



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC PETITION NO. 23 OF 2020**

TESTIMONY ENTERPRISE LTD.....1<sup>ST</sup> PETITIONER  
LUKA MWANGI WAHINYA.....2<sup>ND</sup> PETITIONER  
ZACHARIAH NJENGA MBUGUA..... 3<sup>RD</sup> PETITIONER  
JOYCE NGINA MUSYOKA .....4<sup>TH</sup> PETITIONER  
SIMON KABOCHO KANGETHE.....5<sup>TH</sup> PETITIONER  
ANSELM GACHUKI WANJIKU.....6<sup>TH</sup> PETITIONER  
SAMUEL MUIGAI MUGO.....7<sup>TH</sup> PETITIONER

**VERSUS**

PUBLIC PROCUREMENT & REGULATORY AUTHORITY..... 1<sup>ST</sup> RESPONDENT  
ETHICS & ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT  
THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION..3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

**INTRODUCTION**

1. This matter was initially filed as a Constitutional Petition in the Constitutional and Human Rights Division at Nairobi as Petition No. E276 of 2020 and by a ruling dated 30<sup>th</sup> September, 2020 the same was transferred to this Division, on the ground that the petition was based on CMC ACC No. 22 of 2019 pending before the Chief Magistrates Anti- Corruption Court.

2. When the matter was placed before me, the court made several directions thereon in respect to the filing of affidavits and submissions, which were dully filed and directions given that the matter be heard by way of written submissions, which the Advocates representing the parties felt were comprehensive and detailed enough, to enable the court make a determination of the issues in controversy.

**PETITION**

3. By a petition dated 4<sup>th</sup> September, 2020, the petitioners pleaded that as per the requisite Regulations, The COUNTY GOVERNMENT OF KIAMBU advertised Tender No. CGK/RTPW&U/142/2017/2018, for upgrading various gravel roads to bituminous surface in Thika, Limuru, Gatundu North, Juja and Ruiru Sub Counties during the 2017/2018 financial year.

4. The 1<sup>st</sup> petitioner applied for the said tender and at all material times qualified for the same under the provisions of Public Procurement and Assets Disposal Act, having scored the highest at all the three stages at a contract sum of Ksh.588,198,328.20 (Kenya Shillings Five Hundred Thousand Three Hundred Eighty-Eight Million One Hundred and Ninety-Eight Thousand Three Hundred and Twenty-Eight Shillings and Twenty Cents) and the contract thereon executed on 16<sup>th</sup> March, 2018.

5. It was contended that a similar contract would have cost the Kiambu County Government Kenya shillings Eight Hundred Million (Ksh. 800,000,000 at a sum of Ksh.43,000,000. Per kilometre, whereas the 1<sup>st</sup> petitioner quoted at Ksh.29,000,000 per kilometre.

6. The 1<sup>st</sup> petitioner upon execution of the contract, begun the work immediately, having taken a loan to undertake the project, even before the 10% deposit as per the contract was paid.

7. That the contract was for 20 km of tarmac, of which the 1<sup>st</sup> petitioner as at the time of the filing herein, had done 10kms for which it was supposed to be paid Ksh.294,099,164.10, of which only Ksh.13,399,787 has been paid.

8. The 2<sup>nd</sup> Petitioner in his capacity and on the recommendation of the Tender Committee with the 3<sup>rd</sup> to 7<sup>th</sup> Petitioners as members, ratified the decision to have the 1<sup>st</sup> petitioner undertake the work as per the tender, only to be arbitral arrested and charged on allegations of irregularities and corruption.

9. It is the petitioners' case that the arrest made under the instructions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were in contravention of the petitioners' Bill of Rights and discriminatory in nature, in that they excluded key players in the Tender Evaluation Committee, being the Resident Engineer, whose input was crucial to the awarding of the tender such as the subject matter.

10. It was stated that their subsequent charging before the Lower Court, denied them audience before the 1<sup>st</sup> Respondent as stipulated under the provisions of the Act, as it is the first respondent who has the mandate to deal with procurement irregularities, which had been levelled against the Petitioners.

11. It was the Petitioners' contention that they were wrongly before the Anti-Corruption Court, as the correct procedure and forum would have been before the first Respondent and therefore their rights to fair trial had been violated and shall continue to be violated, as the procedurally mandated body had been denied the chance to carry out its function.

