REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANII LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 73 OF 2014

IN THE MATTER OF THE CENTRAL BANK OF KENYA TENDER NO. CBK/46/46/2011-2012

FOR SUPPLY, INSTALLATION AND COMMISSIONING OF AN INTEGRATED

SECURITY MANAGEMENT SYSTEM [ISMS]

AND

IN THE MATTER OF ARTICLES 2, 20, 22, 23, 25, 27, 28,29, 50, 79, 80, 156, 157,

160, 231, 245, AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 26, 27, 98 AND 100 OF THE PUBLIC

PROCUREMENT AND DISPOSAL ACT, 2005

AND

IN THE MATTER OF SECTION 13 OF THE CENTRAL BANK OF KENYA ACT, CAP 491

AND

IN THE MATTER OF SECTIONS 11 & 12 OF THE ETHICS & ANTI-CORRUPTION COMMISSION ACT, 2011

AND

IN THE MATTER OF SECTIONS 4, 5, 6 AND 23 OF THE OFFICE OF THE PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF SECTIONS 8, 10 AND 24 OF THE NATIONAL POLICE SERVICE ACT, 2011

BETWEEN

PROF. NJUGUNA S. NDUNG'U..PETITIONER

AND

1. THE ETHICS & ANTI-CORRUPTION COMMISSION [EACC]................................1ST RESPONDENT

2. DIRECTOR OF PUBLIC PROSECUTIONS [DPP]..2ND REPONDENT

3. THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE [IG NPS].....3RD RESPONDENT

4. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA [AG]............................4TH RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner herein, **Prof. Njuguna Ndun'gu** is, according to this petition a distinguished Professor of Economics. He is currently the Governor of the Central Bank of Kenya pursuant and under Section 13 of ***The Central Bank of Kenya Act, Cap. 491*** as read together with Article 231 of ***The Constitution***.

2. The 1st Respondent is the Ethics & Anti-Corruption Commission, [EACC] duly established pursuant Article 79 & 80 of ***The Constitution*** and ***The Ethics & Anti-Corruption Commission Act, 2011***.

3. The 2nd Respondent is the office of the Director of Public Prosecutions [DPP] established by Article 157 of the ***Constitution*** and the ***Office of the Director of Public Prosecutions Act, 2013*.**

4. The 3rd Respondent is the office of the Inspector General of the National Police Service [IG NPS] established pursuant Article 245 of ***The Constitution*** and ***The National Police Service Act, 2011***.

5. The 4th Respondent is The Attorney General of the Republic of Kenya [AG], established under Article 158 of The Constitution.

The Petition

6. According to the petition, Central Bank of Kenya advertised the tender on the supply, installation and commissioning of the Integrated Security Management Systems [ISMS] for its use vide media advertisements on 14th May, 2012 and pursuant to the said advertisements, fifty eight [58] bidders bought them, though only six [6] responded; viz **AUA Industria**, **Ovad Limited**, **Indra Limited**, **Axicon Kenya Limited**, **Horsebridge Network Systems EA** and **Engineered Systems Solution.**

7. The said bidders were subjected to the tender evaluation process which included Mandatory requirements, Comprehensive technical specifications, Presentations and Financial evaluations. In the evaluation process, Horsebridge emerged the lowest tenderer having quoted **Kshs. 1,219,003,971.42**. The Central Bank Tender Committee however declined to award the tender to **Horsebridge** leading to **Horsebridge** filing Review in Public Procurement & Administrative Review Board (PPARB) in **Review No. 65 of 2012**, and **Review No. 51** of **8th October 2012,** wherein the Public Procurement Appeals Review Board (PPARB) ordered that the tender be awarded to **Horsebridge**. Pursuant thereto, the Central

Bank opened negotiations with Horsebridge before finalization of the contract and the remaining five [5] bidders were duly informed. However owing to investigations by the EACC the contract between Central Bank and Horsebridge is yet to be signed.

8. In the *Daily Nation* of 11th February, 2014, there was a headline story to the effect that the DPP has consented to the arrest and indictment of the Petitioner with corruption and alleging loss of **Kshs, 400,000,000/=.**

9. The Petitioner's case was that in purporting to do so as it is reported in the media, the 1st and 2nd Respondents, have jointly and severally erred in law as the Petitioner as the Chief Executive Officer of Central Bank is not involved in any way in the tender process; the order to award the tender to Horsebridge was made by PPARB, a competent and duly authorized statutory body; the allegations of loss or potential loss of Kshs. 400,000,000/= is spurious and speculative as none can arise as Central Bank prepares its annual budget that is approved before any expenditure; further, no loss can be said to arise when Horsebridge was the lowest bidder, and no contract is yet to be signed; and the alleged legal advice by external advice is that, advice, and cannot over-ride established law.

10. It was pleaded that in attempting to proceed as it is doing, the Petitioner's constitutional rights are being brazenly and violently violated as the attempts to arrest and indict him on the material tender is spurious, capricious and arbitrary and violates his equal protection of the law as provided for in Article 27(1) of the Constitution; in communication through the media of his arrest, when he is abroad on national duties is a breach of his inherent dignity and respect as set out in Article 28 and also Article 41(2)(b) of The Constitution; in anticipating or purporting to arrest the Petitioner, when he is out of the country on official duties is deprivation of Petitioner's freedom in contravention of Article 29(9) of the Constitution; the allegations against the Petitioner are without legal or factual foundation and violate Article 29(c) of the Constitution; the Petitioner is being subjected to psychological torture in contravention of Article 29(d) of The Constitution; in conducting the investigations the way it did, the 1st Respondent violated the Petitioner's rights to a process that is expeditious, efficient, lawful, reasonable and procedurally fair as set out in Article 47(1) of The Constitution; the Petitioner is yet to be informed of any charge or offence he may have committed in contravention of Articles 49(1) and Article 40(b) of The Constitution; and the Petitioner's rights to be presumed innocent has been violated in contravention of Article 50(a) of The Constitution.

