



**Republic v Robinson & 6 others (Anti-Corruption Case 14 of 2012)  
[2017] KEMC 123 (KLR) (Anti-Corruption and Economic Crimes) (31 July 2017) (Judgment)**

*Republic v Eden Odhiambo Robinson & 6 others [2019] eKLR*

Neutral citation: [2017] KEMC 123 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION CASE 14 OF 2012**

**F KOMBO, SPM**

**JULY 31, 2017**

**BETWEEN**

**REPUBLIC ..... COMPLAINANT**

**AND**

**EDEN ODHIAMBO ROBINSON ..... 1<sup>ST</sup> ACCUSED**

**RUTH WANYAGU SANDE ..... 2<sup>ND</sup> ACCUSED**

**OREGO ODHIAMBO FREDRICK ..... 3<sup>RD</sup> ACCUSED**

**JOSEPH KARANJA NDUNG'U ..... 4<sup>TH</sup> ACCUSED**

**FLORA NGINA NGONZE ..... 5<sup>TH</sup> ACCUSED**

**GEORGE MUYA NJOROGE ..... 6<sup>TH</sup> ACCUSED**

**GOERGE OCHANDA MACHOOKA ..... 7<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Eden Odhiambo Robinson (Hereinafter 1st Accused) Ruth Wanyagu Sande (Hereinafter 2nd Accused) Orego Odhiambo Fredrick (Hereinafter 3rd Accused) Joseph Karanja Ndung'u (Hereinafter 4th Accused) Flora Ngina Ngonze (Hereinafter 5th Accused) George Muya Njoroge (Hereinafter 6th Accused) George Ochanda Machooka (Hereinafter 7th Accused)

Are jointly charged in Count 1 herein, with the offence of Careless failure to comply with the law relating to procurement contrary to section 45(2) (b) of the [Anti-Corruption and Economic Crimes Act](#). (Hereinafter 'The ACECA')



This section provides as follows;

45. Protection of public property and revenue etc.

(1) .....

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

(a) ....

(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;

Particulars in support of this Count are stated as follows;

On diverse dates between the 6th September 2010 and 28th October 2010, at the Catering and Tourism Development Levy Trustees Offices within the City of Nairobi, in Nairobi County of the Republic of Kenya, being members of Catering and Tourism Development Levy Trustees Tender Committee, persons whose functions concerned the management of public property, jointly and carelessly failed to comply with the law relating to the procurement by carelessly failing to comply with provisions of section 88(b) of the Public Procurement and Disposal Act, 2005 as read with Regulation 59 of the Public Procurement and Disposal Regulations, 2006 by disregarding the threshold matrix in the first schedule of the said Act when awarding the procurement of promotional materials tender number CTDLT/Q/04/2010-2011 to Ms Pinnacle Media Productions Limited through the Request For Quotation procedure.

2. Counts 2 and 3 in the Charge Sheet relate only to the 4th Accused person and both are charges of making a Document without Authority contrary to section 357(a) of the Penal Code.
3. There is a submission that the two counts are duplicated. I have read the charges and do not find any basis for this submission.
4. According to particulars in support of Counts 2 and 3, therefore, the 4th Accused is alleged to have made, with intent to deceive and without lawful authority or excuse, two documents namely CTDLT Request for Quotation (the subject of Count 2) and CTDLT Confidential Business Questionnaire (the subject of Count 3), purporting that the said documents were submitted by M/S Ultra Limited as part of a bid for Tender No. CTDLT/Q/04/2010-2011.
5. Both offences in the said Counts were allegedly committed between the 6th September 2010 and 28th October 2010.
6. The charges herein were all denied at Plea resulting in this trial, in which a total of 15 witnesses are called by the State in support. Numerous Documentary exhibits have also been tendered in evidence.
7. In a Ruling made on 13/11/2015 by Hon D. Okundi (then SPM), the Accused were called to their defence in their respective counts.
8. In their respective defences, the 1st and 4th Accused persons gave sworn testimony, while the 2nd, 3rd, 5th, 6th and 7th Accused made unsworn statements. The 4th Accused called one witness.



9. I took over this case on 17/11/2015 when the Prosecution case had been heard and the Accused persons called to defend themselves.
10. On the same date I issued directions under section 200(3) CPC in accordance with the election by the Accused persons, that the trial do proceed from the point previously reached by Hon. D. Okundi and thereafter heard the Defence case.  
At close of evidence, Counsel filed written final submissions.
11. Mr Ken Odera, Advocate appears in this matter for the 1st, 2nd, 3rd, 5th, 6th and 7th Accused. Mr Gachuba appears for the 4th Accused while Mr Omirera- Senior Assistant Director of Public Prosecutions prosecuted for the State.
12. Drawing from the evidence, the seven persons the subject of these charges were at the time material to the charges, all senior management employees of the Catering and Tourism Development Levy Trustees (Hereinafter CTDLT), a State Corporation whose name was later changed to 'Tourism Fund', following an expansion of mandate.
13. The 1st Accused was the Head of Levy Operations, while the 2nd Accused was the Head of the Standard Department and also the Head of Human Resource. The 3rd Accused was the Chief Legal Officer, the 4th Accused was the Procurement Manager, the 5th Accused was the ICT Manager, the 6th Accused was the organization's Deputy Regional Manager, Nairobi Region and also a Levy Inspector, and finally the 7th Accused was a Senior Human Resource Officer.
14. The Chief Executive Officer (CEO) at the time material to these charges was Allan Wafula Chanane (PW1) (Hereinafter 'CEO')
15. Whereas it is not a matter of any controversy that the 1st, 2nd, 3rd, 5th, 6th and 7th Accused were, also, by virtue of their positions, duly appointed Members of the CTDLT Corporation Tender Committee (Hereinafter CTC) the status of the 4th Accused person, who was the Procurement Manager in the Committee, is the subject of controversy which I will address later in this judgment.
16. In the Financial Year 2010-2011, the CTDLT planned to spend a part of its budget on the procurement of promotional materials.
17. As a result of these and following some preparatory management meetings, it was decided to undertake a process to procure Diaries, Wall and Desk Calendars, Polo and Ordinary shirts under the Promotional Materials budget item.
18. The CEO, who authorized the Procurement as the CTDLT Accounting Officer testified that the method of procurement that was settled upon was 'Request For Quotation'.
19. This method is provided for in Section 88 of the Public Procurement and Disposal Act 2005 (Hereinafter 'The Act') which provides as follows;
  88. A procuring entity may use a request for quotations for a procurement if-
    - (a) the procurement is for goods that are readily available and for which there is an established market; and
    - (b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.



20. The method is fully broached in Section 89 of the Act and in the Public Procurement and Disposal Regulations 2006 (Hereinafter ‘The Regulations’) at Rules 59, 60 and 61. Rule 59 which is material to the charge in Count 1 states as follows in the relevant part;
59. (1) A procuring entity that conducts procurement using the request for quotations method pursuant to section 88 of the Act shall be subject to the procurement thresholds set out in the First Schedule.
21. The CEO testified as follows with respect to the decision to use the method;
- ...In relation to procurement of calendars and diaries we used a request for quotation process. For items above Kshs.6 Million we would have advertised the tenders but since none of the items were to cost more than Kshs.6 Million threshold we sent bid documents [quotations] to 5 of our pre-qualified suppliers. We were following the Public procurement Act...’
- He further stated at under cross examination by Mr Odera;
- ....Procurement Process we chose was Procurement by sample through a Tender process for items falling below Kshs.6 Million. We did not choose a method beyond the maximum allowed. According to me we followed the correct process and no individual item was to cost more than Kshs. 6 Million....’
22. Documentary evidence before the Court shows Request for Quotation Forms in the names of the following five companies;
1. Pinnacle Media Productions Limited (Pros Exh 3)
  2. AD Gifts Limited 9 Pros Exh 5)
  3. Ultra Limited ( Pros Exh 6)
  4. Stellan Consult Limited ( Pros Exh 7)
  5. Span Image Limited ( Pros Exh 8)
23. On their face, the Request For Quotation Forms contain for each quoted item, handwritten Columns showing the Quantity, Unit Price, Delivery Period, Brand, Country of Origin and Remarks. They also contain signatures and rubber stamp impressions.
24. Corresponding to each of the filled Request For Quotation Forms is also a printed but hand- filled, signed and stamped Confidential Business Questionnaire. (Pros Exhibits 9, 10, 11, 12, and 13) The information filled on the questionnaires includes inter alia, the company’s Physical and postal address, Bankers, details of Directors, Trade Licence number and nominal and issued capital.
25. One of the Quotation Forms (Pros Exh 6) in the names of Ultra Limited and its accompanying Confidential Business Questionnaire (Pros Exh 13) is the subject of the charge in Counts 2 and 3 herein against the 4th Accused.
26. Examination of the said Quotation Document shows hand- filled information indicating that the company bid to supply Diaries, Wall and Desk Calendars, Polo and Ordinary shirts; in essence, all the item types that CTDLT sought to procure.
27. It also shows the supply duration and that the items would be sourced by the Supplier from China. The Form is signed on behalf of the Supplier and stamped.



