REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.185, 149, 150, 151, 154 & 155 OF 2013

(An Appeal arising out of the conviction and sentence of HON. D. N. MULEKYO – AG. CM delivered on 28th August 2013 in Nairobi Anti-Corruption CM. Case No.2 of 2010)

BENSON ANYONA OMBAKI…….....
……..1ST APPELLANT

PATRICK MWAVALA MWALALWA…….....
……..2ND APPELLANT

WILSON SHIVACH M'MAITSI…….....……
3RD APPELLANT

BERNARD MOSES ONGIGE…….....……
4TH APPELLANT

KOCHAR VISHAL……...
……..5TH APPELLANT

VULCAN LAB EQUIPMENT LIMITED…….....……6TH APPELLANT

VERSUS

REPUBLIC…….....
…….....RESPONDENT

JUDGMENT

The 1st to 4th Appellants were convicted on the charge of **fraudulent payment from public revenue for goods not supplied** contrary to **Section 45(2)(a)(ii)** as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act**. The particulars stated that the 1st to 4th Appellants on or about 16th July 2009 at School Equipment Production Unit (SEPU) offices along Ngong Road in Nairobi, the Appellants, being persons whose function concerned management of public revenue, to wit, the funds of SEPU paid M/s Vulcan Lab Equipment Limited the sum of Kshs.75,086,880/- for goods not supplied. The 1st to 4th Appellants were each sentenced to pay a fine of Kshs.800,000/- or indefault to serve two (2) years imprisonment. In addition, the 1st Appellant was sentenced to serve twelve (12) months imprisonment. The 5th and 6th Appellants were convicted of **fraudulent acquisition of public property** contrary to

Section 45(1)(a) as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act**. The particulars of the offence were that on or about 16th July 2009 at School Equipment Production Unit (SEPU) offices along Ngong Road Nairobi, the 5th and 6th Appellant jointly and unlawfully acquired public property namely the sum of Kshs.75,086,880/- from SEPU for goods not supplied. The 5th Appellant was fined Kshs.800,000/- in default he was sentenced to serve two (2) years imprisonment. He was also sentenced to serve a further twelve (12) months in prison without an option of a fine. The 6th Appellant was ordered to pay a fine of Kshs.800,000/- and in addition ordered to pay a fine of Kshs.10 million. The Appellants were aggrieved by their conviction and sentences. They have filed an appeal to this court.

In their petition of appeal, the 1st to 4th Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted of the charge yet the evidence adduced established that they had followed the correct procedure in procuring the said equipment. In particular, the Appellants faulted the trial magistrate for failing to appreciate that the board of management had approved the transaction. They faulted the trial magistrate for failing to appreciate the fact that the procurement was necessitated by the urgency of the need to equip secondary schools and not by any other motive. They took issue with the fact that the trial magistrate had failed to take into consideration that the equipment had infact been supplied at the time the Appellants were arraigned before the court. The trial court failed to take into account the fact that it saw the equipment when it visited the Express Kenya Godown at Industrial Area which confirmed the existence of the goods. In their view, the charge that they had fraudulently paid the supplier did not therefore carry any weight. They were of the view that the prosecution had failed to prove the case against them to the required standard of proof beyond any reasonable doubt. They were aggrieved that the trial court had relied on inconsistent and uncorroborated evidence to convict them. For the above reasons, the Appellants urged the court to allow their respective appeals and acquit them.

On their part, the 5th & 6th Appellants were aggrieved that they had been convicted of the charge of **fraudulent acquisition of Public Property** yet no evidence had been adduced of the alleged fraud. They took issue with the failure by the trial court to appreciate the fact that the goods for which the down payment was made was indeed procured in accordance with the request to supply the goods by SEPU. The said Appellants were aggrieved that they had been convicted yet no evidence was adduced that they had conspired or formed an intention to defraud the public. They faulted the trial magistrate for failing to take into consideration that it was SEPU who approached them to supply the equipment and therefore they could not be accused of being part of any fraudulent activities, if at all. The 5th & 6th Appellants had no obligation to confirm whether or not SEPU had complied with procurement requirements of the institution. They were aggrieved that the trial magistrate had failed to take into consideration the fact that the goods were actually delivered before they were charged. They faulted the trial magistrate for failing to evaluate the totality of evidence adduced before reaching the erroneous determination that the charge against them was proved to the required standard of proof. They were aggrieved that the trial magistrate had not considered their defence before reaching the finding that the charge had been proved. They finally faulted the trial magistrate for sentencing them to serve a sentence that was excessive in the circumstances. They urged the court to allow their respective appeals, quash their conviction and set aside the sentence that was imposed on them.

