

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
CRIMINAL APPEAL NO. E014 OF 2025

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

PETER GITAA KORIA.....RESPONDENT

*(Being an appeal from ruling of Hon. Celesa Okore PM dated 2nd April 2025
in her Chief Magistrate's Court at Milimani Anti-Corruption case No. E013
of 2024)*

JUDGMENT

The respondent was charged in the lower court with the following seven counts;

Count I

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003, particulars being that between 29th December 2020 and 30th June 2021, within Nairobi County in the Republic of Kenya, being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd he failed to comply with the law relating to procurement to wit Section 44(2)(a) of the Public Procurement and Asset Disposal Act 2015 by engaging in a procurement process without an approved budget in relation to quotation 25/Kitchen items; quotation 16/Utensils; quotation 17/Kitchen items; quotation 18/Plates & cups and quotation 19/Cutlery & other items during the financial year 2020/2021.

Count II

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. The particulars were that between 29th December, 2020 and 30th June, 2021 within Nairobi City County in the Republic of Kenya, being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he willfully failed to comply with the law relating to procurement to wit; Section 45(3)(a) of the Public Procurement and Asset Disposal Act, 2015 by engaging in a procurement process which was not factored in the procurement plan in relation to Quotation 15/Kitchen Items; Quotation 16/Utensils; Quotation 17/Kitchen items, Quotation 18/Plates & cups and Quotation 19/Cutlery & other items during the financial year 2020/2021.

Count III

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003 with the particulars being that, between 4th February, 2021 and 3rd March 2021 within Nairobi City County in the Republic of Kenya being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he willfully failed to comply with the law relating to procurement to wit; Section 48 of the Public Procurement and Asset Disposal Act, 2015 by failing to appoint an Ad Hoc Inspection and Acceptance Committee in relation to Quotation 15/Kitchen items during the financial year 2020/2021.

Count IV

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and

Economic Crimes Act, 2003. The particulars were that between 29th December 2020 and 4th March 2021 within Nairobi City County in the Republic of Kenya being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he willfully failed to comply with the law relating to procurement to wit; Section 48 of the Public Procurement and Asset Disposal Act, 2015 by failing to appoint an Ad Hoc Inspection and Acceptance Committee in relation to Quotation 16/Utensils during the financial year 2020/2021.

Count V

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003 particulars being that between 29th December 2020 and 12th February, 2021 within Nairobi City County in the Republic of Kenya being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he willfully failed to comply with the law relating to procurement to wit; Section 48 of the Public Procurement and Asset Disposal Act, 2015 by failing to appoint an Ad Hoc Inspection and Acceptance Committee in relation to Quotation 17/Kitchen items during the financial year 2020/2021.

Count VI

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes act, 2003. The particulars in this count were that between 18th May 2021 and 9th June, 2021 within Nairobi City County in the Republic of Kenya being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he

willfully failed to comply with the law relating to procurement to wit; Section 48 of the Public Procurement and Asset Disposal Act, 2015 by failing to appoint an Ad Hoc Inspection and Acceptance Committee in relation to Quotation 18/Plates and cups during the financial year 2020/2021.

Count VII

Willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003, particulars being that between 12th May 2021 and 9th June, 2021 within Nairobi City County in the Republic of Kenya being the Chief Executive Officer and the Accounting Officer of a public body being Bomas of Kenya Ltd, he willfully failed to comply with the law relating to procurement to wit; Section 48 of the Public Procurement and Asset Disposal Act, 2015 by failing to appoint an Ad Hoc Inspection and Acceptance Committee in relation to Quotation 19/Cutlery and other items during the financial year 2020/2021.

After the prosecution called a total of 24 witnesses, the trial court returned a verdict of no case to answer which prompted this appeal in which the appellant has raised the following grounds;

1. **THAT** *the learned trial Magistrate erred in law and fact in acquitting the respondent against the overwhelming evidence adduced by the prosecution on behalf of the Republic in counts 1, 2, 3, 4, 5, 6 & 7 respectively.*
2. **THAT** *the learned trial Magistrate erred in law and in fact by finding that the Director of Public Prosecutions (DPP) had dismally failed to*

establish prima facie case against the respondent in counts 1, 2, 3, 4, 5, 6 & 7 respectively.