28. Phylis Chepkoech Terer (PW 10) testified that she was an Accounts Manager at Ultra Limited since joining the company in 2009 as a Sales Executive. In 2010, at the time material to these charges, she was already an Accounts Manager and her duties included sending out Quotations and filing Tenders.
29. She testified further that her company was not doing Government Tenders until 2012, which is way beyond the date material to these charges. She added that she encountered Pros Exhibit 6- A Quotation Document and Pros Exh 13- A Confidential Business Questionnaire, in the names of her company for the first time on 24/1/2011 from KACC Officers. By that time, she had never heard of CTDLT at all.
30. According to her Ultra Limited was never aware of such a document and never participated in the procurement as purported. She did not sign the documents and further according to her, the stamp impression on the documents, was an old stamp that the Company had stopped using way back in 2006.
31. She pointed out mis-information in the documents in relation to her said company. For instance, according to her, all the company's products are manufactured locally and there was no way the company would indicate that they would be sourced from China. Further, the company was not manufacturing Diaries and Calendars which are some of the items it is shown to have included in Pros Exh 6
32. On the Confidential Business Questionnaire, the witness faulted the classification of the company's business as merchandising, which is not her company's business line. The Document also indicated a wrong Banker namely Co-Operative Bank when, according to her, the company's Bankers are the Commercial Bank of Africa.
33. The Document also shows names of Directors whom she stated, are unknown to her, namely Samson Odipo, Francis Kamara & Catherine Nyongesa. According to her evidence, her company's real directors are two, namely Sumeet and Sudesh walia.
34. According to a letter exhibited herein from the Registrar of Companies obtained during investigations, (Pros Exh 42), the Directors of Ultra Limited are shown, consistent with her testimony, to be Sumeet Walia and Sudesh Walia, up to and as at 27/7/2011.
35. The witness reiterated her testimony under cross examination stating in response to Mr Gachuba for the 2nd Accused, that she kept a record of all the quotations that she sent out, and that the company never dealt with the documents shown to her. She also stated that the rubber stamp on the documents had not been in use since she joined the company.
36. In similar fashion, witnesses called from the other four companies namely Ad Gifts Limited (Sanmeet Vidyarthi-PW6), Span Image Kenya limited (Mohammed Shatry- PW 12) and Stellan Consult (Eunice Njeri Njambi Mathu- PW 13) dissociated their firms from the Quotation documents and Confidential Business Questionnaires before the Court. They also confirmed that the documents purported to be from their firms similarly contained misinformation which they pointed out.
37. The evidence shows that the five Quotations I have referred to were opened by a 'Tender Opening Committee' in which Erastus Waititu Karanja (PW 2) was a member. The chairman of this Committee was one Eric Mituga who is not a witness.
38. Thereafter an Evaluation Committee chaired by Samuel Milton Obote Alang'o (PW3), and in which Shella Nina Makena (PW4) and Waro James Nyambu (PW5) were members, evaluated the Quotations.



39. Samuel Milton Obote stated as follows with respect to the Procurement Documents that his team evaluated;

...I got the opened quotations from the Procurement Manager. Mr. Ndungu, the letter from him forwarding the documents to me. There was no third party when he handed over the documents to me. Mary Kitaka was nowhere hear us when I was being given the documents...'

40. The Evaluation Committee prepared a Report (Pros Exh 18), which the witness identified in Court. It was recommended to award the tender to M/S Pinnacle Production E.A Limited as the lowest bidder. He confirmed his signature in the Report which, irregularly, is signed by only two of the Committee's four members.

41. The evidence of Shella Nina Makena (PW4), a Management Trainee at the time, who was appointed member of the Evaluation Committee leaves a lot to be desired as relates to the evaluation process above, besides the curious appointment itself.

42. First she makes it clear that she was totally in the dark about the process and saw her participation as a 'learning process'. Secondly and most surprisingly, she did not participate in the making of the recommendations in the report. Thirdly and also most surprisingly, she did not sign the report. She agreed under cross examination that it would have been important if prior to her appointment to the committee, she had been trained on procurement matters.

43. Evidence tendered in this case further shows that a Tender Committee meeting was scheduled on 28/10/2010 in which the recommendation by the Evaluation Committee was approved and an award totalling ksh 11,203,450/- was made to M/S Pinnacle Media Productions Limited.

44. The Minutes of this Meeting are produced before the Court Paragraph 4.3 of MIN 4/61/2010-2011 reads as follows;

... Members approved design, supply and delivery of various promotional materials; one thousand five hundred (1500) diaries at a cost of 5,084,100.00, four thousand (4000) wall calendars at a cost of 1,708,000.00, one thousand (1000) desk calendars at a cost of ksh 214,750.00, five hundred (500) polo shirts at a cost of ksh2,095,500.00 and two and fifty (sic) (250) shirts at a cost of ksh 2,101,100.00 a grand total of ksh 11,2013,450.00 by ms Pinnacle Media Productions Ltd...'

45. Further evidence before the Court is that following the Award, the winner was officially notified of the award by letter written by the CEO (Pros Exh 14). Thereafter a formal Contract (pros Exh 19) was prepared and executed between Pinnacle Media Productions Limited and CTDLT.

46. Three Regret Letters addressed to Ad Gifts Limited (Pros Exh 14), Ultra Limited (Pros Exh 15) and Stellan Consultants (sic) Ltd 9 Pros Exh 16) are also before the Court.

47. The letters are all dated 28/10/2010 and are signed by the CEO, a fact that he acknowledged in Court. This is also confirmed in the testimonies of Eddah Kagure Kaboi (PW7) and Loise Akinyi Josiah (PW8) who were based in his office as Executive Secretary Administrative Assistant respectively.

48. The two further testified that four regret letters, which include the three above, were personally delivered to the CEO's office by the 4th Accused whom they knew as the Procurement Officer.



In her testimony, Loise stated;

...I am the one who took the letters in to the Chief Executive Officer. After letters were signed I called Mr. Ndungu to pick them up and he came. I do not know where Mr. Ndungu went to after he picked up the letters...'

49. Eddah Kagure went as far as stating that she could tell by the formatting, that the letters were typed by the 4th Accused. She stated under re-examination by Mr Omirera as follows;

...Mr. Ndungu had a peculiar way of formatting his letters and that is why I am saying he is the one who typed the letters...'

50. As will be seen in his defence herein later, the 4th Accused acknowledged that he 'raised' the said letters.
51. According to evidence comprised in Pros Exh 70- which is a bunch of Delivery Notes signed and stamped on behalf of CTDLT, Pinnacle Media Productions delivered the goods procured.
52. The deliveries were inspected and accepted by an Inspection and Acceptance Committee in that regard. The Committee prepared the appropriate Certificate (Pros Exh 42). The company then invoiced for the sum of ksh 11,203,451.10.
53. CTDLT also fully paid for the goods. This is confirmed in the evidence of its then Accounts Manager Margaret Njoki Njoka and Payment Vouchers produced in Court.
54. According to the CEO and his said Accounts Manager, the procurement process described above was regular and above board.

The CEO stated as follows in testimony;

...We as the organization never had a complaint in so far as that contract was concerned. Issues arose from the EACC. I as the Accounting Officer was satisfied with the process. EACC informed us that there was a complaint over the process. I do not know where the complaint came from...'

He stated later at re-examination;

...We used a request for quotation method whose threshold is Kshs. 1 Million per item. Looking at the documents I assumed everything was above Board...'

55. The view that the procurement was above board is however not shared by the Investigator herein Mr Salat Abdi Ali (PW 15). (Hereinafter- 'The Investigator')
56. His testimony is that he was assigned alongside two other colleagues who are not witnesses herein, to investigate allegations of procurement irregularities at CTDLT. By that time according to him, a preliminary investigation had already established that there was fraud in the procurement process where Quotations from two companies were alleged to have been forged, and also that a wrong procurement procedure had been used. He stated;

...Value of Tender awarded was about Kshs.11 million and argument that for anything more than Kshs. 1 million according to threshold matrix in 1st schedule of the Act, a different procurement method should have been used...' (sic)