11. It was further pleaded that the 1st and 2nd Respondents have jointly and/or jointly brazenly and egregiously violated the well-established principles set out in *the Constitution* and the principles of national justice and established law.

12. According to the petitioner, the High Court has jurisdiction pursuant Sections 20 (3) and 165 (3) & (6) of The Constitution.

13. The petitioner therefore sought the following orders:

> **a. A Declaratory Order do issue that the allegations on the material tender do not disclose any or any criminal offence.**
>
> **b. A Declaratory Order do issue that the allegations against the Petitioner have no basis in law.**
>
> **c. A Declaratory Order do issue that the Petitioner's rights have been violated as particularized above.**
>
> **d. A Declaratory Order do issue that compliance with the ruling of PPARB cannot constitute a corruption offence.**
>
> **e. A Declaratory Order do issue that any action of the Respondents that is inconsistent with**

the constitution be voided to that extent.

f. Any or further orders of the court do issue to give effect to the principles of *The Constitution*.

Petitioner's Case

14. The Petitioner's case was that while he was away in the week of February 10, representing the government in Paris, France in an Anti-Money Laundering/Combating the Financing of Terrorism [AML/CFT], International Co-operation Review Group meeting, he read in the online edition of the Daily Nation of **February 11** that the 2nd Respondent had issued a consent to the 1st Respondent to arrest him. He immediately instructed **Donald B. Kipkorir**, of **KTK Advocates**, his Counsel on record to file the Petition.

15. He deposed that to-date, he has not been informed what he was to be arrested or indicted for other than the media alluding that it related to the Bank's tender for Integrated Security Management System [ISMS] project.

16. Being cognizant that he had not been charged, he asked for and received material information from the Bank's tender committee and according t him, the said tender, **CBK/46/2011-2012** was advertised on 14th May, 2012 and following pre-bid conference held on 4th June, 2012 with all prospective bidders the Bank issued clarifications.

17. Pursuant thereto, 58 bidders purchased the tender, but only 6 returned viz; **AUA Industria**, **Orad Limited**, **Indra Limited**, **Azicon Kenya Limited**, **Horsebridge Networks Systems EA Ltd** and **Engineered Systems Solutions** and **t**he tender closed on **3rd July, 2012 after which the** Evaluation Committee begun the evaluations of the 6 bids using four parameters; viz. mandatory requirements, comprehensive technical specifications, technical competence, presentation and financial evaluation from which **Horsebridge** emerged the lowest and qualified tender at Kshs, 1,219,003,971.42, and **Orad** was second lowest with Kshs. 1,545,625,541.77, a difference of **Kshs. 326,621,570.35**. following a re-evaluation by the Committee the same conclusion was reached.

18. Thereafter Horesbridge filed the **Review No. 51 of 8th October, 2012** at the Public Procurement Administrative Review Board and in its ruling delivered on **6th November, 2012**, the PPARB ordered that the Tender Committee do consider the recommendations of the Evaluation Committee. Horsebridge also filed another appeal in **Review No. 65 of 2012** at the PPARB in which the Board now directed that the tender be awarded to Horsebridge.

19. Pursuant to the said decision the Petitioner wrote to the winning bid, and the other five losers vide our letters dated **26th February, 2013.** Amidst the above, a law firm called **Gitonga Mureithi & Co. Advocates** made a complaint, which the 1st and 2nd Respondents took up and because of the said investigations, it was not possible for the contract with Horsebridge to be concluded.

20. The Petitioner however asserted that as the Chief Executive Officer of Central Bank of Kenya, he did not participate in tender proceedings and had no role in the decision making process of the Tender or Evaluation Committees.

21. According to the Petitioner, the powers of The Ethics & Anti-Corruption Commission [EACC] are set out in ***The Ethics & Anti-Corruption Commission Act, 2011*** and underpinned in Article 79 of **The Constitution** while those of *t*he Office of the Director of Public Prosecutions [DPP] are set out in ***The Office of the Director of Public Prosecutions Act, 2013*** and underpinned in Article 157 of ***The Constitution***. Whereas the mandate of EACC is purely investigatory and advisory that of the office of the DPP is purely prosecutorial. However, both the EACC and DPP are obligated to act in regard to public interest, interests of administration of justice and need to prevent and avoid abuse of the legal process, and both are to act without directions of any party or authority except the over-sight control of the High

Court.

22. However the position taken by the EACC is that it received intelligence report and also directions from the 2nd Respondent, both in March, 2013 alleging that the material tender was irregular in that the CBK had terminated the material tender; that the Petitioner, failed to comply with the law relating to procurement procedures; and therefore the 2nd Respondent asked EACC to commence investigations;

23. It was however the Petitioner's position that the material rulings by PPARB were on **6th November, 2012** and **4th January, 2013** respectively and the dates are material; that no material has been placed to indicate that he disregarded the **opinion** of his in-house and external counsel; that in any event "opinion" is "opinion"; that the purported termination were held to be fake by the PPARB; that no material has been laid to show that he didn't comply with or brake any procurement law; and that EACC has not demonstrated that it has complied with Section 11(1)(d) of ***The EACC Act, 2011***.