## **RESPONSES**

12. The 1<sup>st</sup> respondent, filed notice of preliminary objection and grounds of opposition and raised the following points of law: -

***1) THAT the application is premature and pre-emptive as the 1<sup>st</sup> respondent has not received and/or been served with any complaint related to procurement process and in respect to this matter for it to investigate in line with its mandate as provided for under Section 35 of the PPAD Act 2015.***

***2) THAT the application has been filed in absolute disregard of Section 37, 38 and 41 of the PPAD Act which only limits the 1<sup>st</sup> Respondent's powers to investigations and debarment but DOES NOT have prosecutorial powers.***

***3) THAT upon being satisfied that there is breach of procurement processes, the 1<sup>st</sup> Respondent prepares a report and submits the investigator's finding with recommendations to the relevant government Agencies in line with Section 38(c) of the PPAD Act 2020 which includes inter alia, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents herein for prosecution.***

***4) THAT the orders sought therein are intended to arbitrary usurp the 1<sup>st</sup> Respondent's statutory powers to investigate and debar.***

***5) THAT the 1<sup>st</sup> Respondent's presence in this matter therefore is not necessary for the court to adjudicate on the constitutional claims as between the petitioner's and the Respondents or to decide on her the 1<sup>st</sup> Respondent breached the Petitioner's constitutional rights.***

***6) THAT without prejudice to the foregoing, the petition and Application are couched in blank statements of allegations which are not supported by any material facts to prove the alleged breach of the constitution and can only be termed as fishing expedition to cause unnecessary anxiety, trouble and expenses to the 1<sup>st</sup> Respondent.***

***7) THAT for all the foregoing reasons, the petition and Application dated 4<sup>th</sup> September, 2020 is therefore misconceived, frivolous, vexatious and an abuse of this Honourable Court's process.***

13. In response to the petition, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn by HASSAN MOHAMED in which he deposed that in early 2019, the commission received a report on allegations of corruption, embezzlement of public funds, irregular and illegal public procurement in the County Government of Kiambu.

14. From the investigations, it was established that the County Government had budgeted for the financial year 2017/2018 Ksh.282,387500.00 for major road upgrade and the 2<sup>nd</sup> Petitioner was appointed member of the tender Evaluation Committee, comprising of the 3<sup>rd</sup> to the 7<sup>th</sup> petitioners.

15. The 1<sup>st</sup> Petitioner placed its bid for the sum of Kenya shillings five hundred and eighty-eight million one hundred and ninety-eight thousand three hundred and twenty-eight hundred and twenty cents (Ksh. 588,198,328.20) among the following bidders: -

S/NO	COMPANY	ADDRESS	BID AMOUNT	BID BOND AMOUNT
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1.	Testimony Enterprises Ltd	2840-00200 NAIROBI	588,198,328.20	11,763,966
2.	Njuca Consolidated Company Ltd.	55-01020 Kenol	710,257,314.83	Nil
3.	Chawins Ltd	2238 -00100 NAIROBI	558,002,847.25	11,200,000
4.	Dickways Construction Co. Ltd	61494-00200 NAIROBI	567,813,060	11,366,261
5.	Wela- Athi Holdings (K) Ltd	8071-0061	466,748,962.20	1,000,000

16. According to the evaluation report, the following bidders did not meet requirements:-

S/ NO	COMPANY	RESULTS
1.	Njuca Consolidated Company Ltd	The bidder had not attached bid bond as per of the tender.
2.	M/s Chawins Company Ltd.	The bidder has not serialized the tender document. There was no methodology proposal attached in the document.
3.	M/s Dickways Construction Co. Ltd	The bond was not compliant and issued by Rafiki Micro-Finance Bank. The bidder had not serialized the tender document.
4.	M/s Wela- Athi Holdings (K) Ltd	The bid bond was not complainant. The documents were not serialized.

17. It was deposed that the criteria for serialization of documents was not listed as a mandatory preliminary requirement in the tender document and was only introduced as a way of eliminating/disqualifying all other bidders, except the 1<sup>st</sup> petitioner to proceed to the next stage contrary to the provisions of Section 70(5) (b) of the PPAD 2015.

18. That the committee subjected the 1<sup>st</sup> petitioner to technical and financial evaluation scoring them 80% and recommending that they be awarded the tender against a professional advice to the 2<sup>nd</sup> Petitioner that the gaps raised to be addressed before an award decision was made.

19. It was deposed that the 2<sup>nd</sup> Petitioner while awarding the tender, stated that due process had been followed to the letter and that the few issues noted in the professional opinion could not affect the outcome even after re-evaluation and both the successful and the unsuccessful bidders were notified and contract entered into on the 16<sup>th</sup> March, 2018.

20. It was contended that the newspaper advertisement did not specify the roads to be upgraded and that there was no purchase requisition submitted to the Accounting Officer or authority to incur expenditure for approval as per the provisions of the Act.

21. It was contended further that the 2<sup>nd</sup> Petitioner engaged in an abuse of office and breach of procurement laws in order to ensure that the tender was awarded to the 1<sup>st</sup> Petitioner, by commencing the procurement of works without prior approval from the Ministry of Transport Infrastructure Housing Urban Development and Public Works of the County and awarding the tender to the 1<sup>st</sup> Petitioner in complete disregard of the fact that they did not have proof of previous similar work done, no adequate equipment and key personnel for the work and or adequate finance.

