



**Omondi & another v Office of the Director of Public Prosecutions  
(Criminal Revision E012 of 2024) [2025] KEHC 2806 (KLR) (Anti-  
Corruption and Economic Crimes) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2806 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**CRIMINAL REVISION E012 OF 2024**

**BM MUSYOKI, J**

**MARCH 14, 2025**

**BETWEEN**

**NOAH OGANO OMONDI ..... 1<sup>ST</sup> APPLICANT**

**JOHN MWAURA NJEHIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an application for revision of ruling of the Chief Magistrate (Dr Victor Wakumile CM)  
at Milimani Anti-Corruption Court in its case number 25 of 2018 dated 26th September 2024)*

**RULING**

1. The applicants were on 16<sup>th</sup> July 2018 charged before the chief magistrate's court with two counts of conspiracy to commit an offence of economic crime contrary to section 47(3) as read together with Section 48 of the *Anti-Corruption and Economic Crimes Act*, Chapter 33 of the laws of Kenya and willful failure to comply with the law relating to procurement contrary to Section 45(2) as read together with Section 48 of the same *Act*. The particulars were that;

Count 1- on diverse dates between 12<sup>th</sup> April 2017 and 12<sup>th</sup> June 2018 at Kenya Power and Lighting Company Limited within Nairobi County in the Republic of Kenya jointly with others not before court conspired to commit an offence of economic crime namely, carelessly failing to comply with procedures and guidelines relating to procurement which led to the fraudulent payment of Kshs 159,195,364.41 (Kenya Shillings One Hundred and Fifty Nine Million One Hundred and Ninety Five Thousand Three Hundred and Sixty Four and Forty One Cents to companies that were unprocedurally prequalified for labour and transport services vide tender number KP1//9AA-2/OT/58/PJT/16-17.



Count 5- on diverse dates between 31<sup>st</sup> May 2017 and 18<sup>th</sup> December 2017 at Kenya Power and Lighting Company Limited within Nairobi County, in the Republic of Kenya, being members of the Tender Evaluation Committee for Labour and Transport tender No. KP1/9AA-2/OT/58/PJT/16-17, willfully failed to comply with section 80(2) of the Public Procurement and Asset Disposal Act, 2015 by failing to adhere to procedure and criteria set out in the tender documents.’

2. The trial court heard a total of 28 witnesses and on 26<sup>th</sup> September 2024 ruled that the all the accused persons had a case to answer. The applicants were aggrieved by the said ruling and consequently made the application dated 8<sup>th</sup> October 2024 asking this court for the following orders;
  - a. Spent.
  - b. The Honourable Court be pleased to review, vary, revise and/or set aside the ruling of Honourable Dr. Victor Wakumile, Chief Magistrate, delivered on 26<sup>th</sup> September 2024 in Milimani Anti-corruption case number 25 of 2018; *R vs Dr. Ken Tarus & 8 Others*.
  - c. The Honourable Court be pleased to make a finding that the respondent failed to make out a case against the applicants (the 4<sup>th</sup> and 6<sup>th</sup> accused persons) to warrant them being put on their defence and therefore proceed to acquit and/or discharge the applicants from the said charges based on the evidence before court.
  - d. Costs of this application be in favour of the applicants.
3. The application was supported by the affidavit of the 1<sup>st</sup> applicant who averred that he had authority of the 2<sup>nd</sup> applicant to represent him in the matter. The application consists of 16 grounds which appear on the face of the application. In support of the application, the applicants filed submissions dated 4<sup>th</sup> November 2024. Despite service of the application and my directions dated 14<sup>th</sup> October 2024, the respondent has chosen to remain silent on the application. It has neither filed any replying affidavit nor submissions. It also did not make appearance during the court proceedings.
4. The applicant has argued that the evidence produced before the trial court was not enough to make out a case against them to warrant them being placed on their defence. According to the applicants, the prosecution witnesses particularly PW28 (the investigations officer) and PW8 (the procurement expert) exonerated them from culpability on account of their testimony that the applicants as members of the tender evaluation committee were bound by clause 3.20.2 of the pre-qualification document which stipulated that the responsiveness of the submitted bids was to be assessed without reliance on extrinsic evidence. The applicants take position that they were bound by that clause and they could not have called for more evidence outside the procurement documents to authenticate the veracity of the documents submitted by various suppliers. They argue further that the expert report by the procurement expert (PW8) was done without the benefit of seeing some important documents and therefore the said report was unreliable.
5. The applicants argue further that the procurement regulations which were considered in the investigations came after the exercise which is the basis of the charges they are facing. They also contend that count 5 was based on wrong provision of the law in that it made reference to Section 80(2) instead of Section 95(1) of the Public Procurement and Disposal Act. They add that the prosecution witnesses confirmed that payments made in respect of the tender in question were commensurate to the measured work done so there was no money that was fraudulently paid out.
6. The powers of this court on revision are derived from Section 362 of the Criminal Procedure Code and Article 165(7) of the Constitution. The discretionary powers therefrom are wide and consequently, this