Prior to the hearing of the appeal, counsel for Appellants filed written submission in support of their respective appeals. The Respondent also filed written submission urging the court to uphold the conviction of the Appellants. The said counsel made further oral submission urging their respective opposing positions. This court shall revert to the arguments made by counsel after briefly setting out the facts of this case.

The 1st to 4th Appellants were at the material time employees of School Equipment Production Unit (SEPU), a semi-autonomous government agency under the Ministry of Education. According to the evidence adduced, SEPU is a company limited by guarantee. It was incorporated in 1976. SEPU was incorporated, *inter alia*, to manufacture equipment to be supplied to schools. SEPU was established to enable the ministry cut costs in procurement of equipment to be supplied to schools. The 1st Appellant was at the material time the managing director of the SEPU. The 2nd, 3rd and 4th Appellants served in

various capacities in SEPU.

According to the evidence adduced by the prosecution witnesses, the Ministry of Education in 2009 budgeted to supply science equipment to certain identified secondary schools. In total, the secondary schools to be supplied with science equipment were 1,440 secondary schools. The schools were to be supplied with certain equipment which were identified by the ministry officials. It was assessed that the cost of supplying the science equipment to each school would be Kshs.179,358/-. In total, it would cost the ministry Kshs.261 million to supply the equipment. In April 2009, SEPU was contacted by the ministry to identify science equipment that was to be supplied to the identified schools. Some of the equipment that was to be supplied included Microscopes, Conco flasks, Electronic balances, Volt metres, Galvano metres and Milian metres. According to the evidence adduced before the trial court, the 1st Appellant called a meeting of the directors of SEPU and informed them of the development. Nothing transpired until the sum of Kshs.261 million was paid to SEPU by the Ministry of Education. The cheque of this amount was issued to SEPU on 9th July 2009.

On 15th July 2009, the 1st Appellant called a meeting of the directors of SEPU. Some of the directors who attended the meeting included PW7 Charles Imbenzi Imbali, the then Principal of Kenya Technical Teachers Training College (KTTC), PW13 Nancy Karimi, the Managing Director of Jomo Kenyatta Foundation and PW6 Lydia Nzomo, the Director of Kenya Institute of Education (KIE). According to these witnesses, the 1st Appellant informed them that SEPU had received the said sum of Kshs.261 million from the Ministry of Education for the purposes of supplying science equipment to identified secondary schools in the Republic. The 1st Appellant informed them that the ministry had insisted that the science equipment be supplied to the schools within a period of two and half (2?2) months. Due to the urgency of the matter, the 1st Appellant requested the board to allow him to identify a supplier from the catalogues supplied to them. The directors were of the view that if the 1st Appellant wanted to avoid the procurement procedures under the **Public Procurement and Disposal Act**, he ought to give a justification and seek further clarification from the ministry. They advised the 1st Appellant to follow the provisions of the **Public Procurement and Disposal Act**.

However, it was apparent that the minutes that were prepared for that day reflected something different to what the witnesses remembered. According to the minutes which were produced in court, it was presented as if the Board had authorized the 1st Appellant to procure the equipment from the 6th Appellant *i.e.* Vulcan Lab Equipment Limited. Although the 1st Appellant insisted that the minutes were genuine, the three members of the Board disowned the minutes. What is without doubt is that pursuant to the said minutes, the 1st Appellant raised a proforma invoice to Vulcan Lab Equipment Limited. In response to the proforma invoice, Vulcan Lab Equipment Limited wrote to SEPU demanding to be paid 33% of the value of the Equipment to be supplied in view of the large quantity of the order. Vulcan Lab Equipment Limited required this commitment from SEPU so that they could order the equipment from their suppliers in India.

The 1st Appellant convened a Procurement Committee meeting on the same 15th July 2009 to validate the procurement. In attendance were the 2nd, 3rd and 4th Appellants. Pursuant to the condition for acceptance of the contract to supply the science equipment by Vulcan Lab Equipment Limited, a cheque of Kshs.75,086,880/- was issued. This constituted 33% of the cost of the equipment to be supplied. PW17 Peter Kimani Ndungu, a Compliance Manager with Public Procurement Oversight Authority and PW18 Maurice John Oduor Juma, the Director General of Public Procurement Oversight Authority testified that the accused persons acted in breach of **Section 74** of the **Public Procurement and Disposal Act** that required certain action to be taken in the event direct procurement is resorted to. In the case of the Appellants, the law was ignored when they directly procured for the supply of goods from Vulcan Lab Equipment Limited.

