



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 258 OF 2015

ALEX KYALO MUTUKU1ST PETITIONER
DIANAH NDUKU MULI2ND PETITIONER
JUSTUS NZIOKA SUKA3RD PETITIONER
MARY MUMBUA MUTETI4TH PETITIONER
MARTIN MUENDO KITAVI5TH PETITIONER
DANIEL NGUYO MUTUTA6TH PETITIONER
AUGUSTINE MUSYOKI KITHEKA7TH PETITIONER
RAEL MUMO MUTHOKA8TH PETITIONER

VERSUS

THE ETHICS AND

ANTI-CORRUPTION COMMISSION1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
THE ATTORNEY GENERAL3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF MAKUENI INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners are all public officers under the County Assembly Service Board of Makueni

County and members of the Tender Committee of Makueni County. They have filed the present petition to challenge their prosecution in connection with a certain tender that they awarded in their capacity as members of the tender committee of the county.

2. The petition is lodged against the Ethics and Anti-Corruption Commission (the Commission) established pursuant to section 3 of the Ethics and Anti-Corruption Commission Act, 2011, the Director of Public Prosecutions (DPP) whose office is established under Article 157 of the Constitution with the mandate to undertake all criminal prosecutions in Kenya, and the Attorney General (AG), the legal representative of the national government in civil matters. The County Government of Makueni was enjoined in the proceedings as an interested party.

Background

3. The facts giving rise to the present petition are fairly straight forward. On 12th June, 2015, the petitioners were charged with corruption offences following investigations by the Commission. The charges were laid against the petitioners in their capacity as members of the County Tender Committee who had participated in procurement for the supply, installation and commissioning of a Skid Mounted Mini Dairy Plant at Kikima Farmers' Co-operative Society in Mbooni Sub-County. The charges alleged that the members of the Tender Committee committed the offences of wilful failure to comply with the law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the **Anti-Corruption and Economic Crimes Act (ACECA)**.
4. The petitioners challenge their prosecution and the decision to suspend them in accordance with Section 62 of ACECA. They allege that their prosecution and suspension is in violation of their constitutional rights under Article 47 which contains the constitutional guarantee to fair administrative action. They also challenge the constitutionality of section 62 of ACECA which they allege violates their constitutional right to presumption of innocence under Article 50(2)(a), to non-discrimination under Article 27, as well as their socio-economic rights guaranteed under Article 43.
5. The interested party supports the petition, while the respondents oppose it. The position taken by the respondents is that the petition is an abuse of process as it asks this Court to deal with matters that fall within the jurisdiction of the trial court, and they contend that there is no violation of the petitioners' constitutional rights demonstrated.

The Petitioners' Case

6. The case for the petitioners is set out in their Amended Petition dated 15th July, 2015, the affidavit in support sworn by the 1st petitioner, Mr. Alex Kyalo Mutuku, on 18th June, 2015, and written submissions dated 21st October, 2015. Learned Senior Counsel, Mr. Nzamba Kitonga, presented their case.
7. According to the petitioners, on or about the year 2014, the County Government of Makueni budgeted for the installation and commissioning of a Skid Mounted Mini Dairy Plant at Kikima Farmers' Co-operative Society in Mbooni Sub-County. The budget for this project, among other projects, was approved by County Government of Makueni Executive and the Controller of Budget. On 14th May, 2014, an advertisement for the application for tenders for the supply, installation and commissioning of the said plant was placed in the Daily Nation, but it was non-responsive. On 7th June, 2014, following the unsuccessful applications for the aforesaid tender due to bidders quoting amounts that exceeded the budget for the supply, the Makueni County Government re-advertised the tender and six bidders responded.
8. On 20th June, 2014, the Evaluation Committee evaluated the tenders and recommended one, ASL Ltd, which was the lowest bidder, for award subject to negotiations. On 21st June, 2014, the said firm was awarded the tender subject to negotiations, and the Tender Committee directed the

Secretary to ensure that the final figure after the negotiations was reflected in the minutes. On 23rd June, 2014, the Evaluation Committee negotiated with the firm a quotation of Kshs.6,000,000/= to Kshs.5,950,000 but the minutes of the negotiation were mistakenly dated 25th June, 2014, while the notification of the award was also mistakenly dated 20th June, 2014 instead of 21st June, 2014.

