REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.78 OF 2016

1. JOHN MWANGI MAINA

2. MARTIN KANYUAIGWA WAMWEA

3. SIMON WACHIRA KAGIRI.....APPELLANTS

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

The Charges

The appellants herein **John Mwangi Maina**, **Martin Kanyuaigwa Wamwea**, and Simon **Wachira Kagiri** (herein after 1st, 2nd and 3rd appellants respectively) were charged together in **Nyeri CMCR Anti-Corruption Case No.3 of 2015**. There was no joint charge but each one of them faced similar charges to wit:

> *1.Willful failure to comply with the law or applicable procedures and guidelines relating to procurement contrary to section* ***45(2)(b)*** *as read with Section* ***48(1)*** *of the* ***Anti-Corruption and Economic Crimes Act (ACECA) 2003***
>
> *2. Abuse of office contrary to section 46 as read with section 48 of the same Act.*

In addition, the 1st appellant was alleged to have committed the offence by failing to comply with **Section 29(3) of the Public Procurement and Disposal Act (PPDA) 2005** and the 2nd and 3rd appellants, by failing to comply with Section **149(2) of the Public Finance Management Act (PFMA) 2012**.

The shared factor was the contract for consultancy of audit services for Roads and Civil Works done within Nyeri County in the Financial Year (FY) 2013/2014 (herein after, ***the consultancy contract)*** which was awarded to a company by the name PLENG KENYA LIMITED. All the offences were alleged to have been committed at Nyeri Town within County of Nyeri, in the Republic of Kenya. Each appellant's charges had particulars specific to the role with regard to that consultancy contract.

The Particulars

The 1st appellant **John Mwangi Maina** was appointed in 2013 as the Executive Committee member Nyeri County in charge of Land and Urban Development. On the 23rd June 2014, his docket was re -constituted to include Infrastructure and Roads. His work now included policy direction and maintenance of road projects.

It was alleged that on 12th August 2014, in his capacity as the County Executive Secretary for Land and Infrastructure Development, a person concerned with the management of public property, he willfully failed to comply with the law/applicable procedures relating to public procurement to wit section 29(3) of the Public Procurement and Disposal Act (PPDA) 2005 by irregularly awarding the consultancy contract through direct procurement without approval of the County tender committee.

It was also alleged that on the same date and place, and in the same capacity, he used his office to improperly confer a benefit on Pleng Limited by irregularly inviting the said Pleng Limited to the consultancy contract without the requisite approval from the County Tender Committee.

The second appellant **Martin Kanyuaigwa Wamwea** was the County Executive Secretary in charge of Finance and Economic Planning Government of Nyeri County from July 2013. He had worked with National Treasury, leaving at the position Director, IFMIS Finance

department. He was a holder of a bachelor's degree in Economics and Business Studies, an MBA, and 7 post graduate diplomas in Finance. His functions included policy direction and appointment of all district accounting officers,

It was alleged that on 20th December 2014 being the County Executive Secretary for Finance and Economic Planning, an officer whose functions concern the administration, custody, management and use of part of public revenue, willfully failed to comply with the law relating to management of public funds to wit section 149(2) (a) of the Public Finance Management Act (PFMA) 2012, by failing to obtain the requisite supporting documents before authorizing the payment of Kshs.3,756,962/37 to Pleng Limited for the consultancy contract.

It was also alleged that on the same date, same place in the same capacity being a person employed in the public service, he used his office to improperly confer a benefit on Pleng Limited by illegally authorizing the processing of payments for the sum of Ksh. 3,756,962/37 to the said Pleng Limited on account of the consultancy contract without the requisite supporting documents.

The 3rd appellant **Simon Wachira Kagiri** was the Chief of Staff County Government of Nyeri, Governor's office. Prior to joining the County Government, he was a part time university lecturer and also coordinated community programs. On the 1st December 2014, he was appointed as one of the accounting officers, as Acting Accounting Officer, Land and Infrastructure. Among his duties was to ensure proper finance management within his department.

It was alleged that on or about 16th December 2014 being the Acting Accounting Officer for Land and Infrastructure Development Nyeri County, being a person employed in the public service, he used his office to improperly confer a benefit on Pleng Limited by approving payment of Ksh. 3,756,962/37 to the said Pleng Limited on account of the consultancy contract which contract was irregularly awarded to the said Pleng Limited, without the requisite supporting documents.

It was also alleged that on the same date and place, and in the same capacity, being a person whose functions concerned the administration, custody and management and use of part of public revenue he willfully failed to comply with the law relating to procurement to wit section 149(2) (a) of the Public Finance and Management Act (PFMA) 2012 by failing to obtain the requisite supporting documents before the payment of Ksh. 3,756,962/37 to Pleng Limited for the consultancy contract.

Each appellant denied the charges when the plea was taken on 9th July 2015.

The Story

On 7th August 2014 the late Governor County of Nyeri H.E. Nderitu Gachagua issued a memo to the County Executive Committee Finance raising concerns over **"Roads and Infrastructural Projects payments"** to the effect that irregular full payments were being made to contractors before the expiry of the requisite 6 months' maintenance period for projects. He directed the CEC Finance to immediately launch investigations into the matter and submit a report to his office within 14 days. The report was to include projects carried out from March 2014 and was to be made under 4 heads: full amount of each contract, status of each project by way of completion amounts of money paid out, full names of payees and addresses and any other relevant information supporting the validity of the payments.

In the meantime, he ordered that all payments to the contractors be suspended.

The memo was copied to the County Secretary and to the 1st appellant. Upon receiving the memo, the 1st appellant proceeded to pick Pleng Limited from a pre-qualified list of service providers through his letter dated 12th August 2014, and to award the consultancy contract to them. To him the county was not a procuring entity, it was not necessary to procure the said services. He was also of the view that did not need the involvement or approval of the tender Committee, neither did he deem it necessary to have any contract or agreement between Pleng Limited and the Nyeri County Government before awarding the said tender. However, contrary to that expressed view he had, prior to appointing Pleng Limited in deed, set off the procurement process! On 11th August 2014 he wrote to Head of Supply Chain Management asking him to ***"process the procurement of the consultancy for approval as per Engineers Registration Board guidelines of fees applicable for supervision works".***

Be that as it may, on the strength of his appointment Pleng Limited did some work and raised a fee note of **Kshs10,795, 868/87**. A payment voucher PEX13 was raised for one third of the fee note amounting to **Ksh. 3,756,962/37.**

This payment voucher was placed before the Ag Chief Officer County Treasurer on 19th December 2014. He immediately noticed an anomaly. That it was not accompanied by the usual tendering procedure documents but by the *document issued for pre-qualification purposes*, which was the letter dated 23rd January 2014 informing Pleng Limited that it had been successful in the tender No. NCG/33/2013-2014 for *pre-qualification of consultant services for Structural and Civil Engineering Services*.

