REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.8 OF 2018

REPUBLIC.....APPELLANT

VERSUS

BENEDICT MAURICE OMOLLO OLWENYO.....1ST RESPONDENT

ELEKEA OCHOLA ODARI.....2ND RESPONDENT

FRANCISCA KATILE MULWA ONYANGO.....3RD RESPONDENT

JAMES AYOKO AMENYA.....4TH RESPONDENT

DAN ODHIAMBO OYUGA.....5TH RESPONDENT

ALEX OTIENO OYUGA.....6TH RESPONDENT

BARNABAS KINYOR AGUI.....7TH RESPONDENT

COLLINS OMONDI BALA.....8TH RESPONDENT

JOSHUA OPONDO OMUKAYA.....9TH RESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court Homa Bay in Criminal Case No.80 of 2017 dated 8th September, 2017 – Hon. T. Obutu, SPM

JUDGMENT

1. Being aggrieved by the decision and judgment of the Senior Principal Magistrate in Homa Bay **CMCC No.8 of 2017**, in which the nine respondents namely, **Benedict Omollo Olwenyo**, **Elekea Ochola Odari**, **Francisca Katile Mulwa Onyango**, **James Ayoko Amenya**, **Dan Odhiambo Othuondo**, **Alex Otieno Oyuga**, **Barnabas Kinyor Agui**, **Collins Omondi Bala** and **Joshua Opondo Omukaya**, were acquitted of the several charges preferred against them either jointly or severally under the **Anti-Corruption and Economic Crimes Act, 2003,** the state/appellant filed this appeal on the basis of the grounds set out in its petition of appeal dated and filed herein on 29th March 2018.

2. A total of four (4) counts were included in the charge sheet dated 2nd February 2017 which was initially presented in court on 3rd February 2017 but was later amended on the 27th March 2017, to include five (5) counts.

In **count one**, the charge was willful failure to comply with the law relating to management of funds and incurring of expenditures contrary to **section 45 (2) (b)** as read with **Section 48 (1)** of the **Anti-Corruption & Economic Crimes Act, 2003**, in that, the first respondent/accused **Benedict Maurice Omolo Olwenyo**, being the interim Chief Finance Officer in the Migori County Government unlawfully and irregularly authorized payment of Kshs.7,986,750/76 to African Merchant Assurance Company (**Amaco**) Limited for Motor Vehicle Insurance Covers worth the aforestated amount which had been procured in contravention of the **Public Procurement & Disposal Act, 2005,** contrary to the requirements of **Section 121** of the **Public Finance Management Act, 2012**.

3. In **count two**, the charge was failure to comply with the law relating to procurement, contrary to **Section 45 (2) (b)** as read with **Section 48 (1)** of the **Anti-Corruption and Economic Crimes Act 2003**, in that, the first accused and the second accused/respondent, **Elekiah Ochola Odari**, being the interim Chief Finance Officer and interim head of supply, claim management services respectively, jointly and willfully failed to comply with the law relating to procurement to wit **Section 26 (3) (a)** of the **Public Procurement & Disposal Act, 2005**,

by initiating the procurement of motor vehicle insurance covers worth Kshs.7, 986, 750/76, without an approved budget. Alternatively, they engaged in a project without prior planning, contrary to **Section 45 (2)**

> **(c)** as read with **Section 48 (1)** of the **Anti-Corruption & Economic Crimes Act, 2003**, in that on diverse dates between 28th November 2013 and 20th December 2013, at the County Government of Migori Offices within Migori County, they jointly engaged in a project namely the procurement of motor vehicle insurance covers worth Kshs.7, 986,750/76, without ensuring that the project was within the approved budget of the County Government of Migori and that it had been planned by the procuring entity.

4. In **count three**, the charge was willful 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 that on or about the 5th December 2013, at the County Government of Migori Offices within Migori County, the third accused/respondent, **Francisca Katile Mulwa Onyango**, the fourth respondent/accused, **James Ayoko Amenya**, the fifth respondent/accused, **Dan Odhiambo Othuondo**, the sixth respondent/accused, **Alex Otieno Oyuga**, the seventh respondent/ accused **Barnabas Kinyor Agui**, the eight respondent/accused, **Collins Omondi Bala**, the ninth respondent/accused, **Joshua Opondo Omukaya**, and the second respondent, being the County Tender Committee willfully failed to comply with the law relating to procurement to with **Regulation 10 (2) (d)** of the **Public Procurement & Disposal Regulations, 2006**, by awarding the tender for motor vehicle insurance worth Kshs.7, 786, 750/76 to Africa Merchant Assurance Company Limited without ensuring that funds were available for the said procurement.