9. The petitioners averred that the approved budget for the project was not exceeded, and that the Tender Committee gave reasons for its decision and acted in line with the resolutions of the County Executive Committee and within the powers conferred on it by public procurement law. Accordingly, in their view, it would amount to unfair and unreasonable administrative action and/or decision for the Commission to press charges against them in the matter. Further, that in any event, any person aggrieved by the decision of the Tender Committee to adopt a certain procedure had a remedy by way of an application for review before the Public Procurement Administrative Review Board, which has powers to review the Tender Committee's decision upon request.
10. The petitioners contended that the Commission's decision to prefer charges against the Tender Committee and the County Secretary is against public policy as it may open flood gates for victimization of Tender Committee members instead of utilizing the statutory remedies available in procurement law. Further, that a charge preferred by the respondent against them is an affront to the principles of natural justice and fundamental rights under Article 47 of the Constitution, the respondents' actions are likely to interfere with the independent exercise of powers and discretion under the statute, and that the power has been exercised unreasonably in an unfair and unconstitutional manner.
11. The petitioners further alleged that section 62 of the Anti-Corruption and Economic Crimes Act is obsolete and offends the provisions of Articles 47, 50, 156 and 157 of the Constitution and is therefore unconstitutional.
12. In his submissions on behalf of the petitioners, Mr. Kitonga attributed the dating of the minutes and tender award which had led to the prosecution of the petitioners to human mistakes. These simple human mistakes, according to the petitioners, appear to have convinced the Commission's investigators that no evaluation was conducted prior to making the award and giving notification of the award, and that the investigators could not accept that the petitioners were working in a hurry to beat the budgetary deadlines.
13. Mr. Kitonga submitted that rather than prefer criminal charges against the petitioners, the provisions of the Public Procurement and Disposal Act (PPDA), which in his view complies fully with Article 47 of the Constitution with regard to the requirement for fair administrative action, should have been followed. These provisions would have required that a party aggrieved by the tendering process should appeal to the Public Procurement Review and Appeals Board, and if still dissatisfied, challenge the decision before the High Court. In his view, the purpose of the procedure under the Act was to protect public officers against criminal suspicion while undertaking their work. Mr. Kitonga submitted that the requirement was based on the realization that in the process of procurement, mistakes can arise and allegations of cronyism and bias made.
14. It was his submission further that the Commission and DPP would be entitled to proceed against the petitioners if there is a clear case against them, such as taking a bribe. In his view, however, there should be no prosecution where there was only a mistake in the petitioners' decision or in the dates.
15. While conceding that the DPP had the power to charge the petitioners, Mr. Kitonga submitted that the power is not absolute and the DPP is required to protect the public interest, which would include the interests of public officers while executing their mandate so that they can act without fear that every mistake will lead to criminal charges. It was his submission that by departing from the requirements of Article 47 which would have led to adherence to the PPDA instead of filing

criminal charges, the DPP had violated Article 157(11).

16. The petitioners also impugned section 62 of the Antic-corruption and Economic Crimes Act which requires that a public officer charged under the Act is suspended on half pay. Mr. Kitonga's submission in this regard was that in view of Article 50 of the Constitution, which states that a person is presumed innocent until proved guilty, the section was a violation of the petitioners' right to the presumption of innocence. Further, it was his submission that other public servants such as Members of Parliament are entitled to remain in office until the appellate process as they are afforded protection by Article 99. It was his submission that the ACECA should take the cue from Article 99 so that there is no different treatment for different public servants.

17. The petitioners submitted that this Court can and will interfere and halt a criminal trial if such trial violates the Constitution. They relied in support for this proposition on the decisions in **Commission for the Implementation of the Constitution vs The Attorney General, Civil Appeal No. 351 of 2012**, **Josephine Akoth Onyango and Others vs Director of Public Prosecutions and Another, HCCE No. 471 of 2013** and **George Okungu and Others vs Attorney General and Another [2014] eKLR**. In their view, there are proper and adequate grounds to halt the petitioners' trial in the subordinate court and to declare the charges against them unconstitutional, null and void. They therefore urged the Court to allow their petition and grant the following orders:

- a. *A declaration that the powers and authority of the 1st respondent under the Constitution and Statute ought to be exercised with due regard and respect to the principles of separation of power and natural justice as envisaged under Article 47 of the Constitution.*
- b. *A declaration that the 1st respondent acted in violation of the right of the petitioners under Articles 47 and 50 of the Constitution.*
- c. *An order for injunction restraining the respondent from in any way proceeding to suspend the petitioners based on the charges preferred against the petitioners in Machakos Anti-Corruption Case No. 10 of 2015 and/or any charges or interfering with the petitioners' fundamental rights and freedoms based on any investigation whether commenced, on-going or concluded relating to the tender for supply, installation and commissioning of a Skid Mounted Dairy Plat at Kikima Farmers' Co-operative Society in Mbooni Sub-County.*
- d. *A declaration that the decision to charge the petitioners for the offences reflected in the charge in Anti-Corruption Case No. 10 of 2015 is in violation of Articles 47 and 50 of the Constitution and in contradiction of the Procurement and Disposals Act, No. 3 of 2005.*
- e. *An order for certiorari to bring into Court and be quashed the charge sheets in the Machakos Law Courts Anti-Corruption Case No. 10 of 2015.*
- f. *Any other relief that this Honourable Court may deem appropriate to ensure law, order and constitutionalism.*
- g. *A declaration that the provisions of section 62 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 are obsolete, contrary to Articles 156, 157, 47 and 50 of the Constitution hence null and void.*
- h. *The costs of these proceedings be borne by the 1st respondent herein.*

