Republic v Nyanamba & 8 others (Anti-Corruption Case 11 of 2019) [2020] KEMC 10 (KLR) (3 September 2020) (Judgment)

Republic v Joyce Nyambache Osinde Nyanamba, Peris K. Nkonge, Stanley K Kibe, John Omo, Leo Kibet Boruett, Muthusi Mutua, Vincent Ikovo Ngundi, Jane Jeptanui Rotich & Philip Kipkemoi Kiplagat [2020] eKLR

Neutral citation: [2020] KEMC 10 (KLR)

REPUBLIC OF KENYA

IN THE ANTI-CORRUPTION MAGISTRATE'S COURT

ANTI-CORRUPTION CASE 11 OF 2019

EK NYUTU, SPM

SEPTEMBER 3, 2020

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOYCE NYAMBACHE OSINDE NYANAMBA ..... 1ST ACCUSED

PERIS K NKONGE ..... 2ND ACCUSED

STANLEY K KIBE ..... 3RD ACCUSED

JOHN OMO ..... 4TH ACCUSED

LEO KIBET BORUETT ..... 5TH ACCUSED

MUTHUSI MUTUA ..... 6TH ACCUSED

VINCENT IKOVO NGUNDI ..... 7TH ACCUSED

JANE JEPTANUI ROTICH ..... 8TH ACCUSED

PHILIP KIPKEMOI KIPLAGAT ..... 9TH ACCUSED

JUDGMENT

1. The 1st accused person Joyce Nyambache Osinde is charged with two counts 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*.

2. The particulars of the charge are that on 17th September 2014 within Nairobi County in the republic of Kenya, the 1st accused person being employed by the Communications Authority of Kenya as the Assistant Director for procurement and the head of Procurement unit and being a person whose function concerned management of public revenue wilfully failed to comply with the applicable law relating to procurement, to wit section 36(2) of PPDA N0. 3 of 2005 by failing to issue a notice to all the bidders as required by law after the Tender No. CA/PROC/RFQ/50/2014-2015 for the renovation of the CA Nairobi ASK show stand was considered terminated.

3. On the second count, the particulars of the charge are that on or around 22nd September, 2014 within Nairobi County in the Republic of Kenya, the 1st accused being an employed by the Communications Authority of Kenya as the Assistant Director for procurement and the head of Procurement Unit and being a person whose function concerned the management of Public property, wilfully failed to comply with the applicable law relating to procurement to wit section 27(3) of PPDA No. 3 of 2005 as read with Regulation 62(3) of PPDR 2006 by failing to report direct procurement of a value exceeding five hundred thousand shillings within the stipulated time to the Public Procurement Oversight Authority in tender No. CA/PROC/RFQ/50/2014-2015 for the renovation of the CA Nairobi ASK show stand.

4. On the third count, Peris K. Nkonge, Stanley K. Kibe, John Omo, Leo Kibet Boruett, Mutua Muthusi, Vincent Ngundi, Jane Jeptanui Rotich and Philip Kipkemoi Kiplagat who are the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th accused persons respectively, are jointly charged with 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*.

5. The particulars of the charge are that on 22nd September, 2014 within Nairobi County in the Republic of Kenya, the accused persons being public officers employed by the Communications Authority of Kenya and having been appointed as tender committee members and being persons whose function concerned the management of Public property, jointly and wilfully failed to comply with the applicable law relating to procurement to wit section 74(2) & (3) of PPDA No. 3 of 2005 by failing to adhere to requirements provided for use of direct procurement as they were bound by law to do in tender No. CA/PROC/RFQ/50/2014-2015 for the renovation of the CA Nairobi ASK show stand.

6. PW1, Samuel Godfrey Anyango Oketch is a retired employee of Communication Authority of Kenya (herein after to be referred to as CAK). Prior to his retirement PW1 was a licensing officer and later the regional manager, Coast region where he worked until retirement.

7. His testimony is that he was appointed to participate in a procurement prequalification exercise in the year 2013. He was the chair of the pre-qualification committee. The committee was required to pre-qualify applicants for the supply of goods and services. The other members of the committee were Jane Masai, Samuel Andati, Rachel Kioko and Kimiwe. According to PW1, they considered several categories of suppliers. Of interest to this case is the category of repairs and general maintenance of buildings and other related services. Under this category, 15 bids were received out of which 4 were pre-qualified for the period 2013 - 2015 namely:

   i. Emec services Ltd

   ii. Tratiz enterprises Ltd

   iii. Blusco painters & property maintenance

   iv. Adrian Company Ltd

8. It is further the evidence of PW1 that the pre-qualification committee relied on the tender document for guidance.

9. On cross examination PW1 stated that he is not the one that prepared the tender paper No. 5/10/13 for the prequalification of suppliers for various goods and services for the year 2013 – 2015. According to PW1, the tender papers are usually prepared by the human resource department. PW1 further stated that according the said Tender Paper No. 5/10/13 the prequalification number assigned to the category of repairs and general maintenance of buildings and related services is given as CCK/PQ/W/20/2012 – 2013. He also stated that the numbers given in the entire document is 2012 – 2013. PW1 explained that the pre-qualification exercise was for a two-year period even though according to the Tender Paper, the pre-qualification was for the period 2012 – 2013. PW1 stated that the pre-qualification committee prepared their own minutes

10. On re-examination, PW1 stated that the pre-qualification committee secretary compiled their findings and forwarded them for consideration by the tender committee. He further stated that the prequalification duration was for the period 2012 – 2015 and that none of the accused persons was involved in the prequalification exercise.

11. PW2, Rachel Wathiha Kiondo is an assistant manager administration at CAK. She was a member of the prequalification committee having been nominated to the same by her department. There were 21 categories of suppliers. It is the evidence of PW2 that when she was summoned at the Ethics and Anti-corruption office she was questioned about the following companies:

    i. Gathig enterprises

    ii. Wilma construction company

    iii. Jeddy general contractors

    iv. Scanad

12. In her response, she stated that Gathig was among the applicants who did not qualify during the prequalification exercise. Wilman, Jeddy and Scanad were not in the list of applicants.

13. On cross examination, PW2 stated that the minutes of the prequalification committee were translated into a tender committee paper and that it is the secretary of the pre-qualification committee who prepares the Tender Committee paper. PW2 fruther stated that there were 15 applicants in the category of general repairs and maintenance. PW2 stated that she first saw the tender paper No. 5/10/13 for the prequalification of suppliers for various goods and services for the year 2013 – 2015 at the EACC offices where it was shown to her during the recording of her statement and that it is on the basis on this document on which her statement is founded.

14. PW2 stated that the prequalification committee used the tender document as a guideline in the prequalification exercise. The tender had been advertised and members of the prequalification committee appointed at the close of the tender. According to PW2, the prequalification committee did not prepare minutes. Instead they prepared a report. She further stated that she did not participate in the preparation of tender paper No. 5/10/13 for the prequalification of suppliers for various goods and services for the year 2013 – 2015.

15. PW3, Jane Nduku Masai is a senior accounts officer at CAK. Her testimony is that in the year 2013 she was nominated into the pre-qualification committee for purposes of prequalifying suppliers in various categories for the period 2013 – 2015. According to PW3, four suppliers were prequalified in the category of general repairs and maintenance, namely:

i. Emec services Ltd

ii. Tratiz enterprises Ltd

iii. Blusco painters & property maintenance

iv. Adrian Company Ltd

16. PW3 stated that in prequalifying the suppliers, they followed the criteria set out in the tender document. After their deliberations, they came up with a report which was prepared by the secretary of the prequalification committee.

17. PW3 also stated that she took part in the payment to SCANAD company by checking the payment voucher and satisfying herself that it was in order and that the amount in the invoice tallied with the amount in the LPO. PW3 identified a payment voucher dated 31st October, 2014 together with an invoice No. PD – 004301 dated 30th September, 2014 from SCANAD Kenya Ltd for the amount of Ksh 1,927,572. She also identified the LPO number 0058 dated 25th September, 2014.

18. On cross examination, PW3 stated that CAK has in the past engaged SCANAD in other jobs. She also stated that she was shown the report of the prequalification committee while at the EACC offices where she had been summoned to record a statement. She also stated that tender paper No. 5/10/13 for the prequalification of suppliers for various goods and services for the year 2013 – 2015 corresponded with the findings contained in the report of the prequalification committee.

19. PW4, Joyce Lodenyi Kimiwe is a former employee of CAK where she worked as an assistant manager procurement. In the year 2013 she was nominated by the 1st accused person herein to be the secretary of the prequalification committee for the prequalification of suppliers for goods and services for the period 2013 – 2015. The 1st accused was the then head of procurement department. During the deliberations, PW4 inserted the information from the findings of the committee in a template on a computer. At the end of the deliberations, PW4 compiled the findings into a tender paper for approval by the tender committee. She handed the tender paper to the 1st accused in her capacity as the head of procurement department.

20. PW4 identified in court the tender paper No. 5/10/13 for the prequalification of suppliers for various goods and services for the year 2013 – 2015 and stated that she personally prepared the same.

21. On cross examination PW4 stated that the tender paper No. 5/10/13 that is before the court was signed by the secretary to the tender committee. She admitted that there was a typing error in column 2 of the document in numbering of the financial year. She further stated that prequalification of suppliers would be done for a particular period of time and not necessarily for one year only. PW4 stated the deliberations of the prequalification committee are recorded in the form of a report as opposed to minutes.

22. PW5, Vincent Onyiego is a procurement officer at CAK. His testimony PW5 stated that he was involved in sourcing for renovation works for the Nairobi ASK show stand on the instruction of the 1st accused who was the head of the procurement department.

23. PW5 identified in court a requisition for the ASK show from the director Corporate and Public Affairs dated 26th May, 2014. The same was assigned to him on 27th May, 2014. He was required to facilitate procurement of the items required. The Nairobi ASK show was scheduled to take place from 29th September, 2014 to 5th October, 2014. PW5 received the requisition and specifications for the show stand from the officer in charge of property one Salim Kiza (PW17) through an email dated

28th August, 2014 (P.EXH 6(a) and (b)). He thereafter prepared a tender document for review and clearance by his immediate supervisor one Janet Irungu.

24. After the tender document was cleared, PW5 invited bids using the list of CAK prequalified contractors for the year 2014. He prepared the invitation letters to 4 bidders and called them to collect the same. He also invited them for a site visit to the ASK show stand. The invited bidders were:

    i. Adrian company Ltd

    ii. Tratiz Enterprise Kenya Ltd

    iii. Emec Enterprises

    iv. Blusco painters and property maintenance

25. Out of the four invited bidders, Blusco did not return the tender documents. PW5 was the secretary of the tender opening committee while Dickson Sikulu and Salim Kiza were also present. PW5 produced in court a local quotation opening register dated 2nd September, 2014 which was the closing date for the tender as well as the tender documents for the three companies that responded namely Adrian, Tratiz and Emec.

26. Upon receipt of the tender documents, PW5 drafted a 253rd Tender Committee paper No. 2/09/14 for presentation to the Tender Committee for deliberations. It showed how much the bidders had quoted. Emec was the lowest bidder among the three bidders that had returned their bid documents, at Ksh 4,474,000. The tender opening committee recommended for Emec Enterprises to be awarded the tender.

27. PW5 went further to state that he did not get back the approved Tender Committee paper but was instead given a list of suppliers from the Central Bank of Kenya by Janet Imunya. She informed PW5 that the 253rd Tender Committee paper had been withdrawn. PW5 was directed to select few suppliers from the list and invite them to bid. PW5 prepared the tender documents and invited the following companies:

    i. Jomuika contractors

    ii. Jeddy general contractors

    iii. Gathig Enterprises

    iv. Wilman construction company

    v. Kaguanjai builders Ltd

28. The closing date for the tender was 16th September 2014. Out of the four companies, Kaguanjai builders Ltd did not collect the tender documents. PW5 was in the team that opened the tenders. The other members were Dickson Sikulu from Finance department and Salim Kiza from Human Capital and Administration department. PW5 prepared the tender opening register referred to as the local quotation register, which he, Dickson Sikulu and Salim Kiza appended their signatures on.

29. PW5 produced the following documents as evidence:Bid documents from Jomuika contractors (Prosecution Exhibit 13)Bid documents from Jedy General Contractors (prosecution exhibit 14)Bid documents from Gathig enterprises (prosecution exhibit 15)Bid documents from Wilman Construction Company (prosecution exhibit 16)Bid documents from Kaguanjai builders Ltd (prosecution exhibit 17)Local quotation opening register (prosecution exhibit 18)Upon opening the tender documents and analysing the same, PW5 prepared the 254th Tender Committee (TC) paper

which he forwarded to his supervisor Janet Imunya. In the TC paper, it is recommended that the tender be awarded to Wilman Construction Ltd who were the lowest bidder at Ksh 2,106, 600.

21. PW5 was to later learn that the tender had been terminated and that the Tender Committee had decided that the renovation works be done by C.A.K staff through the use of imprest. A team to carry out the renovations was assembled via an internal memo from the secretary Tender Committee dated 18th September, 2019. Salim Kiza was the team leader.

22. PW5 was later informed that the finance and accounts department had declined to issue imprest money. PW5 was given a quotation from SCANAD company by his Supervisor Janet Imunya who directed him to prepare a TC paper with the proposed method of procurement being direct. PW5 complied and prepared what is the 255th TC paper number 01/09/2014.

23. According to PW5, SCANAD company was awarded the tender. PW5 later prepared a purchase order dated 25th September, 2014 using the approved 255th TC paper.

27. PW5 further produced the following documents in evidence:Local Purchase Oder dated 25th September, 2014 (P.EXH. 4)Letter of offer from CAK to SCANAD dated 22nd September, 2014 (P.EXH. 22)Letter of acceptance from SCANAD dated 22nd September, 2014 (P.EXH. 23)On cross examination PW5 stated that his role was to facilitate procurement. He also participated in the opening of bids. After comparing the prices quoted by the bidders, he prepared a draft tender paper

28. PW6, Janet Imunya is the manager procurement at CAK. In the year 2014, she was the assistant manager procurement operations section. Her testimony is that the material time relevant to this case, the procurement department received a request to nominate a person to be a representative in the procurement process of the ASK show stand.

29. PW6 nominated Vincent Onyiego (PW5). She received a requisition from the user department which she handed over to PW5 to facilitate procurement of the same. Bidders were invited to compete for the tender. The same were compared and a report was prepared by Vincent.

30. PW6 later came to learn through correspondence between Jane Rotich and Joyce Nyanamba coped to her that the tender had been withdrawn. Another tendering was required to be done. PW6 wrote an email to Joyce Nyanamba and Jane Rotich dated 10th September, 2014 where she pointed out that the ASK show timeline was drawing close. She requested Joyce Nyanamba to give authorisation to use the list of prequalified contractors from the Central Bank of Kenya which authorisation was granted.

31. Through an email dated 10th September, 2014, PW6 directed Vincent to invite bidders using the list of prequalified contractors from CBK. PW6 attached the list in the email. It contained 28 prequalified firms. Vincent complied and invited bidders. A report was thereafter prepared and forwarded to the tender committee. However, none of the bidders was awarded the tender. A decision to use imprest to carry out the renovations was passed. However, it was not executed. Consultations were done between the user, finance and procurement departments.

32. PW6 was present in one of the consultation meetings. It was decided that since the initial procurement process had failed, it was proposed to resort to direct procurement. The proposal was forwarded to the Tender committee for consideration. An invitation was done to SCANAD who forwarded a quotation. They were awarded the tender at Ksh 1,927,572.

33. PW6 produced the following documents as evidence:Email to Joyce Nyanamba dated 10th September, 2014 (prosecution exhibit 12)Email dated 10th September, 2014 to Vincent Onyiego containing list of prequalified contractors from CBK (marked D6. Exhibit 8)Email dated 19th September 2014 to Paul

Kimuyu of SCANADOn cross examination, PW6 stated that the reason that the initial tender was withdrawn was because the amount quoted by the bidder was high and because of the time factor.

34. PW6 stated that she is the one that proposed to the 1st accused that they use a list of prequalified suppliers from Central Bank of Kenya (CBK) which proposal she approved.

35. PW6 also stated that during the month of September, 2014 the first accused person was not on duty and therefore PW6 communicated with her through email.

36. PW7, Juma Kiprono Kandie is the director human capital and administration at CAK. He is also a member of the tender committee having been appointed as such by the then Director General Mr. Wangusi.

37. The testimony of PW7 is that on 17th September, 2014 he was present in the 254th Tender Committee meeting. The chair of the meeting was one Matano Ndaro while a team from the procurement department were the secretariat. One of the agendas of the meeting was the renovation of the show stand.

38. Before discussing the matter of the show ground, the chair stated that he had received an anonymous letter in respect of the same. He circulated the anonymous letter to the members present at the meeting. In the letter, there were allegations to the effect that the tender process had been breached and that the same was not fair. The author of the letter was complaining about the people who had been invited to tender for the renovation of the ASK show stand.

39. Upon reading the letter, the tender committee decided to terminate the tender so as to allow for investigations. It was instead decided that the renovation works be carried out by a team within the CAK office through the use of imprest.

40. Those present in the meeting were:Matano NdaroStanley Kibe (3rd accused)Christopher KemeiMaxwell MosotiJane Rotich – Secretary (8th accused)Philip Kiplagat – Secretariat (9th accused)The following were absent with apology:John Omo (4th accused)Mutua Muthusi (6th accused)

    * Michael Gatundu * Engineer Leo Boruett (5th accused)PW7 further stated that after the 254th TC meeting, he did not participate in any other tender for the renovation of the ASK show stand.

41. On cross examination, PW7 stated that the issue of time was among the things that changed the course of the tender process. He further stated that as a TC they don't modify recommendations which they receive from the evaluation committee or the procurement unit. They can only adopt or reject the recommendations.

42. At the 254th TC meeting, they rejected the recommendation to award the tender due to the sensitivity of the allegations raised in the anonymous letter. The decision to terminate the tender was taken on 17th September, 2014. By then, there were 12 days remaining to the ASK show. Since this time was insufficient to initiate a fresh tender process, a decision was made to use imprest for the renovation of the ASK show stand.

43. PW7 also stated that there was only one technical officer in the department of Human capital and he was overwhelmed with the preparation of the specifications for the ASK show stand which is the reason why there was a delay in preparation of the bills of quantity as he was also required to work with other departments.

44. PW8, James Waigi Kinuthia is the acting manager Expenditure and User accounts, at the CAK finance department. His testimony is that on 31st October, 2014 he authorised a payment to SCANAD upon receipt of the relevant invoices from the checking officer, one Jane Masai of the finance department.

45. PW8 confirmed that the company that was being paid is the one that was contracted according to the Local Purchase Order which was attached to the payment voucher. He also checked that the invoice is signed and stamped by an officer from the user department one Rachel Alwala (PW10).

46. PW8 checked that the payment voucher had been accounted for in the ledger. After confirming all the details, PW8 authorised the payment to SCANAD on 31st October, 2014 by appending his name and signature on the same. It was in the amount of Ksh 3,156, 012 in respect of three invoices one of which was for Ksh 1,927,572.

47. On cross examination, PW8 explained that the Ksh 1,927,572 was in relation to exhibitions. The same was charged under the vote for exhibitions PW8 stated that there was no vote head for renovations.

48. On re-examination, PW8 stated that under the vote head for exhibitions it covers all incidental costs related to exhibitions such as staff costs, hire of venue, renovations etc

49. PW9, Peter Martin Chivondo Ikumile is the acting assistant director Multimedia Service at CAK. During the period that is the subject matter of this case, PW9 was the chairman of the inspection and acceptance committee having been appointed as such by the director general in the year 2012.

50. The other members of the committee are:Philip Kiplagat – secretaryJoseph Nzanu – vice chairChristine Ogongo – memberCaroline Morianki – memberDaniel Kiprop – memberRachel Kiondo – memberThe testimony of PW9 is that on 8th July, 2014 he received an email from one Ooro Juma requesting the inspection committee to inspect the ASK show stands at Nairobi, Mombasa and Kisumu.

51. PW9 forwarded the email to the inspection committee members. Caroline Morianki volunteered to do the inspection. PW9 forwarded her name to the user department namely the Corporate public affairs department. An approval dated 19th September, 2014 was given by the office of the director general for Caroline Morianki to go and do the inspection work. She was to carry out the inspection and thereafter prepare a report and submit the same to the relevant department.

52. PW9 stated that he saw an email dated 23rd October, 2019 showing that Caroline had carried out the inspection. Nevertheless, PW9 never got to see the report that Caroline prepared as it was sent directly to the procurement department. On cross examination,

53. PW9 stated that ordinarily the user department would be present as part of the inspection team. He also stated that there was no requirement that each member of the inspection committee sign the resultant report after an inspection has been carried out.

54. PW10, Rachel Alwala is the assistant director communications and external affairs at CAK. She has worked at CAK for a period of 18 years. Concerning the matter that is before this court, she signed an invoice on behalf of the user department namely the Consumer and Public Affairs department in respect of the refurbishment and renovation of the ASK show stand. The invoice was from SCANAD for the amount of Ksh 1,927,572. She signed the same on 14th October, 2014. It was accompanied by the purchase order issued on 25th September, 2014.

55. On cross examination, PW10 stated that she went to the ASK show stand and verified that the renovation work had been done. She also saw the report of the Show committee confirming that the work had been done satisfactorily.

56. PW11, Christopher Koech Kemei is the director universal service fund at CAK. At the material time relevant to this case, he was a member of the tender committee having been appointed as such by the director general in the year 2012.

57. PW11 participated in the 254th tender committee meeting held on 17th September, 2014. The chair of the meeting was one Matano Ndaro. He brought to the attention of the members that he had received an anonymous letter in respect of the refurbishment of the ASK show stand. He informed the members that the letter was raising concerns about the procedure that was used in identifying the potential bidders.

58. Upon discussion, the tender committee found that the issues raised in the letter were serious and would require further investigation to establish the truth of the claims made in the letter. The tender committee consequently agreed to suspend the 254th tender paper that was due for discussion in that meeting.

59. Since the time remaining to the Nairobi show was less than 2 weeks, it was felt that it was insufficient to institute anther tender process. The only feasible option that came to their minds was to use the CAK internal resources and personnel to carry out the renovation works.

60. PW12, Paul Mumo Kimuyu is an employee at SCANAD. His testimony is that SCANAD was engaged by CAK to carry out advertising, public relations, consumer education and branding services from 21st November, 2012 to 20th November, 2014.

61. On 19th September, 2014 PW12 received an email from Janet Imunya (PW6) requesting for a quotation with regard to renovation works at the ASK show stand and in the meantime to consider the works as awarded to them. PW12 further stated that they reached out to a company affiliated to them going by the name round tree who prepared a quotation in the sum of Ksh 1,927,572. The same was forward to PW6 via email on 22nd September, 2014. After that, SCANAD received a letter of offer in respect of the refurbishment and renovation of the Nairobi ASK show stand.

62. PW12 wrote a letter of acceptance of offer also dated 22nd September, 2014. Thereafter he received a purchase order number 0058. Thereafter, SCANAD, through their affiliate company Round tree carried out the renovation works. The same was inspected. On 30th September, 2014 SCANAD prepared an invoice in the amount of Ksh 1,927, 572.

63. They were paid by way of remittance to the SCANAD account at Stanbic bank in the sum of Ksh 3, 156,012 which was inclusive of payments for other services as follows:

    i. Obituary announcement of Peter Simani at Ksh. 248,240

    ii. Renovation and refurbishment of CA 2014 Nairobi ASK show stand at Ksh 1,927,572

    iii. Materials for Kikao Kikuu campaigns at Ksh 980,200.

64. PW12 produced the following documents in evidence:Quotation from SCANAD in the sum of Ksh 1,927,572 (marked P. EXH 24)SCANAD bank statement from Stanbic bank (marked P.EXH.26)Bank account opening documents for SCANAD (marked P.EXH 27)PW13, Michael Wagema Githiga is an accountant at CAK where he has worked for 6 years. His testimony is that he received the invoice for renovation and refurbishment of the CA Nairobi ASK show stand. He compared it with the LPO No. 0058 and satisfied himself that the purpose of the invoice and amount tallied with the LPO. The amount was Ksh 1,927,572.

65. PW13 identified the correct budget code to place the transaction. It fell under the budget code 300701 for Exhibitions. After checking the documents, he forwarded the same to his supervisor, one Jane Masai. PW13 also prepared a payment voucher dated 31st October, 2014 and forwarded the same to his supervisor.

66. PW14, Maxwel Mosoti Mogaka is the acting director Competition, Tariff and Marketing at CAK. He has worked at CAK for a period of 20 years. At the material time relevant to this case, he was the alternate member at the Tender Committee. He was the alternate for Peris Nkonge (2nd accused).

67. His testimony is that he attended the 254th Tender Committee meeting where chair of the meeting Matano Ndaro (PW16) informed them that he had received an anonymous letter with regard to the refurbishment of the ASK show stand. The chair circulated the letter to the members to read. In the letter, the head of procurement was being accused of mishandling procurement matters. According to PW14, the head of procurement at that time was Joyce Nyanamba (1st accused).