The 1st to 4th Appellants were convicted of **fraudulent payment from public revenue for goods not supplied** contrary to **Section 45(2)(a)(ii)** of the **Anti-Corruption and Economic Crimes Act** by conferring the benefit of the said sum of Kshs.75,086,880/- to Vulcan Lab Equipment Limited. The said

Appellants' conviction arose from their failure to follow the laid down procedure when procuring goods for a public entity, in this case, SEPU. The Law prohibits prepayment by a government agency to a supplier for goods that have not been delivered.

In their defence, the 1st to 4th Appellants argued that they were compelled to procure the equipment in the manner that they did in view of the urgency of the matter. They argued that they had complied with the law in regard to the procurement in question. In particular, they testified that they had undertaken a market survey through catalogues which enabled them to identify Vulcan Lab Equipment Limited as the supplier who would give them best value for the money. The Appellants reiterated this defence in their submission before this court.

As regard the 5th and 6th Appellants, it was their case that they were approached by SEPU to supply the equipment. They gave their conditions. One of the conditions was that SEPU pays 33% of the value of the goods upfront before they could supply the equipment. It was their case that they were not aware nor were they party to any procurement process in SEPU. They further argued that they had already procured the goods in question which were lying at Express Kenya Warehouse in Industrial Area. The goods were marked **"Not For Sale"** and **"Ministry of Education"** in accordance with the specification of SEPU. The 5th and 6th Appellants could therefore not sell the said equipment to any other entity other than the Government of Kenya. It was the said Appellants' case that they were not involved in any criminal conduct to warrant their being charged in court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellants for the charges that they were convicted of to the required standard of proof beyond any reasonable doubt.

Having re-evaluated the evidence adduced before the trial court, and considered the submission made by the parties in this appeal, it was clear to this court that the issue that would determine this appeal is whether the 1st to 4th Appellants applied the procedure laid down by the law when procuring the science equipment. SEPU is a semi-autonomous government agency. Although it is registered as a company limited by guarantee, nevertheless, when procuring goods it was required to comply with the provisions of the **Public Procurement and Disposal Act**. From the evidence adduced before the trial court, it was apparent that the 1st to 4th Appellants either ignored the requirements under the **Public Procurement and Disposal Act** or assumed that they were exempted from its application by virtue of the urgency in which the said science equipment was allegedly required by its parent Ministry of Education. Evidence was tendered how the 1st Appellant, in his capacity as the managing director of SEPU called a meeting of the Board of Directors on 15th July 2009. In this meeting, the 1st Appellant informed the Board that he had received the sum of Kshs.261 million from the Ministry of Education to enable SEPU acquire science equipment for 1,440 secondary schools. The 1st Appellant was advised by the Board of Directors to abide by the procurement law or if he was of a different view, seek further advice from the Permanent Secretary, Ministry of Education. From the evidence adduced, it clear that the 1st Appellant ignored this advice. What's more, the 1st Appellant contrived and manipulated the minutes of the said Board of

Directors to reflect that he had been given authority to procure the said science equipment from the 6th Appellant. These minutes were disowned by the directors who attended the meeting. In the considered view of this court, it was clear that the 1st Appellant was intent on continuing with the unlawful direct procurement irrespective of the advice that he was given by the Board of Directors.

Further, to give the direct procurement a modicum of legality, on the very same 15th July 2009, the 1st Appellant had a Procurement Committee convened where the 2nd to 4th Appellants were not only members but were active participants. PW10 Bernard Isindu, a member of the Procurement Committee told the court how the 4th Appellant casually informed him on 14th July 2009 of the procurement meeting that had been convened for the following day 15th July 2009. The meeting was attended by the 2nd and 3rd Appellants. PW10 did not attend the meeting because he was held elsewhere. He did not know what transpired in the meeting. The minutes of the Procurement Committee meeting held on that day were produced in evidence. What was clear to this court is that the meeting that had been convened by the 1st Appellant of the Board of Directors on the same day was clearly a ruse because the 1st to 4th Appellants had already determined that they would directly procure the said equipment from the 6th Appellant. This explains why the 1st Appellant was in a hurry to conclude the procurement process. He was not keen to follow due process. He did not wait for the approval of the board of directors of SEPU before he convened the Procurement Committee. When the approval was not forthcoming, he forged minutes of the Board of Directors to conform with what he had already decided to do.