57. According to him it was also alleged that the prices settled on had been exorbitant.



58. He summarized the findings of his investigation by stating that the procurement was attended by fraud, that the Quotation documents the subject of the procurement, were never issued to the companies allegedly invited.
59. He also found, upon forensic analysis that the handwriting of the 4th Accused was linked to two of the four quotations, which he suspected were forged. His other finding is as follows in his own words;
- ...there was a violation of the Procurement Act and Regulations in the usage of Requests for quotation in that tender as the goods required had a value over Kshs. 1 million per procurement tender. The same flows from section 88(b) of the Act. I also found that the whole tender committee including all the accused persons in attendance of the Committee Meeting of 28/10/2010 when the award was made had been careless in the performance of their duties. They had a duty of ensuring the right method of procurement was used in the tendering process and this is contained in Regulation 10(h) of the Procurement Act. That is how I ended up charging the other 6 persons besides accused no. 4 as regards the procurement process that was adopted. Counts 2 and 3 relate to the 4th accused only where he was linked to the forgery of the documents concerning Ultra Limited...'
60. Upon these conclusions, the Investigator testified that he sought the consent of the learned DPP which he obtained and drew these charges.
61. The investigator refers in his testimony above to the provisions of Rule 10(2) (h) of the Regulations which provides inter alia, the following function for a Tender Committee;
- 10(1) ....
- (2) ....
- ....
- (h) 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..
62. Chief Inspector Geoffrey Chania (PW 14), the Document Examiner confirmed in testimony that he received documents for forensic analysis from the Investigator. The documents received by him included the Quotation Documents herein and the accompanying Confidential Business Questionnaires. He also received sample and known handwritings of amongst others Joseph Karanja Ndung'u( 4th Accused) (Pros Exh 62(i-xii) and Pros Exh 67(i-vii)], and Erastus Waititu Karanja (PW2) Pros Exh 35(a-d). He also received stamp impressions for the five invited suppliers.
63. According to his Report (Pros Exh 68), the hand- writings on the Quotation Documents in the names Pinnacle Media Productions Limited were similar to those of Tabitha Tasse Aseto (Not a witness)
64. This would suggest that the said documents were prepared by the said company.
65. His comparison of hand writings on the Quotation and Confidential Business Questionnaire in the names of Ultra Limited (marked A7 and A8) with the specimen and known handwriting of the 4th Accused, made him form the opinion that the writings are similar to those of the said 4th Accused. This would in essence mean, if his opinion is accepted, that those documents are not made by officers of Ultra Limited, but by the 4th Accused.
66. It is also his opinion that the hand writings on the other four quotations marked A1, A5, A6 and A9 were made by the same person although they bear the stamp impressions of different companies,



67. His further evidence is that the stamp impressions in the documents in the names of Ultra Limited are made by an instrument different from the sample obtained from the company. This finding also applies to the stamp impressions in the documents relating to the other invited suppliers.
68. The Document Examiner also opined that the hand writings identified for him to examine in a Register known as 'Tender Selling Register' (Pros Exh 34) were similar to those of a witness herein Erastus Waititu Karanja (PW2).

He described his methodology as in detail as follows;

...On methodology, I subjected all these documents to image enhancement and magnification procedures by use of video spectrum comparator machine and infra-red filters for better visibility and identification of minute individual characteristics. I also subjected the Stamp Impression to Superimposition procedures. In my examination I considered the following factors.

- Initial and technical strokes.
- Character construction and arrangements
- Ink distribution in the characters
- Character spacing and their baseline alignment
- Writing quality
- General resemblance'

69. There is also exhibited in this trial, another Document Examiner's Report (Defence exhibit 13) in which the Document Examiner – Mackenzie Mweu ( DW8), acting on instructions by Arimi Kimathi and Company Advocates for the 4th Accused, subjected the Request for Quotation in the names of Ultra Limited(A7), the Confidential Business Questionnaire ( A8) and the known and specimen writings by the 4th Accused (Pros Exh 62(i-xii) and Pros Exh 67(i-vii) to forensic examination.
70. In his said Report, the said document Examiner opined that he found no agreement in the writings by the 4th Accused when compared with those in the said bid documents. He however found no agreement in the stamp impressions.
71. This particular conclusion presents the Court with two conflicting expert opinions. I will revisit this specific issue later in the course of this judgment.
72. My examination of the document referred to as 'Tender selling Register' reveals that it contains columns for Signature, Name and ID Card number under which are hand written entries showing inter alia, names of the bidding companies herein, except one, Stellan Consult.
73. The entries do not however seem to correspond to the hand-written Title of the page under which they are made. The Title reads; Tender for Request for Proposals for Consultancy Services for competence Development'. The said entries fall in line alongside others under this title.
74. It appears to me that these entries are out of sync with the rest of the page's contents. The Document as suggested by its name, seems to me to be a Register for Tenders.



75. The evidence of Mary Ndunge Kitaka (PW 11) is that she was the one responsible for maintaining this Register. She stated confirming that indeed the document was a Tender Register;

...It used to be maintained by me, records in it are of the tenders that have been floated out, that is open tenders. There is no time when I would have made records of quotations in this register. The records for the Financial year 2010/2011 are almost exclusively in my hand. In the Tender Selling register are entries to do with the Companies the subject matter of the Quotation and the entries are not in my handwriting. I do not know who made those entries...'

76. It is these entries that the document Examiner opines, were made by Erastus Waititu Karanja (PW 2)

77. In his own testimony, Erastus Waititu Karanja testified that he was a duly appointed member of the Tender Opening Committee at CTDLT and that in that role he would once in a while open the Tender Box.

78. He stated that as relates to the Procurement herein, he opened the Tender Box on 19/10/2010 and found five sealed envelopes which his 'Tender-Opening Committee' opened and found five duly filled quotation documents which are the subject of this case.

79. In his further testimony, he stated that wrote the particulars in a Register a leaf of which he identified in Court as Pros Exh 33, which he stamped and signed.

80. The Quotation Documents and his register indeed show a stamp with his name, a signature and a date-19/10/2010.

81. He also testified that the Chairman of the Tender opening Committee one Eric Mituga (not a witness) took the opened Quotation documents and gave them to the 4th Accused who was the head of procurement. He stated that he was outside the 4th Accused's office as this happened.

82. He stated in relation to the entries in the Tender Selling Register -Pros Exh 34;

...Two weeks later at around 11.00 am the 4th accused called me through his extension and told me to go to his office. I did so and on his desk I found an open register which I had never seen before. He asked me whether I was in the Tender Opening Committee and I answered in the affirmative. He asked me further whether I was the one who had filled the Tender Opening Register and I again answered in the affirmative. He asked me to transfer the same details in the register I had filled out to the one I had never seen. I would be able to identify that other register as my handwriting is in it. It was marked the Tender Selling Register MFI- 34...'

83. He stated that he obtained the Key to the tender Box from Mary Kitaka. (Mary Ndunge Kitaka (PW 11)

84. Mary Ndunge Kitaka (PW 11) testified that in 2010 at the time material to these charges, she was Procurement Assistant working under the 4th Accused - in the CTDLT Procurement Department. Effectively, she was his Deputy.

85. She stated as follows, which is at odds with the testimony of PW 2 on the matter;

QUOTE{StartQuote "}

QUOTE{StartQuote "}'...when Mr. Ndungu gave me the quotations they were sealed in envelopes. It was not usual for me to get quotations from Mr. Ndungu. Ordinarily when the quotations were



bought back they should have been dropped in the quotation box. Opening Committee was the one to open the quotation Box Mr. Ndungu and I were not part of the Opening Committee. I do not know how Mr. Ndungu got these quotations in sealed envelopes. I did not participate in the Opening Committee Meeting. That Opening Committee Meeting was Chaired by Erastus Karanja. After quotations were opened they were handed over to the Evaluation Committee whose Chairman was one Samuel Obote...'

86. She further testified that although her duties included preparation of quotation documents, she was not aware of the Quotation Documents issued to the five companies herein, neither was she aware of their preparation.

87. She stated with respect to the selection of the companies, which according to her, were all pre-qualified;

...These firms were all among the list of pre-qualified suppliers. I did not pick them Mr. Ndungu is the one who had picked them. I do not know how he picked them...'

88. The witness further testified that she was the custodian of another Register-The Quotations Register (Pros Exh 47), adding that it was improper for quotation entries to have been entered in the Tender Selling Register.

She stated with respect to the four Regret letters before the Court;

...I was responsible for the dispatch of the letters. The Suppliers would pick them from my office a record of which would be contained in the delivery book. The 4 letter in court were not delivered by my office as they are not factored in my delivery book. I wish to produce the delivery book in evidence-Exhibit - 48...'

89. I have examined the said Delivery Book (Pros Exh 48) and indeed it does not contain any entries relating to the reference numbers in any of the Regret letters.

90. The 'Quotations Register' (Pros Exh 47) which is produced in Court, does not have any entries for the instant Quotation reference CTDLT/Q/04/2010-2011. Its entries run to the year 2011.

91. The witness stated with regard to her understanding of what method should have been used in the procurement;

..The total tender price was above the threshold for tender by request for quotation. If we go item by item some of the items meet the threshold for tender by request for quotation. However, the quotation was to be looked at holistically. To be compliant with the law therefore 11 quotations ought to have been raised...'

Under cross examination by Mr Odera, the witness stated;

..Responsibility for choosing the Procurement method to be adopted lies with the Tender Committee...'

She further stated;

...I am aware method adopted was request by quotation. I do not know what would happened when a Committee adopts a wrong method as opposed to a right method...'(sic)



She stated under cross examination by Mr Gachuba for the 4th Accused;

...Committee had to approve the choice of request for quotation...’

92. She also stated that in her view, the proper procurement method used ought to have been Open Tender. She agreed that the primary responsibility for ensuring compliance with the procurement Act is vested in the Accounting Officer. She described CTDLT as a ‘Class B’ procuring entity and stated that she had never heard of any complaint in the procurement.

93. Under cross examination by Mr Gachuba, she maintained that she received the quotation documents from Mr Ndung’u before they were opened. She further stated that she gave the unopened envelopes to Mr Karanja (PW2). She also stated that her working relationship with the 4th Accused was good and denied that it was not cordial. She was shown Pros exh 47- the Quotations Register and acknowledged a gap between 6/9/2010 to 25/11/2010, when procurements were still happening. She agreed that it did not reflect the factual position on the ground. She agreed that the process was followed and that the goods were delivered.

