



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION COURT AT MILIMANI**

**HC ACEC CR. APPEAL NO. 11 OF 2017 AS CONSOLIDATED WITH HC ACEC NO. 11'B' OF 2017**

***(Being an appeal from the decision of Hon. E. Kombo (SPM) Milimani Law Courts delivered on 6<sup>th</sup> March 2017 in Anti-Corruption Case No. 39 of 2011)***

**MOSES GITARI.....1<sup>ST</sup> APPELLANT**

**BENJAMIN SHIDZUGANE ISINDU.....2<sup>ND</sup> APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Benjamin Shidzugane Isindu and Moses Gitari (herein referred to as the Appellants) together with one Michael Muchemi Nduguya were on 7<sup>th</sup> October 2011 jointly arraigned before the Anti-Corruption Chief Magistrate's Court facing various corruption related charges.
2. Count one, they were jointly charged with willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars were that on diverse dates between the 7<sup>th</sup> day of January 2009 and 16<sup>th</sup> January, 2009, at the Ministry of State for Special Programmes in Nairobi, within Nairobi Province, being Public Officers, to wit, the Senior Deputy Secretary, the Senior Procurement Officer and the Procurement Officer respectively, being persons whose functions concerned the management of public property at the Ministry of State for Special Programmes, jointly and willfully failed to comply with the law relating to the procurement and Disposal Act, 2005 as read with Regulation 35 of the Public Procurement and Disposal Regulations, 2006 by procuring building materials for resettlement of Internally Displaced Persons through the Request For Quotation method which method was not applicable.
3. Count two, the appellants were jointly charged with the offence of Abuse of Office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars were that on or about the 4<sup>th</sup> day of April 2009, at the Ministry of State for Special Programmes in Nairobi, within Nairobi Province, being Public Officers, to wit, the Senior Deputy Secretary and Senior Procurement Officer respectively, used their offices to improperly confer a benefit on Agenda Hardware Limited by approving payment of Kshs. 7,245,840/-, for supply and delivery of building materials to National Cereals and Produce Board depots in Mai Mahiu, Nakuru, Molo and Eldoret while knowing that the delivery was partially done.
4. Count three, again the appellants were jointly charged with the offence of abuse of office contrary to Section 46 as read with Section 48(b) (1) of the Anti-Corruption and Economic Crimes Act NO. 3 of 2003. Particulars were that, on or about the 12<sup>th</sup> day of May 2019, at the Ministry of State for Special Programmes in Nairobi, within Nairobi Province, being Public Officers, to wit, the Senior Deputy Secretary and Senior Procurement Officer respectively, used their offices to improperly confer a benefit on Transafri Timber Limited by approving payment of Kshs. 5,316,300/-, for supply and delivery of building materials to National Cereals and Produce Board depots in Mai Mahiu, Nakuru, Molo and Eldoret while knowing that the delivery was partially done.
5. Count four, the two (appellants) were again charged with abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars stated that, on or about 20<sup>th</sup> May 2019, at the Ministry of State for Special Programmes in Nairobi, within Nairobi Province, being Public Officers, to wit, the Senior Deputy Secretary and Senior Procurement Officer respectively, used their offices to improperly confer a benefit on Kliques Business Machines by approving payment of Kshs. 2,240,000/-, for supply and delivery of building materials to National Cereals and Produce Board depots in Mai Mahiu, Nakuru, Molo and Eldoret while knowing that the delivery was partially done.
6. Upon returning a plea of not guilty, the case proceeded to full hearing with the prosecution calling a total of 27 witnesses. At the close of the prosecution case, the appellants were acquitted of Count four (4). After the close of the defence case, they were convicted of counts 1 to

3. They were subsequently sentenced on 6<sup>th</sup> May 2017 to a fine of Kshs. 500,000/- or suffer imprisonment term of one (1) year in respect of count 1. For each of the counts 2 and 3 to pay a fine of Kshs. 250,000/- or suffer a sentence of six (6) months imprisonment.

7. Aggrieved by the conviction and sentence Mr. Benjamin Shidzugane Isindu lodged a petition of appeal dated 17<sup>th</sup> May 2017 and filed the same day vide Criminal Appeal No. 11/17 citing 9 grounds of appeal as follows:-

- i) That the judgment of the court is against the weight of the evidence**
- ii) That there is no direct evidence at all on the record incriminating the Applicant with any of the offences.**
- iii) That the court erred in law and in fact in failing to comply with mandatory provisions of the Criminal Procedure Code.**
- iv) That very evidently the Subordinate Court erred in law by failing to consider the fact that there had been no compliance with the mandatory provisions of Section 35 of both Anti Corruption and Economic Crime Act.**
- v) That though the court did not pronounce a guilty verdict on Count 1, nevertheless ultimately proceeded to make a finding that it had convicted in all 3 counts.**
- vi) That the lower court erred in permitting the filing of written submissions which occasioned the exclusion of the participation of the Appellant in the proceedings to the appellants prejudice.**
- vii) That the court erred in convicting the Applicant on matters it had already made a finding were un-explained, hence creating doubts.**
- viii) In the alternative trial court expressly or improperly sought to shift the burden of proof thereby violating of fundamental constitutional provisions to the prejudice of the Applicant.**
- ix) That considering all the foregoing, it is mete and just that the Honourable Court be pleased to extend time for the purposes of lodging of the appeal.**

8. On 5<sup>th</sup> May 2017, Moses Gitari filed his appeal vide ACEC Cr. Appeal No. 11B of 2017 citing 9 grounds of appeal which are exactly the same word by word as the grounds put forth by his colleague in Criminal Appeal No. 11 of 2017. By consent of both parties, the two appeals were on 19<sup>th</sup> December 2018 consolidated as they arose from the same criminal case and grounds of appeal were similar. The appeal was to proceed under file No. 11 of 2017 with Moses Gitari as the 1<sup>st</sup> appellant and Benjamin Shidzugane Isindu as the second appellant.

9. This is a first appeal which calls upon me as the 1<sup>st</sup> appellate court to re-analyze, re-evaluate and re-assess the evidence afresh so as to arrive at an independent finding or conclusion bearing in mind that, the court is not possessed of the advantage of having seen or heard and assessed witnesses' general demeanor. See **Okeno vs Republic [1972] page 32**. I will therefore endeavour to outline the evidence before the trial court before I make my independent finding and conclusion.