68. It the further testimony of PW14 that there was a discussion among the tender committee members as whether to proceed with the 254th TC paper or not. The members decided not to discuss the TC paper and instead proposed that the renovation works be done by way of imprest due to time constraint. PW14 confirmed that the renovation works were done as he attended the Nairobi ASK show.

69. PW15, Felix Nzuki is the head of business development at Adrian Company. His testimony is that in August, 2013 the company was pre-qualified by CAK for provision of repairs and general maintenance of buildings and related works.

70. In August, 2014 the company received a Request for Quotation from CAK for renovation of the CA Nairobi ASK show stand. The invitation to bid is dated 29th October 2014. It is the testimony of PW15 that on 2nd September, 2019 they submitted their quotation for tender No. CA/PROC/RFQ/33/2014 – 2015 at the sum of Ksh 5,392, 801.54. After that, they did not receive any communication from CAK. They were not awarded the tender.

71. PW16, Matano Mwalimu Ndaro is the director licencing and compliance at CAK. At the material time relevant to this case, he was the chairman of the tender committee having been appointed as such in August 2012 by the then director general one Francis Wangusi.

72. It is the testimony of PW16 that he chaired the 254th tender committee meeting held on 17th September, 2014. Also present in the meeting were the following:Stanley Kibe (3rd accused)Juma KandieMaxwel Mosoti (PW14)Jane Rotich (8th accused)Christopher Kemei (PW11)Those absent in the meeting were:John Omo (4th accused)Mutua Muthusi (6th accused)Michael KatunduEng. Leo Boruett (7th accused)Those in attendance were:Philip Kiplang'at (9th accused) from procurementIt is the testimony of PW16 that it was necessary to have someone from procurement to provide guidance to the committee as regards procurement law and process. They would also take minutes of the meeting.

73. According to PW16 when they started the 254th tender committee meeting, they deferred reading the minutes of the 253rd tender committee meeting pending some issues that were to be discussed by the members. They were informed by the secretariat that the tender No. CA/PROC/R/33/2013 – 2014 with regard to the Nairobi ASK show stand had been withdrawn as the cost was too high compared to the previous years. Emec services Ltd had quoted an amount of Ksh 4,474,000. These remarks are captured at page 24 of the minutes of the 254TH Tender committee meeting (marked as D1.EXH.4). It was also observed that the tender used to rotate between 2 firms which had a risk of raising audit queries.

74. The committee was informed that quotations had been requested for from CBK. It recommended to award the tender to Wilman Construction who had quoted an amount of Ksh 2,106, 600. The works had been scaled down due to the limited time period to the show.

75. PW16 notified the members of the committee that he had received an anonymous letter addressed to the following:The chair of EACC Mr. Mumo MatemuThe vice chair of EACC Mrs KeinoPublic Procurement Oversight AuthorityPermanent Secretary in charge of ICTDirector General CAKChair of the tender committeeAccording to PW16 the letter was questioning the process of cancellation of the tender that was meant to be awarded to Emec Services Ltd. The author of the letter had levelled accusations against Mrs. Nyanamba (1st accused)

76. PW16 shared the letter with the members of the tender committee present at the meeting. After discussion, it was decided that because of the sensitivity of the letter it would not be wise to continue addressing the particular tender and as such it had to be withdrawn. The committee proposed that due to time constraint, the renovation works be carried out by the CAK internal staff through the use of imprest.

77. PW16 wrote a letter to the director general dated 18th September 2014 highlighting the reasons why they had to stop the tender process and instead proposed the use of imprest. The director general approved the use of imprest on 26th September, 2014. That was the last time PW16 dealt with the matter. He did not participate in the 255th tender committee meeting.

78. PW16 produced the following documents in evidence:Minutes of the 254th tender committee meeting held on 17th September, 2014 (marked D1.EXH.4)254th TC paper No. 02/09/2014 for renovation of the CA Nairobi ASK show stand CA/PROC/RFQ/33/2013 – 2014 (marked P.EXH.19)CCK internal memo dated 18th September, 2014 from the chairman tender committee (marked D1.EXH.3)On cross examination, PW16 stated that he would sign a TC paper after a decision of the tender committee had been reached. The secretariat would prepare the TC paper and place it before him for signature. PW16 further stated that the 1st accused was not present at the 254th tender committee meeting as she had travelled out of the country.

79. PW16 also stated that he found the anonymous letter in the in-tray at his office. He was informed by his secretary that it had come from the procurement department. He also stated that he first saw the 254th TC paper on 17th September, 2014. The anonymous letter was discussed in the absence of the members of the secretariat namely the 8th and 9th accused persons herein. They were asked to step out during the said deliberations.

80. PW17, Salim Ali Kiza is the assistant manager in charge of property at CAK. He has worked at CAK for a period of 15 years. PW17 was also a member of the show committee.

81. His testimony is that he is the one who prepared the bills of quantities (BQs) for the renovation of the ASK show stand for the year 2014. He prepared the BQs in August 2014 and forwarded the same to Vincent Onyiego (PW5). Later PW17 was directed by PW5 to take bidders to the site to familiarise themselves with the works. PW17 took the bidders to the site on 29th August, 2014.

82. It is the testimony of PW17 that he also participated in the opening of tenders on 2nd September, 2014 in respect of tender number CA/PROC/RFQ/33/2014 – 2015 after which a summary of their findings was prepared. PW17 was to later learn from PW5 that the works had been re- tendered. He was concerned that there wasn't enough time for a fresh tender exercise.

83. Upon discussion with PW5 and the 1st accused, it was agreed that there was a need to scale down the renovation works due to time constraint. PW17 prepared a scaled down BQ in which he removed the items that would be time consuming. After the renovation works were scaled down, a fresh tendering process was instituted. PW17 was then called to take the new team of bidders for a site visit. PW17

participated in the tender opening of the second round of bids which was done on 16th September, 2014.

84. PW17 was to again to learn from PW5 that the tender committee had decided that the tender will not proceed and that instead they had recommended the use of imprest. PW17 was nominated through an internal memo signed by Jane Rotich (8th accused) to the head the team that was tasked to oversee the renovation of the ASK show stand. PW17 subsequently wrote a memo to the finance department dated 18th September 2014requesting for the cash to carry out the renovations. The finance director responded in a memo dated 19th September, 2014 by advising that imprest was not a proper method for procuring services.

85. Later, PW17 was called by Janet Imunya (PW6) and informed that he was required to take officials from SCANAD to the site. At the show committee meeting, PW17 learnt that SCANAD had been awarded the renovation works.

86. PW17 produced the following documents in evidence:Internal memo dated 18th September, 2014 from the secretary tender committeeInternal memo dated 18th September, 2014 from Salim Kiza to the director financeMemo dated 19th September, 2014 rejecting the use of imprestOn cross examination, PW17 stated that at the material time there were three ASK shows taking place, namely Mombasa, Kisumu and Nairobi. He was the only technical person at CAK and was required to prepare BQs for the show stands in all the three ASK shows besides his normal work. He was therefore overwhelmed with work. He had started with the Kisumu show stand and thereafter the Mombasa show stand. He did the BQs for the Nairobi show stand last.

87. PW18, Pauline Obonyo Opiyo is the manager in charge of compliance at the Public Procurement Regulatory Authority (PPRA) where she has worked for a period of 7 years. Her testimony is that sometime in October, 2019 EACC wrote to PPRA requesting it to nominate an officer conversant with the reports that are received by the authority and specifically in respect of direct procurement that was done by CAK in 2014. PW18 was assigned by the PPRA director general to record a statement at EACC who wanted to know whether the direct procurement for the renovation of the ASK show stand was reported to PPR I in the second quarter of the financial year 2014/2015.

88. PW18 checked the records and established that CAK had submitted a report on 21st January, 2015 and the tender in question appears in the report. The value of the tender is Ksh 1,927,572. According to the report, the reasons given for direct procurement were:

    i. Time constraint

    ii. SCANAD are the CAK advertising agency and had a contract for branding the ASK show stand after refurbishment

    iii. SCANAD had the capacity to do the work within the shortest time possible as they had knowledge of the market and could easily outsource the works.

89. The report was forwarded together with the minutes of the 255th tender committee meeting held on 22nd September, 2014. PW18 produced as evidence the CAK procurement activities returns for the 2nd quarter of 2014/2015 financial year submitted on 21st January, 2015.

90. PW19, Wycliff Sirengo is an investigator at EACC where he has worked for 13 years. He is the investigating officer in this case. He took over the investigation of this matter from his colleague one Charles Kiptanui who had been transferred to the Kisumu regional office. PW19 analysed the documents collected from CAK and also requested for more documents. Upon analysing the

documents, he identified potential witnesses whom he summoned to the EACC offices for interviews and recording of statements.

91. PW19 was able to establish that an anonymous complaint had been made to CAK on 2nd October, 2014 with complaints against the assistant director at the CAK by the name Joyce Nyanamba alleging that she had involved herself in procurement malpractices by inviting bidders outside the pre-qualification list.

92. PW19 was able to establish that in the year 2014 from 29th September to 5th October, the CAK was to participate in the ASK show Nairobi, CAK had leased an existing structure at the show ground which was to be renovated so as to be used as an exhibition stand. The user department at CAK, namely the consumer and public affairs department had on 26th May, 2014 made a requisition for the renovation of the stand. This was done through an internal memo authored by Mutua Muthusi (6th accused) and addressed to the assistant director procurement. There was a request for approval dated 7th September, 2014 written by one Caroline Morianki from the consumer and public affairs department to the Director General CAK.

93. PW19 also established that CAK had prequalified 21 suppliers for the financial year 2013 – 2015 for the supply of goods and services. One of the categories was the repair and general maintenance of buildings and other related services. Under this category, 4 prequalified suppliers had been invited to send their quotations, namely:

    i. Emec services Ltd

    ii. Triatiz Enterprises Ltd

    iii. Adrian Company Ltd

    iv. Blusco Painters and Property maintainers

94. Evaluation of the tenders was done and Emec services Ltd was found to be the lowest bidder at Ksh 4, 474, 000 and was recommended for the award. This information is contained in the local quotation opening register dated 2nd September, 2014 which was the closing date of the tender.

95. PW19 established that the evaluation committee prepared the 253rd TC paper No. 02/09/2014 in reference to the tender for renovation of the CA Nairobi ASK stand. According to the TC paper, it was recommended that the tender be awarded to Emec services Ltd.

96. PW19 further established that 253rd TC paper was given to the Assistant Director of procurement Joyce Nyanamba (1st accused) so as to forward the same to the tender committee for consideration and approval. PW19 established that the 1st accused and the procurement office after discussing the TC paper decided not to forward the same to the tender committee. Instead, they terminated the tender and invited fresh bids. PW19 established there was email communication in respect to the termination of the tender namely an email from Janet Imunya to Jane Rotich (8th accused) dated 7th September, 2014. According to this email, there is talk about using prequalified suppliers from the Central Bank. Attached to the email is also a list of prequalified suppliers from the Central Bank of Kenya (CBK).

97. Using the list of prequalified suppliers from CBK, requests for quotations were sent to the following suppliers:

    i. Jomuika contractors

    ii. Wilman construction company

iii. Gathig enterprises

iv. Kaguanjai builders ltd

v. Jeddy general contractors

vi. Old mark engineering Ltd

98. According to PW19, two of the bidders namely Jomuika contractors and Gathig Enterprises had been disqualified by CAK during the prequalification exercise for the year 2013 – 2015 yet they were invited to bid. PW19 established that the assistant director procurement did not notify the first tenderers of the termination of the tender. PW19 interviewed the tenderers in the first round and they informed him that they did not receive any notification of the termination of the tender.

99. According to the quotation opening register the lowest bidder was Wilman Contractors at Ksh 2,106,600. The evaluation committee prepared the 254th TC paper No. 02/09/2014 which was discussed in the 254th tender committee meeting held on 17th September, 2014. According to the minutes of the said meeting, the chair of the TC said that he had received an anonymous complaint concerning the tender and therefore they could not discuss the tender paper. It was decided that the renovation works be done through an internal team by way of imprest. An internal memo was written to the director finance to avail Ksh. 250,000 to commence the renovation works. The director of finance however declined to authorise the use of imprest citing on the memo that imprest is not a procurement method.

100. PW19 established that the procurement officials, namely 1st accused and her fellow procurement officers, decided to use direct procurement after the imprest method was rejected. There was an email communication to that effect. In a letter dated 19th September, 2014 from Janet Imunya (PW6) to one Paul Kimuyu (PW12), SCANAD company was informed that they had been awarded the renovation works.

101. The matter was taken before the tender committee who also approved the use of direct procurement awarding the tender to SCANAD at Ksh 1,927,572 in their 255th TC meeting held on 22nd September, 2014. Those present in the said meeting were:

i. Peris Nkonge (2nd accused) - chairing the meeting

ii. Stanley Kibe (3rd accused) – member

iii. John Omo (4th accused) – member

iv. Leo Burett (5th accused) – member

v. Mutua Muthusi (6th accused) – member

vi. Vincent Ngundi (7th accused) – alternate member

vii. Jane Rotich (8th accused) – secretary

vii. Philip Kiplang'at (9th accused) – in attendance as secretariat

102. A letter of offer to SCANAD dated 22nd September, 2014 was prepared. SCANAD responded in a letter of acceptance of offer also dated 22nd September, 2014. PW19 produced the following documents as evidence:Prequalification of suppliers for various goods and services for the year 2013 – 2015 (marked P.EXH.1)Requisition for renovation of the ASK stand dated 26th May, 2014 (marked D4. EXH. 5)Request for approval dated 7th May 2014 (marked D4. EXH 12)Tender documents

for Emec services P.EXH. 7Tender documents for Triatiz enterprises P.EXH.8Tender documents for Adrian Company Ltd P.EXH.9Tender documents for Blusco paints and property maintainers P.EXH.10Local quotation opening register dated 2nd September, 2014 (marked D6. EXH. 2)253rd TC paper No. 02/09/2014 in reference to the tender for renovation of the CA Nairobi ASK stand P.EXH.11E mail from Janet Imunya to Jane Rotich (8th accused) dated 7th September, 2017 (marked P. EXH 12).List of prequalified suppliers from the Central Bank of Kenya (marked D6. EXH.6)Tender documents Jomuika contractors (marked P.EXH 13)Tender documents for Wilman construction company (marked P.EXH. 14)Tender documents for Gathig enterprises (marked P. EXH. 15)Tender documents for Jeddy general contractors (marked P.EXH. 16) * Tender documents for Kagwanjai builders Ltd (marked P.EXH. 17)Local quotation opening register (marked P.EXH. 18)254th TC paper No. 02/09/2014 tender for renovation of the CA Nairobi ASK show stand CA/PROC/RFQ/33/2013 - 2014 (marked P.EXH.19)Internal memo dated 18th September, 2014 from Kiza to the Director finance (marked P. EXH. 28)Minutes of the 255th Tender Committee meeting held on 22nd September, 2014 (marked D6. EXH. 7)255th TC paper No. 01/09/2014 tender for renovation of the CA Nairobi ASK show stand CA/PROC/RFQ/50/2014 – 2015 (marked P. EXH. 21)Quotation from SCANAD in the amount of Ksh 1,927, 572 showing fabrication and labour costs (marked P. EXH. 24)Purchase order No. 0058 dated 25th September, 2014 for Ksh 1,927,572 (marked P.EXH. 4)DW1, Joyce Nyambache Osinde Nyanamba is the first accused herein. She gave a sworn testimony and stated that she retired from the CAK in the year 2017. Prior to her retirement she was the assistant director procurement.

103. On 17th September, 2014 she attended an official workshop in London. She produced in court a letter of nomination from CAK to attend a training on women and leadership from 15th to 26th September, 2014 (D1.EXH.15). During her absence, DW1 wrote an email dated 15th September, 2017 (D1. EXH.17) and delegated her duties to Jane Rotich (the 8th accused person herein) for the two weeks period that DW1 was going to be away from work.

104. DW1 returned from the UK on 28th September, 2014. DW1 produced a copy of her passport to prove this fact (D1.EXH.35). It is her testimony that she was not present during the deliberations of the 255th Tender Committee (TC). DW1 upon being shown the 255th TC paper as well as the minutes of the 255th TC meeting, stated that the deliberations were in respect to tender number CA/PROC/RFQ/50/2014 -2015. According to DW1 the said tender was done by way of direct sourcing from SCANAD. The said tender was not terminated.

105. It is further the testimony of DW1 that any communication to the Public Procurement Oversight Authority (PPOA) was ordinarily done by the Director General (DG) and that at no time did communication emanate from the procurement department directly to the PPOA.

106. On cross examination, DW1 admitted that there were instances when she would sign the letters inviting bidders to bid. DW1 also stated that the delegated authority to 8th accused also consisted of attending management committee meetings. DW1 could not recall if she prepared a report for the 1st quarter of the financial year 2014/2015. Upon being shown the report to the PPOA for the 2nd quarter 2014/2015 (D1.EXH.25), DW1 stated that the same was signed by the DG, one Francis Wangusi who was the accounting officer of CAK. DW1 further stated that the 2nd quarter runs from October to December.

107. DW2, Peris Kaari Nkonge is the 2nd accused person herein. She gave a sworn statement and stated that she worked at the finance and accounts department of CAK until her retirement in April 2016.

107. In her testimony she stated that she was aware that the tender that is the subject matter of this case involved several attempts. In the first attempt, the tender was withdrawn before it was presented to the

TC on the ground that the price quoted was considered to be high and also because the tender used to oscillate between two firms. Further, the bidders had only been given 2 days to quote. DW2 stated that she was not responsible for any of these reasons that caused the first tender attempt to be withdrawn.

108. DW2 however admitted to sitting in the 253rd TC meeting and was therefore privy to the reasons raised by the procurement unit for withdrawing the first tender attempt. It is further the testimony of DW2 that a second tender attempt was done by inviting bidders from CBK list of prequalified contractors. The second attempt subsequently failed as a result of an anonymous letter citing procurement malpractices. DW2 admitted that she was present in the TC meeting where the anonymous letter was presented to the members.

109. The third attempt entailed the use of office imprest. DW2 was not present in the 254th TC meeting that proposed the use of imprest. When the request of imprest was placed before her as the head of finance department, DW2 declined to issue the same for the following reasons:Use of imprest was not a procurement process for the purchases of the magnitude involved in the subject tenderBy virtue of it being a replenishable imprest, there could arise issues of accountability.The imprest amount was not cappedThere was no indication on how the expenditure would be controlledThe fourth attempt was by way of direct procurement. DW2 was present at the TC meeting that approved the recommendation of the procurement unit to use direct procurement. According to DW2 the ASK show was about 5 days away and there was no other applicable or practical method of procurement that could have been used to achieve the objective. DW2 stated that she was not responsible for the preparation nor the delay in the preparation of the BQs.

110. It is further the testimony of DW2 that participation in the ASK show was important to CAK as a strategic organisation of government. They had a duty to educate the public on digital migration an exercise that had generated a lot of heat from the public. With only 5 days to the show, several commitments had already been undertaken. One of them was engaging SCANAD to a tune of 26 million shillings for concept development, branding, and production of promotional materials for use at the show in Nairobi, Mombasa and Kisumu. The LPO had already been issued for this.

111. DW2 produced as evidence an LPO number 1919 dated 21st July, 2014 for the amount of Ksh 26,891,920. It is the argument of DW2 that CAK would have had to pay the money anyway even if they did not participate in the Nairobi show. DW2 stated that the show stand was leased in the tune of Ksh 2 million. CAK would not have gotten value for money had they failed to participate in the show. It was therefore better to spend Ksh 1.9 million on renovation than lose Ksh 28 million which had already been committed. The TC did not have much choice other than to approve the direct procurement.

112. DW2 stated that she did not own any share in SCANAD and neither she nor any of her family members has ever been a director or shareholder at SCANAD. DW2 further stated that she did not stand to benefit in the award of the tender to SCANAD. During her participation in the TC, she acted in good faith.

113. On cross examination, DW2 stated that the tender that was terminated as a result of an anonymous letter was tender number 50. She was present in the TC meeting that terminated the said tender. DW2 was also present in the TC meeting that made a decision to award the tender to SCANAD. DW2 admitted that at the time the 255th TC was sitting, the tender had already been awarded to SCANAD through an email dated 19th September, 2014 written by Janet Imunya (PW6).

114. DW2 also confirmed that the requisition for the ASK show was done in May 2014. SCANAD had been issued with an LPO dated 21st July, 2014 for concept development, branding, fabrication and production of educational materials. The show stand was to be branded after the refurbishment. The

commitment for the branding work was done in July 2014 and the same was for all the three shows namely Kisumu, Mombasa and Nairobi. The LPO for branding work was signed by Mutua Muthusi (6th accused) and Jane Rotich (8th accused).

115. DW2 further stated on cross examination that attending the ASK show was a performance target for CAK. There was a budget for the show that required to be utilised. DW2 stated that she did not see the BQs for the first tender or the subsequent tenders.

116. DW3, Stanley Kaige Kibe is the 3rd accused person herein. He retired from CAK on 17th May, 2014. He worked for CAK since 1999. Prior to that, he worked at Kenya Post and Telecommunication Corporation from the year 1979 to 1999. He has cumulatively worked for 36 years in public service during which he has never been charged with any offence. At CAK, DW3 was the director Frequency Spectrum Management. He was also a member of the management committee as well as the Tender Committee.

117. DW3 was present in the 253rd TC meeting. He was the chair of the meeting. According to DW3, the 253rd TC paper was not presented to the meeting. He also attended the 254th TC meeting which was chaired by Matano Ndaro (PW16).

118. It is during that meeting that the chair brought to the attention of the members the existence of an anonymous letter. The chair read the letter aloud and thereafter passed it round for the members to look at. In the letter there were allegations against the 1st accused person accusing her of numerous things among them, the termination of a tender after evaluation had been done.

119. The TC unanimously agreed that tender number 33 could not proceed in view of the allegations raised and the same had to be terminated. They further agreed that the risk and internal audit department investigate the allegations. Since the time remaining to the show was short, the TC summoned the property manager Salim Kiza (PW17) to enquire from him if he was in a position to carry out the renovations. PW17 stated that he could carry out the renovations at a cost of Ksh 1.7million shillings as he is the one who had prepared the BQs.

120. The TC agreed that the renovation works should be done through PW17 by use of replenishable imprest of Ksh 250,000. The decision of the TC was the following day communicated to the DG by the TC chair. The DG approved the decision to use imprest.

121. It is the testimony of DW3 that the tender which was terminated is tender number 33. It had been recommended to be awarded to Wilman Construction Company. It is the one where the issue of the anonymous letter arose. The decision to terminate the tender is recorded in the 254th TC minutes (D1.EXH.4) It is in the 255th TC meeting held on 22nd September, 2014 that the TC was invited to consider and award the tender to SCANAD through direct procurement for the renovation of the Nairobi ASK show stand at the tender sum of Ksh. 1,927,572.

122. According to DW3 the TC had a choice of abandoning the ASK show or give the dilapidated stand to SCANAD to brand it in its dilapidated state. The TC decided against both these choices for the following reasons:Missing the show was going to be disastrous as money had already been committed for branding and production of promotional materials to the tune of Ksh 26 million.Money had been committed for the lease of the show standThe mandate of CAK includes consumer protection and the CAK risked losing out on an opportunity to educate members of public on consumer rights and digital migration.The CAK risked suffering a massive reputational damage if the stand were to be used in its dilapidated state. The CAK was expecting very important guests to visit the stand including the head of state.It is the testimony of DW3 that it is on the basis of these reasons that they considered the option of direct procurement to SCANAD. DW3 however stated that he was not aware about the

email from Jane Imunya to Paul Kimuyu of SCANAD. He further stated that the said email was not brought to the attention of the TC in the 255th TC meeting.

123. DW3 stated that the decision of the TC to use direct procurement was in good faith that it was not meant to disadvantage any party or to favour SCANAD. DW3 further stated that he did not gain personally from that decision. At the time of taking the decision, DW3 was remaining with 7 months to retirement and that he had already built a reputation for himself both locally and internationally. He was not going to compromise his reputation by making an unlawful decision.

124. On cross examination, DW3 admitted that indeed the procuring unit had received a requisition for the ASK show on 26th May 2014 and that the show was to start from 29th September 2014. DW3 also confirmed that the procuring unit received the BQs through an email dated 28th August, 2014 which was three months after the requisition was made.

125. DW3 also stated that he was the chair of the 253rd TC meeting and that they did not deliberate on the 253rd TC paper. The same was in respect of tender number 33. He also confirmed that the TC paper had recommended that the tender be awarded to Emek in the sum of Ksh. 4.4 million. DW3 stated that in the 253rd TC paper there is no recommendation by the procuring unit that the price was excessive or that Emek had in the past been awarded a tender by CAK. There is also no recommendation that the award be terminated.

126. DW3 further stated that the 254th TC meeting was in respect of tender number 50. However, it makes mention of tender number 33 stating that the same was terminated and re-tendered.