court has powers to relook into the evidence adduced by the prosecution in the lower court and the decision therein to satisfy itself that the decision of the trial court as considered together and alongside the applicable law is, lawful, legal, proper and correct. However, I hold the opinion that the High Court should be keen in exercising these powers to avoid a situation where it would be taking over or usurping the position and jurisdiction of the trial court especially where the decision being considered is not final in respect of the proceedings. The revision should be made in the clearest of the cases and avoid interfering with lawful exercise of discretion and jurisdiction of the trial court.

7. I have gone through the evidence especially the documentary exhibits the applicants have made reference to in their application. If I understand the applicants, they argue that their actions which are the basis of the charges they are facing were inevitable as their hands were tied by clause 3.20.2 of the procurement documents. The said clause as per prosecution exhibit 2 (the procurement document) states that;

KPLC will determine the responsiveness of each Tender. For purposes of this pre-qualification, a responsive Tender is one that conforms to all the requirements of the Evaluation. KPLC's determination of a Tender's responsiveness is to be based on the contents of the Tender itself without recourse to extrinsic evidence.'

8. The above argument seems to me as an admission by the applicants that they participated in the pre-qualification which is the subject of the charges and that they were not concerned with counter checking or seeking more information given by the tenderers. I take the position that public officers cannot hide behind standard documents to escape liability where an offence is said to have been committed. The explanation the applicants are giving this court as the reason for their innocence should form part of their defence before the trial court. I do not wish to say much about this argument as the same should be left to the trial court to determine.
9. On whether the charge should have been brought under Section 95(1) and not 80(2) of the Public Procurement and Disposal Act, the court takes cognizance of the legal position that a charge is not fatal just because the charge sheet makes reference to the wrong section of the law. This is an error that can be corrected by amendment even by the court's own motion. The applicants have not shown what prejudice that error would cause them in their defence. That is a want of form which I find curable. I am persuaded by the holding of Honourable Justice G.L. Nzioka in *James Mboya Ndonyi v Republic* (2012) KEHC 4981 (KLR) where she stated that;

The Provisions of Section 137 of the *Criminal Procedure Code*, requires inter alia, that, the statement of the offence, describing the offence shortly, and the particulars of the offence, both in the ordinary language, shall form the content of the charge sheet. A look at the charge sheet herein complies with these basic requirements, and I concur with the submissions of the Learned State Counsel and dismiss the Appellant's submission on the frame of the charge sheet. Even if, there were omissions, they are not such as would prejudice the Appellant's case. Section 137 of the *Criminal Procedure Code* prohibits objection in respect of the form or contents of the charge sheet on simple or technical grounds. I dismiss that ground of appeal.'

10. The third argument put forth by the applicants is that no money was lost from the pre-qualification and my answer to that is that the charges facing the applicants are not purely about the loss of money but conspiracy and failure to adhere to procurement laws. Both are intertwined and inseparable in determination of the culpability of the accused persons especially the fifth count.



11. The net result of the above analysis is that the application dated 8-10-2024 lacks merits and this court declines to revise or set aside the chief magistrate's ruling dated 26<sup>th</sup> September 2024.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Mr. Ochieng holding brief for Prof. Albert Muma for the applicant and Mr. Akula for the respondent