She further stated;

...I was only involved in the opening of the quotations and by that I mean Mr. Ndungu asked me to facilitate the opening and he gave me the unopened envelopes. I got a room for the opening Committee meeting and that is all. I did not participate in the Opening Committee Meeting. It is not true that I was given the request for quotation Forms by Mr. Karanja...’

94. In his sworn Defence the 1st Accused testified that he was the chairman of the CTDLT CTC and identified the 2nd, 3rd, 5th, 6th and 7th Accused as fellow members. He denied the allegation that the CTC was careless as alleged in the charge in Count 1.

95. He further stated that the CTC made its award to prequalified suppliers on the basis of the report by the Evaluation Committee and that in their view there was no reason to reject the report. He further stated that the items that were being procured were readily available in the market and that their price range was between ksh 400-ksh 7000/- per item. He also stated;

...I recall the prosecution case referred to the procurement threshold matrix. We did not understand the matter the way they put it. We understood the reference to be the cost of individual items, not the whole budget. We dealt with the matter in the context...’

96. He further expressed his surprise that the CEO was not charged yet under section 27(2) of the Act he was ‘primarily responsible’ for the propriety of a procurement. According to him, there was no complaint in the matter and no money was lost. He concluded that they acted in good faith and stated;

...all the guidance we sought was clarified...’

97. He was not specific however, what nature of guidance was sought and from who.

Under cross -examination by Mr Omirera, he stated;

....I was appointed to chair the tender committee by the CEO.

The only requirement was that I had to be a head of department. Knowledge of procurement rules and procedures was not a requirement...’

98. He further stated that he had familiarized himself with the Act. He confirmed that the 4th Accused, Joseph Ndung’u was the head of procurement, and that he had no issues. He reiterated that all



- the suppliers awarded were prequalified and stated that anybody saying the contrary would just be mischievous. He reiterated the belief of the Committee that they had done the right thing. He was shown Pros Exh 3 and agreed that the amount was not ksh 1 million.
99. He reiterated under re-examination that the unit price did not exceed the threshold.
100. On her part, the 2nd Accused in her unsworn statement also denied that she had been careless in the award, stating that she acted in the best interests of CTDLT. She confirmed that the procurement method used was Request for quotation because the goods to be procured were readily available. She stated that she had not received any formal training in procurement matters.
101. The 3rd Accused who made his unsworn statement as DW6 also denied that the CTC had been careless in the award. He stated as follows;
- ...In choosing the procurement method, we looked at the individual prices of the goods, which in the maximum did not exceed ksh 8000/-. We believe we were well within the threshold matrix...'
102. He confirmed that the request for quotations method was used based on a List of pre-qualified suppliers which was with the Procurement Officer and the Head of Accounting. In his view, the CTC did not act out of malice if it could be argued that they went out of the threshold matrix.
103. The 4th Accused testified at great length herein as DW7. He confirmed that he was the Procurement Manager at CTDLT. He stated that the procurement was approved by the CEO, after which some management meetings were held where quantities of goods to be procured were agreed.
104. His further testimony is that he thereafter held a meeting with his assistant Mary Kitaka (PW 11) where they drew a list of suppliers from a pre-qualified List. He identified the List of Prequalified Suppliers as defence DMFI 4. According to him the List had been approved earlier on 13/5/2010 by the CTC whose minutes he produced (Defence Exh 5)
105. His further testimony is that he then requested Mary Kitaka (PW 11) to contact the identified Suppliers and request for samples of the items intended to be procured. According to him, contrary to her assertion, PW 11 was involved in the Procurement process.
106. He further testified that he received the samples and thereafter a management meeting to discuss the samples was held between 6th September and 28th October. He could not recall the precise date.
107. Further according to his testimony, after this meeting, he alongside PW 11 prepared Requests for Quotation. He identified pros Exh 3 as one such form prepared by PW 11. He further stated that he thereafter requested PW 11 to dispatch the documents to the identified suppliers, which to the best of his knowledge, was done.
108. He then recalled that on 19/10/2010 the chairman of the Tender Opening Committee Eric Mituga (not a witness) went to his office requesting the key to the tender box. He stated that he referred him to PW 11.
109. His further testimony is that later on the same day PW 11 went to his office to brief him about the tender-opening process. He stated that PW 11 had with her, documents that had been received from the tender box together with a register- Pros Exh 33. He noticed that the register was only signed by one person PW2.



110. He further testified that he requested PW11 to hand over the documents to the chairman of the Evaluation Committee Samuel Obote. Later he received an Evaluation Report from the office of the CEO with instructions in a memo, requiring him to convene a Tender Committee.
111. He identified the report (Pros Exh 18) and pointed Court to a hand-written comment;  
Tender Comm.  
Evaluation Report approved. Please proceed to discuss and recommend award as per Proc Act'
112. His further testimony is that he convened the Tender Committee in which an award was made to M/S Pinnacle Media productions Limited. He identified his co-accused persons as having been present. He also identified the Minutes in which his name appears as 'Secretary'.
113. He further stated that he thereafter did a brief to the CEO and later raised various letters to the awarded bidder Pinnacle Media and the unsuccessful bidders. He identified the letters as those before the Court dated 28/10/2010 signed by the CEO.  
In his testimony, he gave the letters to PW 11 to dispatch.
114. Thereafter, further according to him, a contract was prepared and executed between CTDLT and Pinnacle Media Productions limited. The goods were delivered and distributed and that ended the matter.
115. Still according to him, no complaint was made against the procurement until he was summoned by EACC on 28/3/2011 and required to record a statement. He was charged on 4/10/2012, which he stated, was eighteen months later.
116. When he was referred to Count 1 in the charge sheet, he stated that he is not a member of the Tender Committee and referred the Court to section 26(5) of the Act, the 2nd Schedule of the Regulations item 3 and the Public Procurement and Disposal Manual 2005. According to him, Clause 4.5 of the Manual clarifies that he is not a member of the Tender Committee.
117. He also referred the Court to Regulation 8(3) (p) and (q) of the Regulations which he stated, define his role as Procurement Manager.
118. He stated that he carried out his functions according to the provisions and was not careless as alleged in the charge. According to him, the Investigator herein was malicious.
119. He further stated with regard to the method of procurement used that CTDLT is a 'Class A' procuring entity of which the Threshold Matrix imposes a minimum of ksh 6 million for national advertising. According to him the law contains a lacuna with regard to the method applicable for procurement for goods falling between ksh 1-6 million.
120. He added that the matter has been acknowledged by the Public Procurement and Oversight Authority (PPOA) who in their Frequently Asked Questions (FAQ) Document found on their website, give a procuring entity (PE) four options. He produced the printed FAQ document- Defence Exh 12 and stated as follows;

...We chose option 4 in the List by using Suppliers from our prequalified List. We complied with Regulation 59 by opting to do so...'



121. I have looked at the said FAQ Document- FAQ item 77 (Defence Exh 12) and the question it addresses is framed as follows;

It is not clear to PEs what action to take for tenders between IM and 6M (Class A where the justifications for restricted procedure do not apply...’

The answer is stated as follows;

..PEs should use the open tender procedure but without the need for national newspaper advertising. They can advertise on their physical bulletin board, on their website and in local newspapers, and they can bring the requirement to the attention of known suppliers or contractors, particularly those on pre-qualification lists they have...’

122. It is clear to me even without reference to the answers relied upon by the 4th Accused person that the question is raised with reference to tenders and not any other procurement process. I will address the matter further later on.

123. The 4th Accused was further referred to Count 2 and stated that he is authorized to prepare a Request for Quotation. According to him, it was within his mandate to prepare Pros exh 3.

124. He denied authoring Pros Exh 6. He denied that his handwriting was on the document.

125. He was referred to Count 3 and pros Exh 13. He stated that PW 11 prepared the documents. He denied filling Pros Exh 13, and denied that his handwriting was on the document. He stated that he was not an employee of Ultra Limited.

126. Under cross examination by Mr Omirera for the State, the 4th Accused agreed that Minutes that he had referred to (DMFI3) showed that the Human Resources officer had sourced samples from the market. He also stated as follows;

... We sampled to different places. We went to Pinnacle and Ultra Limited...PW 11 made a call to Pinnacle Media. We did not go to Ad Gift Limited...’

He further stated when shown Pros Exh 5;

... I believe PW11 got the firms whose documents are in Court...’

He stated when shown DMFI4- A List of pre-qualified firms;

.. The five firms we invited are in the list. We randomly picked the five firms. Ad Gifts is number one in the List. The allegations that the firms were not consulted were false’

127. He denied that he had filled Pros Exh 3 but agreed that he had heard the testimony of the Document examiner in Court which he disagreed with.

128. He was shown Pros Exh 6, 7 and 8 and stated that only the blank form with the logo left CTDLT. He agreed that there was no signature of PW 11 in the forms.

129. He stated that PW 11 was in the Tender –Opening team and that she reported back.

130. When cross examined about his presence in the CTC Meeting, the 4th Accused stated;

... I would not say that I was an unnecessary component in the tender committee meeting. I was present at the Tender Committee meeting. I took the minutes of the Tender Committee



meeting. I did not guide the tender Committee meeting. I do not know why it is important to have a procurement officer at the meeting. I was the most qualified in procurement in the meeting... It is true that I was the expert...'