The Case for the Interested Party

18. The County Government of Makueni supported the petition and filed a replying affidavit sworn by its County Secretary, Mr. Joshua Wambua, on 22nd September, 2015. It also filled submissions

dated 11th November, 2015, which were highlighted by their Learned Counsel, Mr. Nyamu.

19. In his affidavit, Mr. Wambua reiterated the averments by the petitioners and asserted that the entire procurement process was carried out within the rules and regulations provided under the PPDA and the Public Procurement Regulations. He contended that the Commission was misguided and merely witch hunting when it pressed corruption charges against the petitioners as they did not commit any corruption while carrying out their duties. It was his deposition that the allegations against the petitioners fall within the dispute resolution mechanism under the PPDA, and that none of the persons who applied for the tender lodged any complaint against the procedure that was adopted by the Tender Committee.
20. Mr Wambua further deposed that suspending the petitioners and subjecting them to half pay as prescribed under section 62 of the Anti-Corruption and Economics Crimes Act creates the presumption of conviction before trial which offends Article 50 (2) of the Constitution under which one is presumed innocent until the contrary is proved. According to the interested party, the provision also infringed the petitioners' socio-economic rights guaranteed under Article 43 of the Constitution.
21. In his submissions on behalf of the interested party, Mr. Nyamu associated himself with the submissions of the petitioners in support of the petition. He added that failure to comply with procurement proceedings does not meet the definition of corruption and/or economic crime under ACECA; that matters of procurement procedures are not matters within the purview of ACECA; and that the DPP's power must be exercised with regard to the public interest, the interest of the administration of justice and so as to avoid an abuse of the legal process. Mr Nyamu argued that charging members of procurement committees will create fear which will make public officers hesitant to serve in such committees.
22. The interested party agreed with the petitioners that section 62 of ACECA violates Articles 50(2) (a) and 27 of the Constitution and ought to be declared unconstitutional. It relied on the decision in **Republic vs Attorney General Exp Kipngeno Arap Ngeny, High Court Civil Appl. No 406 of 2001** to echo the petitioners' argument that this Court has the power to stay or halt criminal proceedings where they violate the Constitution.

The 1st Respondent's Case

23. The Commission opposed the petition and filed an affidavit in reply sworn on 31st August, 2015 by its Investigating officer, Mr. Mohamud Hassan. It also filed submissions dated 14th December, 2015 which were highlighted by Learned Counsel, Mrs. Shamalla.
24. Mr Hassan averred on behalf of the Commission that it conducted investigations into allegations of financial mismanagement, fiscal indiscipline and procurement malpractices in Makueni County involving the County Executive. The investigations revealed that the tender opening process, after re-advertisement, was done on 20th June, 2014 and from the tender opening register there were six candidates, one of whom was ASL Limited. The investigations further revealed that an evaluation Committee was established and it evaluated the submitted tenders on the same day that the tender bids were opened and a notification of award was given. The Commission states that this was contrary to section 66 (6) of the Public Procurement and Disposal Act as read with **Regulation 46 of the Public Procurement and Disposal Regulations, 2006**.
25. According to the Commission, the reason why tenders should be evaluated within 15 days after the opening of the tender, with an exception, where the accounting officer allows, for 30 more days but within the tender validity period, is to give the Evaluation Committee sufficient time within which to carry out due diligence as required by Regulation 16 of the Public Procurement and Disposal Regulations. In this case, this was never done by the petitioners.