10. The facts and circumstances surrounding the institution of the criminal proceedings the subject of this appeal can be traced to an emergency resettlement programme of IDPs following the 2007 and 2008 post election violence. The programme which was undertaken by the Ministry of Special Programmes, was executed by various government officials in that Ministry among them; the 1<sup>st</sup> appellant (Moses Gitari) who was Senior Deputy Secretary Administration in his capacity as the Chairman Ministerial Tender Committee who also held authority to incur expenditure (AIE) for the Humanitarian Fund Board created vide Notice No. 11/30/1/2008 charged with the mandate to resettle IDPs.

11. The second appellant (Benjamin) was the Senior Procurement Officer and head of procurement in the Ministry and therefore the Secretary of the Ministerial Tender Committee. Equally, the 3<sup>rd</sup> accused Michael Muchemi was the deputy to the 2<sup>nd</sup> appellant being a procurement officer.

12. Pursuant to persistent complaints individually and through the media that funds meant for resettlement of IDPs were being embezzled, the EACC commenced investigations culminating to the arrest and subsequent prosecution of the appellants. Prior to the commencement of the procurement process, the Humanitarian Fund Board had in the company of the PS made a field tour to assess the situation on the ground which generated an emergency (abrupt) decision to procure construction materials to resettle the IDPs.

13. Pursuant to the direction and request for procurement of construction materials by the PS vide his memo dated 5<sup>th</sup> January 2009 (MF1), Peter Lukori Eripete (PW1) the then Assistant Director Mitigation and Re-settlement Programme generated a requisition (P.EX. 2) in the form of an internal memo to the PS seeking authorization or approval of the items to be bought. Among the items targeted for acquisition as specified in the requisition were-

- a) Iron sheets – 8000 sheets**
- b) Ridges – 3200 pieces**
- c) Cedar posts – 2400 pieces**
- d) Timber 4” X 2” cypress – 6600 ft**

**e) Timber 3”X2” cypress 187,600 ft**

**f) Roofing nails – 2000kg**

**g) Nails – ordinary 3”, 4”, 5” – 8000kg**

14. Upon approval, the procurement department headed by the 2<sup>nd</sup> appellant commenced procurement process.

15. PW2 Chief Finance Officer Ministry of State for Public Service sat in the tender committee meeting where he was the Vice-Chair deliberating on the issue of purchase of building materials for IDPs. Among other committee members in attendance were, the 1<sup>st</sup> appellant (Moses Gitari) as the Chair, Philip Tarus, Mr. Isundu head of procurement and Secretary to the tender committee (2<sup>nd</sup> appellant), Michael Ndungu and Mr. Salemba. He confirmed that they held their 1<sup>st</sup> meeting on 16<sup>th</sup> January 2009 (MF1.3 minutes) and second meeting on 25<sup>th</sup> February 2009 (MF1-4 minutes).

16. That upon deliberation and comparing price schedule, the contract for supply of iron sheets, ridges’ and roofing nails was awarded to the lowest bidder General Hardware Ltd out of a total of 5 bidders who had tendered vide quotation No. OOP/SP/068 (2008-2009). Delivery was to be done at NCPB depots Mai Mahiu, Molo, Nakuru and Eldoret.

17. He further stated that under minute No. 8/6/2008-2009, they deliberated the supply of cedar posts vide quotation No. 00P/SP/069/ 2008-2009. After comparing price schedules quoted by five bidders, Agenda Hardware won the tender being the lowest bidder at Kshs. 500/- per piece.

18. The 3<sup>rd</sup> item for discussion was minute No. 9/6/2008. 2009 for supply of timber quotation No. 0P/SP/70/2008-2009. After deliberation and comparing price schedules of the 4 bidders, Trans-Afric Timber Ltd the lowest bidder won the contract for supply of timber (4”X2”). Delivery of the said timber was to be at Mai Mahiu, Molo, Nakuru and Eldoret NCPB depots in equal quantities of 16,500 running feet.

19. Further, that they deliberated on the supply of nails under quotation No. 00P/SP/71/2008-2009. Out of the 4 bidders, Peru Multi-Agencies emerged the lowest bidder at 345/- per kilo but the committee felt the price was too high and advised refloating of the tender.

20. On the 2<sup>nd</sup> meeting of 25<sup>th</sup> February 2009, they deliberated on quotation No. OOP/SP/076/2008-2009 for the supply of timber size 3 x2 and Agenda Hardware won the contract. Under minute No. 7 (MF1-4) quotation NO. OOP/SP/081/2008-2009 for supply of nails, Klique Business Machine won the tender. According to the witness, the contract sum was inclusive of the delivery cost.

21. On cross examination by Mr. Okundo, he stated that all procurement procedures were followed and that due to the urgency of the work, they applied restricted tendering method. However, he could not explain why the request for quotation was applied. He wondered why three of the Tender Committee members were charged yet they took a collective decision as tender committee.

22. PW3 Philip Kiprono Tarus an under Secretary Ministry of State for Special Programmes and a member of the tender committee corroborated the testimony of PW2. He stated that due to the urgency of the work, they used request for quotation method and that all procedures were followed.

23. PW4 Vincent Mateoli Ambutzi then a Senior Assistant Secretary in charge of department of risk reduction, disaster preparedness and a member of the Ministerial Tender Committee confirmed that he sat in the tender committee meeting held on 16<sup>th</sup> February 2009 where minute No. 6 & 7/2008-2009 was deliberated regarding supply of iron sheets for IDPs. He also corroborated the testimony of PW 2 and PW 3. He stated that they did everything according to the rules under the guidance of the procurement secretariat.

24. PW5 Janet Nyanjera Ongwae a Senior Accountant in the Ministry and the incharge payment voucher was summoned by KACC to explain how payments were made to Agenda Hardware at Kshs. 1,344,000/-. She confirmed that the voucher (Ex.10) was duly authorized by the appellants who signed the certificate at the back supported by an LPO and letter showing that the tender went through the Ministerial Tender Committee. She confirmed signing the same after it went through validation process including examination, delivery notes, invoicing and IFMIS.

25. PW6 Peter Mutua Nzulu – Manager then NCPB depot Nairobi acknowledged that on 5<sup>th</sup> March 2009 he received materials for special programmes ministry being iron sheets 1300 pieces vide delivery note No. 27484 (Ex. 8), roofing nails 500kg vide delivery No. 27496 (Ex. 19), and 800 ridges vide delivery No. 27492 (Ex. 20) all from General Hardware Ltd. The fourth delivery was No. 1093 from Klique Business Machine for the supply of 2000 kilograms of ordinary nails (Ex. 21).

