



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 90 OF 2018**

**AYUB TUVAKA CHINA .....2<sup>ND</sup> APPELLANT**

**HOWARD LUGADILU .....3<sup>RD</sup> APPELLANT**

**OSCAR ONYANGO OJWANG .....4<sup>TH</sup> APPELLANT**

**ARLINGTON SHIKUKU OMUSHENI.....5<sup>TH</sup> APPELLANT**

**REUBEN CHERUIYOT RUTO ..... 8<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence in Kakamega CMC. EACC Criminal Case No. 1 of 2017 by B. Ochieng, CM, delivered on 27/6/2018)

**JUDGMENT**

1. The appellants were convicted by the lower court in count 4 of the offence of wilful failure to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts contrary to section 45 (2) (b) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act, 2003. In count 5 they were convicted of the offence of wilful failure to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts contrary to section 45 (2) (b) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act, 2003. In each of the counts, each of them was sentenced to a fine of Ksh. 300,000/= in default to serve one and a half years imprisonment. The period of imprisonment in default of payment of the fine was ordered to run consecutively. The appellants were aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are that:-

- (i) The judgment passed by the trial court is against the law, incorrect and improbable.
- (ii) The learned trial magistrate grossly erred in ignoring the contradictions of the prosecution witnesses and in particular on whether or not members of the Inspection and Acceptance Committee conducted a market survey.
- (iii) The learned trial magistrate grossly erred in basing his decision to convict the appellants on the pronouncement of a valuation report prepared and uttered by an unqualified person and hence gave force to as documentary evidence, a document that is of no evidentiary value.
- (iv) The learned trial magistrate grossly erred in arriving at his verdict based on facts that were not part of the facts to the charges read to the appellant and which facts therefore they could not be called upon to answer to.
- (v) The learned trial magistrate grossly erred by giving weightage to the procedures of direct procurement while the charges the appellants were called upon to answer to had no relation to direct procurement. The learned trial magistrate therefore misdirected himself in the analysis of the fact before him by considering facts that were irrelevant and extraneous to the case before him.
- (vi) .....
- (vii) The learned trial magistrate erred in failing to read and consider the law as a whole and erred in holding that the findings of the

evaluation committee was legally and absolutely binding and without room for discretion on the part of the appellants and particularly the procurement unit.

(viii) The learned trial magistrate grossly erred in seeming to hold that the evaluation committee constitutes the procurement unit in this case, leading to the wrong holding that the “**procurement unit**” was of the opinion that the prices were too high.

(ix) The learned trial magistrate grossly misdirected himself in holding that the items or equipment were ordinarily available in the market thereby contradicting his own finding that the equipment had to be prefabricated.

(x) The learned trial magistrate should have taken into account the evidence in totality while passing judgment.

(xi) The learned trial magistrate erred at law in failing completely to address the constitutionality of the arrest and prosecution of the Appellants by failing to appreciate the fact that the investigations having been conducted during the absence of a duly constituted Commission were in breach of constitutional provisions which rendered both the investigations as well as the resultant recommendation to prosecute a nullity.

(xii) The learned trial magistrate erred at law in convicting the appellants on charges brought to court via a fatally defective charge sheet.

(xiii) The learned trial magistrate grossly erred in failing to appreciate that in the entire hearing, no evidence was adduced of criminal intent (as imported by the word ‘**wilfully**’ in the charges) by any of the appellants and hence imputed guilt without proof.

(xiv) The learned trial magistrate erred in law in convicting the 2<sup>nd</sup> to 8<sup>th</sup> Appellants on account ‘V’ on a charge of awarding a tender without evaluation while the prosecution case was that there was evaluation findings that were not adhered to.

(xv) The learned trial magistrate grossly erred in seeming to hold that members of the tender committee are by dint of that role Managerial Officers as envisioned under **Section 45 (2) (b) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003**.

(xvi) The learned trial magistrate erred in law and in fact in placing reliance while convicting the Appellants on case law that were civil in nature thereby in effect convicting on standards based on proof to “**a balance of probability**” rather than “**beyond reasonable doubt**”.

(xvii) The learned trial magistrate failed to take into account the evidence in totality, mitigating circumstance, and elimination of extraneous considerations and pressures while passing the sentence.

2. The State on the other hand was aggrieved by the sentence imposed on the appellants and counter-appealed against the sentence. The grounds of the counter-appeal are that:-

(i) .....

