charged in counts 1 to 10. In the case at bar, the evidence as to the specific intent points one reasonable interpretation that points to casting a reasonable doubt with regard to the involvement of the respondents in respect of the crimes charged.

As noted in the Judgment of the Learned trial Magistrate, I view it as thorough and shows plainly that she gave adequate consideration to all the evidence and gave reasons why the case for the prosecution failed against the respondents scrutiny and evaluation. There was, sufficient evidence upon which the Learned trial Magistrate could properly find as she did that the respondents were entitled to an acquittal.

In any event as a Court, I am concerned with the nature of the appeal being guided by the principles in **Pandya's case (supra)**. Further, there is a tenable argument that the case at the trial depended on the credibility and cogency of the evidence which the Learned trial Magistrate distilled and gave it full consideration. The interpretation of this evidence has not given rise to the trial Court error which is cognizable under the standards discussed in **R v Golkuldas Kangi Karia & Another {1949} 16 EACA**. I find no basis to interfere with findings and Judgment of the trial Court. I will also bear in mind as was said in the case **Okale v R {1965} EA 555** that no single piece of evidence should be weighed except in relation to all other evidence in that case at the trial of the respondents and the questions of fraudulent dealings in the alleged counts must be properly determined beyond reasonable doubt by the prosecution.

In conclusion, the appellant has failed to demonstrate rightly that the grave concerns in the memorandum of appeal weighed together with the Judgment there exist real issues before the Court to warrant a retrial of the respondents.

To which I find to the negative. I do agree with the trial court and find that the learned magistrate did not err in law and fact nor misapplied the law by finding in favour of the respondents

2. Whether the court should direct the trial court for a retrial

Blacks Law dictionary defines retrial as *a new trial that is conducted when an issue has been disputed and decided by court but is being re-examined due to an unfair or improper result.*

Having defined what a retrial is, we shall then concern ourselves with what the threshold principles of a retrial are.

a) There has to be prove that the original trial was illegal or defective

b) That facts or circumstances of each case made where the interest of justice require it and where it is not likely to cause injustice to the accused person

c) That the appellate court is of the opinion that on proper consideration of admissible evidence or potentially admissible evidence a conviction may arise.

These principles were upheld in the case of **Ahmed Sumar V R [1964] EALR**:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence in the first trial; even when a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not follow that a retrial should be ordered...”

In the case of **Lolimo Ekimat v R Criminal Appeal no. 151 of 2004** (unreported) it was held that,

“the principal that has been accepted to court is that each case must depend on the particular facts and circumstances of each case but an order for retrial should only be made where interest of justice require it.”

Flowing from the foregoing, we then have to consider that the accused right to a fair trial as envisaged by the Constitution of Kenya 2010 under 2010 Article 50 has not been infringed. Fair trial is the main object of the Criminal procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and the society. This is both a constitutional and human right and under no circumstances that the same ought to be jeopardized.

I am not convinced that the in the instant case that ordering for retrial would not in any way jeopardize and or be prejudicial to the respondents. The respondents were first arraigned in court on 3rd August 2018 and went through the entire process of trial including being placed on their defence. It is trite that the prosecution provided the defence with all witness statements and documents that they intended to

rely upon at a trial.

There can be no doubt that the respondent ought not to be tried a second time regarding the same subject matter. They were previously acquitted in consonant with the legal maxim "*nemo debet bis vexari pro ura et eadem causa*" a Latin phrase which literally means "**No-one shall be tried or punished twice in regards to the same event**". This is the legal protection against "**double jeopardy**" which gives right to the defence of '*autrefois convict*' or '*autrefois acquit*'. Unless, the second trial is mounted to advance the interest of justice.

At the close of the prosecution case, each of the respondent was placed on his defence on matters touching on the evidence. The trial Magistrate evaluated both the prosecution and defence case and felt that convictions of the respondent was unsafe on fraudulent practice in procurement proceedings and other related offences in the same transactions.

As matter stands in this appeal, it must be dismissed as the direct or circumstantial evidence to justify a retrial going by the aggregation of separate facts seems to me to be inconclusive to proof the elements of the offences beyond reasonable doubt. This being so the appeal must be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mulwa advocate for the 4th respondent

2. Mr. Alenga for the state