127. DW3 stated that the tender was recommended to be awarded to Wilman Constructors but the same was terminated due to integrity concerns that had been raised. According to DW3 tender number 50 was awarded to SCANAD through direct procurement. DW3 further stated that SCANAD were chosen because they were already on site and had knowledge of the industry such that they could easily outsource from 3rd parties. There was no time to wait for the outcome of the investigations by the risk department. DW3 also stated that he was aware that the renovation works had been scaled down so that only the bare minimum could be done in the interest of time.

128. DW4, John Omo is the 4th accused person herein. He was Legal Secretary CAK until his retirement in 2018. He was also a member of the tender committee at CAK. On 22nd September, 2014 he received a notice of the 255th TC meeting which he attended. The secretariat briefed the members on the attempts that had been undertaken to deal with the ASK show as follows: at the 254th TC meeting there had been a proposal by the secretariat to the TC for the award of the tender but before the matter could be considered substantively the chair informed the members about an anonymous letter alleging several malpractices by staff. The TC took a decision not to proceed with the adjudication of the matter but asked the management to probe into the allegations of malpractices. Meanwhile the TC passed a resolution to have the renovation works done by way of imprest. However, the finance department declined to issue the imprest citing the inappropriateness of the imprest method to carry out the works as it is not a procurement method. The secretariat recommended scaling down of the works. It also recommended that the works be awarded to SCANAD who had been contracted to do other related works with regard to the show.

129. The TC was also briefed that commitments had been made with regard to other service providers in respect to the ASK show to the tune of Ksh. 33 million.

130. It is the testimony of DW4 that upon these recommendations, the TC deliberated on the issue. They took into consideration the time that was left to the commencement of the show which was 5 days away at that point. They also took into consideration that other service providers had been contracted

to undertake services at the show. The choices available to them were to proceed as recommended or call off the process all together.

131. If they opted to call off the process, they had to grapple with the commitments already made way back in July 2014 as well as the reputation of the organisation. It is the testimony of DW4 that they would not have gotten value for money had they chosen to abandon the process. They also had to consider their organisation's commitment to the government in the nature of obligations that they undertook in their performance contract. The TC concluded that participation in the show was important and proceeded to approve the recommendations by the secretariat.

132. DW4 stated that he was not party to the delay occasioned in the preparation of the BQs and that his first contact with the matter was on 22nd September, 2014. He further stated that he was not party to identification of SCANAD for the award of tender and neither does he have any interest nor did he benefit from the award of the tender to SCANAD. It is the testimony of DW4 that the TC took the decision of direct procurement to SCANAD in utmost good faith to protect the interest of the public. DW4 stated that he has served in public service for 27 years and had never been subjected to any disciplinary measures or sanctions.

133. On cross examination, DW4 stated that he was the head of legal department at CAK and that he sat on the TC as a representative of the legal department. It is his testimony that the TC was composed of members of the management, namely the departmental heads. The ASK show fell under the Corporate Public Affairs (CPA) department headed by Mutua Muthusi (6th accused person). It was the user department and therefore they are the ones who generated the request in May, 2014.

134. DW4 further stated that the was not called upon to give a legal opinion to the TC on the matter of direct procurement.

135. DW5, Leo Kibet Boruett is the 5th accused person herein. He is the director multimedia services at CAK. His testimony is that he participated in the 255th TC meeting held on 22nd September, 2014. It was his first and only encounter with the tender for the renovation of the ASK show stand. He was appointed as a member of the TC by the DG Francis Wangusi in the year 2013.

136. At the 255th TC meeting they received a proposal to award the tender to SCANAD. After deliberations, they made a unanimous decision to award the tender as proposed. They had an alternative decision to reject with reasons. However, the consequences for rejecting the award to SCANAD were as follows:CAK would not have achieved their objective of consumer education on digital migration which was a government driven exercise. Kenya had an international deadline to migrate by 15th June 2016 and a local deadline for 31st December, 2015 for Nairobi and 2nd February, 2016 for major towns and 30th March, 2016 for other towns. Digital migration had a monetary implication on the consumer as it involves purchasing the set box. There was therefore need to protect the consumer by educating them that they had the option of a one-off payment in purchasing a set box or in the alternative to use pay TV where they pay monthly subscriptions.CAK had committed money in preparation for the show.The reputation of CAK was at stake.DW5 stated that the 255th TC paper gave a chronology of the various attempts at procuring renovation services. He further stated that the TC did not play any role in the delay in preparation of the BQs. It is the testimony of DW5 that the role of the secretary in the TC is to give advice and guide the TC. The secretary does not participate in decision making.

137. It is further the testimony of DW5 that the TC made the decision in good faith and even made recommendations on the way forward. They were satisfied that the amount quoted by SCANAD was within the prevailing market rate and the threshold set out in law.

138. On cross examination DW5 stated that it was the practice at CAK that the secretary to the TC did not vote in decision making. DW5 also confirmed that the scope of works was scaled down the reason being time constraint. However, he did not have an opportunity to look at the scaled down BQs.

139. DW6, Mutua Muthusi is the 6th accused person herein. He opted to remain silent in his defence pursuant to section 211 of the Criminal Procedure Code.

140. DW7, Vincent Ikovo Ngundi is the 7th accused person herein. He is the assistant director cyber security and e-commerce at CAK. His testimony is that he first interacted with the matter concerning renovation of the ASK stand on 22nd September, 2014 while sitting in the 255th TC meeting. He attended the meeting in his capacity as an alternate member. The principal member was the head of IT. At the meeting they were briefed on the 3 attempts that had been made at procuring for the renovation of the ASK show stand namely:Using the list of CAK prequalified suppliers. This failed because the secretariat felt that the quotation by the lowest bidder was highUsing the list of prequalified suppliers from CBK. This failed on the basis of an anonymous letter levelling corruption allegations against the head of the procurement unitReplenishable imprest. This failed because use of imprest was not a procurement procedure and secondly because there would be accountability and control issues as the imprest was replenishable without a limit.According to DW7, the 255th TC meeting deliberated on a proposal for direct procurement to SCANAD. It is the testimony of DW7 that the TC approved the proposal on the following grounds:

* Time constraint as the TC meeting was taking place on the 22nd September, 2014 yet the show was scheduled to start on 29th September, 2014

* CAK had already made financial commitment with regard to the show and had already paid Ksh 2 million to lease the show stand. There were also commitments for branding and fabrication of the stand as well as provision of branded materials for the ASK show.

* It was important that CAK participate in the show so as to engage with consumers and create awareness particularly on the issue of digital migration and cyber security. Both these issues were part of the CAK strategic plan.DW7 stated that he did not participate in the identification of SCANAD as a service provider and neither did he have any interest in it. He did not stand to benefit in any way from the tender. It is his contention that the TC took the decision for direct procurement in good faith. DW7 further stated that he did not wilfully fail to adhere to the law.

141. On cross examination, DW7 stated that he was aware that the renovation works had been scaled down. He also stated that he was not part of the process in the first three failed attempts.

142. DW8, Jane Cheptanui Rotich is the 8th accused person herein. She is the manager procurement at CAK. At the material time relevant to this case, she was answerable to the assistant director procurement unit who at the time was Joyce Nyanamba (1st accused). Her role in tender number 50 is that the head of procurement (1st accused) was away. DW8 therefore took the place of the 1st accused in the 255th TC meeting held on 22nd September, 2014. DW8 prepared the agenda for the meeting, invited the TC members to the meeting where she presented the 255th TC paper (P.EXH.21). The TC paper had been prepared by staff in the procurement unit. According to DW8, the purpose of a TC paper is to enable the TC to make a decision. It contained the following:background informationmethod of tendering, re-tendering of the worksevaluation and comparison of pricesdecision of the TC in the 254th TC meetingproposal to award SCANADDW8 further stated that her role in the 255th TC meeting was to take minutes, record attendance of the TC, record any conflict of interest declared by members.

143. DW8 confirmed that she is the one who took the minutes of the 255th TC meeting (D6.EXH.7). Those present at the meeting were:

1. Peris Nkonge, Director Finance and Chair of the meeting (2nd accused)
2. Stanley Kibe, Director Frequency spectrum management (3rd accused)
3. John Omo, Director Legal Services (4th accused)
4. Eng. Leo Boruett, Director Multimedia Services (5th accused)
5. Mutua Muthusi, Director Consumer and Public Affairs department (6th accused)
6. Vincent Ngundi, Assistant Director Information and Technology (7th accused)
7. Jane Rotich, Manager Procurement and Secretary of the meeting (8th accused)
8. Philip Kiplangant from procurement department in attendance as secretariat (9th accused)

144. It is the testimony of DW8 that the 255th TC reached the decision to use direct procurement. The tender was awarded to SCANAD. This decision was reached unanimously and there was no vote. DW8 did not participate in decision making and neither was she asked for professional opinion. The TC also made recommendation to include bidders in the first tender where there is a subsequent tender. It also recommended the need to obtain a schedule of government rates.

145. DW8 also stated that she was present during the 254th TC meeting that was held on 17th September, 2014. Others present were:Matano Ndaro (PW16) - ChairStanley Kibe (3rd accused)Juma Kandie ((PW7)Christopher Kemei (PW11)Maxwell Mosoti (PW14)Jane Rotich (8th accused) – SecretaryPhilip Kiplagat (9th accused) – SecretariatAccording to DW8, it is during this meeting that she and the 9th accused were asked by the chair to step out as he had some information that he needed to share with the members. On returning back to the meeting, she was asked to record that the TC paper had been suspended on account of a letter raising complaints. The TC recommended that the renovation works be done internally. DW8 did not participate in the decision making.

146. DW8 further stated that there was a time that her boss (1st accused) was away and she was left in charge of the procurement unit. DW8 further stated that she did not participate in identifying SCANAD as a service provider and she was not aware of any communication awarding SCANAD the tender prior to the 255th TC meeting.

147. On cross examination, DW8 stated that she cannot recall if she sat in the 253rd TC meeting. She also confirmed that in the 255th TC meeting she sat in the capacity of secretary on behalf of the 1st accused. DW8 also stated that she did not report the direct procurement to PPOA as is required in law.

148. DW9, Philip Kipkemoi Kiplagat is the 9th accused person herein. He is a procurement manager at CAK. His testimony is that he was wrongly charged as he is not a member of the Tender Committee.

149. On cross examination, DW9 confirmed that he sat in the 255th TC as the secretariat. His role involved logistics such as setting the venue and facilitating the TC. DW9 also confirmed that he is the one who signed the invitation to bid on behalf of the 1st accused. DW9 stated that he did not sign any tender document in respect to SCANAD. DW9 stated that the 1st accused was the head of procurement and that she was away during TC meetings of 17th September, 2014 and 22nd September, 2014. It is the 8th accused who took the place of the 1st accused during her absence.

150. DW10, John Lolkol is the deputy director in charge of forensic investigation at EACC. The team that investigated this matter was working under him. His testimony is in respect of a letter he authored on 23rd November, 2017 and addressed to the Director General CAK. (D2.EXH.29)

151. DW10 stated on cross examination that section 11 EACC Act gives the EACC a wide mandate which includes investigation as well as offering advice. It is the testimony of DW10 that in the letter to CAK dated 23rd November, 2017 he offered advice on weaknesses that were discovered in the course of investigations as follows:That there should be good record keeping practice as per section 45(1) PPDA No. 3 of 2005. What arose from the investigation was that CAK could not get all the records that EACC had requisitioned.That there should be segregation of responsibilities for the purpose of ensuring that decisions are made in a systematic and structured way pursuant to section 26(1) PPDA No. 3 of 2005 which provides that all procurement shall be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services.DW10 clarified that the letter dated 23rd November, 2017 did not preclude the decision to charge. Offering advice and recommending to charge are not mutually exclusive mandates. Both can be done at the same time. According to DW10, the decision to charge was made in the year 2019.

152. DW8, Jane Cheptanui Rotich was recalled to testify in the capacity of a witness for purposes of producing as evidence purchase order No. 1919 in the amount of Ksh 26,891,017.92. The same was issued to SCANAD in respect of concept development, management, fabrication, branding and production of promotional materials for CAK ASK Show at Nairobi, Mombasa and Kisumu. DW11 stated that the purchase order was raised by Vincent Onyiego (PW5). DW11 checked the document by appending her signature. The same was approved by Mutua Muthusi (6th accused person) on 22nd July, 2014. This was two months before the 255th TC meeting.

153. DW1 stated that issuance of an LPO signifies that all the procurement processes had been followed. She further stated that SCANAD had an existing contract with CAK for advertising.

Prosecution Submissions

1st Accused: count 1

154. It is the submission of prosecution that in her defence, the first accused has not controverted or denied the following facts and evidence produced by the prosecution;

    a. That she was the Assistant Director of Procurement and Head of the Procurement Unit;

    b. That Section 36(2) of the PPDA No.3 of 2005 which is couched in mandatory terms, mandates that all the bidders who sent a tender, proposal or quotation shall be given prompt notice of a termination.

    c. That the Tender No. CA/PROC/RFQ/50/2014-2015 (PEx-13, PEx-14, PEx-15, PEx-16 and PEX-17) was opened on the 16th September, 2014 (PEx-18) and terminated on the 17th September, 2014 by the 254th Tender Committee (PEx-19) and (D1Ex-4).

    d. That there was no letter notifying the five (5) CBK Pre-qualified bidders who sent quotations to CAK as evidenced by their bids produced as PEx-13, PEx-14, PEx-15, PEx-16 and PEX-17.

155. It is further the submission of the prosecution that the 1st accused has only raised a defence that she was not in the country and that she had delegated her duties to Jane Rotich (accused 8) and that she had left the country on 15th September, 2014 and returned on 28th September, 2014. She relied on D1Ex17, D1Ex15 and D1Ex35.

156. Under Regulations 8(3) (a-ee) of the Public Procurement and Disposal Regulations, 2006, the procuring unit - which is headed by the 1st accused - is tasked with several functions on behalf of the procuring unit. The 1st accused at Regulation 8(3)(l) is mandated to prepare and issue rejection notices which she failed to do.

157. Section 26 of the Public Procurement and Disposal Act, 2005 established the Procuring unit and section 27(3) of the Public Procurement and Disposal Act, 2005 provides that each employee of a public entity, shall ensure that within the areas of responsibility of the employee, that the provisions of the Act (Section 36(2)) are complied with.

158. The prosecution has submitted that notifying the bidders under section 36(2) was solely the role of the 1st accused (Joyce Nyambache Osinde Nyanamba) which said role cannot be delegated as it is a core function of the Head of Procurement.

159. When one delegates authority, that authority is not delegated to an individual but to a position. The 8th accused was acting as head of procurement and thus handling responsibilities commensurate with that position. Upon the return of the 1st accused, she resumed position and authority of the head of procurement. All acts done or omitted lay in her docket and she thus had the responsibility to ensure that what was not done was accordingly done. Responsibility is not only absolute but it also cannot be shifted.

160. Even in the circumstance where the first accused temporarily delegated her role to the eighth accused person in the two weeks she was out of the country, the responsibility to issue the mandatory notices did not shift from her. She ought to have ensured that the individual to whom she delegated her responsibility performed the same to the required standard and if this was not done, she ought to have performed the same upon her return to office.

1st accused: count 2

161. It is the submission of the prosecution that in her defence, the First Accused has not controverted or denied the following facts and evidence produced by the prosecution:

    a. That she was the Assistant Director of Procurement and Head of the Procurement Unit;

    b. That MS Scanad Kenya Limited was directly procured on 22nd September, 2014 by the 255th Tender Committee sitting on 22nd September, 2014 as evidenced by D6Ex-7), PEx-21, PEx-22 and PEx-23.

    c. That the subject Tender directly procured was Tender No. CA/PROC/RFQ/ 50/2014-2015 worth Kshs.1,927,572.00.

    d. That Regulation 27(3) of the PPDR, 2006 which is couched in mandatory terms, mandates that a direct procurement of over Five Hundred Thousand (KShs.500,000.00) must be reported to the Public Procurement Oversight Authority within fourteen (14) days of the award.

    e. That the Direct Tender Report made to the Public Procurement Oversight Authority on Tender No. CA/PROC/RFQ/ 50/2014-2015 was made on 22nd January, 2015 as evidenced by the testimony of PW18 Pauline Obonyo Opiyo and the quarterly report dated 21st January, 2015 by the Director General CAK (D1Ex-25) four months after the Direct Procurement of Ms. Scanad Kenya Limited;

162. It is further the submission of the prosecution that Regulations 8(3)(s) of the Public Procurement and Disposal Rules, 2006 and Section 27(3) of the Public Procurement and Disposal Act, 2005 places the responsibility of preparing and submitting reports to the Public Procurement Oversight Authority upon the Procuring Unit headed by the 1st accused (Joyce Nyambache Osinde Nyanamba).

163. Being the head of the Procuring Unit established under section 26 PPDA, 2005, the 1st accused (Joyce Nyambache Osinde Nyanamba) had the sole responsibility of ensuring that the report on direct procurement was made within fourteen (14) days after the notification of award of Direct Procurement upon Ms Scanad Kenya Limited. I.e. Between 22nd September, 2014 and 6th October, 2014. She failed to do so.

164. According to the prosecution, the quarterly report quarterly report dated 21st January, 2015 by the Director General CAK (D1Ex-25) is misplaced as it is not based on any provision of the PPDA, 2005. The Circular No.3/2008 dated 26th August, 2008 was made to bring to the attention of all public entities the four (4) mandatory reporting under the PPDA 2005 that entities were to make. The circular is clear that Direct Procurement ought to be reported within fourteen (14) days of the award.

165. Further, section 26 of the Public Procurement and Disposal Act, 2005 established the procuring unit and provides that a threshold matrix and segregation of responsibilities ought to have been placed in order to know the specific acts that the 8th Accused (Jane Rotich) was delegated to conduct.

166. Section 26(5) of PPDA, 2005 provides that the Tender Committee is established under section 26(4) and also under the regulations in the PPDR, 2006. It provides that:

> "A tender committee or body established under subsection (4) shall be established in accordance with the regulations and shall
>
> a. Consist of not less than five members;
>
> b. Have as its secretary, the procurement professional in charge of the procurement unit.

167. Regulation 10(1) and 12 of the PPDR, 2006 provides for the establishment of the Tender Committee in accordance with the Second Schedule of the Rules, the composition and procedure of its sitting.

168. Section 27 of PPDA, 2005 also provides that the Tender Committee complies with the provisions of the PPDA, 2005 and the PPDR, 2006. Section 27(3) of the PPDA is clear that each employee of CAK and each member of the Tender Committee shall ensure, within the areas of their responsibility, to comply with the provisions of the PPDA, 2005 and PPDR, 2006.

169. The Second Schedule provides the composition of Tender Committees members to include;

a. The Chairman,

b. Deputy Chairman,

c. A Secretary, and

d. At least Five (5) Head of Departments appointed by the Accounting Officer/CEO

170. The prosecution have further submitted that the 8th Accused (Jane Jeptanui Rotich) was a substantive member sitting as a Secretary for the 255th Tender Committee as captured in the 255th Tender Committee Minutes (D6Ex-7) and the other accused (2nd, 3rd, 4th, 5th, 6th and 7th) were members as defined under the second schedule of the PPDR, 2006.

171. Section 26(4) of the PPDA, 2005 establishes the procurement unit and such other bodies (secretariat) as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations.

172. In this regard, Regulation 8 PPDR, 2006 establishes the functions of the Procuring Unit in a Procuring Entity. Regulation 8(3)(q) provides the Procuring Unit to be a body known as the Secretariat to the Tender Committee. Further, Regulation 8(3)(r) provides the role of the procuring unit (secretariat) as to liaise with the in the Tender Committee on matters procurement which mandates the secretariat to be an advisory body. The Regulations provide:

> " 8
>
> (3) The functions of the procurement unit shall be to -
>
> (q) Act as a secretariat to the tender, procurement and disposal committees
>
> (r) Liaise with the Authority and other bodies (Tender Committee) on matters relating to procurement and disposal;".

173. By reason of the aforementioned, the 9th Accused (Philip Kipkemoi Kiplangat) is as per his role as a secretariat to the 255th Tender Committee (D6Ex-7) a person charged with the management of public property and was the person charged with liaising with the Tender Committee as a Secretariat to give advisory. We humbly submit that it is in his position as a manager of public funds that he is charged in the particulars of the charge sheet.

174. Section 29(2) of the PPDA, 2005 permits the use of Direct Procurement in accordance with Part VI of the Act (Part VI(B) - Section 74).

175. Section 74(2) of the PPDA, 2005 provides that:

(2) A procuring entity may use direct procurement if the following are satisfied

(a) There is only one person who can supply the goods, works or services being procured; and

(b) There is no reasonable alternative or substitute for the goods, works or services.

176. It is the submission of the prosecution that section 74(2)(a) & (b) does not apply in the current case at hand as the renovation works for the CAK Nairobi ASK Show Stand under Tender No.CA/PROC/RFQ/50/2014-2015 were not complex or specialized in a way suggesting that Ms Scanad Kenya Limited was the only supplier and/or there was no reasonable alternative for the works.

177. Section 74(3) provides for three (3) mandatory requirements for Direct Procurement to be utilized under the said provision which relates to the urgency. Section 74(3) of the PPDA, 2005 provides that:

(3) A procuring entity may use direct procurement if the following are satisfied

(a) There is an urgent need for the goods, works or services being procured;

(b Because of the urgency the other available methods of procurement are impractical; and

(c) The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

178. There is an urgent need for the goods, works or services being procured;

179. The prosecution reiterates that from the evidence adduced, that as early as May, 2014 the Procuring Unit was aware that the Nairobi ASK Show was an annual important function that had been budgeted for and was scheduled for 29th September, 2014 until 5th October, 2014.

180. On 8th May, 2014 the Director General had approved commencement of the 2014 ASK Shows as indicated in the Memo dated 7th May, 2014 (D4Ex-12).

181. The requisition by the 6th Accused (Mutua Muthusi) had been approved by the Head of Procurement to commence the subject procurement on the 26th May, 2014 (D4Ex-5) whereas without any justifiable explanation of the delay, the procuring unit commenced the subject procurement on 28th August, 2014 (PEX-6).

182. The accused in their defence have alleged that the urgency was occasioned by the following reasons;

a. Cancellation of the 1st Tender No. CA/PROC/RFQ/33/2014-2015 by the Procuring Unit under regulation 61(2) of the PPDR, 2006 wherein the 253rd TC Paper (PEx-11) was not deliberated in the 253rd TC Meeting.

b. Termination of the 2nd Tender No. CA/PROC/RFQ/50/2014-2015 by the 254th Tender Committee on allegation of corruption in the tender process (PEx-9 and D1Ex-4).

c. Rejection by the Accounts Department (2nd Accused - Peris Nkonge) for use of Accountable Imprest as proposed by the 254th Tender Committee (PEx-9) in Memo dated 18th September, 2014 (PEx-28) and Rejection Memo dated 19th September, 2014 (PEx-29).

d. Delay in the submission of the bill of quantities.

183. The prosecution submits that a properly managed procuring unit would have planned well in advance and placed adequate time for the procurement process not to be rushed as demonstrated by the prosecution. The evidence is clear that the procuring unit did not plan in advance in order to mitigate on time.

184. In addition, there is no evidence that the user department which was headed by the 6th accused made any effort to follow up with the relevant departments to ensure that all documentation is prepared in time to ensure that the tender process commences in good time.

185. Further, the Tender Committee is not a mechanical conveyer belt created for the sole purpose of rubber stamping the proposals by the procuring unit. A well-informed Tender Committee and Procuring Unit will well in advance anticipate a negative or positive response from the Tender Committee. In the instant case, the procuring unit had not planned for a rejection by the Tender Committee as the procurement was commenced very late and rushed. There was no urgent need for the services as the need was well within the knowledge of both the Procuring Unit and the Tender Committee.

186. Because of the urgency the other available methods of procurement are impractical

187. From the cross-examination of the 8th Accused (Jane Rotich) the prosecution ably demonstrated that indeed there was a chance for a fresh request for quotation to be used and Direct Procurement was not the only method available for procurement.

188. In the 1st Tender CA/PROC/RFQ/33/2014-2015 as demonstrated by Exhibits PEx-7, PEx-8, PEx-9, PEx-10, PEx-11 and D6Ex-2:Bids were invited on Friday, 29th August, 2014 and the Bidders submitted their bids on Tuesday, 2nd September, 2014 (PEx-7, PEx-8, PEx-9 and PEx-10).Bidders were given two (2) working days (Friday & Monday) to prepare and submit their bids.Upon opening the bids on Tuesday, 2nd September, 2014 (D6Ex-2) the 253rd Tender Committee Paper (PEx-11) was prepared but never submitted to the Tender Committee.Your Honour, this was nineteen (19) working days (three weeks, three days) to the opening of the Nairobi ASK Show on 29th September, 2014.In the 2nd Tender CA/PROC/RFQ/50/2014-2015 as demonstrated by Exhibits PEx-12, PEx-13, PEx-14, PEx-15, PEx-16, PEx-17 and PEx-18:

* The Procuring unit commenced the 2nd tender on Sunday, 7th September, 2014 (PEx-12) by obtaining the CBK List of Prequalified entities (D6Ex-8). This is seven (7) days after the opening and evaluation of the 1st Tender on 2nd September, 2014 (D6Ex-2) and fifteen (15) working days (Three Weeks) to the opening of the Nairobi ASK Show on 29th September, 2014.