(ii) The trial magistrate erred by failing to consider or sufficiently consider the Appellants’ lack of remorse.

(iii) The trial magistrate erred by failing to impose of the mandatory additional fines under section 48 (1) (b) of the Anti-Corruption and Economic Crimes Act, 2003.

(iv) The trial magistrate erred by failing to appreciate the imposition of the mandatory additional fines of Ksh. 1,859,760/= which was to be imposed as a result of the loss (which is Ksh. 929,880/=) suffered by the state as stipulated in section 48 (1) (b) of the Anti-Corruption and Economic Crimes Act, 2003 and which must be equal to two times the amount of the benefit or loss described as stipulated in section 48 (2) (a) of the Anti-Corruption and Economic Crimes Act, 2003.

3. The appeal was canvassed by way of written submissions by the learned counsel for the appellants, **Mr. Malalah** and the learned State prosecution counsel, **Mr. P. O. Juma**.

4. The particulars of the charge against the appellants in count 4 were that on or about the 10<sup>th</sup> January, 2014 at the Bungoma County Offices in Bungoma County in the Republic of Kenya being the County Tender Committee wilfully failed to comply with the law relating to procurement, to wit, Section 30 (3) of the Public Procurement and Disposal Act, 2005 and Regulations 10 (2) (e), 61 (2) and (3) of the Public Procurement and Disposal Regulations, 2006 by awarding the procurement of nine wheelbarrows to Jagla Enterprises at a unit price of Ksh. 109,320/= which was well above the real market price.

5. The particulars of the charge in count 5 were that on or about the 10<sup>th</sup> January, 2014 at the Bungoma County Offices in Bungoma County in the Republic of Kenya being the County Tender Committee wilfully failed to comply with the law relating to procurement, by awarding the contract for supply of nine wheelbarrows to Jagla Enterprises without a proper evaluation having been conducted contrary to the requirements of Regulation 10 (2) (a) of the Public Procurement and Disposal Regulations 2006.

#### **Case for prosecution –**

6. The prosecution case was that the appellants were employees of Bungoma County Government. That on the 18<sup>th</sup> June, 2013 they were

appointed to be members of the County Tender Board. The 3<sup>rd</sup> appellant was the Chairman of the board while the 4<sup>th</sup> appellant was the Deputy Chair. The 2<sup>nd</sup> appellant was the Secretary to the board. The 5<sup>th</sup> and 7<sup>th</sup> appellants were members to the board. For the record, it is to be noted that the 1<sup>st</sup> and the 7<sup>th</sup> appellants withdrew their appeals. The 6<sup>th</sup> accused did not appear in court during the trial at the lower court.

7. That in the year 2013 the veterinary department was budgeted to buy wheelbarrows and steel hooks to be used at their slaughter houses. On the 22/10/2013 the officer in charge of veterinary services PW2 through the instructions of the County's Director of veterinary services, Dr. Wangwe PW1, prepared a requisition order for 36 steel hooks and 9 stainless wheelbarrows. On the 28/11/2013, a procurement officer, Mary Nekesa Marumba PW14 prepared a quotation for said items. She invited 4 bidders. The quotations were opened on 13/12/2013. Four suppliers had tendered for the bids, i.e. Economic Crescent, Biogauge (K) Ltd, Chemyati Enterprises and Jagla Enterprises. On the 7/1/2014 an Evaluation Committee made up of John Wafula PW6 as the chairman and 4 other members – Jedida Nasimiyu Kulundu (PW7), Francis Simiyu (PW8), Pascal Wanjala (PW9) and Mwalati Kalowango PW11 - was appointed. The Committee sat on 8/1/2014 to evaluate the 4 bids. The bids for stainless steel wheelbarrows per unit were as follows:-

Economic Crescent - Ksh. 140,000/=

Biogauge (K) Limited - Ksh. 136,700/=

Chemyati Enterprises - Ksh. 122,000/=

Jagla Enterprises - Ksh. 109,320/=

8. On deliberating on the bids, the Committee decided that the prices quoted were above the market value and recommended that fresh quotations be floated to new suppliers. The Committee prepared its report and submitted it to the secretary to the Tendering Committee. The Tendering Committee sat on 10/1/2014. On learning of the recommendations of the Evaluation Committee, the Tender Committee wrote to Dr. Wangwe PW1 asking him to conduct a market survey on the cost of the wheelbarrows. Dr. Wangwe wrote back a letter stating that from his experience the cost of such wheelbarrows ranged between Ksh. 63,000/= to Ksh. 117,000/=. The Tender Committee thereupon ignored the recommendations of the Evaluation Committee and awarded the tender for the wheelbarrows to Jagla Enterprises at a unit price of Ksh. 109,880/=. The secretary to the Procurement Committee Mercy Nekesa PW14 prepared Minutes of the Committee to that end. The Minutes were approved on 22/1/2014. She produced the minutes as exhibit, PEx. 14.