This prompted him to write a memo to the 2nd appellant seeking guidance on what he should do in the circumstances.

The second Appellant gave his guidance by way of remarks made, dated and signed on the memo, telling the Ag Chief Officer County Treasurer to proceed to process the claim because the Executive Secretary in Land and Infrastructure development had assured him that the procurement process had been complied with.

Following the direction, the payment voucher was processed. The third appellant who was the AIE holder, or the person with the Authority to Incur Expenditure on behalf of his department received the payment voucher on 16th December 2014. It was not accompanied by any other documents. He did not deem it necessary to look at the contract awarding the tender or any other supporting documents because in his view that was not his role. His role was simply to confirm that the funds were available. He authorized the payment by certifying that the amount sought to be paid was available for the services rendered. The sum of Ksh. 3,569,114/- which was the invoice less the withholding

tax of Ksh. 197,848/- on behalf of KRA was paid into the account of Pleng Limited after the District accountant had signed his part on 22nd December 2014.

The Case

The case against the three was brought by PW8, Aden Gedi. At the material time he was a forensic investigator with the Ethics and Anti-Corruption Commission and was based at Nyeri Regional office. On 6th February 2015, he received information from his informants about the irregularly awarded contracts and flagrant disregard for procurement procedures at the Nyeri County offices. He immediately swung into investigations. This is what he found: -

That following the Governor's instructions of 7th August 2014 the 1st appellant wrote to the Procurement office vide his letter of 11th August 2014 requesting for procurement of the requisite services of the consultancy contract. The procurement officer and Secretary to the County Tender Committee, PW1 **Samuel Wachira Gachiri** set off the procurement process through his letter of 15th August 2014 to the 1st appellant asking to be supplied with the requisite information to enable the Tender Committee to consider the request.

What followed was a series of correspondence back and forth between the PW1 and the 1st Appellant until all the requirements, which included comprehensive TORs for the consultancy, availability of funds, and the value of the works to be done, were provided. The Nyeri County Tender Committee sat on 19th November 2014 chaired by PW2. The Tender Committee deliberated procurement request. It was of the view that **the County did not have pre-qualified technical auditors for the requested service.** This was communicated to Ag Chief Officer Lands and Infrastructure through the letter dated 19th November /2014 ref. NCG/CON/TEND/1/135 (b) 154, which was produced as PEX.6. The Tender Committee pointed out that because there was no prequalified service provider, and the value of the works was Ksh 500,000,000, the tender consultancy would have to be treated as a stand-alone project and on those grounds, the procurement would have to be done through open tendering.

An advertisement was placed in the newspapers on 21st November 2014 (P Ex 7) for *"Tender No. NCG/L & ID /2/2014/2015 Selection of a technical audit consultant for infrastructural protests (Building Works and Roads) implemented from March 2013 to June 2014"*. The third suspicious thing happened. On 1st December 2014 an advertisement was carried in the same newspapers cancelling the advertisement for the tender. The Tender Committee was neither involved nor informed why. It became clear later why this had to be cancelled. The 1st Appellant had single sourced, and directly awarded the consultancy contract Pleng Limited, service provider who was clearly was not pre-qualified to provide the said service, and had not tendered for the works. That 1st appellant had acted against all laid down procurement processes, without and against the advice of the tender committee. It was evident to PW8 that at time the advertisement was being cancelled Pleng Limited had done the work and raised its fee note for over Ksh 10, 000,000. Which invoice somewhere in the process of payment. The same invoice was processed and a third of the fee note paid eventually.

In all this there was not a single supporting document for the awarding of the contract to Pleng Limited. There was no contract between the contractor and the Nyeri County Government, there was no competitive bidding for the tender, in fact Pleng Limited never tendered for the work. Aden Gedi formed the opinion that the three were working in cahoots and had used their offices to bypass procurement processes to ensure Pleng Limited got the tender and to make sure Pleng limited was paid.

The Trial

Eight witnesses testified for the prosecution. PW1 Samwel Wachira Gachiri was head of Supply Chain management and secretary to the Tender Committee. PW2 Francis Maranga Kerera, was the Chairman of the County Procurement Committee. Both these witnesses confirmed that the committee received the request to procure, carried out their legal mandate, only to realise later that the 1st appellant had illegally awarded the contract to Pleng. PW3 Emilio Mukera Gichigo was Acting Chief Officer Finance. He was instructed by the 2nd Appellnat to process the payment. PW4 George Muhoro was the procurement officer who confirmed that there were no tender documents with respect to the consultancy contract. PW5 Mary Wangui Wamugunda, a clerical officer in the accounts section was instructed to generate the payment voucher by her boss the Chief Officer one Zeverio Kinyua. PW6 Timothy Wachanga Nderitu, Operating Manger Equity Bank produced the bank statement for Pleng Limited showing that the sum of Ksh 3,569,114/25 was paid into their account no. 0010201201062 from Nyeri County Government on 24th December 2014. PW7 Engineer Maina Kiambigi the MD and CEO Pleng Limited and Engineering Firm confirmed that they had been single sourced to carry out the said work. PW8 was Aden Gedi.

The trial Magistrate found that the prosecution had established a *prima facie case* to warrant each of the accused persons now appellants, being put on the defence. Each appellant testified on oath and did not call any witnesses. None of them denied the action he took in his capacity in the matter relating to the consultancy contract and Pleng Limited. The 1st appellant's defence was that he did no wrong in appointing Pleng Limited. That Pleng did a good job and saved the people of Nyeri County millions of shillings by unearthing another scam whose report was sent to the EACC and the National Auditor's Office. The 2nd Appellant conceded that the contract was wrongly awarded but that he did nothing wrong as he had nothing to do with payments. His advice to his accountant was just that, and that the accountant could have ignored it. To him, it was not his work to ask for any documents to support the proposed payment. The third appellant as the AIE holder testified that his role was only to confirm that funds were available. He did not have to ask for supporting documents while doing so. That he only did his job.

The trial magistrate found each of the accused persons guilty and convicted each for willful failure to comply with the law, applicable procedures and guidelines relating to procurement contrary to section 45(2) (b) as read with 48 (1) of the ACECA 2003. Each was acquitted of the offence of abuse of office on the basis that that charge ought to have been an alternative charge to the former.

