REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CRIMINAL APPEAL NO. 1 OF 2016

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

THUITA MWANGI.....1st RESPONDENT

ANTHONY MWANIKI MUCHIRI.....2ND RESPONDENT

ALLAN WAWERU MBURU.....3RD RESPONDENT

(Being an appeal arising from conviction and sentence in Milimani Chief Magistrate's

Court Anti-Corruption Court in Anti-corruption criminal Case No. 2 of 2013

delivered by Hon. Kennedy Bidali Chief Magistrate on 30th March 2016.)

JUDGMENT

1. The Appellant herein is the Republic of Kenya represented by the Director of Public Prosecutions (DPP). Thuita Mwangi, Anthony Mwaniki Muchiri & Allan Waweru Mburu the 1st, 2nd & 3rd Respondents respectively were 1st, 2nd and 3rd accused persons before the Nairobi Chief Magistrates Court in Anti Corruption Criminal Case No. 2 of 2013.

2. The appellants were charged with four counts of offences namely:

Count 1

Conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

The particulars being that 1st, 2nd and 3rd respondents on diverse dates between January, 2009 and October, 2009 at the Ministry of Foreign Affairs Nairobi, within Nairobi Province, being the Permanent Secretary, Deputy Director of Administration, Ministry of Foreign Affairs, and the Charge D' Affairs at the Kenya Embassy in Tokyo, respectively; jointly conspired to commit an offence of corruption namely, breach of trust by approving the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence at a price of 1.75 billion Japanese Yen while aware that a fair market price could have been obtained had proper procurement procedures been adhered to.

Count 2

Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act. 2003

The particulars being that the 1st and 3rd respondents on or about the 30th day of June, 2009 at the Ministry of Foreign Affairs, Nairobi within Nairobi Province, being the Permanent Secretary and charge D' Affairs, Ministry of Foreign Affairs in the Kenya Embassy Tokyo, respectively jointly used their offices to improperly confer a benefit of 318,700,000 Japanese Yen to Mr. Nobuo Kuriyama for the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence, being

the difference between the actual price paid of 1,750,000,000 Japanese Yen and 1,431,300,000 Japanese Yen being the value assessed by the Government of Kenya Valuer.

Count 3

Wilful failure to comply with the law and applicable procedures relating to procurement contrary to section 45(2)(b) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act, 2003.

The particulars being that the 1st , 2nd and 3rd respondents on diverse dates between January and October, 2009, at the Ministry of Foreign Affairs Nairobi, within Nairobi County, being the Permanent Secretary, the Deputy Director of Administration, Ministry of Foreign Affairs, Kenya and the Charge D' Affairs at the Kenya Embassy in Tokyo, respectively; being officers whose functions concern the use of public revenue, jointly and wilfully failed to comply with the applicable law and procedures relating to procurement of real property, to wit, sections 50 of the Public Procurement and Disposal Act, 2005, and regulation 35 of the Public Procurement and Disposal Regulations, 2006, by directly purchasing the property known as 3-24-3 Yakumo Meguro-ku in Tokyo the Chancery for the Kenya Embassy and Ambassador's residence in contravention of the said procurement procedures.

Count 4

False assumption of authority contrary to section 104(b) of the penal Code as read with section 34 of the Penal Code.

The Particulars being that the 3rd respondent on or about the 30th day of June, 2009 at the Kenya Embassy in Tokyo, Japan, being the Charge D'Affairs, without authority signed a contract for the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence, an act he was not authorized by the law to do.

3. The respondents denied all the charges and the matter proceeded to full hearing with the prosecution calling a total of eighteen (18) witnesses. All these witnesses were heard by Hon. Mrs Doreen Mulekyo (Chief Magistrate then). After the close of the prosecution case an order was made for written submissions to be filed by the parties.

4. This order was made on 28th October 2015. Mrs Mulekyo disqualified herself from hearing the matter on 25th January 2016. By then no submissions had been filed. Directions under section 200(3) Criminal Procedure Code were taken before Hon Kennedy Bidali Chief magistrate on 3rd February 2016, and it was agreed that the matter proceeds from where it had reached without re-summoning any witness.

5. The new trial court took submissions and did a Ruling. Vide the Ruling, the

court acquitted all the respondents of all counts under section 210 Criminal Procedure Code. This is what has aggrieved the appellant who has filed this appeal citing the following grounds:

> *i. THAT the trial magistrate erred in law in finding that the Prosecution had not established a prima facie case against the Respondents on all the counts when indeed it had done so.*
>
> *ii. THAT the trial magistrate erred in law in failing to analyse the evidence of all the Prosecution witnesses before arriving at the decision that there was insufficient evidence tendered by the Prosecution in support of all the Charges.*
>
> *iii. THAT the trial magistrate erred in law by failing to make a finding regarding the main limb of Count 4 which was section 104(b) of the Penal Code against the 3rd respondent and focused only the 2nd limb of the charge.*
>
> *iv. THAT the trial magistrate erred in law and fact by acquitting the 3rd respondent in Count 4 by his finding that the 3rd Respondent did not sign exhibit 72 yet both PW8 and PW13 recognized his signature.*
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> *v. THAT the trial magistrate erred in law and fact by acquitting all the Respondents in Count 1 of Conspiracy to commit an offence of corruption on the basis that there was a joinder of counts with Count 2 of Abuse of Office against the 1st and 3rd Respondents yet both counts were independent of each other.*
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> *(vi) THAT the trial magistrate erred in law and fact by acquitting the 1st and 3rd Respondents in Count 2 of Abuse of Office despite acknowledging that there was evidence of a parallel procurement process through the advertisement in Tokyo newspapers of an expression of interest.*
>
> *(vii) THAT the trial magistrate erred in law and fact by acquitting all the respondents in Count 3 of Wilful Failure to comply with the law applicable procedures relating to procurement despite making a finding that there were many breaches of procurement procedures.*

6. It will suffice to have a summary of the evidence that was presented to the court. **PW1 Denis Awori** served as an Ambassador to Japan under the Ministry of Foreign Affairs (MFA) from 2nd October 2003 – 16th April 2009. He testified that the Tokyo mission which was built in 1988 comprised of the Chancery (office block), Ambassador's residence and a small compound. The rent was 47,000 US Dollars per month. Due to the high rents the purchase of this chancery was highly considered. This was in consideration of the shift in Government Policy concerning Kenyan missions abroad. The Government of Kenya (G.O.K) had come up with a policy to realize the need for saving on rent on foreign missions through acquisition of chancery and residences for Ambassadors.

7. There was quite a bit of communication on this subject as can be evidenced from the various letters produced as **EXB1-7**. In the letter **EXB7** the Permanent Secretary MFA was cautioned by Mr. Watamake of an exaggerated value of 2 Billion Japanese Yen instead of the real value of 1.5 Japanese Yen. An evaluation by Mr. Hidehiko Takahashi of local Corporation dated 23rd March 2007 put the value at 1.09 Billion Japanese Yen. The report was never produced as an exhibit herein.

8. Communication on this continued and with advice from the MFA PW1 sought for a re- evaluation of the property, and consideration was also given on the distance from the Chancery to the CBD by car. The landlord had also rejected the offer of 1.09 Billion Japanese Yen.

9. A series of meetings were held to see how best to handle the issue. PW1 and others decided to look for alternative premises with the help of the Government of Japan (G.O.J). He did this through the letter dated 24th October 2007 (EXB12) which referred to the several meetings held. The Permanent Secretary (P/S) was in picture of all this and via a letter dated 26th October 2007 they sought permission to proceed with the purchase of the plot **(EXB13)**.