9. Subsequently Jagla Enterprises delivered the 9 wheelbarrows. They were inspected by the Inspection and Acceptance Committee who included Dr. Wakhungu PW2 and a meat inspector Ernest Wanjala PW5. The wheelbarrows were received by the in-charge stores, Jane Naliaka Simiyu PW4. Thereafter payment of Ksh. 983,880/= was made to Jagla Enterprises.

10. Later issues were raised on the cost of the 9 wheelbarrows. The matter was investigated by Wycliffe Serengo PW15 of Ethics and Anti-Corruption Commission (EACC) Kisumu office. He obtained all the relevant documents. He interviewed witnesses. He established that the procurement of the wheelbarrows did not comply with procurement procedure. The wheelbarrows were valued by a valuer working with the EACC, James Githinji PW10 who established that they were made of galvanized steel coated with stainless steel. He found that each wheelbarrow weighed 35 Kg. That the legs were steel sections and chassis was steel welded to the main frame. He made a finding that they were locally assembled without certification of Kenya Bureau of Standards as envisaged in standard KS153 2013 that guides the assembly of wheelbarrows. He found that the standard wheelbarrow has a weight of 22Kg and cost of around Ksh. 3,000/=. Taking into consideration the extra weight of the subject wheelbarrows and modification, he valued each of them at Ksh. 6,000/=. The total value for the 9 of them was Ksh. 54,000/=. He prepared a report to that end, PEx. 13.

11. The investigation documents procured by the investigating officer (PW 15) were reviewed by a compliance officer working with the Public Procurement Regulatory Authority, Peter Wangai (PW12) to ascertain whether the procurement of the wheelbarrows complied with regulations. He found that the requisition did not give a description of the wheelbarrows and the estimated cost as required by the law. That the Tender Committee did not carry out a market survey as required before awarding the tender and ignored the recommendation of the Evaluation Committee. He concluded that procurement laws were not followed. He prepared a report, PEx. 15.

12. The investigating officer forwarded the file to the office of the Director of Public Prosecutions. The appellants were charged accordingly.

#### **Defence Evidence –**

13. When put to their defence, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants gave unsworn evidence. The 5<sup>th</sup> and 8<sup>th</sup> appellants opted to remain silent.

14. The 2<sup>nd</sup> appellant stated in his defence that he was the secretary to the Tender Committee. That they followed the law and awarded the tender to the lowest bidder. That the Evaluation report did not comply with the requirements of the law as it did not capture the opening minutes, entry of result of preliminary exam, reasons why the proposals were rejected, names of evaluators, scores, an order to call proposals, summary of strength/weakness of each proposal and total scores. However that the Tender Committee is not bound by the recommendations of the Evaluation Committee. That it was not possible for them to raise new bids as they had exhausted the list of prequalified bidders in the first process. That they contacted the user department who guided them on the price. That after awarding the tender the goods were supplied and accepted by the user department.

15. The 2<sup>nd</sup> appellant further stated that they did not go by the recommendations of the Evaluation Committee as their recommendation was not backed by any document. That the stainless steel wheelbarrows bid for were not readily stocked in local shops. Therefore that the prevailing market price did not apply in the case. That the prosecution witnesses went for different items and not stainless steel. He admitted in cross-examination that they did not conduct a market survey.

16. The 3<sup>rd</sup> appellant stated that he was at the time working with Bungoma County as the in charge of Municipality Treasury. He was also the chair of the Tender Committee. That at the time he had no experience on procurement matters but that there was a technical person to advise them on issues to do with tendering. That his role as the chairman was to control the meeting and pronounce recommendations to the members.