24. The position of the DPP, according to the Petitioner was on the other hand that it received a letter of complaint on 26th July, 2013 from **Gitonga & Mureithi & Co. Advocates**, acting for one of the material tenderers alleging irregularity; that the Petitioner ignored advise of his internal and external legal teams; and that the DPP received recommendations from EACC to prosecute the Petitioner, which recommendations the DPP agreed to.

25. In the Petitioner's view, if the alleged unnamed complaining tenderer was genuine, he ought to have known the law relating to the procurement process; that no material has been established that the advice of **Ngatia & Associates** was given to him; that whereas the alleged internal memo is from alleged "Legal Services Division", in CBK, all internal memos and more so those dealing with advise are authored by individuals and no evidence has been shown that the alleged memo is indeed authored by any employee of CBK or that the Petitioner received it; that in any event, there is no law that a Chief Executive must comply with "opinions" as opinions remain opinions; that CBK was only a procuring entity in the tender and never an aggrieved party and therefore didn't have reasons whatsoever to appeal against the PPARB decisions; and that in awarding the tender to Horsebridge by PPARB, the Bank doesn't suffer any loss; as Horsebridge was the lowest tenderer and technically qualified.

26. It was the Petitioner's case that the positions adopted by both the EACC and DPP demonstrate a scripted course of action by them; reliance on anonymous sources to prosecute which is not provided for in law; alleged breaches of law which none is shown; complete misapprehension by both of procurement law; their contempt of the decisions of PPARB; their disobedience of *The Constitution* and statutes establishing them; and that their intended prosecution is actuated by extreme malice, and selective application of the law.

27. Based on legal advice, the Petitioner contended that the entire intended prosecution has no legal or factual *substratum*.

1st Respondent's Case

28. According to the 1st Respondent, it is established as a body corporate under the ***Ethics and Anti-Corruption Commission Act*** No. 22 of 2011 and is the legal successor to the Kenya Anti-Corruption Commission (hereafter referred to as "the defunct KACC") which was established under the ***Anti-Corruption and Economic Crimes Act***, No. 3 of 2003.

29. Sometimes in March w013 the 1st Respondent received intelligence report that Central Bank of Kenya had irregularly awarded a tender for installation of ISMIS at Kshs 1.2 billion. Further to the intelligence report the 1st Respondent received a letter from the 2nd Respondent requesting it to investigate the pursuant to the 1st Respondents mandate though the matter was already under investigation. Pursuant to receipt of the allegations 1st Respondent's initiated investigations into the circumstances surrounding the procurement of the system which investigations revealed that the tender relating to the delivery,

Installations, Testing and Commissioning of the ISMIS was terminated by the Tender Committee on 26th September 2013.

30. To the 1st Respondent, its investigations established the petitioner who is the Governor of the Central Bank and hence the accounting officer wilfully failed to comply with the law relating to procurement procedures in relation to the delivery, installation, Testing and Commissioning of the system for the Central Bank of Kenya and or otherwise conferred or attempted to confer a benefit on one of the bidders, Horsebridge Network Systems E.A Limited by directing that the contract be given to the said bidder notwithstanding the termination.

31. Upon conclusion of the investigation the 1st Respondent prepared and forwarded its recommendations to the 2nd Respondent who upon evaluating the evidence agreed that the petitioner be charged on charges directed by him.

32. According to the 1st Respondent, the Petition does not indicate the manner in which the petitioner's rights have been infringed by the 1st Respondent.

33. In its view, the petitioner herein is using the Constitutional Court to subvert the criminal law process; the purported Petition herein does not raise any constitutional issues for determination by this honourable court; the proceedings are incompetent and the court has no jurisdiction to hear it; the petitioner herein is using the constitutional court to determine issues of fact that are within the province and competence of the trial court; and that the Constitutional Court is not the forum to conduct a mini-trial or pre-trial to determine whether there is sufficient evidence to charge the petitioner.

34. The 1st Respondent contended that it did not in any way instigate the headline story attributed to the *Daily Nation* of 11th February 2014 or any other newspaper or media report and that the media report or story on the matter cannot be a ground for stopping the 1st Respondent from executing its mandate.

35. To the 1st Respondent, the granting of the orders sought will be tantamount to fettering the 1st Respondent ion the execution of its legal mandate.

The 2nd Respondents' Case

36. The 2nd Respondent's case on the other hand was that on 26th July, 2013, it received a letter of complaint dated 25th July, 2013 from **Messrs Gitonga Mureithi & Co. Advocates** which referred to Tender No. CBK/46/2011-2012, Tender for Supply, Delivery, Installation Commissioning of an Integrated Security Management System for the Central Bank of Kenya (CBK) and in which the advocates complained among other things, that the decision of the Central Bank in the said tender was not only irregular but was also tainted with procedural impropriety.

37. Pursuant thereto, the 2nd Respondent wrote to the Ethics and Anti-Corruption Authority (EACC) requesting that the EACC cause investigations to be conducted on the said complaint pursuant to the EACC's constitutional and legal mandate and thereafter to forward its report and recommendation to the 2nd Respondent in accordance with the law. The EACC acknowledged receipt of the said letter and confirmed that it was already investigating the matter.

38. Upon completion of investigations, the EACC forwarded the duplicate inquiry file together with its report and recommendations, pursuant to Section 35 of the ***Anti-Corruption and Economic Crimes Act***, No. 3 of 2003 as read with Section 11(1)(d) of the ***Ethics and Anti-Corruption Commission Act***, No. 22 of 2011, to the 2nd Respondent in which report the EACC recommended that the Petitioner herein be charged with the following offences under the ***Anti-Corruption and Economic Crimes Act*** (ACECA); namely:-

i. Wilful failure to comply with the law relating to procurement contrary to Section 45(2)(5) as read with Section 48 of ACECA, and

ii. Attempt to commit an offence involving corruption to Section 47A(1) of ACECA.