In their defence, the 1st to 4th Appellants stated that they undertook the direct procurement of the said goods because of the urgency that the Ministry of Education required the particular science equipment. If that was the position, the Appellants should have abided by the terms of **Sections 74** and **75** of the **Public Procurement and Disposal Act**. Under **Section 74(2) & (3)** of the **Public Procurement and Disposal Act**, direct procurement may be applied where there is urgent need for the goods, works and services to be procured. Under **Section 74(3)(c)** of the **Act**, the circumstances that give rise to the urgency must be such that it was not foreseeable and not a result of dilatory conduct on the part of the procuring entity.

In the present appeal, it was evident to this court that the reason for the urgency that the 1st to 4th Appellants advanced was not supported by evidence. The procurement of the said science equipment was foreseeable as early as April 2009 when the 1st Appellant informed the Directors of SEPU of the plan to procure the said equipment. This court is of the view that the **"urgency"** was created by the 1st to 4th Appellants to give them the opportunity not to be bound by the provisions of the **Public Procurement and Disposal Act**.

This court therefore holds that the entire procurement process was tainted with illegality. In fact it was criminal. Therefore when the 1st to 4th Appellants made a prepayment to the 6th Appellant, they were compounding an illegal and criminal act that commenced when the direct procurement process was put in place by the 1st Appellant. The law did not allow the Appellants to make a prepayment of such a colossal sum of money when infact no goods had been supplied. It was clear to the court that the 1st to 4th Appellants were financing the 6th Appellant to supply the science equipment. The 5th and 6th Appellants explained that they gave condition to SEPU to be paid the advance sum of 33% of the total cost before they could supply the equipment. The 1st to 4th Appellants ought to have known or indeed were presumed by the law to know that they were not supposed to pay an advance payment before the goods were supplied. The court therefore holds that the prosecution did prove to the required standard of proof beyond reasonable doubt that the 1st to 4th Appellants fraudulently paid to the 6th Appellant the said sum of Kshs.75,086,880/- for goods not supplied. It does not constitute a valid defence that the said goods were supplied later. Their appeal in that regard cannot succeed.

As regard the 5th and 6th Appellants, it was clear from the evidence adduced that they did not in any way participate in the subversion of the procurement process by the 1st to 4th Appellants. The 5th and 6th Appellants were approached by the 1st to 4th Appellants with a proforma invoice. They gave their

conditions if they were to supply the science equipment sought by SEPU. One of the conditions was that SEPU was required to pay upfront 33% of the total cost of the procured items. The 1st to 4th Appellants paid this amount. The 5th and 6th Appellants were not under any legal obligation to inquire from the 1st to 4th Appellants if they had followed the procurement process. There is no evidence to suggest that the 5th and 6th Appellants solicited the said order from the 1st to 4th Appellants. Criminal liability cannot therefore attach to them where no evidence was put forward by the prosecution to establish their culpability. In that regard, their appeals succeed. However, this court cannot allow the 5th to 6th Appellants to benefit from an obvious illegality and blatant breach of the law. This court cannot therefore grant their plea that they be paid the cost of the goods which they ordered at the instance of SEPU but were frustrated from supplying the same. The 5th and 6th Appellants' remedy lies elsewhere.

In the premises therefore, the appeals lodged by the 1st to 4th Appellants lacks merit and are hereby dismissed. The sentences of the 1st to 4th Appellants are upheld. The additional sentence of twelve (12) months imprisonment of the 1st Appellant is however set aside. This court is of the view that the sentence that was imposed on the four appellants is sufficient.

In respect of the 5th and 6th Appellants, their respective appeals are allowed. Their conviction is quashed. The sentence imposed upon them is set aside. However, the sum of Kshs.70 million deposited in Equatorial Bank formerly Southern Credit Bank Account No.4010000004 together with all the accrued interests shall be refunded to the Ministry of Education within seven (7) days of the judgment of this court. The 5th and 6th Appellants' remedy lies in the civil court. However, this court cannot in the circumstances of this case allow them to benefit from an obvious illegal and criminal conduct of the 1st to 4th Appellants. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2015

L. KIMARU

JUDGE