17. That they did receive a report from the Evaluation Committee stating that the prices offered for stainless steel wheelbarrows were high. His committee found that there was no reason given on how that decision was reached. There was no document to indicate that they had conducted a market survey. His committee wrote to Dr. Wangwe PW1 of the user department asking him to conduct a market survey. PW1 wrote back stating that the price should range between Ksh. 60,000/= to 100,000/=. They were not bound by the recommendation of the Evaluation Committee. The specified wheelbarrows could not be readily found in the market. For this reason they did not conduct a market survey. They thereupon rejected the recommendation of the Evaluation Committee and awarded the tender to Jagla Enterprises who were the lowest bidder. The items were supplied and accepted by the user department.

18. The 3<sup>rd</sup> appellant insisted that there was no overpricing of the items and that the items were bought within the existing price. That though there was no specification provided in the quotation other than stainless steel, the specification was enough. He said that the equipment was needed urgently as they had been given close notice.

19. The 4<sup>th</sup> appellant stated in his defence that he works with County Government of Bungoma as a Principal Finance Officer. That in 2013 he was the Vice-chairman of the Tender Committee. That the duty of his committee included review and verification of the tendering process to ascertain that the procurement was in accordance with the law. That in this case they did get communication from the Evaluation Committee that the price quoted was high. That his committee did not understand what was requested for. They engaged the head of the user department PW1 who gave a price range of between Ksh. 60,000/= to 117,000/=. That research was done through internet and the price found to be approximately Ksh. 122,000/=. That the tender committee is not bound by the decision of the Evaluation Committee. The items were not readily available in the market. They thereupon rejected the recommendation of Evaluation Committee and awarded the tender.

20. The 4<sup>th</sup> appellant further stated that Dr. Wangwe PW1 sent Isaiah Masinde (PW3) to attend one of their meetings who duly signed the certificates. That they relied on PW3's advice. That PW1 did not reject the items before payment.

#### **Submissions for the Appellants –**

21. The learned counsel for the appellants submitted that the wheelbarrows which were the subject of the case against the appellants were not ordinary wheelbarrows. That they would better be described as food-carts or meat trolleys as they were specialized customized wheelbarrows. That such items cannot be found in the ordinary market. That there cannot be a prevailing market price for goods that are not in the market. Therefore that the trial court erred in convicting the appellants in count 4 for awarding a tender that was above the prevailing market price when such goods did not exist in the market. That the evidence of the County Director of Veterinary Services PW1 indicated that the wheelbarrows were specialized goods which from his experience the price would range between Ksh. 63,000/= to Ksh. 117,000/=. That the trial court failed to consider the evidence of PW1 on the estimated cost of the specialized wheelbarrows.

22. Counsel referred to Section 30 (3) of the Public Procurement and Disposal Act, 2005 that provides that:-

**“Standard goods, services and works with known market prices shall be procured at the prevailing real market price.”**

23. It was submitted that the subject wheelbarrows were not standard goods. That the trial magistrate found that the wheelbarrows were fabricated, which meant that they were not readily available in the market. That the appellants could not be convicted of awarding the tender above the prevailing market price when the subject wheelbarrows were not standard goods. That the prosecution did not at any time introduce evidence on price of steel.

24. On Count 5 where the appellants were charged with awarding a tender “without a proper evaluation”, counsel submitted that Mercy Nekesa Marumu PW14 testified that she prepared the quotation documents and forwarded 4 of them to prequalified suppliers. That she was in the meeting of the Tender Committee when the committee considered the report of the Evaluation Committee and decided to award the tender to Jagla Enterprises. Counsel submitted that the fact that the Committee awarded the tender does not mean that they did not consider the recommendation of the Evaluation Committee as the Tender Committee was not bound by the recommendation of the Evaluation Committee.

25. Counsel submitted that the trial court erred in making a finding that there was no urgency in awarding the tender while by-passing the recommendation of the Evaluation Committee. That Dr. Wangwe PW1 stated that the County's slaughter houses had been in bad state since early 2013. That requisition was prepared in October, 2013 but it was not until January, 2014 when the procurement office initiated the process. Therefore that the goods were required as soon as possible so as to ensure that the slaughter houses were not shut down.

26. Counsel submitted that the duty of the user department as stated by section 9 of the Public Procurement and Disposal Act is to prepare technical specifications and submitting the same to the Procurement Unit. That the Evaluation Committee did not comply with the said section as it did not give specifications of the wheelbarrows.