10. PW1's evidence is that every step that the Missions in Tokyo made was communicated to the MFA in Kenya, (**EXB14-26**). He denied being privy to the contents of the letter by the 1st respondent dated 3rd December 2008 **(EXB30).** In his letter dated 24th December 2008**(EXB31**) to the 1st respondent he was requesting to proceed to acquire the plot valued at 1,307,000,000 Japanese Yen. He prepared for a team visit from Kenya on 13th-17th January 2009. The team was to visit the plot ear marked for purchase plus any others. **(EXB32)**

11. He participated in the plot inspection and he confirmed the report flowing

therefrom (**EXB35)**. The report recommended the purchase of the property from G.O.J for various reasons. A decision had to be made after consultations with the Minister and P/S MFA. Finally he opted not to renew his contract which was expiring in October 2009.

12. Later he learnt from the 3rd respondent that the G.O.K had opted to purchase the plot the Mission was occupying though no negotiations had been done on it since 2007 when their offer had been turned down. **(EXB36, 37, 38)**. He confirmed that by the time his term ended the purchase of the Mission was not complete.

13. In cross examination he clarified that there was no time the G.O.J was offering the G.O.K a free plot. He confirmed that the Mission's premises had been renovated, and the price of 1.75 Billion had come down from 2.2. and 1.9 Billion Japanese Yen. He agreed that purchase of a plot and construction would have taken time and would have been very costly. He further in cross examination said the G.O.K got value for their money in purchasing the chancery mission plot. He however in re- examination changed tone and said it did not get value for money.

14. **PW2 Joseph Kathuri Ndathi** served as Director Immigration Services (January-September 2008) and thereafter worked in the MFA as Director of Administration. He supervised the Headquarters Administration, Procurement division, Accounts division, Asset Management, Welfare, Security and Transport, Library Service and Personnel. He was the Chair of the Ministerial Tender Committee (MTC), Training Committee, Budget Committee H/R Management Committee among others.

15. PW2 confirmed receiving the letter dated 3rd February 2009 **(EXB9)** from the 3rd respondent on the outcome of final negotiations on sale of plot on which the chancery and official residences are located. He had only learnt of this purchase during the budget committee meeting after his resumption from leave. It was later in the financial year and this was not a priority to him. The Budget committee resolved that the procurement was urgent (**EXB32**) and had to proceed.

16. A team travelled to Tokyo to view the property alongside others and to ratify the decision. A report from the team was filed before the MTC recommending the purchase and acceptance of the offer by the landlord. Alternatives for funding were proposed including relocating the funds for Kampala, Kigali & Abuja projects. To him the team was not addressing what had been set in their terms of reference. He referred to communication vide letters **(EXB43-44)** showing that financing would be done.

17. The MTC held a meeting on 12th March 2009 in respect of this purchase **(EXB45**). The Public Procurement Oversight Authority (PPOA) was to be consulted since the amount involved was huge (**EXB46).** The response by one E.K. Korir (PW4) advised against the move advising that the proper procedure under section 72-75 Public Procurement and Disposal of Asset (PPDA) be used. A further meeting by MTC was held and direct procurement was accepted, on the understanding that they were procuring property already agreed upon both by the team that visited Tokyo and the P/S MFA **(EXB48**).The report by the team that visited Tokyo was considered.

18. The purchase was approved by the MTC and payment was to be in two tranches i.e 1,500,000,000 Japanese Yen on or before 30th June 2009 and 2,500,000,000 Japanese Yen by 30th September 2009. There were also details on how and when transfer of ownership would be done. He clarified that the MTC was not given any other options as far as this purchase was concerned.

19. The witness claimed not to have been given any brief on the history of the purchase of this property. He was seeing the architectural analysis for the first time during the investigations **(EXB50**). He was also not aware of any adverts in Tokyo over the property and if anything it was not authorized by the MTC. Generally the witness complained that vital information was not given to the MTC to enable it make an informed decision.

20. He said the mission tender committee sitting in Tokyo did not seek to comply with what was expected of it in this matter. It kept away crucial documents from the MTC he said. In cross examination he stated that the valuation report was presented by Mrs. Kimondiu (PW3), who rectified the cost based on the actual size of the property after visiting Tokyo. He also stated that the end product of the negotiations outside the MTC was that the price negotiated outside the MTC and that by the negotiating team appointed by the MTC remained the same. At the end of it all he said the G.O.K received value for its money.

21. **PW3 Teresiah Wamboi Kimondiu** was part of the team that travelled to Tokyo to do the valuation. She is a Senior Commissioner of Lands (valuation). They met PW1 and other staff at the Embassy office in Tokyo, and were duly briefed. They visited five (5) plots owned by the G.O.J and two(2) privately owned. They also met the Landlord of the property on which the Kenyan Embassy stood because in 2007 he had offered to sell the property to the MFA. The Landlord asked for time to consult his family. The 2nd respondent who was the team leader asked her to include its valuation in the list.

22. On 25th May 2009 she presented her report at the MTC meeting at the MFA. She noted that her valuation was based on an erroneous area of 160.00 sqm instead of 143.28 sqm. She rectified it and the price went down to 1,431,300,000 Japanese Yen **(EXB42)** from 1,600,000,000 Japanese Yen. (**EXB49a & 63**). The value of the buildings was 149,318,200 Japanese Yen and the total come to 1,580,618,000 Japanese Yen. She was not aware that the property was eventually bought at 1,750,000,000 Japenese Yen.

23. The witness said in cross examination that she undertook her valuation professionally and she stood by it. She gave her market value of the property she said. She added that it was agreed in the mission meeting that there would be adverts placed in the local media inviting expressions of interest. That the purpose of the adverts was to attract more offers from the market. (para C of EXB42). She did not however see any adverts.

24. It was her position that after all had been said and done she would still have recommended the purchase of the Kenyan Mission from the landlord Mr Nobuo Kuriyama. She said her valuation was not influenced by anybody.

25. **PW4 Eric Mutai Kori**r works with the National Treasury directorate of public procurement as a senior assistant director, supply chain management. Between March 2008- January 2010 he was a Principal procurement officer at MFA while in the MTC he was the Secretary. He gave the process of procurement and the various modes of tendering under the (PPDA) and the Regulations. He said the acquisition of Tokyo Mission was in the 2008/2009 financial year though it had not been captured in the procurement plan.

26. He only learnt of it when his comments were requested on the procedures by the director of administration who was also the MTC Chair. His major concern was that as the head of procurement he was not aware of all the happenings. He shared this with the MTC Chair (PW3). The 1st and 3rd respondents called him wanting to know the progress in procurement. He was only able to respond to them after getting feedback from the PPOA, to the effect that owing to the advanced progress of the matter direct procurement was the only option.

27. He brought this to the attention of the MTC which eventually approved it.

He was nominated to be part of the team that went for negotiations with the Landlord. The meeting did not bear much fruit as the purchase price was never reduced. This was later brought to the attention of the MTC meeting of 25th May 2009. The final meeting he had with the MTC was on 12th June 2009. There were two letters he saw e.g. (**EXB44)** which confirmed to him that the decision to purchase the Tokyo Mission was a foregone case. He however confirmed that the G.O.K. saved to the tune of 20 million in terms of saved rent.