Later he stated;

... The law of 2005 did not give the procurement officer room to raise any objection. That is cured in the law of 2015. The law of 2005 did not consider me an expert...'

He further stated;

... it is true we settled for a procurement method in this matter. We settled for Request for Quotation method...'

131. The 4th Accused denied that he had asked Erastus Waititu Karanja (PW 2) to fill the Tender Selling Register- pros Exh 34. He stated that PW2 had lied against him but conceded that there was no grudge between them. He further stated that he had no reason why PW2 would want to lie against him. He did not recall calling the witness as alleged in his testimony.
132. He was shown the entries in Pros Exh 34. He denied giving instructions for making of the entries.
133. He was shown pros Exh 62 and acknowledged the specimen writings as his own. He denied that his writings were on Pros Exh 6 and 13. He stated that he had a problem with the Document Examiner's Findings.

Under re-examination, the 4th Accused stated;

... We settled on the method prescribed in FAQ by IPOA.(sic) The Act and the Regulations did not prescribe the method to be used in certain instance...'

134. He reiterated that PW 2 had lied against him stating that the witness had stated in his statement (not produced) that he had left the documents with Mary Kitaka (PW 11)
135. The 5th Accused made an unsworn statement herein as DW 3. She denied that she was careless as alleged and stated that at the time of the award, she been at CTDLT for only six months and had just received her letter of appointment to the Committee. According to her the goods were delivered and there was no complaint.
136. The 6th Accused made an unsworn statement as DW 4. He stated that he was surprised by the charge against him. He stated that he was called by KACC to record a statement. According to him, the goods procured were readily available and the price range at most was ksh 7000/-. According to him the goods were 'super' and nobody complained.

The 7th Accused made an unsworn statement as DW 5.

137. He stated that the Request for Quotation method was used because the goods were readily available. According to him, they had considered the Report of the Evaluation Committee, the price range and the Act.

He denied that he was careless.

138. Mackenzie Mweu- DW 8 was called by the 4th Accused as an expert witness. He testified that he was a trained Document Examiner of thirty years' experience, formerly based at the CID offices Nairobi, but now retired and running a private firm called Hawk Eye which concerns itself with document examination and fingerprints.



139. He testified that he had received instructions from Arimi Kimathi & Co. Advocates to examine documents already exhibited herein as Pros Exh 6 and 13 and specimen and standard writings associated herein with the 4th Accused, alongside stamp impressions Pros Exh46 (a) –(c) initially supplied to the Investigator herein by the company known as Ultra Limited.
140. It is important to note that these are the same documents that were subjected to forensic analysis by the Government Document Examiner herein Chief Inspector Geoffrey Chania. (PW 14)
141. The instruction to the Examiner was to examine and compare the questioned writings on Pros Exh 6 and 13 with the standard and known hand writings supplied to the investigation by the 4th Accused.
142. He was also to compare the stamp impressions on Pros Exh 6 and 13 with the standard stamp impressions on pros Exh 46(a)-(c).
143. His opinion contained in his Report herein (Defence Exh 13) is that he found no similarities in the two examinations. In his opinion, the stamp impressions were made using a different instrument.
144. He explained that in his examination, he used a microscope and a magnifying glass.
145. During cross examination by Mr Omirera, he conceded that the equipment at the Government Lab are ‘very expensive’. He informed the Court that he is the one who ordered them.
146. He further defended his equipment, a microscope saying that it is very good and that his equipment is well calibrated.

He further stated;

... Mr Kirimi did not inform me that there was another Report by a Document examiner. I would not be surprised if the report differed with mine. It is normal for experts to differ. It would have made a difference if I was made aware of the other report...’(sic)

147. He explained that he had considered the ‘individualities’ in the writings which he stated, differed. He further stated that those were ‘technical details’ that he could not put in his report. He stated that he could not put everything in his report.  
He denied that he had done a shoddy report.
148. Under re-examination, he reiterated his conclusion that the questioned documents were not done by the same persons.
149. I have extensively set out hereinabove, as much of the evidence adduced herein as I felt would inform the decision in this case. I must also add that indeed the entire evidence on record is considered in this judgment.
150. I now examine the evidence in light of the charges and taking into account Counsel’s submissions.
151. As already seen the charge in Count 1 is preferred against all the seven Accused persons herein. In the particulars to the charge, the Accused are described as having been ‘members’ of the Tender Committee. This description is accepted by the 1st, 2nd, 3rd, 5th, 6th and 7th Accused.
152. The 4th Accused though does not accept the description. It is contended that as a Procurement Manager, he was not a member of the CTC.
153. He has referred the Court to various provisions of the law including regulation 8(3)(p) and (q) in the Regulations to assert that he was not a member of the Tender Committee. He also referred to



- the second Schedule to the Regulations at paragraph 3 where the composition of a State Corporation Tender Committee is provided.
154. I think it is impossible to argue with these provisions that indeed, the 4th Accused was not a ‘member’ of the Tender Committee. This is in the decisional sense. He has no decision-making power in his role at the Committee.
  155. In the Minutes of the CTC produced herein his position is recorded as ‘Secretary’ and not ‘member’. In that status the 4th Accused had neither vote nor decision-making power in the CTC.
  156. The ability to make a decision is a relevant matter, having regard to the charge in Count 1, I therefore agree with Mr Gachuba’s submission that the 4th Accused was indeed not a member of the CTC in the sense of the charge and I so find.
  157. I now explore the import of this finding to the charge as it relates to the 4th Accused person.
  158. The charge is brought under section 45 (2) of the ACECA. I have already set out the provision. From the provision, it is a charge that would lie against an officer or person whose functions concern inter alia, the management of public property or revenue. It is alleged in the particulars to the charge herein that the functions of the Accused persons concerned the management of public property.
  159. The procurement law that the Accused persons are alleged to have failed to comply with is section 88(b) of the Act, and the manner in which they are alleged to have failed to comply with the said law, is that they ‘carelessly’ disregarded the threshold matrix referred to in the said section 88(b) and Rule 59 of the Regulations.
  160. These provisions apply to the method of procurement known as ‘Request for Quotations’.
  161. It is common ground that Request For Quotations is the method which was used in the procurement the subject of this case, although in his evidence, the 4th Accused seemed to waver in the matter, which he confirmed under re-examination.
  162. That this is the method adopted by the Procuring Entity is also clear from the documentation produced before Court which as already seen, were Request for Quotation Forms.
  163. In his own testimony in defence, the 4th Accused went to great lengths to explain how the said procurement method was arrived at. In the process he made reference to the PPOA FAQ Document that he said provided guidelines on the method applicable to procurements that fell between ksh 1 million and ksh 6 million. He contended that a legal lacuna acknowledged and addressed by the PPOA in its FAQ Document exists.
  164. He explained that he received guidance from that FAQ Document whose contents I have referred to, and therefore in effect, that is how it was decided to issue Requests for Quotations to Pre-Qualified suppliers of CTDLT. Indeed he produced the List of the said Pre-Qualified Suppliers in Court.
  165. As I indicated having considered the text of the said FAQ Document, it is clear to me that the procedure addressed in the Document is one that refers to Tenders and not the Request for Quotation method. An examination of the provisions of the Threshold Matrix applicable to ‘Class A’ procuring entities, under which CTDLT, as a State Corporation falls, shows clearly that the lacuna alleged by the 4th Accused lies under the ‘Open Tender’ method, which requires advertising.
  166. It is true that the minimum ‘value’ of procurement required for a national advertisement to happen is ksh 6 million under an Open Tender Method.



167. A gap therefore exists in the Matrix for procuring entities wishing to use the Open Tender method, but with a budget that falls below ksh 6 million. Because the open tender method requires advertisement of the tender, a legitimate question arises in view of the limitation.
168. That question in my view is the one that the PPOA in its FAQ Document sought to address. The question has nothing to do with the method of procurement to adopt, as there are other procurement methods that could be used for the procurement values in question. As a matter of fact, the Threshold matrix provides that a Class A procuring entity adopting the Open Tender method of procurement has no lower or upper limit in terms of the value of the procurement.
169. It must be for this reason that section 29 of the Act provides open tendering as the default procurement method, and all other methods as ‘alternatives’.
170. The 4th Accused’s CEO herein also offered in his testimony, explanation that ties with the evidence of the 4th Accused, as related to the method of procurement adopted. He however seemed to be aware as he stated under re-examination, that the threshold matrix limit where the Request For Quotations method is used is ksh 1 million.
171. Because the FAQ Document does not in my view relate to the method actually adopted in this case, both the CEO and the 4th Accused misdirected themselves in that regard.
172. Hence the PPOA FAQ document ought not to have informed the method of procurement adopted.
173. But the method was chosen and applied nevertheless. Was it the proper method to use in this procurement? This issue seemed to be a matter that was pursued by Mr Gachuba in his cross examination of PW 11 when he asked her whether she knew what should happen when a Tender Committee adopted the wrong method of procurement.
174. The witness went on to give her interpretation of the Threshold Matrix as relates to this case and stated her opinion that the proper method for this procurement ought to have been Open Tender
175. To revisit the issue at hand which is whether my finding that the 4th Accused was not a ‘member’ of the CTC has any impact on the charge facing him in Count1, I think it is important to review what exactly happened in this matter vis a vis the legal function of a Procurement Unit which the 4th Accused headed.
176. From the flow of events in the evidence, it is clear that the CTC came into the picture only after an ‘Evaluation had been done and a Report prepared. This evaluation was preceded by the issuance of, and processing of Requests For Quotation by the Procurement Unit, although the circumstances of issuance of the forms is a matter of controversy in this trial.
177. Rule 59(2) of the Regulations expressly requires procuring entities wishing to use the method in accordance with section 89 of the Act to prepare a list of qualified persons and submit the list to the Tender Committee for approval. Quotations would then be issued to persons in the list while maintaining a fair and equal rotation.
178. The approved List of Prequalified Suppliers is maintained by the Procurement Unit under regulation 8(3) (a). Under Regulation 8(3) (f), the Procurement Unit has the following obligation;
- 8(3) ....
- (f) issue procurement and disposal documents to candidates in accordance with the Act and these Regulations;