* Bids were invited on Thursday, 11th September, 2014 (PEx-16) and the Bidders submitted their bids on Tuesday, 16th September, 2014 (PEx-7, PEx-8, PEx-9 and PEx-10).

* Bidders were given three (3) working days (Thursday, Friday & Monday) to prepare and submit their bids.

* Upon opening the bids on Tuesday, 16th September, 2014 (PEx-18) the 254th Tender Committee Paper (PEx-19) was prepared and was deliberated on Wednesday, 17th September, 2014 (D1Ex-4) and the Tender was cancelled. This was seven (7) working days (one week, two days) to the opening of the Nairobi ASK Show on 29th September, 2014.The Third Attempt of procurement was by use of Accountable Imprest which was sanctioned by the 254th Tender Committee on 17th September, 2014 as demonstrated by Exhibits D1Ex-4 and PEx-19.

The attempt commenced on Thursday; 18th September, 2014 vide memo (PEx-20) from the secretary Tender Committee/Procuring Head.On Thursday, 18th September, 2013, (PEx-28) the request for accountable imprest as made by PW17 Salim Kiza and PW2 Peris Nkonge declined to approve the same on Friday, 19th September, 2014 (PEx-29).The team had been given only one (1) working day to commence the process.Your Honour, this was five (5) working days (one week) to the opening of the Nairobi ASK Show on 29th September, 2014.The 3rd Tender CA/PROC/RFQ/50/2014-2015 which had been cancelled by the 254th Tender Committee on 17th September, 2014 (PEx-19 and D1Ex-4) was sanctioned by the procuring unit as demonstrated by Exhibits PEx-21, PEx-22, PEx-23, PEx-24PEx-25 and D6Ex-7.The Procuring unit commenced the 3rd Tender on Friday, 19th September, 2014 at 19:05Hrs(PEx-25 and PEx-24) whereby the procuring unit without the authority of the Tender Committee awarded the contract to Scanad Kenya Ltd.On Monday, 22nd September, 2014 Ms Scanad Kenya Limited had submitted its quotation and the 255th Tender Committee Paper (PEx-24) was prepared.Ms Scanad was given Saturday and Sunday to prepare and submit the bid as the request was made on Friday, at 17:05Hrs.The 255th Tender Committee sat on Monday, 22nd September, 2014 at noon (D6Ex-7) and rubberstamped the decision of the procuring unit to award the direct procurement to Ms Scanad Kenya Limited. (PEx-22 and PEx-23).Your Honour, this was five (5) working days to the opening of the Nairobi ASK Show on 29th September, 2014.From the dissection above, it is clear that bidders were given between one (1) to three (3) days to prepare the bids and as such, as at 17th September, 2014 which was one week and three (3) days to the opening of the ASK Show, the

prosecution has demonstrated that there was sufficient time to conduct a request for quotation and as such direct procurement was not the only available method of demonstrated by Exhibits PEx-12, PEx-13, PEx-14, PEx-15, PEx-16, PEx-17 and PEx-18:

189. In addition, the prosecution has demonstrated that it took the procuring unit less than one (1) day to prepare and table a Tender Paper. The evidence is clear that it took one day between the opening of bids, evaluation of bids and Tender Committee sittings.

190. The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

191. According to the prosecution, there was no urgency and there was time for an alternative procurement method to be conducted based on how the three (3) tenders were processed.

192. The circumstances that lead to the alleged 'urgency' were a creation of the Tender Committee, the procuring unit and the procuring entity.

193. If at all there was an urgency, the same was occasioned by the careless way in which the procuring unit commenced the procurement after a four (4) month delay despite the necessary approvals being granted in May, 2014.

194. The Nairobi ASK Show was a planned event and had been approved in May, 2014 by the Director General.

195. An entity in its procurement planning has to provide a grace period to be able to handle any eventuality that may arise in the process. A period for the bidders to appeal if they are dissatisfied and/or a period to re-start the process in-case the Tender Committee declines to approve the Tender Paper.

196. The 255th Tender Committee in its deliberations did not factor in the aforementioned circumstances that led to the irregular award of the tender to Ms. Scanad Kenya Limited.

197. Having thus established that the purported urgency was as a result of the dilatory conduct of the Procuring entity and its employees, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused persons as Tender Committee Members and the 9th accused the secretariat and a person in-charge of management of public funds wilfully failed to ensure that the provisions of section 74(3) of the PPDA, 2005 were adhered to.

1st Accused Submissions

198. The 1st Accused Person has submitted that during the date of the alleged offence in Count I, which is 17th September, 2014, she was away in the United Kingdom on official duty and had formally handed over all the official duties and responsibilities of the Head of the Procurement Unit to Ms. Jane Rotich, who was well aware of the Tendering process that was already ongoing. (as evidenced by D1 EX 9 "Email to the Management Committee dated Monday, September 15, 2014.)

199. PW 14, PW17 and other witnesses who work for CA and testified that the standard practice of CA provided that, for easy transition and seamless undertaking of duties, the Head of any Department when away on official duty was required to hand over their duties and responsibilities to their deputies who would then be the Acting Head and have the mandate to carry out any and all duties that the officer away on duty is usually required to undertake.

200. There has been no evidence tendered by the Prosecution that the delegation of duties to Jane Rotich to ensure seamless continuation of the tendering process was not in accordance to the laid down internal procedures of CA.

201. The assertions by the Prosecution presupposes a relationship between an Employer and a Servant which is not the case in this matter. The delegation of duties came hand in hand with complete handing over of the duties meant to be handled by the Head of Procurement, as can be evidenced by the record and the testimony of the 8th Accused Person. Every duty that was to be undertaken by the Head of Procurement was done sufficiently by the 8th Accused Person and no evidence has been given to suggest that the same was not performed aptly.

202. The Tender No. CA/PROC/RFQ/50/2014-2015 was initiated, deliberated and awarded in the absence of the 1st Accused Person. The Prosecution has not adduced before the Court any evidence to the contrary. Every witness privy to the tender process including the Investigating Officer confirmed that the 1st Accused Person was absent during the period of the alleged offence.

203. The 8th Accused as the Acting Head of Procurement was responsible for undertaking any and all duties incidental to the office of the Head of Procurement. Any acts done or omissions during the 1st Accused Person's absence lay squarely with the person acting in that position during the period of her absence and cannot be shifted to the 1st Accused Person.

204. Further, the Tender Bidders from the first pre-qualified list put in their bids for CA/PROC/RFQ/33/2014-2015 (as evidenced by MFI 11, tender committee paper of the 253rd Tender Committee Meeting) while the pre-qualified list from CBK all put in their bids for CA/PROC/RFQ/33/2013-2014 going by the minutes of the 254th Tender Committee meeting which was held on the 17th of September 2014.

205. It was the 254th Tender Committee meeting that terminated Tender No. CA/PROC/RFQ/33/2013-2014 which had been presented to the pre-qualified list of bidders from CBK. (as evidenced on page 30 of DI EX 4, minutes of the 254th Tender Committee Meeting held at the Main Board Room)

206. According to the 1st accused, the Prosecution has not availed any evidence to show that the bidders from the Pre-Qualified CBK list had not been notified of the termination of the tendering proceedings before the Procuring entity chose to go with Direct Procurement. The Prosecution has only relied on the averments of made by the Investigating Officer without any proof that this was indeed the position.

207. The Investigating Officer, by merely stating that the bidders were not informed of the termination of tender without producing any evidence to corroborate this claim, makes his assertion circumstantial at best. In Joan Chebichii Sawe v Republic [2003] eKLR the Court of Appeal stated that;

> before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution... There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

208. The accused contends that the prosecution has failed to adduce evidence before the Court to prove that the 1st Accused Person willfully and carelessly neglected 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 in Count I.

209. Furthermore, the two Counts against the 1st Accused Person in themselves are contradictory. Count I specifies that the 1st Accused Person willfully and carelessly failed to notify bidders of the termination of Tender No. CA/PROC/RFQ/50/2014-2015 and yet the same was awarded to Scanad Kenya Limited who performed the works necessary at the stand. Count II then stipulates that the tender apparently terminated in Count I was an award of Direct Procurement to Scanad Kenya Limited and the same was not reported to PPOA.

210. The Prosecution has failed to adduce evidence before this Court against the 1st Accused Person with regard to Count II. Section 27 (2) of the Public Procurement and Disposal *Act No. 3 of 2005* (hereinafter PPDA No. 3 of 2005) which provides that the Accounting Officer of a Public Entity shall be primarily responsible for ensuring that the Public Entity fulfills its obligations under section (1) which provides that the Public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with in respect to each of its procurements.

211. Section 3 of the PPDA No. 3 of 2005 Act states that an Accounting Officer means-

> For a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or if there is no such person, the chief executive of the public entity, or [Emphasis ours]

212. Section 62 (3) of the Public Procurement and Disposal Regulations, 2006 states that: A procuring entity shall within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.

213. PW 14 in his testimony stated that it was the duty of the Director General as the Accounting Officer of CA was the Officer in charge of satisfying Section 62 (3) as he was the one to send any and all procurement reports from CA to PPOA. This is also inclusive of the direct procurement awarded to Scanad Kenya Ltd.

214. PW18, the officer in charge of compliance at PPOA equally confirmed this by stating in her testimony that the procurement reports emanating from CA to PPOA were always sent in by the Director General of CA and never the Head of Procurement.

215. This is further evidenced by D1 EX 25 which was a report by CA to PPOA dated 21stJanuary, 2015 which was essentially reporting, among other procurement processes, the direct procurement in Tender No. CA/PROC/RFQ/50/2014-2015. This report was signed by the Director General of CA who is the procuring entity's Accounting Officer.

216. Furthermore, and without prejudice to the foregoing, during the time of the alleged offence the 1st Accused Person was neither in the country nor was she privy to any deliberations and awards done by the Tender Committee during the period of her absence. Any duties that were to be undertaken by her office on the 22nd of September, 2014 had been delegated and done by the 8th Accused Person.

2nd Accused Submissions

217. It is the submission of the 2nd that the case before the Honourable Court has elements which point to (inter alia)

    a. dilettante, abuse of process and ulterior motive on the part of the Prosecution. To illustrate:

i. the third Count revolves around acts/omissions allegedly done/made by all the Accused Persons as "tender committee members," yet at least one third of the Accused Persons were not members of the Tender Committee;

ii. although the third count revolves around alleged wilful breach of "section 74 (2) & (3)" of the 2005 Procurement Act, the Prosecution has belatedly conceded, at paragraph 39 of its Final Submissions, that "section 74 (2) (a) & (b) of does not apply in the current case...," raising questions as to the bona fides of charging the Accused Persons for breach of those sections;

b. the letter communicating the outcome of the investigations by the EACC (i.e. D2 Exhibit 29), did not recommend the institution of criminal proceedings against any of the Accused Persons or any other person;

c. although D2 Exhibit 29 and all the witness statements clearly indicate that the EACC completed investigations in 2017, the Prosecution slumped into inaction until 17th May 2019, after a third of the Accused Persons had retired from office

d. the belated arrest and arraignment of the Accused Persons after a two-year hiatus demonstrates dilettante, abuse of process and ulterior motive on the part of the Prosecution because (inter alia):

i. there is no evidence of any new development in the investigations after the issuance of D2 Exhibit 29 and the recording of witness statements. Instead, the Prosecution based the belated arrest and arraignment of the Accused Persons on informal and unrecorded post-investigation discussions between the Investigating Officer and unidentified staff of the EACC (see the testimony of the Investigating Officer, i.e. PW19); and

ii. it coincided with the rise of a vacancy in the office of the Director General of the CA. This lends credence to the contention by the Accused Persons that the institution of the case before the Honourable Court calculated to achieve the collateral or ulterior motive of pre-empting some of them from applying for the vacant post of Director General; and

e. all Prosecution witnesses, save for the Investigation Officer (i.e. PW19), denied essential elements of the offences charged

f. the witness statements that the Investigating Officer recorded from various officers of the CA do not disclose even a whiff of wrongdoing (let alone criminal offences) on the part of the Accused Persons, which raises serious questions as to how or why the Prosecution decided to institute the proceedings before the Court.

218. The implication of section 138 of the 2005 Procurement Act for the case before the Honourable Court is that it is not enough for the Prosecution to prove a breach of section 74 (2) and (3) of the 2005 Procurement Act. The Prosecution must, additionally, prove that the accused persons did not act "in good faith" at the time they allegedly breached section 74 (2) and (3) of the 2005 Procurement Act. That is why section 45 (2) (b) [as read with section 48] of the *Anti-Corruption and Economic Crimes Act*, 2003 (hereinafter, "the Anti-Corruption Act") targets persons who 'wilfully' fail to comply with public procurement laws.

219. On the undisputed facts and the evidence placed before the Honourable Court, the Accused Persons should be acquitted because all Prosecution Witnesses (Investigating Officer) unqualifiedly agreed that:

g. the CA faced an extreme urgency or time constraint of ensuring that the renovations were completed within six days;

h. the Accused Persons did not contribute to the circumstances that led to extreme urgency or time constraint;

i. forgoing participation in the 2014 Nairobi ASK Show was not a viable option, because the CA would, by forgoing participation, have—

   i . frustrated an important Government agenda of sensitising the public on the digital migration, leading to a breach of an important international obligation on the part of the Republic;

   ii. suffered enormous reputational damage;

   iii. lost monies far greater than the KShs.1,927,572/=. that was spent on renovating the Nairobi ASK Show Stand, committed through other contracts (see e.g. the Figure of KShs.26,891,17/= set out in D2 Exhibit 36, whose existence and contents the Prosecution strenuously attempted to suppress throughout the trial); and

j. most importantly, the Accused Persons acted in good faith (see section 138 of the 2005 Procurement Act).

Section 74 (2) and (3) of the 2005 Procurement Act set out the conditions for recourse to Direct Procurement. A procuring entity can engage in Direct Procurement if/where:
there is only one person who can supply the goods, works or services being procured (irrelevant and inapplicable to the instant case); orthere is no reasonable alternative or substitute for the goods, works or services (irrelevant and inapplicable to the instant case); orthere is an urgent need for the goods, works or services being procured; orbecause of the urgency the other available methods of procurement are impractical; andthe circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.As stated, the conditions set out in section 74 (2) and (3) must be read disjunctively (as opposed to conjunctively). This can be confirmed from a plain reading of Regulation 62 (2) of the 2006 Regulations, which requires a procuring entity to satisfy itself that "the relevant condition" set out in section 74 of the Act is met. A procuring entity, therefore, can engage in Direct Procurement where any one or more of the conditions exist.

220. The Accused Persons approved the Direct Procurement of the renovation services from Scanad in the context and backdrop of:a delay on the part of one of the Prosecution's witnesses, Mr. Salim Kiza (i.e. PW17), in preparing the Bills of Quantities;three abortive attempts to procure the renovation services by way of two requests for quotations a replenishable imprest; andextreme urgency/time constraint of ensuring that the Stand was renovated within the remaining six days to the show.Count III of the Charge Sheet, in which the 2nd Accused Person is named, cannot succeed in the absence of evidence proving, beyond all reasonable doubt, that:

> the Accused Persons intentionally, purposefully, or with bad purpose or evil intent created the situation that ultimately constrained recourse to Direct Procurement; andmore importantly, since the case before the Honourable Court revolves around corruption and/or economic crime, that the Accused Persons benefited either directly or indirectly from the recourse to use direct procurement.The Prosecution did not adduce any evidence showing that the Accused Persons were responsible for the delay in preparing the Bills of Quantities.

On the contrary, the Investigating Officer (i.e. PW19) attributed the delay to a witness for the prosecution (i.e. Salim Kiza, PW17).

221. Moreover, the Prosecution did not adduce any evidence showing that the Accused Persons were responsible for:Mr. Salim Kiza's failure to prepare the Bills of Quantities on/in time;the exaggerated prices that bidders quoted in the first round of the three abortive procurement processes; orthe anonymous letter that led to the abandonment of the second round of the three abortive procurement processes; orparliament's omission of "replenishable imprest" from the list of recognised procurement methods in the 2005 Procurement Act [or its successor], which led to the abandonment of the third round of the three abortive procurement processes.The Accused Persons set up the defences of necessity, urgency, time constraint and good faith. The evidence from the Accused Persons is that:

(a) the CA had previously engaged in three abortive procurement processes;

(b) they (i.e. the Accused Persons) were not responsible for the failure of the previous abortive procurement processes;

(c) the CA faced a difficult dilemma of either abandoning participation at the ASK Show or engaging in Direct Procurement of the required renovation services;

(d) though available on paper, the option of abandoning participation at the Show was not practically feasible, as it inevitably entailed inflicting enormous harm to the CA, the Government of Kenya and the general public;

(e) the CA faced an extreme urgency/time constraint, as there were only five days between the date of the 255th Meeting of the Tender Committee and the commencement of the Show;

(f) the above realities left Direct Procurement as the only viable option; and

(g) notably, subsequent developments vindicated the decision that the Accused Persons made, as evidenced by (inter alia) the multiple awards the CA won at the 2014 ASK Show.

222. In *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal (Nairobi) No. 224 of 2017*, where the Court of Appeal upheld the validity of a decision to go for Direct Procurement after several abortive attempts to use other procurement methods. Moreover, the Court of Appeal upheld the validity of direct procurement in situations characterised by urgency, time constraints and considerations of public interest, as happened in the case now before this Honourable Court.

3rd Accused Submissions

Points of Defence

a. The Prosecution did not prove even a single element/ingredient of the offence for which the 3rd accused is charged with.

223. It is trite law that the prosecution must prove each and every element/ingredient of an offence beyond reasonable doubt failure to which the prosecution case must fall in its totality and the accused

acquitted. This position is well captured in in Sekitoliko vs. Uganga (1967) EA 53 where it was held that:

> " The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case."

224. The 3rd Accused person is charged jointly with the 2nd, 4th, 5th, 6th, 7th, 8th, and 9th accused persons with "Willful failure to comply with the law relating to procurement contrary to Section 45(2) as read with Section 48 of the *Anti-corruption and Economic Crimes Act* No. 3 of 2003."

225. From the wording of the statement of offence above, it is clear that Section 45(2) of the *Anti-corruption and Economic Crimes Act* No. 3 of 2003 DOES NOT create a strict liability offence.

226. Further, remembering the common law Latin maxim "Actus reus non facit reum nisi mens sit rea" (an act does not make a defendant guilty without a guilty mind), it is clear from the above statement of charge that the offence created has two (2) broad elements: the prosecution must prove beyond reasonable doubt that: (1) there was failure to comply with the applicable law relating to procurement (actus reus), and (2) the failure was willful (mens rea).

227. The Black's Law Dictionary, Sixth Edition, 1991, p. 1599 defines willful as:

> Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequence; unlawful; without legal justification. Proceeding from a conscious motion of the will; voluntary; knowingly deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

228. An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced to its context. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

229. A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished form an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

230. Going by the above definition the prosecution did not establish or prove beyond reasonable doubt that the 3rd accused person jointly with other accused persons acted "voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law". The prosecution did not prove in any way that there was joint intent amongst the 2nd – 9th accused persons not to comply with the law. This is a cardinal element/ingredient of the offence which the prosecution must have proved beyond reasonable doubt, failure to which the case must collapse.

231. It was also incumbent upon the prosecution to prove beyond reasonable doubt that the process of direct procurement was flawed and the 3rd accused person jointly with other members of the Tender Committee having full knowledge and being aware of the flaw went ahead to ultimately approve the direct procurement.

b. The Prosecution did not prove which specific direct procurement requirements the 3rd accused jointly with others failed to adhere to.

232. Section 74(1) of the Public Procurement & Disposal Act, 2005, provides for instances where Direct Procurement may be used. It provides "A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

233. From the evidence on record, it cannot be inferred directly or indirectly that the decision to award the tender to Scanad was for the sole purpose of avoiding competition. To the contrary, the evidence shows that the procuring unit had made all reasonable efforts to encourage competition through the "Request for Quotation" methods applied before, by even including bidders from the Central Bank of Kenya to ensure that the tenders did not rotate between only two companies.

234. Further, from the wording of Section 74(1) of the Public Procurement & Disposal Act, 2005, a procuring entity is allowed to use direct procurement either under subsection (2) or (3) depending on the circumstances of each case. The law permits a procuring entity to choose which of the two methods to use. There is no legal requirement that both subsection (2) and (3) must be adhered to before a procuring entity can embark on direct procurement.

235. Section 74(3) of the Public Procurement & Disposal Act, 2005 provides that-

> " A procuring entity may use direct procurement if the following are satisfied —
>
> (a) there is an urgent need for the goods, works or services being procured;
>
> (b) because of the urgency the other available methods of procurement are impractical; and
>
> (c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity

236. The cardinal principle of the law of evidence is that he who alleges must prove. The burden rests squarely on the prosecution to prove that the 3rd accused person jointly with others failed to adhere to any of the above requirements for direct procurement. The burden does not shift, nor are the accused persons bound to disprove that they never complied with the law.

237. Section 107 (1) and 109 of the *Evidence Act* are clear on who bears the burden of proving the existence of a particular fact. Section 107 (1) provides thus "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." While Section 109 is in no unclear terms that "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

238. The Prosecution witnesses PW3, PW4, PW5, PW6, PW7, PW11, PW14 and PW16 all confirmed there were time constraints/urgency and bearing in mind the show was 7 days away as at 22nd September 2104, it was impractical to embark on other procurement methods. PW7, PW11, PW14 and PW16 who were members of the Tender Committee testified that as 17th September 2014, during the 254th Tender Committee meeting, the urgency was so great that they had resolved to use internal staff and replenishable imprest to do the work due to time constraint.

239. Further, circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity. PW17, Mr. Salim Ali Kiza and PW7, Mr. Juma

Kiprono, both from the Human Resource and Administration department which was responsible for the preparation of the Bill of Quantities testified on why the Bill of Quantities were not ready until 28th August 2014. PW7, Mr. Juma Kiprono, who was the head of the Human Resource and Administration department confirmed that PW17, Mr. Salim Ali Kiza was the only technical person in the department to prepare the Bill of Quantities. PW17, Mr. Salim Ali Kiza himself testified and confirmed that he was responsible for the preparation of the Bill of Quantities for all the three (3) 2014 shows and he had successfully prepared the Bill of Quantities for the Kisumu and Mombasa show on time. He further testified that if the procurement process did not experience any enforceable challenges the period between 28th August 2014 and 29th September 2014 would have been sufficient to renovate the stand through open tendering without embarking on direct procurement. Further, none of the 2nd – 9th accused persons belonged to the Human Resource and Administration department which was solely responsible for the preparation or supervision of the preparation of the BQs.

240. The evidence on record shows that the decision by the procurement department to suspend the 253rd Tender Committee paper was due to lack of competition and high prices above the prevailing market value, and the decision of the 254th Tender Committee to suspend the 254th Tender Committee paper was due to allegations of corruption which reasons were within the law. The circumstances leading to the urgency were therefore unforeseeable and not as a result of dilatory conduct on the part of the 3rd accused or the tender committee.

c. The 3rd accused acted in good faith

241. Section 138 of the Public Procurement and Disposal Act, 2005 unambiguously grants a qualified immunity against personal liability to all persons in respect of any act or omissions done in good faith in the performance of their duties under the Act as follows:

Protection from personal liability.

> " 138. No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act."

242. The above provision is couched in mandatory terms. Its application in criminal proceedings such as these connotes that any person who acts in good faith in the performance of his legitimate and legal duties conferred by the Act cannot be held personally culpable unless the contrary is proved beyond reasonable doubt.

243. In criminal proceedings the burden is always on the prosecution to prove all elements of an offence beyond reasonable doubt. It therefore follows that the prosecution must prove beyond reasonable doubt that an act was not done in good faith in order to deny an accused person the benefit of the immunity/protection conferred by Section 138 of the Public Procurement and Disposal Act, 2005. Differently put, the prosecution must prove beyond reasonable doubt that an act was done in bad faith.

244. In Republic v Anti-Counterfeit Agency Ex-parte Caroline Mangala t/a Hair Works Saloon [2019] eKLR, Justice John Mativo explained what constitutes good faith and bad faith as follows:

> " 55. Bad faith has been defined rarely, but an Australian case defined it as "a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker." Even though "Bad faith" has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, and dishonesty,

abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southin in MacMillan Bloedel Ltd. v. Galiano Island Trust Committee [30] articulated the concept of bad faith as follows:

"The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, and conflict of interest, and discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact" (Emphasis added)

56. .....