26. It was the Commission's averment that its investigations revealed that the alleged negotiations took place on 25th June, 2014 as opposed to 23rd June, 2014 as suggested by the petitioners, and that the notification was given on 20th June, 2014, a day before the Tender Committee met to award the tenders. It avers further that the Tender Committee did not have the mandate or power to award the tender subject to further negotiations as to the bidder reducing the price quoted. It is its case therefore that the petitioners contravened Regulation 11 of the Public Procurement and Disposal Regulations.
27. The Commission further avers that its investigations also revealed that no technical evaluation of the proposals was done to confirm that the candidates had the technical capacity to satisfy the conditions of the tender.
28. The Commission asserts that during its investigations, the petitioners were informed about the allegations levelled against them and they were accorded an opportunity to give an account of what transpired in their own words. In its view, since they were given a hearing and accorded an opportunity to give an account of what transpired, the Commission acted in accordance with the rules of natural justice and did not in any way act in an arbitrary manner.
29. With regard to the petitioners' contention that the matter should have been taken before the Public Procurement Administrative Review Board, the Commission argued that the reviews that are made to the Review Board are done by candidates who submit bids to tenders and who claim to have suffered or are at risk of suffering loss or damage due to breach of a duty imposed on a procuring entity. Its submission was therefore that the contention by the petitioners that any violations of the procurement laws should be lodged at the Public Procurement Administrative Review Board is untenable as the allegations against them are economic crimes which fall under the mandate of the Commission.
30. The Commission also argued that the petitioners are public officers and are bound by the provisions of Chapter Six of the Constitution and the provisions of the PPDA whenever they are dealing with matters of procurement using public funds. They had not demonstrated how section 62 of the Anti-Corruption and Economic Crimes Act (ACECA) is unconstitutional; that the intention of the said section 62 was to avoid interference of key witnesses by accused persons and that it is a vital provision of the law due to the nature and sensitivity of corruption and economic crimes matters.
31. In her submissions, Mrs. Shamalla observed that what is being referred to as human error by the petitioners is not actually human error as the tenders in question were opened on 20th June, 2014, an evaluation committee was established on the same date, and tenders were issued. This, in her view, cannot be dismissed as human error as there is a question as to whether the said Tender Committee even sat. It was also her submission that in any event, these are the issues before the criminal court as they were contrary to section 45 (2) (b) of the Anti-Corruption and Economic Crimes Act, the section under which the petitioners are charged.
32. Mrs Shamalla submitted further that another fact not brought before this Court is that a different Committee is, under Regulation 10(2) (b) of the Public Procurement and Disposals Act, required to review and ascertain that all processes have been carried out by the Tender Evaluation Committee before they award a tender. These were all matters, in her view, which can only be dealt with by the trial court.
33. The Commission further submitted that the petitioners have failed to plead their case with precision as required under the principles espoused in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**. They had also failed to show how the provisions of Article 47 of the Constitution had been violated, or how the Article applies to their case. It was the Commission's submission that section 4 (3) of the **Fair Administration Act, No. 4 of 2015** does not presuppose an application of the provision to criminal investigations by an investigating agency such as the Commission, the Criminal Investigations Directorate and the Kenya Police.

34. Further, according to the Commission, the petitioners have been charged with the offence spelt out under section 45 of ACECA, which is criminal in nature, and the investigations thereof cannot be administrative in nature. It was also their submission, in reliance on the decisions in **Dry Associates Limited vs Capital Markets Authority and Another, Petition No 328 of 2011** and **George Taitumu vs Chief Magistrate Court, Kibera and Another, Petition No. 81 of 2014**, that Article 47 of the Constitution does not apply to criminal proceedings as the rights of the accused person are protected under Article 50 of the Constitution.
35. With respect to the challenge of the constitutionality of section 62 of ACECA, the Commission submitted that the Court should be guided by the decision in **Ndyanabo vs Attorney General [2001] EA 495**, and **The Queen vs Big M Drug Mart Ltd [1985] 1 S.C.R 295** in determining the constitutionality or otherwise of the section. In its view, suspension under the section does not address the question of the accused person's guilt or innocence but instead provides for means to safeguard the evidence from interference or tampering by an accused person. The purpose of the section is valid and in its view, it passes the constitutionality test.
36. The Commission further submitted that the drafters of ACECA took into account that corruption and economic crimes are matters of great importance as they touch on public funds. Section 62 of the Act was intended to safeguard the witnesses' evidence in view of the fact that in corruption matters, the witnesses are known to the accused person by virtue of being work mates and/or being involved in the transactions being investigated. At other times, the accused person is the person entrusted with the documents that are being used in the prosecution of the case, and consequently, there is a high possibility of interference which the section sought to prevent.
37. The Commission discounted the argument that section 62 violated the petitioners' socio-economic rights. Its submission was that under section 62, an accused person on half pay still lives in humane conditions and the time frame within which criminal proceedings must be completed is 24 months, which ensures that justice is not delayed. It therefore prayed that the petition should be dismissed with costs to it.