179. The 4th Accused referred to Regulation 8(3) (p) and (q) as defining his function as head of the Procurement Unit but I think this was selective. Indeed the entire regulation 8 contains very many other functions and legal obligations of the Unit.
180. As is clear from the cited regulation above, the Procurement Unit, which as in this case, originates the method of procurement that eventually finds its way to the Tender Committee, is bound to do so in accordance with the Act and the Regulations.
181. Section 88(b) and Rule 59, which are the provisions alleged to be flouted in Count 1 are very much part of the 'Act and Regulations' that the 4th Accused, as Head of the CTDLT Procurement Unit was bound to observe in this Procurement.
182. Section 88(b) of the Act, though enacted specifically to impose the obligation to procuring entities that adopt the Request for Quotation method, has language that mirrors the general obligation for Procuring Entities to adhere to the Threshold Matrices under section 26(3)(b), which this time applies generally regardless of the procurement method adopted by a Procuring Entity.
183. The Threshold matrices themselves, as a Schedule (Schedule 1) to the Regulations are also part of the Regulations that must be observed.
184. Moreover it should be borne in mind that in determining what documents to issue, the Procurement Unit must give prior consideration of the procurement method to adopt. As PW 11 stated, the method to adopt is determined by the limits in the Threshold Matrix in Schedule 1 of the Regulations.
185. I therefore conclude that the charge in Count1 is as valid as against the 4th Accused, as it is against his co-accused, who do not refute that they were members of the CTC. I find that the reference to the 1st Accused as a 'member' to the Tender Committee in the particulars to Count 1 is a mistake and/or an irregularity that does not vitiate the charge against him.
186. It will also follow that because the Procurement Unit and the Tender Committee were legally distinct entities in the procurement chain, an examination of the question whether or not they complied with the cited law must also be in the context of their distinct legal mandates
187. In his testimony, the Investigator herein cited Regulation 10(1) (h) of the regulations. The Regulation imposes an obligation on the Tender Committee to review the selection of the procurement method where an alternative method is used, to ensure that it accords with the Act, the Regulations and guidelines given by the PPOA.
188. From the portion of his testimony that I quoted verbatim herein, it is clear that this is the Regulation that formed the basis of the charge against the 1st, 2nd, 3rd, 5th, 6th and 7th Accused.
189. His invocation of the Rule, which he does not mention in the charge, is well understood because as is evident, the Tender Committee has no initial role in the determination of the method of procurement in the circumstances. It must be the reason why the language of the provision is 'review' as opposed to 'determine' or maybe 'decide'.
190. It appears to me under the Regulations that I have already referred to, and the Act, that once a Tender Committee has approved the List of Pre-Qualified Suppliers, it has no further mandate on the method of procurement as the law expressly provides the method in those circumstances as the Request for Quotations method.
191. As such, in the circumstances of this case, Regulation 10(1)(h) has no application and was erroneously cited by the Investigator. PW 11 was also wrong to state that the Tender Committee was to 'approve'



- the method of Procurement. As seen in the cross examination of the witness, approval of a method of procurement by the Tender Committee applies in a totally different context.
192. Does this then mean that there was no basis for charging the members of the CTC in Count 1?
193. This too is not the case because of the obligations imposed on a Tender Committee by regulations 10(1) (a) and 10(1) (c) Regulation 10(1) (c) provides that the Tender Committee has the obligation to 'award the contract in accordance with threshold prescribed in the first schedule'.
194. Where the Request for Quotation method is used, in my view, this is the only opportunity the Committee has to examine the method presented before it by the Procurement Unit. Because a Tender Committee can only accept or reject, it cannot itself determine a method of procurement.
195. From Regulation 10(1) (c), when the CTC herein was considering the Report of the Evaluation Committee, it was, regardless of the recommendations therein, bound to consider whether or not there was an adherence to the provisions of the Threshold Matrix, in relation to the adopted procurement method of Request for Quotation as it applies to 'Class A' entities, of which CTDLT was. Upon doing this, it was bound by law, to either accept the method, or reject it and sent the matter back to the Procurement Unit.
196. I now consider whether the award made herein by the Tender Committee did in fact, exceed the thresholds set in the Matrix for a Class A procuring entity.
197. The Minute in which the CTC approved awarded the contract shows that the total value of items procured by CTDLT was over ksh 11 million. Five distinct items were to be procured in various quantities. Diaries alone were costed at ksh 5,084,100/-. Wall Calendars were costed at ksh 1,708,000/-. Desk Calendars at ksh 214,750/-, Polo Shirts at ksh 2,095,500/- and Shirts at ksh 2,101,100/-.
- These were all goods.
198. According to the Threshold Matrix for a Class A Procuring Entity in the First Schedule to the Regulations, a Procuring Entity seeking to procure Goods using the Request For Quotation Method, the relevant provision states;  
'Maximum level of expenditure under this method is Kshs 1,000,000'
199. It is important to note that the term used in the Schedule is 'expenditure'
200. This in my view suggests a holistic consideration of the budgeted amount for the procurement, which should not exceed ksh one million if this method is adopted by the Procuring entity.
201. This interpretation is in agreement with that of PW 11 who stated that the correct method going by the thresholds ought to have been Open Tender. She stated that from the total value eleven quotations ought to have been raised and I fully agree with that.
202. As I already stated, the FAQ Document referred to by the 4th Accused was no basis for the determination neither did it provide a sui generis method of procurement, outside the ambit of the Act.
203. I find as a fact, that for the method of procurement adopted, the limits provided for in the relevant Threshold Matrix applying to CTDLT were exceeded.
204. The Charge in Count 1 proceeds on the basis that there was a 'careless' disregard of these limits.
205. I now consider whether the 4th Accused, in his distinctive role as Head of the Procurement Unit, and his co-accused, as members of the CTC were 'careless' as alleged.



206. In their respective defences, the 1st, 2nd, 3rd, 5th, 6th, and 7th Accused stated that they were not careless as alleged in the charge. They believed that they had not offended the provisions of the Schedule because to their own understanding, which is different from that held by the prosecution, the amount in the Schedule refers to the individual cost of the items they procured, which is essentially a reference to unit prices. As such, because none of the unit prices exceeded ksh 8000/-, they acted within the schedule and the Act.
207. It was also their defence that they had not been trained on procurement laws and procedures upon appointment by the CEO to the Committee. The 5th Accused stated that she had only been at CTDLT for six months when she was appointed.
208. I have looked at their appointment documents produced in Court and it is true that there is nothing to show that the members were appointed on the basis of any knowledge of procurement laws and procedures. No evidence is called by the prosecution to show that they were subsequently trained in the same matters.
209. The defence by the said Accused persons is that they had not, in the circumstances, disregarded the Threshold Matrix or acted carelessly as alleged, in making the award.
210. It is clear from what I have stated hereinabove, that the interpretation that the CTC members gave the Threshold Matrix is wrong.
211. When the 1st Accused testified in defence, he stated that all the guidance that they sought was clarified. He however did not state what nature of guidance was sought and from whom.
212. The Minutes of the CTC produced herein do not contain anything about the discussion that was made by the Committee, but only the decision.
213. It is acknowledged by the 4th Accused that he was present in the meeting that made the award. Although he claimed that he did not advise or guide the CTC, he acknowledged that he was the expert in the room and that there must be a reason why the law provided for his participation. I think the law is also clear that it is the Procurement Unit that provides secretariat support to the Tender Committee.
214. As was evident from the testimony of Shella Nina Makena (PW 4), the CEO at CTDLT did not seem to pay any regard to competence when he made appointments to the Procurement Committees. In the case of this witness who participated in the Evaluation Committee, the CEO appointed a member who had absolutely no clue what her role entailed. The 5th Accused told this Court that she was barely six months in the organization when she found herself in the Tender Committee. There is no indication that prior to her appointment, it was ascertained that she had any prior experience in procurement matters.
215. Basing on the example of this witness and the 5th Accused's statement which her evidence supports, and the clearly bungled process of evaluation that attended the tender, there is a lot of merits in the defence presented by the 1st, 2nd, 3rd, 5th, 6th, and 7th Accused persons herein. In those circumstances, it was highly likely that they would fall upon the 4th Accused as the expert on procurement matters for guidance.
216. The likelihood that this was the case will be more apparent when I discuss the 2nd and 3rd Counts herein which affect only the 4th Accused.
217. I therefore reject the denial by the 4th Accused, that he offered no guidance to the CTC. As a person appointed on the basis of his knowledge and expertise in Procurement matters, it follows that the fact