28. In cross examination he said the matter in issue had been ongoing even earlier than 2006. He faulted the process at three fronts namely:

(i) Negotiations commenced without the involvement of the MTC.

(ii) A conveyancing Lawyer had been settled on but there was a re direction.

(iii) Critical information was withheld from the MTC

29. He however confirmed that they had information that a team had been sent to inspect the plot being offered by G.O.J as well as consider other available options. He denied any manner of influence by anyone in form of kick backs. The witness admitted that the MTC had noted that the acquisition of this property was within the Ministry's Strategic Plan.

30. **PW5 Maurice John Oduor Juma** from PPOA confirmed receiving a letter (**EXB46)** from PW4 seeking directions and authority for a specially permitted procurement procedure for the proposed acquisition of Chancery and High Commission residence in Tokyo. The request was reviewed and authority granted for them to use the conventional procedures set out in sections 72-85 of the PPDA. They were also advised to ensure that the MTC played its role as provided for in the law and its regulations.

31. In cross examination he stated that prior to negotiating, for the purchase the MFA needed to send an inspection and validation team appointed by the Accounting Officer, to Tokyo. The negotiating team was also appointed by the Accounting Officer. The MTC had however to approve these appointment, which was done.

32. **PW6 Catherine Muthoni Muraguri** a Confidential secretary in the MFA stated that she served at the Tokyo Embassy from 6th July 2006-19th October 2010. They worked from a premises rented from a Mr. Kuriyama, and paid a rent of 4.7 Million Japanese Yen per month. She confirmed that upon receipt of the circular on Missions on 1st September 2006 (EXB5) PW1 put up some adverts and invited proposals from interested parties. She was not aware if the adverts attracted any bidders. It was her evidence that the G.O.K was keen on purchasing the premises on which the Chancery and residence stood.

33. On 16th January 2009 and 2nd February 2009 she attended meetings with the 3rd respondent among others whose discussion was the acquisition of the said property. The discussions was aimed at reducing the purchase amount (EXB 55). She also attended a meeting on 31st March 2009 at 4pm with the same team and the landlord who reduced the price from 1.9 billion to 1.75 billion Japanese Yen. The Landlord was also informed that the G.O.K had given the authority for the acquisition of the property. In cross examination she confirmed that four(4) bids were received following the advert by the Mission.

34. **PW7 Alice Njambi Kinyungu** confirmed having been the deputy director political affairs MFA between February 2008- August 2008. She deputized the director and was his alternate in the MTC. She attended the MTC meeting held on 12th March 2009 at their Headquarters. Part of the agenda was the purchase of the Embassy in Tokyo. She attended the next meeting on 24th April 2009 which approved the direct procurement under sections 72-85 PPDA. She was appointed alongside three others as part of the negotiating team vide a memo dated 6th May 2009 and she led this team.

35. They were not successful in negotiating the purchase price downwards. She stated in cross examination that it was confirmed in the MTC that the acquisition of the Tokyo property was in line with the Ministry's Strategic plan to cost cutting measures and gradual acquisition of politically and economically strategic missions. She said she had not heard of any opposition to the acquisition or a parallel procurement process during the meeting (MTC).

36. She also confirmed that during the negotiations the landlord had accepted payment by two instalments and to forego payment of rent once the 1st installment was paid. She further stated that following the re-evaluation by PW3 the value came to 1,431,300,000 Japanese Yen. However the MTC insisted that the value of the buildings had to be factored in since rent was still being paid bringing the total to 1,580,618,200.00. In spite of this, the MTC approved the price of 1,750,000,000 Japanese Yen.

37. Having been in the MTC and having participated in the negotiations her take was that the G.O.K got value for money in the purchase of the Tokyo Mission. Further that the procurement laws and regulations were within the said transaction.

38. **PW8 James Kihwaga** worked as head of the Legal Division at the MFA between 2007-2011. A letter from the Tokyo Mission dated 18th December 2009 was referred to him. It was authored by the 3rd respondent and addressed to the P/S MFA. There had been a demand for compensation for delayed payments for the Mission property. The sale agreement was not in the bundle of documents but it was finally traced. The agreement had been signed by the 3rd respondent on behalf of the G.O.K.

39. PW2 had alerted him on the need of keenness on this document. He again called him and informed him of instructions to the effect that a fresh agreement had to be prepared in regard to this property and it was to be signed by the P/S MFA on behalf of the G.O.K for purposes of regularizing the file. This was irregular but he still did it, and it was signed by the P/S (1st respondent). The redrawn agreement was produced as **EXB73.**

40. He was directed to take the document to Tokyo for signature by the Vendor, which he again protested in vain. He was advised to keep away from the Embassy staff while in Tokyo. He however got to meet them and the agreement dated 30th June 2009 was signed by the vendor in their presence and that of the 3rd respondent.

41. He was not sure if there had been authority for one besides the PS to sign the sale agreement on behalf of the G.O.K (EXB72). In cross examination he insisted that as head of the Legal Division he did not receive any communication on the drafting of the sale agreement in the first place. His position however was that the redrafted sale agreement was an illegality. He made mention of a M/s Beatrice Karago his junior who had participated in some of the meetings in this matter.

42. **PW9 John Kenneth Njeru Nyaga** was an attaché at the Tokyo Embassy during the period in issue and his docket was finance. He confirmed a total payment of 1,749,098,404 Japanese Yen to Mrs Kuriyama's account leaving a balance of 901,596 Japanese Yen. The payment was by the G.O.K. **PW10 Judy Muthoni Njau** confirmed receiving a letter quoting the purchase price of the Tokyo Embassy premises as 1,900,000,000. She was instructed by the 1st respondent to write a response asking them to renegotiate with the landlord with a focus on a reduction of the figure.

43. **PW11 Peter Kerandi Mose** said he worked with the State department of Immigration and was based in Tokyo Japan from December 2005-July 2010, as a Consular attache. He confirmed the visit by the team inspecting the seven(7) plots and he joined the team. He also confirmed the minutes of the meeting of 22nd June 2009 by home officers. **PW12 Joseph Kimemia** was in the team that went to Tokyo Japan to inspect and value and validate the premises in issue. His evidence is similar to that of PW3.

44. **PW13 Margaret Gachuru** is the head of Assets management for the MFA and their Missions abroad, development of policy for the acquisition management and disposal of moveable and immovable assets. With respect to the acquisition of the Tokyo Missions, she said they were in December 2009 requested by Parliament to furnish it with all documents related to this. She got a certified copy of the sale agreement **(EXB72**) two valuation reports, **(EXB8, 49(a)** and **63)**. She compiled them into a report which she forwarded to the committee of Parliament which had requested for it.

45. She first saw EXB73 (Purchase & Sale Contract) when they went to Parliament. The said document dated 30th June 2009 is signed by the P/S MFA. She saw the title to the property (EXB82) when she went to Tokyo Japan in March 2010. She did a report after considering so many factors. Her conclusion was that the G.O.K had gotten value for its money. After her professional analysis she explained the difference between value, cost and price.

46. She explained value to be the open market value and was the basis of all valuations. That it is the estimate of the amount that a property can change hands at between a willing buyer and willing seller at a particular time. It is also a negotiating tool, and neither the buyer and seller is obligated to accept it. The witness also confirmed the availability of all the documents in relation to this matter in the Mission files at the MFA headquarters.