5. In **count four,** the charge was willful 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 & Economic Crimes Act, 2003,** in that on or about the 5th December 2013, at the County Government of Migori Offices within Migori County, the aforementioned County Tender Committee members willfully failed to comply with the law relating to procurement to wit, **Regulation 10 (2) (h)** of the **Public Procurement & Disposal Regulations, 2006,** by approving the direct procurement of motor vehicle insurance worth Kshs.7,986,750/76, from Africa Merchant Assurance Company Limited in circumstances that did not meet the criteria set out in **section 29 (3)** and **74** of the **Public Procurement & Disposal Act, 2005**.

6. In **count five**, the charge was willful failure to comply with the applicable procedures and guidelines relating to management of funds, contrary to **section 45 (2) (b)** as read with **section 48 (1)** of the **Anti-Corruption & Economic Crimes Act, 2003**, in that on diverse dates between 5th December 2013 and 20th December 2013, at the County Government of Migori Offices within Migori County, being the interim Chief Officer for Finance and the head of treasury accounting respectively, the first respondent and the eight respondent, jointly and willfully failed to comply with the applicable procedures and guidelines relating to management of funds by irregularly authorizing payments of Kshs.7,986,750/76 to African Merchant Assurance Company Limited on purchase of motor vehicle insurance without the certification of the inspection and acceptance committee as per the provisions of **Regulation 17 (3)** and **(4)** of the **Public Procurement & Disposal Regulations, 2006**.

7. Each of the respondents/accused denied the charges. After a full trial, the trial court found them not guilty as charged in all counts and acquitted them under **Section 215** of the **Criminal Procedure Code**.

This appeal is against that decision and was argued by way of written submissions with each party having the liberty to make oral highlights.

Accordingly, the appellant filed its written submissions on 24th June 2019, through the learned Senior Assistant Deputy Public Prosecutor (SADPP**) Mr. A.O. Oluoch,** while the respondents filed their submissions on 27th September 2018, through **Sagana, Biriq & Co. Advocates**.

8. The rival submissions together with the grounds of appeal have been given consideration by this court whose primary purpose at this juncture was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (See, **Okeno –vs- Republic [1972] EA 32**).

In that regard, the evidence led against the respondents by the prosecution witnesses i.e. Peter Njuguna Mwangi (**PW1**), Felix Samingo Saitoti(**PW2**),Paul Kipkwech Tanui (**PW3**), James Francis Opundo Odero (**PW4**), **Joshua Gregory Okongo** (**PW5**), Jacob Oduor (**PW6**), **Solomon Ochieng Obunga** (**PW7**), Buriguri Paul Manditch (**PW8**), Lazarus Martin Onyancha (**PW9**), Patrick Oyugi Wakine (**PW10**), Martin Mwei (**PW11**) and Nicholas Kirwa Koech(**PW12**), was considered against that led by each of the respondents in their respective defence.

9. The defence case was generally a denial. The obligation to prove their guilty on the standard of proof applicable to criminal cases i.e beyond reasonable doubt, lay on the prosecution.

No obligation was placed on the respondents to prove their innocence. It is only in exceptional circumstances that the law places a legal burden on the accused to prove his innocence especially where he is required to explain matters which are peculiarly within his personal knowledge – (See, **Chamagong –vs- Republic (1984) KLR 611)** (see also, **S.111 (1) (2)** of the **Evidence Act**). Otherwise, it is trite law that in all criminal cases the burden remains with the prosecution to prove its case against an accused person beyond any reasonable doubt. (See, **Mkendesho –vs- Republic [2002] KLR 461**).

10. Herein, in all the five counts, the base allegation against the respondents was willful failure to comply with the law relating to management of funds and procurement as well as 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 the alternative count in count two, the allegation was engaging in a project without prior planning contrary to **Section 45 (2) (c)** of the **Act**.

Section 45 of the **Act** (i.e. **Anti-Corruption & Economic Crimes Act, 2003**), dealt with protection of public property and revenue etc.

Under **Section 45 (2) (b)**, an officer or person whose functions concerns the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if he/she willfully and carelessly fails to comply with any law or applicable procedures and guidelines relating to procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures.