- that the CTC made an erroneous award in violation of the applicable threshold matrix shows that the 4th Accused deliberately and wilfully misled them to the decision.
218. Can it then be said in these circumstances, that the 1st, 2nd, 3rd, 5th, 6th and 7th Accused as CTC members were careless in awarding the contract as they did?
  219. I do not think so as it is clear from their defence, that they had in mind, the threshold matrix but gave it an erroneous interpretation, in which they determined that the amount of ksh 1 million referred to, related to the price of an individual item and not the total expenditure amount. It cannot in these circumstances, be supposed that they disregarded the Threshold Matrix, as alleged in the charge.
  220. It is also clear that the guidance that they say they got was misleading as the 1st Accused testified that the Procurement Manager- the 4th Accused who was in the room, 'had no issues'. He also testified that the CTC received all the clarifications it sought.
  221. As is obvious, the charge in section 45(2) of the ACECA which the CTC Members face in Count 1 is not a strict-liability offence and requires the proof of the mens rea elements 'wilfulness' or 'carelessness'.
  222. As such, the nature of the provision is such that an entity such as a Tender Committee can err in good faith.
  223. Moreover, carelessness in its ordinary meaning suggests action that is inattentive or negligent. This presupposes a knowledge or understanding of the matter under consideration in the first place.
  224. In conclusion, it is my finding that the charge in Count 1 is not proved beyond all reasonable doubt against the 1st, 2nd, 3rd, 5th, 6th, and 7th Accused, who were all charged by virtue of having been members of the CTC.
  225. I will tie the discussion in relation to the 4th Accused in Count 1, to that for Counts 2 and 3, which he faces individually.
  226. These Counts relate to two documents produced herein as Pros Exh 6 and 13. They are a Request for Quotation Form and a Confidential Business Questionnaire in the names of Ultra Limited, one of the Suppliers who supposedly unsuccessfully presented a bid for the procurement herein.
  227. These Documents and other Documents supposed to have been presented by three other allegedly invited Suppliers namely Span Image Limited, Stellan Consult Limited and Ad Gift Limited were disowned by witnesses called from those entities.
  228. The same witnesses pointed out to Court various aspects of misinformation about their companies in the documents. For instance, in some of the documents, and notably for Ultra Company Limited, as seen hereinabove, the Bankers of the entity are misrepresented. It is also purported in the entries that the company made bids for items that it does not manufacture. It is also purported to have indicated that it would source its locally manufactured goods in China.
  229. The Particulars of the Company on its Confidential Business Questionnaire (Pros Exh 13) are according to the evidence, those of strangers unknown to the witness called from the entity.
  230. It is the view of the Court that the nature of misinformation entered in these documents suggests that the hand written entries therein could not have been made by or with the authority of the Company.
  231. The evidence of the Investigator is that these documents were forged. He relies on the evidence of the Document Examiner called by the Prosecution (PW 14) who opined that the writings in the said documents which he analysed were similar to the known and standard writings of the 4th Accused.



The Document examiner also opined that the stamp impressions on the said documents did not match the sample stamp impression provided by the Company.

232. As seen however, this opinion is in conflict with that of Mr Mackenzie Mweu (DW 8), called by the 4th Accused, who found that the same writings had no such similarity. His opinion on the stamp impressions however, seems to agree with that of PW 14.
233. Taken as it is then, it is still the evidence of this witness that the stamp impression on the Quotation and the Confidential Business Questionnaire in the names of the Ultra Limited is not from the stamp of the company.
234. The witness from the company did not totally disown the stamp. She was however clear that the stamp was last used in 2006. I examined the sample of the then current stamp impression produced herein and noted that the two stamp impressions have no visible layout similarity.
235. The testimonies of Mary Kitaka (PW 11), Erastus Waititu Karanja (PW2) contain conflicts on some matters which make it improbable that both witnesses would be telling the truth in those matters.
236. One of those matters relates to the manner in which the Quotation documents herein reached the Tender Opening Committee. Mary Kitaka testified that the documents were with the 4th Accused, while Erastus Waititu testified that the documents were in the CTDLT Tender box. The 4th Accused in his defence does not agree that he had the Documents.
237. The evidence of the four Suppliers I have already referred to in this judgment is that they did not participate in the procurement in any way. If the evidence from the Suppliers is accepted, then there is no way they would have dropped the documents in the CTDLT Tender Box.
238. The evidence of Erastus Waititu that the Documents were opened on 19/10/2010 is supported by entries in the Tender Opening Register- Pros Exh 33. According to the witness, One Eric Mituga was the Chairman of the Tender Opening Committee. He is not a witness in this matter. He did not sign Pros Exh 33, which is only signed by PW2.
239. Mary Kitaka's evidence on the other hand is that the Chairman of the tender –opening Committee meeting was actually Erastus Waititu (PW 2). The 4th Accused also referred to Mituga as having been the Chairman of the Tender-Opening Committee.
240. PW 2 gave evidence herein that the 4th Accused called him two weeks after the tender opening and instructed him to transfer the details in the Tender Opening Register ( Pros Exh 33) to another Register ( Pros Exh 34) named 'Tender Selling Register'.
241. It is confirmed in the Prosecution Document Examiner's evidence that the witness indeed made the entries. It is not clear why he agreed to do it two weeks after his Committee had completed its work or why he agreed to make the entries in a register that his Committee was not mandated to use.
242. The witness who acknowledged in cross-examination that he was a CPA-K did not give very clear answers to the question why he made the entries. He could not explain why he left some columns in the Register he was filling blank.

He stated under cross-examination by Mr Odera;

...Mr. Ndungu told me that since the list I had made was a paper I was to transfer the entries to a hand register...'

243. Pros Exh 33 which is the leaf that he filled is a standard printed CTDLT Document and therefore this explanation does not make sense. The witness who was based in the Finance Department also conceded



- that he did not discuss the odd occurrence with his boss. His explanation that this was because it did not concern the Finance Department is equally senseless. It is not clear and he does not explain why he did not take the issue up with the CEO whom his Committee was accountable to.
244. I hold serious reservations on the level of candour of PW2 based on his evidence aforesaid. It is clear to me that the witness was not entirely truthful. I conclude that he is a witness of diminished credit.
245. His statement that he collected Quotation Documents from the Tender Box is in direct conflict with the evidence from Supplier companies as I have already stated. His mention of Eric Mituga is not confirmed by any of the documents that his Tender-Opening Committee prepared. None of the Documents he has identified are signed by the said Eric Mituga.
246. In relation to this witness, the 4th Accused denied that he had instructed him to make entries in the Tender Selling Register- Pros Ex 34. He also stated that the witness had lied against him.
247. From the unclear responses of the witness, it is likely that indeed PW2 was not acting under any instructions from the 4th Accused when he transferred the information in the Tender Opening Register to the Tender-Selling Register. One would easily infer that he worked in cahoots with the 4th Accused in that regard.
248. The Document identified by the witness- pros Exh 34 speaks for itself in terms of the entries and therefore without having called any evidence against it, the 4th Accused lacks basis to say that the 4th Accused lied against him as far as that document goes.
249. The Tender Selling Register (Pros Exh 34) and another Register-A quotations Register (Pros Exh 47) were maintained by Mary Kitaka who testified that she was the one responsible for making entries in Pros Exh 34. She identified her writings in the Register.
250. The 4th Accused testified in relation to the four regret letters herein, that he claimed he gave Mary Kitaka- PW 11 the to dispatch, a matter that she denied. Apart from saying that he 'raised; them, he does not refute evidence that he personally collected them from the office of the CEO.
251. Mary Kitaka was able to identify The Procurement Unit Delivery Book (Pros Exh 48) which did not contain entry on any such letters. The evidence of staff working in the office of the CEO (PW 7 and 8) is that the letters were brought to the office of the CEO for signature by the 4th Accused, who also collected the letters.
252. Examination of her oral testimony shows that it has ample support in Documentary evidence before the Court such as the contents of the Tender Selling Register, the Delivery Book from her office and the Quotations Register. It also has support in other testimony adduced herein such as that by PW7 and PW8 who stated that the regret letters were personally collected by the 4th Accused from the CEOs Office and therefore the 4th Accused's claim that he gave them to her to dispatch is not true.
253. Contrary to the testimony by the 4th Accused that she made Pros Exh 3 and all the Quotation documents before the Court, she has not been linked to the said documents by both Document examiners' who testified herein. It is instead the 4th Accused who is linked to hand written to the Documents although he refutes and has called his own expert.
254. I find from the foregoing that Mary Kitaka (PW 11) is a credible and truthful witness in this trial and I accept her evidence. The 4th Accused has called no evidence to show that she harbours a grudge against him.
255. I therefore find that her statement that she received the Quotation Documents herein unopened from the 4th Accused to be a true statement. I find that it cannot be true, as PW2 purported, that the