26. That on 26<sup>th</sup> April 2009, they dispatched the items to Mai Mahiu IDPs Camp through GK 713M driven by Peter Kyalo (PW24). He stated that the items were originally destined for Mai Mahiu but were re-routed to Nairobi depot as there was no depot at Mai Mahiu. He later confirmed that there was/is NCPB depot at Naivasha and that he accepted the items based on a letter from the PS Special Programmes requesting for alternative storage arrangements.

27. PW7, Nathaniel Njuguna Sirich who at the material time was a clerical officer working with the Ministry of State for Special Programmes was summoned by KACC officers to shed light on how IDPs building materials for Mai Mahiu IDP Camp and Ngarue IDP Camps in Eldoret were supplied. He confirmed that, on 7<sup>th</sup> April 2009 while in the company of Kyalo their ministry driver (PW24) they collected roofing and ordinary nails plus iron sheets and hedges’ from Nairobi NCPB depot and proceeded to deliver them at Jikaze Self Help Group at Mai Mahiu in Naivasha in the presence of the area D.O and the Chief.

28. That they further proceeded to Nakuru NCPB and collected Cedar posts after being dispatched by the D.O. He delivered them at Ngarue IDP Camp and then proceeded to Eldoret NCPB and picked more building materials and delivered at Ngarue IDP Camp in Burnt Forest. He denied collecting Cedar posts from Eldoret.
29. That on their 2<sup>nd</sup> trip, in the month of April 2009, he used GK 714M driven by Mule Fred. During that time, he proceeded to Nakuru NCPB and collected timber for delivery at Mai Mahiu which they did before the provincial administration officers. That some materials were also picked from Nakuru NCPB and delivered at Ngarue IDP Camp.
30. That in May 2009, he again went for a 3<sup>rd</sup> trip using GK 714M. They proceeded to Nakuru NCPB, picked timber and delivered the same at Ngarue IDP Camp. On cross examination by Okundo, he confirmed that some materials could not be delivered as they were out of stock.
31. PW8 Clement Obure Odeke the then Assistant Director of Information, Communication and Technology in the Ministry of State and Special Programmes participated in the opening of tender documents in respect of the supply and delivery of building materials to various destinations among them Mai Mahiu, Nakuru, Molo and Eldoret. He did not notice anything abnormal in the quotations.
32. PW9 Ahoi Oguny Kobonyo a Public Relations Officer in the Ministry confirmed that, he, Mr. Isindu, Clement Odeke and Michael Ndunguya opened the tender documents for supply of IDP materials.
33. PW10 Ibrahim Ali Nduare District Coordinator IDPs then, confirmed being tasked to supply building materials to IDPs in Mai Mahiu and Burnt Forest.
34. To execute his mandate, he was issued with a Computer print out by Mr. Ndunguya (3<sup>rd</sup> accused) the procurement officer then. In the company of a driver (PW24) and a clerk (PW7) they collected various building materials (items) from Nairobi, Nakuru and Eldoret NCPB depots and delivered them at Ngarue in Ainabkoi where they were received by the local DO one Halima Wale. He confirmed that the materials for Mai Mahiu were received by the local D.O Mr. Anyona.
35. PW11 Fredrick Musyoki Muli a driver then working with the NYS attached to the Ministry stated that, on 28<sup>th</sup> April 2009 while in company of Nduare and Sirichi, they transported building materials from Nakuru NCPB to Mai Mahiu. He later delivered some materials at Burnt Forest using GK A714M.
36. PW12 Arrest Muturi Oguora Operations Manager Nairobi NCPB confirmed receiving a letter addressed to his MD by one M.C Gitari on behalf of the P.S Ministry of Special Programmes requesting for storage facility of some building materials in their Nakuru, Nairobi and Eldoret depots. He marked the letter for the attention of regional managers Nairobi, Nakuru and Eldoret to facilitate. He further confirmed they did not have depots at Mai Mahiu and that the nearest was Naivasha. He however could not comment on whether those items were delivered or collected.
37. PW13 Stanley Wathiru Kimani a business man dealing with hardware and supplies in the name of Klique Business Machines stated that sometime on 15<sup>th</sup> May 2008, he wrote a letter to the P.S Ministry Special Programmes introducing himself as a potential supplier of building materials. That around 2009, one Mr. Ndunguya (3<sup>rd</sup> accused) called and requested him to supply 8000kgs of assorted nails at Kshs. 280/- per kg making a total of Kshs. 2.24 million. That the price was inclusive of delivery expenses. He was issued with an LPO No. 0714453 (Ex. 68). He confirmed getting delivery notes for Nakuru, Eldoret and Mai Mahiu. That on arrival at Mai Mahiu he met a D.O who told him that there was no NCPB depot there. Subsequently, he returned to Nairobi with the materials where he was advised by Ndunguya to deliver the goods at Nairobi NCPB depot at an extra cost.
38. He further confirmed delivering 2000kgs of nails at Mai Mahiu, 2000kgs Molo, 2000kgs Nakuru and 2000kg at Eldoret. He acknowledged receipt of payments for nails at 2.24million. On cross examination, he stated that the delivery for Mai Mahiu was re-routed to Nairobi and that for Molo to Nakuru as there were no storage facilities at the two destinations as per the quotations.
39. He claimed that they incurred extra costs on transport due to that miscommunication on delivery of goods where there was no storage point.
40. Florence Kaitany PW14 Chief Accountant Ministry of Special Programmes participated in attending a tender committee in which the impugned tender awards were deliberated and made. She corroborated the evidence of PW2, PW3 and PW4. She did not notice anything irregular with the tendering process. She further confirmed that procurement department had confirmed delivery and receipt of the goods and the appellants duly authorized payments. She confirmed signing a voucher for payment in respect of General Hardware & Klique Business Machine after the 1<sup>st</sup> appellant (AIE holder) had signed.
41. PW15 Angela Makau a D.O then working in Nakuru County confirmed that, sometime 2009 she received building materials meant for IDPs from Agenda Hardware and Transafic Timber Limited. That she went to the NCPB Nakuru and signed for the materials. She further confirmed seeing materials meant for Mai Mahiu, Molo and Eldoret. She received some materials destined for Mai Mahiu and Molo as there were no facilities in those areas. According to her, she protected government property by receiving them on behalf of Mai Mahiu and Molo upon instructions from Nakuru D.C Mr. Thuku.
42. PW16 Benson Wakima Mugaga the Manager Nakuru NCPB, confirmed that in March 2009, he received an officer from the Ministry of Programmes with delivery notes for delivery of building materials *inter alia*; iron sheets meant for Molo NCPB delivery No. 27489 order No. 0714099, and delivery No. 27490 order No. 0714099 meant for Nakuru. He also acknowledged receipt of delivery note No. 27413 for 800 pieces of ridges for NCPB Molo (Ex. 78), delivery No. 27494 under note No. 0714100 for 800 pieces for ridges NCPB Nakuru depot (Ex. 78), delivery No. 27497 order No. 071445 for roofing nails for NCPB Molo depot and delivery note number 27498 in respect of roofing nails for Nakuru (Ex. 76).