27. It was submitted that the Evaluation Committee failed in its duty by not evaluating the tenders in accordance with the provisions of sections 16 (9) and 16 (10) of the Public Procurement and Disposal Act (PPDA) which provide that:-

**16 (9) “An evaluation committee shall prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee.”**

**16 (10) “The report prepared under paragraph (9) shall include-**

- (a) minutes of the opening of the tenders or proposals;**
- (b) the results of the preliminary evaluation, with reasons why any tenders or proposals were rejected;**
- (c) the scores awarded by each evaluator for each tender or proposal;**
- (d) a summary of the relative strengths and weaknesses of each tender or proposal;**
- (e) the total score for each tender or proposal; and**
- (f) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.”**

28. Counsel submitted that the reasoning of the Evaluation Committee was not based on any market survey. That the Tender Committee was not bound by the recommendation of the Evaluation Committee as section 11 (1) of the PPDA Regulations (2006) gives power to the Tender Committee to reject a submission of the Evaluation Committee with reasons. Therefore that there was nothing illegal in the Tender Committee rejecting the recommendation of the Evaluation Committee.

29. It was submitted that the evidence of the Valuer PW10 was that he was gazetted on 2/5/2017 via Gazette Notice No. 4342. That his report PEx. 15 is dated and signed 19/2/2016. That this means that the Valuer was not licenced when he signed the report. That his report was of no probative value. Furthermore that he was not licenced in either metal works or health services. That his report should be dismissed in its entirety.

30. Counsel submitted that Dr. Wangwe inspected the wheelbarrows and was satisfied by their quality. That the goods supplied complied with what was awarded. That the tendering process was followed. That the elements of the crime were not proved.

31. On sentencing counsel submitted that there was no allegation that the appellants in any way benefited from the tender awarded to Jagla Enterprises. That there was no material loss suffered by the County Government of Bungoma. Counsel urged the court to consider that the appellants were first time offenders and that they had served the public throughout their careers. That the court should in calculating the fine consider the pricing stated by PW1 and not that of the unlicensed Valuer.

#### **Submissions by the State –**

32. The prosecution counsel, Mr. Juma submitted that the price of Ksh. 109,320/= per unit was inflated. That the quotations were evaluated by the Evaluation Committee who concluded that the prices were above the prevailing market price. That the conclusion of said committee was based on their informal assessment which they did by visiting hardware shops around Bungoma County where the prices ranged between Ksh. 2,500/= to Ksh. 3,000/=. That the assessment was legitimate since the Public Procurement Regulatory Authority market price index dated October, 2013 placed the price of a wheelbarrow at Ksh. 3,231/=. That an independent valuation by the Valuer placed the price of the subject wheelbarrows at a price of Ksh. 6,000/=.

33. The prosecution counsel submitted that the Tender Committee did not conduct any market survey. That there were no specifications of the wheelbarrows given on the tender documents by the user department on the type and quality of the wheelbarrows sought to be purchased. That the order available to the Tender Committee was to direct the procuring entity to commence the tender process afresh. In failing to do so, the Tender Committee was liable for the excessive payment of the goods.

34. It was submitted that the Tender Committee did not follow the proper procurement procedure in awarding the tender. That the decision of the Tender Committee went against the recommendation of the Evaluation Committee and awarded a tender where no financial evaluation or technical pass mark and scores for bidders had been carried out by the Evaluation Committee during the evaluation process. That there being no technical evaluation, it is not clear how the Tender Committee arrived at the financial evaluation and awarding of tender to Jagla Enterprises. That there was no justification of awarding the tender to the said company even if they were the lowest bidder as the quotation was higher than the prevailing market price. Therefore that the Tender Committee acted unlawfully and their decision was ultra vires.

35. Counsel further submitted that the Evaluation Committee formed an integral part of the process of deciding as to whom to award the tender. Without its evaluation and recommendation, the Tender Committee would not have been able to do its work. That the Tender Committee could only reject the recommendation of the Evaluation Committee with justifiable and objective reasons as provided by Regulation 11 of the PPD Regulations 2006. However that in this case the Tender Committee did not give any reasons for rejecting the recommendation of the Evaluation Committee as envisaged by Regulation 11 (2) (3). That no evaluation was conducted by the Evaluation Committee. That the spirit of Section 64 (4) of the PPDA 2005 (repealed) provides that the successful tender shall be the tender with the lowest evaluated price which means that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does consideration of the lowest tender come into play. That in awarding the tender the Tender Committee usurped the role of the Evaluation Committee who had not evaluated the tenders for reasons that they were above the prevailing market price.