22. That the sum of Kshs.58,819,833 was paid to the 1<sup>st</sup> Petitioner representing 10% of the contract sum as mobilization fee and subsequent payments made on the interim payment certificates as follows:-

S/NO	TRAN DATE	VALUE DATE	TRAN PARTICULARS	CREDIT (KSH)
1.	06/04/2018	06/04/2018	RTGS/RMT KIAMBU COUNTY	10,000,000.00
2.	30/04/2018	30/04/2018	RTGS/RMT KIAMBU COUNTY	15,000,000.00
3.	30/04/2018	30/04/2018	RTGS/RMT KIAMBU COUNTY	13,819,833.00
4.	16/05/2018	16/05/2018	RTGS/RMT KIAMBU COUNTY	10,000,000.00
5.	16/05/2018	16/05/2018	RTGS/RMT KIAMBU COUNTY	10,000,000.00
6.	18/10/2018	18/10/2018	RTGS/RMT KIAMBU COUNTY	22,000,000.00
7.	03/01/2019	03/01/2019	RTGS/RMT KIAMBU COUNTY	22,000,000.00
8.	06/02/2019	06/02/2019	RTGS/RMT KIAMBU COUNTY	22,454,222.39
9.	11/03/2019	11/03/2019	RTGS/RMT KIAMBU COUNTY	22,000,000.00
	<b>TOTAL</b>			<b>147,274,055.39</b>

23. That the 1<sup>st</sup> Petitioner used forged tender documents and falsified curriculum vitae for the purported technical site staff and the 3<sup>rd</sup> to 7<sup>th</sup> Petitioners being members of the tender evaluation committee, jointly conducted the process irregularly and in blatant disregard of the procurement laws in favour of the 1<sup>st</sup> Petitioner.

24. It was finally stated that upon the completion of the investigations, the commission recommended to the 3<sup>rd</sup> respondent, under Section 35 of ACECA, who made an independent decision to charge the Petitioners, since the contract entered into was illegal, null and void.

25. The 3<sup>rd</sup> respondent filed grounds of opposition to the petition and raised the following grounds: -

1) **THAT** The 3<sup>rd</sup> Respondent has and continues to act within the confines of the Constitution Particularly Article 157 of the Constitution and all other laws incidental thereto in that state powers of prosecution are exercised by the Director of Public Prosecutions personally or by persons under his control and direction.

2) **THAT** under Article 157(10) of the Constitution, in the exercise of such powers, the Director of Public prosecutions is subject only to the constitution and the law; does not require the consent of any person or authority; is independent and not subject to the direction or control of any person or authority.

3) **THAT** the petitioners/applicant cannot direct the 3<sup>rd</sup> Respondent on how it ought to carry out its constitutional mandate by stating who ought to be charged and even what charges to prefer.

4) **THAT** the High Court would be crossing into the line of the independence of the 3<sup>rd</sup> Respondent to descent into the arena by granting blanket conservatory orders against the 3<sup>rd</sup> Respondent by quashing the proceedings against the petitioner before the anti-Corruption Court at Milimani Law Courts in Case No. 22 of 2019.

5) **THAT** The petitioners/applicants have not demonstrated that the 3<sup>rd</sup> Respondent has not acted independently or will not act independently or has acted capriciously, in bad faith, or has abused the process in a manner to trigger the High Court's intervention in making the decision to charge and prosecute the petitioners.

6) **THAT** every case investigated by the 2<sup>nd</sup> Respondents, the report is then forwarded to the 3<sup>rd</sup> Respondent pursuant to Section 35 under the Anti-Corruption and Economics Crimes Act; and a decision made by the Director of Public Prosecutions on whether or not to prefer criminal charges is based on whether or not there is sufficient evidence to make such a decision; the orders sought against the 3<sup>rd</sup> Respondent ought not to be granted as the decision to charge was solely based on the sufficiency of evidence and not on any other extraneous factors.

7) **THAT** the 3<sup>rd</sup> Respondent has jurisdiction to prosecute criminal offences under the Public Procurement and Asset Disposal Act of 2015 and Public Procurement and Disposal of Asset Regulations, 2006; thus being satisfied with the sufficiency of evidence in the instant case, the 3<sup>rd</sup> Respondent made the decision to charge pursuant to Article 157 of the Constitution and Section 6 of the Director of Public Prosecutions Act.

8) **THAT** by virtue of Section 38(c) of the Public procurement And Asset Disposal Act, the 1<sup>st</sup> Respondent lacks prosecutorial

powers and therefore the prosecution of this matter cannot fall within the mandate of the 1<sup>st</sup> Respondent.