39. That upon receipt of the EACC Report stated above, the 2nd Respondent perused and thoroughly reviewed the Report, the Statements and Documentary Exhibits contained in the Duplicate Inquiry File and concluded that there was sufficient evidence establishing criminal culpability on the part of the Petitioner herein for the offence of Abuse of Office contrary to Section 46 as read with Section 48(1) of ACECA and in arriving at the conclusion, the 2nd Respondent considered and took into account the following facts, among others, as is disclosed by the evidence in the file, namely:-

(a) There is irrefutable evidence that the Tender Committee of the Central Bank of Kenya met on 26th September, 2012 at its 143rd meeting at which meeting, the Tender Committee terminated the tender relating to the Delivery, Installation, Testing and Commissioning of an Integrated Security Management System for the Central Bank of Kenya.

(b) The Petitioner herein, being the Accounting Officer of the Procuring Entity (CBK) was fully aware of and was well briefed by the Tender Committee regarding the Tender Committee's termination of the tender.

(c) In accordance with Sections 36 and 93 of the ***Public Procurement and Disposal Act***, 2005, the decision of the Tender Committee to terminate procurement proceedings is not subject to review. Therefore, the Public Procurement Appeals and Review Board, in assuming jurisdiction in application No. 65 of 2012 and making an order awarding the tender to a specific bidder when the tendering process had earlier been legally terminated by the Tender Committee, acted *ultra vires* its powers and in fragrant violation of Sections 36(6) and 93(2) of the PPDA.

(d) Earlier, on 8th October, 2012, when the tenders were being evaluated, Horsebridge Networks System (E.A) Ltd, one of the bidders, lodged a review application before the Public Procurement Advisory Review Board (hereinafter PPARB) challenging the decision of the Tender Committee in the evaluation process. Notably, at the time Horsebridge Networks Ltd lodged its review, there had been no formal communication to any of the bidders. The documents annexed in support of the review, there had been no formal communication to any of the bidders. The documents annexed in support of the review application were thus obtained in breach of the law.

(e) After the PPARB ruling referred to in paragraph (c) above, the petitioner received unanimous, considered and well-reasoned advice from the Central Bank's own legal Services Division, the Bank's external lawyers Messrs Ngatia & Associates and senior Bank officials recommending that the Central Bank of Kenya should challenge the Ruling of the PPARB before the High Court of Kenya.

(f) The Petitioner wilfully ignored the said advice and, after expiry of the 14 days period allowed under Section 100(1) of the PPDA for appeal, eventually made the decision not to appeal the ruling.

(g) Even after the period of appeal had expired, the petitioner still wrote to the Central Bank's external lawyers on 26th February, 2012, requesting for advice on the way forward. On the same date, and without waiting for the Bank's external lawyer's reply, the petitioner instructed his subordinates to issue letters to all bidders informing them of the decision to award the tender to Horsebridge Networks E.A and inviting Horsebridge Networks Ltd for negotiations.

(h) In reply to the petitioner's request for a legal opinion, the external lawyers, in a letter dated 27th February 2013, reiterated their earlier legal opinion and implored the petitioner to make a final decision to invoke the court process.

(i) After soliciting for and receiving the numerous opinions referred to above, the petitioner eventually pronounced that all such opinions were, after all, not for the purpose of appealing against the PPARB ruling but for the petitioner "*to be sure the line we take was appropriate*" and further that the legal advice did not add up, and declined to follow it.

40. According to the 2nd Respondent, the legal effect of the CBK's failure to appeal the ruling of the PPARB in Application No. 65 of 2012 was that the PPARB decision became final and binding (Section 100 (1) of PPDA) and that any party disobeying the same would be in breach of the PPDA and any action by that party would be null and void. Thus as matters stand, Horsebridge Ltd has in its favour an award by PPARB which is final and binding on the parties because the Accounting officer who is the petitioner herein did not approve the sound, well-reasoned and unanimous recommendations of lawyers and officers to challenge the PPARB decision in the High Court.

41. It was therefore the 2nd Respondent's case that the benefit now accruing to Horsebridge Ltd was conferred upon it by the wilful and deliberate refusal by the petitioner to accept the unanimous and well-reasoned advice given to the petitioner by CBK external lawyers, CBK's own Legal Services Division and by other officials of the Bank including the Deputy Governor and that the 2nd Respondent was satisfied based on the evidence above, that the petitioner has improperly and unlawfully conferred a benefit to Horsebridge Networks Ltd in terms of Section 46 of the ACECA and being so satisfied, the DPP directed the EACC to charge the petitioner with the office of abuse of office contrary to Section 46 as read with Section 48 (1) ACECA.

42. That the 2nd Respondent's decision and direction to charge the petitioner was based solely on the sufficiency of evidence and was not actuated by any other extraneous considerations. Further, the decision by the 2nd Respondent to charge he petitioner does not in any way violate any of the petitioner's fundamental freedoms or rights as alleged by the petitioner or at all.

<u>Petitioner's Submissions</u>

43. It was submitted based on Christian, Islamic and historical records that to condemn an innocent person by public acclamation is deeply rooted in antiquity. However currently it is deemed by the World that the biggest offences are crimes against humanity, terrorism, drug and human trafficking, piracy and corruption and that Kenyans have decided to cherry-pick corruption as its own bogeyman to end careers or settle scores with people they don't like. It was submitted that the accusations against the Petitioner is a classic example of the false hysteria created by the 1st and 2nd Respondents.