57. The greatest defence to allegations of this nature is that the act must have been performed in good faith. The act complained of must have been done in the performance or intended performance of a duty or authority under the enabling act or by-law passed under it. The words "good faith" must be read in the context of the act. When one speaks of good faith in the performance of a duty or statutory authority, one must look to the nature of the duty or statutory authority to determine what is reasonable and what is not. This contextual approach can lead to very subjective judgments. If there is clear evidence of an intention to act illegally or outside the scope of authority, dishonestly or with malice, in other words, a blatantly dishonest exercise of power, then a party cannot rely on the good faith defence. However, to lose the immunity of "good faith" involves more than negligence or an error in judgment. If there is an honest attempt to give effect to the law, the good faith defence should prevail."

245. From the above decision, the words "good faith" must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.

246. The issue of the immunity conferred by other statues in almost similar terms as Section 138 of the Public Procurement and Disposal Act, 2005 has been the subject of judicial adjudication. For example, Section 3 (12) of the *Betting, Lotteries and Gaming Act*, Cap 131 of the Laws of Kenya which provides: "No member of the Board, nor any officer or servant thereof, shall be personally liable for any act or default done or omitted to be done in good faith in the course of his duties under this Act."

247. While addressing the nature and extent of the immunity conferred by the above-quoted Section 3 (12) of the *Betting, Lotteries and Gaming Act*, Justice Odunga in Advanced Gaming Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited (Interested Party) [2019] eKLR held as follows:

" 165. First, a fundamental principle flowing from the above provision is that an officer or servant of the first Respondent cannot be sued where he acts in

good faith. It has not been alleged or demonstrated that the second and third respondents acted in bad faith.

166. Second, the use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

167 .....

168. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory.

169. A proper construction of section 3 (12) above leads me to the conclusion that it is couched in mandatory terms. It follows that by dint of the said provisions, the suit against the second and third Respondents is unsustainable."

248. It is not in dispute that the 3rd accused is facing the charges before court for acts or missions done in the performance of his legal duties conferred to him by the Public Procurement and Disposal Act, 2005 as a member of the Tender Committee. Second, the prosecution did not lead an iota of evidence to prove that he acted in bad faith or that he did not act in good faith. Third, the 3rd accused testified in his defence that he and his colleagues in the Tender Committee acted in good faith in approving the direct procurement. His testimony/evidence was never discredited by the prosecution who cross-examined him at length. Finally, by dint of Section 138 of the Public Procurement and Disposal Act, 2005 the third accused enjoys the immunity/protection from personally liability in these proceedings having acted in good faith and cannot therefore be held personally liable or criminally culpable.

249. Even if it were to be assumed that Section 138 of the PPDA, 2005 (protection from personal liability) is not an immunity against personal liability/culpability but a statutory defence or exception, Justice C. Meoli in Stephen Gitwa Kimani v Republic [2017] eKLR:

" 31. The burden of proving the guilt of an Accused person always lies with the prosecution, and does not shift, barring a few exceptions stipulated in the law. Section 111 (1) of the *Evidence Act* states as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

32. Under the second proviso, an Accused person is entitled to an acquittal where a reasonable doubt is created by the defence (or prosecution) evidence as to his guilt. The reference to reasonable doubt alludes to the fact that the burden of proof of guilt beyond reasonable doubt in a criminal trial does not shift, and remains with the prosecution. And whereas the Accused may assume the evidentiary burden to establish a statutory defence or exception provided for in the law, the standard of proof required of him must necessarily be lower – sufficient to create reasonable doubt"

d. The 3rd accused adduced credible and plausible defence

250. It is trite law that the prosecution bears the duty at all times to prove the guilt of the accused beyond reasonable doubt. That burden of proof (legal burden) never shifts to the accused, who assumes no burden to prove his innocence. Further, any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.

251. The 3rd accused person elected to testify on oath. He testified that he was present during the 254th and 255th Tender Committee meetings.

252. It was the 3rd accused's testimony that at the 255th TC meeting they deliberated and observed that;

(i) CA abandoning its quest to participate in the 2014 ASK altogether would result in massive and irreparable reputational damage to CA, as well the funds that had been committed by CA to Scanad through LPO amounting to over Ksh. 26,891,017. 92 for the participation of the ASK Show in Kisumu, Mombasa and Nairobi and a further Ksh. 2,247,000.00 for the lease of the Nairobi ASK Show for the period 2013-2014 which was approved by the 197th TC. Further, the Show was very important to CA at that time in view of the then on-going DIGITAL MIGRATION CAMPAIGN;

(ii) Failure to do the renovations the renovations would mean CA exhibiting in a dilapidated stand which would have also resulted in a massive reputational damage to the organization since CA was expecting VIPs to visit the CA Stand at the 2014 ASK Show, and on top of the list was His Excellency the President. The Head of State indeed visited the CA Stand at this Show and CA got at least 2 awards in various categories.

253. The Tender Committee came to the conclusion that there was insufficient time to retender the works and in view of the foregoing the Tender Committee decided that, given the circumstances, the most prudent and best possible cause of action was to do direct procurement to Scanad as per the proposal by the Procurement Unit contained in the Tender Paper. Scanad had been awarded a contract through open tender, for provision of "concept development, fabrication and branding, production of information materials, promotional items and management of the CA Show stands." Furthermore, the firm had demonstrated to CA in other jobs that they had the mobilization ability to do the works within the shortest time. The 3rd accused testified that he was not aware of the email from Ms. Janet

Imunya to Scanad dated 19th September 2014, was never copied to him and was never brought to the attention of the Tender Committee during the deliberations.

254. The 3rd accused was categorical that he never willfully failed to comply with the law nor conspired with any of the accused persons to violate the law. His conscience was clear that the prevailing circumstances necessitated the direct procurement and the same done as per the law. He further stated that there was no motivation for him to willfully violate the law hence risk ruining his national and international reputation, and there was no monetary gain a fact which was confirmed by the investigating officer. He concluded that the decision to award the tender was made in good faith, in the best interests of the Communication Authority and with utmost prudence and goodwill.

e. None of the prosecution witnesses blamed or implicated the 3rd accused person with the commission of any offence.

255. All the witnesses who testified for the Prosecution did not apportion any blame to the 3rd accused person or any of the Tender Committee members nor did they accuse them of the commission of the offences alleged.

f. The decision of the tender committee was legal, reasonable and in the best interests of the Communication Authority and the Public.

256. Regulation 11 of the Public Procurement and Disposal Regulations, 2006 provides as follows:

(1) In considering submissions made by the procurement unit or evaluation committees, the tender committee may-

(a) approve a submission; or

(b) reject a submission with reasons; or approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.

(2) The tender committee shall not-

(a) modify any submission with respect to the recommendations for a contract award or in any other respect;

(b) reject any submission without justifiable and objective reasons;

(c) where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer

(3) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof.

257. From the above, Regulation 11 (6) (2) is expressly clear that "the tender committee shall not…reject any submission without justifiable and objective reasons" The evidence adduced by the Prosecution Witnesses, including PW19, did not prove the existence of any justifiable and objective reasons that would have warranted the 2nd – 9th accused persons to reject the proposal contained in the 255th Tender Committee Paper to award the Tender to Scanad.

258. The Prosecution has failed to discharge its legal burden of proving the guilt of the 3rd accused person beyond reasonable doubt. The prosecution did not prove that the 3rd accused willfully failed to comply with the law and acted in bad faith. The evidence on record taken in totality and considering all the

prevailing circumstances reaffirm the 3rd accused's fidelity to the law. It's crystal clear that he acted in good faith and did not violate any law.

259. There is overwhelming reasonable doubt to warrant the acquittal of the accused person. In the words of Justice John Mativo in Republic v Patrick Muriithi [2016] eKLR:

> "To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

4th Accused Submissions

260. In terms of section 74 of the PPDA, 2005, as at 22nd September, 2014 direct procurement was warranted because there was an urgent need to procure the services for renovation of CAK's stand and other alternative methods of procurement were impractical. The selection of Scanad was equally motivated by practicality as they were already on the Show ground, their services having been previously procured for branding and fabrication following a competitive tender process. The delay in getting the first RFP out was not dilatory. The failure of the three abortive attempts at procurement- two RFP and imprest were neither foreseeable nor the results of any dilatory conduct.

261. In IEBC vs NASA & others Civil Appeal No. 224 of 2017 [2017] eKLR has authoritatively settled when direct procurement would be improper. Reversing the High Court's decision, the learned Judges of Appeal held that provided it was not for the purposes of avoiding competition and transparency is ensured- see, inter alia, paragraphs 183, 184, 185 & 186, direct procurements proper when timelines do not allow for an open tender.

262. As at the time of the 255th TC meeting, the timelines did not allow for an open tender. It cannot, on the evidence before the Court, be credibly concluded that the direct procurement of Scanad was for purposes of avoiding competition. No such invidious intention can be attributed to the 4th Accused or anyone else in the dock. Indeed, the prosecution led no evidence to that effect.

263. While, it is not necessary to do so in absence of any proof of violation of section 74 of the PPDA, 2005 in the first place, turning briefly to the mens rea required to sustain a conviction under section 45 of the ACEA. Can it be credibly be claimed that in approving the direct procurement at the 255th TC meeting, the 4th or any of the other Accused willfully or carelessly failed to comply law relating to procurement? The Prosecution has failed to establish to the requisite standard the mental element required for a conviction under section 45.

264. At its 255th meeting approving the direct procurement of Scanad's services, members of the TC acted punctiliously in good faith in the discharge of their duties in terms of regulation 10 in the interests of CA and the public. Such good faith was borne out, abundantly so, in the evidence of each of the 2nd to 7th Accused (i.e. members of the TC who made the decision). Accordingly, its terms of section 138

of the PPDA, 2005 they are immune from individual criminal culpability for that decision either as sought by the Prosecution or at all. Section 138 provides:

> " No person shall, his personal capacity shall be liable in civil or criminal proceedings in respect of any act or omission done in good faith in performance of his duties under this Act."

265. In light of this provision, to sustain any conviction under Count III, it was necessary for the Prosecution, not only to plead bad faith in relation to the alleged breach of section 74 of PPDA, 2005 but also to prove it beyond reasonable doubt.

The Propriety of the Charges Brought Against the Accused

266. When it comes to prosecution for breaches of the PPDA, 2005, EACC could not commence it in absence of a complaint by the PPOA's Director-General (D-G):

101. A public entity shall provide the Authority with such information relating to procurement as the Director-General may require in writing.

102.

(1) The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.

(2) An investigation shall be conducted by an investigator appointed for the purpose by the Director-General.

103.

(1) For the purpose of carrying out an investigation of procurement proceedings an investigator has the following powers—

(a) the investigator shall have access to all books, records, returns, reports and other documents of the procuring entity or a person who participated in the procurement proceedings, including electronic documents;

(b) the investigator may remove or make copies of any documents the investigator has access to under paragraph *(a)*; and *(c)* the investigator may require any of the following to provide explanations, information and assistance—

(i) an employee or official of the procuring entity; or

(ii) an employee or official of a person who participated in the procurement proceedings.

(2) In addition to the powers under subsection (1), an investigator shall have such powers as are prescribed.

(3) The powers of an investigator are subject to such conditions and limitations as are prescribed.

104. After completing his investigation, an investigator shall prepare and submit a report thereon to the Director-General.

105.

(1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—

(a) direct the procuring entity to take such actions as are necessary to rectify the contravention;

(b) cancel the procurement contract, if any;

(c) terminate the procurement proceedings; or

(d) prepare and submit a summary of the investigator's findings and recommendations to the procuring entity and to the Kenya Anti-Corruption Commission established under the *Anti-Corruption and Economic Crimes Act* 2003. (2) Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—

(a) the procuring entity; and (b) any other person whose legal rights the Director-General believes may be adversely affected by the order.

106.

(1) The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 105 (2) may request the Review Board to review the order of the Director-General under section 109.

(2) A request for a review may only be made within twenty-one days after the order was made.

(3) A request for a review shall be accompanied by the prescribed fee.

267. Crucially, the structure of the inquiry conducted by the PPOA under part VIII of the PPOA, 2005 is based on strict observations of the principles of fundamental fairness (natural justice) requiring the D-G, if minded, to make a complaint and to give notice not only to the procuring entity (PE) but also anybody potentially culpable to make representations which s/he must consider. Both the PE and any affected person has a right to challenge any recommendation by the D-G before the Review Board. Thus, to allow prosecutions without strict adherence to all provisions of the PPDA would be in breach of any accused fundamental statutory rights. It is canonical law, that any act done in breach of the rules of natural justice, as is the case here, is a nullity- see Hypolito Cassaino de Souza v Chairman and Members of Tanga Town Council [1961] EA 377 at page 388 and David Oloo Onyango v the Attorney-General [1987] eKLR.

268. There was no complaint by the PPOA as confirmed by PW19. There is no evidence of the finding by its Director-General of any impropriety whether on the basis of the anonymous letter or at all. Indeed, from PW18's evidence the very first time the PPOA was consulted was on 25th October, 2019 well after the charges herein had been preferred and indeed well into the hearing the case against the accused.

5th, 7th, 8th, 9th Accused Submissions

B. 5th and 7th Accused Persons Defence

269. It is not in dispute that the 5th and 7th accused persons were appointed as members of the Tender Committee in respect of Tender No. CA/PROC/RFQ/50/2014-2015 for the renovation of the CA Nairobi ASK Stand.

270. The substance of the charge against the 5th, 7th, 8th, and 9th accused persons revolves around the 255th Tender Committee meeting held on 22nd September, 2014 which approved the proposal by the procurement function to directly procure Ms. Scanad Limited to carry out renovations of the CA ASK Stand at a consideration of Ksh. 1,927,572.00.

271,. The title preceding Section 74 (2) and (3) of the Act is indicated as "Alternative Procurement Procedures" followed by "Direct Procurement" with a side footnote titled, "When Direct Procurement may be used".

a. Regulation 62 of the Procurement and Disposal Regulations 2006 ("the Regulations") provides as follows:

62

(1) A procurement entity that conducts procurement using direct procurement method pursuant to Section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes determination that the relevant conditions in Section 74 of the Act has been satisfied.

272. The evidence on record demonstrates that the 255th tender committee meeting approved the use of direct procurement of Ms. Scanad Limited as proposed by the procurement unit having satisfied themselves that every effort had been made to use Request for Quotations from the procuring entities own pre- qualified list in the first instance, from the list pre-qualified by CBK in the second instance and by replenishable imprest as per the decision of the 254th tender committee meeting.

273. The evidence on record demonstrates that there was urgent need for the works in question. This was confirmed by the prosecution's own witnesses. Prosecution witnesses testified that it was impracticable to use open tender for the renovations in the circumstances and that other works that had been procured through open tender had already been carried out and it was critical for the procuring entity to participate in the annual show.

274. From the evidence, the direct procurement was strictly limited to the repair works which the Prosecution's own witnesses confirmed were scaled down. The evidence on record is that Scanad Limited had already been procured separately for the other main works. Further the evidence on record is incontrovertible that:

a. The procuring entity did no pay in excess of prevailing market rates.

b. The accused as part of the Tender Committee duly approved the award as is required under the law.

c. The Contract to Ms. Scanad Limited was within the thresholds provided in the First Schedule of the Regulations.

d. No evidence whatsoever was laid out by the prosecution to demonstrate any willful or unlawful conduct on the part of the said Accused Persons.

e. The particulars pleaded in the charge sheet do not state in what manner the Accused Persons breached Section 74 (2) and (3) of the Act so as to enable them fully plead and answer to the charge. The Court and the Accused Persons have been left to speculation as to what provision in particular they are alleged to have failed to comply with in clear breach of Section 50 (2) (a)

of *the Constitution* of Kenya which stipulates that, "Every Accused Person has the right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it".

275. The main issue arising in this matter is whether accused persons numbers 2-9 by the decision arrived at in the tender committee meeting of the 255th tender committee held at noon on 22nd September 2014, willfully failed to comply with the law relating to procurement by awarding Ms Scanad Kenya Limited the tender to refurbish the CA Nairobi ASK show stand.

276. From the totality of the evidence tendered, the Prosecution failed to prove beyond reasonable doubt that the Accused persons engaged in willful conduct that is contrary to Section 74(2) and 74(3) of the Act and the regulations made thereunder and thereby contravened Section 45 (2) (b) as read together with Section 48 of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.

277. Accused persons 5 and 7 became involved in the matter in issue at the 255th tender committee meeting. A8 and A9 were present as secretariat.

278. The Prosecution did not tender any evidence to demonstrate that the Accused persons played any role in preparation of bill of quantities, in preparation of tender documents, in obtaining requisite approvals prior to tender award. Further, it was clearly demonstrated by way of evidence that the procuring entity would have lost substantial tax payers money had the Tender Committee terminated the procurement proceedings. Indeed, the law gives the Tender Committee the discretion to award the tender or terminate the procurement proceedings and no evidence was tendered to demonstrate there was any dilatory conduct on the part of the Accused Persons and more so the Tender Committee.

279. The prosecutions own witnesses confirmed that the Bill of Quantities (BQ) without which the procurement could not proceed was not made available until 28th August 2014. The evidence on record reveals that none of the accused persons numbers 5,7,8 and 9 nor indeed any of the other accused persons were responsible for the preparation of the BQ.

280. The evidence on record shows that the 5th and 7th accused persons first interacted with the tender in issue at the 255th tender Committee meeting held on 22nd September 2014. Their culpability, if any, must be evaluated in the context of that meeting which was held only seven (7) days before the commencement of the show and five (5) days before the stand was required to be ready for handover.

C. 8th Accused Person's Defence And Position

281. Jane Jeptanui Rotich, the 8th Accused Person sat in the Tender Committee for Tender No. CA/PROC/RFQ/50/2014-2015 in her capacity as the Secretary to the Tender Committee. This position is supported by the law and more so Section 26 of the Act which states in part:

> " 26
>
> (4) A public entity shall establish a Tender Committee; Procurement Unit and such other bodies as are required under the regulations for the purposes of making such decisions on behalf of the procuring entity as are specified in this Act and the regulations.
>
> (5) A Tender Committee or body established under Sub-Section (4) shall be established in accordance with the regulations and shall:
>
> a. Consist of not less than five members.

b. Have as its Secretary, the procurement professional in charge of the procurement unit.

282. Regulation 7 (1) states that, "In addition to the responsibilities stipulated under Section 27 (2) of the Act, the Accounting Officer shall be responsible for ensuring that the procuring entity establishes a Tender Committee and a Procurement Committee in accordance with the Act and these Regulations.

283. Regulation 8 (b) states that the function of the procurement unit shall be to act as a Secretarial to the tender procurement and disposal committees.

284. Regulation 12 provides that:

1. The Accounting Officer or the Head of the Procuring entity shall appoint an alternative member for each member of the Tender Committee and only the alternative shall attend any meeting of the Tender Committee whenever the member is unable to attend.

2. The quorum of the Tender Committee shall be five members including the chairman.

3. Decisions of the Tender Committee shall be by consensus and where there is no consensus, the decision shall be through voting by simple majority and where there is a tie, the chairman shall have a second casting vote.

4. The Tender Committee shall cause to be prepared minutes of all the meetings and such records shall include:

   a. A register of attendance

   b. A date of the meeting

   c. List of the matters considered

   d. The decisions made for each matter including any major issues discussed, the reasons for any rejections and any clarifications or minor amendments to which the approval is subject.

   e. A note on the basis of any evaluation made.

   f. Any conflicts of interest declared by members.

   g. Any dissenting opinions among Tender Committee members and

   h. Such other records as may be necessary

5. The Tender Committee may invite independent advisors or members of the procurement unit to explain submissions or provide technical advice where required.

286. The Second Schedule of the Regulations titled, "Composition of Tender Committees" under Category 3 of the State Corporates Tender Committee provides that membership structures as:

i. Chairman who shall be a Head of Department appointed in writing by the Chief Executive Officer.

ii. Deputy Chairman who shall be the Head of Finance Department appointed in writing by the Chief Executive Officer.

iii. Other members who shall be at least five Departmental Heads including the Company Secretary or officers in equivalent positions appointed in writing by the Chief Executive Officer.

iv. Secretary who shall be the Officer heading the Procurement Unit of the Corporation.

287. The 8th Accused Person has been charged alongside others in Count 111 and it is alleged that she was a member of the Tender Committee. The Accused Person in her defence was categorical and consistent in her evidence that she was a Secretary to the Tender Committee and her role was to only record minutes and further that she does not make decisions required of a Tender Committee under the law.

288. To bolster her position, she cited the instance where at the 254th tender committee meeting held on 17th September 2014, when an allegation against the Head of Procurement Unit was made to the tender committee through an anonymous letter, the Tender Committee required the Officers of the Procurement Unit to step out of the meeting as the Tender Committee deliberated on the same. She could not have been required to leave the meeting if she was considered a member of the tender committee and if she was entitled to participate in the decision making of the tender committee.

289. The Prosecution was required to tender evidence and proof beyond reasonable doubt that:

i. The Accused was a member of Tender Committee of Tender No. CA/PROC/RFQ/50/2014-2015.

ii. The Accused in her capacity as a member of Tender Committee willfully failed to comply with the applicable law.

290. The Prosecution in a bid to rebut the evidence of the 8th Accused sought to suggest and convince the Court that the Secretary to a Tender Committee is part and parcel of the Tender Committee. But as we shall demonstrate hereinbelow, that is not the legal position for the following reasons:

a. Section 26 (5) of the Public Procurement Disposal Act 2005 states that a Tender Committee shall consist of not less than five members and which position is consistent with the composition set out in the Second Schedule which lists a Chairman, Deputy Chairman and five (5) other members. If the Act and the Regulations intended that the Secretary shall be decreed as a member of the Tender Committee, it would have clearly stated under Section 26 (5) (a) and the Second Schedule that a Secretary for the purposes of a Tender Committee shall be decreed to be a member.

b. The Prosecution did not tender any letter appointing the 8th Accused as a member of the Tender Committee and preciously because she was not appointed as such. It can only therefore be taken that the reason why the Prosecution did not tender in evidence the letters of appointment is because the same would not have been favorable to their case against the 8th Accused Person.

c. The 8th Accused was consistent in her position that her role in the Tender Committee was only to take minutes, that she does not participate in deliberations and neither does she vote, that if an adverse allegation arises against the Procurement Unit she was required to step out of the proceedings. Her evidence was not rebutted in any manner by the Prosecution.

d. If indeed the Act and the Regulations deemed the Secretary as a member of the Tender Committee, then why did the same regulations (12 (7)) categorically state that the Tender Committee may invite independent advisors or members of the Procurement Unit to explain

submissions or provide technical advice where required yet the Secretary is an officer of the Procurement Unit?

291. The Prosecution did not tender any evidence to prove that the 8th Accused Person was a member of the Tender Committee, that she actively participated in the deliberations at the Tender Committee meeting other than recording minutes, that her role in law goes beyond recording minutes and that there was overwhelming evidence (if at all) that she engaged in a conduct that amounts to willful failure to comply with the applicable law. Her duties, to the extent set out by the law, were not impugned in any manner.

D. 9th Accused Person's Defence And Position

292. Philip Kipkemoi Kiplangat, the 9th Accused Person is indicated in Prosecution's Exhibit 7 as having been in attendance as Secretariat. Notwithstanding this position, he has been charged in Count Number 111 as having been a member of the Tender Committee.

293. The 9th Accused in his evidence in support of his defence maintained that his role was only that of logistical support to the Tender Committee and to ensure that their sessions were smooth and that at no time did he participate in the deliberations of the Tender Committee. The Prosecution in cross-examination did not rebut his evidence in any manner despite attempts to suggest to him that he offered technical advice to them.

294. The 8th and 9th accused persons testified that whenever technical advice is sought from the secretariat other than the advice contained in the tender committee meeting papers, such advice is specifically recorded in the minutes. It follows therefore that if technical advice had been sought from the 9th accused, the same would have been recorded in the minutes. There is therefore absolutely no evidence that the 9th accused participated substantively in the deliberations of the 255th tender committee meeting.

295. It was the Prosecution's burden to prove beyond reasonable doubt to the Court that:

a. The 9th Accused was duly appointed as a member of the Tender Committee. No evidence or even a mere scintilla of the same was tendered.

b. He was appointed by the Procurement Unit to explain submissions by Procurement Unit or provide technical advice having been so required by the Tender Committee pursuant to Regulation 12(7). No such evidence was presented to the Court.

c. From the minutes of the Tender Committee meeting or other documentary evidence there was willful failure on the part of the 9th Accused Person to comply with the applicable law. Having failed the test, we have set out under (a) and (b) above, the mens rea or alleged willful conduct on the 9th Accused's part does not arise.

E. Response To The Prosecutions Final Written Submissions

296. The prosecution has placed heavy reliance on Section 26 (4) of Public Procurement and Disposal Act 2005 and Regulation 10 (1) and 12 of Public Procurement and Disposal Regulation 2006. Regulation 10 (1) states that a procuring entity shall establish a Tender Committee in the manner set out in the Second Schedule.