36. Counsel submitted that the explanation of urgency was not an excuse for flouting procurement procedures. Neither was it supported by the evidence as the process started in October, 2013. That there was no urgent need as defined in Section 3 of the Act. It was submitted that the urgency was created by the appellants to justify their unlawful actions. Counsel submitted that the prosecution had proved that proper procurement procedure was not followed.

37. Counsel submitted that the effect of the 5<sup>th</sup> and 8<sup>th</sup> appellants in opting to remain silent in face of a preponderance of incriminating evidence that called for explanation, was that inference could be drawn that they had no exculpatory answer to offer. Several authorities were cited in support of this proposition.

38. On sentence, counsel submitted that the trial magistrate erred in not imposing the mandatory sentence envisaged under section 48 (2) (b) of the Anti-Corruption and Economic Crimes Act, 2003. He relied on the cases of **John Njenga Kinuthia –Vs- Republic (2015) eKLR** and **Stephen Mboguah –Vs- Republic (2017) eKLR** where the mandatory fines were emphasized. He submitted that in this case the County suffered a quantifiable loss of Ksh. 928,880/=. That the mandatory sentence was therefore applicable.

39. On the ground of appeal that the Ethics and Anti-Corruption Commission was not properly constituted when investigations commenced and recommendations made to the Director of Public Prosecutions for the prosecution of the appellants, the prosecution counsel submitted that the commission was properly constituted at the time when investigations were completed and report forwarded to the DPP. Counsel relied on the case of **Eng. Michael Sistu Mwaura Kamau –Vs- Ethics and Anti-Corruption Commission & 4 Others (2017) eKLR** where the Court of Appeal allowed the appeal on the ground that the EACC was not properly constituted when investigations were conducted and when recommendation to prosecution the appellant was forwarded to the DPP. Counsel however distinguished the position in that case with the instant case in that in that case the EACC was not properly constituted at the time the investigations were completed and report forwarded to the DPP while in the instant case the EAC was in place when investigations were completed and report forwarded to the DPP.

#### **Analysis and Determination –**

40. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh 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**.

41. I have considered the grounds of appeal, the record of the lower court and the submissions by the respective advocates for the parties. The issues for determination are:-

(1) Whether the Ethics and Anti-Corruption Commission was properly constituted at the time investigations were conducted by the EACC and whether the resultant recommendation to prosecute the appellants was a nullity.

(2) Whether the prosecution proved its case to the required standard.

#### **Whether the EACC was properly constituted –**

42. The appellants were in the lower court represented by **Mr. Madialo**, advocate. The court record indicates that the grounds of appeal were filed by the firm of Madialo & Co. Advocates. The appeal herein was then taken over by **Mr. Malalah**, Advocate who made the final submissions in respect to the appeal.

43. The issue on whether or not the EACC was properly constituted was not raised in the case when the prosecution witnesses testified. The issue was first raised by Mr. Madialo in his submissions on no case to answer. He subsequently raised it in his final submissions to the trial court and made it one of the grounds of appeal. However the trial court did not make any determination on the issue. When the appeal was urged Mr. Malalah did not make any submissions on the issue. In my view the issue is one that went to the validity of the proceedings that were before the trial court. It did not matter that the issue was raised during the submissions on no case to answer. In **Gabriel Mburu Irungu –V- Republic (2018) eKLR** where such an issue was raised during the appeal, the court held that:-

**“When proceedings are a nullity that position remains notwithstanding the fact that the issue has been raised too late in the day. In the case of Mwangi –V- Republic (2006) 2 KLR 94 the Court of Appeal stated thus:-**

**The trial of the appellant was a nullity because the Court was unable to exclude the probability of his having been convicted on unsworn evidence.**

**It did not matter that the issue was being raised for the first time in this appeal. If the trial was a nullity then it did not matter at what stage that issue was raised.”**

In the premises this ground of appeal is valid.

44. The investigating officer in the case Wycliffe Sirengo PW15 who is an investigator with the EACC testified that he was assigned duty to investigate the case by his Regional Manager, Kisumu, on the 8/9/2015. That he interviewed witnesses, collected the relevant documents and prepared the exhibit memo. He forwarded the exhibit memo to the forensic expert on 24/11/2015.