43. Besides, he also received materials from Klique Business Machines meant for Nakuru NCPB. He further clarified that Mai Mahiu and Molo had no storage facility.

44. PW17 Nancy Kotut a store clerk working then with NCPB Nakuru NCPB 2009 stated that on 6<sup>th</sup> March 2009, upon instruction from her manager Benson, she received goods from the Ministry of Special Programmes abode motor vehicle KAU 196Z. Among those goods were roofing nails, ordinary nails, ridges and roofing materials. She confirmed receiving one consignment and that they were later collected by people from the D.C's office.

45. PW18 Joseph Kipkemo Langat a records clerk Nakuru NCPB, also confirmed that sometime in year 2009 his manager Benson directed him to receive and store materials from Special Programmes Ministry. Assisted by Mary Kotut who had received the goods, he filled the inward and outward movement register. He stated that goods were delivered on 6<sup>th</sup> February 2009, 18<sup>th</sup> March 2009, 19<sup>th</sup> March 2009, 20<sup>th</sup> March 2009, 23<sup>rd</sup> March 2009, 30<sup>th</sup> March 2009 and 21<sup>st</sup> May 2009 and later collected for delivery at Molo, Mai Mahiu and Eldoret vide motor vehicle GKA 714M and GKA 315G.

46. PW19 Edward Maina Mathu a businessman dealing with saw milling and sale of timber trading in the name of Z.E. Timber Merchants stated that, in the year 2009, he applied for a tender at the Ministry of State and Special Programmes to supply timber at a price inclusive of transport costs. He was however not awarded any tender.

47. PW20 Kennedy Kaunda Muluka records clerk Eldoret NCPB confirmed receiving items from General Hardware Ltd and Klique Business Machines in 4 different delivery notes. From General Hardware, he received 3 delivery notes, one being for iron sheets, ridges and another for roofing nails. Another delivery was from Klique for nails delivery. He also acknowledged that all the items were delivered using one lorry belonging to the Ministry of State for Special Programmes. That later, a D.C by the name of Nduare collected the goods using GK A713M driven by Kyalo accompanied by an Administration Police Officer. On cross examination, he clarified that the goods were taken to their depot in a civilian motor vehicle whose registration number he could not remember.

48. PW21 Wilson Okumu Otori a guard at Eldoret NCPB stated that on 9<sup>th</sup> April 2009 a GK A713M motor vehicle did collect iron sheets, ridges and ordinary nails from their store.

49. PW22 Fredrick Kigotho Mwangi, a Procurement Assistant in the Ministry of Special Programmes charged with preparation of orders and LPOs confirmed preparing a voucher for LPO No. 0714099 in favour of General Hardware for supply of iron sheets and delivery points for various quantities worth Kshs. 5,850,000/-. He confirmed the voucher was signed by the appellants and the concern accountants (Ex. 89). The second LPO S. No. 0714100 was in favour of General Hardware for supply of ridges worth 1,446,800 (Ex. 90). The 3<sup>rd</sup> LPO was No. 0714451 in favour of General Hardware for supply of nails worth Kshs. 550,000/- (Ex. 91). The 4<sup>th</sup> LPO No. 0714097 in favour of Agenda Hardware was for supply of cedar posts for a sum of Kshs. 1,344,000/- (Ex. 12). The 5<sup>th</sup> LPO was in favour of Transafric for supply of cypress timber worth Kshs. 5,316,300 (Ex. 12). The 6<sup>th</sup> LPO NO. 07144098 in favour of Agenda Hardware was for supply of cypress timber to delivery points worth Kshs. 5,910,840/- (Ex. 93). The 7<sup>th</sup> LPO No. 0714453 in favour of Klique Business Machines was for supply of ordinary nails worth Kshs. 2,240,000/- (Ex. 68). He confirmed that all payments were authorized by the appellants. He denied preparing the price comparison schedules and recording the lowest bidders although his name was indicated by Nduunguya. According to him every necessary procurement procedure was followed.

50. PW23 Abdi Abdille a business man and director operating Agenda Hardware, confirmed winning a tender from the Ministry of Special Programmes for supply of building materials. He stated that he had quoted for supply of cypress timber and cedar posts which he won. He stated that he delivered all the materials at Nakuru NCPB.

51. He identified the relevant delivery notes duly stamped by the relevant authorized recipients. He further acknowledged receipt of full payment inclusive of the transport costs. On cross examination, he denied making any deliveries at Molo nor Mai Mahiu. He categorically confirmed that he did not make any delivery outside Nakuru NCPB.

52. PW24 Peter Njangawa Kyalo a driver then in the Ministry of Special Programmes assigned to Chauffeur the 1<sup>st</sup> appellant was also a lorry driver at the Ministry. He stated that on 6<sup>th</sup> April 2009 he was directed to pick some materials from NCPB Industrial area Nairobi. On 7<sup>th</sup> April 2009, he in company of Mr. Sirichi a clerk and Mr. Nduare the coordinator proceeded to Nairobi Cereals Board depot and collected nails and iron sheets. He delivered the same at Mai Mahiu and some to Nakuru. From Nakuru, they proceeded to Burnt Forest where they met a D.O who took them to a police station where they offloaded the items.

53. PW25 Zakayo Maina Waweru a businessman dealing with timber also a director to Transafric Timber Ltd stated that he quoted for supply of timber size 4X2 and 3X2. Later, he was presented with a Local Purchase Order (Ex. 9) with instructions to supply timber size 4X2. He confirmed delivering the consignment at Nakuru NCPB. Deliveries were done on 18<sup>th</sup> March 2009 vide delivery note No. 7401 (Ex. 96), deliveries for 30<sup>th</sup> March 2009 vide note No. 7402 – (Ex 97), vide delivery order No. 7403 (Ex. 98) and another one vide note No. 7404 (Ex 99). He confirmed receiving full payment in respect of the deliveries made.

54. PW26 Jacob Oduor Document Examiner received various questioned documents from the investigating officer comprising of payment vouchers, LPOs, price comparison schedules/quotation forms, internal memo and minutes from the Ministerial Tendering Committee. Upon analyzing the specimen signatures and known signatures of Mr. Gitari (1<sup>st</sup> appellant) Mr. Benjamin (second appellant) and Mr. Nduunguya (3<sup>rd</sup> appellant) against the questioned documents and their respective signatures, the same were in agreement and similar implying that they were made by the same hands and therefore prepared and produced his report (Ex. 118).