11. Such person would also be guilty of an offence if he/she engages in a project without prior planning as provided in **Section 45 (2) (c)** of the **Act**. **Section 48 (1)** of the **Act**, provided for a penalty of a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both and an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

12. In this case, with regard to count one affecting the first respondent, the learned trial magistrate after considering the evidence in its totality, concluded that **Section 121** of the **Public Finance Management Act, 2012**, was not flouted by the first accused as he was not the head of treasury to authorize payment of Kshs.7, 986,750/76 to Amaco Limited and that his role was merely to sign the payment cheque as one of the signatories after the completion of the whole process.

The charge indicated that the first accused was the interim chief finance officer in the County Government of Migori and as such, he unlawfully and irregularly authorized payment of Kshs.7, 986,750/76.

13. **Section 121** of the **Public Finance Management Act 2012**, provides for procurement for County Government entities to the extent that all procurement of goods and services and disposal of assets required for the purposes of the County Government or a County Government entity are to be carried out in accordance with **Article 227** of the **Constitution** and the **Public Procurement and Disposal Act**.

Article 227 (1)of the **Constitution** provides that a state organ or public entity shall contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. In that regard, the Public Procurement and Disposal Act 2005, was the applicable statute.

14. It was incumbent upon the prosecution to first establish by necessary evidence that the procurement process which led to the payment of the impugned amount was flawed from the very beginning and that the first respondent despite having full knowledge and being aware of the flaw went ahead to ultimately authorize the payment in his capacity as the interim Chief Finance Officer.

The particulars in the main count two involving the first and second respondent apparently disclosed the manner in which the first respondent was said to have acted unlawfully and irregularly along with the second respondent who was the interim head of supply chain management services. The two are said to have acted contrary to **Section 26 (3) (a)** of the **Public Procurement and Disposal Act, 2005,** by initiating the procurement of motor vehicle insurance covers worth Kshs.7,986,750/76 without an approved budget.

15. This provision provides that all procurement shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan.

If therefore the impugned procurement was not based on an approved budget of the procuring entity and was not planned by the procuring entity through an annual procurement plan, it would follow that the first respondent would be guilty of the first count in ultimately authorizing the impugned payment. He would also be guilty of the main second count or its alternative count along with the second accused/respondent.

16. Such scenario would however, be realized only if the first respondent and indeed the second respondent played a significant role in the entire procurement process which invariably had to be conducted in accordance with the Procurement and Disposal Act, 2005.

The forensic investigator (PW1) indicated that audit queries arose with regard to alleged irregularities in procurement of motor vehicle insurance covers worth Kshs.7, 986,750/76. His role was only to assist the investigator of the case (PW12) with respect to procurement procedures.

He did this by examining several documents which according to him indicated that the relevant county procuring entity did not strictly comply with the procedures and guideline prescribed in the relevant Act. The issue pertaining to direct procurement of the required services was flagged as a key issue.

17. The witness indicated that his role was restricted to irregular procurement and not investigations of corruption and/or embezzlement of funds relating to the procurement process. He did not therefore establish any criminal conduct on the part of the first accused in relation to the first count or even the second count. He actually indicated that both the first and second respondents may not have played any significant role in the initial stages of the impugned procurement i.e. initialization and budgeting of the procurement.

Consequently, the findings of the trial court with regard to the first and second counts are hereby sustained by this court upon its own evaluation of the relevant evidence.

18. With regard to count three, affecting the second to the ninth respondents, it was alleged that being members of the County Tender Committee, they willfully failed to comply with **Regulation 10 (2) (d)** of the **Public Procurement and Disposal Regulations, 2006** by awarding the tender of motor vehicle insurance worth Kshs.7,986,750/76 to Amaco Limited without ensuring that funds were available for the procurement.

The evidence in respect of the allegation did not establish the particulars of the charge. This court must therefore agree with the findings of the trial court in that respect to wit –

> **"----- PW5 Joshua Okongo an accountant and the incharge of the vote book told the court that his duties included to confirm that there was money in the vote book items. He told the court that he perused the LSO in question and confirmed that there was money after which he signed the voucher, the procurement having been initiated by the user department meant that there were funds for the purpose. PW9 Lazarus Martin Onyancha, a prosecution witness supported the evidence of PW5. He told the court that insurance covers was one of the items budgeted for and was paid under the current grant to government's vote which had sufficient funds. He also stated that at the time of procurement of the insurance covers from Amaco, there was money budgeted and approved for that purpose."**

19. With regard to count four, the second to the ninth accused/ respondents were again affected in their capacity as the County Tender Committee.