9) **THAT** the petitioners' Application herein has been filed in bad faith, is frivolous, misconceived, premature and an abuse of the court process and is meant to derail and defeat the cause of justice in the trial court.

10) **THAT** the accuracy and correctness of the evidence or facts fathered in an investigation can only be assessed and tested by the trial court where the applicant is assured of fair trial and protection of the law and which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges before it.

11) **THAT** the right to fair administration action under Article 47(1) of the Constitutional has been fully complied with during the investigations, arrest, arraignment and subsequent prosecution of the petitioners.

12) **THAT** the petitioners have not demonstrated a prima facie arguable case on breach of any constitutional right or fundamental freedom by the 3<sup>rd</sup> Respondent.

13) **THAT** the petitioners have failed to specifically prove how any of their constitutional rights have been violated by the 3<sup>rd</sup> Respondent

14) **THAT** in view of the foregoing, I pray that the application and petition dated 4<sup>th</sup> September, 2020 be dismissed with costs to the 3<sup>rd</sup> Respondent.

### **SUBMISSIONS**

26. Directions were given to the effect that the petition herein be determined by way of written submissions which were duly filed.

### **PETITIONERS' SUBMISSIONS.**

27. It was submitted that procurement within the public and state organs, is governed by the provisions of the Public Procurements and Assets Disposal Act, which at Section 8 thereof establishes Public Procurement Regulatory Authority, with the powers to monitor, enforce and investigate complaints, with reference to the process of procurement and asset disposal by public bodies and agencies.

28. It was submitted that the 1<sup>st</sup> respondent has the sole mandate with reference to any matter touching on procurement and asset disposal and since the subject matter of this petition relates to the procurement process it ought to lie with the 1<sup>st</sup> Respondent as a matter of right.

29. It was contended that Section 35(3) of the Act gives the Authority the investigating powers in order to determine whether there has been breach of the Act, either initiated by the authority itself or on request in writing by public institution or any other person. It was the petitioners' contention that any investigations into illegality or irregularity of any procurement process can only be performed by the figures appointed by the authority.

30. It was the Petitioners' case that the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents only kicks in after the provision of Section 38(1) of the Act have kicked in and no sooner and therefore any breach or derogation from the provisions of the Act, would be in breach of Article 47 of the constitution and Section 4 of the Fair Administrative Actions Act and Article 50 of the Constitution.

31. It was submitted that the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent amounts to usurpation of the powers that lies with the 1<sup>st</sup> respondent and therefore they acted in excess of their authority in purporting to carry out investigations and arraigning the Petitioners in court, against their legitimate expectation. It was contended that it was only after the 1<sup>st</sup> Respondent had carried out its investigation and affording the petitioners an opportunity to respond to the same, that their finding is forwarded to the 2<sup>nd</sup> respondent for further action to the 3<sup>rd</sup> respondent.

32. It was submitted further that the actions of the Respondents violated the Petitioners' right to fair administrative action under the provisions of Fair Administration of Actions under Article 47 and Section 4 of the Fair Administrative Action Act, which guarantee an action which is expeditious, efficient, lawful, reasonable and procedurally fair. It was contended that the denial of the Petitioners' opportunity to make representation before the 1<sup>st</sup> respondent was in breach of their rights to fair administrative actions.

33. It was submitted that the decision of the 3<sup>rd</sup> respondent to indict the Petitioners despite the availability of another impartial and independent body, was in breach of their right to fair hearing and led to condemning them unheard.

34. It was submitted that the Petitioners were denied right to equality and freedom from discrimination under Article 27 of the Constitution, in that they were the target of unfair, un-procedural and grossly flawed investigations, since they were the only ones singled out for investigations leaving out other persons equally tasked with overseeing the works.

35. It was contended that the action by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to proceed without involving the 1<sup>st</sup> respondent, denied the Petitioners their right to equal protection and full benefit of the law of the dispute herein fell in the mandate of the 1<sup>st</sup> respondent and therefore the petitioners were selectively, unfairly and discriminatively targeted.

36. It was finally submitted that the decision by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to parade the petitioners before the court and the subsequent publication of the same before the media was indignifying to the petitioners, who were denied right of audience before the 1<sup>st</sup> respondent,

thereby violating their right to dignity under Article 28 of the Constitution.

37. It was submitted that the proceedings before the lower court were devoid of any proper factual or procedural foundation and therefore the court should find that the investigations and subsequent finding by the 2<sup>nd</sup> respondent were tainted with malice and were an abuse of and appropriation of authority and therefore the petitioners have set out a case for the award of the remedies sought. In support thereof the case of **REPUBLIC V DIRECTOR OF PUBLIC PROSECUTION & ANOTHER EX PARTE CHAMANLAL VRAIJLAL KAMANI & 2 OTHERS [2015] eKLR** was submitted.