3. **THAT** *the learned trial Magistrate erred in law and fact by finding that failure by the appellant to produce the budget for FY 2021/2022 marked as PMFI-5 was fatal, whereas the charges related to the budget for FY 2020/2022, which was produced as PEx-6(b).*
4. **THAT** *the learned trial Magistrate erred in law and fact by failing to find that the procurement of the kitchen items violated Section 44(2)(a) as read with Section 45(3)(a) of the Public Procurement and Asset Disposal Act, 2015.*
5. **THAT** *the learned trial Magistrate erred in law and fact by finding that there was an approved procurement plan being the Board Paper produced as PEx8(a) whereas the evidence produced by the appellant demonstrated that there was no approved plan for the procurement of the kitchen items which was in violation of Section 44 and 53 of the Public Procurement and Asset Disposal Act, 2015.*
6. **THAT** *the learned trial Magistrate erred in law and fact by finding that the establishment of the Ad Hoc Inspection & Acceptance Committee was not mandatory whereas the law required the respondent to either accept the goods or in his absence, he establishes an Ad Hoc Inspection Acceptance Committee.*
7. **THAT** *the learned trial Magistrate erred in law and fact by finding that the Standing Committee established under the Public Procurement &*

Disposal Act, 2005 (repealed) was lawfully extended whereas the Public Procurement and Asset Disposal Act, 2015 required the establishment of an Ad Hoc Inspection Acceptance Committee in accordance with Sections 4, 42, 45 of the Public Procurement & Asset Disposal Act 2015 and 53 Regulation 3 of the Public Procurement and Asset Disposal Regulations, 2020.

8. **THAT** *the learned trial Magistrate erred in law and fact by misapplying and misinterpreting the provisions of Section 48 of the Public Procurement & Asset Disposal Act, 2015 as read with the Second Schedule of the Threshold Matrix in the Public Procurement and Asset Disposal Regulations, 2020.*
9. **THAT** *the learned trial Magistrate erred in law and fact in failing to find that the appellant had made a prima facie case as against the respondent based on the evidence tendered.*
10. **THAT** *the learned trial Magistrate erred in law and fact by in failing to place the respondent on his defence with regard to counts 1, 2, 3, 4, 5, 6 & 7.*
11. **THAT** *the learned trial Magistrate erred in law and fact by failing to consider the submissions by the appellant.*
12. **THAT** *such other grounds that may be adduced during the hearing of the appeal.*

This is a first appeal and this court is required to re-evaluate the evidence produced before the trial court, re-analyse and re-consider the same and reach

its own independent conclusion. However, the court should put into consideration the fact that it did not hear the witnesses and as such did not observe their demeanours and therefore give due allowance for that. This legal position has been encapsulated in many decided cases including ***Simon Taveta v Mercy Mutitu Njeru (2014) KECA 755 (KLR)*** where the Court of Appeal held that;

‘As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter.’

In order to comply with the above obligation, this court will reproduce the evidence of the witnesses then analyse it and make independent conclusion whether the prosecution had made a *prima facie* case against the respondent which warranted that he be placed on his defence.

Prosecution’s evidence

The first prosecution witness was Josiah Kiprotich Magut who told the court that he was the Chairman of the Board of Bomas of Kenya (hereinafter referred to ‘BOK’) while the respondent was its Chief Executive Officer. The witness’s responsibility was to ensure execution of the Board's resolutions among other duties.

He added that before 2020, BOK had leased its Utamaduni restaurant to Utalii college but at some point, Utalii college exited and that during the time of the lease, BOK did not have a budget for the restaurant. He identified an approved detailed annual budget for the year 2021 and 2022 as PMFI 5. This budget was sent to the Ministry of Finance and approved.

PW1 added that in a Board meeting held on 23-09-2020 which he chaired, the issues which were in court were discussed. The heading of the minutes of the

meeting which he identified was operations of Utamaduni restaurant which the board approved and recommended. They also approved and recommended procurement plan of the procurement is issue before the court. He also stated that after their approval, the items were purchased and the restaurant operationalised. He however claimed that they later came to have a budget which should have been a supplementary budget. He proceeded to produce the minutes of the board as an exhibit.

In cross-examination, he stated that he was arrested together with the respondent and procurement manager but the respondent was later charged alone. He admitted that it was during the covid-19 period and directions had been issued by the Ministry to reduce the staff in work places. He also confirmed that there was a budget and procurement plan for 2020/2021 which the board approved. He added that they needed to get food at the restaurant and therefore they needed to avail equipment like plates, cups, glasses, utensils, cutlery and other kitchen items.