55. PW27, Simon Phukat the I.O was sometime 2009 tasked together with another colleague to carry out investigations over irregular process of procurement at the Ministry of Special Programmes. After collecting relevant procurement documentation, he discovered various

irregularities. Among such irregularities was that, the method of procurement adopted was that of request for quotation for goods whose maximum value is 1 million. The other irregularity he found out was delivery of goods to destinations not quoted for eg Nairobi, Mai Mahiu and Molo where there were no NCPB depots. He also noted that the government had incurred extra costs for re-routing goods from the wrong direction to the right direction. Among such missing destinations were Nairobi which was not tendered for and delivery of goods meant for Nakuru thus causing the government to bear losses in re-transporting. He found the 1<sup>st</sup> appellant culpable for signing the payment voucher that goods had been delivered at the contracted destinations when in essence they were not yet the contractors were paid in full even where no proper delivery was made at the intended destination.

56. On their defence, the appellants gave sworn testimony. The 1<sup>st</sup> appellant admitted that he was the chairman ministerial tender committee. He stated that he was only called to chair the tender committee on 16<sup>th</sup> January 2009 and the bidders had already been identified by procurement department due to the urgency of the matter. He stated that he did not know how the bidders among them Agenda Hardware, Transafric Timber, Klique Business Machines and General Hardware were identified.

57. The first appellant stated that on 10<sup>th</sup> March 2009 the permanent secretary instructed him to write a letter to the MD NCPB to allow storage of materials considering that there were no facilities at Mai Mahiu and Molo. He admitted signing the vouchers in good faith and in the knowledge that goods were delivered and that they had a certificate at the rear confirming that the goods had been delivered. He insisted that they used restricted method and not quotation method.

58. The 2<sup>nd</sup> appellant was on the other hand denied that there was any abuse of office in the tendering process. He stated that everything was done as required and every procedure followed, save for change of some delivery points due to lack of storage facilities at the initially intended points. He stated that the process of restricted tendering was arrived at by the permanent secretary. On re-examination, he stated that they used the document for request for quotation because there is no document for restricted tendering. He claimed that he was out of the country when the process started.

### **Appellants' Submissions**

59. Mr. Wandugi Counsel for the appellants filed his submissions on 28<sup>th</sup> May 2019. He submitted that the conviction of the appellants was unwarranted for reasons that; **The decision of the court was against the weight of evidence; the court made numerous misdirection to the prejudice of the appellants; the court allowed written submissions without consent from the appellants; court shifted burden of proof to the appellants; failure to consider that Section 35 of ACECA had not been complied with and, failure to consider that the charge sheet was incurably defective.**

60. Learned counsel submitted that the offence of wilful failure to comply with the law relating to procurement was incurably defective from the onset. That the claim that the offence was committed on diverse dates means the charge lacked specificity or particulars hence gravely prejudiced the appellants as they did not know the particular time the offence was committed thus making it difficult for them to prepare their defence.

61. Further, that the ingredients of the offences on counts 1 – 3 were not established. Mr. Wandugi asserted that there was no proof that the appellants had an obligation to comply with the cited laws; that the appellants were in the procurement department and that the appellants did engage in questionable procurement. That the 2<sup>nd</sup> appellant was out of the country when the tender was flouted. He contended that there is a difference between a tender committee and ministerial tender committee.

62. Counsel opined that there was no proof of improper use of office, conferring a benefit, the alleged approval nor was their proof of abuse of office as they discharged their mandate as required.

63. Touching on failure to prove the case to the required standard or degree against the weight of evidence, counsel opined that the burden of proof does not shift in criminal cases. In support of that proposition, he referred the court to the case of **Okethi OKale v. Republic Cr. Appeal No. 179 of 1994**. According to Mr. Wandugi, all the materials were delivered at the contracted destinations. There was no proof of partial deliveries and there was no reason given why the evidence of PW 23 and 25 was not given due consideration yet they confirmed full delivery thus exonerating the appellants.

64. Regarding count 1 on wilful failure to comply with procurement Legislation, there was no proof that the 1<sup>st</sup> appellant took part in the procurement process as he was out of the country. Learned counsel wondered why the court convicted on Count 1 yet it had misgivings at page 34 of its judgment.

65. Touching on count 2 and 3 on abuse of office where the appellants were accused of conferring a benefit on grounds that delivery was partial, the same was not proved because change of delivery points was necessitated by lack of storage facilities at the destined places. There was no proof that a benefit was conferred without delivery of goods.

66. Counsel also submitted on selective prosecution. He contended that the decision taken in awarding the tender was collective yet only 3 of the tender committee members were charged leaving the rest hence discrimination and thus offending the fair administrative action provisions. To support this argument the court was referred to the case of **Joram Mwenda Guantai vs. Chief Magistrate Nairobi (2007)eKLR Civil Appeal No. Civil Appeal No. 228 of 2003** where the court on account of discrimination quashed criminal proceedings against one member of the tender award committee yet the decision was collective.

67. On failure to comply with mandatory provisions of Criminal Procedure Code and ACECA, counsel submitted that Section 35 of ACECA was not complied with. To fortify his position, counsel referred to the decision in the case of **Esther Theuri Waruiru and Another v. Republic (2011)eKLR Criminal Appeal No. 48 of 2008**. That the court failed to comply with Section 200(3) of Criminal Procedure Code when Hon. Kombo took over from Hon. Onkundi without explaining to the accused their rights under the said provision. To buttress this

legal position counsel made reference to the case of **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v. Republic (2010)eKLR Criminal Appeal No. 106 of 2009** and **Eric Omondi v. Republic (207)eKLR Criminal Appeal No. 15 of 2007**.

68. Lastly, Mr. Wandugi submitted that there was no consent sought from the appellants before filing written submissions in a criminal case. In support of this position the court was referred to the holding in the case of **Akhuya v. Republic Criminal Appeal No. 42 of 2002** and **Henry Odhiambo Otieno v. The Republic Cr. Appeal No. 83 of 2005**.

#### **Submissions by the Respondent**

69. Miss Aluda appearing for the State filed submissions on 9<sup>th</sup> March 2019 basically summarizing the evidence of both the prosecution and defence. Counsel submitted that the appellants were members of ministerial tender committee which awarded a contract exceeding required the threshold without approval from ministerial tendering committee and that the goods were not delivered at their required destinations i.e Molo and Mai Mahiu yet full payment was made.