In sentencing them he said though accused were remorseful public funds were lost. He took judicial notice of the fact that the Country was losing a lot of funds through this kind of tendering. This called for a deterrent sentence. Each accused was fined the sum of Ksh. 400,000/- in default to serve 1-year imprisonment. In addition, each was also sentenced to pay twice the amount lost by the County Government

calculated at Ksh. 7,513,924/- in default to serve 3 years' imprisonment. the default sentences were to run consecutively.

The Appeal

The appellants were aggrieved by the conviction and sentence and filed this this appeal. At first they filed joint grounds of appeal as hereunder:

1. THAT the learned trial magistrate erred and misdirected himself in both law and fact by convicting the Appellants when the essential ingredients of the charges against them were not proved beyond reasonable doubt.

2. THAT the learned trial Magistrate erred in both law and fact by failing to find that the evidence led by the prosecution could not support the charges against the Appellant.

3. THAT the learned trial court erred both in law and fact by failing to address the issue of absence mens rea which was an essential ingredient in the charges facing the Appellants.

4. THAT the learned trial Magistrate erred in both law and fact by failing to find that there was no evidence to establish the 1st Appellant willfully failed to comply with the law relating to public procurement and guidelines relating to public procurement.

5. THAT the learned trial Magistrate erred in both law and fact by failing to address and take into account the applicable law in proving a charge of willful failure to comply with the law or applicable procedures and guidelines relating to procurement.

6. THAT the learned trial magistrate erred both in law and fact by finding that the procurement subject of Count one was done through direct procurement without sufficient evidence.

7. THAT the learned trial magistrate erred in law and fact by convicting the 2nd and 3rd Appellants on a charge of abuse of office and failing to find that the evidence tendered could not support the charge.

8. THAT the learned trial magistrate erred in law and fact by enumerating what he termed as supporting documents when no evidence was lead as to what the supporting documents were.

9. THAT the learned trial magistrate erred and misdirecting himself in both law and fact by taking into account unproven matters to base a conviction against the Applicant/Appellant.

10. THAT the learned trial magistrate erred and misdirecting himself in both law and fact by totally ignoring the Applicant's/Appellant's defence and wholly failing to take into account the Applicant's /Appellant's s defence and wholly failing to take into account the applicant's/Appellant's submissions.

11. THAT the learned trial magistrate erred and misdirecting himself in both law and fact by failing to find that the evidence led by the prosecution witnesses was full of contradictions and could not therefore sustain a conviction against the Applicant/Appellants.

12. THAT the learned trial magistrate erred and misdirected himself in both law and fact by shifting the burden of proof from the prosecution to the Applicant/Appellants.

13. THAT the learned trial magistrate erred and misdirecting himself in both law and fact by sentencing the Appellants to a fine which is manifestly illegal.

14. THAT the learned trial Magistrate erred in finding that there was a loss incurred when there was no evidence to support that finding.

15. THAT the learned trial magistrate erred and misdirected himself in both law and fact by failing to find that the prosecution had not sufficiently proved their case against the Appellant beyond reasonable doubt.

The second appellant feeling that his case was slightly different from that of his co accused filed an AMENDED PETITION OF APPEAL with additional grounds to wit;

1. THAT the learned trial magistrate erred and misdirected himself both in law and fact by convicting the 2nd Appellant when the essential ingredient of the charge against him was not proved beyond reasonable doubt.

2. THAT the learned trial magistrate erred in both and fact by failing to find that the evidence led by the prosecution could not support the charges against the 2nd Appellant.

3. THAT the learned trial court erred both in law and fact by failing to address the issue of absence of mens rea which was an essential ingredient in the charges facing the 2nd Appellant.

4. THAT the learned trial magistrate erred in both law and fact by failing to find that there was no evidence to establish the 1st Appellant willfully failed to comply with the law relating to public procurement and guidelines relating to public procurement.

5. THAT the learned trial magistrate erred in both law and fact by failing to address and take into account the applicable law in proving a charge of willful failure to comply with the law or applicable procedures and guidelines relating to procurement.

6. THAT the learned trial magistrate erred in both law and fact by finding that the procurement subject of count one was done through direct procurement without sufficient evidence.

7. THAT the learned trial magistrate erred in both law and fact by convicting the 2nd and 3rd Appellants on a charge of abuse of office and failing to find that the evidence tendered could not support the charge.

8. THAT the learned trial magistrate erred in law and fact by enumerating what he termed as supporting documents when no evidence was led as to what the supporting documents were.

9. THAT the learned trial magistrate erred in law and fact misdirected himself in both law and fact by taking into account unproven matters to base a conviction against the 2nd Appellant.

10. THAT the learned trial magistrate erred himself in both law and fact by totaling ignoring the 2nd Appellant's defence and wholly failing to take into account the 2nd Appellant's defence and wholly failing to take into account the 2nd Appellant's submissions.

11. THAT the trial magistrate erred and misdirected himself in both law and fact by failing to find that the evidence led by the prosecution witnesses was full of contradictions and could not therefore sustain a conviction against the 2nd Appellant.

12. THAT the trial magistrate erred and misdirected himself in both law and fact by shifting the burden of proof from the prosecution to the 2nd Appellant.

13. THAT the trial magistrate erred and misdirected himself in both law and fact by sentencing the 2nd Appellant to fine is which manifestly illegal.

14. THAT the learned trial magistrate erred in finding that there was a loss incurred when there was no evidence to support that finding.

15. THAT the learned trial magistrate erred and misdirected himself in both law and fact by failing to find that the prosecution had not sufficiently proved their case against the 2nd Appellant beyond reasonable doubt.

16. THAT the trial magistrate erred in both law and fact by failing to find that the 2nd Appellant was not person responsible for managing the finances of the Nyeri County Government as he was not the Accounting Officer within the meaning of the Public Finance Management Act.

17. THAT the trial magistrate erred in both law and fact by failing to find that the 2nd Appellant as the County Executive Committee member for Finance had designated an Accounting Officer responsible for managing the finances of the Nyeri County Government in accordance with his constitutional and statutory duty.

18. THAT the trial magistrate erred in both law and fact by failing to find that the statutory duty to comply with the law, applicable procedures and guidelines relating to management of public funds was a duty imposed on the Accounting Officer for the Nyeri County Government and was not a duty imposed on the 2nd Appellant.

19. THAT the trial magistrate erred in both law and fact by failing to find that Accounting Officer for the Nyeri County Government was statutorily accountable to the Nyeri County Assembly for ensuring that public funds were used in a lawful and authorized way and was not accountable to the 2nd Appellant.