Francis Simiran Nko'toi was the second witness who had joined BOK as a board member in 2014 until 2021. He was the chairman of the finance committee which reported to the full board on issues finance and acted as an oversight body for the Board of B.O.K. He stated that when he was questioned by EACC about the procurement in issue, he told them that it was an emergency as they needed to operationalize Utamaduni restaurant again after Utalii college exited. After passing through some committees, the recommendations to operationalise the restaurant reached the Board. He confirmed attending the meeting which approved the resumption of the restaurant. He added that the itemised budget was proposed and was categorical that the budget was not approved.

In cross-examination, he confirmed that he chaired the finance committee and that they approved the procurement plans. He added that they approved a special account for Utamaduni restaurant which needed plates, cups, fridge and equipment to enable it operate. He was referred to a document marked as MFI 3 which was a budget for 2020/2021 and which had provision for hot plates, deep friers and cooking gas burners. He also stated that the treasury had advised that they realign the budget to fit the operationalisation of the restaurant and additional funding of Kshs 59,000,000.00.

Pressed further, the witness stated that there were proposals for extension of the term of the existing committees but he did not attend meetings after September 2020 due to covid-19 restrictions but added that it was the duty of the management to operationalize the restaurant. He also stated that the Board directed the management to market Utamaduni restaurant at that time to allow the restaurant to get customers.

PW3 was Johnson Swenson Ekalil who was at BOK between 2013 and June 2021 as an acting food and beverage manager. He added that when EACC came for his statement, they wanted to know the procedure on how they requested for food and beverage items in their department which he gave. He narrated to the court the process of requisition which I do not consider relevant to this appeal as there is no contest that the items in the charge sheet were procured but it is important to note that during cross-examination, the witness confirmed that they had an inspection and acceptance committee which checked the items and received them and that Pamela Nyaga represented the food and beverage department in the committee.

The prosecution's 4th witness was one Godfrey Owiti Ndiwati who worked for BOK between 2020 to 2021 as assistant property management officer. He was

appointed by the respondent as a member of the evaluation committee alongside two others. His testimony was on evaluation of the quotations which I also consider irrelevant to the issues in this appeal.

Silas Kimutai Tum an accounts clerk with BOK was the fifth witness who participated in the procurement processes for the items in question in the evaluation committee. Similarly, his evidence is not relevant to this appeal as there is no dispute as to the fact that the items were procured neither are there any issues surrounding evaluation.

PW6, Jimmy Okidiangi the human resource manager told the court that he was in the tender opening committee as the chair. His evidence is also not important and has no bearing to what I am called upon to determine in this appeal as there is no dispute on evaluation or the fact that the respondent was the Chief Executive Officer of BOK.

PW7 was Pamela Gatanga Nyaga who told the court that she was a senior cook at BOK. She was a member of the inspection and acceptance committee having been appointed by the then CEO Ahmed Quresh who had retired. She produced a letter of appointment to the committee dated 20/6/2016. She confirmed that she was asked to receive goods and services to BOK. She went on to refer to several local purchase orders, invoices and delivery notes and narrated that the committee received the items in question. She added that she attended the committee and inspected the items upon which she signed and stamp.

In cross-examination, she stated that the goods were actually delivered and that the committee worked within the law. From her testimony in cross-examination, it is apparent that this was not the only procurement her

committee was involved in. They used to inspect others the same way they did the one subject of the proceedings.

PW8 was Christine Melisa Mukoya Sakwa who worked in the stores desk and the chairperson of the inspection and acceptance committee having been appointed through a letter dated 23/7/2013. The letter appointed her to the said committee to inspect and accept all goods and services for BOK. She participated in inspection of the goods in question and signed and stamp after inspection and acceptance. Her detailed testimony was the same as that of PW7.

PW9 one Lydia Jerotich Jarus worked as a cashier in the food and beverage department of BOK. She added that between 2017 and February 2022, she was working in the stores under food and beverage department. Her testimony bordered on how she received the goods in question from the inspection and acceptance committee and kept them. Just like PW6 and PW7, her testimony does not touch on the issues I am to determine in this appeal.

Ambrose Riasi who was the acting supply chain manager was the tenth witness. He told the court that his roles were ensuring correct implementation of Procurement Act and coordinating and implementing procurement and strategic plans. He was the one overseeing procurement activities in the corporation.