The 2nd Respondent's Case

38. The DPP supported the position taken by the Commission with respect to the prosecution of the petitioners. He filed Grounds of Opposition dated 10th November, 2015 and submissions of the same date. His case was presented by Learned State Counsel, Mr. Ashimosi.
39. The DPP argued that the petitioner had not demonstrated that in undertaking investigations into the complaint that was lodged, the respondents acted without or in excess of powers conferred upon them by the law or that they have contravened in any manner or failed to comply with the Constitution or any provisions of any written law.
40. In the DPP's view, the decision to charge the petitioners was informed by the sufficiency of the evidence on record and public interest and not any other considerations. Further, that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed by the trial court. The petitioners had not demonstrated that the DPP did not act independently or has acted capriciously, in bad faith or has abused the process in a manner to necessitate intervention of this Court.
41. It was further the DPP's position that the petitioners had not met the requirements for the grant of the orders that they sought, and that section 62 of the Anti-Corruption and Economic Crimes Act does not shift the burden of proof to the accused person and is therefore not unconstitutional.
42. In his submissions, Mr. Ashimosi associated himself with the submissions by Mrs. Shamalla. He argued that public interest was the factor underlying the prosecution of corruption cases, a factor that must be jealously guarded and that can only be balanced against the need to safeguard the Constitution. Counsel argued further that no material has been placed before this Court to enable

the balance tilt in favour of the petitioners and that they have failed to prove any infringement of any law or regulation.

43. The DPP maintained that his office acted within the law and submitted that this Court ought not to usurp the constitutional mandate of the DPP. He relied on the decisions in, among others, **Kenya Commercial Bank Limited and Others vs Commissioner of Police and Another, Petition No. 218 of 2012**, **George Joshua Okungu and Another vs Chief Magistrate Court Anti-Corruption Court Nairobi and Another Petition No.227 and 230 of 2009**, **Republic vs Commissioner of Police and Another ex parte Michael Monari and Another [2012] eKLR** to submit that the petitioners have failed to prove any violations of their rights and/ or fundamental freedoms.

The 3rd Respondent's Case

44. The AG opposed the petition and filed grounds of opposition and submissions both dated 9th September, 2015.

45. Through Learned State Counsel Mr. Obura, the AG contended that the Commission has the mandate, under section 11 of the Ethics and Anti-Corruption Act to, *inter alia*, investigate and recommend to the DPP the prosecution of any acts of corruption or economic crimes or any matter prescribed under the said Act or any other laws enacted pursuant to Chapter Six of the Constitution. It was his case further that the petitioners, being public officers, are bound by the provisions of Chapter Six of the Constitution on leadership and integrity.

46. The AG further argued that under Article 157 of the Constitution, the DPP cannot be directed or controlled by any person or authority on when to commence any investigations or criminal proceedings against any person. In his view, this petition is full of speculations and assumptions that the petitioners will automatically be found guilty if they undergo trial and as such it contravenes the provisions of Articles 50 (2) (a), (d) and (k) and 160 of the Constitution. It was his case that this is not a proper case in which the Court ought to bring the anti-corruption proceedings to a halt since the petitioners will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case during trial.

47. The AG further submitted that the orders sought in the present petition should not issue as they are intended to frustrate investigations and trial against the petitioners and are therefore against the public interest. In his view, the petition is otherwise misconceived and is an abuse of the Court process as the petitioners' rights and fundamental freedoms have not been breached in any way.

48. Mr. Obura associated himself with the submissions for the Commission and the DPP. He argued that on issues to do with policy being pushed by ACECA or any other Act of Parliament, whether such policy is proper or not is one to be dealt with by the National Assembly. This Court can only deal with such a matter if the Constitution has been contravened, which is not the case in the present petition.

49. It was also the AG's case that this Court ought not to usurp the powers of the DPP, and the mere fact that the intended criminal proceedings were likely to fail is not a ground for halting the proceedings by way of judicial review as judicial review proceedings are not concerned with the merits but with the decision making process. The AG relied on the decision in **Republic vs Attorney General ex parte Kenneth Kariuki Githii, Misc. App. No. 151 of 2013** to submit that this is not a proper case for halting the criminal proceedings. He joined the Commission and DPP in praying that the petition be dismissed with costs.

Determination

50. Having read and considered the pleadings and submissions of the parties in this matter, it is my view that three issues arise for determination. The first is whether a violation of the petitioners'

rights has been demonstrated. The second relates to the constitutionality of section 62 of the Anti-corruption and Economic Crimes Act, while the third, which is predicated on the first, is what relief the Court should grant should it find in favour of the petitioners.