47. In cross examination she explained that price is the actual amount charged in exchange for goods or services irrespective of the valuation. Further that there could be several factors which would affect the price of a property and cause it to differ from the value, including the history of a property. She also stated that sentimental attachment to a property may also influence the price, same to the actual utility the buyer may be seeing in the property to be bought. Equally the return on capital for both the buyer and the seller as well as supply and

demand, have an impact on the price.

48. In conclusion she said in order to arrive at a "fair price" there are factors on both sides which will influence what the price will be. Further that in technical terms "fair price" and "value" are two different terms meaning different things.

49. **PW14 Kariuki Mugwe** was the Principal accountant and head of the accounts department at the MFA during the period in issue. He was also managing the financial transactions and accounts of the entire ministry. He referred to a memo dated 22nd June 2009 (**EXB82**), approval to the same and the payment voucher (**EXB83)**. He therefore confirmed payment of Kshs. 1.2 billion for the purchase of the Tokyo Embassy property.

50. **PW15 Cosmas Josephat Mundo Maweo** is a Chief Architect in the former Ministry of public works. His evidence is that he was never involved in the acquisition of the Tokyo property, which was contrary to procedure.

51. **PW17 Ojuok Dicl George Olang'o** is an Architect based in Tokyo Japan. He testified that in 2009 he was part of a delegation from Nairobi that was looking at some parcels of land in Tokyo. One of the lands was that which housed the Kenyan Embassy. He used an area of 1600 sqm to do his calculations. The average value would be 1.35 Billion Japenese Yen. In his report he said the Embassy sat on 1.195.33 sqm, coupled with the residence it came to 1600 sqm.

52. When he measured the land he found it to be 1432sqm. He further stated that the Embassy land even with the ratification was twice the size of the G.O.J land. Further that going by the land alone, the G.O.J parcel was more expensive and the cost of construction would be more expensive than that of the Embassy property.

53. **PW18 Kipsang Sambai** was the investigating officer. He carried out the investigations together with other officers. The investigation related to purchase of the Kenya Embassy in Tokyo (K.E.T). He referred to a letter dated 8th December 2004 written by PW1 in respect of the need for the G.O.K to acquire the K.E.T property due to the high rent being paid. He referred to other letters on the same **(EXB3**) dated 28th December 2005, and **(EXB5)** dated 31st August 2006. The letters talk of the negotiations done and the available properties and prices. PW1 was however emphatic on acquisition of the property. Other letters on the same issue are **EXB10, 12, 13, 14, 17 and 22.**

54. PW1 wrote other letters **(EXB 27 & 31**) where he was now talking of a plot offered by G.O.J for construction of the Chancery and residence. It measured 700.39 sqm at a price of 1.307 billion Japenese Yen translating to Kshs 1,054,095,500.00. He requested for the offer to be accepted and a supplementary budget raised to cover the deficit. The 3rd respondent then did a letter dated 19th November 2008 **(EXB 28**) inviting a team for inspection and valuation etc. Officers were appointed to form the team to travel (**EXB32, 33)** to see the property and also view others as proposed by the 1st respondent and indeed the team travelled.

55. The witness referred to a matrix given by Mr. Korir of PPOA in which he explains the steps to be undertaken in order for the process to be aligned to direct procurement, and not section 92 PPDA and the MTC approved it. He produced minutes of the negotiations on the reduction of the purchase price.

56. PW18 pointe d out that there is a similarity between EXB 72 & 73 as they referred to the same parcel of land. That the document was signed by the 3rd respondent who had no authority to do so as the authority was in the PS. He wondered why there were two contracts. According to him the payment of 1.75 billion Japenese Yen was not a fair market price as valuation experts had given much lower figures.

57. It was his evidence that the correct procurement procedures were not followed in this case. He cited the following instances.

- Negotiations commenced without the blessing of the MTC

- The Chief Architect was never involved.

- No Attorney or estate agent was involved.

58. In cross examination he said he had confirmed that there was no money demanded and/ or received. He also confirmed that none of the respondents was a member of the MTC which made the decision to purchase the property. He said he charged them because the G.O.K could have gotten a better deal. He was however unable to state which provisions of section 72-85 PPDA had been violated. His stand was that the respondents conspired before the MTC meeting in the purchase of the suit property. He personally wanted the property bought through open tendering and not direct tendering. When the appeal came for directions on the hearing it was agreed that the Counsels file written submissions and this was done.

59. The Appellant relied on the written submissions of Mr. Karuri without highlighting them. His case is that despite the finding by the trial court that there were many breaches of procurement procedures, he still acquitted the respondents of count 3. He submitted that the above finding was supported by PW2's oral evidence plus Exhibits **Nos. 32, 41, 45, 47, 48** and the evidence of PW4, PW5, PW6 which he explained at length.

60. Mr. Karuri argued that the 1st and 3rd respondents authorized the 2nd respondent to negotiate with the Landlord in January 2009 well before the inspection and validation team had published its report and before the deadline of 30th January 2009 for receipt of bids. The said bids were never opened, considered and evaluated by the relevant procurement committee under the law.

61. In regard to count 2 he submitted that the evidence of PW3 was sufficient to have the 1st and 3rd respondents placed on their defence.

This was because the 1st respondent had requested her and others to meet the landlord of the property that was later purchased yet it was not on the list of those to be seen. That after meeting the landlord the 2nd respondent asked her to include the plot in her valuations (**EXB63**).

62. Mr. Karuri submitted that there was abuse of office by the 1st and 3rd respondents who conferred a benefit of 318,700,000 Japanese Yen to the landlord this being the difference between the value (1,431,300,000.00) and the actual price (1,750,000.000.00. It was his further submission that failure by the trial magistrate to refer at all to the evidence of **PW10 Judy Muthoni Njau, PW11 Peter Kerande Mose, PW12 Joseph Kimemia,** and **PW15 Cosmas Josephat Mundo Maweu** was a serious omission. That had he considered it alongside the other evidence he could not have acquitted the respondents.

63. He also argued that section 104(b) of the Penal Code clearly creates an offence and was the 1st limb of count 4. That the learned trial Magistrate should have ignored section 34 of the Penal Code cited as the punishment for the offence is found in section 36 of the Penal Code. He said the evidence by PW8 and PW 13 supported the charge as preferred.

64. Counsel submitted that count 4 was satisfactorily proved by PW8 and PW13. That Pw8 had explained that he was directed to prepare a fresh agreement (EXB73) while the earlier agreement (EXB72) was still in existence. To him this was illegal. PW8 and PW13 were head of Legal Division at the MFA and head of Asset management at the MFA and both of them identified the 3rd respondent's signature. He submitted that the charge in count 4 had been proved.

65. Finally he submitted that the 3 respondents were the main players in the decision to purchase the Landlord's property, and they failed in their role of ensuring that all procedures and processes under section 27(2) and (3) PPDA and the Regulations as provided were complied with. He asked the court to allow the appeal and place the 3 respondents on their defence.

66. Mr. Kithinji Marete for the 1st respondent in his submissions and relying on the case of **Engineer Michael Sistu Mwaura Kamau v EACC & 4 Others [2017]eKLR** stated that at the time of investigation, recommendations thereon and ensuring prosecution of the respondents the **EACC** was not properly constituted. That the trial against the three respondents was itself unlawful *ab nitio*

67. Counsel submitted that following the pertinent revelations in the trial, it was clear that the G.O.K was keen on purchasing property on which stood the K.E.T since it had been its tenant for so many years. On what a prima facie case is, he referred to the cases of:

(i) **Ramanlal Trambaklal Bhatt v Republic [1957] E.A. 332**

(ii) **Alfred Nyakundi Ondara & Anor v Republic [2015] eKLR**.