45. The court record further indicates that the specimen handwriting and signatures of the 4<sup>th</sup> appellant were taken on 16/11/2015 and those of John Juma (formerly the 1<sup>st</sup> appellant) were taken on 27/10/2015. The document examiner’s report is dated 25/11/2015. The record shows that the report of the Compliance officer of the Public Procurement Regulatory Authority PW12 is dated 14/7/2016.

46. Under the law of evidence the court is permitted to take judicial notice of matters of general or local notoriety. It is common knowledge that between the months of May, 2015 and January, 2016, the ECC did not have Commissioners, them having resigned from their positions between the months of March and May, 2015. In a similar case involving the EACC during that period in 2015, the court in the case of

Gabriel Mburu Irungu –V- Republic (Supra) observed that:-

**“... It is not disputed that the EACC Chairman Mumo Mutemu and Commissioners Jane Onsongo and Irene Keino resigned on 12<sup>th</sup> May, 2015, 31<sup>st</sup> March, 2015 and 30<sup>th</sup> April, 2015 respectively. The new Commissioners were sworn into office on 23<sup>rd</sup> January, 2016.**

The court takes note that the EACC did not have commissioners in the period stated.

47. According to the evidence of the investigating officer PW15, investigations in the case against the appellants commenced in September, 2015. It was not stated in evidence as to the date when investigations ended and a report forwarded to the office of the DPP. It would appear that the Commissioners were in office when the recommendation to charge the appellants was forwarded to the DPP. What is however abundantly clear is that the EACC did not have Commissioners when investigations were commenced against the appellants. The evidence procured by the officers of the Commission in the absence of commissioners was used to nail the appellants.

48. The core mandate of the EACC as set out in Section 11 (1) (d) of the EACC Act is to:-

**“Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.”**

The question then is whether investigations commenced by officers of EACC in the absence of Commissioners were valid.

49. The functions of the Commission and those of the commissioners are set out in Section 11 of the EACC Act. In the case of **Michael Sistu Mwaura Kamau -V- Ethics and Anti-Corruption Commission** (Supra), the Court of Appeal dealt at length on the functions of the EACC, the functions of the Commissioners and those of the Secretariat and held that:-

**“It is clear from the provisions of both section 11 (1) and 11 (6) that the Act has separated the powers of the EACC and those of the Commissioners. This in our view is not in vain. The EACC has been given powers and functions, which can only be exercised and performed by the commissioners. The law also recognizes that the commissioners may not have the technical, professional and administrative skills needed to perform all the aforesaid functions and in that regard has mandated EACC to recruit appropriate staff to help in discharging its functions. Such staff, who form the secretariat, is ultimately subject to the direction, control and oversight of the commissioners. It is the core mandate of the EACC under section 11 (1) (d) of the EACC Act to:**

**“..investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.”**

**From that provision, it is crystal clear to us that the functions of investigating and making recommendations to the DPP belong corporately to EACC and not to the secretary or the secretariat alone. The investigations and the recommendation to the DPP must be authorized and sanctioned by the commissioners who are required to exercise oversight over the secretariat and overall, to give strategic direction to EACC in the performance of its actions under the Act.”**

50. The court concluded that:-

**“We have already found that the power to undertake investigations and make recommendations is one of the core functions of the EACC and is undertaken by the commissioners with the help of the secretary and other staff of the EACC as the commissioners may direct from time to time. If the commissioners are not in office, it would therefore follow that the business of EACC as contemplated under paragraph 5 of the Second Schedule to the EACC Act as read with section 11 (1) (d) of the EACC Act cannot be undertaken.”**

51. Investigations in the case against the appellants were commenced in September, 2015 when the EACC did not have Commissioners. The investigations were therefore not authorized by the Commissioners of the EACC. The officer of the EACC who instructed the Investigating Officer PW15 to commence investigations in the case had no powers to order such an investigation. It is clear from the Michael Sistu Mwaura Kamau case that such investigations could only be authorized and sanctioned by the Commissioners who are required to exercise oversight over the Secretariat. It matters not that the EACC was properly constituted when investigations were concluded and a report forwarded to the DPP. The act of investigating the case, either partial or not, when there were no Commissioners in office rendered the whole trial a nullity.