Whether there has been a Violation of the Petitioners' Rights

51. The petitioners case is that the preferment of criminal charges against them is unconstitutional as the factual basis of the charges are matters that should be addressed under the provisions of the Public Procurement and Disposal Act before the Public Procurement Administrative Review Board. The response is that the matters at issue are criminal in nature under the provisions of the Anti-corruption and Economic Crimes Act and are therefore not within the mandate of the Board.

52. The petitioners have been charged under section 45 (2) of the Anti-Corruption and Economic Crimes Act which provides that:

An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures.

53. Thus, the Act creates offences with respect to the failure by a public officer to adhere to, amongst others, ***“any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal”*** of public property. The charges against the petitioners relate to a failure to comply with the provisions of the Public Procurement and Disposal Act. On the face of it therefore, and without entering into an examination of the factual basis of the charges against the petitioners, they are accused of having done what is prohibited under section 45 of ACECA.

54. That being the case, the next question is whether the issue is one that is within the mandate of the Public Procurement Administrative Review Board. Section 25 of the Public Procurement and Disposal Act establishes the Public Procurement Administrative Review Board, while section 93 thereof sets out the matters that fall for review before the Board in the following terms:

1. ***Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.***
2. ***The following matters shall not be subject to the review under subsection (1)—***
 - a. ***the choice of a procurement procedure pursuant to Part IV;***
 - b. ***a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;***
 - c. ***where a contract is signed in accordance to section 68; and***
 - d. ***where an appeal is frivolous.***

55. As is evident from the above provision, the matters that go to the Board relate to a claim by a party, who has made a bid to a procuring entity, and who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by law or the regulations. That, in my view, is an entirely different matter from what is contemplated by section 45 of ACECA. The Board is mandated to review the decisions of procuring entities on the complaints of candidates for tenders floated by the entities. Section 45 of ACECA is intended to check the commission of economic crimes and corrupt practices by public officers in whom is

vested the “**administration, custody, management, receipt or use of any part of the public revenue or public property.**” The Board does not have the mandate, let alone the capacity, to deal with such matters, which are vested in the Commission and the DPP.

56. The petitioners have argued that the matters complained of are simple human mistakes that do not amount to criminal offences or economic crimes. That may well be the case. However, as the respondents submit, those are matters of evidence, which fall within the mandate of the trial court.

57. The petitioners have alleged violation of Article 47. However, no evidence was placed before me to demonstrate how the violation of that right has occurred. From the evidence, they were called to record statements by the respondents, and indeed, Mr. Kitonga submitted that they were not alleging a violation of Article 47 by the respondents. It is therefore difficult to see how the violation of Article 47 occurred, especially in view of the provisions of the Fair Administrative Action Act. As submitted by the respondents, the provisions of that Act, both at the interpretation section and in section 4(3), do not contemplate a situation in which administrative action can apply to criminal investigations or proceedings.

58. The petitioners have also alleged violation of their right to non-discrimination in relation to their suspension from employment. However, as this is linked with the challenge to section 62 of ACECA, I shall consider it in relation to the constitutionality or otherwise of that provision.

Whether Section 62 of ACECA is Unconstitutional

59. The petitioners have challenged the constitutionality of section 62 of the Anti-corruption and Economic Crimes Act on three levels. They allege that it violates their right under Article 50(2)(a) to be presumed innocent until proved guilty. They argue, secondly, that it is discriminatory against them as other public officers such as Members of Parliament are not suspended in similar circumstances. Finally, it is their contention that their suspension on half pay violates their socio-economic rights.

60. When confronted with a challenge to the constitutionality of a statute or a provision thereof, the Court starts with the principle articulated in the case of **Ndyanabo vs Attorney General of Tanzania [2001] EA 495**, that there is a general presumption that every Act of Parliament is constitutional and the burden of proving the converse rests upon any person who alleges otherwise. A second important principle, enunciated in the case of **Murang’a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011**, is that the Court should be guided by the object and purpose of the impugned legislation in determining its constitutionality, which object and purpose can be discerned from the legislation itself.