*20. THAT the trial magistrate erred in both law and fact by failing to find that the statutory power to authorize payment from public funds belonged to the Accounting Officer for the Nyeri County Government and not to the 2nd Appellant***.**

The Submissions

All the appellants relied on the Court of Appeal case of **Engineer Michael Sistu Mwaura Kamau in Ethics & Anti-Corruption Commission, 4 others (2017) eKLR.** The second appellant also relied on the case of **Council of Governors & 6 others -Vs- the Senate (2015) eKLR**

In the **Sistu case**, the Petitioners therein had sought orders barring their prosecution on grounds *inter alia* that the chairperson of the EACC, Mumo Matemu and his commissioners Jane Onsongo and Irene Keino had resigned, rendering the EACC unconstitutional. That the effect of that was to render any prosecutions done without the input of the commissioners, illegal. The Judges made the following declarations inter alia;

(a) We declare that subsequent to the resignation of the Chairperson of the Ethics and Anti- Corruption Commission, Mumo Matemu on 12 May 2015, the 1st respondent was not properly constituted in accordance with Articles 79, 249 and 250 of the Constitution and section 4 of the Ethics and Anti-Corruption Commission Act of 2012.

(b) …..…

(c) We declare that the Director of Public Prosecutions is at liberty to rely on any source of information in order to institute criminal proceedings whether the information emanates from the Ethics and Anti-Corruption Commission or not as long as the source is not declared to be unlawful.

(d) ……..……..…..

(e) For the avoidance of doubt, we decline to prohibit the prosecution of the Petitioners, which we deem to be undertaken in accordance with the constitutional and legislative mandate of the Director of Public Prosecutions.

It is against these declarations that the petitioners appealed in the Court of Appeal where one of the issues foe determination was whether in the absence of commissioners the EACC was properly constituted to carry out investigations and make recommendations to the DPP to charge the appellant? The Court of Appeal analysed the functions of the Ethics and Anti-Corruption Commission Commissioners, and the Commission's staff, and the statutory requirements with regard to investigations and prosecution, citing section 11 (1) of the Ethics and Anti-Corruption Commission Act no 22 of 2011 which provides for the functions of the EACC as follows: That the EACC shall,

(a) in relation to State officers—

(i) develop and promote standards and best practices in integrity and Anti-corruption;

(ii) develop a code of ethics;

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) 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*;*

(e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;

(f) oversee the enforcement of codes of ethics prescribed for public officers;

(g) advise, on its own initiative, any person on any matter within its functions;

(h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality;

(i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

(emphasis added)

The functions of the commissioners are provided for under section 11(6) of the EACC Act as follows;

(a) assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary perform their duties to the highest standards possible in accordance with this Act,

(b) give strategic direction to the Commission in the performance of its functions as stipulated in this Act;

(c) establish and maintain strategic linkages and partnerships with other stakeholders in the rule law and other governance sector;

(d) deal with reports, complains of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff; and

(e) deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff."

The court also set out the powers of EACC as set out in Section 13:

"(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law.

(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to—

(a) educate and create awareness on any matter within the Commission's mandate;

(b) undertake preventive measures against unethical and corrupt practices;

(c) conduct investigations on its own initiative or on a complaint made by any person;

(d) conduct mediation, conciliation and negotiation; and

(e) hire such experts as may be necessary for the performance of any of its functions"

And after analysis of the law as set out above the court found, that the core mandate of EACC was expressed at s. 11(1) (d) of the EACC Act as 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;

And that this provision would be read with s. 35 of ACECA which states

"…. following an investigation, the commission shall report to the DPP on the results of the investigation. The commission's report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime".

The court then went on to say:

Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.

The Judges in conclusion allowed the appeal stating:

This 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. From the foregoing anti-corruption constitutional edicts, 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.

It is in the backdrop of the above findings that counsel for the appellants made their oral arguments.

For the 1st Appellant

Mr. Ng'ang'a's argument was that the whole case from investigations, arrest, prosecution, trial was unconstitutional and illegal on the strength of the **Sistu** case. That at all material times the EACC was not properly constituted and therefore the whole trial was a nullity, that the whole trial had infringed on the fundamental rights of the 1st appellant and this court should find that the conviction and sentence could not stand. He argued that this court had no business looking at the evidence. He also submitted that PW8 Aden Gedi testified he had received the information on 6th February 2015, the arrests were made on 6th July 2015, appellants were arraigned in court on 7th July 2015. By this time the commissioners of the EACC had resigned between 31st March 2015 and 12th May 2015.

For the 2nd Appellant

Mr. Nderitu agreed with Mr. Ng'ang'a with regard to the import of the **Sistu case** on the proceedings in the subordinate court. That the Court of Appeal had found that criminal proceedings instituted when the existence of the EACC was unconstitutional were unlawful, as in this case.

Specifically, to the 2nd appellant he drew the court's attention to the provisions of the PFMA 2012 sections 148 and 149 and especially Section 148(1) which provides for the designation of accounting officers for County Government entities. He submitted that the 2nd appellant's roles in the County had nothing to do with everyday authorization of payments but with policy directions of the department. He argued that section 149(1) 2(b) could not apply to the 2nd appellant as he was not the accounting officer, and that that no criminal to liability could arise on his part from the authorization process. Referring to the payment voucher (PEX13) he emphasized the fact that the 2nd appellant did not sign anywhere on that document. That the AIE holder had signed, certifying that the expenditure had been incurred for the

authorized purpose, and the Accounting Officer had also signed his part, confirming that the expenditure had been incurred on proper authority.

He submitted further that PW3 could not be heard to say that he obeyed the orders of the 2nd appellant in proceeding to process the payment the claim despite his own query over the procurement process. That the writings made by the 2nd appellant on the memo PEx15 could not amount to directions to pay. That if anything it was PW3 as an accountant who was bound by Section 149 of the PFMA. That his action of writing that memo amounted to the 2nd appellant was only intended to solicit an order to back up a process he knew had issues.

He relied on the case of **Council of Governors & 6 others -Vs- the Senate (2015) eKLR**- on the meaning of accounting officer. He pointed out errors in the record and especially the evidence of PW8 to the effect that the 2nd appellant had made a payment. He distinguished the case **Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR** which he said the trial magistrate relied on as not applicable to 2nd appellant as Nabutola was the accounting officer as the Permanent Secretary. He urged the court to find that the conviction against the 2nd appellant could not stand.

For the 3rd Appellant

Mr. Muchiri wa Gathoni agreed with the counsel for the 1st and 2nd appellants on the import of the **Sistu case** on his client's appeal. In addition, he submitted that the 3rd appellant appeared only once in the proceedings where he signed the payment voucher PEx13. Otherwise no witness had actually mentioned him. That even the investigating officer PW8 had mentioned him only in connection with the signing of the payment voucher, PEx13.