### 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS

38. It was submitted that under Article 227 of the Constitution, when a public entity contracts for goods or services, it should be in accordance with a system that is fair, equitable, transparent, competitive and cost effective. It was submitted that on the basis of a complaint received, the 2<sup>nd</sup> respondent commenced investigations as per its mandate leading into the recommendation the 3<sup>rd</sup> respondent, who has powers to recommend and commence proceedings as per Article 157 of the Constitution.

39. It was contended that the powers of the DPP are exercised subject to the limitations under sub-Article 10 and 11 and that the courts will interfere with the exercise of the discretion sparingly as was stated in the case of **DIAMOND HASHAM LALJI AND ANOTHER VS AG AND 4 OTHERS [2018] eKLR**

40. It was contended that the powers of the 1<sup>st</sup> respondent were only limited to investigation of offences under the Act in Section 35 and the findings thereon are submitted under Section 38 to the 3<sup>rd</sup> respondent who has prosecutorial mandate under Article 157. It was therefore submitted that granting the orders sought in the petition will amount to interfering with the 3<sup>rd</sup> respondent's mandate.

41. It was submitted that a constitution petition is charged with establishment of constitutional rights or breach of a fundamental freedom and not with the transfer of suit from the Anti-Corruption Court to the Public Procurement Regulatory Authority.

42. It was stated further that an arrest and prosecution of the petitioners' was not unconstitutional as the investigation into the award of the subject tender was not an infringement into their rights, since it was in public interest that offences be investigated and prosecuted if sufficient evidence is obtained.

43. It was contended that the Petitioners had not established any violation of their rights and they failed to prove in the pleadings that there was violation as was stated in the case of **ANARITA KARIMI NJERU v REPUBLIC [1997]1KLR**

### 3<sup>RD</sup> RESPONDENT'S SUBMISSIONS

44. It was submitted that the petitioners had the duty to state and identify the rights alleged to have been violated with precision and how the same have been or will be infringed, as was stated in the **Anarita Karimi Njeru (supra)**. It was contended that the Petitioners merely stated the rights without demonstrating specifically the violations.

45. It was submitted that the 3<sup>rd</sup> respondent is empowered by the constitution under Article 157(6) to institute, undertake and take over prosecution of all criminal proceedings and in undertaking the said role, the DPP does not require the consent of any person or authority. It was contended that the case of **Matalulu Vs DPP (2003) 4LRC712** sets out the grounds upon which the powers of the DPP conferred under the constitution may be subject to review as follows:-

- a) In the excess of the DPP's constitutional or statutory powers.
- b) Contrary to the provisions of the constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his/her own independent discretion.
- c) In bad faith.
- d) In abuse of the process of the court in which it was instituted
- e) Where the DPP has fettered his discretion by a rigid policy and obtained that which was undesirable.

46. It was contended that the petitioners failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Petitioners be charged based on evidence gathered by the 2<sup>nd</sup> respondent in exercise of its powers under Sections 13(2)(c) and 23 of the ACECA and in compliance with Section 35 thereof.

47. It was contended that an order of Certiorari was discretionary and is only attainable where the public body or official acted in excess of their powers as was defined in the case of **STEPHEN OYUGI OKERO v MILIMANI CHIEF MAGISTRATE'S COURT & ANOTHER HIGH COURT PETITION NO. 537 OF 2017**.

48. It was finally contended that the petitioners had not demonstrated that in making the decision to prefer charges against them the DPP acted without or in excess of his powers. It was submitted that the decision was based on the sufficiency of the evidence on record and the public interest.

49. For record purposes, the 1<sup>st</sup> Respondent did not file any written submissions.

### **ANALYSIS AND DETERMINATION**

50. I have looked at the pleadings and submissions of the parties together with the authorities in support thereof and since this petition was heard by way of written submissions, I have taken into account, the facts in support and against the same. The legal principles thereon in details for the purposes of this judgment into details.

51. From the pleadings, submissions and the authorities in support thereof, the following factual basis of the petition are not disputed by all the parties herein: The Kiambu County Government constituted a tender committee made up of the 2<sup>nd</sup> to the 7<sup>th</sup> petitioners for the purposes of awarding tender in respect of the upgrading of several roads within the County, which tender was awarded to the 1<sup>st</sup> petitioner, in what the petitioners considered to have been proper and regular process. The 2<sup>nd</sup> Respondent on the other hand considered the same otherwise.

52. The 2<sup>nd</sup> respondent in exercise of its constitutional and statutory mandate, investigated the said award of tender and formed an opinion that it was irregular and in violation of the provisions of the Public Procurement and Assets Disposal Act, for which they recommended to the 3<sup>rd</sup> Respondent the prosecution of the petitioners herein.