The particulars of the charge pinpointed **Regulation 10 (2) (h)** of the **Public Procurement and Disposal Regulations, 2006,** as having been flouted by the said respondents in terms of **Section 29 (3)** and **74** of the **Public Procurement & Disposal Act, 2005**.

Referring to **Section 74** of the **Provision**, the appellant contended in its submissions that the trial court failed to appreciate the principle of **"urgent need"** when it found that the procurement of the services was urgent as the vehicles had already been purchased and needed to be used.

20. It was the appellant's contention that the use of the vehicles did not qualify as an urgent need and in any event, the letter authorizing the respondents to proceed by way of direct procurement did not specifically instruct them to proceed by that method.

The respondents' contended that necessary guidelines were adhered to before setting on a direct mode of procurement of the required services. They implied that the issue was infact a non-issue and was included in the charge merely because it was questioned by the office of the Auditor-General.

21. The trial court, in dealing with the charge (i.e count four (4)) observed that there was a report of the user department to the effect that direct procurement was necessary as the services required were urgent considering that the vehicles had already been purchased and needed to be used but could not leave the premises of the supply to be driven all the way to Migori without insurance covers as that would be unlawful. That, it would have taken more than three months if another mode of procurement was adopted.

Evidence indicated that the vehicles had to be driven from Kericho.

22. It was thus the trial court's conclusion that the respondents/tender committee addressed themselves to the request for direct procurement and proceeded to so act in accordance with the provisions of **SS 29**and **74** of the **Procurement Act**. That, the committee exercised discretion in awarding direct tender as required by law and not to avoid competition.

Despite the contention by the prosecution that the committee had no justification for direct procurement or tendering and that it flouted the law by failing to comply with the applicable procedure and guidelines, the trial court found for the second to ninth respondents and acquitted them on the fourth count as well.

23. Apparently, the decision to opt for direct procurement of the relevant services and/or goods was the **"Achilles tendon"** of the fourth count.

The function of a tender committee under **Regulation 10 (2) (h)** of the **Public Procurement & Disposal Regulations, 2006**, is to review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority.

24. **Regulation 53 (1)**, allows restricted tendering such that a procuring entity could use restricted tendering only if the conditions provided in **Section 29 (3)** and **73 (2)** of the **Act** are satisfied.

Section 29 (3) of the **Public Procurement & Disposal Act 2005** provides that:-

> **"A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity –**
>
> **(a) obtains the written approval of its tender committee and**
>
> **(b) records in writing the reasons for using the alternative procurement procedure."**

Herein, the particulars of the fourth count pinpoint **Section 74** which specifically provides for direct procurement to the extent that a procuring entity may use direct procurement as long as the purpose is not to avoid competition and as allowed under **sub section (2)** or **(3)**.

25. **Subsection (2)** of **Section 74** provides that a procuring entity may use direct procurement if there is only one person who can supply the goods, works or services being procured and there is no reasonable alternative or substitute for the goods, works or services.

And **Subsection (3)**, provides that a procuring entity may use direct procurement if there is an urgent need for the goods, works or services being procured or because of the urgency the other available methods of procurement are impractical and the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

26. It may safely be stated that **Ss 29(3)** and **74 (3)** provided for the parameters for the usage of the direct procurement method by the procuring entity and its tender committee.

The evidence by the respondents suggested that it was necessary to use the direct method as there was an urgent need for the insurance services and the affected vehicles were needed for usage and could not be driven to Migori from Kericho without insurance cover.

Another justification was that there would have been a delay of over three (3) months if another procurement method were to be used.

27. Apparently, urgency and delay are the factors which were applied by the respondents/tender committee as a justification for adopting the direct procurement method rather than a competitive method.

Urgency connotes compelling immediate action or a pressing need.

The defence implied that there was a compelling or pressing need to use the vehicles and this was only possible if insurance cover in respect thereof was immediately obtained without unnecessary delay.

28. The term **"urgent need"** is described in **Section 3 (1)** of the **Public Procurement & Disposal Act, 2005,** to mean the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable. This is the meaning which the trial court ought to have applied in determining whether or not there was an urgent need to put the affected vehicles into immediate use and avoid delays which may otherwise have been occasioned by strict adherence to procurement requirements.