He argued further that the 3rd appellant was appointed on 1st December 2014 as an accounting officer vide DEX 6, by which time everything regarding the transaction under scrutiny had been done by the other appellants. That the 3rd appellant was not involved in any process of procurement and had come in only as an alternate on behalf of the in charge one Zawerio Kinyua.

Further that the signature of the 3rd appellant alone would not have resulted in payment. That without the authority of PW3 no payment would have been made. That there was no explanation why PW3 had not been subject of the investigation herein.

He submitted that it was evident that the trial magistrate had pre -formed opinion that those who were brought before him were guilty and had to be convicted as he failed in his duty to analyze the evidence. That in the end the trial magistrate went on to confuse the 3rd appellant with PW1 in the judgment.

Relying on the **Sistu** case he challenged the legality of the proceedings in the subordinate court submitting that the EACC , in bringing the charges against his client, had not complied the provisions of Section 11(1) (d) of the EACC Act which requires the commission, upon completion of investigations, to make recommendations to the DPP, and, s. 35 of the ACECA which requires the Commission to report to the DPP on any investigations conducted and any recommendations for the prosecution of any person. He pointed out that from the evidence of PW8 no such report /recommendations were made and if they were then they ought to have been the basis for these proceedings.

For the State

Mr. Magoma Prosecuting Counsel submitted: -

That the **Sistu case** was inapplicable because in this case investigations began on 12th August 2014 at which time the EACC was properly constituted.

That under Article 157 of the Constitution and Section 4 of the ODPP Act No 2/2013. The DPP was well mandated to protect the administration of justice and could direct the IG to investigate any allegation of criminal conduct. Further that the DPP could get evidence from any other source.

That the appellants had clearly failed to comply with procurement guidelines and procedures.That the tender to Pleng Limited was given without subjecting it to the normal procurement procedures. A tender was advertised and cancelled in suspicious circumstances.

That the 1st Appellant admitted to the fact that the tender committee was not involved and the tender to Pleng was awarded without following the procurement procedures.

That the prosecution had proved the case against each of the appellants and the conviction and sentences were sound.

In Rejoinder

Mr. Ng'ang'a for 1st appellant asked the court to look at the time when proceedings took place in relation to the **Sistu case**. That the powers of DPP and those of EACC were clearly set out by the law. Mr. Nderitu referred the court to the **Sistu case** again and asked the court to take judicial notice, under s. 60 of the Evidence Act of the **Trusted Society & another -Vs- The AG & others** case where the Supreme Court held that in the period when chairman Mumo Matemo had resigned, the EACC was essentially functionally nonexistent. Mr. Muchiri wa Gathoni added that even if investigations had started on 12th August 2014 they would still suffer the fate of the resignation of the commissioners as it is PW8 who conducted the investigations and he never complied Section 35 of the EACC Act.

The issues: Following the Sistu Case,

1. Was the Magistrate right in making a finding of guilt on the part of the appellants? Whether the case against each of the appellants was proved to warrant the conviction and sentence? Was any money lost?

2. Was the EACC properly constituted to carry out investigations?

3. Whether the prosecution of the appellants without making the requisite report and recommendations to the DPP rendered the whole process unlawful.

4. Whether the appellants are entitled to an acquittal.

Analysis and Determination

Counsel for the 1st appellant urged this court not to even look at the evidence but simply proceed on the strength of the **Sistu Case** to declare the whole process a nullity, and stop there. The appeal was brought and argued on both points of law and fact, and not on the single issue of law. In any event, it is now settled as to the role of the 1st appellate court. In **OKENO VERSUS REPUBLIC [1972] EA 323** the court said;

> ***"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition."***

Or in other words as was said by the same court in **KIILU &ANOTHER VS. R (2005) 1 KLR 174;**

> ***"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.***

The 1st appellant was accused to have failed to comply with s. 29(3) of the PPDA (2003) which provides for the choice of procurement, restricted tendering or direct procurement in the following terms;

> *(3) 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. (emphasis added)***

The second and third appellants were accused of failing to comply with s. 149(2) (a) of the PFMA which provides for the ***Responsibilities of accounting officers designated for county government entities;***

> *(1)* ***An accounting officer*** *is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is—*
>
> *(a) lawful and authorised; and*
>
> *(b) effective, efficient, economical and transparent.*
>
> *(2) In carrying out a responsibility imposed by subsection (1), an accounting officer shall, in respect of the entity concerned—*
>
> *(a) ensure that all expenditure made by the entity complies with subsection (1);*

Did the 1st appellant award Pleng Kenya Limited the tender for consultancy of audit services for roads and civil works done for the F/Y 2013/2014?

There is no doubt that he did. Through his letter dated 12th August 2014 ref NCG/LHP/40/2014 he wrote to Pleng Limited:

> *RE: CONSULTANCY FOR REVIEW AND AUDIT OF ROADS AND CIVIL WORKS TENDER WORKS, NYERI COUNTY.*
>
> *The above referenced subject refers.*
>
> *We have the pleasure to inform you that as one of our prequalified consultants in civil engineering services,* ***we wish to***

request you to undertake the above-named audit as per the attached terms of reference. *Please contact the head of Supply Chain and Procurement for more details.*

Sincere regards.

(signed)

John M. Maina

County Executive Secretary

Land and Infrastructure Development

This letter was admitted in sworn evidence by the first appellant. The appellant proceeded to set off the procurement process knowing very well what he had done. What more would be needed to establish *mens rea?* The previous day, this same officer had written a Memo to the Head of Supply Chain management, and enclosed the same TORs he sent to Pleng Limited, in the following words:

Dear Mr. Wachira,

RE: CONSULTANCY FOR REVIEW OF ROADS AND CIVIL WORKS FOR F/Y 2013/2014 NYERI COUNTY

The above referenced subject refers. ***This is to request you to process the procurement of the said CONSULTANCY for approval*** *as per Engineers Registration Board guidelines of fees applicable for supervision works.*

Kindly expedite

(signed)

John M. Maina

County Executive Secretary

Land and Infrastructure Development

Cc County Secretary (emphasis added)

If the appellant had no ill motives why did he not disclose at any stage that he had already single handedly appointed Pleng Limited to undertake the works? *See what follows:*

PW1 and PW2 confirmed that upon receiving the letter of 12th August 2014 the tender committee set off the requisite procurement processes. On 15th August 2014, PW3 asked to be supplied with the TORs for the consultancy, estimated costs of the services and confirmation of availability of funds to undertake the services. On 19th August 2014, the 1st appellant responded attaching the same TORs he had sent to Pleng. PW3 responded on 12th November 2014 to say that that the information requested in the letter of 15th August 2014 had not been supplied. He requested the 1st appellant to have the information forwarded by his Chief Officer, through the Chief Officer Treasury. The 1st appellant responded by letter of same date indicating that the 'comprehensive TORs' had been developed and forwarded to the Procurement department. The notable thing in all this exchange of correspondence is the 1st appellant's loud silence on the fact that he had already single handedly picked on Pleng Limited. This charade on his part went on up till 19th November 2014, when the tender committee completed its task and gave out its verdict. It contradicted the 1st appellant's actions: requiring the County Government of Nyeri to proceed by way of open tendering as per the provisions of s. 29(3) of The PPDA Act, 2012. The County proceeded to incur expenses in putting up the newspaper advertisements.

