



**Director of Public Prosecutions v Okendi & 5 others (Appeal E001 of 2021)
[2024] KEHC 9551 (KLR) (Anti-Corruption and Economic Crimes) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9551 (KLR)

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

APPEAL E001 OF 2021

F GIKONYO, J

JULY 19, 2024

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

WILLIAM NYABOLA OKENDI 1ST RESPONDENT

JOHN MUTURI 2ND RESPONDENT

FLORINA MWIKALI 3RD RESPONDENT

ZEKA WEKESA 4TH RESPONDENT

ANTHONY MUNYUI 5TH RESPONDENT

GEORGE MURIMI 6TH RESPONDENT

*(Being an appeal against the ruling of Hon F. Kombo (CM) delivered
on 08/02/2023 in Milimani Anti-Corruption Case No. 10 of 2016)*

JUDGMENT

Interlocutory appeal: dispositive ruling

1. The respondents were charged with five counts on willful failure to comply with the laws relating to procurement and abuse of office.
2. The prosecution called a total of 12 witnesses in support of its case. The trial court delivered its ruling on a case to answer in which he acquitted all the respondents of all the five counts.
3. Being dissatisfied with the decision of the trial court, the appellant has appealed to this court citing the following five grounds in the petition of appeal dated 20/02/2023, to wit, that, the trial court: -



- i. Failed to analyze the evidence tendered;
- ii. Disregarded the weight of the evidence'
- iii. Failed to consider submissions of the appellant;
- iv. Applied section 210 of the CPC mechanically against the public interest; and
- v. Relied on extraneous reasons in acquitting the respondents.

Evidence before the trial court

4. PW1-Alice Warugu Njage, program officer at NACADA. She joined the institution in 2009 and was attached to the CEO's office as a personal program assistant. She testified that under part 4 of the circular, a National Fund Management Committee (NFCM) was established to manage the alcoholic drinks control fund. The members of the committees were appointed by their various agencies. She sat in two meetings of the National Fund Management Committee (NFMC) and was a member of the technical evaluation committee. She stated that in the first meeting, she took down the minutes of the meeting held on 07/09/2012. During the said meeting the committee recommended the engagement of a fund management agency to oversee the funds. She stated that the 5th respondent was a procurement officer and a member of the evaluation committee but she did not remember whether his advice was sought in the procurement.
5. PW2- Franklin Mugambi Mwiricha was a monitoring and evaluation officer at NACADA. He testified that he chaired the technical evaluation committee and named the 5th respondent as one of the members and the secretary of the committee. He stated that the funds had been properly disbursed and did not see what would lead to this court process. He further stated that he was informed by EACC officers that the process was flawed. But according to him, the process was not flouted. He collaborated with PW1's evidence that there were wrangles at the organization.
6. PW3-Jackline Nyambura a legal officer. She testified that she was appointed as a member of the tender evaluation committee via a letter dated 3/1/2013. Her role was to guide the committee on the law relating to procurement. The role of the 5th respondent was a secretary to the committee. The 5th respondent was also to convene the meeting, present the committee with the proposal and terms of reference, and record the proceedings. The committee did not recommend any award but they did recommend that the tender committee use the best fit criteria.
7. PW4-Samuel Omwenga Makini, a finance officer. He was in charge of paying out the professional fees to the contracted firms. On cross-examination, he stated that he was surprised that the respondents were charged and according to him NACADA got value for money he paid to Ernst and Young for their services. He attributed the prosecution of the respondents to the squabbles at NACADA during that time.
8. PW5-Stephen Githinji Kimani, ICT assistant. He testified that he was not present during the meeting held on 21/1/2013 but his name appeared in the minutes. The 5th respondent was the secretary at the said meeting. The witness at the time of recording the statement at EACC confirmed that he was present at the meeting. He produced a letter written by him dated 16/6/2013(P EXH34) where he stated that he was present at the meeting. He recorded a further statement on 06/11/2015- 6 months after he had been suspended from NACADA stating that he was not present at the meeting. In his testimony, he stated that of the members present at the meeting he was the only one who could provide advice on ICT.