61. Further, the Court must bear in mind the words of the Court in the case of **U.S vs Butler, 297 U.S. 1[1936]** in which it was stated that:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.” (Emphasis added)

62. Section 62(1)-(4) of ACECA, whose constitutionality the petitioners challenge and which are relevant for present purposes, provide as follows:

1. ***A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: Provided that the case shall be determined within twenty-four months.***
2. ***A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.***
3. ***The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.***
4. ***This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.***

63. I will examine these provisions against Articles 50(2), 27 and 43 of the Constitution.

Violation of the Right to Presumption of Innocence

64. According to the petitioners, the suspension of a person accused of a crime on half pay derogates from the right of an accused person to be presumed innocent as the imposition of the half pay sanction amounts to condemning an accused person.
65. The response from the respondents is that such suspension does not address the question of the accused person's guilt or innocence. In their view, it provides a means to safeguard evidence from being interfered or tampered with by the accused person.
66. Let me consider first the issue of suspension from employment taken as an administrative action after one has been charged with an offence committed at the work place. The issue has been considered in various decisions in other jurisdictions. The rationale for such suspension was explained in the case of **Lewis vs Heffer and Others (1978) 3 ALL ER 354** in which Lord Denning acknowledged that:

“Very often irregularities are disclosed in a government department or in a business house, and a man may be suspended on full pay pending inquiries. Suspicion may rest on him, and so he is suspended until he is cleared of it. No one, so far as I know has ever questioned a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumour and suspicions. The others will not trust the man. In order to get back to work, the man is suspended. At that stage the rules of natural justice do not apply.”

67. The South African Court in **Maurice Mangena vs Nelson Mandela Metropolitan Municipality and Another, ECJ No. 034 of 2005** upheld the principle of suspension as a holding operation and held that:

“the purpose of the suspension was not to impose discipline, but for reasons of good administration. It was to ensure that the investigation proceeded unhindered and without any interference, in the first instance, and to protect the interests of the first respondent having regard to the nature of the alleged misconduct, the position of applicant and the obvious consequences of the alleged misconduct, should it be proved.”

68. It thus appears to me that the suspension of a person suspected or charged with a criminal offence is a perfectly rational and permissible administrative decision. It allows for investigations to be

carried out without interference from the employee involved. Viewed from that perspective, suspension is not a punishment but an administrative holding operation pending the outcome of further investigations or action.

69. In my view therefore, such suspension does not violate Article 50 (2) (a) of the Constitution. An administrative action taken by an employer has no connection whatsoever with the trial of an accused person before a competent court. The presumption of innocence is guaranteed under Article 50(2)(a) as one of the constitutional safeguards to a fair trial in the following terms:

Every accused person has the right to a fair trial, which includes the right.

(a) to be presumed innocent until the contrary is proved.

70. The suspension does not take away the right of the person so suspended to be presumed innocent, and the burden still lies on the prosecution to prove his or her guilt beyond reasonable doubt. Indeed, the provisions of section 62(3) make clear that should one be acquitted or for any reason the proceedings against him or her terminated, the public officer ceases to be suspended. It is my view therefore that section 62 of ACECA does not violate the petitioners' rights under Article 50(2)(a).

71. I am fortified in this view of the matter by the decision of the Supreme Court of Philippines in **Corazon C. Gonzaga vs The Honourable Sandiganbayan (First Division) and Others, G.R. No. 96131 September 6, 1991** (which is of persuasive authority), where it was held that:

“It will be noted that in the questioned resolutions, respondent court imposed on petitioner an indefinite period of suspension, pendente lite, from her mentioned office, on the basis of Section 13, Rep. Act 3019, as amended, earlier quoted. Petitioner at the outset contends that Section 13 of Rep. Act 3019, as amended, is unconstitutional as the suspension provided thereunder partakes of a penalty even before a judgment of conviction is reached, and is thus violative of her constitutional right to be presumed innocent.

We do not accept the contention because: firstly, under Section 13, Rep. Act 3019, suspension of a public officer upon the filing of a valid information is mandatory. What the Constitution rejects is a preventive suspension of indefinite duration as it raises, at the very least, questions of denial of due process and equal protection of the laws; in other words, preventive suspension is justifiable for as long as its continuance is for a reasonable length of time; secondly, preventive suspension is not a penalty; a person under preventive suspension, especially in a criminal action, remains entitled to the constitutional presumption of innocence as his culpability must still be established, thirdly, the rule is that every law has in its favor the presumption of validity, and that to declare a law unconstitutional, the basis for such a declaration must be clearly established.”
(Emphasis added)

72. I believe that I need say no more on this point.

Violation of Socio-economic Rights

73. The second issue to consider under this head is whether the suspension on half pay violates the petitioners' socio-economic rights.

74. I consider this question from the perspective that it arises in circumstances where an employee is suspected and/or charged with having committed a criminal offence, and an administrative decision to suspend him has been taken. As noted above, such suspension is permissible in order to safeguard evidence and prevent interference by the suspended employee with evidence or with

witnesses. In such circumstances, is the employer under an obligation to pay the employee who is employed and receives a salary or wages for his labour, when no labour is being offered as a consequence of the alleged unlawful acts of the employee?