The 1st appellant aware of the need for the procurement process. It is evident he deliberately chose not to comply while at the same time hood winking the tender committee that he was complying. This act of impunity was confirmed by Engineer Maina Kiambigi the Managing Director and CEO of Pleng Limited, that his company did not bid for this job but were picked from a list of pre -qualified service providers. True, his firm was prequalified vide the letter dated 23rd January 2014 *'REF: TENDER NUMBER NCG/33/2013-2014 FOR PREQUALIFICATION OF CONSULTANT SERVICES FOR STRCTURAL AND CIVIL ENGINEERING SERVICES".* His firm was however **not** pre-qualified for the services it was picked to offer. Doing the job did not legitimize the process. Their being picked through single sourcing by the 1st appellant denied the people of the County of Nyeri the opportunity to pick the best service provider for value for their money.

The evidence shows that 1st appellant acted against the clear provisions of s. 29(3) of the PPDA 2012. He did not have the written approval of the tender committee nor were any reasons given in writing for the use of the alternative procurement procedure. From the evidence on record it is clear that the 1st appellant did willfully fail to comply with the law and procedure on procurement.

Did the 1st appellant improperly confer a benefit to Pleng Limited?

At all times the 1st appellant was acting in the capacity of a **"public officer" as envisaged by Section 2 of the ACECA 'an officer, employee or member of a public body',** His functions included the administration, management, and use of part of the public revenue and property of the County of Nyeri. These functions are conferred and governed by law, and a system of governance underpinned by our national values and principles of governance as set out under Article 10 of the Constitution and in particular 10 (2)(c) *'good governance, integrity, transparency and accountability'.*

By definition under s. 2 of the ACECA, *"benefit" means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage;*

Pleng Limited had the advantage of being single sourced to carry out the said works. It did not have to compete with other entities to determine whether they were the lowest bidder or the best qualified. The People of the County of Nyeri had no opportunity to get to know whether they got value for their money in terms of considering different bidder. His willful act of single sourcing Pleng Limited improperly conferred a benefit, the advantage not to face any competition with other bidders, and that was amounted to abuse of office.

Do the provisions of s. 148 and 149 (1) PMFA apply to the Second Appellant?

It is true that the law envisages that one of his functions is as stated under section 148 *(1)*

> *A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.*

It is also correct that s. 149(2)(b) specially applies to accounting officers as defined by the law. Section 2 states;

> *1. In this Act, unless the context otherwise requires— **"accounting officer"** means— (b) an accounting officer of a county government entity referred to in section 148;*

Hence going by the evidence and the law, s. 149 is not applicable to the 2nd appellant, and therefore could not have been accused of failing to comply with those provisions of the law.

Did the second appellant confer a benefit the Pleng limited?

Under ACECA the 2nd appellant was acting in his capacity as a public officer whose functions, by virtue of being the County Executive Secretary Finance, and the designator of accounting officers, involved the administration, management, receipt and use of part of the public revenue and public property. He was in charge Finance and Economic Planning of the ministry. He was at the top of the chain of command as the in charge. In the Internal Memo dated 19th December 2014, PW3, the Ag. Chief Officer Finance sought his advice, which is not denied with regard to the payment that was to be made to Pleng Limited. He wrote;

> *'I am in receipt of a payment voucher for Pleng Limited for Ksh. 3,756,962/37. The following issue need(sic) your **guidance.***
>
> ***a. The tendering procedure used to source the company as the once(sic) attached was only for prequalification purposes.***

And what **guidance** did he give as the boss?

> ***"Please process the claim. The ES Infrastructure has assured the process."***

As the person in charge, and having been told by one of his subordinates that there appeared to be an anomaly with the process, he assured him that his colleague at the other end had 'assured' the process. In his defence he stated that he had been instructed by the County Secretary Infrastructure that the procurement process had been followed. That his comments were not instructions to pay. That he had no responsibility to demand for supporting documents as that was the role of PW3. It was argued strongly for him that PW3 was simply fishing for an order to pay. That he 2nd appellant had no role in the day today handling of payments.

With due respect I disagree with the simple question, could he have given different guidance? Could he have said, ask for those documents? Anything else other than to direct that the payment be processed? He could have. And that is why his comment cannot be taken as mere comment. It was very specific. Process the payment. The procurement process has been done. Checks and balances exist to protect the interests of the taxpayer. If PW3 did any wrong doing, that is his cross to carry but it does not exonerate the 2nd appellant from his role in influencing the payment through his advice. In fact, in his defence he conceded that the tender though intended to safeguard the interest of the people of Nyeri was not awarded in the correct manner. What he did amounted to an abuse of his office as the CES Finance. The proper directions would have been to advice his officer the call for documents, or better still inform his colleague CES of the anomaly.

Did the 3rd appellant fail to comply with s. 149 of the PFMA?

The third appellant was appointed Acting Chief Officer Department of Lands and Infrastructure on 1st December 2014. He came on stage in the *Final Act* of this saga. The case for the prosecution against him was the payment voucher to Pleng Limited for Ksh 3,756,962/37, where he appended his signature on 16th December 2014 as **the A.I.E holder**.