Concerning the case before the court, he stated that he sent request for quotations for the items in question. After the tenders were opened and evaluated by the relevant committees, he recommended the tenders be awarded to the respective winners. According to him Regulation 91(2) of the Procurement Regulations 2020 required the accounting officer to appoint an inspection and acceptance committee. He added that due to covid-19 pandemic,

they decided to continue using the committee that was there. He emphasised that there was a committee in place and produced exhibit 57 being a letter appointing the committee and stood ground that the committee was appointed in accordance with the law as the members' letters had not been revoked.

In cross-examination, the witness stated that he was the one who prepared the quotations and had verified that they complied with the law and was categorical that there was a budget for the kitchen items. He also added that the items were in the procurement plan.

The witness also stated that none of the items went beyond the budget and that the accounting officer has no mandate to change his (the witness's) opinion but could reject it. He also stated that there were enough funds for the procured items. He stated further that Kshs 8.4 million had been set aside for the items. The respondent was not involved in the budgeting which was done by the procurement and finance departments. He stated that all procurement laws were complied with and that he is the one who recommended to the CEO the members to be appointed to committees. He stated further that it was not mandatory to constitute an Ad Hoc Committee and he was the one who made a memo to the respondent to extend the life of the existing inspection and acceptance committee.

Arnold Omwansa was an accountant with BOK since January 2021. His testimony as the 11th prosecution witness was about the purchase of the items which had been done by the time he took office and he did not say much except identifying what he took over from the chairperson of evaluation committee. The same applied to PW12 one Timothy Munyoki Muimi who was working as a clerical officer in the finance department. His testimony is not relevant to this appeal as it touches on payment for the goods supplied which is not in dispute.

PW13 was Eva Kimeiyoo Njeri who told the court that she worked at the government press. Her testimony related to verification and certification of some gazette notices appointing PW1 and others as board members which is also irrelevant for now and I will not reproduce the evidence here.

Other witnesses whose testimony I considered not worthy of consideration in this appeal PW14 one Samuel Epara who was working as a security manager at credit bank since May 2019; PW15, a Mr Japheth Rona who worked in the department of food and beverages at Bomas of Kenya as a chef; Georgina Muthoni Kiarie who testified as PW 16 and who was an intern deployed to the stores; Haggai Onyago who worked at Stanbic Bank and who testified as PW17; PW18 a Mr. Gordon Linami who stated that he worked in Kenya Commercial Bank; PW19, a Mr. Patrick Nduvu Mwarithi who was working at the Kenya Commercial Bank; PW20, a Mr. Irungu Evans who was an employee of the Cooperative Bank, PW21, a Mr. Moses Wamugunda who was an accountant with the BOK at the time of the alleged offence and Mr. Felix Naftali Mutethia working with Business Registration Services who testified as PW23.

PW22 was one Cyrus Musyoki Makuyu. He told the court that he worked as a security guard at BOK and that he recorded statement with the EACC because he was in the inspection and acceptance committee of BOK between 2013 and 2021 having been appointed by the former CEO one Ahmed Qureshi. He added that the chair of the committee was Christine Salawa and that he did not know of any other committee. He stated that he participated in inspection and acceptance of some of the goods in question. He signed against delivery of those he participated in.

In cross-examination, he stated that the EACC was interested in him because he was a member of the inspection and acceptance committee. He confirmed that he worked during covid -19 period and the deliveries for the procured items was done. He also confirmed that the inspection and acceptance done in his absence was proper as the committee has the requisite quorum of three members at any given time.

The last witness for the prosecution was the investigating officer Mr. George Ligami Shamalla who told the court that in 202,1 EACC received a report of unlawful award of tenders and embezzlement of funds by BOK following which he was assigned the matter as the lead investigating officer. He analyses the case and wrote necessary letters requesting for documents and information from BOK.

Some of the documents and information he requested were for payments, reports, minutes, account statements, minutes for board meetings for 2018, 2019, 2020 2021, human resource manual, payroll for employees for 2018 to 2021, sales disbursements for 2018 to 2019, approved detailed and itemized budget for financial year 2021-2022, approved procured plans for 2020-2021 and 2021 2022 and procurement documents for the items in question in this matter. These documents were provided by the respondent.

He added that after getting the information, he established from the documents that the procurement process was flawed. The items were not captured in the budget for financial year 2020-2021 neither were they captured in the years' procurement plan. He added that Utamadumi restaurant was not captured in the procurement plan and that in 2018. Utalii college and Bomas had a contract for 5 five years which was to end in 2023 but it ended during covid period due to financial constraints and Utalii moved out and left management of the

Utamaduni restaurant. He stated that supplementary budgets were not produced in court.