#### **Analysis and Determination**

70. I have considered the grounds of appeal herein, trial court's original record and submissions by both counsel. As stated earlier, the appellants' grounds of appeal are similar. Mr. Wandugi condensed them into:

- a) **Whether the charge of wilful failure to comply with the law relating to procurement in count 1 was defective.**
- b) **Whether the ingredients in counts 1 – 3 were not established.**
- c) **Whether the case was not proved beyond reasonable doubt and that the court shifted the burden of proof to the accused.**
- d) **Whether there was failure to comply with mandatory provisions of the Criminal Procedure Code and ACECA.**
- e) **Whether acceptance of written submissions was irregular.**

#### **Defective Charge – Count 1**

71. According to Wandugi, the charge sheet was framed that on diverse dates between the 7<sup>th</sup> day of January 2009 and 16<sup>th</sup> January 2009 being public officers, the appellants jointly and wilfully failed to comply with the law relating to the procurement of goods, to wit; Section 29(1) and Part V of Public Procurement and Disposal Act 2005 as read with Regulation 35 of the Public Procurement and Disposal Regulations 2006 by procuring building materials for resettlement of internally displaced persons through the request for quotation method, which method was not applicable.

72. The law governing formulation and all framing of charges or information is Section 134 of CPC which provides that-

**“Every charge sheet or information shall contain, and shall be sufficient if it contains a statement of specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

73. It is a constitutional imperative under Article 50(2)(b) of the Constitution that every accused person has a right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer. It therefore follows that commencement of any fair criminal trial begins with clarity of mind and understanding with particularity or specificity of every ingredient of the charge to enable an accused person prepare his or her defence adequately.

74. However, it is not every defect that will render a conviction thereunder defective. (see **JMA v Republic (2009)eKLR 671**. It is for that reason that Section 382 of CPC provides:-

**“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this court, unless the error, omission, or irregularity has occasioned a miscarriage of justice.”**

75. For a court to overturn a conviction on account of a defective charge, the defect must not be as a matter of course (formality) but substantive as to render the entire prosecution a nullity or occasion a miscarriage of justice. In the case of **Bernard Ombuna vs Republic (2019)eKLR** the Court of Appeal had this to say on defective charge sheet:-

**“In a nutshell, the test of whether a charge sheet is defective is a substantive rather than formalistic. Of relevancy is whether a defect in the charge sheet prejudiced the appellant to the extent that he was not aware of or at least was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”**

76. Similar position was held in the case of **BND vs Republic (2017)eKLR** where the court stated that-

**“The test for whether the charge was defective is a substantial one. Was the accused charged with an offence known to law and was it disclosed in sufficiently accurate fashion to give the accused adequate notice of the charges facing him?”**

77. In the instant case, the trial Magistrate expressed concern and reservation in the manner in which the charge sheet in respect of Count 1 was drawn. At page 34 the Magistrate made the following remarks:-

**“The charge in court, seems, in my view, to erroneously suggest that the applicable legal provision is Section 29(1) and Regulation 35 both of which relates to open tender, and therefore result to any other procurement method would have been illegal in the circumstances.”**

**“It is not therefore, for instance, an offence per se, to use the method request for quotation in place of open tendering.”**

**“A charge and prosecution of offences under the provision in Count 1 must in my view concentrate on showing that the methods selected did not apply based on the facts demonstrated or put otherwise, was wrong, or that there was a failure to follow the precise legal nitty gritty relevant to that procurement method.”**

**“The problem I have with the manner in which Count 1 is drawn is that the law alleged not to have been complied relates to the open tendering method, but further down the particulars relate to another totally different method, that of request for quotations.”**

78. At page 35 the learned Magistrate went further to add – **“clearly it was not a breach of the provisions cited in the particulars to the charge sheet, to procure by means of request for quotations neither is the cited provisions allegedly breached concern with the question whether the request for quotation method was applicable or not to the procurement.”**

However, the court went further to find that the irregularity or omission was not prejudicial as the details of evidence reveals otherwise.

79. From the Magistrate’s remarks, one would see a mind geared towards finding the charge sheet defective but yet qualified it as not being prejudicial. The appellants are accused of failing to comply with Section 29(1) of the Public Procurement and Disposal Act 2005. This provision provides:-

**“Sub-Section 1 - For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.”**

80. The prosecution’s case is that there was no justification in not applying open tendering method as envisaged under Section 29(1) Part V of the Act which recognizes open tendering or in the alternative, apply alternative method under Part VI among them, request for quotations or restricted tendering subject to meeting the requisite attendant conditions. It is therefore clear that the open tendering having not been followed under Section 29(1) in respect of the tendering process under Part V, the alternative method under Part VI would be request for quotations or restricted or direct tendering which rules were contravened as the contract sum exceeded the 1 million maximum threshold for supply of goods, lack of approval from the tender committee with written record stating reasons for resulting for alternative method among them restricted tendering.

81. I do not find any error or misdirection in the manner in which the charge sheet was drafted and the ingredients thereof as those are the provisions that were breached. To that extent, I do not agree with Mr. Wandugi and the trial Magistrate that the provisions quoted were not the proper ones. In any event, even if I were to find as such, I do not find any prejudice occasioned because substantively, the appellants understood the charge from the plea stage, underwent full trial including them giving detailed defence a manifestation that the omission or irregularity alleged did not substantially affect adequate preparation of their defence hence the logical inference that they understood the charges clearly and articulately prepared their defence hence no prejudice. For those reasons, that ground fails.

### **Ingredients in Count 1 – 3 were not established and case not proved to the required standard**

82. I will combine the two grounds as they are intertwined. It is trite that the duty to prove the offence both the ingredients of the charge and the evidence tendered always lies with the prosecution. The burden does not shift at all times. See **Okethi Okale vs Republic Criminal Appeal No. 179/1964** and **Republic vs Silas Magongo Onzere alias Fredrick Namena (2019)eKLR** where the court held that-

**“In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law.”**

83. The Appellants were accused of flouting procurement rules and abuse of office by conferring some benefit to some contractors who partially delivered building materials against the contract. The question with regard to Count 1 is whether the procurement rules were followed. According to the prosecution, the process of open tendering under Section 29(1) of the Act ought to have been followed as provided under Part V and incase of alternative method under Part VI, subject to necessary conditions being fulfilled. On the other hand, the appellants argued that due to the urgency of the required materials they had no time to advertise for tendering as required in the open tendering method hence they resulted to restricted tendering.