44. It was submitted that the Respondents have failed to prove or disclose or discharge the role of the Petitioner in the tender outcome, that Horsebridge has been conferred any benefit, that the Petitioner indeed requested for or received advice as alleged to appeal against the decision of the PPARB and the complainant.

45. According to **Mr Kipkorir**, learned counsel for the Petitioner, as no contract had been entered into by the CBK, no money had been paid and no money had been lost. According to learned counsel, it seems that the submissions contained more evidence than the affidavit which amounted to adducing evidence from the Bar and it was alleged that the tender to Horsebridge was way above the budgeted tender n allegation not contained in the affidavit.

46. It was contended that in this case the media was being used by the 1st and 2nd Respondents to destroy careers.

47. It was submitted that CBK is established under Article 232 of the Constitution and the CBK Act hence it is not supposed to be directed by anyone as it is run by a Board of Directors with the Governor being just a CEO. Under the Act, it can only incur expenditure budgeted for hence the issue of the tender being way above the budget is difficult to understand.

48. According to learned counsel, procurement is undertaken under the PPDA which sets out the entire law relating to public procurement and in section 26 it reiterates the same policy of non-exceeding its budget and under section 27 there is a need to comply with the Act. The same Act established the PPARB and in all matters of procurement, the parties must appeal. According to him, it is contended that the Petitioner did not appeal and wondered when the failure to appeal became an offence in this country. Decisions having been made by PPARB one being on 4th January, 2013 yet the letter that triggered the investigations was in July 2013, 6 months later.

49. It was contended that the PPDA is clear on the role of the CEO that he is not involved in the tender since there is a tender and evaluation committee. It was submitted that both the ECC and the DPP being offices established by the Constitution are enjoined to comply with the Constitution and in particular Articles 10, Chapter 15, Articles 248-254, and Article 156 thereof.

50. It was submitted that both the EACC and the DPP were discriminating against the Petitioner contrary to Article 27 of the Constitution since the CBK is ran by a Board of Governors and if any offence was committed all the Governors and Directors ought to have been charged as well as Committee Members of the Tender Committee.

51. It was submitted that the intention to charge the Petitioner with an offence under section 22(5) is an abuse of the process since the same does not exist while no benefit has been conferred upon the said Horsebridge to warrant a charge under section 46.

52. This court was urged to expand the bounds of constitutional interpretation so as to hold that before a person is taken to court he ought to know the nature of the offence the prosecution intend to charge him with and the evidence intended to be adduced and the witnesses intended to be called.

53. It was contended that there can be no offence in complying with the provisions of the PPDA and Regulations. It was contended that whereas the Constitution, the EACC to proceed on own motion or on a complaint made by a Kenyan, in the instant case it is alleged that the complaint was by intelligence source which in learned counsel's view is not the same thing as a Kenyan.

54. In support of the submissions the Petitioner relied on a number of decisions.

1st Respondent's Submissions

55. On behalf of the 1st Respondent, it was submitted that since under Article 252(1)(a) of the Constitution each Commission and each holder of an Independent Office is empowered to conduct investigations on own initiative or on a complaint made by a member of the public, the 1st Respondent had the mandate to conducting investigation the subject of this petition whether *suo moto* or on receipt of a complaint from any member of the public. It was therefore submitted that the investigations of the 1st Respondent were commenced and undertaken in accordance with statutory provisions.

56. On completion of its investigations the 1st Respondent pursuant to section 35 of the ***Anti-Corruption and Economic Crimes Act***, 2003 as read with Section 11(1)(d) of the ***Ethics and Anti-Corruption Commission Act***, 2011 prepared and forwarded its report to the 2nd Respondent in which it made recommendations based on the material evidence and information obtained in the course of the investigations. It was submitted that the 2nd Respondent thereafter acted in accordance with the powers conferred upon him under Article 157 of the Constitution.

57. According to the 1st Respondent a challenge to the competence of the charges facing the ex parte applicant or the sufficiency or otherwise of the evidence that the prosecution intends to rely on in support of the charges can be ventilated and resolved before the trial court which is sufficiently empowered under the provisions of section 89(5) of the ***Criminal Procedure Code*** to determine that issue and in support of this submission, **Meixner & Another vs. Attorney General [2005] 2 KLR 189** and **Joshua Kulei vs. Republic and 9 interested parties Nairobi HC Pet. No. 66 of 2012** were relied upon.

58. Similarly the issue of whether the Petitioner was involved in the tender process is a defence that the petitioner ought to raise before the trial court and irrespective of whether or not he was involved in the tender process, he is the accounting officer bound to ensure that the procuring entity, the CBK, complies with the procurement law and regulations.

59. It was contended that it would be shown that despite being aware of the termination of the tender by the Tender Committee, the Petitioner failed to communicate the same to the Public Oversight Authority as provided under section 36(7)A of the PPDA and failed to bring that fact to the attention of the Review Board.

60. According to the 1st Respondent's submissions whereas the CBK had budgeted for the ISMIS in the sum of Kshs 800 million the Horsebridge bid was for the sum of Kshs 1.2 billion contrary to section 13(1) which prohibits the Governor from incurring expenditure not approved by the Board.

61. It was submitted that contrary to legal advice to appeal against the decision of the Review Board, the Petitioner filed to instruct the CBK's lawyers to do so but instead instructed that the contract be awarded to Horsebridge. To the 1st Respondent the issues of non-involvement in the tender, that there is no proof that he received legal advice and that he conferred any benefit to Horsebridge are all matters that can be raised in the defence at the trial as they do not meet the threshold of mounting a petition to stop the charging or prosecution of a person and in support the case of **R vs. DPP, ex parte Kebilene & Other [2002] 2 AC 236** was relied upon.