75. It has been tacitly acknowledged in a decision of the Employment and Labour Relations Court that it is lawful for an employer to suspend an employee on half pay while a criminal prosecution is on-going. In the case of **Patrick Wanyonyi Khaemba vs Secretary, Teachers Service Commission and Another, Kisumu Industrial Court, Petition No. 231 of 2013**, the Court (Wasilwa J) considered various public sector regulations with respect to suspension on half pay, including Regulation 23 of the **Public Service Commission Regulation 2005**, Regulation 17 of the **Judicial Service Commission Regulations**, and Regulation 23 of the **Public Service Commission (Prison Service) Regulations 2006**, and held that Regulation 68 of the Teachers Service Commission Regulations, which denied a teacher's full salary in the event of interdiction on certain grounds, was unconstitutional and violated Article 27(1).
76. It appears to me that the view taken by that Court, which I agree with, is that withholding the half pay of an employee who is on interdiction for having committed a disciplinary infraction or a criminal offence which is under investigation is lawful. What is not lawful in the view of the Court is subjecting some public sector employees to half pay, while others have their full pay withheld.
77. In any event, employees are aware, or are deemed to be aware, of the terms of their employment, including the regulations governing various aspects of their employment such as suspension on half pay in the event that one is charged with a criminal offence. In the circumstances, I am unable to find a violation of the petitioners' socio-economic rights as alleged by the petitioners and the interested party.

Violation of Article 27 on Non-Discrimination

78. The petitioners have argued that section 62 contravenes the non-discriminatory provisions of Article 27 of the Constitution as it does not apply to Members of Parliament. They base their argument on the provisions of Article 99(3) of the Constitution to argue that Members of Parliament are entitled to remain in office until the end of the appellate process as they are afforded protection by Article 99.
79. However, it is noteworthy that Article 99 deals with qualifications and disqualifications for election to Parliament. It provides as follows:

99. (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—

...

(2) A person is disqualified from being elected a member of Parliament if the person—

...

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or

(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

80. Article 99 does not deal with a situation comparable with what is contemplated by section 62 of ACECA- that is a situation in which a sitting member of Parliament is charged with the commission of a criminal offence. It deals with disqualification from seeking elective office. In their wisdom, the people of Kenya accepted a situation in which a person who has been convicted of a criminal offence, but who has not exhausted the review or appeal process, is still eligible to run for elective office.

81. Unlike the public service or other public sector employees, it seems that Parliament has not seen an ethical need to place sanctions on Members of Parliament charged with the commission of criminal offences. This, however, is not the ideal situation. Rather than public officers in other public sector seeking to be placed in the same situation as Members of Parliament in terms of accountability and adherence to Chapter Six of the Constitution, the reverse should be the case: that Members of Parliament should face the same sanctions and regulations as other public sector workers who are suspected of having committed criminal offences, and have been charged with regard thereto, or similar but appropriate sanctions that would apply to elected officials.

82. In any event, I am unable to find a violation of Article 27 of the Constitution by the provisions of ACECA.

Disposition

83. Having considered the pleadings and submissions of the parties and analysed their respective cases against statutory and constitutional provisions, it is my finding that all the issues must be answered in the negative. In sum, my findings on the two main issues and the three sub-issues are as follows:

- i. *There is no violation of the petitioners' rights demonstrated in their prosecution by the respondents;*
- ii. *The provisions of section 62 of the Anti-corruption and Economic Crimes Act are not unconstitutional;*
- iii. *The suspension of the petitioners as provided under section 62 of the Anti-corruption and Economic Crimes Act does not violate their right to be presumed innocent guaranteed under Article 50(2)(a) of the Constitution;*
- iv. *The suspension of the petitioners on half pay does not violate their socio-economic rights under Article 43 of the Constitution;*
- v. *The suspension of the petitioners does not violate the non-discrimination provisions contained in Article 27 of the Constitution.*

84. As I have responded to the two main issues and the three sub-issues in the negative, I need not deal with the last issue identified at the beginning with respect to the remedies. The upshot is that there is no merit in the present petition. It is therefore dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 5th day of April 2016.

MUMBI NGUGI

JUDGE

Mr. Kitonga instructed by the firm of Nzamba Kitonga & Co. Advocates for the petitioner.

Mrs. Shamalla instructed by the firm of Judith T. Mwanzia Shamalla for the 1st respondent.

Mr. Ashimosi instructed by the Director of Public Prosecution for the 2nd respondent.

Mr. Obura instructed by the State Law Office for the 3rd respondent.

Mr. Nyamu instructed by the firm of Nyamu & Nyamu Co. Advocates for the interested party.