53. Acting on the said recommendation the petitioners were duly charged and are currently facing prosecution in Nairobi Chief Magistrate Court ACC No. 22 of 2019, a trial which the petitioners feel should not have been commenced, without the subject matter being investigated by the 1<sup>st</sup> respondent, hence this petition.

54. The issues therefore for determination in this petition is whether the 2<sup>nd</sup> respondent has a mandate to investigate matters arising out of an award of tender or whether that lies within the exclusive jurisdiction of the 1<sup>st</sup> respondent. If the answer to the said question is in favour of the petition, then the petition should be allowed and if not the same to be dismissed.

55. This question is not new and novel! This court faced with the same question in the case of **HARDY ENTERPRISES LIMITED & 2 OTHERS v ETHICS & ANTI-CORRUPTION COMMISSION AND 2 OTHERS [2021] eKLR** had this to say:-

*“45. To enable the court answer the said issues, it is necessary for the court to look at the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of investigation and prosecution of matters arising out of contracts awarded under the provisions of the Public Procurement and Assets Disposal Act, put different, does the 1<sup>st</sup> Respondent have jurisdiction to investigate contract allegedly awarded under the provisions of the Public Procurement and Assets Disposal Act? and if the answer is in the affirmative, were the petitioners herein investigated in a conformity with the provisions of the constitution? and if not what order should this court issue?”*

*46. The 1<sup>st</sup> Respondent is established under the provisions of Article 79 of the Constitution of Kenya 2010, which directed parliament to enact legislation to establish an independent Ethics & Anti-Corruption Commission, with powers and statutes of independent commission established under Article 252(1) of the Constitution, which grants it powers to conduct investigation on its own or on a complaint made by a member of the public.*

*47. Parliament enacted ETHICS & ANTI-CORRUPTION COMMISSION ACT, 2011 with powers thereof set out in Section 13(2) (b) to undertake preventive measures against unethical and corrupt practices and (c) to conduct investigations on its own initiative or on complaint made by any person under Section 28 of the Act. The commission is independent and subject to the constitution shall in the performance of its functions not be subject to the direction or control of any person or authority.*

*48. Section 23 of the Anti-Corruption and Economic Crimes Act 2003 further mandates the 1<sup>st</sup> respondent to conduct investigations in respect of corruption and economic crimes which is denied as follows: -*

*“Corruption*

*a. An offence under any of the provisions of section*

*44 (bid rigging)*

*46 (abuse of office) and*

*47 (dealing with suspect property)*

*b. Bribery*

*c. Fraud*

*d. Embezzlement or misappropriation of public funds.*

*e. Abuse of office*

*f. Breach of trust or*

*g. An offence involving dishonesty*

*h. Economic crime*

*a. An offence under Section 45 (protection of public property and revenue.)*

*b. An offence involving dishonesty under any written law providing for the maintenance or protection of the public revenues.*

49. *It is therefore clear that the 1<sup>st</sup> Respondent has both constitutional and statutory mandate to investigate corruption and economic crimes and in the performance of that function, the same is only subjected to the provisions of the constitution of Kenya 2010 and the limitations provided therein in addition to the supervisory jurisdiction of this court.*

*Whether the 1<sup>st</sup> Respondent has jurisdiction to investigate the propriety or otherwise of a procurement process.*

50. *Whereas the petitioners submitted at length that the 1<sup>st</sup> Respondent does not have power or jurisdiction to supervise the award and/or performance of public procurement tenders and that Section 27(1) of the Act established the Public Procurement Administration Review Board which procedure should be followed in case of any dispute, as was held in the case of SPEAKER OF THE NATIONAL ASSEMBLY v JAMES NJENGA KARUME [1992] eKLR as submitted by the 1<sup>st</sup> respondent, this issue had been adjudicated upon and it is settled that where the provisions of the act are violated in a manner that craters an offence or in violation of the provisions of Sections 45(1) and 48 of the ACECA, then the 1<sup>st</sup> respondent is entitled to investigate and make recommendations appropriately.*

51. *Similar issue was dealt with in the case of REPUBLIC v KENYA ANTI-CORRUPTION COMMISSION & 4 OTHERS EXPARTE JACKSON GICHOHI MWANGI & 5 OTHERS [2010] eKLR where the ex parte applicant raised similar issue as the petitioner herein and the court had this to say: -*

*“It seems the mandate of the commission to investigate any offence relating to corruption is unfettered within the above section. The powers are very wide. The question is whether the 1<sup>st</sup> Respondent powers are subject to the provisions of the public procurement and Disposal Act.... An aggrieved party has a right to judicial review board which is set up under Section 93-99 of the Act. In my view this section would not be available to a party alleged to have committed a crime or corruption. An application under that section will be of a civil nature. The Applicants are alleged to commit a crime.*

.....