62. Without setting out with reasonable degree the manner in which his rights have been infringed it was submitted based on **Anarita Karimi Njeru vs. Republic (No. 1) [1979] KLR 154, at 1275**, **Matiba vs. Attorney General HC Misc 66 of 1990**, **Cyprian Kubai vs. Stanley Kanyonga Mwenda Nairobi High Court Mis. Appl. No. 612 of 2002** and **Hon. James Ondicho Gesami vs. The Hon. Attorney General & 2 Others Nrb. HC Pet. No. 376 of 2011**, that the Petitioner's claim was defective.

63. It was submitted that the Petitioner has not demonstrated how the highlighting by the media of the decision to charge him amounts to a breach of his inherent dignity and in any case the 1st Respondent was not responsible for the said highlighting. It was further submitted that media publicity per se does not constitute violation of a party's right to hearing and in support the decisions of **Thuita Mwangi & 2 Others vs. EACC & 3 Others Nrb HC Pet No. 153 of 2013** consolidated with Pet. No. 369 of 2013, **William S K Ruto & Another vs. Attorney general HC Civil Suit No. 1192 of 2005**, **Kamlesh Pattni vs. AG Misc. App. No. 1296 of 1998 and Deepak Kamani vs. AG Civil Appeal No. 152 of 2009** were relied upon. In the 1st Respondents view there are adequate legal safeguards available to protect the Petitioner's Constitutional rights. .

64. On the allegation of discrimination it was submitted that in the absence of specific plea of discrimination the 1st Respondent could not respond thereto. However, based on **Justice Said Juma Chotembe and Edward Muriu Kamau and 4 Others Civil Appeal Appl. No. 95 of 2010**, it was submitted that the failure to charge all persons perceived by the accused person to be accomplices not a defence and does not affect criminal prosecution.

65. According to the petitioner this petition is just a delaying tactic and on behalf of the 1st Respondent, **Mr Ruto** urged the Court to dismiss the petition.

2nd Respondent's Case

66. On the part of the 2nd Respondent, it was submitted while tracing the history of the events leading to the award of the tender to Horsebridge by the Petitioner that whereas the Petitioner was aware of the decision by the Tender Committee to terminate the tender, this fact was never brought to the attention of the Review Board which would have thereby been deprived of the jurisdiction to entertain the review. Thereafter the legal advice of the in house legal advisers to appeal the decision of the Review Board was ignored thereby rendering that decision final and binding on the parties.

67. It was therefore submitted that the foregoing showed that a benefit was conferred to Horsebridge by wilful and deliberate refusal by the Governor to accept the unanimous and well-reasoned advice given to him by the CBK external lawyers; CBK's own Legal Services Division and other officials of the Bank, including the Deputy Governor, that the decision of the Board be challenged in the High Court.

68. It was submitted that the Courts ought not to usurp the Constitutional mandate of the DPP conferred by Article 157 of the Constitution and reliance was placed on **Kenya Commercial Bank Ltd & 2 Others vs. Commissioner of Police and Another Nrb Petition No. 218 of 2011 [2013] eKLR**.

69. Relying on **George Joshua Okungu and Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi and Another [2014] eKLR**, **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, Meixner & Another vs. Attorney General [2005] 2 KLR 189, Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, and Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR,** it was submitted that the Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and further reliance was placed on **Koinange vs. Attorney General and Others [2007] 2 EA 256.**

70. According to the 2nd Respondent, the prayers sought in the petition for determination require the court to analyse and examine facts and evidence on the basis of which guilt, innocence or otherwise of the petitioner shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter is the trial court.

71. Apart from the foregoing submissions the 1st Respondent associated itself with the submissions made by the 1st Respondent.

3rd and 4th Respondent's Submissions

72. As for the 3rd and 4th Respondent, it was submitted that the 2nd respondent acted within his mandate. Similarly the 4th respondent acted within the internationally recognised criteria.

Determinations

73. I have considered the issues raised both in support of and in opposition to the Petition herein as well as the submissions made and authorities cited.

74. However, first to the principles which guide the decision whether or not to grant orders prohibiting the commencement or continuation of a criminal trial process.

75. The starting point is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it is agreed, is not without more a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the

achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

76. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

> **"........the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

77. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

> **"The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."**

78. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta....The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer..."**

79. The Court proceeded:

“In the instant case it is... alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit... ...[W]here the prosecution is an abuse of the process of court...there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances...where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed”.

80. The Court however was of the view that:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

81. In **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help

individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is...to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process..”

82. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

83. In the said case, the Court expressed itself inter alia as follows:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all.....Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries......Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters.......”

84. The Court continued:

“The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious.......In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual’s freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed.......A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay.... A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence....A criminal prosecution that does not accord with an individual’s freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial

court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights.....In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

85. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

86. It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. However as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

87. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256,** the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant.

88. As was stated in the case of **Githunguri vs. Republic KLR [1986] 1:**

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are

speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

89. In this case, **Mr Kipkorir**, learned counsel for the Petitioner opened his submissions by submitting that to condemn an innocent person by public acclamation is deeply rooted in antiquity and that in the time of Jesus, once accused of blasphemy for men and prostitution for women, meant instant death penalty and that the public only needed to call two witnesses whose evidence was even dubious after which the man or woman was crucified or stoned to death. At the dawn of the Islamic religion, to be called an apostate invited instant death penalty while in the Middle Ages of Europe, to be called a witch attracted public opprobrium and death penalty. Similarly in the 1950's America, to be called a communist meant the end of one's career. These offences, it was submitted have been replaced in modern age with crimes against humanity, terrorism, drug and human trafficking, piracy and one which Kenya relishes most, corruption.