The witness stated further that other than failure to capture the items in the budget, the respondent did not appoint committees to do procurement at Bomas. There were standing committees in place, but respondent did not appoint inspection and acceptance committee to carry out the exercise. He added that the respondent was summoned but he did not provide a letter appointing Ad Hoc committee for inspection and acceptance. The inspection committee in place had been appointed by Qureshi Mohamed and not the respondent.

The witness's attempt to produce the annual approved budget for financial year 2020-2021 for BOK and the accompanying electronic evidence certificate was thwarted by an objection raised by the respondent's advocate and sustained by the court vide ruling dated 12-03-2025 on grounds that PW24 was not the person who printed it neither was he the maker of the certificate. The maker of the certificate was available at the EACC and could be called to produce the same.

After the objection was sustained, the prosecution asked for an adjournment to reorganize its case and probably call more witness which adjournment was granted but immediately thereafter, the prosecution approached the court and agreed that the approved budget which had been marked as PMFI5 be left out and the following day, PW24 concluded his evidence in chief without producing the same.

In cross-examination, PW24 insisted that even if the items were purchased, they were not within the budget. He also admitted that PW4 said that there was a budget and added that the Cabinet Secretary for Tourism had done a budget for

BOK which was approved. He agreed that during covid -19 period, things were unique and services were hampered.

He was shown a letter indicating that the inspection committee's life had been extended and stated that the letter had not been provided to him and even if it had, it would not have changed the situation since it was against procurement. According to him, the issue was that the members of the acceptance and inspection committee were not appointed by the respondent and he could not extend the life of the committee because one cannot extend appointments he had not done.

He added that his proposal to the Office of the Director of Public Prosecutions were was that, 9 officers and the Chief Finance Officer be charged and not the CEO. He stated that the EACC's letter proposing charges did not bear the name of the General Manager or the CEO. According to his recommendations, more than one officers were to be charged including officers from procurement, finance and management and the board members, but they were not charged.

He admitted that the law allows the procurement officer to advice the CEO before any decision is made to procure items. The head of procurement in this case was Mr. Riasi who was not charged. The witness added that the Board comes up with policies which are implemented by the management. The Board of BOK came up with a policy to operationalize restaurant and the management should have come up with a budget.

Analysis and determination

Having gone through the evidence presented by the prosecution, grounds of appeal herein and the lower court's ruling, I find myself agreeing with the

Honourable Magistrate in the manner she framed the issues for determination to wit;

- a. Whether there was an approved budget for the financial year 2020/2021 and whether the impugned quotations were included in therein.
- b. Whether the respondent engaged in procurement process that was not factored in the procurement plan for the year 2020/2021; and
- c. Whether it was mandatory for the respondent to appoint an Ad Hoc inspection and acceptance committee in relation to the impugned quotations.

The first and second counts fell in the first and 2nd issue respectively while the 3rd to 7th counts fell under the 3rd issue. In respect of the 1st and 2nd issue, the respondent was accused of failing to comply with the law relating to procurement in particular Section 44(2)(a) and 25(3)(a) of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as PPADA).

According to the prosecution there was no budget and procurement plan for kitchen items, utensils, plates, cups and cutlery for the financial year 2020/2021. If I understand the prosecution's case well, the budget and procurement plan for the year did not contain the provision for these specified items.

I have gone through the proceedings of the trial court and it is clear to me that the prosecution witnesses especially PW1, PW2, PW7, PW8 and PW10 were empathic that there was a budget for the year. PW1 identified MFI as the budget for the year but as it would turn out, the same was never produced in court. I pick a statement by PW1 where he told the court in his evidence in chief that the Board approved and recommended that since Utalii college had left, they made

provisions for the restaurant. This witness in his subsequent evidence kept on faltering on the issue. In one instance, he stated that he approved the expenditure in what he stated was supposed to be a supplementary budget then he changed and said that it was not approved and he signed just because he was chairing the Board.

PW2 is on record stating under cross-examination that they approved procurement plans. Failure to produce the approved plans was in my view fatal to the prosecution case. The documents were in their possession and by virtue of Section 112 of the Evidence Act, the prosecution was bound to prove its allegations the items purchased were not in the budget and procurement plan by producing of the approved budget and procurement plan for the year. In absence of this important document, this court presumes that had the plan been produced, it would have been adverse to the appellant's case.