68. He submitted that the lower court after considering the totality of the evidence correctly found that the prosecution had not established a prima facie case against the 1st respondent. That the mere fact that the learned trial Magistrate did not specifically mention some witnesses did not mean their evidence was not considered.

69. On the 1st count of conspiracy and the 2nd count of abuse of office Counsel submitted that the trial court had considered them separately and distinctly and analyzed the evidence thereon. He relied on the case of **Mburu Kinyanjui v Republic Criminal Appeal No 141 of 1986 [1988] eKLR** to buttress his argument. He argued that E.O.I was not evidence of a parallel procurement process. Further he submitted that there was no evidence of failure to adhere to procurement procedure.

70. Mr Nderitu appearing for the 2nd respondent submitted that breach of trust and abuse of office are one and the same thing. That the alleged breach was purchase of the Tokyo Embassy at a certain price. Abuse of office referred to improper use of their offices to confer a benefit. He argued that the two counts mean one and the same thing. To support this argument he cited the case of **Regina vs Boulanger 2006 SCC32 & John Mburu v Republic [1988] Eklr.**

71. On parallel process of procurement he said the evidence of PW2, PW6 and PW11 spoke to this. The respondents were not involved in the decision making process. On alleged breaches of procurement procedure he submitted that none was pointed out and he referred to the evidence of PW4 on this. He further stated that the appellant did not say what value the evidence left out, would have, so as to change the result.

72. On the 4th count he submitted that there were no limbs in the said count. That the Appellant should have amended the charge when there was room to do so and not at the appeal stage. He too referred to the **Engineer Mwaura** case. All in all he submitted that the Appellant's case was incurably weak and the Ruling by the learned trial Magistrate should not be disturbed.

73. Mr. Kilukumi for the 3rd respondent relied entirely on the submissions filed on 20th march 2018. Referring to the evidence of PW1, PW3, PW4 PW12, PW13 PW14, PW17, PW18 he submitted that the prosecution had failed to establish a prima facie case of conspiracy to commit corruption.

74. Counsel submitted that the basis of the charge in the 2nd count was the difference between the purchase price period by the G.O.K for the Tokyo property and the value returned by PW3. That there was no evidence of a benefit having been incurred, and he referred to the evidence of PW2, PW7, PW9, PW13 and PW18.

75. He submitted on the 3rd count saying that this was a case of direct procurement and not open tendering under section 50 PPDA. The procedure under section 50 PPDA could therefore not be combined with Regulation 35 of the PPDR. He referred to the evidence of PW4 the Principal procurement officer, plus that of PW1, PW2, PW5, and PW13.

76. On alleged parallel procurement undertaken in Tokyo Japan he argued that the procurement committee in Tokyo had a maximum threshold of Kshs 500,000/- which could not purchase the Tokyo property. On this he referred to the evidence of PW7 and PW11.

77. On the 4th count in respect of the 3rd respondent Mr. Kilukumi submitted that the 3rd respondent did not commit any such offence. He argued that section 104(b) of the Penal Code was restricted to persons specifically authorized to do acts of a public nature such as administering oaths by Commissioners of oaths & notaries public.

78. Referring to section 3 of the Government Contracts Act he said the Act does not create any offence. In any event he argued that the inclusion of section 34 of the Penal Code rendered the charge fatally defective. He submitted that there was no proof that it is the 3rd respondent who had indeed signed the contract. Furthermore according to PW8 it was not known who should sign contracts on behalf of the G.O.K.

79. Counsel raised issue on the jurisdiction of this court to issue the orders sought by the appellant under section 348A Criminal Procedure Code. Referring to the said section he submitted that the same does not confer this court with power or authority to order the respondents to be placed on their defence as pleaded by the appellant. He argued that the Criminal Procedure Code being a Penal Statute must be construed strictly in favour of the accused person and so does not grant this court the power to place an accused on his defence.

80. His submission is that this court as a 1st appellate court cannot order the 3rd appellant's acquittal to be substituted with a conviction in terms of section 348A(2) of the Criminal Procedure Code. He referred to Article 50(2)(c); (c)(k) (l) of the Constitution and submitted that any such substitution by this court would amount to a violation of the said provisions.

81. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record as a whole and make its own decision. An allowance must be given owing to the fact that the appellate court did not see nor hear any of the witnesses. The Court of Appeal in the case of **Okeno v Republic 1972 E.A 32** had this to say of the duty of a first appeal court:

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusions.(*Shantilal M. Ruwala v. R., [1957] E.A 570.* It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post, [1958]E.A. 424."***

DETERMINATION

82. I have duly considered the evidence on record and the grounds of appeal. I have equally considered the submissions by all the parties and the authorities cited. All the respondents were acquitted on all the counts under section 210 Criminal Procedure Code. I have found the following to be the issues falling for determination.

> **(i) Whether this matter falls under the cases investigated and prosecuted when the Ethics Anti Corruption Commission was not fully constituted as stated in the Engineer Kamau case (supra)**
>
> **(ii) Whether this court as a 1st appellate court has jurisdiction to substitute an acquittal under section 210 of Criminal Procedure Code with an order placing an appellant on his defence.**
>
> **(iii) Whether the prosecution established a *prima facie* case against the respondents on all or some of the counts to warrant their being placed on their defence.**

83. I will first of all define what a *prima facie* case is. Black's Law Dictionary 9th Edition at pg 1310 defines it as:

> **"1. The establishment of a legally required rebuttable presumption.**
>
> **2. A party's production of enough evidence to allow the fact- trier to infer the fact at issue and rule in the party's favour.**

84. The Wex Legal dictionary/Encyclopedia defines it thus:

> **"A prima facie case is the establishment of legally required rebuttable presumption. A prima facie is a case of action or defense that is sufficiently established by a party's evidence to justify a verdict in his or her favour, provided such evidence is not rebutted by the other party."**

85. The Oxford Dictionary of Law defines a prima facie case as:

> **" A case that has been supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary… a prosecution case that is strong enough to require the defendant to answer it.'**

86. The standard applicable in determining whether a prima facie case has been established is found in the case of **Ramanlal T. Bhatta v Republic [1957] E.A. 332** where it was held:

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one " which on full consideration might possibly be thought sufficient to sustain a conviction.

(ii) The question whether there is a case to answer cannot depend only on whether there is "some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.

(iii) The judge hearing the case stated misdirected himself on the law when considering the question whether a prima facie case is made out, and, as it could not be said that the magistrate at the resumed trial would necessarily have reached the conclusion he did, had he not been influenced by this misdirection, it was not safe to allow the conviction on the first count to stand. Appeal allowed on first count.

87. In the same case at pg 335 Sir Newnham Worley P. stated thus:

"A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a " prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

Issue No. (i) Whether this matter falls under the cases investigated and prosecuted when the EACC was not fully constituted *Engineer Kamau* case (supra)

88. Reference was made to the **Engineer Kamau case** (supra) by Mr. Kithinji for the 1st respondent. He submitted that the investigations and recommendations herein were conducted when the EACC was not properly constituted. **PW18 Kipsang Sambai** the Investigating Officer testified that in May 2010 him and other EACC officers were assigned the task of investigating the acquisition of the K.E.T Japan.