90. This Court appreciates the fact that in certain cases the contention by the Petitioner that criminal proceedings may be commenced with the aim of destroying people's careers or for the purposes of witch hunting is not altogether remote. Where the Court is convinced that that is the motive, the Court will not hesitate to bring such misconceived proceedings to an end. In **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** it was held that:

"this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

91. However, as was held in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) for the Court to bring to a halt criminal proceedings based on witch-hunting, it has to be shown that the predominant motive is that of witch-hunting and simply not that witch-hunting is a collateral one. The Court must therefore strike a balance between the rights of an individual to a fair trial and the rights of the public to ensure that a crime reasonably suspected to have been committed is punished. As was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

"Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

92. This position was emphasised by **Hardie Boys, J** in **Martin vs. Tauranga District Court [1995] 2 LRC 788** where he held:

"The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently, guilty of a serious crime, is no

light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages."

93. As was held in held in **Kuria & 3 Others vs. Attorney General** (supra):

> "**the effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."**

94. I am not therefore convinced that there is such witch hunt on the part of the Respondents to justify the remedies sought.

95. It was contended that the decision to charge the Petitioner alone without the other officers of the CBK or the members of the Tender and Evaluation Committees was discriminatory. I agree with the Respondents that this ground was not expounded in details to enable the Court appreciate its magnitude. This Court appreciates the fact that the discretion on whom to prefer charges against is on the prosecuting authority. It is also within the discretion of the said Authority and it is perfectly in order for the Authority to call some of the accomplices in a criminal trial as prosecution witnesses. The weight of their evidence is of course subject to the law relating to accomplice evidence.

96. However as this Court held in **George Joshua Okungu and Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi and Another [2014] eKLR** (supra):

> **"Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the Petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the Petitioner and who have, with a view to being rendered incompetent as the Petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy, we hold, constitutes an unfair trial under Article 50 of the Constitution. "**

97. Here, unfortunately this ground was not sufficiently elaborated upon. For example it was not contended that the decision not to disclose the termination of the tender was collective or that the decision not to invoke the High Court's jurisdiction was a collective decision yet it is only the Petitioner who is being singled out to face the consequences of the collective decision as was the case in **Okungu's Case**. To the contrary, it is alleged that the Petitioner offered to shoulder the consequences of his decision.

98. The petitioner has also taken issue with the conduct of the Respondents in sneaking information to the media about the impending prosecution of the Petitioner. This Court deprecates the practice of using the media as a means of disclosing information about impending institution of criminal offences before such persons are afforded an opportunity to respond to the allegations levelled against them. Such conduct may well be construed as evidence of malice and where the Court is of the view that the facts disclosed do not

amount to a commission of an offence it may well be taken to be geared towards causing embarrassment rather than a genuine desire to punish a crime believed to have been committed. With respect to adverse publicity it was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69:**

> **"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."**

99. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

> **"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."**

100. As was held in **Jago vs. District Court (NSW) 106**:

> **"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

101. In other words adverse publicity *per se* does not warrant the interference with an otherwise *bona fide* criminal proceedings. However, it is a factor which together with others can influence the decision of the Court in deciding whether or not to terminate intended or ongoing criminal proceedings.

102. Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused adverse publicity notwithstanding. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless a Petitioner demonstrates that the circumstances of the impugned process render it impossible for the applicant to have a fair trial or that the intended criminal proceedings are a mere sham and merely meant to be an avenue for witch hunt and career damaging gimmick, the High Court ought not to interfere with the decision to commence criminal proceedings simply on the basis that the applicant's chances of being

acquitted are high. In other words a Judicial Review or a Constitutional Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

103. This Court was also urged to make a finding on the need to inform a person against whom criminal charges are intended to be preferred, of the intended charges, the nature of the evidence and the particulars of the witnesses. In my view ideally where a decision has been made to charge a person with a criminal offence, the prosecution ought to as soon as practicable avail to the person intended to be charged the particulars of the charges, the statements of the intended witnesses and unless the circumstances as such as to justify the protection of the witnesses, the particulars of the potential witnesses. This is meant to give the person intended to be charged adequate opportunity to prepare for the case. It ought to be remembered that all things being equal there is no bar to an accused person taking plea and the hearing commencing immediately thereafter, if there is no impediment to that course. Therefore the prosecution ought not to wait until the Court gives an order for them to avail the aforesaid material to an intended or an accused person. It must always be remembered that transparency is one of the national values and principles of governance enshrined under Article 10 of the Constitution. Section 4 of the ***Office of the Director of Public Prosecution Act*** enjoins that office in fulfilling its mandate to be guided by the Constitution and *inter alia* the principles of the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to serve the cause of justice, prevent abuse of the legal process and public interest and promotion of constitutionalism. The office cannot be said to be promoting public confidence in the integrity of the office when its activities and operations are shrouded in mystery and secrecy. I wish to associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

104. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by in **Koinange vs. Attorney General and Others** (supra):

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the**

following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

105. This Court has held in the past that law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.

106. In this case however, it is premature to hold that the Petitioner is unlikely to get an unfair trial or that his right to be furnished with the said material is likely to be violated since the criminal proceedings are yet to commence.