297. The key word in a Tender Committee is "member" and who is a member thereof is clearly set out in Section 26 (4) of the Public Procurement and Disposal Act 2005 and the Second Schedule. In fact,

the Second Schedule lists what it has described as "other members" other than the Chairman and the Deputy Chairman and does not include the Secretary in its definition of a member.

298. Further the Prosecution in their submissions does not make any attempt whatsoever to refer to any of the Prosecution's or Defense's exhibits that would support any substantive act on the part of the 8th Accused Person other than taking minutes as by law required. It is not enough for the Prosecution to suggest to the Court that the law might have intended and did so intend that a Secretary is deemed to be a member of a Tender Committee. The Prosecution must lay evidence beyond reasonable doubt that indeed there is evidence that a Secretary actively participates in Tender Committee proceedings and did so over and above the responsibility of taking minutes and which is not the case. The Prosecution dismally failed to discharge the burden.

299. Regulation 8 (3) (9) of the Public Procurement and Disposal Regulations 2006 is not in any manner inconsistent with the position set out in Section 26 (4) of the Public Procurement and Disposal Act 2005 and the Second Schedule of the Regulations. The Prosecution has attempted to mislead the Court that the term "Secretariat" has ascribed a different meaning to the term "Secretary" so as to justify the inclusion of the 9th Accused in Count No. 111.

300. The meaning of "act as Secretariat" is derivable from the meaning of "Secretariat" and the Oxford Dictionary defines Secretariat as "the office or people responsible for the management of an organization..." To act as Secretariat means to perform the Secretarial duties.

301. Regulation 8 of the Public Procurement and Disposal Regulations 2006 is derived from Section 26 (4) of the Public Procurement and Disposal Act 2005 which requires a public entity to establish a Procurement Unit and a Tender Committee. Section 26 (5) goes to state that a Procurement professional from the Procurement Unit shall be the Secretary of the Tender Committee. There is therefore no ambiguity between Section 26 (4) and (5) and Regulation 8 (3) (9) in so far as what the terms "Secretary" and to "act as a Secretariat to the Tender Committee" means.

302. Regulation 8 (3) (8) of the Public Procurement and Disposal Regulations 2006 that requires the Procurement Unit to liaise with the Authority and other bodies on matters relating to procurement and disposal must be read together with Regulation 12 (7) which expressly states that, "the Tender Committee may invite independent advisors or members of the Procurement Unit to explain submissions or provide technical advice, where required."

303. To the extent that the Prosecution have sought to persuade the Court that the 9th Accused's role in the 255th Tender Committee was to liaise with the Tender Committee as a Secretariat to give advisory, the Prosecution ought to have tendered oral and documentary evidence to proof beyond reasonable doubt that:

   i. The 9th Accused was appointed by the Procuring Unit to give advisory to the Tender Committee. No such evidence or a semblance thereof was tendered to the Court.

   ii. The proceedings of the 255th Tender Committee meeting demonstrates that the Tender Committee did invite members of the Procurement Unit to explain submissions or to provide technical advice and that the 9th Accused did attend in that capacity. Again, no such evidence or a semblance thereof was tendered to the Court.

304. As regards the Prosecution's submissions on the question of "urgent need for the goods, works or services being procured", we wish to respond as follows:

   a. A Procuring Unit is by law a separate body from a Tender Committee. The Procuring Unit is a permanent Department or Unit within a Procuring Entity or a public body. In order to

determine whether there was an urgent need for the works in question, the role of the Tender Committee as per the evidence adduced before the Court is limited to the deliberations at the 255th Tender Committee meeting of 22nd September, 2014.

b. There is no dispute, from the evidence on record that;

i. CA played a vital role in provision of telecommunication services to the public and that their participation in the annual ASK Show was critical.

ii. The country was undergoing digital migration at the material time and the annual show was the best event for the CA to disseminate information to the public on digital change.

iii. The Procuring entity had already tendered for and procured other services and works to enable them participate in the annual show and that the financial loss to the procuring entity was going to be immense.

iv. The failure to participate in the annual show would have disfranchised the public and on matters pertaining to digital migration and would have occasioned loss of public funds.

v. The repairs were necessary to enable CA participate in the annual show.

305. The Prosecution did not lay any basis to demonstrate that there was no urgent need for the repair works. They did not call any witness to affirm that the annual show could have proceeded without the intended repair works.

306. The Prosecution argues that, "the Tender Committee is not a mechanical conveyor belt created for the sole purpose of rubber stamping the proposals by the Procuring Unit and that a well-informed Tender Committee and Procuring Unit would have anticipated a negative or positive response from the Tender Committee and that in so far as this case is concerned, the Procuring Unit had not planned for a rejection by the Tender Committee as the procurement was commenced late and rushed" (emphasis ours). This line of submissions reinforces the 5th, 7th, 8th and 9th Accused Persons position that they played no role in the delay and accordingly there was no dilatory conduct on the part of the said Accused Persons.

307. The 5th, 7th, 8th and 9th Accused Persons have been charged and called to answer to the events that took place at the 255th Tender Committee meeting only and are not liable to answer to any events preceding the meeting of 22nd September 2014 or at all.

308. The contention by the Prosecution that there was no urgency and that there was time for an alternative procurement method to be conducted does not assign any blame or culpability on the part of the 5th, 7th, 8th and 9th Accused Persons.

a. The allegations that the circumstances that led to the alleged urgency was a creation of the Tender Committee is not supported by the evidence on record and is a theory created by the Prosecution to support the charge under Count No. 111.

b. In so far as the question of urgency was concerned, the Tender Committee was only required to consider whether there was need to procure for the repair works to be carried out to enable the CA participate in the annual show and the evidence on record vindicates the Tender Committee decision.

c. The Prosecution did not fault or prosecute the 253rd and 254th Tender Committees meetings yet the circumstances that led to the 255th Tender Committee meeting arose particularly from the decision of the 254th Tender committee meeting. The 5th and 7th Accused Persons were not parties to the said 253rd and 254th Tender Committee meetings.

d. The 9th Accused was never invited by the Tender Committee to explain submissions by the Procurement Unit or provide technical advice.

e. The Prosecution fails to acknowledge the fact that neither the user Department nor the Procurement Unit was faulted and charged for delaying the procurement of the repair works and or for dilatory conduct leading to the inevitable conclusion that the members of the 255th Tender Committee meeting and more so the 5th and 7th Accused Persons and also the 8th Accused Person who sat as the Secretary and the 9th Accused Person who rendered logistical services must have been charged and arraigned in Court on account of malice, spite and extraneous reasons.

6th Accused Submissions

1. Legal Effect Of Remaining Silent.

309. In advancing the argument that the court must find the 6th accused person guilty because he elected to offer no defence, the DPP has cited the case of R.T Bhatt v Republic [1957] EA. Firstly, we wish to submit, with respect, that the DPP has misinterpreted the law as pronounced in the said case and secondly, under *the constitution*, statute and common law, that there is absolute clarity that by opting to offer no defence or remaining silent, the burden of proof never shifts from the prosecution to an accused person.

310. The DPP has reproduced the words used in the Bhatt (supra) decision as follows:

> " Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount or worthless discredited evidence. It may not be easy to define what is meant by prima facie, but at least it must mean one which a reasonable tribunal, properly directing its mind to the law and the evidence COULD convict if no explanation is offered by the defence".

311. In making the above pronouncement, the judges of The East African Court of Appeal selectively used the words "could convict" as opposed to the words "should convict". A plain meaning of the word "could" connote possibility as opposed to certainty or obligation. The Black's Law Dictionary, 8th Edition, defines the word CAN- present tense of the word "could" as "may or to be able to do something" while the Oxford English Dictionary gives a definition of the same word as "be potentially capable of". From the said plain meaning of the words used in the Bhatt decision, it means that a prima facie case does not mean that an accused person is subject to automatic conviction.

312. It would make non-sense of the constitutional right of an accused person (as provided under Article 50 (2)(i) of *the constitution*) to remain silent and the principle of the standard of proof, if one was to interpret the Bhatt decision to the effect that where an accused person has been placed on his defence but fails to offer a defence he is liable to conviction. Such an interpretation amounts to an absurdity.

313. In his interpretation of the Bhatt case the DPP has confused prima facie case with the principle of standard of proof. In determining whether or not the prosecution has established a prima facie case, a trial court does not consider whether the case has been proved beyond reasonable doubt, which is a standard of proof, but whether the prosecution has establishing a set of facts, which is a burden of proof. In the case of Sir Boesak [2000] (3) SA, Statford JA stated as follows:

> " Prima facie evidence in its usual sense, is used to mean prima facie proof of an issue; the burden of proving which is upon the party giving that evidence." Similarly, in R-vs-Jagjivan M. Patel and Others 1.TLR. 85 the court dealt with the issue of prima facie case in the following words:
>
> > "All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worth of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt.

314. Kenyan courts have also dealt with the legal effect, in situations where an accused person has elected to remain silent. In all the cases, our courts have come to the inevitable conclusion that an accused person is not to be prejudiced by the fact that he has elected to remain silent because the burden of proof still remains with the prosecution and that a trial court must evaluate the evidence against the required standard of proof. By way of example we wish to cite the following local cases:

(i). The case of Jacob Muriungi v Republic [2018] eKLR leaves no doubt as to the legal position and the proper interpretation of the Bhatt case. The High Court sitting as an appellant court, considered whether in situations where an accused person offers no rebuttal evidence, the prima facie case should lead to an automatic conviction. In reaching the conclusion that a prima facie case does not mean that the prosecution has proved its case, the court stated as follows:

> " When called upon to defend himself, the appellant opted to remain silent. - - - In its judgement the trial court held in respect of this as follows:
>
> > "The accused further complicated his standing by opting to remain mute when placed on his defence. In the case of Murimi vs. R (1967) EA 542 it was observed that a prima facie case would be that which would sustain a conviction should the accused person offer no evidence in rebuttal during defence."
>
> I think the trial court proceeded on the wrong footing. It assumed that since a prima facie case had been established, the case had been proved. That is not the position. A prima facie case does not mean that a case beyond reasonable doubt has been established."

(ii). In Director of Public Prosecutions v Geoffrey Mukonza Mwangangi [2018] eKLR, the High Court still sitting as an appellate court held as follows:

> " The definition clearly distinguishes a prima facie case from proof beyond reasonable doubt. The latter is applicable only when the accused has been called to tender a defence. At that point the trial court is enjoined to critically evaluate the entire evidence to the standard of beyond a reasonable doubt. - - - The only error the learned trial magistrate made was to address to the improper burden of proof the prosecution was required to discharge at that point. She set out the issue for determination at paragraph 24 of the ruling, as whether the prosecution had proved the charges beyond a reasonable doubt. She simply was required to consider whether a prima facie case had been established pursuant to the test set out in the Bhatt case."

(iii). In the case of Dickson Nyakundi v Republic [2015] eKLR, the High Court set aside a conviction by a trial court, by inter alia holding that a trial court should never be influenced by the fact that an accused person has opted to remain silent. It stated thus:

> " The court made further findings that opting to maintain silence the appellant had opted to a course of action that accorded him little or no protection at all because the silence had not created reasonable doubt in the courts mind about his role.- - - This court is left to ask itself whether the reasonable doubt ought to have (sic) created by the appellant or by the prosecution evidence. It is the prosecution that is under a duty to prove its case beyond reasonable doubt and that burden cannot be shifted to the accused."

2. Statutory Obligation Of User Department.

316. At paragraph 46 of the submission by the DPP, they submit that the 6th accused person is liable because there was no evidence of "any effort to follow up with the relevant departments to ensure that all documentation is prepared in time to ensure that the tender process commences in good time."

317. The particulars of Count III of the charge sheet, informs the accused that he allegedly contravened procurement law, in his capacity or office of a member of a tender committee. Nowhere in the charge sheet or particulars thereof is it disclosed that the 6th accused has been accused of violating procurement law while acting as the head of user department. In the premises it would amount to both substantive and procedural injustice if the 6th accused person where to be called upon to respond to an accusation which has been raised for the first time through submissions.

318. Article 50(2)(b) of *the constitution* provides that "Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it." To allow the DPP to submit and make refence to the responsibilities of the 6th accused person as head of the user department is to proceed contrary to and in violation of the forgoing Article 50(2)(b). Without a disclosure in the charge sheet of the said aspect of the 6th accused's responsibility as head of the user department, the accused person was deprived of his right to know in advance the kind of accusation that he faces and to prepare his defence. Needless to state but submissions do not constitute evidence. In the case of Sigilai & Anor v. Republic [2004] KLR 480, the Hon. Justice Kimaru emphasized the need for clarity in a charge sheet as follows:

> " The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence which such an accused is charged should be

disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable him to prepare his defence to the charge. This principle has a constitutional underpinning.

319. The Act does not provide or envisage a situation where the user department is supposed to make a follow up with the procurement department or any other department. To the contrary, the Act makes it an offence for any person, including the user department, to interfere with the functions and activities of a procurement unit.

320. The Act does not establish a body known as a user department. Accordingly, under the Act, there are no function, capable of being violated, that has been prescribed for the user department. In the premises the 6th accused person cannot be accused of violating any such law. The Latin Maxim nullum crimen sine lege nulla poena sine lege (no crime and no penalty without law) militates against the proposition by the DPP.

321. The responsibilities of a user department are provided for under the regulations to the Act. However, regulation 9 thereof, does not provide or disclose an offence. The same provides as follows:

> " A user department shall be responsible for-
>
> a. Initiating procurement and disposal requirements and forwarding them to the procurement unit.
>
> b. Participating in the evaluation of tenders, proposals and quotations.
>
> c. Reporting any departure from the terms and conditions of the contract to the procurement unit.
>
> d. Forwarding details of any required variations to contracts to the procurement unit for consideration and action.
>
> e. Maintaining and archiving records of contract management.
>
> f. Preparing any reports required for submission to the procurement unit, the procurement committee, the tender committee, head of procuring entity or the accounting officer.
>
> g. Undertaking conformity assessment of supplied goods, works and services with the specifications of the contract document.
>
> h. Endorsing the issuance of goods, works and services received notes.
>
> i. Preparing technical specifications and submitting the same to the procurement unit.
>
> j. Assisting in preparation of procurement and disposal plans.
>
> k. Making clarification on tenders, requests for quotations and any other matter as may be required; and
>
> l. Carrying out any other functions and duties as may be provided under the Act or these regulations, or as may be stipulated by the authority."

322. As may be discerned from the above regulation 9, the user department has not been given any responsibility of preparation of tender document(s) and or following up on its preparation.

323. Flowing from the provisions of Section 27 (3) of the Act, the responsibility of the 6th accused as head of the user department, must be strictly confined to the above rule 9. The said section 27 (3) provides that "each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the area of responsibility of the employee or member that this act, the regulations and any directions of the Authority are complied with."

324. Did the user department cause the alleged delay in the procurement process? The answer to the above question lies in the evidence of PW6 and PW17. PW6 (Janet Karumani Imunya) testified and confirmed the following undisputed facts:

I. That the Nairobi ASK show was to be held on the 27th September 2014.

II. That by a memo dated the 26th May 2014 (which was produced as D4 exhibit 5) the 6th Accused person, in his capacity as head of the user department, did requisition for the works.

III. That the time taken or duration between 26th May 2014 and 27th September 2014 was a reasonable and adequate period for preparation of tender documents and completing the procurement process.

IV. That there was a delay in preparation of the tender documents which delay was occasioned by the technical department, to wit, Human Capital Resources and Administration Department. They took too long in preparation of the Bill of Quantities.

V. That the 6th accused person was not responsible for preparation of the Bill of Quantities and therefore not liable for the delay.

325. PW 17, (Salim Ali Kiza) was responsible for preparation of the Bill of Quantities. In his evidence he confirmed the following uncontested facts:

I. He was qualified to prepare Bill of Quantities.

II. He received a request to prepare the Bill of Quantities in June 2014

III. He was unable to prepare the Bill of Quantities until August 2014

IV. The delay in preparation of the Bill of Quantities was occasioned by understaffing and workload.

326. Given the said undisputed facts and uncontested evidence, it would be irreconcilable for the prosecution to turn around in its submission, and allege that the 6th accused person, as head of the user department, was responsible for the delay in the procurement process.

3. Conclusion

327. The prosecution cannot point out any one witness who has given evidence or any document which points to failure whether wilful or otherwise, on the part of the 6th accused person in complying with section 74(2) and (3) of the Public Procurement and Disposal Act 2005. The only evidence is that of the investigating officer which is so discredited that it cannot be relied upon.

328. There is overwhelming evidence that the works which were to be done were very important to CA and to the public in general on account of public security and public welfare. With the deadline of 5 days, there was an explained urgency which meant that it was not possible to use any other method of procurement other than direct procurement.

329. Issues for Determination

1. Was there a wilful failure by the 1st accused to issue a notice of termination of tender to all bidders in tender number CA/PROC/RFQ/50/2014-2015 as required in section 36(2) of PPDA NO. 3 OF 2005?

2. Was there a wilful failure by the 1st accused person to report direct procurement of a value exceeding Ksh 500,000 to PPOA in respect of tender number CA/PROC/RFQ/50/2014-2015 as is required under section 27(3) PPDA NO. 3 OF 2005 and regulation 62(3) PPDR 2006?

3. Was there a wilful failure by the tender committee to adhere to requirements provided for use of direct procurement in respect of tender number CA/PROC/RFQ/50/2014-2015 as required under section 74(2) & (3) of the Public Procurement and Disposal *Act No. 3 of 2005*?

Was there a wilful failure by the 1st accused to issue a notice of termination of tender to all bidders in tender number ca/proc/rfq/50/2014-2015 as required in section 36(2) of PPDA no. 3 of 2005?

330. It is the defence of the 1st accused person that tender number CA/PROC/RFQ/50/2014-2015 was not terminated as the same was awarded to SCANAD. This therefore begs the question: What's in a tender number? This question is akin to the words spoken by Juliet in Act 2 Scene 2 of the play Romeo and Juliet by William Shakespeare where she ponders:

> " What's in a name? That which we call a rose by any other name would smell as sweet."

331. In the play, the blood feud between the Montague and Capulet families prevents Juliet Capulet from loving Romeo who is a Montague. However, she is complaining that his name is meaningless. If the rose had any other name it would still be the same. So, with Romeo; he would still be the same beautiful young man even if he had a different name.

332. Can the same be said in the matter now before the court? To answer this question, it is important to look at the metamorphosis of the subject matter, which is the procurement for renovation works for the Nairobi ASK show stand.

333. From the evidence tendered by various prosecution witnesses and confirmed by the accused persons in their respective defences it is moot that the CAK had a goal to participate in the Nairobi ASK show. This need had been identified and provided for in the organisation's budget for the financial years 2013/2014 and 2014/2015 to the tune of Ksh 60 million under budget code 30070. This is according to the request for approval of 2014 ASK show activities made on 7th May, 2014 (D4.EXH.12) and requisition for the 2014 ASK Show dated 26th May 2014 (D4.EXH.5). Both documents were made by the user department namely Corporate and Public Affairs.

334. Following the requisition, the procurement processes were set in motion. PW5 stated that the requisition was placed before him on 27th May, 2014 when he was assigned to facilitate the procurement process. Upon receiving the specifications from PW17 on 28th August, 2014, PW5 prepared the tender documents and invitation to bid. The invitation to bid was addressed to the CAK prequalified suppliers for the year 2014 namely:

   i. Adrian company Ltd (P.EXH.7)

   ii. Tratiz Enterprise Kenya Ltd (P.EXH.8)

   iii. Emec Enterprises (P.EXH.9)

iv. Blusco painters and property maintenance (P.EXH.10)

335. All the four sets of documents above bear the reference "Tender For Renovation Of The Ca Nairobi Ask Show Stand" and assigned the number "CA/PROC/RFQ/33/2013-2014 – Tender For Renovation Of The Ca Nairobi Ask Show Stand"

336. The tenders were thereafter evaluated and Emec Enterprises was the lowest bidder at Ksh 4,474,000. PW5 drafted a 253rd Tender Committee paper No. 2/09/14 for presentation to the Tender Committee for deliberations. It showed how much the bidders had quoted and the recommendation of the Tender opening committee to award Emec Enterprises the tender.

337. It is a moot fact that this particular attempt at procurement failed because the procurement department, headed by the 1st accused failed to present the TC paper before the 253rd TC. The 3rd accused who was present in the 253rd TC meeting stated that the TC paper was withdrawn before it was presented to the TC on the ground that the price quoted was considered to be high and also because the tender used to oscillate between two firms. Further, the bidders had only been given 2 days to quote.

338. The 3rd accused is the one who chaired the 253rd TC meeting and he confirmed that the 253rd TC paper was not presented at the meeting. The minutes of the 253rd TC meeting were not availed before this court. However, the decision of the 253rd TC meeting on the subject is captured in the minutes of the 254th TC meeting at page 24 (D1.EXH.4) and in the minutes of the 255th TC meeting at page 2 (D6.EXH.7)

338. Further, the evidence of PW5 confirms that indeed the first attempt at procurement for renovation services failed as he was later instructed to prepare fresh tender documents using a list of prequalified suppliers from CBK.

339. The evidence of PW6 confirms this position. She stated that she came to learn through correspondence between Jane Rotich (8th accused) and Joyce Nyanamba (1st accused) copied to her that the tender had been withdrawn and another tendering was required to be done. PW6 wrote an email to Joyce Nyanamba and Jane Rotich dated 10th September, 2014 where she pointed out that the ASK show timeline was drawing close (P.EXH.12). She requested Joyce Nyanamba to give authorisation to use the list of prequalified contractors from the Central Bank of Kenya which authorisation was granted.

340. I have looked at the said 253rd TC paper (P.EXH.11) and noted that the meeting took place on 2nd September, 2014. The 1st accused being the head of the procurement department and therefore the secretary of the TC is expected to have been well aware of this development.

341. This brings us to the second attempt at procurement using the list of prequalified suppliers from CBK. I have seen the tender documents. PW5 stated that he was given a list of suppliers from the Central Bank of Kenya by Janet Imunya (PW6) who informed him that the 253rd Tender Committee paper had been withdrawn. PW5 was directed to select few suppliers from the list and invite them to bid. PW5 prepared the tender documents and invited the following companies:

i) Jomuika contractors (P.EXH.13)

ii) Jeddy general contractors (P.EXH.14)

iii) Gathig Enterprises (P.EXH.15)

iv) Wilman construction company (P.EXH.16)

v) Kaguanjai builders Ltd (P.EXH.17)

342. I have looked at the said tender documents and invitation to bid and noted that All the five sets of documents above bear the reference "tender For Renovation Of The Ca Nairobi Ask Show Stand" and assigned the number "CA/PROC/RFQ/50/2013-2014 – Tender For Renovation Of The Ca Nairobi Ask Show Stand"

343. The tenders were later evaluated and it was recommended that the tender be awarded to Wilman Construction Ltd who were the lowest bidder at Ksh 2,106, 600. PW5 prepared the 254th TC paper. According to the evidence adduced in court, this is the TC paper that was not considered on account of an anonymous letter raising allegations of impropriety on the part of the 1st accused.

344. For this reason, the TC made a decision to terminate the tender. At page 30 of the minutes of the 254th TC the decision is captured as follows:

> " in view of the foregoing, the tender committee decided as follows:terminated the tender for renovation of the stand.That an internal team comprising of staff from the following departments be constituted to coordinate the works directly" The failure of the second attempt at procurement for the renovation of the ASK show stand is what led the TC to make a recommendation for the use of imprest as per the minutes of the 254th TC meeting held on 17th September, 2014 (D1.EXH.4)

345. Evidence on record, supported by the testimony of the 2nd accused person who was the head of the finance department shows that the attempt to use imprest also failed. The 2nd accused declined to release the imprest on the main ground that the use of imprest was not a procurement procedure and the same would present accountability challenges as the imprest was not capped.

346. As a result of this, the procurement unit recommended the use of direct procurement to SCANAD at the 255th TC meeting held on 22nd September, 2014 (D6.EXH.7)

347. I have seen the letter of offer to SCANAD dated 22nd September, 2014 (P.EXH.22). The same is referenced "CA/PROC/RFQ/50/2014-2015 – Tender For Renovation And Refurbishment Of The Ca Nairobi Ask Show Stand"

348. SCANAD accepted the offer on the same date in their letter dated 22nd September, 2014 (P.EXH.23)

349. From the foregoing analysis, I have arrived at the following conclusion:

   a. The subject matter remained constant throughout the four attempts. It was the renovation of the CA Nairobi ASK show stand.

   b. The numbering changed from 33 to 50 to distinguish the attempts made at procuring the said renovation services

   c. If indeed the 1st accused argument that tender number CA/PROC/RFQ/50/2014-2015 was not terminated but was instead awarded to SCANAD is correct, then what is the explanation for the termination of the 2nd attempt at procurement in respect of the CBK list of prequalified suppliers? (at page 30 of the minutes of the 254th TC meeting D1.EXH.4). It is my finding that the purpose of the numbering was simply for distinguishing the attempts made for one tender process which is for the procurement of renovation services.

   d. It is therefore correct to say that "a rose by any other name would smell as sweet" and that at all material times the tender in question was that for the renovation of the CA Nairobi ASK show stand.

e. That being the head of the procurement department, the 1st accused had a duty under section 36(2) PPDA No. 3 of 2005 to give a PROMPT notice of termination of procurement proceedings to all the persons who submitted the tender.

f. That the prosecution brought a witness in the first procurement attempt, namely PW15, to demonstrate that he was not issued with any notice of termination. However, there was no witness that was brought to represent the tenderers in the second attempt. That being the case, it has not been proved beyond reasonable doubt that the 1st accused failed to issue a notice of termination to ALL the tenderers in both the 1st and 2nd attempts of procurement for renovation works.