PW2 told the court that there were memos which stated that inspection and acceptance committees should be retained till a new board was put in place. This was confirmed by PW10 who was the head of procurement department and the author of the memos. In its submissions on the issue of lack of budget and procurement plan, the appellant has placed so much reliance on evidence of PW1 and PW2. In my view very little weight should be accorded the testimony of these witnesses as I find their testimony self-contradictory and one gets an impression that they were out to fix the respondent and exonerate themselves from a subject they had participated in and approved. It is not lost on me that PW1 who chaired the Board testified that he had been arrested with the respondent but later released. He was part of the discussion to operationalise the restaurant and the respondent being the Chief Executive Officer was an executor of the resolutions of the Board.

None of the witnesses except PW24 told the court that the items were missing in the procurement plan. I note that the budget for the year was not produced in evidence as attempt to do so was objected to by the defence and sustained by the court. There was no appeal against the trial court's ruling on the objection on the production of the budget and the same cannot be a subject of this appeal. In any event the effect of the ruling would have been cured by a simple act of calling the maker to produce it with the necessary certificates. The applicant squandered that opportunity and cannot claim it in this appeal.

As rightly observed by the trial court, the investigating officer (PW24) seemed to be the only witness who insisted that there was no budget for the items and that the items were not included in the procurement plan for the year. It is not disputable that an investigating officer can never be a direct or an eye witness in criminal matters. His work is to collect evidence, call witnesses and guide the prosecution of the case. He usually testifies on what was gathered from the witnesses during the process of investigations.

Where the investigating officer differs in material way with the prosecution witnesses, the case is irredeemably weakened. Indeed, the prosecution witnesses in this matter were clear and categorical that the items in question were in the procurement plan and there was a budget for the same. The investigation officer could only insist otherwise if he had produced the budget and the procurement plan for the year.

In this case, there was no budget or procurement plan produced. The same were only marked for identification as MFI 5 and MFI 57. They therefore do not form part of the evidence for the court's consideration. In ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) KECA 334 (KLR)***, the Court of Appeal held as follows;

‘The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.’

In the circumstances, I agree with the trial court that calling upon the appellant to defend himself would have been an exercise in futility. He has no duty to close the gaps left in the prosecution’s case. An accused person has no duty of proving his innocence and he will be entitled to an acquittal where he succeeds in creating a reasonable doubt in the prosecution’s case. In **Maina & 4 others v Republic (2021) KECA 126 (KLR)**, the Court of Appeal held as follows on this position;

‘It must be recalled that in order to justify a ruling that an accused person has a case to answer, the prosecution evidence must be such as would entitle a reasonable tribunal, properly directing itself on it, without more, to convict. If the evidence is either devoid of relevant elements that would go to establish the offence charged, or has been so discredited in cross-examination as to be of low credibility or probative value, the court has a duty to uphold a submission of no case to answer, and acquit the accused. It has to be so, for to hold otherwise would be to say that a case that is incapable of reasonably sustaining a conviction should still be answered by the defence. What would be the use of such answer unless the intention be that the accused would thereby somehow provide, contrary to the principle of non-self-incrimination, facts that would pad and patch up the holes and defects of the prosecution case to the point where the court might then be entitled to convict?’

Such an approach would be wholly untenable and inimical to the golden thread that postulates that the burden of proving a criminal charge beyond reasonable doubt resides with the prosecution throughout the trial and never shifts. This principle is so fundamental that it must be jealously guarded as it implicates the liberty of all citizens as well as their human dignity.'

The last issue is whether the respondent had a mandatory duty to appoint an Ad Hoc inspection and acceptance committee. It has been stated that the inspection and acceptance of the procured goods was done by a standing committee. There is no prescribed criteria for appointment of an Ad Hoc committee under Section 48 of the PPADA save the composition thereof and the functions of the committee. In this matter, those who inspected the goods did so under instructions from the respondent and they were to do that for a specific tender.

The appellant has submitted that it is mandatory under Section 48(1) that the accounting officer appoints an Ad Hoc committee for every tender while the respondent has submitted that the Section is couched in a discretionary manner. The use of the word 'may' in my view does not necessarily mean that it is permissible for the accounting officer to act outside the confines of the law. Any section of the law which makes provision by use of the word, must be read and interpreted in consideration of the context. If the law requires that a particular task be done in a particular way, the mere fact that the word 'may' appears in some place does not give the executors of the function a leeway to depart from the substance and intention of the law.