The certificate he signed states;

AIE HOLDER CERTIFICATE

*'I certify that the **expenditure detailed above has been incurred for the authorised purpose** and should be charged to the item shown here below' (emphasis added)*

His defence was that his role was simply to confirm that funds were available for payment. That cannot be further from the truth. At this stage, the A.I.E holder was still required to confirm that the expenditure had been incurred for the authorised purpose. His D Exhibit 6, a 10-page letter designating him as 'accounting officer' placed responsibilities on him as set out under s. 148 and 149(2) of the PFMA. It set out his duties as an accounting officer and to include; ensuring that

2. …the resources of the Lands and Infrastructure are used in a way that is

(a) Lawful and authorised

(b). ……. Transparent

1. …

(e) Ensure that all applicable accounting and financial controls, systems, standards, laws, and procedures are followed when procuring or disposing of goods and services…

As the A.I.E holder the 3rd appellant could not argue that he was just a messenger. His own signature alone was the final confirmation that every process, every law, every financial standard required to incur the expenditure on behalf of the entity had been complied with. By appending his signature without complying with the clear provisions of his letter of appointment, he failed to comply with the law. In my view it was a negligent, willful act on his part not to do the correct thing. He cannot be heard to shift the blame to anyone else.

In my view the act of signing that payment voucher without asking for the requisite supporting documents conferred a benefit to Pleng Limited, of getting payment for services which they were not pre-qualified to give.

Was any money lost?

According to s. 48 the fine is to be calculated from the loss incurred and or the benefit conferred.

In this case two things happened. There was payment made to a contractor who was awarded a contract wrongfully. That money should never have been paid in the first place. Secondly it was a benefit conferred. The second thing is the cost of the procurement process, the sittings of the Tender Committee, and the cost of the advertisement. These needed to be added on top of the benefit that had been conferred. I am satisfied that the trial magistrate was right in finding that the prosecution had established sufficient evidence to warrant the convictions. The only issue with the sentence was the leaving out the other sums that were not specified but which ought to have been specified had the trial magistrate conducted a sentencing hearing.

What is the import of the Sistu Case?

In this case the appellants were tried, found guilty convicted and sentenced, unlike in the appeal in the **Sistu Case** where the scenario was completely different, in that in Constitutional Petition the main order sought was the prohibition against the petitioner's trial on impugned evidence.

The circumstances prevailing are similar in that the EACC was not properly constituted at all material times. As at 6th February 2015 when the investigations by PW8 began, the EACC Commissioners were in office but by the time he completed the same and filed charges against the appellants the last commissioner had resigned. That could explain why charges against the appellants were brought in contravention of sections 11 of the EACC Act and 35 of ACECA both of which are couched in mandatory terms. On that ground I must find that the trial in the lower court was tainted with illegalities.

The appeal is attacks both conviction and sentences meted by the subordinate court. In determining the orders to make Section ***354 of the Criminal Procedure Code sets out the Powers of High Court in an appeal:***

(1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

(2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

*(a) in an appeal from a **conviction—***

*(i) **reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction**; or*

(ii) ***alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;*** *or*

(iii) with or without a reduction or increase and with or without altering the finding ***alter the nature of the sentence****;*

(b) in an appeal against ***sentence****,* ***increase or reduce the sentence or alter the nature of the sentence****;*

(all emphasis added)

I was urged not only to find that this whole process of arrest, prosecution and trial was a nullity. Could what had happened **pretrial** render **the trial** a nullity?

This question was not addressed in submissions as counsel did not distinguish the difference between the **Sistu** case and this case. In **Sistu** there had been no trial.

Looking for guidance I found that I could cross reference this situation to principles applied by the Court of Appeal to the cases that were caught in the controversy of persons held in police custody beyond the prescribed time before being presented to court. Judges of this court had taken divergent stands on the issue. To some, all an appellant needed to show was that he had been held for longer than 24 hours before being presented to court and his trial was declared a nullity and he was entitled to an automatic acquittal.

In the case of **Julius Kamau Mbugua v Republic [2010] eKLR** where the of Appeal analysed the varying decisions emanating from this court on that issue. The apparently dissenting voice of the Hon Justice Emukule that not every declaration of nullity was an automatic acquittal appeared reasonable as there were other considerations to be taken into accounts. The Court had this to say:

The analysis of the decisions of the superior court will not be complete without highlighting the apparently dissenting view of Anyara Emukule, J. in ***Republic vs. David Geoffrey Gitonga****, Criminal Case No. 79 of 2006 (Meru) (unreported). In that case, the accused was tried for the offence of murder and after the conclusion of the trial and after the accused had made his defence, his counsel submitted that the trial was a nullity since the accused was detained for 140 days before he was charged in violation of* ***Section 72 (2) (b)*** *of the Constitution. The* ***trial Judge declined to acquit the accused*** *saying that a breach of* ***Section 72 (3) (b)*** *does not render a trial a nullity but entitles an accused to compensation as stipulated in* ***Section 72 (6)****. The trial Judge reasoned thus:*

"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.

……...

A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as case may be within 14 days".

The Judges upheld Hon Justice Emukule's reasoning above;

Furthermore, we respectfully agree with the decision of Emukule, J. in the Republic vs. David Geoffrey Gitonga that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated in that case subsists*.*

To paraphrase Emukule J, should a reckless public officer who willfully fails to comply with set down law and procedure, acts with impunity in abuse of his office, has a don't care attitude towards the implementation of his duties, is negligent in the carrying out of his duties, to the detriment of his employer, the *Mwananchi*, be allowed to simply walk way because either ***deliberately or inadvertently, the prosecution authority did not fully comply with the statutory process?*** The answer can only be NO.

In this case the offences the appellants were charged exist in law, and were supported by the facts as found by the investigating officer. The trail court had the requisite jurisdiction to determine the matter. Hence on the strength of the holding of the Court of Appeal, the trial itself was not a nullity.

The war against corruption, impunity and abuse of office by state officers cannot be sacrificed at the altar of technicalities. A balance must be found where the fundamental rights of persons suspected of violating the law, and the public interest, Wanjiku's interest, because for every acquittal on a technicality, another muscle is slackened against the push towards the entrenchment of the national values and principles of governance in the fabric of public service. I refuse to be a party to that. With the case law on my side, I choose the path to strengthening that muscle, of the eye and the arm, to not only see but do something about it. Hence it is my considered view that even though the trial was preceded by the illegality, of the EACC not complying with the requirements of the law to report its investigations to the DPP with the

recommendations on the charges to be made against the appellants, **the appellants are not entitled to an automatic acquittal.**

However, this ought to have been written in the EACC Act and the ACECA to provide guidance as to what action the court should take in the event that of failure by the agencies to comply with mandatory pre trail procedures.