Was There A Wilful Failure By The 1st Accused Person To Report Direct Procurement Of A Value Exceeding Ksh 500,000 To Ppoa In Respect Of Tender Number Ca/proc/rfq/50/2014-2015 As Is Required Under Section 27(3) Ppda No. 3 Of 2005 And Regulation 62(3) Ppdr 2006?

350. It is not in dispute that the TC in the 255th TC meeting approved the use of direct procurement to SCANAD.

351. Section 27(3) PPDA NO. 3 of 2005 states that each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.

352. Regulation 62(3) PPDR 2006 states that a procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.

353. Regulation 8(3)(s) PPDR 2006 states that it is the function of the procurement unit of a procurement entity to prepare and submit to the authority reports required under the Act, regulations and guidelines of the Authority. In the matter before me, the procurement unit is the procurement department of CAK which is headed by the 1st accused person.

354. As stated earlier, the 1st accused returned from London on 28th September, 2014 which means that she resumed her substantive role as the procurement head by 29th September, 2014. Indeed, her email of 15th September, 2014 shows that she delegated her powers to the 8th accused person for a period of 2 weeks only after which the powers reverted back to her. The period from 22th to 29th September, 2014 was 7 days. She was therefore within the 14 days' timeline for reporting the direct procurement to PPOA. She failed to do so.

355. The defence of the 1st accused that communication to the PPOA is done by the Director General is not supported by any provision of the procurement law. A close scrutiny of Regulation 89(3)(s) discloses that it is the function of a procurement unit to prepare and submit to the Authority reports required under the Act, regulations and guidelines of the authority. The role of the accounting officer is to establish a procurement unit as captured in regulation 7(b) PPDR. It has been sufficiently demonstrated that there was a procurement unit in place at CAK. It is moot that the 1st accused was the head of the said procurement unit. It is therefore incorrect for the 1st accused to argue that it is the role of the accounting officer to submit reports on direct procurement to PPOA. That role fell within her docket as the head of the procurement unit.

356. The 1st accused produced as evidence, a document marked D1.EXH.25 which is addressed to the Director General PPOA dated 21st January, 2015 bearing the reference Communications Authority Of Kenya (ca) Procurement Activities Returns To Ppoa For Thr 2Nd Quarter Of 2014/2015 Financial

Year. The same is authored by Francis Wangusi, the director general CAK. Tender CA/PROC/RFQ/50/2014 – 2015 for renovation of the CA Nairobi ASK show stand appears at page 21 of the document. Does this document meet the requirements of law on reporting direct procurement?

357. First and foremost, it has been demonstrated in evidence on record and indeed this court takes judicial notice that the financial year for government and quasi government institutions starts running from the month of July of each year and is divided into 4 equal parts referred to as quarters. Therefore, the second quarter starts running from October to December. The direct procurement that is the subject of this case was undertaken in September 2014. This fell within the first quarter.

358. Secondly, the law at regulation 62(3) PPDR, requires that direct procurement SHALL be reported to PPOA within 14 days after notification of the award of the contract. SCANAD was awarded the contract on 22nd September 2014 (document marked P.EXH.22) The statutory 14 days started running the following day and expired on 6th October, 2014. The report before the court is dated 21st January, 2015 which is over three months later. This is an inordinately long period of time. No explanation for the delay.

The next question that begs an answer is What Is Willful Failure?

359. The Black's Law Dictionary 10th Ed. Defines 'wilful' as a voluntary and intentional act that involves conscious wrong or evil purpose on the part of the actor or at least inexcusable carelessness, whether the act is right or wrong.

360. In this matter, it is the burden of the prosecution to establish that the accused persons intentionally breached the provisions of procurement law either consciously or for an evil purpose or out of inexcusable carelessness.

361. The 1st accused person has stated that she was not present when the decision to terminate tender number CA/PROC/RFQ/50/2014-2015 was made at the 255th TC meeting held on 22nd September, 2014. She has produced as evidence a letter dated 7th July, 2014 from the Director General nominating her to attend training on women in leadership from 15th to 26th September, 2014 in London, United Kingdom (D1.EXH.15). She has also produced an extract of her passport number C025822 showing that she landed at Heathrow Airport, on 14th September, 2014 and returned to Nairobi on 28th September, 2014. The 1st accused has also produced an email dated 15th September, 2014 addressed to the management committee and copied to the procurement staff informing them that she was going to be away for 2 weeks with effect from 15th September, 2014 and that Jane Rotich (8th accused) would be in charge of the procurement division during that period. This fact has been confirmed by various prosecution witnesses as well as the 8th accused.

Did the fact that the 1st accused person was absent from 14th to 28th September, 2014 relieve her of the duty to report the use of direct procurement to PPOA?

362. If indeed the 1st accused returned from London on 28th September, 2014 it means she resumed her substantive role as the procurement head by 29th September, 2014. Her email of 15th September, 2014 shows that she delegated her powers to the 8th accused person for a period of 2 weeks only after which the powers reverted back to her. She had therefore resumed her duties as the head of procurement unit as at 6th October, 2014 which was the deadline of reporting the direct procurement to PPOA. She has failed to offer any plausible explanation for the failure to report the same. For this reason, I am satisfied that there was wilful failure on the part of the accused person to report the direct procurement to PPOA.

Was There A Wilful Failure By The Tender Committee To Adhere To Requirements Provided For Use Of Direct Procurement In Respect Of Tender Number Ca/proc/rfq/50/2014-2015 As Required Under Section 74(2) & (3) Of The Public Procurement And Disposal Act No. 3 Of 2005?

363. Section 74 PPDA NO. 3 OF 2005 states.

(1) a procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied—

(a) there is only one person who can supply the goods, works or services being procured; and

(b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied—

(a) there is an urgent need for the goods, works or services being procured;

(b) because of the urgency the other available methods of procurement are impractical; and

(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

364. The 2nd to 9th accused persons are charged with failing to comply with the above provisions in respect to direct procurement. The prosecution has adduced evidence, namely the minutes of the 255th TC meeting held on 22nd September, 2014 (D6.EXH.7). The 2nd to 9th accused persons were present in that meeting in the following capacities:Peris Nkonge, Director Finance and Chair of the meeting (2nd accused)Stanley Kibe, Director Frequency spectrum management (3rd accused)John Omo, Director Legal Services (4th accused)Eng. Leo Boruett, Director Multimedia Services (5th accused)Mutua Muthusi, Director Consumer and Public Affairs department (6th accused)Vincent Ngundi, Assistant Director Information and Technology (7th accused)Jane Rotich, Manager Procurement and Secretary of the meeting (8th accused)Philip Kiplangant from procurement department in attendance as secretariat (9th accused) Except for the1st accused who was absent at the 255th TC, 6th accused who remained silent in his defence, 8th accused person who stated that she did not participate in the decision making and the 9th accused who denied being a member of the TC, the rest of the accused persons admitted to having approved the recommendation to award the tender for renovation works to SCANAD using direct procurement. They further stated that the decision was passed in good faith and was informed by the following reasons:

> Time constraintMoney had already been committed for branding and production of promotional materials to the tune of Ksh 26 million.Money had been committed for the lease of the show stand to the tune of Ksh 2 millionThe mandate of CAK includes consumer protection and the CAK risked losing out on an opportunity to educate members of public on consumer rights and digital migration.The CAK risked suffering a massive reputational damage if the stand were to be used in its dilapidated state.The CAK was expecting very important guests to visit the stand including the president of the Republic. Basically, in their defence, the accused persons have relied on Section 74(3)(a), (b) and (c) PPDA NO. 3 OF 2005 stating that since the 255th TC meeting was taking place on 22nd September, 2014

and the ASK show was due to commence on 29th September, 2014 there were only 5 days left. According to the accused persons, these 5 days were not sufficient to initiate any other method of procurement except direct procurement. Their defence is that they were caught between a rock and a hard place.

365. Even though they admit there was delay from the time of requisition to the time that the 255th TC meeting was taking place, each of them denied any complicity in the delay. However, did the members of the TC satisfy themselves that the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity?

366. Before embarking on that, it is first and foremost important to understand the stages of procurement.

PROCUREMENT STAGES

Step 0: Needs Recognition

367. The preliminary step in a procurement process is recognizing the need for a product. Be it a brand-new order or a recurring purchase, needs are analysed and the availability is double-checked before creating a request for purchase.

368. It has been stated by various witnesses in this case and even by the accused persons that the CAK habitually participated in the ASK shows because they are a strategic public institution and also because the show provides a forum through which they can sensitize the public on consumer rights which happens to be one of their mandate. Indeed, it was mentioned by the 2nd accused person who is the head of finance at CAK that participation in the ASK show constitutes one of the performance targets of the institution.

369. The 4th accused person on the other hand informed the court that they set their performance targets at the beginning of every financial year. In this case it would be correct to infer that participation in the show had been planned since July 2013.

370. Indeed, the email authored by the 6th accused dated 26th May, 2014 marked D4. EXH.5. discloses that there is a budgetary allocation to the tune of Ksh 60 million each for the financial years 2013/14 and 2014/15 in the CPA exhibitions budget code 30070

Step 1: Purchase Requisition

371. Typically, a procurement process starts with a purchase requisition. The requester sends a request for procurement to the purchasing department.

372. I have seen a letter dated 7th May 2014 authored by one Caroline Murianki and addressed to the Director General seeking approval of 2014 ASK show activities for the Kisumu, Nairobi and Mombasa ASK shows (D4. EXH.12). A budget estimate of Ksh 58,840,000 is attached to the letter. It is proposed in the letter that the costs shall be drawn from the Corporate Affairs Exhibitions budget item 30070. On the letter, there is a handwritten note by the Director General that reads: "Approved. Signed. 8.5.2014"

373. I have also seen an email authored by the 6th accused dated 26th May, 2014 marked D4. EXH.5. It is addressed to the procurement department and is requesting facilitation of various procurement items as listed in the attached table. The document also discloses that there is a budgetary allocation to the tune of Ksh 60 million each for the financial years 2013/14 and 2014/15 in the CPA exhibitions budget code 30070

374. PW5, Vincent Onyiego received the requisition and specifications for the show stand from the officer in charge of property one Salim Kiza (PW17) through an email dated 28th August, 2014 (P.EXH.6(a) and (b)).

Step 2: Review of Request

375. The purchase request is then reviewed by the procurement/finance team. I have seen that on the requisition email marked D4 EXH.5 there is a hand written note dated 27th May 2014 authorising Janet Imunya (PW6) to handle the matter and another authorising Vincent Onyiego (PW5) to facilitate procurement of the items. The handwritten notes read thus:

> " Janet. Please handle. Signed 27/05/2014"
>
> "Vincent. Facilitate procurement of the items required. 27/05/2014"

376. Vincent Onyiego (PW5) in his testimony confirmed that he indeed received the authorisation to facilitate the procurement in accordance with the requisition.

Step 3: Budget Approval

377. This approval was done by the Director General who is the accounting officer of CAK through the letter dated 7th May, 2014 (D4. EXH 12)

Step 4: Quotation Requests

378. Once the budget is approved, the procurement team forwards several requests for quotation (RFQ) to vendors with the intention to receive and compare bids to shortlist the perfect vendor.

379. Vincent Onyiego (PW5) in his testimony stated that in the first procurement attempt, he sent invitation to bid to the CAK prequalified suppliers. In the second procurement attempt, he also sent invitation to bid to the CBK prequalified suppliers. Both sets of documents were produced as evidence in court namely P.EXH 7,8,9,10,13,14,15,16,17 respectively.

380. On the fourth procurement attempt, which for the use of direct procurement method, it has been shown that Janet Imunya (PW6) sent an email dated 19th September, 2014 to Paul Kimuyu (PW12) of SCANAD requesting him to send quotation for the renovation works (P.EXH. 25)

390. I have seen the said quotation prepared by SCANAD in the amount of Ksh. 1,927,572 (P.EXH. 24)

Step 5: Negotiation & Contract

391. Once a vendor is selected, the contract negotiation and signing are completed, and the purchase order is then forwarded to the vendor.

392. It has been shown by the prosecution and confirmed by the accused persons that the procurement unit recommended awarding the tender to SCANAD. This recommendation for direct procurement was approved by the TC in its 255th TC meeting held on 22nd September 2014.

393. A letter of offer dated 22nd September, 2014 authored by Jane Rotich (8th accused) was sent to SCANAD (P.EXH.22)

394. SCANAD accepted the offer through a letter dated 22nd September, 2014 (P.EXH.23)

395. A purchase order N0. 0058 for Ksh. 1,927,572 was issued to SCANAD (P.EXH.4) The same was prepared by Vincent Onyiego (PW5) and checked by Janet Imunya (PW6) on 25th September, 2014.

Step 6: Receive Goods/Services

396. The vendor delivers the promised goods/services within the stipulated timeline. After receiving them, the purchaser examines the order and notifies the vendor of any issues with the received items.

397. According to the letter of offer to SCANAD dated 22nd September, 2014 (P.EXH.22) the renovation works were supposed to be completed and handed over to CAK on or before 27th September, 2014.

398. According to Peter Martin Chivondo Ikumile (PW9) who is the Chair of the Inspection Committee, he authorised one Caroline Morianki to carry out inspection of the renovation works undertaken by SCANAD. It is the testimony of PW9 that he saw an email dated 23rd October, 2019 (D6.EXH.24) showing that Caroline had carried out the inspection. In the said email, Caroline requested Vincent Onyiego (PW5) to furnish her with soft copy documentation of the Nairobi show to enable her to compile the report. Nevertheless, PW9 never got to see the report that Caroline prepared as it was sent directly to the procurement department.

Step 7: Three-Way Matching

399. At this step, three documents purchase orders, packaging slips (that arrive with the order), and vendor invoices are lined up and reconciled to pinpoint discrepancies and ensure that the transaction is accurate. Discrepancies should be addressed once they are discovered. I have seen the purchase order (P.EXH.4), invoice (P.EXH.3) and payment voucher (P.EXH.2). I am satisfied that they underwent the relevant checks by not less than two different officers

Step 8: Invoice Approval Payment

400. Once three-way matching is complete, the invoice is approved and forwarded to payment processing depending on organizational norms. I have seen the payment voucher (P.EXH.2) and I have noted that the same was approved for payment. Indeed, it is the testimony of PW8 that on 31st October, 2014 he authorised a payment to SCANAD upon receipt of the relevant invoices from the checking officer, one Jane Masai of the finance department.

Step 9: Record Keeping

401. After the payment process, buyers make a record of it for bookkeeping and auditing. All appropriate documents right from purchase requests to approved invoices are stored in a centralized location. It has been shown that the CAK did not comply with this requirement in the period preceding the investigation. Indeed, the EACC upon conducting investigations found that there was a poor record keeping practice at CAK and this observation is contained among the recommendations made in their letter dated 23rd November, 2017 (D2. EXH.29)

402. From the foregoing it is therefore correct to conclude that at the time that the requisition was done by the user department, there was sufficient time to carry out the procurement for the renovation services. Indeed, PW5 received the specifications on 28th August, 2014 and proceeded to invite bidders on 29th August 2014. The tenders were evaluated on 2nd September, 2014 whereupon PW5 prepared the TC paper that was to be presented before the 253rd TC meeting. And this is the point at which the trouble begins.

403. The 253rd TC meeting, based on purported recommendations of the procurement unit, disregarded the TC paper for the reason that the price quoted by the lowest bidder was higher than the prevailing market rate and that the subject tender had been oscillating between a few suppliers. It was also alleged that the bidders had been given a short notice for bidding. This begs the questions:Who ascertained the prevailing market rates so as to come to the conclusion that the amount quoted by the lowest bidder was high in the circumstances? What data did they rely on? Was the same availed to the members of the 253rd TC meeting so as to persuade them to abandon the tender?If the tender had been oscillating between two suppliers, what is the basis of such an opinion? Was it supported by tangible data? 4 bidders did return the bid documents which means that they managed to utilise the time that was availed to them. How then, did this become a ground for abandoning the tender? It has been shown that the procurement unit unilaterally decided to re-tender the renovation works using the list of prequalified suppliers from CBK. This decision in my opinion ought to have come from the 253rd TC with accompanying reasons. Nevertheless, PW6 with the blessings of the 1st accused person, goes ahead to instruct PW5 to invite bids using a list of prequalified suppliers to which he obliged. Invitations to bid were sent out on 11th September, 2014 and thereafter the tenders were evaluated on 16th September, 2014. This in my opinion was still sufficient time for the renovation works to have been carried prior to the commencement of the show. But as fate would have it, it is at the 254th TC meeting that an anonymous letter surfaces accusing the 1st accused person of procurement malpractices. More questions arise here:

> Was terminating the tender on the basis of an anonymous letter the best decision that the TC would have undertaken? What prevented them from carrying on with the tender process while at the same time conducting investigations into the letter? Supposing the allegations were untrue? Supposing the letter was made by a person solely with the intention of getting the very decision that the TC took?Does the TC have the mandate to order that a complaint be investigated? The law provides for procedures for redress where a party feels aggrieved about a tender process. Did the TC satisfy itself that this procedure had been complied with? Does the TC have capacity to terminate a tender on the basis of an anonymous complaint? Does the TC have capacity to order alternative methods of procurement?The procurement laws mandate the procurement unit, whose representative sits in the TC to advise them accordingly. According to the minutes of the 254th TC the 8th accused person sat in as the secretary to the TC. Why did she not advise the TC that the use of imprest was not a recognised procurement procedure in law?Further, PW14 as sitting in as an alternate member for the Director Finance. Why did he fail to advice the TC that use of imprest was not viable as a procurement process for the scale of renovation works that were proposed to be done? It is evident from the foregoing that the rain started beating the TC right from the 253rd meeting. The fact that the illegality of the actions of the 253rd TC meeting were perpetuated further down the line by the 254th meeting did not give any justification for the 255th meeting to perpetuate it further. The fact that funds had already been committed towards the ASK show should have been a consideration for the 254th TC meeting.

404. It is my considered opinion that the circumstances that gave rise to the urgency cannot be said to have been unforeseeable for the following reasons:

1. Participation in the ASK show was a target that had been identified since July, 2013
2. Request for approval to prepare for participation in the ASK show was done on 7th May 2014 (D4.EXH.12)

3. Requisition by the user department was done on 26th May, 2014 (D4.EXH.5)

4. Specification for the renovation works were availed on 28th August, 2014

5. Invitation to the first set of bidders was done on 29th August, 2014

6. Tender evaluation for the first set of bids was done on 2nd September, 2014

7. The 253rd TC meeting was held on 2nd September, 2014

8. Invitation to the second set of bidders was done on 11th September, 2014

9. Tender evaluation of the second set of bids was done on 16th September, 2014

10. The 254th TC meeting was held on 17th September, 2014

405. Regulation 10 PPDR 2006 which sets out the functions of the Tender Committee clearly states that:

a. The tender committee shall review, verify and ascertain that all procurement and disposal had been undertaken in accordance with the Act, the regulations and the terms set out in the tender documents

h. The tender committee shall review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority

406. Nowhere does the law give the TC powers to receive and act on complaints from individuals, and to make matters worse, anonymous complaints for that matter. By doing so, they usurped the role of the review board.

407. Not only did the 255th TC endorse an illegality perpetuated by the 253rd and the 254th TC, they committed an even worse error. They approved a tender retrospectively.

408. It has been shown by the prosecution that PW6 had already been in communication with SCANAD prior to the meeting of the 255th TC. In an email dated 19th September, 2014 at 7.05pm authored by PW6 and addressed to Paul Kimuyu of SCANAD (PW12), she writes and I quote:

> " Dear Paul,
>
> This is to inform you that the Authority has resolved to engage M/S Scanad for the work of renovation of its stand at ASK show ground in Nairobi. Mr. Kiza and Rachael Alwala had discussed with you the works involved which is not limited to Electrical, Painting, plumbing etc. You may consult them further for more details and visit the site to establish the scope. The authority has limited budget and therefore your quotation should be limited to the works that are very necessary.
>
> Kindly send to us the quotation for the works with details for consideration. In the meantime, consider the work awarded to you and move with speed to prepare the stand."

409. The accused persons have invoked the defence of good faith enshrined in section 138 PPDA No. 3 of 2005 which states:

> " No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under the act"

410. The accused persons in Count 2 (with the exception of the 6th and 9th accused) have stated that they were driven by the bigger interest of the organisation and the public in arriving at the decision to resort to direct procurement. It is their contention that an amount of approximately 30 million shillings had already been committed towards the show and that had they rejected the proposal for direct procurement, the organisation would still have paid the Ksh 30 million anyway. That would have occasioned a loss of public funds.

411. They have further contended that the lowest bidder in the first attempt had quoted Ksh. 4, 474,000 while the lowest bidder in the second attempt had quoted Ksh 2,106,600. SCANAD ended up doing the renovation works at Ksh. 1,927,572. As such, the organisation did not lose any public funds. This argument is partly true in the sense that the organisation could have spent more had the first attempt been successful.

412. However, the fault with this argument is that it flows from the presumption that the bidders in the various attempt were provided with a level playground. It has been demonstrated by the prosecution that the specifications varied in each attempt. The BQs in the first attempt consisted of more works that the BQs in the second attempt. This was confirmed by PW17 who stated that when he learnt that the first attempt at procurement of the renovation works had failed, he consulted the 1st accused and expressed his concerns to her that there wasn't sufficient time for re-tendering. Upon discussion, it was agreed that so as to achieve the goal of renovation within the time left, it was necessary to scale down the works. PW17 therefore prepared fresh BQs which were used for the second attempt.

413. In the final attempt, it is SCANAD who prepared their own BQs. PW17 stated in his testimony, that he merely took their representatives to the site. He was not involved in preparing the BQs which they presented when they were requested to put in their quotation.

414. It is therefore incorrect to state that the organisation saved money, since the ASK show activities had been budgeted for to a tune of Ksh.60 million. Unless it can be shown that the unspent money under that budget reverted to the state, that argument lacks merit.

415. All said, it is the duty of the prosecution to demonstrate that the accused persons had a criminal intent or were outright careless when they made the decision to award the tender to SCANAD by way of direct procurement. Article 28 of the United Nations Convention Against Corruption to which Kenya is a signatory, states that Knowledge, intent or purpose required as an element of an offence may be inferred form objective factual circumstances.

416. The accused persons have denied having benefited in any way from the award of the tender to SCANAD. Indeed, the prosecution has not tendered any proof to demonstrate such a probability. The accused persons have further denied having any interest in SCANAD. The prosecution has not produced any such proof either. In short, Count 3 leans more on the aspect of legal compliance and transparency.

417. Article 10(2)(c) of *the constitution* binds public officers in making or implementing public body decisions to apply national values and principles of good governance, integrity, transparency and accountability.

418. Further to that, public procurement is governed by the following basic principles:

i. Transparency

ii. Integrity

iii. Economy

iv. Openness

v. Fairness

vi. Competition

vii. accountability

Transparency

419. Transparency in public procurement is important. Information on the public procurement process must be made available to all public procurement stakeholders: contractors, suppliers, service providers, and the public at large, unless there are valid and legal reasons for keeping certain information confidential. This principle is enshrined in Article 227(1) of *the constitution* which states:

> " when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective"

420. It has been demonstrated by the prosecution that there was no communication that was given to the bidders in both the first and second attempts informing them of the termination of the process. The bidders were not involved in the subsequent bids.

421. Indeed the 255th TC was aware of this omission and even gave recommendations that are captured at page 11 of the minutes of their meeting (D6.EXH.7) as follows:

> " The committee advised the secretariat that in future when faced with similar challenge, it is important while inviting a new group of bidders, there is need to include the firms that had responded in the first tender. In addition, it was agreed that the secretariat together with the Ag.AM/Property Management need to obtain a list of government rates for reference on the competitiveness of bids."

422. The 255th TC even while aware of these omissions, nevertheless went ahead and adopted the recommendation of direct procurement to SCANAD.

Integrity

423. In public procurement integrity is twofold. There is the integrity of the procurement process, and that of public procurement practitioners.

a. Integrity of the Public Procurement Process

Integrity is defined in the Black's Law Dictionary 10th Ed. as

i. freedom from corruption or impurity.

ii. Moral soundness, the quality, state or condition of being honest and upright

424. The integrity of the procurement process assures confidence in the public procurement system. This begins from the tender documents, evaluation criteria, and sufficient time to bid. An unsuccessful bidder is entitled to be notified when he doesn't qualify and the reasons for the disqualification should be furnished to them upon request.