9. PW6 Dr. Charles Chore NZAI was a principal compliance officer at PPOA, deputizing the manager compliance department.
10. He testified that the authorities were invited to advise on whether the tendering process complied with procurement laws. He prepared the report whose findings implied that there had been breaches in awarding the tender based on the documents that were not supplied to him.
11. PW7-Laban Kalibia Gathungu. A partner leading public sector advisory services at Ernst and Young. He stated that Ernst and Young applied for and performed the contract tendered for above board without any hint or suggestion of impropriety from any of the respondents.
12. PW8-Perryl Njeri Kamau, manager at Deloitte Consulting Limited
13. PW9-Maurice Giatu Kamaderi, senior research officer at NACADA. He testified that he was appointed to the technical evaluation committee via a letter dated 3/1/2013. He stated that the committee's first meeting was on 04/1/2013 where they received tender opening minutes from Secretary Anthony Munyui, the 5th respondent. The minutes were dated 19/12/2012, signed by the 6th respondent, MM Mohamed, and the 5th respondent. The tender technical proposals from Ernst and Young, Price Water House Coopers (PWC), and Kenya Post Office Savings Bank. He thereafter took the court through the process they undertook in scoring and informed the court that the committee scored PWC tender proposal at 97%, E&Y 67%, and Kenya post bank saving 05. According to the witness, the committee did not make any recommendation on awarding to any bidder. The witness stated that the 5th respondent did not take part in scoring of the bids.
14. PW10- John Micheal Njenga Mututho, a chairman of NACADA board in 2015. He stated that the audit committee informed him that there were serious issues touching on the payment of Kshs. 99 million to civil societies. He wrote to EACC and PPOA to investigate. The procurement of the fund manager was in 2013, two years before the witness joined NACADA. The NACADA board was made up of non-employees of NACADA save for the 1st respondent (CEO) who acted as the secretary of the board. The witness confirmed that he was the complainant. He stated that the resolution to go to EACC was by the NACADA board though he did not produce a meeting of the said resolution. He also stated that he went to complain alone at EACC.
15. PW11 Jacob Oduor, a forensic document examiner at EACC. He testified that he analyzed the sample specimen signatures of the respondents against the signatures appearing in the minutes of the tender committee meeting held on 21/1/2013. His findings were that the signatures on the tender committee minutes were made by the same authors as those on the collected samples.
16. PW12-Patricia Chebet, an investigator at EACC. She joined EACC in 2015. She confirmed that Mr. Mututho who was the board chairman at NACADA was the complainant in the matter. In her investigations, she noted that the terms of reference were not in the standard tender document as required by section 29(4) of PPDA,2005. The method of procurement that was used was restricted tendering- a method that requires approval by the tender committee which was not done. The persons invited were not prequalified suppliers for NACADA. Regulations 54(3) require that at least 10 suppliers should have been invited. The threshold marks for the technical evaluation were not specified in the TOR and therefore a best-fit method was adopted in terms of clause 4.1.2 of the TOR. The tender opening minutes were signed on 19/12/2012 but the meeting was held on 19/12/2013. The tender committee was not properly constituted. No proof that financial evaluation took place and therefore the scores awarded had no basis. No inspection and acceptance committee, and no interim or completion certificates issued to show completion. However, during cross-examination, the witness



confirmed that she was not aware that regulation 17 had been repealed and as per 2013 regulations, the most important committee was the evaluation committee.

17. The witness could not confirm whether any money was lost. She stated that her scope was only that the procurement process was irregular. She also informed the court that the respondents did not influence the award of the tender. There was a fund management committee that was formed and they came up with the idea to procure a fund manager to manage funds. None of the respondents were part of the fund management committee. She did not find any problem with the tender evaluation. The problem was that the respondents failed to conduct a financial evaluation.
18. PW6-Dr. Charles Chore Nzai a principal compliance officer at the Public Procurement Oversight Authority (PPOA) testified that there was neither a procurement plan nor budget, there was also no requisition by use, the tender committee had not approved the restricted tendering method, there was non-compliance with the requirements of open tender, the evaluation process was wrong, the tender committee did not ascertain before the award and that the 1st respondent signed the contract with Ernst and Young before ensuring compliance with the relevant laws.