Looking for comparative jurisprudence, I found the **Indian Prevention of Corruption Ac**t which contains preliminaries required by law before a prosecution can take place. It provides for the import of the failure to comply and the exemptions to those consequences. At section it provides: **"19. Previous sanction necessary for prosecution**

> *(1) No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction…*

With the rider that …

> 19() (*a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1),* ***unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;***
>
> *(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority****, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;***
>
> *(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.*
>
> *(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.*
>
> *Explanation. -For the purposes of this section, -*
>
> > *(a) error includes competency of the authority to grant sanction;*
> >
> > *(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."*

Hence, under the Indian Act, there is the specific prohibition to interfere with the findings of the special Judge, even in the case of error or omission in the pre trail procedure, unless it is demonstrated that a failure of justice has in fact been occasioned thereby

In the case of **Nanjappa vs. State of Karnataka the Supreme Court of India Criminal Appellate Jurisdiction Criminal Appeal No.1867 of 2012** The court was dealing with a matter where s. 19(1) had not been complied with. The Judges expressed themselves thus:

> *This appeal must, in our opinion, succeed on the short ground that in the absence of a valid previous sanction required under Section 19 of the Prevention of Corruption Act, the trial Court was not competent to take cognizance of the offence alleged against the appellant.*

The above line of reasoning was followed by the **Supreme Court in State of Goa vs. Babu Thomas (2005) 8 SCC 130,** holding that absence of a valid sanction under Section 19(1) went to the very root of the prosecution case. The court went on to state that:

> *The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid* ***the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law****. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be* ***non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution. (emphasis added)***

From this persuasive authority, I take the view that the trial court never had the opportunity to determine the validity of the charges before it in light of the failure by the EACC to comply with the requirements of s. 11 of the EACC Act and 35 of the ACECA. Perhaps if the issue had been raised then, then the matter would have been dealt with like in the **Sistu Case.**

I am persuaded however that even though the trial proceeded it was based on an illegality and in the words of the Judges in the **Nanjappa** case above;

> *If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be* ***non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution. (emphasis added)***

In my view having found that the appellants are not entitled to an automatic acquittal, and following the persuasive authority above, I find that they are also not entitled to the defence of ***autre fois convict***. I say this while very much alive to the two principles of innocence until

proven guilty and against double jeopardy as envisaged in our Constitution at article 50 which provides for the right to fair hearing, that,

> *(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*
>
> *(2) Every accused person has the right to a fair trial, which includes the right—*
>
> *(a) to be presumed innocent until the contrary is proved;*
>
> **…….……..……..**
>
> *(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been* ***either acquitted or convicted;***

This position is strengthened by what happened in the case of **Republic v Danson Mgunya [2016] eKLR** where the court of appeal discussed the issue of double jeopardy in the context of an appeal by the state against the acquittal of an accused person. The court looked at other Commonwealth jurisdictions and arrived at the conclusion that that the same right that exists for the appellant exists for the state to appeal against the decision of the court acquitting an appellant. The Court had this to say:

> *On the other side of the prism is the view that the society has legitimate interest in ensuring that perpetrators of crime are duly punished and that they should not go Scot-free even where the trial court has made obvious errors and mistakes by acquitting an accused person. The trial system, it is to be contended, is not some Russian roulette and the State ought to have a free hand to appeal against acquittals where they are based on errors and mistakes, otherwise tainted acquittals will de-legitimize the criminal trial process and irreparably undermine the administration of justice. Secondly, ignoring the argument founded on equality of arms, it is contended that if the accused person is entitled to appeal in a bid to correct errors and mistakes by the trial court, why should the State not enjoy the same right" Lastly is the view that in jurisdictions with a hierarchy of courts, an accused person is not finally acquitted or convicted until the relevant final court with jurisdiction has pronounced itself on the matter. In this view, an appeal by the State against an acquittal does not run afoul of the rule against double jeopardy because the appeal is a continuation of the trial rather than an entirely different trial.*

If the state can have the opportunity to have a second go where an appellant has been acquitted on a technicality, without running afoul the principle of double jeopardy, what about a case where the trial itself was tainted with illegality, and in the eyes of the law, did not take place?

Ideally this court is empowered to order a retrial. However, that is not tenable taking into consideration that the EACC would still have to make its report and recommendations to the DPP, who then would make the determination of the way forward.

In the Indian Case above the court in dealing with the similar issue stated:

> *The next question then is whether we should, while allowing this appeal, set aside the order passed by the High Court and permit the launch of a fresh prosecution against the appellant, at this distant point of time. The incident in question occurred on 24th March, 1998. The appellant was, at that point of time, around 38 years old. The appellant is today a senior citizen. Putting the clock back at this stage when the prosecution witnesses themselves may not be available, will in our opinion, serve no purpose. ……*

That is not the case here. This matter is still relatively fresh by Kenyan standards. The EACC is properly constituted, and there is a new DPP. The appellants are still here and so are the witnesses. There is a renewed zeal in the Kenyan psyche to deal with such cases. It is only fair all round that justice be seen to have been done.

In conclusion

I considered the evidence on record, the submissions, the authorities and the law. The EACC Act and the ACECA ought to spell out in the statute the consequences of failure to comply with pretrial requirements by EACC fails either through negligence or inadvertence, otherwise like in this case, the EACC becomes a stumbling block towards the integration of integrity within the fabric of the public service, and society at large.

It is correct that were errors in the record in which the trial magistrate mixed up PW3 and the 2nd and 3rd appellants. However, the conviction was based on sound principles and the correct interpretation of the law.

In determining the sentence, I found that the fine as per s. 48(1) (a) ACECA to be reasonable as the provision provides for a maximum of Ksh 1, 000,000. The appellants were fine Ksh 400,000.

With regard to the mandatory sentence as per s. 48(2) the trial magistrate ought to have determined the full loss incurred by the County with regard to this procurement during a sentencing hearing. The sum of Ksh. **7,513,924.00.** was understated.

Hence on the facts and the law, I would not have disturbed the trial magistrate's findings. My hands are however tied by the Court of Appeal decision in the **Sistu** Case and I cannot uphold his decision. Having found that the process leading to the trial was tainted with illegalities, I find that deprived the trial of its legitimacy.

Consequently, the appellants are hereby discharged. The State is at liberty to launch a fresh prosecution.

Dated, delivered and signed at Nyeri this 12th Day of June 2018

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Atelu

Appellants present

Mr. Magoma for the State

Mr. Ng'ang'a for 1st appellant

Mr. Nderitu for 2nd appellant

Mr. Muchiri wa Gathoni for 3rd appellant

Mr. Ng'ang'a: There were various fines that were paid by the appellants. We apply that the fines be returned to the appellants.

Mr. Nderitu: I seek similar orders

Mr. Muchiri wa Gathoni: I seek similar orders.

Mr. Magoma. We intend to appeal. We pray for stay of the proceedings.

Court: Mention on the 9th July 2018 before the Deputy Registrar for directions with regard to the applications Counsel.