107. In this case, the Respondents' case was that petitioner who is the Governor of the Central Bank and hence the accounting officer wilfully failed to comply with the law relating to procurement procedures in relation to the Delivery, Installation, Testing and Commissioning of the system for the Central Bank of Kenya and or otherwise conferred or attempted to confer a benefit on one of the bidders, Horsebridge Network Systems E.A Limited by directing that the contract be given to the said bidder notwithstanding the termination. It contended the benefit now accruing to Horsebridge Ltd was conferred upon it by the wilful and deliberate refusal by the petitioner to accept the unanimous and well-reasoned advice given to the Petitioner by CBK external lawyers, CBK's own Legal Services Division and by other officials of the Bank including the Deputy Governor and that the Respondents were satisfied based on the evidence above, that the petitioner had improperly and unlawfully conferred a benefit to Horsebridge Networks Ltd in terms of Section 46 of the ACECA and being so satisfied, the DPP directed the EACC to charge the petitioner with the offence of abuse of office contrary to Section 46 as read with Section 48 (1) ACECA.

108. Section 46 of the ACECA provides that a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence. It is contended that by not disclosing to the Review Board that the tender had been terminated and therefore the said Board had no jurisdiction to entertain the Review lodged by Horsebridge, the said Board wrongfully entertained the Review. The Petitioner however contends that it did not participate in the tender proceedings. However the Respondents contend that the information relating to the termination was brought to the attention of the Petitioner but the Petitioner as the Accounting Officer chose not to act on it. It is contended that there is sufficient evidence to show that the Petitioner was appraised of the termination. It is not for this Court to find with finality that the position taken by the Respondents is correct. However, if the Petitioner ignored material placed before him and as a result a tender which had been terminated by the Tender Committee was given a lease of life as a result of the failure to act on the material before him, this Court cannot find at this stage that the facts do not disclose a commission of an offence. Under Article 201 of the Constitution one of the principles of all aspects of Public Finance is that public money shall be used in a prudent and responsible way and in my view one of the ways of ensuring this is achieved is by ensuring that procurement

procedures are adhered to. The Accounting Officer whose attention has been drawn to possible irresponsible use of Public Finance cannot simply watch sideways as Public Funds are being misused. Therefore if it is proved at the hearing that the Petitioner's failure to stop the tender from being wrongfully awarded was wilful and was geared towards conferring an undeserved benefit the Respondents may well have a case against the Petitioner.

109. Apart from that it is contended that even after the decision of the Review Board, several legal opinions were given to the Petitioner to challenge the said decision before the High Court which opinions the Petitioner declined to act upon. As a result thereof, the decision of the Review Board attained the status of finality. Whereas one cannot state with certainty that had the Petitioner acted on the said opinions the High Court would have reversed the Review Board, the failure to act on the said legal opinions if it led to a wrongful benefit been conferred upon Horsebridge may well form the basis of a case to be presented before the trial court. Whether that offence will succeed is another matter altogether. It may well be that the opinion to appeal came too late in the day or that such an opinion was misplaced. For the Court to embark on such an investigation, this Court would trespass on the jurisdiction of the trial court. The Petitioner however contends that those opinions were just opinions and he was not bound to give effect to them. That may be so. However this Court is not in a position to find that the Petitioner was justified in ignoring the said opinions, especially if by the time they were given, the Petitioner knew that the tender had been terminated and the affect of not appealing would have been to confer the benefit of a terminated tender on Horsebridge. In other words this Court is not in a position to state that the view taken by the Respondents that the failure to act on the said opinions had the effect of unlawfully conferring a benefit on Horsebridge, is clearly far-fetched.

110. Whereas I agree with the Petitioner's contention that compliance with the decision of the PPARB does not constitute an offence, here it is contended that the said decision would not have been arrived at had the issue of want of jurisdiction been brought to the attention of the Board in good time. As to whether this was true or whether the failure to do so was wilful is a matter for evidence to be placed before the trial court.

111. It was however contended that the CBK has not lost any money since the contract had not been signed. This argument clearly runs contrary to the provisions of section 100(1) of the PPDA that where there is no challenge made to the decision by the Review Board within 14 days the said decision would be final and binding. It does not require serious legal thinking to deduce that a final and binding decision confers benefit on the beneficiary of the said decision because that decision is capable of being given effect to by a Court of law.

112. This Court was urged and properly in my view and this view is supported by Article 20(3)(b) which enjoins this Court in applying a provision of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom, to expand the bounds of constitutional interpretation. Whereas that position is in principle correct, in widening the said bounds, the Court must be careful in ensuring that it does not in the process muzzle the other organs established by and under the Constitution. As was held in **Constitutional Petition Number 359 of 2013 <u>Diana KethiKilonzo vs. IEBC and 2 Others</u>** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

113. The Court's supervisory jurisdiction under the Constitution ought to be limited to ensuring that such bodies operate within the bounds of the Constitution and the law and that in carrying out their mandate the values and principles which underlie the principle of constitutionalism are adhered to. Once that is

done, such bodies ought to be allowed to carry on with their mandate and their decisions ought only to be revisited on appeal.

114. Having considered the material placed before this Court by the parties herein, it is my view and I so hold that this case does not meet the threshold for prohibiting the Respondents from carrying out their Constitutional mandate. I am not satisfied that the Petitioner's fundamental rights have been infringed are threatened with infringement by the actions contemplated by the Respondents.

Order

115. In the foregoing premises this Petition has no merit and fails. The same is hereby dismissed with costs to the Respondents.

116. I must express my gratitude to learned counsel for their in depth submissions which this Court found very helpful. If I have not referred to all of them specifically, it is not out of lack of appreciation for their industry.

Judgement read, signed and delivered in court this 17th day of November, 2014.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kipkorir for the Petitioner.

Mr Ruto for the 1st Respondent.

Mr Ashimosi for the 2nd Respondent.

Mr Kamunya for the 3rd and 4th Respondents.

Cc Patricia.