84. There is no dispute that open tendering was not followed due to the urgency of the required goods as evidenced by the internal memo by the P.S (Ex. 1) addressed to the 1<sup>st</sup> appellant. There is no dispute that the appellants were members of the Ministerial Committee that awarded the tenders. The only contestation is whether the method they followed which is disputed was proper in the circumstances and

whether the contracted goods were duly delivered and therefore payment properly made.

85. What entails alternative method of tendering besides open tendering? Section 29(1) provides-

**“For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.**

**Sub-Section (2)-**

**“A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.**

**(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity-**

**(a) obtains the written approval of its tender committee; and**

**(b) records in writing the reasons for using the alternative procurement procedure.**

**(4) A procuring entity shall use such standard tender documents as may be prescribed.”**

86. For restricted tendering to apply, Section 73 comes to play-

**(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.**

**(2) A procuring entity may use restricted tendering if the following conditions are satisfied-**

**(a) competition for contract, because of the complex or specialized nature of the goods, works or services is limited to prequalified contractors;**

**(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and**

**(c) there is only a few known suppliers of the goods, works or services as may be prescribed in the regulations.**

87. Although the appellants argued that they used restricted tendering, all the documents used in seeking quotations are reflecting request for quotation method and not restricted tendering method. Secondly, there was no written approval from the tender committee. This was admitted by the appellants in their defence thus confirming the evidence of the Investigating officer (PW 27).

88. Besides, the Tender committee did not comply with Regulation 54(3) of the public procurement and disposal regulations of 2006 which requires that where restricted tendering is applied, the procuring entity shall invite at least ten persons from a list of prequalified registered tenderers which list should have been tabled before the tender committee for approval in accordance with regulation 59(2)(b) before awarding the contract. From the evidence of the bidders who won the contracts among them pw23 and 25, they were approached physically by the second appellant and the 3<sup>rd</sup> accused who told them to submit quotations.

89. Having invited tenders through quotation method, the committee was duty bound to follow the procedure under Section 88 of the Act and the allowable matrix of a maximum of 1 million for goods procured by Class A procuring entity. In this case all the awards went past the maximum threshold as read under Schedule 1 of the Public Procurement and Disposal Act 2005 Regulation 2006.

90. Although the 1<sup>st</sup> appellant insisted that his role was merely chairing the committee and that everything was done by the procurement department, he cannot escape responsibility nor liability under Regulation 10(2) (a) of the PP and DA Regulations 2006 which binds him as a member of the tender committee with the following function-

**“(a) Review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents.”**

91. The 1<sup>st</sup> appellant cannot hide behind ignorance as the law deems every tender committee member to be conversant with procurement procedures. Regarding the 2<sup>nd</sup> appellant's argument that he was out of the country when the process commenced, there is evidence that he took part in the award process. This is confirmed by his co-appellant, his defence and evidence of PW2, PW3 and PW4 both members who sat in the committee.

92. I am therefore in agreement with the trial court that the appellants did disregard the relevant procurement provisions among them Section 29(1) of the Public Procurement Act hence engaged in a tender process that was not compliant with the law. Having found that the ingredients of the offence under Count 1 were properly set out, I have no choice but to uphold the conviction in respect of that Count (Count 1).

93. I will now turn to Counts 2 and 3. Count 3, it was alleged that a benefit to the tune of Kshs. 5,316,300/- was conferred to Transafric

Timber Ltd for the supply and delivery of building materials. It is not in dispute that Transafric Timber Ltd was awarded a contract for the supply of timber size 4X2 and 3X2. PW25 Zakayo Maina the Director of the said company confirmed delivering those goods at NCPB Nakuru and necessary delivery notes confirmed as such.

94. PW18 records clerk at NCPB Nakuru acknowledged receipt of the supply. PW15 Angela Makau a D.O then working in Nakuru confirmed receiving timber from Transafric. That some of the timber meant for Molo was delivered at Nakuru due to lack of storage facilities at Molo. PW10 Ibrahim Nduare the District Coordinator for IDPs also confirmed that the said goods were delivered as per the contract. His evidence was further corroborated by PW7 Nathaniel Njuguna who was assigned the duty of collecting and delivering the supplied items to the required IDP Camps (destinations).

95. They both confirmed that some materials destined for Molo and Mai Mahiu could not be taken there due to lack of storage facilities as NCPB does not have depots in those locations. There is no proof that the goods were not delivered or were partially delivered as purported in the particulars of the charge. The allegation that partial supply was made is not founded on any evidence. All relevant Ministry officials who took part in the delivery and collection of materials confirmed that all goods were supplied. Where is the evidence for partial supply? What is the value of the unsupplied goods? Prosecution cannot claim that goods that were meant for Molo were not supplied when there is evidence that they were received in Nakuru depot. If there was no NCPB facility at Molo as confirmed by the Nakuru D.O and Arrest Muturi Oguora Operations Manager NCPB, where were the goods to be delivered?

96. The only logical and prudent thing and which the 1<sup>st</sup> appellant did with consent from the P.S was to look for alternative storage facility to save government property from damage or loss. Did the government lose any money by rerouting the goods? The prosecution did not state the difference in monetary terms if any. We cannot therefore allege that there was partial delivery and loss of funds without specifying the value of the unsupplied goods. The submission by the prosecution before the trial court that the government suffered unspecified loss is clear that the ingredients of the charge in Counts 2 and 3 have not been proved.

97. We cannot penalize the appellants for the entire sum as a benefit conferred yet the claim is for unsupplied or goods not delivered. If anything, some of the contractors like General Hardware complained of having incurred unnecessary costs in transporting goods to non-existent destinations only to be told to reroute them to the right delivery points.

98. Equally, in respect to Count 2 for conferring a benefit to Agenda Hardware for a sum of Kshs. 7,245,840/- for supply of goods at Mai Mahiu, Nakuru, Molo and Eldoret, there is proof from the supplier (PW23) and government officials who received the delivered goods at Mai Mahiu and Molo which did not have an NCPB facility. It was definitely an oversight committed when awarding the contracts. However, PW15 a D.O at Nakuru, PW10 a District Co-ordinator IDP Programmes and PW7 the clerk in charge of deliveries confirmed the goods were all delivered. What then constitutes partial supply? Obviously, the steps taken by the PS and the 1<sup>st</sup> appellant by looking for alternative storage was made in good faith hence the 1<sup>st</sup> appellant could not be penalized for actions done in good faith.

99. The Appellants authorized payments in good faith believing that all deliveries were done in accordance with the contract. They had no knowledge of non-delivery and if anything those who acknowledged false receipt should be the people to be answerable. In the absence of any assessment as to how much extra was incurred in changing the route, we cannot with certainty blame the appellants for unknown ingredients of the offence. We cannot ignore the supplies made by the contractors.