- documents were obtained from the Tender Box. Such a conclusion would in any event be problematic as the evidence from the suppliers, except Pinnacle Media
256. Productions Ltd who won the award, is that they never received invitation to participate in the procurement.
  257. I also accept her statement that PW2 chaired the Tender Opening Committee on that date. I do not accept that one Mituga, mentioned by both PW2 and the 4th Accused was the Chairman of the meeting. This Committee had no minutes and the said Mituga never signed on any of the documents identified by PW2 in Court.
  258. During his testimony, the 4th Accused found himself hard pressed severally during cross examination by Mr Omirera, especially with regard to a management meeting that he referred to as 'ad hoc' which had no Minutes, and in which he alleged, samples obtained from suppliers were discussed.
  259. He could not recall the date of the said meeting and only stated that it occurred between 6th September 2010 and 28th October 2010 which are the dates on the charge sheet in Count 1. These purported dates are in my view, nothing but a creation of the 4th Accused lifted directly from the charge sheet.
  260. He also contradicted himself when he conceded that it is the Human Resource Officer and not his office that had obtained the samples.
  261. He conceded that no sample was obtained from Ad Gifts limited and it is therefore unclear on what basis the company would have been invited to quote.
  262. Although he stated that 'we went' to Ultra and Pinnacle Media Limited for samples, the evidence of Ultra Limited is that they were never aware of the procurement at all.
  263. The 4th Accused testified that all the invited Suppliers were pre-qualified, which has support in the evidence of the CEO and Mary Kitaka (PW 11). Evidence from Ultra Limited is that the company was not participating in Government Tenders until 2012. I have found no suggestion in the evidence of the witness that she was untruthful in the matters that she stated in Court. She was clear that her company never participated in the CTDLT procurement as purported.
  264. I now revisit the issue of the conflicting opinions of the two Document Examiners herein. I have considered the said opinions in light of the factual circumstances of this case, and also bearing in mind that I am not thereby bound.
  265. There are in my view, serious factors militating against the opinion rendered herein by the witness called by the 4th Accused, namely Mr Mackenzie Mweu (DW 8). The most important of these is that in reaching the opinion, the witness was not made aware of the existence of the opinion by PW 14 so that his report could explain the findings reached by the Prosecution's Document Examiner PW 14. As such, the report by the witness, which directly differs with that by PW 14 does not help the Court to distinguish the two opinions. To do this, the Court has to resort to other factors, such as quality of equipment used in the two examinations and the depth of the Reports.
  266. The witness was made to concede under cross-examination, that the equipment at the CID Laboratories, which he also said he procured, are much more sophisticated and hence more likely to permit a more accurate analysis of the samples submitted. This is also apparent from the description of method by PW14.
  267. Although he claimed that his equipment was highly calibrated, his testimony was that he had used a microscope and a magnifying glass. I have serious doubts that such equipment could match the accuracy of the equipment his counterpart stated he used in his examination.



268. The witness was also hard pressed to explain why, unlike his counterpart, he had not indicated his method in his report. His response that those were technical details that could not be in the report, or that everything could not be included in the report are unconvincing to these Court, especially noting the witness's stated experience of thirty years.
269. As noted from the evidence, the Document Examiner called by the Prosecution has explained in detail, the method he used to arrive at his findings.
270. Finally I must in considering the opinion, take into account that the same was sought by the Accused during the pendency of this case, and therefore the Court must weigh the same with extreme caution, as the person for whom it is sought is directly affected, and clearly an interested party in the outcome of these proceedings.
271. I therefore in view of the foregoing, do not find the opinion of DW8 helpful in this case and I hereby reject it. On the other hand I have no reason to fault the Opinion of PW 14 and I accept it.
272. Having considered and evaluated the evidence as it relates to Counts 2 and 3, I find that the Quotation Documents produced herein and the accompanying Confidential Business Questionnaires were not issued by the CTDLT Procurement Unit as purported, and were forgeries.
273. I find that two of those documents relating to the Company known as Ultra Limited were filled by the 4th Accused as derived from the evidence by the Prosecution Document Examiner- PW 14. I also find that the stamp impressions in those documents were forgeries and that by inference; the 4th Accused made or caused the said stamp impressions to be made in the documents.
274. Consistent with the above, I further find, in agreement with the evidence of Mary Kitaka (PW 11) that she neither prepared nor issued the Quotation documents to the firms alleged, who in any event, never got them, nor was she involved in the selection of companies purported to have been invited to quote. I find that this was the secretive work of the 4th Accused.
275. I find that because it is shown that two of the forged documents were made by the 4th Accused, only the 4th Accused person knew the whereabouts of those Quotation Documents after preparation and how they found their way into the procurement process. I infer from the facts that he had possession of the documents and worked with PW2 to knowingly initiate a fraudulent procurement process.
276. I find it well demonstrated in the evidence that the 4th Accused had an unexplained personal interest in the subject procurement as to interfere with it and did in fact interfere by causing PW 2 to enter details of the Quotation Documents in the wrong register maintained by his office.
277. Viewed in this context, there existed sufficient reason to equally conclude that the 4th Accused had also interfered with the documentation in the Procurement as shown in the evidence.
278. It is clear therefore, that in his unexplained personal pursuit, the 4th Accused went as far as employing criminal conduct to ensure that the Procurement went according to his desired way, and as such, there is basis to find that he misled the CEO, and the CTC at the time of its award of the contract. It is clear that he misled the CEO by purporting to write Regret letters for his signature, addressed to firms that were in fact never party to the Procurement.
279. The 4th Accused, as the Head of the CTDLT Procurement Unit in my finding, also misled the CTC from the moment he purported that there was a properly founded agenda relating to this procurement for their discussion in a CTC Meeting which he personally convened, and not just when CTC members sought his guidance during the meeting as seen from the evidence of the 1st Accused.



280. Further as relates to Count 1 herein, the 4th Accused ensured an unsuited procurement method namely Request for Quotations by deliberately misinterpreting the PPOA FAQ Document which clearly applies to Open Tender method. It is this misinterpretation that ensured that the 4th Accused used a Pre-Qualified List which ensured that only one method- namely Request for Quotations would be used in the procurement. The choice of this method was, in view of the budget lines involved, itself a violation of Section 26(3)(b) of the Act.
281. The 4th Accused in fact had absolutely no basis to make any reference to the said PPOA FAQ document because the value of the intended procurement was way beyond the ksh 6 million limit placed on the Open Tender method in the relevant Threshold Matrix.
282. Further the 4th Accused in pursuit of his fraudulent design did not correct his mistake when he received the Memo from the CEO to convene a CTC Meeting to discuss the award. As such, in the performance of his unique function under the Act, he wilfully disregarded section 26(3)(b), Section 88(b) of the Act and Regulation 59(1) of the Regulations.
283. The 4th Accused further violated regulation 8(3)(f) and regulation 59(1)(c) of the Regulations and Section 89 of the Act when he purported to have issued Quotation Documents to the cited firms when he knew, as the evidence shows, that only one- Pinnacle Media Productions Limited received it.
284. From the evidence, it seems that the 4th Accused had pre-determined that the award in the Procurement would go to Pinnacle Media Productions Limited and set in motion a scheme that ensured that eventuality.
285. The only inference can be made from the evidence is that the 4th Accused deliberately avoided the use of Open Tender method which would have required advertisement to stave off the competition that would bring against Pinnacle Media who were his pre-determined contract winners.
286. To make it even more certain he created false invitations to quote whose contents ensured that Pinnacle Media would be the eventual winners of the bid. The false process then ended at the CTC where he was present to offer necessary (mis)‘guidance’.
287. It is my conclusion from the foregoing discussion that Count 1 is established against the 4th Accused beyond all reasonable doubt.
288. The charge in Counts 2 and 3 are charges of making a document without authority. The 4th Accused stated in his defence that as Procurement Manager, he could make a Quotation Document. I have found that the quotation document in question is a forgery.
289. While the law, which is regulation 8 does in fact empower the 4th Accused and the Officers of the Procurement Unit to make and issue Request for Quotation Forms, the law does not empower them to forge documents.
290. It is not clear why the Investigator who properly concluded in my view, that the two documents were forgeries preferred a charge of making a document without authority under section 357(a) of the Penal Code. It is my view that this was not the proper charge to prefer from the evidence.
291. The proper charge is one of Forgery contrary to section 349 of the Penal Code as read with section 345.
292. I have read the two provisions and noted that both are felonies. The offence charged is a more grave offence in terms of punishment compared to the one in section 349.



293. As I have found an offence is disclosed against the 4th Accused, I have considered the provisions of section 179 CPC. Section 179(2) empowers the Court to convict for offences minor to the one charged, though not charged themselves, if disclosed in the evidence.
294. The facts before me in relation to Counts 2 and 3 do not disclose the charged offence of Making a Document without authority but do disclose fully, the offence of forgery, a minor offence relative to the one charged.
295. I therefore invoke the powers bestowed upon the Court under section 179 (2) CPC and convict the 4th Accused of the charges in Counts 2 and 3 as well.
296. In the end, the 1st, 2nd, 3rd, 5th, 6th, and 7th Accused persons stand acquitted of the charge in Count 1 under section 215 CPC. The 4th Accused stands convicted in Counts 1, 2 and 3 under the same provision.

R/A 14 days.

**FELIX KOMBO**

**SENIOR PRINCIPAL MAGISTRATE**

**DELIVERED IN OPEN COURT THIS 31ST DAY OF JULY 2017**