89. The 1st & 3rd respondents were first arraigned in court on 28th February 2013 while the 2nd respondent first appeared on 14th March 2013. The period the EACC was not properly constituted in respect to the **Engineer Kamau** case (supra) Court of Appeal Judgment is **12th May 2015-22nd January 2016**. The new Commissioners were sworn in on 23rd January 2016. It is therefore clear that the period of investigations and recommendations in respect of this matter is outside the period when the EACC was not properly constituted.

Issue No (ii) Whether this court as a 1st appellate court has jurisdiction to substitute an acquittal under section 21 of Criminal Procedure Code with an order placing an appellant on his defence.

90. During the pendency of these proceedings section 348A of the Criminal Procedure Code was amended by the Security Laws (Amendment) Act 2014. The section now allows the Director of Public Prosecutions to appeal against an acquittal on the basis of fact and law. It provides as follows:

Section 348A

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

91. It was Mr. Kithinji's submission that there is no way this court can substitute an acquittal under section 210 Criminal Procedure Code to a conviction. That substitution of an acquittal to a conviction in terms of section 348(2) Criminal Procedure Code can only be done where one has been convicted under section 215 Criminal Procedure Code.

92. An acquittal under section 210 falls under section 348(1) Criminal Procedure Code where the provision refers to an acquittal after a trial by a subordinate court or high court. There is no way an acquittal under section 210 criminal procedure code can be substituted for a conviction. The simple reason being that one can only be convicted after his defense has been taken, under section 211 Criminal Procedure Code. The provision for appeal following an acquittal does not specify whether it is under section 210 or section 215 of the Criminal Procedure Code. I take it that it applies to both an acquittal under sections 210 & 215 Criminal Procedure Code.

93. In the case of **Patel v Republic [1968] EA 97** the Court of Appeal set aside Patel's acquittal and directed that he be put on his defence; In **Republic v Tony Mutai ELD HCCRA No. 20 of 2006 [2007] eKLR,** Ibrahim J (as he then was) set aside the acquittal and ordered the matter to proceed by directing the Magistrate to reconsider the submissions under section 210 of the Criminal Procedure Code.

94. This court has the jurisdiction not only to set aside an acquittal but also to make any other orders that will serve the cause of justice, under section 354(3) (c) of the Criminal Procedure Code which provides:

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing

or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;

95. I therefore find that this court has jurisdiction to issue the orders sought in this appeal.

Issue No. (iii) Whether the prosecution established a prima facie case against the respondents on all or some of the counts to warrant their being placed on their defence.

96. According to the Appellant sufficient evidence was adduced by the Prosecution to warrant all the respondents being placed on their defence on all the counts. I will now consider each count separately.

Count 1

Conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of the ACECA.

97. From the onset I wish to point out that the learned trial Magistrate in his Ruling on this count dealt with section 47(1) and (2) of ACECA instead of section 47A under which the offence fell. That was a misdirection.

98. The Penal Code and ACECA do not define the word "Conspiracy". The Black's Law Dictionary defines conspiracy as follows:

> "A **combination of confederacy between two or more persons formed for the common purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful"**

99**.** Section 47A(3) of the ACECA under which the respondents were charged provides:

> **"A person who conspires with another to commit an offence of corruption or economics crime is guilty of an offence."**

From the particulars the offence its alleged that the respondents conspired to commit breach of trust by approving the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy & Ambassador's residence at a price of 1.75 billion Japanese Yen **while aware** that a fair market price could have been obtained had proper procurement procedures been adhered to.

100. What then is breach of trust? This is not defined either by the ACECA or Penal Code. In the black's Law dictionary at pg 214 it is defined as:

> **1. A trustee's violation of either the trust's terms or the trustee's general fiduciary obligations; the violation of a duty that equity imposes on a trustee, whether the violation was wilful, fraudulent, negligent, or inadvertent. A breach of trust subjects the trustee to removal and creates personal liability. 2. see maladministration."**

101. On the other hand maladministration is defined in the same dictionary as:

> **"poor management or regulation by a public officer; specific, an official's abuse of power. Also termed misadministration; breach of trust."**

102. The complaint by the appellant in respect of this Count No 1 is found at ground 5 of the appeal. This cannot be correct because the learned trial Magistrate in his Ruling referred to what was enunciated in the case of **John Mburu Kinyanjui v republic [1988] eKLR**. Thereafter he analysed the evidence on count 1 and arrived at a decision to acquit. This is what he stated at pg 23 of the Ruling:

> **"These findings on their own and further fortified by the *ratio decidendi* in the John Mburu Kinyanjui case can only lead to the inevitable conclusion that bearing in mind the facts of this case it was improper to charge the accused with the offence of conspiracy as stated in count 1 together with the substantive charge of abuse of office as stated in count 2. I shall hence acquit all accused persons under section 210 in to count 1."**

103. The case of **John Mburu Kinyanjui** (supra) set out very useful guidelines on the approach to be used while charging persons with the offence of conspiracy and other charges of specific offences based on the same evidence. This is what the Court of Appeal stated."

> **"…. It is not illegal perse to join an alternative charge of conspiracy; indeed it is not necessarily illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences, as Musinga's case above shows, and more especially *Republic v Cooper & Compton [1947] 2 ALL E.R 701.* The problem is deeper than simply charging substantive**

counts of conspiracy to alternative counts. Dealing with counts of conspiracy raises problems which require discretion and complete understanding of the case in hand. It seems to us that the principles summarized in Archbold Criminal pleading evidence and practice, 40th Edition para 4073 as to the desirability of including a count of conspiracy in an indictment or charge, offers a useful approach. But the question cannot be determined by the application of any rigid rules. Each case must be considered according to its facts."

104. It is the submission by the respondents that in view of the existence of count 2 in respect of the charge of abuse the 1st count should not be allowed to stand. I have considered the particulars in the 1st count. An interpretation of these particulars is that there could have been no problem with the approval of the purchase of the property by the respondents if a fair market price was gotten. In other words the problem arose because there was failure to follow laid down procedures hence the loss of 318,700,000 Japenese Yen which went to the benefit of Mr. Nobuo Kuriyama.

105. As per the **John Mburu Kinyanjui** case (supra) decision, some of the points to be considered in determining whether a charge of conspiracy should be preferred and which I find relevant to this case are:

1. As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence.

2c. Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence it may be right and proper to include a charge of conspiracy.

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

106. Following what I have stated above at **para 104** and with the appropriate points from the **John Mburu Kinyanjui** case (supra) it is clear that what the prosecution is trying to achieve in the conspiracy charge in (count 1) is also covered in the 2nd and 3rd counts and the evidence is the same. It would be unfair and prejudicial to an accused person for the prosecution to use the same evidence to prove a charge of conspiracy alongside other specific offences. It amounts to punishing an accused twice over the same facts.

107. I am persuaded in this by the case of **The queen v Hoar [1981] 148 CLR 32** where the High Court of Australia stated

" Para… 15 that suggest that the Crown's advisers have overlooked a practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act (see Connolly v Meagher (1906) 3 CLR 682). It has long been established that prosecutions for conspiracy and for a substantive offence ought not to result in a duplication of penalty. In 1848 Lord Denman C.J. in *Reg. v Button [1848] 11QB 929 at PP 947-948 (116E.R. 720 at p. 727*) said; If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction"

Para 17…. If the crown's belief was that it had effective charges for the substantive offence then it should have proceeded with those charges and sought a conviction and order for forfeiture which the court would have been authorized to make. If there had been some real basis for doubting that the offence has been committed the Crown may have been justified in alleging an attempt or a conspiracy."