100. In the circumstances of this case, the appellants cannot be accused of conferring a benefit on the suppliers yet the full amount of goods was supplied and the same acknowledged and utilized for the intended purpose. In my view, I find that the appellants acted properly by authorizing payments just like the other officers e.g the accountants did.

101. For the above reasons stated, I am satisfied that there was no proof beyond reasonable doubt in respect of Counts 2 and 3. To that extent I will substitute the finding of conviction on those two counts to that of acquittal.

#### **Failure to comply with mandatory provisions in the CPC and ACECA**

102. Mr. Wandugi stated that Section 200(3) of the CPC was not followed by Hon. Kombo when he took over the Criminal case. It is clear that this case was heard by two (2) other Magistrates before Hon. Kombo took over at which stage prosecution had already closed their case. At page 204 of the proceedings the court did make directions as follows:-

**“Court: I note that there is no order in directions under Section 200(3) CPC.**

**Karongo: We wish that the trial proceeds from the point previously reached.**

**1<sup>st</sup> accused: I confirm.**

**2<sup>nd</sup> accused: I confirm.**

**Miss Gatheru: I would leave the matter to the court.”**

At page 205 the court directed that the matter to proceed from where it had reached. I am satisfied that sufficient directions were given in compliance with Section 200(3) of the CPC and that accused understood their rights very well.

103. Regarding non-compliance with Section 35 of the ACECA, the court was referred to a decision in the case of **Esther Theuri** (supra) where consent was not obtained from the Attorney General before prosecution and the accused was acquitted on that ground. It is trite that

consent to prosecute is not provided under Section 35 of ACECA. This requirement was relevant under Section 12 of the repealed Prevention of Corruption Act. Consent is no longer a requirement under Section 35 of ACECA which merely binds the EACC to forward the investigation report to the DPP recommending prosecution. In the case of Susan Mboo Nganga vs AG (sued for and on behalf of the Chief Magistrate's Court Nyeri Law Courts) and 2 Others (2017)eKLR the Court of Appeal held that-

**“It would appear to us that the provisions of Section 12 of the Prevention of Corruption Act were not retained in Section 35 of the Anticorruption and Economic Crimes Act.”**

104. Guided by the above reasoning, it is my holding that consent is not a mandatory requirement under Section 35 of ACECA.

#### **Selective Prosecution**

105. Mr. Wandugi argued that the appellants were discriminated against by being prosecuted for a collective decision undertaken by a full Ministerial Tender Committee comprising of seven (7) members thus contravening the Constitution and particularly Article 47 on fair administrative action. To support this position Counsel referred to the case of Joram Guantai case (supra). I have examined the facts in Guantai case which relate to a Judicial Review application in which he sought an order prohibiting his prosecution which he alleged was discriminatory on the ground that the basis upon which he was charged arose from a contract awarded by a full tender committee hence could not be charged alone.

106. The circumstances under Guantai case and this case are almost similar and related. However, the appellants herein have raised the issue at a wrong time and forum. They should have filed a Petition or Judicial Review application before the Criminal proceedings in this case were concluded. Having gone through the entire process and found guilty, they cannot seek to invalidate the guilty verdict to that of not guilty at sunset. Criminal responsibility is an individual act or omission and liability is never collective. Once convicted, it does not matter that there were other persons who should have been charged together with the guilty person on the ground that they had committed the same offence.

107. The DPP is an independent constitutional body under Article 157 with authority to recommend and prosecute persons alleged to have committed a crime without seeking any consent, authorization, direction or control from anybody (see Article 157(10)). The DPP can choose whom to charge and whom not to charge taking into account public interest, interest of the administration of justice and the need to avoid abuse of legal process.

108. From the set of facts and circumstances of this case, the DPP ought to have treated the entire Ministerial Tender Committee equally without applying selective prosecution. However, it's too late in the day and the declaration cannot be a ground to vary a conviction which is already in place. To that extent that ground fails.

#### **Filing of Written Submissions**

109. Mr. Wandugi contended that the court erred in allowing written submissions without consent of the accused persons. Reliance was placed in the case of Akhuya vs Republic Criminal Appeal No. 42 of 2002 where the court said-

**“The practice of asking for or accepting written submissions in all manner of judicial proceedings, except where the law expressly sanctions it, must stop forthwith.”**

Similar position was held in Henry Odhiambo Otieno vs Republic Criminal Appeal No. 83 of 2002 where the court stated that in criminal proceedings written submissions can only apply with the consent of the accused person.

110. Having read the two authorities, it is clear that they were all decided before the new Constitutional order. Filing written submissions is no longer a preserve of the accused person. It is not prejudicial to file written proceedings. To allow written submissions will promote the spirit under Article 50(1) which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

111. The application of the word 'any person' includes an accused person or a complainant who must be treated equally and therefore afforded an opportunity to ventilate their case by application of the law. In my view, one such way of addressing a case by the prosecution and the defence is through written submissions outlining the relevant applicable laws. Courts cannot restrict the scope of presenting a case by a litigant through written submissions. In any event, Article 159 of the Constitution recognizes that justice shall be determined without delay and undue regard to procedural technicalities. One-way justice is expedited by written submissions hence their relevancy.

112. In the case of Ali Ngumbao Baya & 2 Others vs Director of Public Prosecution (2015)eKLR and Joseph Mwangi Njoroge vs Republic (2017)eKLR both courts recognized that filing written submissions in the new Constitutional dispensation is legal and that the holdings in the case of Akhuya and Henry Odhiambo above quoted is bad law. In Joseph Mwangi Njoroge case the court held-

**“It is now settled practice under the new Constitutional dispensation that filing of written submissions has become the norm. With the provision in the Constitution at Article 159 that courts should not dwell on technicalities but focus on doing substantive justice, written submissions serve the purpose of expediency.”**

Having held as such, that ground also fails.

113. Accordingly, it's my finding that the appeal herein partially succeeds and partially fails to the extent that-

- a) The conviction and sentence in respect of Count 1 against all the appellants be and is hereby upheld;
- b) The conviction in respect of Counts 2 and 3 against both appellants is hereby quashed and the sentence is hereby set aside and therefore substituted with an order of acquittal;
- c) The fine paid if any in respect of Counts 2 and 3 be refunded to the appellants through the normal process of cash refund;
- d) Right of Appeal fourteen (14) days.

DATED, DELIVERED and SIGNED IN OPEN COURT AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY, 2020.

J. N. ONYIEGO

JUDGE