425. Section 36(2) PPDA No. 3 of 2005 clearly states that the procuring entity shall give prompt notice of a termination of procurement proceedings to each person who submitted a tender, proposal or quotation.

Integrity of Public Procurement Practitioners

426. Persons working within procuring entities, and other government officials involved in the public procurement process, must display personal and professional integrity.

427. Public servants involved in the public procurement process should, at all times, be perceived as honest, trustworthy, responsible and reliable. They must always keep the purpose of the procurement requirement in mind, and strive to ensure that they responsibly manage public procurement as mandated by the public procurement rules.

428. Whereas the anonymous letter that arose during the 254th TC meeting is not proof of the absence of integrity against the 1st accused person, it is a pointer of poor public perception against the procurement system of CAK. This inference is supported by the recommendations made by the 255th TC in their minutes (D6.EXH.7) as well as the advisory letter by the EACC to CAK dated 23rd November, 2017 (D2.EXH.29)

Economy

429. This principle of economy emphasizes the need to manage public funds with care and due diligence so that prices paid for goods, services and works are acceptable and represent good value for the public funds expended on them.

430. Everyone associated with the public procurement process or directly responsible for facilitating the acquisition of goods and services with public funds, should strive to avoid fraud, waste and abuse of public resources.

431. It is the argument of the accused persons that the goal of CAK was to have the ASK show stand renovated in time for the Nairobi Show. They have also argued that the there was no loss incurred. It is their further argument that CAK got value for money. However, these arguments have several faults:

    i. This court was not shown the inspection report so as to form the opinion that the final product was up to the expected standard. Indeed, the Chair of the inspection and acceptance committee Peter Chivondo Ikumile (PW9) stated in court that he did not participate in the inspection and neither did he see the inspection report. The person who attended the inspection was Caroline Murianki. She was not called to testify. This court was called to make an inference that since the money was eventually paid to SCANAD, it is sufficient proof that the works were done to the required standard. However, in the light of the desperation to participate in the ASK show it would be unsafe for me to agree with the word of mouth of witnesses that the renovation met the required standard.

    ii. On the issue of value for money, I have stated elsewhere in this judgment, that the Bills of Quantity were scaled down from the original specifications in the first procurement attempt. The specifications in the four procurement attempts were different. PW17 confirmed that he is not the person who prepared the specifications that SCANAD used to carry out the renovations. He further confirmed that they were different from the scaled down specifications that he himself had prepared for the second procurement attempt. How then, can it be argued that the organisation got value for money when clearly the works that were eventually carried out were less than what had been originally planned for? So where did the money that was saved from the scaled down works go to? Unless it can be shown that the savings were successfully returned to the treasury, then the argument is not convincing.

iii. On the argument that there was no loss incurred, the accused persons have limited their argument to financial loss only. However, there is a loss perhaps greater if not equal to financial loss. That is the loss of public confidence. This is displayed by the anonymous letter that led to the tragic decision taken by the 254th TC in an attempt to mitigate the dent to the image of the organisation, which decision was perpetuated by the 255th TC which unfortunately is part of the problem that is now before this court. In short, yes, the organisation did suffer loss, contrary to the argument by the accused persons that it did not. And to take the argument further, the fact that the accused persons are now before this court is a further example of loss of time and resources (in terms of lawyers' fees etc) suffered in their personal capacity.

Openness

432. Except for confidential defense procurements, the results of the public procurement process should be not only be communicated to the bidders, the same should also published and made available on a relevant public platform. If that were the case, the 1st accused person would not be facing the charge in count 1. It is clear from the evidence tendered in court that none of the bidders in the 1st and 2nd procurement attempts was notified about termination of the process as is required in Section 36(2) PPDA No. 3 of 2005

Fairness

433. This principle requires that decision–making and actions must be impartial, and no preferential treatment should be extended to individuals or organisations. All offers must be considered on the basis of their compliance with the stipulations of the tender documents, and offers should not be rejected for reasons other than those specifically stated in the tender documents and the procurement rules.

434. In the instant case, it has been demonstrated that the bidders were not given a level playing field. The BQs in the first procurement attempt consisted of more works than those for the second attempt. Similarly, the BQs that SCANAD eventually used were different from those in the second attempt. This is from the first hand evidence of PW17 who had been tasked with the duty of preparing the BQs.

435. Secondly, the bidders in the first attempt were not invited to compete again using the scaled down BQS. Clearly, the element of fairness is conspicuously missing in the entire procurement process for the renovation works. This is a matter that was well within the knowledge of the 255th TC as it is contained in the 255th TC paper (P.EXH.21)

436. Thirdly, it is the defence of the accused persons who sat tin the 255th TC that SCANAD were already on the ground as they had been contracted by the organisation to carry out branding. However, I find that the same is not persuasive as there is no document that was adduced, in court to show that SCANAD was among the service providers in the CAK list of prequalified suppliers or that they had been contracted by CAK to carry out branding works. Be it as it may, branding and renovation are two different services with requiring different qualification criteria. It is not convincing enough for the accused persons to state that they settled for SCANAD when they had at their disposal a list of prequalified suppliers for repairs and general maintenance of building and other related services as shown in the 220th TC paper containing the list of prequalified suppliers for the year 2013 – 2015. (P.EXH.1). I have carefully perused the said document and nowhere does SCANAD appear even for the prequalified suppliers branding or even for repair and general maintenance of buildings. What prevented them from satisfying themselves as to whether SCANAD was prequalified to carry out renovation works? Their justification of time constraints would have made much more sense had they shown fairness by questioning why the procurement unit had picked SCANAD instead of picking

one of the suppliers prequalified for renovation works. Nowhere in the minutes of the 255th TC meeting does it show that the TC made such an enquiry from the secretary who is the representative of the procurement unit. Clearly, the action of the 255th TC in awarding the tender to SCANAD is a demonstration of sheer carelessness, for the lack of a better word.

Competition

437. The public procurement process should not be manipulated for the benefit of any organization or individual. The aspect of competition was partially demonstrated in the first and second attempts at procurement. PW5 confirmed that he invited 4 bidders in the first attempt. He also demonstrated that he invited 5 bidders in the second attempt. However, the competitiveness of the procurement process as a whole was lost when the procurement unit failed to incorporate the first set of bidders using the scaled down BQs which were used in the second attempt. Further the competitiveness of the tender process was also lost when the 255th TC decided to award the tender to SCANAD who do not feature in the list of prequalified suppliers for repair and general maintenance of building and other related services thereby locking out the bonafide prequalified suppliers of that particular service. The prosecution has shown that SCANAD had already been notified by PW6 to consider the tender as awarded to them long before the 255th TC sat and approved the that recommendation in retrospect. This is shown in the email dated 19th September, 2014 to SCANAD by PW6. (P.EXH.25)

Accountability

438. Accountability in public procurement means that anyone involved in the procurement process is responsible for their actions and decisions with respect to the public procurement process. This principle is captured in section 27(3) PPDA No.3 of 2005 which states that each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that the PPDA, PPDR and any directions of the PPOA are complied with. It also explains why the accused persons have been charged before this court in their individual capacities.

439. The accused persons have relied on the case of *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal (Nairobi) No. 224 of 2017*, to justify the use of direct procurement on the ground of urgency. However, the urgency that arose in that case is because the 1st respondent had filed a review before the Public Procurement Administrative Review board which was dismissed. The 1st respondent thereafter moved to the high court to challenge the decision of the review board. The same was quashed prompting a fresh procurement process. Once again, the bidders challenged the process and the review board terminated the entire process. All this while the time was running and there were only 80 days left to the general election. The final decision of the appellate court was that the high court ought to have taken into consideration the constitutional timelines within which presidential and general elections are to be held vis a vis the timelines for various procurement activities.

440. The same cannot be said about the matter now before me. There was no constitutional crisis that the TC had to grapple with. There were no formal proceedings before the review board or any court of aw that interfered with the procurement timelines so as to justify the use of direct procurement.

441. From the foregoing I find that the prosecution has successfully proved beyond doubt that:

    1. SCANAD was not the only entity that could supply the renovation services. If anything, they had never been prequalified for renovation and maintenance services. It has been shown that

other companies had been prequalified for that service. Why were they not considered for direct procurement if indeed the situation was as dire as the defence would have us believe?

2. There were indeed reasonable alternatives contained in the list of prequalified suppliers for maintenance and renovation works as per document marked P.EXH.1

3. The purported urgency that led to the decision to use direct procurement was foreseeable and the same was as a result od dilatory conduct on the part of the procuring entity.

4. That in the light of the foregoing, the 255th failed in the discharge of its mandate in approving the use of direct procurement.

5. That the protection afforded in section 138 PPDA 2005 does not apply where the persons in question knowingly fail to apply the express provisions of law governing direct procurement and instead chose to rely on extraneous reasons not authorised in procurement law.

THE 8TH ACCUSED PERSON

442. It is the testimony of the 8th accused person that she sat in the 255th TC meeting as the secretary on behalf of the head of procurement who was away at the time. In other words, she was the alternate member for the 1st accused. This is in line with Regulation 12(1) PPDR 2006 which states that an alternate member shall attend the meeting of the TC whenever the substantive member is unable to attend.

443. I have also looked at the second schedule PPDR 2006 which lists the composition of various tender committees. The members of the state corporations tender committee are listed as:Chairman – head of department appointed in writing the by Chief Executive OfficerDeputy Chairman – Head of finance department appointed in writing by the Chief Executive OfficerOther members – at least 5 departmental heads including the company secretary or officers in equivalent positions appointed in writing by the Chief Executive OfficerSecretary – the officer heading the procurement unit of the corporation. The prosecution witnesses who are members of the TC namely PW7, PW11, PW14 and PW16 stated in the court that it was the practice of the TC that the secretary did not participate in decision making. In the circumstances, I am satisfied that PW8 did not participate in the decision making of the 255th TC.

The 9Th Accused Person

444. Count 3 of the charge is targeted at the members of the 255th TC. In his defence, the 9th accused person has person has stated that he was not a member of the TC but rather the secretariat. His role was simply to facilitate the logistics for the meeting. I have looked at the said 255th TC minutes and noted that indeed the 9th accused person is listed as being in attendance in the capacity of secretariat (D6.EXH.7). The prosecution has not tendered any evidence to prove that he was a member of the TC or that he took part in making the decision of the 255th TC to adopt direct procurement method. In the circumstances, the charge against the 9th accused person must fail accordingly.

Defence Of Necessity

445. Having arrived at the conclusion that the accused persons contravened the law by resorting to direct procurement, I hereby move to interrogate the defence of necessity that the said accused 2, 3, 4, 5, 7, have expressly brought out in their respective defences. The 6th accused person advanced the same in his submissions.

446. The said accused persons have consistently maintained in their defence that they resorted to direct procurement out of necessity, in order to avert a crisis. It is their argument that a substantial amount of money totalling to about 30 million shillings had already been expended towards preparations for the ASK show. This is public money that could have been lost if the 255th TC had decided to reject the recommendation to use direct procurement. They further stated that the head of state was expected to visit the show stand and there was no way that they could have presented the stand in a dilapidated state.

447. The defence of necessity in criminal law is where the accused is arguing that it was necessary for them to commit a crime. It operates where the defendant has two alternatives either commit a crime or suffer or cause another extreme hardship. (www.e-lawresources.co.uk)

Elements Of The Defence Of Necessity

The following are widely accepted as the elements of the defence of necessity:

(1) the accused acted to avoid a significant risk of harm;

(2) no adequate lawful means could have been used to escape the harm

(3) the harm avoided was greater than that caused by breaking the law.

448. The accused must reasonably have believed that there was an actual and specific threat that required immediate action. The defendant must have had no realistic alternative to completing the criminal act. The harm caused by the criminal act must not be greater than the harm avoided.

449. The accused persons seeking to rely on this defence argue that they should not be held liable for their actions as a crime because their conduct was necessary to prevent some greater harm.

450. Most common law jurisdictions recognize this defence, under the following limited circumstances.

(a) the harm they sought to avoid outweighs the danger of the prohibited conduct they are charged with;

(b) they had no reasonable alternative;

(c) they ceased to engage in the prohibited conduct as soon as the danger passed;

(d) they themselves did not create the danger they sought to avoid.

The circumstances where necessity could apply to a serious crime are extremely narrow,

451. This defence was used in the early trial of Regina v. Dudley & Stephens (1884) 14 QBD 273 DC, where four shipwrecked sailors were cast adrift in a small boat without provisions. To save themselves, the three strongest decided to eat the fourth, the 17-year-old cabin boy. The court ruled that cannibalising the boy was not urgently necessary. Even though the cabin boy would almost certainly have died of natural causes, the sailors killed the boy intentionally and were guilty of murder. There was some degree of necessity arising from the threat of starvation but, at any moment, a ship could have sailed over the horizon to save them as, indeed, the three were rescued. Since they could never be sure that the killing was actually necessary from one minute to the next, the defence was denied. Cannibalism itself is not an offence so long as the death occurs naturally.

452. Dudley and Stephens were convicted of murder and sentenced to be hanged; however, their sentence was later reduced to just six months in prison. The third man, Brooks, was not tried, as he had not participated in the murder.

453. The defence of necessity requires that there must be an urgent and immediate threat to life which creates a situation in which the defendant reasonably believes that a proportionate response to that threat is to break the law. The general approach was laid down by Lord Denning in Southwark London Borough Council v Williams (1971) 2 AER 175 that necessity should be denied as a general defence because otherwise anarchy and disorder would follow. If hunger was allowed to become the basis of necessity, any poor person might seek to justify burglary to steal food by arguing that he or she had reasonably believed that this was a proportionate response to the threat of malnutrition.

Canada

454. In Canada, Necessity is recognized as a defence for crimes committed in urgent situations of clear and imminent peril in which the accused has no safe or legal way out of the situation.

Three Requirements for defence of necessity:

(1) Urgent situation of imminent peril or danger

(2) No reasonable legal alternative

(3) Proportionality between harm inflicted and harm avoided

455. In Perka v The Queen (1984) 2 SCR 232, Dickson J. held at p250 that

> If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognised, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale.

456. When considering necessity in R v Cole (1994) Crim. LR 582 Simon Brown LJ. held that the peril relied on to support the plea of necessity lacked imminence and the degree of directness and immediacy required of the link between the suggested peril and the offence charged. This defendant robbed two building societies in order to repay debts. The form of defence was "duress by circumstance" which attempts to extend the coverage of duress by borrowing the idea of an uncontrollable external circumstance forcing a choice by the defendant to break the law.

457. In the instant matter, what is the worst that could have happened if the 255th TC had declined the recommendation to use direct procurement? It has been argued by the defendant that approximately 30 million shillings of public funds could have been lost. Is this assertion really accurate? From the evidence tendered by the 2nd accused person namely LPO number 1919 dated 21st July, 2014 for the amount of Ksh 26,891,920 issued to SCANAD for concept development, branding, fabrication and production of educational materials. The show stand was to be branded after the refurbishment. The commitment for the branding work was done in July 2014 and the same was for all the three shows namely Kisumu, Mombasa and Nairobi. The LPO for branding work was signed by Mutua Muthusi (6th accused) and Jane Rotich (8th accused). It was also her evidence that a further Ksh 2 million shillings had been used to lease the show stand.

458. The questions that must be answered are these: could the education materials and branded products have been distributed to the public anyway whether or not the show stand was dilapidated? Since SCANAD already had a contract for fabrication, could that not have sufficed in the circumstances if indeed it was absolutely necessary that CAK participate in the show? Was it a matter of life and death that they participate in the show anyway? If indeed dissemination of information to the public is part of the mandate of CAK, was the ASK show the only available avenue to discharge that mandate? Was there any communication from the office of the president indicating that he would specifically visit

the CAK stand? Regrettably, the evidence before the court answers these questions in such a way that negates the defence of necessity. In any event CAK participated in the Kisumu and Mombasa shows.

459. I find that the harm that the 255th TC sought to avoid DOES NOT outweigh the danger of the prohibited conduct they are charged with, namely abuse of procurement processes and setting a dangerous precedent of anarchy and corruption in public procurement. Two wrongs do not make a right. Perpetuating an illegality in order to mitigate the consequences of a former illegality does not fall within the established principles of the defence of necessity. I also find that the 255TH TC had an alternative option to reject the recommendation for direct procurement especially in the light of the fact that they had the information that led to the alleged stalemate. The branded material would still have been distributed to the public. It has been shown that scanad had earlier been granted the contract for branding and fabrication and could probably have made the stand presentable even if not according to the standards that CAK was accustomed to. In other words, CAK should have worked with the lemons in its hands and made some lemonade as opposed to flouting the procurement laws. As the wise say, necessity is the mother of invention. This would have provided valuable lessons about complying with procurement timelines and compliance with the procurement laws. Nevertheless, all is not lost. Lessons will still be learned, hopefully, through this judgment.

Conclusion

460. I find that the prosecution has failed to prove its case beyond reasonable doubt against the 1st accused person on count 1 of the charge and I accordingly acquit her under section 215 of the criminal procedure code. However, I am satisfied that count 2 of the charge has been sufficiently proved beyond reasonable doubt and I therefore convict her under section 215 of the criminal procedure code.

461. I further find that the prosecution has proved its case beyond reasonable doubt against the 2nd, 3rd, 4th, 5th, 6th and 7th accused persons on count 3 of the charge and I convict them accordingly under 215 of the criminal procedure code.

462. The prosecution has failed to prove its case beyond reasonable doubt against the 8th and 9th accused persons on count 3 of the charge and I acquit them accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS... OF 2020

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

ANTICORRUPTION COURT MILIMANI

2. 9.2020

Corma: Nyutu [M/s] SPM

Prosecutor – Akula &Nyamache for the State

Court Clerk -Eric

1st Accused -

2nd Accused -

3rd Accused

4th Accused

5th Accused ..... All Present

6th Accused

7th Accused

8th Accused

9th Accused

Mr. Mbeche & Nyanchoka for 1st Accused

Mr. Muthomi for 2nd accused

Kamande for 3rd accused

Amoko for 4th accused

Bundotich & Mung'ata for 5th, 7th, 8th and 9th Accused persons

Mutua for 6th Accused-

Court – Judgment delivered in open court this 2nd day of September, 2020.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Akula – We do not hve any past records against the accused persons 1st, 2nd, 3rd, 4th, 5th , 6th and 7th they can be treated as first offenders.

Mitigation

Mbeche for 1st accused -

1st Accused is elderly she is above 58 years. She suffers from SLE lupus disease. We pray for the court considers her age and state of health. The disease also not allow her to be in cold conditions. She takes medication on a daily basis. With the prevailing Covid 19 pandemic people above 58 years are classified as vulnerable by Ministry of Health. We pray for a non- custodial sentence. The hardship likely to be occasioned is high. Article 57 of *the Constitution* affirms the right of older member of society to be granted dignity. The sentence should not undermine the right of the accused that under that Article. Pray for a lenient sentence.

Muthomi for 2nd Accused -

The court should consider a lenient sentence specifically non-custodial for the following reasons:-

1. 2nd Accused is aged 63 years.

2. She is diabetic and hypertensive. She is required to take medication twice a day every day.

People aged 58 years have a unique vulnerability on the light of the prevailing covid 19 pandemic.

I refer the court to the merchant of Venice by Shakespeare. Justice should be tempered with mercy. This is a case where the court can show mercy on account of 2nd accused age. 2nd accused is a citizen who has led an exemplary life. She has no Criminal record. She has spent her productive years in the service of the Republic. That order weigh on the scale on the type of sentence that should be imposed.

2nd accused did not benefit in any way. Personal benefits is not one of the reason for 2nd accused took the decision that she did.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Kamande for 3rd Accused -

I associate myself with the submissions of counsel for 1st and 2nd accused.

3rd Accused is 65 years old. He has participated throughout the proceedings. 3Rd accused is diabetic, rheumatic and has an enlarged prostate. He is also hypertensive. His health necessities constant medication. We pray that the court tampers justice with mercy. He has served in Public Service for over 35 years. He does not have a Criminal or disciplinary record. 3Rd Accused did not derive any benefit from the offence. There are no aggravating circumstances to suggest that he does not deserve the mercy of the court.

3rd Accused falls in the category of vulnerable persons in light of the Covid 19 pandemic. A custodial sentence is tantamount to a death sentence. We pray for a lenient sentence, non-custodial or a discharge. We wish to produce a medical report dated 27.7.2020.

Amoko for 4th Accused -

I associate myself with the submissions made on behalf of 1st, 2nd and 3rd accused. 4Th accused is hypertensive. Based on the facts of this case a custodial sentence will not be appropriate. There is no aggravation in ..... or crime. It was one of failure of process at the tail end of the prosecution process. The 4th accused doe not have a Criminal History. 4Th accused has served in Public Services and now serves on the International Platform. The decision they took was not actuated by greed. He is humble man with 2 teenage boys who are in school. I pray that the court exercise its powers under section 35 PC and grant 4th accused a discharge with conditions that the court will deem fit.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Bondotich for 5th Accused -

5th Accused 53 years old. He is married with 3 children. Two of them have physical impairment and live under care of 5th accused.

The 5th accused has served in the Public Service for 29 years. He has never been accused or convicted for any offence except today. He gave evidence of his exemplary career. He is a re known professional in Actuarial Science. This court faulted that the process led to the award of the tender. The prosecution concedes that they do not have any criminal record for 5th accused. The investigations started in 2014 and the accused has never interfered with investigations or trial of his case. Pay for a non-custodial sentence. Pray for reasonable sentence.

Mutua for 6th accused -

We urge the court t consider the following:-

The court has made a finding that the offence the accused has committed is in respect of non-compliance with the law as opposed to personal gain. I urge the court to consider the general conduct of the accused during the trial.

The accused has been cooperative. All accused persons and advocates have been co-operative.

6th Accused is now 58 years old. Due to his exemplary record at CAK he was seconded to the UN where he is working. 6Th accused is a family person. I urge the court to consider a non-custodial sentence.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Mungata for 7th Accused -

I pray for leniency taking into account the circumstances of the case. No personal benefit accrued by 7th accused. 7th accused is a first offender. He has a young family with 2 small children. We urge the court to follow the sentencing guidelines. Pray that the court exercise mercy and order a non-custodial sentence.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Akula for the state -

The defence have relied on age, Covid-19 and medical status. We concede to age and covid-19. However on the issue of health status only 3rd accused had provided a health record. We urge the court to consider the following:-

- Restriction

- Deterrence

- Rehabilitation

- Renunciation of the offence

- Protection of the Public

Court – The court has considered the mitigation tendered by the accused persons as well as the submissions by the state in response to the mitigation.

The court has also considered the circumstances in which the offence was committed. The offence that the accused persons are convicted on purely border on non-compliance with Procurement Law.

There was no demonstration of personal gain in the accused persons. There was no demonstration of computed loss of Public resources by CAK either.

Nevertheless the law makers in their wisdom crafted procurement laws so as to ensure that procurement processes are fair, transparent and that there is value for money for goods and services among other principles of Procurement.

It is therefore a role of this court to sent out a message to the general public that when laws are made the same should be obeyed for good governance of the procurement process and the nation at large.

The court has also taken notice of the ages of the accused persons. This matter is eligible for non-custodial sentence.

In the circumstances the accused persons are hereby sentenced as follows:-

Each convicted accused shall pay a fine of Kshs.500,000/= in default 12 months imprisonment.

R/A 14 days

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Mbeche – The 1st accused person deposited cash bail of Kshs.500,000/=. We pray that the same be converted to fine.

Muthoni – We make a similar request on behalf of all accused persons that cash bail already deposited in court can be converted to fine.

Pay that cash of the accused persons acquitted be released.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Court -

(1) Cash Bail in respect of 8th and 9th accused to be released to depositors.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Court – Cash bail in respect of 1st accused to 7th accused to be converted to fine upon presentation of the original receipts.

- Joyce Nyambache – 1st Accused – Receipt No.4361734 – 500,000/=

- Peris Nkonge – 2nd Accused – Receipt No.4361952 – Kshs.500,000/=

- Stanley Kibe – 3rd Accused Receipt No. 4361733 – 500,000/=

- John Omo – 4th accused – Receipt No.446867 – 500,000/=

- Leo Boruett – 5th Accused Receipt No.4361730 – 500,000/=

- Mutua Mutusi – 6th accused – Receipt No. 446870 – 500,000/=

- Vincent Ngundi – 7th accused – Receipt No.4317332 – 500,000/=.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

Amoko – 4th accused does not have his original receipt- We shall pay the fine and follow up with cash bail later.

Court – Noted.

Mutua – 6th accused does not have the original cash bail receipt. We shall also pay the fine and follow up with the cash bail later.

Court – Noted.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

2. 9.2020

3. 9.2020

Before E. K. Nyutu [SPM]

In Chambers -

I have seen the affidavit sworn on the 2nd September, 2020 by the 1st accused Joyce Nyambache Osinde stating that her original cash bail receipts is misplaced.

Her cash bail of Kshs.500,000/= paid vide receipt No.4361734 is hereby converted to fine on the strength of her affidavit.

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

3. 9.2020