108. That notwithstanding, I find that the three respondents are not the ones who approved the purchase of the suit property. The evidence adduced is that the approval done was by the MTC under the chairmanship of **PW2 Joseph Kathuri Ndathi** having been guided by the PPOA represented by PW4 Eric Mutai Korir. PW2 and PW4 were not suspected of any conspiracy yet they were the chair and secretary of the MTC which approved the purchase. There is also a Minister in MFA. Could a process of such a magnitude have gone on without his blessings and/or knowledge?

109. All in all I find that it was not wise to charge the respondents with count 1 in view of count 2 and count 3 but especially Count 2. However since they charged them I have also considered the evidence on record and find none to support the said charge to the required standard.

Count 2

Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes act. 2003

110. This offence only relates to the 1st and 3rd respondents. The particulars are that they improperly conferred a benefit of 318,700,000 Japanese Yen to Mr. Nobuo Kuriyama. This amount is the difference between what was paid for the property and the value that was assessed by the GOK Valuer. In other words the Appellant is trying to show that the vendor Mr Nobuo Kuriyama was duty bound to accept the valuation done by the G.O.K's valuer-PW3 Teresia Wamboi Kimondiu. Is that the position under the law? Can a vendor be forced to accept the value placed on a property by a buyer?

111. **PW13 Margaret Gachuru** has a background in land matter,s an area she studied for her Bachelors and Masters degrees. She is the head of Assets Management for the MFA and Missions abroad. She referred to three(3) valuation reports namely **EXB49(a)** dated 10th February 2009 for 1,600,000,000 Japanese Yen, **(EXB8)** dated 25/5/09 for 1,431,300,000 therefore **EXB49(a)** & **8** were both done by PW3. The other report she mentioned but which was not produced as an exhibit was the valuation report by M/s Coral Corporation dated 23rd

March 2007 placing the value at 1.09 Billion Japenese Yen. It was said the valuer was not qualified.

112. This witness gave clarity on the difference between a valuation and price. It was her evidence that valuation for sale and purchase purposes will differ since each party tries to gain the most advantage. In normal circumstances the seller's valuation would be higher. It is also on record that this property had attracted different values and prices as far back as the year 2002.

113. The prosecution witnesses, **PW2, PW3, PW7, PW13** were all of the view that in this sale/purchase the G.O.K got value for its money. PW1 (the former Ambassador) was not sure of his stand on the same. In cross examination he said the G.O.K had got value for its money but in re -examination he said it had not.

114. **PW3 Teresia Wamboi Kimondiu** is the G.O.K Valuer who gave the value of the property as 1,431,300,000 exclusive of the buildings. Her report **(EXB49a)** shows that the value of the buildings was not to be included in the negotiations. She has indicated the value of the buildings as 149,318,200 Yens having been directed by PW2 to include it (see testimony of PW7.) All this including the offer of 1,750,000,000 Japenese Yen by Mr. Nobuo Kuriyama were placed before the MTC, which did approve the same. **PW17 Ojuok Dicl George Olang'o** calculated his figures based on the wrong acreage and his valuation was rightly not considered.

115. The above is the background of what transpired. The experts in land valuations etc **(PW3 Teresia Wamboi Kimondiu** and **PW13 Margaret Gachuru** have clearly indicated what a value is and what a price is. It has also been shown that both the buyer and vendor do their valuations and none is binding on the other. They have to sit and agree on the price guided by the valuations done.

116. In respect to this count (No 2) it was the duty of the prosecution to confirm the following:

(i) That the vendor Mr. Nabuo Kuriyama was duty bound to accept 1,431,300,000 Yen valuation by the G.O.K valuer (PW3) as the purchase price.

(ii) That the 1st and 3rd respondents were part of the MTC that approved the purchase.

(iii) If (ii) was in the affirmative, why only the two of them (1st & 3rd respondents) were picked from the team of members of the MTC to face prosecution. And if it's in the negative it had to be shown how the approval was done and where the **MTC, PPOA, MFA Minister** were as all these things were done including the payments.

It is only after the above three(3) issues have been satisfied that the court can assess how the 1st and 3rd respondents used their offices to improperly confer a benefit if any to the said Mr. Kuriyama. What was presented to court was not the **FULL** evidence, and if it was, then there was a deliberate omission of some evidence.

117. I find that there is no sufficient evidence to satisfactorily answer the three(3) issues raised above. The conclusion is that the prosecution failed to establish this allegation.

Count No. 3

Wilful failure to comply with the law and applicable procedures relating to procurement contrary to section 45(2)(b) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act, 2003.

This Count(No 3) was against all the three(3) respondents. It states that they violated the law and procedures in particular section 50 of PPDA and regulation 35 of the PPDA Regulations 2006 by directly purchasing the suit property. This offence is alleged to have been committed on diverse dates between January 2009 and October 2009.

118. Section 45(2)(b) ACECA under which they have been charged provides as follows:

> **"(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—**
>
> **(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;"**

Section 50 of the PPDA provides

> **"This part sets out the requirements for open tendering."**

Regulation 35 provides

> **"A procuring entity that conducts procurement using open tender method shall be subject to the procurement thresholds as set out in the 1st schedule."**

The 1st schedule referred to in Regulation 35 talks about:

" Provisions relating to Members of the advisory board"

119. The evidence of **PW1 Dennis Awori** and the numerous letters (**EXBs 1-40)** confirm that discussions on the purchase of the K.E.T Property started way back in 2004. No one just woke up one morning and decided to purchase it. Through a letter by PW1 dated 24th October 2007 the tide appears to have changed towards buying of a plot on which to construct buildings. This again changed after the visit by the team led by the 2nd respondent from 13th January – 16th January 2009.

120. **PW2 Joseph Kathuri Ndathi** explains the happenings after he was served with the letter dated 3rd February 2009 **(EXB40**) re-appointing him to chair the MTC. He claims to have known nothing about the purchase discussions until after his re-appointment to the MTC and upon seeing a letter dated 3rd February 2009 **(EXB41**). I say this because he stated that on 12th January 2009 he was brought a letter asking him to clear officers travelling to Japan. The said letter obviously indicated what the mission was all about. If he saw this letter on 12th January 2009 how can he pretend not to have known anything until he saw the letter dated 3/2/2009? There are documents he also claims not to have seen, but **PW13 Margaret Gachuru** the head of assets management for the MFA where PW1 was stationed said this in cross examination at pg 377 (R.O.A) lines 7.

> **"With respect to the correspondence/minutes of meetings, they were in one file. All matters relating to a mission would be in files relating to that Mission. Hence like the Tokyo files contains all Tokyo Mission correspondence matters. There is nothing secretive about the acquisition of the Tokyo property and anyone can access these files."**

121. PW2 was the director administration MFA. He was the one supervising divisions which reported to him such as: Procurement, Accounts, Asset Management, Welfare, Security, Transport, Library Service & Personnel. He was therefore a very senior officer at the MFA. These documents in respect of K.E.T were in the relevant files and him and his secretary (PW4) had all the opportunity to peruse them if they wanted to. Be it as it may, he told the court that when the matter came before the MTC it was floated that the suit property should be bought. He however never told the court who floated this. Was it any of the respondents? He only raised his concerns about the timing and the availability of funds during the meeting.