I hold the view that in this case, the discretion is on whether the accounting officer will appoint an Ad Hoc inspection and acceptance committee. This is so

because my reading of Section 46 and 78 which provides for evaluation committee and opening committee respectively use the mandatory word ‘shall’ while Section 48 uses the word ‘may’. Regulation 91(2) of Public Procurement and Asset Disposal Regulations which in my view is relevant to these proceedings makes it mandatory for appointment of an *Ad Hoc* evaluation committee and opening committee but it is silent on the acceptance and inspection committee. This taken into account together and reading the Sections and the Regulation together means that the Legislature was very clear on which *Ad Hoc* committees are mandatory. If it had intended the inspection and acceptance committee to be mandatorily *Ad Hoc*, it would not have couched Section 48 differently from Sections 46 and 78 and it would not have left out that aspect in Regulation 91(2). For clarity, Regulation 91(2) provides as follows;’

The accounting officer or such other person delegated in writing by that accounting officer shall, and for the purposes of the procurement process, appoint-

- a) an ad hoc opening committee in accordance with section 78 of the Act; and*
- b) the ad hoc evaluation committee in accordance with section 46 of the Act and regulation 29 of these Regulations.*

Having said the above, I am of the opinion that the circumstances of a specific procurement may require use of some level of discretion. For instance, Part IX of the PPADA allows the accounting officer discretion to choose the method of procurement but that does not mean that the head of the procuring entity should not follow the law on procurement or that he can twist or bend the law to suit other interests. He must follow and meet the conditions given under specific Sections in that Part. The accounting officer must be able to justify his choice.

In this matter, it is said that there were special circumstances which dictated that the respondent does make use of the standing inspection and acceptance committee. It is said that the BOK had been overwhelmed by government demands and those of political parties and other activities. It was a time when Utalii College had suspended its operations and there were restrictions of movement and number of people to be in office at any given time. It was stated by PW10 that the respondent sought advice of the head of procurement who advised that they could use the standing committee. This opinion was produced as prosecution exhibits 93 to 97. I am satisfied that by using the standing committee, the respondent did not break the law. What mattered in my view was that there was an established committee capable of executing the function of committee inspection and acceptance who worked under direct supervision and appointment of the respondent.

The appellant has submitted that PW7 and PW8 admitted that they had been appointed as members of inspection and acceptance committee under the repealed Public Procurement and Disposal Act 2013 instead of PPADA and that the appointment was therefore null and void for being based on a repealed Act. The testimony of PW7 shows that she participated in the inspection and acceptance of the goods which I take as execution of the duty she was appointed to although she seems to deny her presence in some of the deliveries. If indeed she failed to attend some of the inspection and acceptance meetings, that cannot be blamed on the respondent as it was her dereliction of a duty she had been assigned. The duty of the respondent was to designate the officers to perform the functions of the committee.

The same goes for PW8 who was the chairperson of the committee. She said in cross-examination that her committee's mandate was extended until the

operations normalised since it was covid-19 period. She is on record stating that in the period the respondent allegedly committed the offence, the committee was in place and that new committees were reconstituted on 21-12-2021.

The standard of proof required to establish a prima facie case in a criminal case may be difficult to describe in a sentence but it must be one which lays basis for the court to found a conviction if the accused were to remain silent in his defence. An accused person can only be called to defend himself if the evidence produced by the prosecution is strong enough to convince the court that the accused person has an explanation to give based on what has been placed before the court. It cannot be that the accused person would be placed on his defence as a matter of formality. Where the evidence produced is too loose and carries no hope of a conviction, the accused person has a right to benefit from an acquittal. Such is the case in this matter. The Court of Appeal held in **Anthony Njue Njeru v Republic (2006) KECA 339 (KLR)** that;

‘It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”. The issue of what is a prima facie case in criminal trials was clearly explained in RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332 at p. 334-335 where it was said:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one: -

“Which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is: -

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

Flowing from the above, I do not see any reason for disturbing the trial court’s ruling. Consequently, this appeal is found unmerited and it is disallowed.

Dated signed and delivered at Nairobi this **18th** day of **December**
2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;
Miss Wangia holding brief for Mr. Akula for the appellant;

Mr. Oyaro holding brief for Mr. Ondieki for the respondent; and
The respondent.

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