52. A similar finding was made in the case of **Busia County Government –Vs- Ethics & Anti-Corruption Commission Milimani Constitutional Petition No. 382 of 2015 (2016) eKLR**, where officers of the Commission had conducted a search on the offices of the petitioner and carted away documents and equipment at a time when there were no Commissioners in office. While finding that the seizure was unconstitutional, the late Onguto J. held that:-

**“.....In the absence of the Commissioners, the secretariat on its own motion could not and cannot purport to execute and perform the core functions of the EACC. It would be contrary to law. Such core functions include investigating and recommending prosecution of offenders ....**

**I come to the conclusion that while the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions. The EACC in the circumstances of this case had no powers in the absence of the commissioners to initiate investigations of its own motion or any other's motion, save any directions by the Director of Public Prosecutions."**

53. In **Robert Cheruiyot –V- Republic Nakuru HCCRA No. 3 of 2017 (2019) eKLR** where the EACC was not properly constituted when investigations, recommendations to prosecute and prosecution of the appellant was undertaken in 2015, the court relied on the decision in **Michael Sistu Mwaura Kamau** case and held that the trial was a nullity.

54. A similar verdict was reached in **Gabriel Mburu Irungu –Vs- Republic** (Supra) where the prosecution of the appellant was founded on an investigation and recommendations of an improperly constituted EACC. See also **John Mwangi Maina & 2 Others –V- Republic (2018) eKLR**.

55. In view of the above I accordingly hold that the EACC had no power to initiate investigations against the appellants at the time when there were no Commissioners in office. The EACC was at the time in comatose with no power to investigate anybody. On the basis of the decision of the Court of Appeal in *Michael Sistu Mwaura Kamau* case as stated above, I do find that the prosecution of the appellants was tainted with illegality and the prosecution was a nullity. The appeal succeeds on this technicality.

56. Having come to the above conclusion, I do not think that it is necessary for me to delve into determining the other grounds of appeal. The question is whether I should make an order for re-trial.

57. The principles under which a re-trial can be ordered are now well settled. In **Bernard Lolimo Ekimat –V- Republic Criminal Appeal No. 151 of 2004 (2005) eKLR**, the Court of Appeal stated as follows with respect to a re-trial:

**"There are many decisions on the question of what appropriate case would attract an order of retrial but in the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."**

58. In **Njenga & Another –V- Republic (2006) 1 KLR 17** the same court held that:-

**"Where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered. Each case depends on its own facts and circumstances but an order for retrial should only be made where the interests of justice require it."**

59. Further, in **M'Obici & Another –V- Republic (2006) 2 KLR 166** the Court of Appeal held:-

**"A retrial should not be ordered unless the appellate court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. In this case, the Court having carefully considered the evidence on record assessed that the evidence was unlikely to lead to a conviction for the offence charged even if a retrial was held.**

See also **Opicho –V- Republic (2009) KLR 369**.

60. In **Gabriel Mburu Irungu –V- Republic** (Supra) were, as in this case investigations were commenced in the absence of Commissioners, the Court considered whether to order a re-trial and stated that:-

**"The circumstances of this case are a bit unique because the case was investigated when EACC was not properly constituted. The report and recommendations to the DPP were also forwarded during the same period. Ordering a retrial would take the Appellant back to the same scenario that the court has found to have been a nullity. I therefore decline to order for a retrial.....**

**The result is that the appeal is allowed on the basis of the above mentioned technicality. The conviction and sentence are set aside. This is not however a bar to any action being taken against the Appellant within the confines of the Constitution and the law."**

61. In the **Michael Sistu Mwaura Kamau** case, the Court of Appeal while allowing the appeal stated that:-

**"The appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. ....the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law."**

62. In the case against the appellants, the investigations were commenced when the EACC was not properly constituted. To order a re-trial on the basis of the same evidence would place the prosecution in the same quagmire as they are in now. I therefore decline to order a re-trial.

63. The appellants were facing serious charges related to corruption. The interests of justice do not justify a bar to a future prosecution on

the basis of investigations conducted by a properly constituted EACC.

64. The upshot is that the appeal is upheld on the technical ground and reason that the EACC was not properly constituted when investigations against the appellants commenced which act rendered the entire trial a nullity. The conviction of the appellants in Kakamega CMC EACC Criminal Case No. 1 of 2017 is thereby quashed and the sentence thereof set aside. The State is however at liberty to take any action against the appellants that they may deem appropriate within the confines of the Constitution and the law.

**Delivered, dated and signed at Kakamega this 1<sup>st</sup> day of October, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Malalah for Appellants

Mr. Mutua for State/Respondent

Appellants – Present

Court Assistant - Polycap

14 days right of appeal.