122. The issue of procurement was addressed through the MTC secretary who communicated to the PPOA and they were given the go ahead to procure directly and comply with sections 72-85 PPDA. The MTC then passed a resolution on 24th April 2009 to directly procure, the suit property from Mr Kuriyama, at the sum of 1,750,000,000 Japanese Yen. Was direct procurement allowed under the PPDA/ the answer is YES. It was provided for under sections 74-75 PPDA as follows:

> **Section 74 :**
>
> **"(2) A procuring entity may use direct procurement if**
>
> **the following are satisfied —**
>
> **(a) there is only one person who can supply the goods, works or services being procured;"**
>
> **Section 75:**
>
> **The following shall apply with respect to direct procurement —**
>
> **(a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;**
>
> **(b) the procuring entity shall not use direct procurement in a discriminatory manner; and**
>
> **(c) the resulting contract must be in writing and signed by both parties.**

123. Regulation 10(2)(a-o) sets out the powers and functions of the MTC. Of relevance to this case is Regulation 10(2)(h) which states:

> **"The functions of the tender committee shall be to:-**
>
> > **….review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority**."

124. The MTC had the power to approve or reject the proposal to go for direct tendering. None of the members who testified and in particular the chair (PW2) or the secretary (PW4) said he was threatened by anyone or forced into approving the process. PW1, PW2, PW4 & PW8 presented evidence justifying the use of direct procurement in the said acquisition.

125. An issue was raised about a parallel procurement process undertaken in Tokyo Japan by way of advertisement in newspapers. The evidence on record is that the Tokyo tender committee could only procure to a limit of Kshs. 500,000/-The property in issue was worth over Kshs 1 Billion. PW2 in cross examination at pg 218 (Record of Appeal) states:

"The procurement committee at the Kenya Embassy Tokyo could not procure the Chancery and residence because of limitation. My assertion that the Kenya Embassy Tokyo was carrying out a parallel procurement is based on the limitations for expressions of interest and the letter relating to "Outcome of final negotiations" I confirm we did not adopt the Tokyo mission Report in the report, it states the Expressions of Interests were to get price comparables, but they should have sought permission of the MTC. The MTC had approved direct procurement"

At pg 221 he goes further to state;

"The end product of the negotiations outside the MTC, is that the price negotiated outside the MTC and that by the negotiations team appointed by the MTC remained the same. The negotiations team tabled its report before the MTC, they did tell us that the landlord had flatly refused to discount the price of 1.750 Billion Japanese Yens."

126. All this goes a long way to show that the adverts were for a specific purpose i.e. to get comparative prices and no more. The Tokyo procurement committee did not have the mandate to get into any procurement process for any property going for over Kshs 500,000/-. The adverts could not amount to any parallel process or anything.

127. The respondents were said to have breached the procurement laws and procedures. The particulars of the charge have referred to section 50 PPDA and regulation 35 PPDR, which I have set out at para 118 of this Judgment. The said cited provisions have no relevance at all to what the prosecution set out to prove. The evidence sought to show the breach of sections 72-85 PPDA, and not what was cited in the particulars. **PW18 Kipsang Sambai** who was the Investigating Officer appeared not to know which provisions of the PPDA had been breached by the respondents. He also confirmed that none of the respondents was party to the decision to directly procure.

128. Whatever decision was made by the MTC was made by the Committee and not by an individual. The Investigating Officer testified that there was no evidence of receipt of a benefit by any of the respondents. This is what he states at pg 528 (Record of Appeal)

"I confirm I carried out exhaustive investigations to establish if they did receive a benefit. I confirm, we even investigated bank accounts and even went as far as trying to establish if accused 1 had purchased some land. I confirm I did not find any evidence that any of them received a benefit. I also confirm that Mr. Kuriyama confirmed that he was never asked for any kick back and never gave out any."

129. This statement was made by none other than the Investigating Officer who charged the respondents for breach of trust, abuse of office and violation of procurement procedures and yet did not charge the Chair and Secretary of the MTC that made the major decision that committed the G.O.K to buy the suit property. The key witnesses he availed to the court clearly indicated that the G.O.K got value for its money.

130. I am satisfied that the evidence presented to the court on this count does not meet the threshold for a prima facie case in a criminal case.

Count No. 4

False Assumption of authority contrary to section 104(b) as read with section 34 of the Penal Code.

131. This charge was in respect of the 3rd respondent only. The grounds raised in respect of this count are grounds No 3 and 4. The learned trial Magistrate dismissed the charge and acquitted the 3rd respondent on the ground that section 34 Penal Code did not create any offence and in particular the offence the 3rd respondent was charged with. He did not mention section 104(b) of the Penal Code.

132. Mr. Karuri in his submissions stated that the 3rd respondent's signature on the sale agreement (EXB72) was identified by **PW8 James Kihwaga** and **PW13 Margaret Gachuru.** Mr Kilukumi for the 3rd respondent agreed with the trial Magistrate's finding. He argued that signing a contract was not one of the contemplated situations in section 104(b) of the Penal Code. He referred to section 3 of the Government Contracts Act which provides;

" Contracts made outside Kenya for the Government: Any contract made for the government outside Kenya by a person either generally or specially authorized in writing in that behalf by the Minister shall, so far as the same comes within the jurisdiction of the courts of Kenya, be deemed to be a contract made on behalf of the Government."

133. It was Counsel's submission that there was no evidence that the contract was signed by the 3rd respondent, and if indeed he signed it, he was not generally or specially authorized to do so.

134. I wish to disagree with Mr. Karuri when he states that there are two limbs of offences in Count No. 4. The offence in this count is found in section 104(b) of the Penal Code which states:

"Any person who

(b) without authority assumes to act as a person having authority by law to administer an oath or take a solemn declaration or affirmation or affidavit or to do any other act of a public nature which can only be done by persons authorized by law to do so;

This is a complete offence without any limbs. It however does not provide for any punishment. The charge had to include a provision for the punishment. Unfortunately the provision that was provided was irrelevant, and so the charge remained hanging. Mr. Karuri cannot therefore submit and state that the 3rd respondent was charged under section 104(b) of the Penal Code as read with section 36 of the Penal Code, when it is clear that the punishment provision in the charge sheet clearly reads section 34 of the Penal Code.

135. It is true that there are two sale agreements dated 30th June 2009 produced herein as **EXB 72** and **EXB 73**. The signatures for the G.O.K on the two documents are said to be different. **EXB73** could not have been brought on board if **EXB72** had been signed by the authorized person under section 3 of the Government Contracts Act. Who then signed **EXB72** on behalf of the G.O.K?

136. PW8 and PW13 testified that the person who signed **EXB72** on behalf of G.O.K was the 3rd respondent, who pleaded not guilty to the charge. PW8 and PW13 are not Document examiners or handwriting experts. The court required an expert's evidence to give support to the opinion evidence of PW8 and PW13. I can say no more on that. The evidence adduced on this count is not sufficient. The 3rd respondent could not be placed on his defence because of the evidence of PW8 and PW13 only.

137. Having analyzed the evidence in respect of all the counts that the respondents were charged with I find that there is material evidence that was not placed before the court to tie the loose ends. If the respondents were placed on their defence and they elected to remain **silent** I find that the evidence on record would not be sufficient to found any conviction. I therefore come to the same conclusion as that of the learned trial Magistrate (Hon. K. Bidali Chief Magistrate) though in a more detailed manner.

The end result is that the appeal lacks merit and is dismissed.

Orders accordingly.

Signed, dated and delivered this 13th day of June 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE