



**Maluti v Director of Public Prosecutions & another (Petition
E013 of 2024) [2025] KEHC 14835 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E013 OF 2024**

JRA WANANDA, J

OCTOBER 21, 2025

**IN THE MATTER OF ARTICLES 22(1), 23(1)(3), 25(C), 48, 50(1)(2)(K)(6),
159(1)(2)(A)(E), 165(3)(A)(B) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULE 4(1), 10(1)(2), 11 AND 13 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF ELDORET MCACC/1/2012 – REPUBLIC V
MIKOYA LABAN SACHILE, PAMELA MALUTI, JOHN KHAEMBA
SIMIYU, HON. PERIS SIMAM, WISDOM KIMUTAI, ENOCH SIMAM**

AND

**IN THE MATTER OF NAIROBI HCACECA/20/2017 – MIKOYA LABAN
SACHILE, PAMELA MALUTI, JOHN KHAEMBA SIMIYU, HON.
PERIS SIMAM, WISDOM KIMUTAI, ENOCH SIMAM V REPUBLIC**

AND

**IN THE MATTER COACRA/100/2019 - JOHN
KHAEMBA SIMIYU & PAMELA MALUTI V REPUBLIC**

AND

IN THE MATTER OF AVAILABILITY OF NEW AND COMPELLING EVIDENCE

AND

**IN THE MATTER OF MEETING OF THE KENYA RURAL ROADS AUTHORITY
REGIONAL TENDER COMMITTEE HELD ON 25TH MARCH, 2010**

BETWEEN

PAMELA MALUTI PETITIONER



AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

JUDGMENT

1. The Petitioner is a former Regional Procurement Officer at the Kenya Rural Roads Authority (KERRA). However, her career at KERRA came to a premature end when in the year 2012, she was charged before the Magistrate’s Criminal Court at Eldoret, with, inter alia, the offence of abuse of office allegedly committed in the course of execution of her work, in respect to a tender award. She was accordingly suspended from her duties, and later convicted on 5/08/2016. Her appeals to the High Court and later, to the Court of Appeal were also unsuccessful.
2. The Petitioner, citing violation of her constitutional rights at the trial, has now returned to this Court seeking a new trial at the Magistrate’s Court. In her Petition dated 3/06/2024, and filed through Messrs Mwaniki Gachuba Advocates, she seeks orders as follows:
 - i. A declaration that the Respondents violated the Petitioner’s right to information, fair administrative action and fair trial by withholding and concealing from her and the trial Court, the minutes of the meeting of the Regional Tender Committee held on 25/03/2010.
 - ii. A declaration that the copy of the minutes of the meeting of the Regional Tender Committee held on 25/03/2010 is new and compelling evidence.
 - iii. An order that a new trial be conducted against the Petitioner for abuse of office contrary to Section 46 as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act*, No. 2003 as charged under Count Seven of the Charge Sheet dated 31st May, 2013.
 - iv. An order that the Petitioner be admitted to bond and bail on reasonable terms and conditions.
 - v. An order that the suspension from office under Section 62 of the *Anti-Corruption and Economic Crimes Act*, 2003 dated 2nd July, 2012 continues to be in force.
 - vi. An order that the Kshs 300,000.00 be refunded to the Petitioner.
 - vii. An order that the Petitioner is awarded Kshs 5 million as compensation for violation of her right to freedom from psychological torture, right to access to information held by the Respondents, right to fair administrative action, right to access to justice and right to fair trial.
 - viii. Costs of the Petition be borne by the Respondent.
3. In her Affidavit in support of her case, the Petitioner has described herself as a Procurement Practitioner and a member of the Kenya Institute of Supplies Management. She deponed that on 17/09/2009, KERRA invited applications for prequalification of contractors for maintenance of roads under the Fuel Levy Constituency Funding FY 2009/2010, and that on 6/10/2009, KERRA changed the closing date for submission of applications for prequalification of contractors.
4. She stated that she joined KERRA as a Regional Procurement Officer and was posted to Uasin Gishu Region, on 6/01/2010, she invited the pre-qualified contractors to submit tenders for “Routine Maintenance and Spot Improvement Works During the 2009/2010 Financial Year” of multifarious roads within Uasin Gishu Region (comprising 3 Parliamentary Constituencies) to be financed under



- the 2009/2010 twenty per cent Road Maintenance Fuel Levy (RMFL) and the 2009/2010 twelve per cent (later ten per cent) of the RMFL. She deponed that the roads were specifically listed as either funded under twenty per cent of the RMFL or under 12 per cent (now ten per cent) in accordance with Section 6(2)(d)(i)(ii) of the *Kenya Roads Board Act*, 2000. She deponed further that on 25/01/2010, the Tender Opening Committee opened all the tenders that were submitted in response to the invitation dated 6/01/2010, that the Committee evaluated all the tenders that were opened on 25/01/2010 and made appropriate recommendations in respect to either the Regional Tender Committee or to the Constituency Roads Tender Committee.
5. It was her deposition that the Evaluation Committee's recommendations in respect of tenders that were financed under the 22 per cent of the Roads Maintenance Fuel Levy were adjudicated and awarded by the Regional Tender Committee, and that as the "Routine Maintenance and Spot Improvement Works of Bayete-Chuiyat-Tulwet Road in Eldoret South Constituency During the 2009/2010 Financial Year" was financed under the 12% of the Roads Maintenance Fuel Levy, that consideration of the Evaluation Committee's recommendations and award of the tenders thereof was the function of the Regional Tender Committee, and the Evaluation Committee then recommended that Kachur Holdings Limited's be awarded the tender.
 6. She added that on 25/03/2010, she invited the Regional Tender Committee to consider the Evaluation Committee's evaluation report and recommendations in respect of the Bayete-Tulwet Road, that on the same date, the Regional Tender Committee convened, considered the Evaluation Report and awarded Kachur Holdings Limited the tender. She deponed that the Regional Tender Committee members present were Eng. Laban Shachile (Chairman), Joseph Mwathi (member) and Wilson Lelei (member) and the Petitioner attended in her capacity as the Secretary. She deponed further that on 31/03/2010, she issued a notification of award in accordance with the Regional Tender Committee's award decision, on 6/04/2010, Kachur Holdings Limited accepted the award, on 21/04/2010, KERRA and Kachur Holdings Limited entered into the contract for execution of the works, and on 26/04/2010, KERRA's Regional Manager Eng. Laban Shachile ordered Kachur Holdings Limited to commence works. She then stated that Kachur Holdings Limited executed the contract and was paid the contractual sum of Kshs 5,010,040/- upon approval by Eng. Shachile and later by the Regional Manager, Eng. Robert Mule.
 7. It was her further deposition that on 9/08/2011, the Kenya Anti-Corruption Commission (KACC) requested KERRA for inter alia, Tender Committee minutes that awarded the tender, on 10/08/2011, Eng. Mule handed to the KACC's George Ojowi, inter alia, the Minutes of the Regional Tender Committee meeting held on 25/03/2010 that awarded the tender, and that on 14/06/2012, he was arraigned in Eldoret Magistrate's Court together with Mikoya Laban Sachile, John Khaemba Simiyu, Hon. Peris Simam, Wisdom Kimutai and Enoch Simam, and she was charged for, inter alia, abuse of office contrary to Section 46 as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003 (ACECA) in case number MCACC/1/2012-Republic v Mikoya Sachile and 5 Others. According to her, the particulars of the charge (Count VII) were that on 31/03/2010, at the KERRA office in Eldoret, she used her office to improperly confer a benefit on Kachur Holdings Limited by issuing the company with a Letter of Award for the Tender before the bids were adjudicated and award made by the Eldoret South Constituency Roads Committee.
 8. She contended that whereas the Investigating Officer was seized of the original minutes of the Regional Tender Committee meeting held on 25/03/2010, he deliberately and maliciously concealed and withheld the same from the Petitioner and the trial Court, and upon which the trial Court found her with a case to answer and placed her on her defence. She deponed that while defending herself, she sought and was granted an order of discovery of the said minutes but she could not find a copy



thereof and the trial Court ordered the trial to proceed. She added that she was grossly prejudiced as she conducted her defence without the benefit of the said minutes and that the Respondents' false and malicious narrative prevailed and the trial Court found her guilty as charged, convicted her of all counts and sentenced her to pay a fine of KShs 300,000/- and in default, to serve a jail sentence of 1 year. She stated that although she paid the fine, aggrieved by the decision, she appealed to the High Court at Nairobi in HCACECA/20/2017, which Court however confirmed the conviction and sentence in Count VII for abuse of office. She deponed that she appealed further to the Court of Appeal at Nairobi in COACRA/100/2019 which Court, too, dismissed the Appeal. According to her, her Advocate advised her that she stood no chance of proceeding to the Supreme Court, and that she should instead find a copy of the said minutes of the meeting of 25/03/2010.

9. She deponed that in view thereof, on 12/03/2024, she requested the 2nd Respondent for a copy of the minutes of the said meeting but which request was not responded to, the Commission on Administrative Justice intervened and directed the 2nd Respondent to provide the minutes which direction the 2nd Responded also did not respond to.
10. She stated that after a tedious and laborious scouring of her documents in her Nairobi and Kakamega homes, on 28/05/2024, she came across a copy of the minutes, that having exhausted her right of appeals and having come across the new and compelling evidence that demonstrates that she issued the letter of award after the Regional Tender Committee's award, she desires a fresh trial in respect of Count VII (abuse of office). In conclusion, she contended that her Advocate has advised her that this Court has jurisdiction under the provisions of *the Constitution* cited above, to grant her prayers for a fresh trial.

2nd Respondent's Replying Affidavit

11. The Petition is opposed by the 2nd Respondent by way of the Replying Affidavit sworn by the said George Ojowi, who described himself as the Deputy Director, Directorate of Investigation at the 2nd Respondent. In the Affidavit, drawn by Esther Githinji Advocate, he contended that the Petitioner is inviting the Court to re-open a trial that has been conclusively determined at the Magistrate's Court, the High Court and the Court of Appeal. He averred that on 19/08/2020, the Petitioner filed a Notice of Appeal at the Supreme Court but failed to follow with lodging an appeal and consequently, the Notice was deemed withdrawn upon lapse of the stipulated timelines as per an order made by the Supreme Court.
12. He then deponed that the contract No. UG/2-27-09/10-003 which was related to Tender Ref: KeRRA/PRO/VOL. 1:16 became the subject of the 2nd Respondent's investigation sometime in August 2011 following an anonymous complaint alleging procurement irregularities and conflict of interest. According to him, that contract was illegally awarded to a newly registered company, Kachur Holdings Ltd, owned by former Member of Parliament for Eldoret South Constituency, Hon. Peris Chepchumba Simam and her husband. He stated that the 2nd Respondent initiated an investigation in which he served as the Lead Investigator and which was conducted under the auspices of the 10 per cent Road Maintenance Levy Fund (RMFL) managed by KeRRA for the 2009/2010 financial year. He deponed further that as part of the investigation, on 9/08/2011, the 2nd Respondent issued a request to KeRRA for documents related to the tender award, including minutes for the relevant Tender committee meetings, on 10/08/2011, KeRRA furnished the documents through its Regional Manager, in the presence of the Petitioner, and received by the deponent and another officer at the KeRRA offices in Eldoret, as documented through an inventory listing signed also by the Regional Manager and the Petitioner. He stated that within the inventory were specified the original documents submitted and the minutes pertaining to the allocation of the contract was not original and that



furthermore, the minutes supplied related to Eldoret South Constituency Roads Committee meeting held on 1/04/2010, and not the alleged Regional Committee meeting of 25/03/2010 as claimed by the Petitioner.

13. Mr. Ojowi deponed further that the Tender Committee meeting of 1/04/2010 was preceded by invitation letters dated 30/03/2010 authored by the Petitioner in her capacity as the Procurement Officer inviting Tender Committee members, which minutes indicates that the Petitioner was present, a fact also confirmed by witnesses who testified at the trial and who also confirmed that the Petitioner presented the Evaluation Report at the meeting, which was signed by all members, including herself. According to him, it is clear that the Eldoret South Constituency Roads Tender Committee which only had a mandate over 22 per cent RMLF roads deliberated and affirmed the recommendation made by the Evaluation Committee recommending the award of 10 per cent RMLF contract for Bayete-Chuiyat-Bargeiywa road to Kachur Holdings Limited, and that, in fact, the Petitioner, in her statement with the 2nd Respondent confirmed her attendance in the Tender Committee meeting of 1/04/2010, and that the Committee affirmed the recommendation to award to Kachur Holdings Limited.
14. According to him, the impugned minutes of 25/03/2010 were never supplied to the 2nd Respondent during investigation and the Petitioner only introduced the issue of the minutes at defence hearing purporting to have obtained them from KeRRA following a Court order. He urged that the Petitioner, cognizant of the irregularity in the 22% RMLF Constituency Roads Tender Committee deliberations on a 10% RMLF road and her issuance of a Letter of Award on 31/03/2010 before the award, attempted to counter the Prosecution's evidence and that during her testimony in the trial, she claimed that the Eldoret South Constituency Roads Tender Committee meeting held on 1/04/2010 did not deliberate the subject contract but that it was undertaken by the Regional Committee meeting of 25/03/2010. He deponed further that this attempt failed miserably following the revelation that the Regional Committee minutes for 10% RMLF of 25/03/2010 (impugned minutes) never originated from KeRRA and were thus not genuine, which fact was confirmed by Prosecution witnesses called under Section 212 of the Criminal Procedure Code in rebuttal to the defence as the same was a new issue introduced at the defence stage.
15. He referred to the testimony of PW14 who denied supplying the minutes to the Petitioner and PW11 and PW12 who, though claimed to have attended the said meeting, both denied receiving the invitation alleged by the Petitioner. He contended that he, too, in his testimony, denied receiving the alleged minutes and the Petitioner's Counsel was allowed to, and did, cross-examine him on this issue. He averred that although the Petitioner appears to have been aware of the alleged new evidence, she never brought it up in her grounds of appeal either before the High Court or Court of Appeal. He also observed that in its Judgment, the Court of Appeal observed that she belaboured in demonstrating that the bids were correctly stamped with the date of 21/01/2010.
16. He contended further that the Petitioner's allegation that the impugned minutes are new and compelling evidence is preposterous as they have been exhaustively addressed and adjudicated by the Magistrate's Court, the High Court, and the Court of Appeal, and that throughout the proceedings, it is only the Petitioner who raised concerns about the Regional Tender Committee minutes. According to him therefore, there is no new and compelling evidence, the Petition is filed is contrary to the principles of finality of Court decisions and judicial economy that underlie the judicial and legal system. He therefore refuted the allegation that he had maliciously concealed or withheld the minutes of the meeting of 25/03/2010, and reiterated that the records from KeRRA clearly show that the minutes furnished to him were not original, as confirmed by the letter dated 10/08/2011.
17. He also alleged inconsistencies in the Petitioner's statements and pointed out that according to the Petitioner, she invited the Committee to consider the Evaluation Committee's recommendations on



25/03/2010 and the meeting was held on the same day with Kachur Holdings Limited being awarded the tender, but however, the invitation letter dated 27/05/2010 (PM7) exhibited by the Petitioner indicates that the meeting was scheduled for 2.00 pm on 25/03/2010, and that in contrast, the minutes exhibited as PM21 by the Petitioner indicates that the meeting took place from 10.00-1.00 pm on 25/05/2010. According to him therefore, this discrepancy raises fundamental questions on the veracity and legitimacy of the minutes and shows that she is being less than forthright. He also submitted that the Petitioner is not being candid or transparent since her claim contradicts her letter dated 12/03/2024 exhibited as PM19 in which she asserts that the deponent took the original minutes and did not leave a copy at the KeRRA offices. He stated that this raises the question: if the deponent supposedly took the original minutes and did not leave a copy, how is it that the Petitioner now claims to have found a copy at her residences in Nairobi and Kakamega? According to him, this contradiction casts doubt on the Petitioner's credibility.

18. He contended further that the Petitioner is on a fishing expedition to discredit the 2nd Respondent so as to undermine public trust in the 2nd Respondent's efforts to combat corruption, that given this context, the minutes the Petitioner claims to have found in her home should be regarded as false and fabricated, and urged the Court to dismiss the purported minutes and view them with the contempt they deserve. Regarding the claim that the 2nd Respondent has breached the Petitioner's right to information, he termed the same as utterly wrong noting that she never sought any documents from the 2nd Respondent, and the defence proceeded without any request for the minutes, thus confirming that the Petitioner was aware the minutes did not exist.
19. He agreed that the 2nd Respondent received the request for minutes on 14/03/2024 upon which the 2nd Respondent after conducting a thorough review of its records, confirmed that no such minutes were presented in its exhibits or inventory received from KeRRA, and thus the 2nd Respondent was unable to provide what it did not possess. He pointed out that the Petitioner herself acknowledges this fact because she testified that she went to KeRRA offices to get a copy of the minutes with a Court order. According to him therefore, on whether the trial should be heard afresh, the Petition does not meet the threshold for such new trial under Article 50(6) of *the Constitution* as read with the Supreme Court guidelines outlined in the case of Tom Martins Kibisu v Republic [2014] eKLR. He also pointed out that at the Court of Appeal, the Petitioner submitted against a retrial citing the 6 years had lapsed, the Petitioner was acquitted for most of the counts, there was no guarantee that witnesses were still available, and her co-accused did not prefer appeals to the Court of Appeal. According to the deponent therefore, the Petitioner's sudden change of mind is made in bad faith as the Petitioner is well aware that a retrial is not feasible nor ideal in the circumstances. He was therefore emphatic that the Petitioner has failed to demonstrate how her constitutional rights have been or are threatened to infringe.

Petitioner's Further Affidavit

20. The Petitioner then filed the Further Affidavit she swore on 23/09/2024. She pointed out that the 2nd Respondent could not have sworn the Replying Affidavit on behalf of the 1st Respondent, that re-opening the case is her right as guaranteed under Article 50(6) of *the Constitution*, that she was unable to file a Petition of Appeal at the Supreme Court after the Court of Appeal refused to certify her intended Appeal as being of public interest and thus she reached her dead end. She added that the investigations were unconstitutional by virtue of Article 252(2) of *the Constitution* which commands that a complainant cannot be anonymous and must be a person who is entitled to institute Court proceedings under Article 22(1)(2), that by hiding behind the anonymous complainant, the 2nd Respondent allowed itself to be misused and gave comfort to busybodies and gossipers actuated by malice. She added that the investigations was an unfair administrative action with the meaning of Article 47(1) of *the Constitution* and Section 105(1)(d) of the Public Procurement and Disposal Act,



2005. She deponed further that the powers to investigate non-compliance of procurement law is now vested in the Public Procurement Regulatory Authority, and not in the 2nd Respondent. She urged further that the 2nd Respondent did not cite the law that empowered the Constituency Roads Tender Committee that was in charge of 22% RMFL projects. She also contended that the said George Ojowi, recorded her statement through coercion, threats and intimidation, which fact led the trial Court to discard it when the Prosecution tried to produce it in evidence.

21. In a rather strong language, she then deponed that the said George Ojowi, is an incorrigible liar and is unfit to hold to serve in the public service as he destroyed or concealed public documents in the form of the minutes of the meeting of 25/03/2010. She added further that the witnesses who testified at the trial in respect to the said minutes perjured themselves due to coercion, threats and intimidation by the said George Ojowi. She also contended that had George Ojowi not concealed the minutes, he would have had the opportunity to learn during cross-examination as to why and how the meeting was rescheduled from 2.00 pm to 10.00 am on 25/03/2010. She then reiterated that had the said George Ojowi, produced the minutes in Court, the trial Court would most likely have declined to admit the charge.

Hearing of the Petition

22. The Petition was canvassed by way of written Submissions. The Petitioner filed the Submissions dated 24/09/2024, while the 2nd Respondent filed the Submissions dated 18/10/2024. On her part, the 1st Respondent, apart from not filing its own respective Response to the Petition, did not also file any Submissions. With leave of the Court, the Petitioner filed the Supplementary Submissions dated 25/10/2024.
23. I thereafter fixed the matter for Judgment. However, the Court file somehow “disappeared” and after efforts to trace it bore no fruits, upon Application by the Petitioner, I ordered for reconstruction thereof. Thanks to the Judiciary Case Tracking System (CTS) online system, and the parties’ co-operation by supplying the pleadings, the retrieval of the relevant documents for the reconstruction exercise was swiftly concluded. I then invited the Counsels to peruse the Court file and satisfy themselves that all their pleadings were in the Court file. It was therefore only after they confirmed that they had perused the file and ascertained that all pleadings were on record, that I proceeded to fix the matter afresh for Judgment.

Petitioner’s Submissions

24. The Petitioner’s Counsel reiterated that the Petition is premised on Article 50(6) of *the Constitution*, and that having appealed up to the Court of Appeal and that having declined to certify her intended Appeal to the Supreme Court as being of public interest, she had exhausted her appeal avenue. He cited the case of Philip Mueke Maingi & 2 Others v Republic [2022] eKLR, in which the case of James Mwaniki Kamau vs Republic, Makueni High Court Misc. Application No. 179 of 2014 was also referred to. On the issue of “new and compelling evidence”, he submitted that the Petitioner has produced the impugned minutes, which demonstrates that the tender was considered and awarded by the Regional Tender Committee contrary to the Respondents’ theory that the tender was never awarded by the lawful Tender Committee or at all.
25. He added that both parties are in agreement that the minutes was not available at the time of the trial despite the Petitioner’s exercise of due diligence including obtaining a Court order to search for the same in the KeRRA offices, and that both parties are in agreement that the Petitioner did not find the same and thus it was not availed in Court at the time of trial or appeal. Counsel then cited the case of Maurice Odhiambo Wesonga v Republic [2014] eKLR, the case of Tom Martins v



Republic [2014] eKLR, the case of Philip Mueke (supra) in which several other cases were referred to. On the issue of award of costs, he cited Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and contended that this expensive Petition was necessitated by the repulsive conduct of the Respondents in the discharge of their duties as they connived to deny the Petitioner a fair trial, and she is therefore entitled to reimbursement of costs, and damages that she has incurred in the process. He cited several cases on the issue.

2nd Respondent's Submissions

26. Counsel for the 2nd Respondent, after reciting the background to the matter, submitted that the Supreme Court being the highest Court in Kenya, the Petitioner, by her own admission, did not exhaust her appellate rights as she failed to lodge an appeal to the Supreme Court and she thus has not meet the threshold under Article 50(6)(a) of *the Constitution* requiring that an appeal must have been heard and dismissed by the highest Court. According her therefore, the Appeal is procedurally deficient and also pointed out that the Petitioner only informs the Court that the Court of Appeal declined to certify the matter as one of public interest without providing any evidence in the form of a Court order to that effect.
27. She also observed that the Petitioner did not disclose to this Court that she had filed a Notice of Appeal at the Supreme Court and that it was only after the 2nd Respondent brought this to light that the Petitioner shifted her position, now claiming that the Court of Appeal declined certification. She cited Section 15B (2) of the *Supreme Court Act*, No. 26 of 2022 which deals with the issue of certification of Appeals to the Supreme Court in the first instance, and submitted that Rule 33 of the Supreme Court Rules, 2020 allows an aggrieved party, if the Court of Appeal declines certification, to apply for review thereof within 14 days, a step which he submitted, the Petitioner neglected, thus forfeiting her opportunity to meet the threshold of lodging an appeal to the Supreme Court. On the issue of the alleged concealment of the impugned minutes and the claim that the same violated the Petitioner's right to fair administrative action under Article 47 of *the Constitution*, Counsel submitted that this issue ought to have been raised before the Supreme Court, which has jurisdiction under Article 163(4) (a) to hear appeals involving constitutional interpretation and application. According to her therefore, for this further reason, the Petitioner did not exhaust the appeal avenues.
28. Counsel added that the Petitioner cannot approbate and reprobate since she never, in her appeal to the High Court and to the Court of Appeal, raise the issue of the alleged concealed minutes and which thus indicated her acceptance of those decisions, and she cannot now seek to challenge the finality of those Judgments and thus asking this Court to overturn the decision of a superior Court. According to her, this inconsistency not only undermines the principle of finality in litigation but also threatens the integrity of the judicial process. She cited the case of Kenya Hotel Properties Limited v Attorney General & 5 Others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment). On the issue of "new and compelling evidence", she cited the case of Ngao v Republic (Petition E017 of 2023) [2024] KEHC 2008 (KLR) (1 March 2024), the case of Peter Manson Okeyo v Republic [2014] eKLR, the United Kingdom case of R v A (2008) EWCA Crim 2908, and also the case of James Macharia Anumbi vs Republic [2017] eKLR, and reiterated that the alleged evidence is neither "new" or "compelling".
29. She refuted the assertion made in the Petitioner's Submissions that the 2nd Respondent agrees that the said minutes were not available during the trial and termed it as misleading since yet in the Replying Affidavit, the 2nd Respondent clearly stated that the impugned minutes of 25/03/2010 was introduced during the defence hearing purported to have been obtained from KeRRA, and which the Petitioner attempted to introduce but her attempts failed miserably. She thus averred that the purported evidence



is nothing more than old news then reiterated matters already deponed in the Replying Affidavit on the issue, and also that the evidence was already presented and dismissed at the trial, and also found by the High Court and the Court of Appeal as not being genuine and did not originate from KeRRA and thus fabricated.

30. She then submitted that even if the minutes is to be considered, it still does not negate the numerous irregularities and illegalities in the tendering process that led to the Petitioner's conviction, and that as the Procurement Officer, the Petitioner was responsible for ensuring that the process adhered to legal requirements which responsibility the Petitioner failed to uphold. He cited for instance, the finding that the tender was opened on 21/01/2010, instead of 25/01/2010 as provided in the tender advertisement, the tender was awarded to a company which was not the lowest evaluated bidder affiliated and which as the successful bidder, was affiliated to the Member of Parliament of the same constituency the where the road was situated. According to her therefore, given the myriads of irregularities, the minutes of 25/03/2010 do not tip the scales, and the minutes is not exactly a "smoking gun" to warrant the orders sought.
31. Counsel then commented on the matters deponed in the Further Affidavit and termed the same as introduction of new issues. She nonetheless proceeded to counter the challenges raised against the 2nd Respondent's mandate or authority to investigate non-compliance with procurement laws and refuted the allegations by citing the provisions of Article 79 and Article 252(1)(a) of *the Constitution*, and also Section 11(1)(d) and 23 of the *Anti-Corruption and Economic Crimes Act* (ACECA), and Section 11(j) of the EACC Act, and enumerated the powers of the 2nd Respondent. She therefore termed the challenge as unfounded. On the challenge on reliance on anonymous sources for investigations, she cited Section 65 of the ACECA and thus termed the challenge as one lacking merit. According to her, the Petitioner was introducing irrelevant arguments that were not included in the Petition and is "grasping at straws". She, too, cited authorities on the issue of award of costs and urged that costs should be awarded to the 2nd Respondent.

Further Directions and Supplementary Submissions

32. I had fixed this matter for Judgment on 17/10/2025. However, while studying the file, I came to the conclusion that there were some matters that I needed clarifications upon from the parties before finalizing the Judgment. Pursuant thereto, by my orders given on 17/09/2025, I directed the parties to address the following matters by filing Supplementary Submissions:
 - i. Where in the record can I ascertain or verify what the exhibit produced at the trial as DEX 36, or marked as DMFI 36 is contained?
 - ii. Where in the Judgment did the trial Magistrate deal with the issue of the said DMFI 36 or DEX 36?
 - iii. Did the issue of the DMFI 36 or DEX 36 feature in any of the Appeals and if so, where in the record can I find such dealing or determination?
 - iv. Did DMFI 36 and/or DEX 36 contain the minutes said to be dated 25/3/2010?
 - v. If so, was it an original version or a photocopy?
 - vi. The version that the Petitioner now wants to be allowed to produce at the fresh trial, is it an original version or a copy?



- vii. There is an allegation that the statement recorded by the Petitioner before Investigators was not eventually acted upon or considered because the Court allegedly found that the same was recorded under duress or coercion. Where in the record can this be contained?
33. To their credit, and despite the strict timelines I imposed, the Petitioner and the 2nd Respondent complied with the directions. The Appellant filed the Submissions dated 1/10/2025 while the 2nd Respondent filed the Submissions dated 3/10/2025. I have considered both the respective Submissions in response to the said directions, and which I must admit, have been very helpful.

Determination

34. The broad issue that arises for determination herein is “whether this Court should order for a fresh trial of the criminal case conducted at the Magistrate’s Court on the ground of discovery of new and compelling evidence, and despite the issue of the conviction of the Petitioner having been litigated up to the Court of Appeal.”
35. Needless to state, the Petition herein is premised on the provisions of Article 50(6) of *the Constitution*. The issues raised in this matter therefore revolve around the application and interpretation of that provision of *the Constitution*. As has been argued elsewhere, the provision, which did not exist in the past, is said to have been introduced in the 2010 Kenyan Constitution to correct historical injustices which had arisen about by reason of the past political dispensation in the country which, as it were, had permeated the entire Kenyan society, including the Judiciary. It has been urged that the provision was therefore one of those meant to inject a new beginning. The Article 50(6) provides as follows:
- “A person who is convicted of a criminal offence may petition the High Court for a new trial if--
- (a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (b) new and compelling evidence has become available.”
36. The above provisions were analyzed by the Supreme Court in the case of Tom Martins Kibisu -vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR), in which the following was stated:

“41. Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling’ evidence.

42. We are in agreement with the Court of Appeal that under Article 50(6), “new evidence” means “evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial”; and “compelling evidence” implies “evidence that would have been admissible at the trial, of high probative value and capable of belief, and which,



if adduced at the trial would probably have led to a different verdict.” A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person”.

37. The first question is therefore whether the Petitioner has met the threshold of his appeal having been dismissed by the highest Court to which he is or was entitled to appeal, or, in the alternative, he did not appeal within the time allowed for appeal.
38. In answering the above question, I note that the record before me shows that the Petitioner and her 5 co-accused were arraigned in Eldoret Chief Magistrate’s Court Criminal Case No. MCACC/1/2012 on 14/06/2012 and charged with up to 10 counts of offences under the Anti- Corruption and Economic Crimes Act (ACECA). After a lengthy trial that took about 4 years, the Petitioners and some of her co-accused were eventually convicted on 5/08/2016 on all counts except count VII, and were sentenced in terms of payment of fines and in default, to serve imprisonment. On appeal in Nairobi HCACECA/20/2017 by all 6 accused persons, by the Judgment delivered on 16/08/2018, in respect to the Petitioner, only the conviction on one count, the one on abuse of office under count VII was upheld and the rest were set aside. Undeterred, the Petitioner and one other accused person filed a further Appeal at the Court of Appeal at Nairobi, namely COACRA 100/2019. This Appeal was however dismissed on 7/08/2020 in its entirety.
39. The Petitioner stated that after the dismissal of the Appeal by the Court of Appeal, she filed a Notice of Appeal indicating her intention to further appeal to the Supreme Court. This has been confirmed by the 2nd Respondent which produced a copy of the Notice of Appeal dated 19/08/2020. The Petitioner has then stated that upon advice from her Advocates that she stood no chance of succeeding at the Supreme Court, she opted not to pursue the Appeal further.
40. However, the 2nd Respondent has refuted the above allegation and in so doing, produced a copy of an order from the Supreme Court dated 26/05/2023, indicating that the Notice of Appeal was deemed as withdrawn for failure to institute the Appeal within the prescribed time. In response, the Petitioner has stated that she was unable to appeal further because the Court declined to grant her leave to appeal to the Supreme Court by refusing to certify the same as a matter of public interest.
41. Be that as it may, my view is that whichever the reason for the Petitioner’s failure to further appeal to the Supreme Court, she meets the threshold contemplated under Article 50(6)(a) of *the Constitution*, since the fact remains that her last appeal was at the Court of Appeal, and she did not further appeal to the Supreme Court within the time allowed. Either by operation of the law, or by reason of her own inaction, she was either locked out, or locked herself out of the Supreme Court. The fact remained that the highest Court in which she hit a dead end, and thus, the highest she was “entitled to appeal” was the Court of Appeal.
42. In reaching the above finding, I am fortified by the holding of Odunga J (as he then was) in the case of Philip Mueke Maingi & 2 Others v Republic [2022] eKLR, in which he stated as follows:
 - “ 39. Therefore, for one to invoke the above provision two conditions must therefore be fulfilled. The first condition is that the Petitioner’s appeal must have been dismissed by the highest court to which the Petitioner is entitled to appeal or that the Petitioner did not appeal within the time allowed for appeal. In my understanding the Petitioner can only exercise this right where legally he has reached the end of the road in so far as his appellate options are concerned



or where he is by law barred from lodging his appeal due to effluxion of time.

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40. In so far as the first limb is concerned, the Article talks about the highest court to which the person is entitled to appeal as opposed to the highest appellate court in the land. In other words, what is to be determined is that Appellate avenue that is legally available to the Petitioner by entitlement as opposed to the discretionary avenue since *the Constitution* deliberately applies the phrase “entitled to” or opposed, for example to “available”.
43. I also agree with the Judge’s further view made in the same case that in interpreting *the Constitution*, the Courts should adopt a broad, liberal and purposive interpretation to give effect to the fundamental values and principles advanced therein, and that therefore, in order to live up to that spirit, the interpretation of the phrase “the highest court to which the person is entitled to appeal” ought to be broad in order to achieve the constitutional objective of advancing the rule of law, and the human rights and fundamental freedoms in the Bill of Rights permitting the development of the law.
44. Similarly, D. Chepkwony J, and P.J.O Otieno J, sitting as two-judge bench, in the case of Jona Ngala Kilimbi vs. Republic [2016] eKLR, held as follows:
- “In so far as there is no evidence that the applicant ever appealed against the Judgment on appeal dated by M. Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6) ... we say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1st prerequisite under Article 50(6) 1 a has thus been met.”
45. I am also persuaded by the further holding of Odunga J (as he then was) in the case of Philip Mueke (supra), in which he further held that:
- “ 53. In my view and I find, based on the decision of the Court of Appeal in respect of the 1st Petitioner’s appeal that a person who is relying on the ground of existence of new and compelling factual evidence must for the purposes of Article 50(6) of *the Constitution* be deemed to have had his appeal “dismissed by the highest court to which the person is entitled to appeal” once his first appeal has been dismissed. In other words, the highest court to which he is entitled to appeal on matters of facts is the first appellate court and no further unless the Court of Appeal grants him leave to adduce fresh or additional evidence. Having been denied an application to adduce fresh evidence, it is clear that he had reached a dead end in so far as he could adduce new evidence. [Emphasis mine]
46. The Petitioner therefore surmounts the first hurdle of exhaustion of appellate options. The second condition which the Petitioner must now also meet is whether the minutes of the Regional Tender Committee dated 25/03/2010 attains the threshold of “new and compelling evidence” to the extent that it should warrant an order for a fresh trial.
47. The alleged minutes dated 25/03/2010 has indeed been exhibited by the Petitioner in his Supporting Affidavit as “PM 21”. In refuting the Petitioner’s contention that the minutes constituted “new and



compelling evidence”, the 2nd Respondent termed the contention as preposterous as the issue of the minutes has been exhaustively addressed and adjudicated by the Magistrate’s Court, the High Court, and the Court of Appeal.

48. In answering this question, it is important to recall that only Count VII of the charge sheet remains in issue. This is because although the Magistrate’s Court convicted the Petitioner in all the 10 counts preferred, the High Court, on appeal, overturned all the convictions save for Count VII. It is this one remaining conviction that the Petitioner fought further in the Court of Appeal but again, lost. To place the matter in context, I reproduce the wording of Count VII as presented in the charge sheet, as follows:

“Abuse of office contrary to Section 46 as read with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003.

Particulars of offence

Maluti Pamela Maluti: On the 31st March 2010 at the Kenya Rural Roads Authority office in Eldoret Town within Uasin Gishu County in the Republic of Kenya, being the Uasin Gishu Regional Procurement Officer of Kenya Rural Roads Authority, a public body, used her office to improperly confer a benefit on Kachur Holdings Limited by issuing the said Kachur Holdings Limited with a letter of award of contract for Routine Maintenance and Spot Improvement of Bayete-Chuyat-Bargeiywa Road in Eldoret South Constituency before the bids were adjudicated and award made by the Eldoret South Constituency Roads Committee.”

49. The charge being that the Petitioner gave out the letter of award of the contract on 31/03/2021 before the bids were adjudicated, I understand the Petitioner’s insistence in producing the alleged minutes dated 25/03/2010, to be geared towards demonstrating that the bids had indeed been adjudicated upon before 31/03/2010 when she gave out the letter, and that this fact is demonstrated in the alleged minutes of the meeting of the Regional Tender Committee which she contends, was held on 25/03/2010, 6 days before she issued the letter dated 31/03/2010. As correctly observed by the 2nd Respondent therefore, the Petitioner’s case is basically that the alleged minutes of the meeting of 25/03/2010 is the “smoking gun” that finally exonerates her from the accusations that led to her conviction by the trial Court.
50. I have carefully perused the proceedings of the trial Court and note that the Petitioner, as Accused No. 2, commenced presenting her defence case on 17/09/2024 as DW2. This was after all the 6 accused persons had been found to have a case to answer and put on their defence. The preceding defence witness, Accused No.1, had referred to the alleged letter dated 25/03/2010 inviting the Regional Tender Committee for a meeting to held at 2.00 pm on the same date, and which letter was then marked as DMFI 36. This seems to be the first time that the letter marked DMFI 36 alleging holding the meeting of 25/03/2010, and/or minutes thereof, emerged at the trial Court.
51. After the Petitioner took the stand as Accused No. 2, during her testimony, an issue arose regarding the authenticity of the documents newly introduced by the defence, including the said DMFI 36. The Prosecution urged that the documents and/or minutes thereto were never part of the documents collected from or supplied by KeRRA to the 2nd Respondent vide the inventory dated 14/08/2014, and that their authenticity was therefore in doubt. In response, the defence insisted that the documents were part of those collected from or supplied subsequently by KeRRA as a consequence of a Court order applied for and obtained by the Petitioner.



52. I have however not found any indication that the Petitioner had, before or during the trial, on her own, sought production or supply of the minutes from the 2nd Respondent.
53. To get to the bottom of the matter, the trial Magistrate summoned the relevant officer from KeRRA who attended Court on the same day at 3.00 pm. When examined on the origin of the documents, including DMFI 36, the officer (one Engineer L. Ngigi) disowned the same, and denied any knowledge thereof. He stated that he is the one who released documents pursuant to the Court order obtained by the Petitioner, but was emphatic that the minutes, were never part of what he supplied. Still keen to unravel the mystery of the documents, the trial Magistrate directed the Counsels in the matter (Prosecution and defence) to converge at the KeRRA offices to ascertain the allegations and counter-allegations presented. When the Counsels returned to Court on the next day, 18/09/2014, still there was no resolution. In the circumstances, the Magistrate rendered a Ruling in which she allowed the documents to be produced, nonetheless, noting that the Prosecution would have a chance, during cross-examination, to question the origin thereof.
54. Pursuant to the above, the Petitioner thus produced DMFI 36 (letter dated 25/03/2010) as DExh. 36, and other related documents which she maintained, were supplied by KeRRA to the 2nd Respondent. The Petitioner was then extensively cross-examined about the origin or source of the documents, and thus, their authenticity.
55. I note that after close of the defence case, the Prosecution, on 14/01/2016, made an Application under Section 212 of the Criminal Procedure Code seeking to be allowed to rebut part of the evidence introduced at the defence stage, including DExh. 36 (letter dated 25/03/2010), by adducing rebuttal evidence. This Application was opposed and was extensively canvassed. At the end, the trial Magistrate, by her Ruling delivered on 22/01/2016, agreed with the Prosecution and allowed it to adduce the rebuttal evidence.
56. Pursuant thereto, the Prosecution called, or recalled several witnesses, who all disowned the documents, including the alleged letter DExh. 36 (letter dated 25/03/2010), or knowledge of any such meeting convened or held on 25/03/2010, or of any minutes arising therefrom. The witnesses whom the Petitioner had alleged to have attended the meeting, also refuted any such attendance by themselves, as did those whom the Petitioner alleged were the officers who supplied the documents.
57. As aforesaid, Count VII which the Petitioner faced and was convicted of was that she “used her office to improperly confer a benefit on Kachur Holdings Limited by issuing the said Kachur Holdings Limited with a letter of award of contract before the bids were adjudicated and award made by the Eldoret South Constituency Roads Committee”.
58. My understanding of the Petitioner’s case is that she has now recently come across “new and compelling evidence” that demonstrates that she simply issued the letter of award to the successful bidder on 31/03/2010, only after the Regional Tender Committee had already, earlier on 25/03/2010, declared the said bidder successful. In other words, she claims that the “new and compelling evidence” demonstrates that, as the Secretary to the Committee, she only executed her duty of communicating the decision of the Committee. According to the 2nd Respondent however, there is no such “new and compelling evidence” since the purported meeting of 25/03/2010 never took place, and the minutes alleged to have arisen therefrom are not genuine, which conclusion was reached by the trial Court, and acknowledged by both the High Court and Court of Appeal. The alternative argument put forward by the 2nd Respondent is that even if the alleged minutes are genuine, it will not, by itself vitiate the conviction as there were various other irregularities found by the trial Court that support the conviction.



59. As recounted above, it is clear from the record that the very first time that the issue of the alleged meeting of 25/03/2010 arose at the trial Court was at the defence stage. George Ojowi, the Deputy Director, Directorate of Investigation at the 2nd Respondent, both at the trial Court and in this Petition, vehemently refuted the allegation that he maliciously concealed or withheld the alleged minutes, and reiterated that the records from KeRRA clearly show that the purported minutes furnished to him were not original, as confirmed by the letter dated 10/08/2011, contrary to the Petitioner's claims. I have indeed the documents on record and which, I may say, vindicate Mr. Ojowi's assertions.
60. According to Mr. Ojowi, the tender became the subject of the 2nd Respondent's investigation sometime in August 2011 following an anonymous complaint alleging procurement irregularities and conflict of interest. He stated that pursuant thereto, the 2nd Respondent initiated an investigation in which he served as the Lead Investigator and which was conducted under the auspices of the 10 per cent Road Maintenance Levy Fund (RMFL) managed by KeRRA for the 2009/2010 financial year. He deponed further that, on 9/08/2011, the 2nd Respondent issued a request to KeRRA for documents related to the tender award, including minutes for the relevant Tender committee meetings held on 10/08/2011, that KeRRA furnished the documents in the presence of the Petitioner, and which were received by him (Mr. Ojowi), amongst other officers at the KeRRA offices in Eldoret, as documented through an inventory listing signed by, among others, the Petitioner herself. According to him, the inventory specified the original documents submitted, and that the minutes pertaining to the allocation of the contract was not original, and were in any event, minutes supplied in relation to Eldoret South Constituency Roads Committee meeting held on 1/04/2010, and not the alleged Regional Committee meeting of 25/03/2010 as claimed by the Petitioner. Once again, the documents on record vindicate Mr. Ojowi's assertions.
61. As aforesaid, the Petitioner, during her defence testimony at the trial Court, sought to counter the Prosecution evidence by putting up the argument that the Eldoret South Constituency Roads Tender Committee meeting held on 1/04/2010 did not deliberate the subject contract and that such deliberation was undertaken by the Regional Committee in its meeting of 25/03/2010.
62. It is clear from the record of the trial Court that, in response, the Prosecution and its witnesses who were recalled to rebut this claim newly introduced by the Petitioner strenuously contended that the purported Regional Committee minutes of 25/03/2010 for 10% RMLF, never originated from KeRRA and were thus not genuine. For instance, PW14 denied supplying the purported minutes to the Petitioner, and PW11 and PW12 who, though claimed to have attended the meeting, both denied even receiving the alleged invitation letter dated 25/03/2010 (same date of the meeting) as alleged by the Petitioner. Mr. Ojowi, too, in his testimony, denied being supplied with the minutes. I may add that these Prosecution witnesses were all cross-examined on their denials.
63. In its Judgment, the trial Magistrate observed that the Petitioner had been challenged to prove the origin or authenticity of the alleged letter of invitation dated 25/03/2010, and/or of convening of the alleged meeting on the same date. She also observed that the Petitioner had been challenged to prove her allegation that she obtained the documents from KeRRA. The trial Magistrate thus clearly did not rely on or consider the same. The invitation letter and the convening of the meeting having been presumably disregarded by the trial Court, it follows that, by extension, whatever minutes are alleged to have arisen from the purported would similarly suffer the same fate. Although the Petitioner filed an Appeal at the High Court, and later, further at the Court of Appeal, she never challenged the above findings made by the trial Court, nor did she include them in her grounds of Appeal. Nonetheless, the above findings by the trial Court were acknowledged by both the High Court and the Court of Appeal.



The High Court (H. Ongudi J), at paragraph 186 of its Judgment in Eldoret HCACECA/20/2017, was even more blunt as it stated as follows:

“There was an attempt by the defence to say the meeting that awarded the contract was held on 25/03/2010. The documents they relied on (DEXB 36 and 37) were confirmed not to have originated from KERRA offices. Same to the minutes of the alleged tender award meeting of 25th January 2010, produced by the defence. All the defence exhibits (DEXB 36, 37, 46 & 47) were not genuine documents as they were proved not to have originated from KERRA”

64. On its part, the Court of Appeal (Nambuye, Minoti & Kantai, JJ.A.) in COACRA/100/2019, stated that:

“As regards the 2nd appellant, the contention by the prosecution was that she used her office to improperly confer a benefit on Kachur Holdings by issuing it with a letter of award of contract before adjudication of the bids. The 2nd appellant contends that the two courts below erred by taking into account other violations of the regulations, which she considers to have been irrelevant considerations. She also made heavy weather of the evidence of when the bids were opened, insisting that the date stamp showing 21st January 2010 was erroneous.

The record shows that the first appellate court carefully considered this issue and rejected the appellant’s contention. This is how that court addressed the issue:

“182. The evidence of PW8 Mule Robert Maingi from the documents (PEXB 44-55) is that the bids were opened on 21st January 2010. The opening of bids should not have preceded the site visit which was mandatory. (PEXB 34) which was the certificate of contractors visit to the site was un-dated but it was received on 21st January 2010 a day before the official mandatory site visit. The said certificate showed that the visit had taken place on 22nd January 2010 even before the said date.

183. The explanation by the defence was that the stamping of the documents with a date stamp of 21st January 2010 was erroneous. That the clerk who did that forgot to adjust it before stamping and he had died. These are documents which were supposed to have been handled by a committee. If indeed there was such an error, the same committee could have noted that as it went through the rest of the processes and corrected the errors as a committee. This was never done.”

Similarly the first appellate court addressed the question whether the contract was awarded on 25th March as claimed by the appellants. It found that the documents that the appellants were relying on in support of that contention were confirmed not to have originated from the Kenya Rural Roads Authority (KERRA) offices. The Court concluded:

“All the defence exhibits (DEXB 36, 37, 46 and 47 were not genuine documents as they were proved not to have originated from KERRA.”

65. Considering the above state of affairs, I am, again, constrained to agree with the 2nd Respondent’s contention that the issue of the alleged minutes of 25/03/2010, and the alleged recent retrieval of the same by the Petitioner, cannot constitute “new and compelling evidence” within the meaning of Article 50(6) of *the Constitution*, as the issue was live before the Magistrate’s Court, which extensively addressed it, and which issue was also addressed both by the High Court, and the Court of Appeal.



66. Regarding the Petitioner's claim that she invited the Committee to consider the Evaluation Committee's recommendations on 25/03/2010, and that the meeting was then held on the same day with Kachur Holdings Limited being awarded the tender, the 2nd Respondent pointed out possible inconsistencies in this account. He, for instance, pointed out that while the invitation letter dated 27/03/2010 PM7 and exhibited herein by the Petitioner as "PM7", indicates that the meeting was scheduled for 2.00 pm on 25/03/2010, the alleged minutes exhibited by the Petitioner as "PM21" indicates that the meeting took place from 10.00-1.00 pm. According to the 2nd Respondent therefore, this discrepancy raises fundamental questions on the veracity and legitimacy of the alleged minutes and casts doubts on the Petitioner's forthright.
67. The Petitioner's response to this allegation of inconsistencies, was a curt and dismissive one, simply that "had George Ojowi not concealed the minutes, he would have had the opportunity to learn during cross-examination as to why and how the meeting was rescheduled from 2.00 pm to 10.00 am on 25/03/2010". In my view, the issue of the inconsistency pointed out by the 2nd Respondent is not a frivolous one and the Petitioner ought to have addressed it. Considering that the authenticity of the minutes has always been in contention, and the Petitioner being the one seeking this Court's intervention, the Petitioner, ought to have responded to the allegation. Simply dismissing it in the manner done is, in my view, counter-productive to her case.
68. Another observation made by the 2nd Respondent is in respect to the Petitioner's claim made in her Advocates letter dated 12/03/2024 and exhibited by the Petitioner as "PM 19". In that letter, the Advocate asserts that Mr. Ojowi took the original minutes and did not leave a copy at the KeRRA offices. The 2nd Respondent wondered, rightfully in my view, if Mr. Ojowi took the original minutes and did not leave a copy, how is it that the Petitioner now claims to have found a copy at her residences in Nairobi and Kakamega? Considering, again, that the authenticity of the minutes has been a live issue, I cannot term this observation far-fetched.
69. Regarding the allegation of violation of the Petitioner's right to information, she deponed that, by the said letter dated 12/03/2024 from her Advocates, she requested the 2nd Respondent for a copy of the alleged minutes, but which request was not responded to, that the Commission on Administrative Justice intervened and directed the 2nd Respondent to provide the minutes, which direction the 2nd Respondent also ignored. She claimed that however, after a tedious and laborious scouring of her documents in her Nairobi and Kakamega homes, on 28/05/2024, barely 2 months after the demand letter, she eventually found a photocopy of the minutes.
70. Mr. Ojowi, in response, agreed that the 2nd Respondent, on 14/03/2024, 8 years after the trial Court rendered its verdict, received a request from the Petitioner for release of the alleged minutes of the meeting of 25/03/2020, upon which the 2nd Respondent, after conducting a thorough review of its records, confirmed that no such minutes were presented in its exhibits or inventory received from KeRRA, and thus the 2nd Respondent was unable to provide what it did not possess. I am constrained to agree with this contention since the Petitioner, in a possible acknowledgment that the letter dated 25/03/2020, or minutes of the same date, were never surrendered to the 2nd Respondent, deponed that she sought and obtained a Court order which permitted her to go to KeRRA offices and search for the same minutes, which however she still did not find at KeRRA. The Petitioner, just as she failed to do at the trial Court, therefore, again, in this Petition, failed to prove that the documents were in the possession or custody of the 2nd Respondent. This is even more relevant considering that the 2nd Respondent is not even the alleged author of the documents, but KeRRA, and also considering that at no time earlier, not even during the trial, did the Petitioner make any demands to the 2nd Respondent to supply the same documents.



71. Considering the above circumstances, and also the fact that it is now 8 years since the trial Court rendered its Judgment, my view is that the Petitioner has failed to convincingly persuade this Court to grant the prayers sought.
72. I may also state that in her Further Affidavit, the Petitioner irregularly introduced totally new issues that were not contained in the Petition, and which, if accepted for arguments, would fundamentally change the face of the cause of action presented under the Petition. For instance, she introduced the new issue that a complainant cannot be anonymous and must be a person who is entitled to institute Court proceedings under Article 22(1)(2), that the powers to investigate non-compliance of procurement law is now vested in the Public Procurement Regulatory Authority, and not in the 2nd Respondent, that the 2nd Respondent did not cite the law that empowered the Constituency Roads Tender Committee that was in charge of 22% RMFL projects, and that the said George Ojowi recorded the Petitioner's statement through coercion, threats and intimidation which led the trial Court to discard it when the Prosecution tried to produce it in evidence, and that the witnesses who testified at the trial in respect to the said minutes perjured themselves.
73. Although the 2nd Respondent did protest about this irregular introduction of new issues, the 2nd Respondent nevertheless responded by reiterating its statutory mandate or authority to investigate non-compliance with procurement laws, and cited the provisions of Article 79 and Article 252(1)(a) of *the Constitution*, and also Section 11(1)(d) and 23 of the *Anti-Corruption and Economic Crimes Act* (ACECA), and Section 11(j) of the EACC Act. The 2nd Respondent, in respect to the issue of reliance on anonymous sources for investigations, cited Section 65 of the ACECA.
74. Be that as it may, apart from clearly being new allegations, it is also evident that the allegations are matters for Appeal, not a Constitutional Petition under Article 50(6) of *the Constitution*, which is limited to the emergence of "new and compelling evidence", and which is what the Petitioner has come under. Having preferred Appeals to the High Court and further to the Court of Appeal, and not raising the said issues in those Appeals, the Petitioner does not explain why she now wants to belatedly introduce the issues before this Court under Article 50(6).
75. The 2nd Respondent has also contended that even if the alleged minutes of 25/03/2010 had been accepted by the trial Court and considered, still it would not have negated the finding of other numerous irregularities and illegalities apparent in the tendering process that led to the Petitioner's conviction. The 2nd Respondent argued that as the Procurement Officer, the Petitioner was responsible for ensuring that the process adhered to legal requirements which responsibility the Petitioner failed to uphold. The 2nd Respondent cited, for instance, the trial Court's findings that the tender was opened on 21/01/2010, instead of 25/01/2010, as provided in the tender advertisement, that the tender was awarded to a company which was not the lowest evaluated bidder, and that the successful bidder was affiliated to the Member of Parliament of the same constituency where the road was situated. According to the 2nd Respondent therefore, given the myriads of irregularities, the minutes of 25/03/2010 do not at all "tip the scales", and is not exactly a "smoking gun" it is alleged to be. The Petitioner however inexplicably never responded to, or addressed this crucial submission. The above submission by the 2nd Respondent is bolstered by the statement made by the Court of Appeal in when dismissing the Petitioner's further Appeal, that:

"We are satisfied that the two courts below did not proceed on the assumption that breach of procurement regulations perse constitutes criminal offences. Rather, they found on the evidence before them that in the circumstances of this case, the breach of the regulations constituted improper conferment of a benefit to Kachur Holdings Ltd. It is not enough



to claim, as the appellants do, that no public money was lost; a benefit was improperly conferred which otherwise should not have been. We do not see any basis to differ with the concurrent findings of the two courts below in that regard.

.....
The two courts below were satisfied on the evidence on record that the 2nd appellant issued Kachur with the letter of award of contract before adjudication of the bids. The other irregularities noted by those courts were not irrelevant as claimed by the appellants; in our view, they went to demonstrate that the conferment of benefit to Kachur Holdings Ltd was not accidental or innocent. It was tainted through and through with impropriety.

76. In the circumstances, my view is that the Petitioner, is in effect, asking this Court to review the decisions, not only of the High Court, thus a Judge of concurrent jurisdiction, but also of the Court of Appeal, a superior Court. As was aptly stated by Mumbi Ngugi J (as she then was), in the case of *Tom Martins Kibisu v Republic* [2014] eKLR, while this Court has jurisdiction to determine questions regarding alleged violation of *the Constitution* or interpretation of *the Constitution*, it is merely a division of the High Court, and has no powers superior to those of other divisions (see also the Court of Appeal case of *Peter Nganga Muiruri -v- Credit Bank Limited & Another* Court of Appeal Civil Appeal 203 of 2006)
77. In the end, my finding is that the Petitioner has failed to convince this Court that the alleged minutes of the Regional Tender Committee dated 25/03/2010 that she claims to have recently come across in her home, either in Nairobi or Kakamega, is genuine and/or authentic as the source thereof remains unproven, just as it was before the trial Court. I also find that the issue of the existence of the alleged minutes, or lack thereof is not “new”, the same having been raised at the trial Court, canvassed and addressed by the trial Court, and also subsequently, recognized and appreciated by both the High Court and the Court of Appeal when dismissing the Petitioner’s Appeals. Further, the Petitioner has also failed to demonstrate or convince this Court that the minutes amounts to “compelling evidence”, such that had it been admitted in evidence before the trial Court, would have led to her exoneration or acquittal. In other words, I am not persuaded that the alleged minutes meets the threshold of what may be described as “new and compelling evidence”, to the extent that it should warrant an order for a fresh criminal trial. Consequently, I am not persuaded that the Petitioner has demonstrated that she is entitled to a new trial within the confines of Article 50(6) of *the Constitution*.

Final Orders

78. In conclusion, I hereby rule and/or order as follows:
- i. The Petition dated 3/06/2024 is dismissed.
 - ii. As costs follow the event, and as the 1st Respondent never participated in this matter, I award costs of these proceedings to only the 2nd Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF OCTOBER 2025

.....
WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Gachuba Mwangi for the Petitioner



Ms. Mureithi for 1st Respondent

N/A for the 2nd Respondent

Court Assistant: Brian Kimathi