*The issue at hand does directly relate to procurement and disposal but here in nowhere in the Act that makes provision for the manner in which an alleged criminal act will be dealt with. If it is a criminal act, it will end up being dealt with under the criminal justice system which involved investigation and prosecution of the crime. In the instant case, the Director General of the PPOA had not acted on any complaint and this court has no idea whether the said director had received any complaint that the procurement procedure has been breached. The procedure under Section 105 (2) could therefore not be followed because it is not the Director who commenced investigations. The KACC conducted investigations on the complaint made to it and forwarded their report to the A.G pursuant to Section 35 of ACECA. The KACC made a report to the AG with a recommendation that the applicants be charged with the offence. In my considered view, the KACC acted within its mandate both under ACECA and the PPD Act and cannot be faulted in any way.”*

52. *It is therefore clear to my mind and I find and hold that the 1<sup>st</sup> Respondent has mandate to investigate matters which arises out of public procurement and therefore the petitioner’s submissions that it lacks mandate over the subject matter herein has no merit as where it is alleged that the tender was procured in blatant disregard of the statutory provision of the Act, then the contract entered into will be null and void as was stated in the cases of BLUE SEA SHOPPING BALL LTD v CITY COUNCIL OF NAIROBI & 3 OTHERS (SUPRA) and BENSON ANYONA OMBAKI & 5 OTHERS v REPUBLIC (Supra)*

53. *Once there is an allegation of illegality and/or corruption in the award of or performance of tender awarded by a public body, the 1<sup>st</sup> Respondent in fulfilment of its statutory and constitutional obligation is required to investigate the same and if it finds merit thereon, to make recommendations to the 2<sup>nd</sup> respondent who has the constitutional mandate to institute prosecutions in Kenya and unless the petitioner satisfy the court, that the said investigation and/or prosecution is in breach of their constitutional rights, the court will be very reluctant to injunct.... the Respondents from discharging their constitutional and statutory mandate.*

54. *In the case of FLORICULTURE INTERNATIONAL LTD & OTHERS v TRUST BANK LTD & OTHERS High Court Misc. Civil Appeal No. 114 of 1997 the court was clear that the existence of an alternative procedure and/or remedy was no bar to pursuant of criminal redress and addressed itself thus: -*

*“I am of course very clear in my mind and I am alive to the well-known principle that the existence of alternative remedies is no bar to the pursuit of a criminal process. Thus the power to stop private criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related fact.*

55. This position is also confirmed by the Court of Appeal in *KENYA PIPELINE CO. LTD v GLENCORE ENERGY (UK) LTD [2015] eKLR* where it stated as follows: -

***“In STANDARD CHARTERED BANK V INTER COMS SERVICES LTD & 4 OTHERS (supra) this court.....accepted the submissions made that once an issue of breach of stature is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the courts fundamental role is to uphold the law. The court upheld and endorsed the old English case of HOLMAN v JOHNSON (1775-1803) ALLER 98 where Chief Justice Mansfield stated: -***

***The principle of public policy is this Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.....”***

56. I have taken the liberty of quoting the above case in details and represents the legal position and answer to the question raised by the petitioners herein and I am persuaded that the same reflect the correct position as regards the role of the 1<sup>st</sup> Respondent (Public Procurement & Regulatory authority), the 2<sup>nd</sup> Respondent (Ethics & Anti-corruption Commission and the 3<sup>rd</sup> Respondent (The office of Director of Public Prosecutions) in respect of investigations prosecution got procurement irregularities.

57. When you apply the above principles to the petition herein, the only logical conclusion one comes to is that the petitioners’ contention that the matter should have been handled by the 1<sup>st</sup> respondent has no basis both in law and in fact as the investigative powers of the 1<sup>st</sup> Respondent in respect to procurement is only limited to claims of civil nature not in cases where there is allegation of irregularity on the process and some criminal element in nature.

58. However attractive the submissions of the petitioners are, to rule that the 2<sup>nd</sup> respondent has no mandate to investigate the matters arising out of irregularities on the award of tender to the 1<sup>st</sup> petitioner, having gleaned at the scope and nature of the allegations made against the said award, will amount to defeating the constitutional mandate of both the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent. Each of the Respondents have a clear lane set out in the constitution and the statutes establishing them and it is not for the petitioners to forum-shop for any of the 1<sup>st</sup> two.

59. Further the 1<sup>st</sup> Respondent whom the Petitioner would like to find refuge in, has clearly stated in their grounds of opposition, which has not been controverted and which the court finds to be the true legal position, that it does not have prosecutorial powers, which lies with the 3<sup>rd</sup> Respondent and that it had fulfilled its statutory mandate under section 38(8) of the Act and prepared a report to both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. The Petitioners have not provided the court with evidence to enable it find to the contrary.