Directions of the court

19. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 13/02/2024. The 1st respondent's submissions are dated 25/03/2024. The 2nd and 4th respondents' submissions are dated 02/04/2024. The 3rd respondent's submissions are dated 25/03/2024. The 5th respondent's submissions are dated 23/02/2024. The 6th respondent's submissions are dated 02/04/2024.

Analysis And Determination

20. This being a first appeal, the duty of the court is to analyze and re-evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See Okeno –V- Republic (1972) EA 32 and Kiilu & Another –Vs- Republic (2005) 1KLR 174.

Issues for determination

21. Arising from the grounds of appeal, the record of the lower court, and the submissions by the respective advocates for the parties are the following issues: -
 - i. Whether the prosecution established a prima facie case against the respondents on all or some of the counts to warrant placing the respondents to their defense.

Prima facie case against the respondents on all or some of the counts

22. The appellant submitted that the prosecution established a prima facie case against the respondents. The appellant relied on Republic Vs Abdi Ibrahim Owl [2013] eKLR.
23. The 1st respondent submitted that the prosecution failed to discharge its duties as required under section 210 of the CPC, thereby leaving the trial court with no option but to discharge and acquit the 1st respondent.



Interlocutory appeal

24. This is an interlocutory appeal against a decision of the trial court which found that the appellants did not have a case to answer, thereby acquitting them. The decision is dispositive of the case and so the interlocutory appeal should be heard and determined.
25. This court will therefore, consider whether the prosecution established a prima facie case for the respondents to be placed on their defense.
26. The 1st respondent was charged with counts I and II on this charge. The 2nd, 3rd, 4th, 5th, and 6th respondents were accused of counts III, IV and V.

Situating responsibility

27. The appellant submitted that the trial court ought to have analyzed whether or not the procurement of Ernst and Young as a fund manager was properly done in accordance with the law. The appellant contends that there was no procurement plan, no requisition plan by the user, and no prescribed tender documents. The tender committee did not approve the restricted procurement method, the evaluation of the tenders was not properly done and the committee did not ascertain before the tender was awarded. The 1st respondent went ahead to award the contract to Ernst and Young. Therefore, according to the appellants, the entire procurement process was flawed. The appellant relied on Philip Nzaka Watu Vs Republic [2016] eKLR
28. The 1st respondent contends that the appellant failed to make a prima facie case that NACADA as an institution, budgeted for and procured a consultant for the management of the alcoholic drinks control fund. From the witness testimonies, the decision to procure a fund manager was made by the National Fund Management Committee and the said committee was not a department within NACADA but rather the members had been appointed from various intergovernmental ministries. The appellant failed to make a prima facie case that an inspection and acceptance committee was necessary for the procurement of the fund manager. The appellant failed to make a prima facie case that the 1st respondent abused his office to confer any benefit to any person with respect to the subject tender. The 1st respondent relied on Okeno vs. Republic [1972] EA 32, Peters V Sunday Post Ltd [1958] EA 424, Martin Makhakha V Republic [2019] eKLR criminal appeal no. 48 of 2017, Ramanlal Trambakhal Bhatt V R. 1957 EA at page 335, Sanjit Chaittal Vs the state [1985] 39 WLR 925, Republic V Robert Zippor Nzilu [2020] eKLR, section 45(2)(b) of the *anti-corruption and economic crimes act*, section 27(2) of the Procurement and Disposal Act, Black's law dictionary, ninth edition, 9168, at page 1737, MTG V Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189, Robert Onchiri Ogeto V Republic [2004] eKLR Criminal Appeal No. 1 of 2004, Republic V Director of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR.
29. These submissions bring the court to ponder the purport of Section 45(2)(b) of ACECA under which the respondents have been charged which provides as follows:
 - “(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—
 - (b) willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;”