29. However, the trial court appeared to have applied the general or literal meaning of the word **"urgent"** or the phrase **"urgent need"**. In doing so, the court made a finding that the vehicles were urgently needed for usage and could not be driven from the supplier's premises to Migori without insurance cover as that would be unlawful. The court held the view that adopting a method other than direct procurement would have resulted in a delay of over three months.

With respect, it is this court's opinion that that reasoning by the trial court was untenable as there was no evidence showing that these were not ordinary vehicles but special vehicles such as fire engines or ambulances which if procured and not put into immediate use may threaten public health, welfare and safety.

30. It is thus this court's finding that the finding of the trial court with regard to the fourth count went against the weight of the evidence. This is more so considering that the adoption of the direct procurement method by the relevant tender committee may have been an afterthought in view of the evidence adduced by Lazarus Martin Onyancha (PW9), Patrick Oyugi Wakine (PW10) and Martin Mwei (PW11) which clearly indicated that the preferred method of procurement was the open tender or competitive method.

31. These witnesses implied that the sudden change from the open tender method to the direct tender method was unusual and capable of raising **"eyebrows".**

There was undisputed evidence that the decision to change into the direct procurement method was made in a meeting of the tender committee held on 3rd December 2013.

All the respondents/accused in the fourth count admitted in their respective testimonies that they attended the crucial meeting and participated in the decision making.

Although the second respondent/accused indicated that he was only the secretary of the committee without powers to make decisions, he was nonetheless, expected to give proper and lawful guidelines and/or directions to the committee before the decision to change to direct procurement method was made. Had he done so, the committee would have observed and adhered to the legal guidelines and procedures applicable to direct procurement. It is the finding of this court that he in effect aided and abetted the committee's unlawful conduct of flouting the necessary procurement laws and regulations.

32. Ultimately, with regard to the forth count, this court must find and hereby finds that the charge was proved beyond reasonable doubt.

The acquittal of the second to the ninth accused/respondents by the trial court was therefore erroneous and is hereby quashed and substituted with a conviction in respect thereof.

33. With regard to the fifth count which affects the first and eighth respondents, the particulars of the charge indicate that they willfully failed to comply with the applicable procedures and guidelines relating to management of funds by irregularly authorizing payment of Amaco of Kshs.7, 986, 750/76 on purchase of motor vehicle insurance without the certification by the inspection and acceptance committee contrary to **Regulation 17 (3)** and **(4)** of the **Public Procurement & Disposal Regulations, 2006**.

This regulation generally provides for a procurement entity's inspection and acceptance committee.

34. **Regulation 17 (3)** requires such committee to inspect, review, accept or reject goods, works or services after delivery while **Regulation**

17 (4) requires the committee to ensure that the correct quantity has been received, the technical standards defined in the contract are met, the delivery or completion was on time and delays have been noted, required manuals or documentations have been received. Thereafter, the committee is required to issue interim or completion certificates.

35. The particulars of the charge pre-supposed that the two accused made payment of the impugned amount in the absence of a certificate from the inspection and acceptance committee. This fact was disputed by both the first and eighth respondents who implied in their defence that the existing circumstances did not require a certificate from the committee as what was procured was a service which was confirmed by a letter acknowledging receipt of the insurance stickers and the policy document.

The first respondent contended that the certificate was not the authority for effecting payment.

36. This line of defence adopted by both the first and eighth respondents was somehow acknowledged with approval by the prosecution through Felix Saningo Saitoti (PW3), a member of the inspection and acceptance committee, who indicated that the insurance stickers and the policy document was all that was required to facilitate payment of any due amount.

James Francis Opundo Odero (PW4), Solomon Ochieng Obunga (PW7) and **Burigiri Paul Manditch** (PW8), all indicated that the circumstances pertaining to the impugned procurement did not require the issuance of a certificate by the inspection committee. It would follow from the foregoing that the trial court's finding on count five was proper and is hereby upheld.

37. All in all, this appeal is allowed only with regard to the fourth count affecting all the respondents save the first respondent and is dismissed with regard to the first, second, third and fifth counts.

The matter be mentioned on 25th July 2019 for sentencing on the fourth count in accordance with **Section 48 (1)** of the **Anti-Corruption** and **Economic Crimes Act No.3 of 2003**.

Ordered accordingly.

J.R. KARANJAH

JUDGE

18.07.2019

[Delivered and signed this 18th day of July, 2019]