60. In exercise of the powers and mandate conferred upon it under Article 157, the 2<sup>nd</sup> Respondent under sub-title (10) thereof, shall not require the consent or authority for the commencement of criminal proceedings and in exercise of his/her powers or function shall not be under the directive or control of any person or authority. The only limitation to the said powers is provided for under sub-Article (11) which states as follows:-

***“(11) In exercising the powers conferred by this Article, the Director of Public prosecution shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.”***

61. I take the view and hold that the 1<sup>st</sup> Respondent falls under the persons and Authority that is injuncted from giving directions or controlling the DPP in the performance of his/her statutory and constitutional duties. It is also clear that the mandate of the 2<sup>nd</sup> Respondent to investigate is not conditional upon the role of the 1<sup>st</sup> Respondent.

62. The evidential test in making a prosecutorial decision was stated in the case of *JANET ATIENO OTIENO v PHARMACY & POISON BOARD & ANOTHER [2016] eKLR* thus:

***“To constitute reasonable and probable case, the totality of the material within the knowledge of the prosecution at the time he instituted the prosecution must be such as to be capable of satisfying an ordinary reasonable, prudent and cautious man to the extent of believing that the accused is probably guilty.”***

63. As was stated by the Supreme Court of Fiji in *MATULU v DPP (2003) 4 LRC 712* this court may only review the exercise of the DPP’s prosecutorial powers if the following grounds are established:-

***“If it were made:-***

***i.) In excess of the DPP’s constitutional and statutory grants of powers***

***ii.) When contrary to the provisions of the constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his/her own independent discretion – if the DPP were to act upon a***

*political instructions, the decision could be amenable to review.*

*iii.) in bad faith for example, dishonesty.*

*iv.) abuse of the process of court in which it was instituted for*

*v.) where the DPP has fettered his/her discretion by a rigid policy.”*

64. From the material placed before me, I am unable to find that the 3<sup>rd</sup> Respondent violated or acted outside the scope of his mandate and therefore the petitioner’s contention is of no merit. The Affidavit evidence by the 2<sup>nd</sup> Respondent confirms allegations of irregularities in award of the tender to the 1<sup>st</sup> petitioner by the 2<sup>nd</sup> to 7<sup>th</sup> petitioners and on that basis make recommendation to the 3<sup>rd</sup> respondent who upon independent review formed an opinion that there were reasonable grounds to charge the petitioners, which is the subject matter of the trial before the Chief Magistrate Anti-Corruption Court.

65. On the allegation by the petitioner that their legitimate expectation to appear before the 1<sup>st</sup> Respondent were violated, notwithstanding what I have stated herein in paragraph 57, there can be no legitimate expectation on the part of the petitioners that they were entitled to appear before the 1<sup>st</sup> Respondent before any decision to charge them was made by the 3<sup>rd</sup> Respondent. In this I find support in the decision of the Court in **ISAAC TUMUNG NJUNGE v DPP & 2 Others [2016] eKLR** where it was held as follows: -

***“In my view the mere fact that the Director of Criminal Investigations (read the Public Procurement and Regulatory Authority) has conducted its own independent investigations and based thereon arrived at a decision not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions.*”**

.....

***The ultimate decision of what steps ought to be taken to enforce the Criminal law is placed on the officers in charge of prosecution.”***

66. I am in total agreement with the legal principle set out herein and hold that the Anti-Corruption Court would be required to examine the tender documents for its inception by the County Government to the time the same was awarded to the 1<sup>st</sup> Petitioner and to make a determination as to whether there was any illegality or whether the same complied with the law, which this court sitting on a constitutional petition is not best suited to do.

67. I take the view and hold that all the allegations of breach of fundamental rights and freedoms, by the petitioners shall constitute their defence and or justification at their on-going trial before the lower court and therefore to quash their trial before the Anti-Corruption Court will not be in their best interest and the public interest, that requires the allegations to be proved by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. The Petitioners right to fair hearing are constitutionally guaranteed under Article 50 of the Constitution and there is no allegation that the same is being violated for which this court can act in their favour to stop their prosecution.

68. From the material placed before me I have come to the conclusion that the petitioners have failed proved any violation of their constitutional and fundamental rights and are therefore not entitle to any order of damages at all.

69. For reasons stated herein I find and hold that the petition herein has no merit and is therefore dismissed in totality with cost to the respondents.

**SIGNED DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>th</sup> DAY OF JUNE, 2021**

.....

**J. WAKIAGA**

**JUDGE**

***In the presence of:-***

*Mr. Kinyanjui for Mr. Kihara for DPP*

*Mr. Swaka for the Petitioner*

*Court assistant Potishoi*