30. The charges pertain to ‘an officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property’. The 1st respondent was alleged to have committed the offence of abuse of office, as well as willfully failing to comply with section 27(2) of the PPDA, 2005, and regulation 17 of the PDDR, 2006 by disregarding the threshold matrix referred thereto. The 2nd to 6th respondents were alleged to have committed the offence of willfully failing to comply with section 27(3) of the PPDA, 2005, and regulation 10(2)(a)(h) of the PDDR, 2006 by disregarding the threshold matrix referred thereto.
31. This court takes the view, responsibility of ensuring that procurement law and regulations thereto are adhered to, is central in the charges the respondents faced. The responsibility is statutory as well as constitutional under article 227 of *the Constitution*. PPDA should, thus, be injected with the constitutional imperatives, especially to ensure that: - ‘When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective’ (art. 227. (1) of *the Constitution*).
32. Section 27(2) & (3) of the PPDA provides for responsibility for complying with the Act by the public entity, its employees, member of the board or committee ‘with respect to each of its procurements’.
33. Therefore, properly situating the responsibility of ensuring procurement by a public entity comply with procurement law and regulations, is critical in a case as this, so as to assign criminal culpability.
34. Thus, there was absolute need for the appellant to establish the nexus between the National Fund Management Committee and NACADA to reinforce the proper procuring entity in this case and situating responsibility on the respondents. The evidence by the appellant did not make this connection or establish without doubt that NACADA was the PE, which would in law, make the respondents the persons responsible for ensuring the procurement complied with the procurement law and regulations.
35. PW12 was recorded as having stated that, there was a fund management committee that was formed and they came up with the idea to procure a fund manager to manage funds. None of the respondents were part of the fund management committee.
36. These statements by the investigator helped in creating obscurity rather than clarity of the basis for which the respondents should be held responsible for the procurement in question.
37. This court notes that, the 2nd and 4th respondents submitted that any reasonable court could not find members of a tender committee for actions done or supposed to be done by a tender evaluation committee.
38. Again, this submission shows, the need to establish through evidence, the breaches of responsibilities by the respective committees engaged in the procurement in question.
39. In addition, PW12, an investigator with EACC made statements which demolished their otherwise robust case against the respondents.
40. Although the witness was clear about the scope of the case; that the procurement process was irregular; she also informed the court that the respondents did not influence the award of the tender. She also stated that, she did not find any problem with the tender evaluation. She was of the opinion that, the problem was that the respondents failed to conduct a financial evaluation.
41. Although the 3rd respondent exaggerated that the investigations were poor, the foot on which the responsibility of the respondents would have rested to ensure the procurement complied with the law on procurement was made immobile due to serious evidentiary fracture.



42. All other charges including abuse of office, choice and selection of procurement method, lack of technical evaluation, absence of completion certificate, will attach upon the person or committee bearing responsibility of ensuring that the particular procurement complied with the procurement law and regulations.
43. The offences charged are very serious as they relate to financial leakages of public funds. They may have been committed by the appellants. Nevertheless, the law requires any doubt or obscurity in criminal cases to be resolved in favour of the accused.
44. The record shows that, the trial court considered the evidence and arguments presented. It made specific findings on the issues raised in the trial.
45. Having analyzed the evidence in respect of the charges, a major lapse on material aspects of the charges-situating responsibility for the procurement in question- demolished the prosecution's case. The lapses denied the case prima facie threshold for case to answer.
46. Without further evidence, it is unlikely the court would convict the appellants on the evidence adduced.
47. The end result is that the appeal is dismissed.
48. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH DAY OF JULY, 2024.

F. GIKONYO M

JUDGE

In The Presence of: -

Mwaseru for DPP

Agwara for 1st respondent

Macharia for 3rd respondent

Ms. Gikonyo for Thuita for 2nd respondent

Raymond C/A

