



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAKURU**

**MCAC NO. E001 OF 2024**

REPUBLIC.....DIRECTOR OF  
PUBLIC PROSECUTIONS

**VERSUS**

ESTHER  
WAMUIYA.....1<sup>ST</sup>  
ACCUSED

REGINA                      WAIRIMU                      WACIRA.....  
.....2<sup>ND</sup> ACCUSED

VINCENT              MUIRURI              WAMBUI              .....  
..... 3<sup>RD</sup> ACCUSED

SOPHIA WAIRIMU KARANJA.....  
.....4<sup>TH</sup> ACCUSED

SHADRACK

KANYUNGO

NDIRANGU.....5<sup>TH</sup> ACCUSED

TIMOTHY

NGUNJIRI

KIRAGU.....6<sup>TH</sup>

ACCUSED

SIMON MWANGI NG'ANG'A.....

.....7<sup>TH</sup> ACCUSED

## **RULING ON SENTENCE**

### **INTRODUCTION**

1. The accused persons herein were charged with 16 counts of diverse offences as follows:

- i) **Count I: Attempt to Commit an Offence of Economic Crime contrary to Section 47A(1) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003** (Hereinafter also abbreviated as the ACECA) the particulars of which allege that the accused persons herein between May, 2018 and June, 2018, within Nyandarua County in the Republic of Kenya, being the

CECM, Accountant, Head of Procurement, Supply Chain Management Assistant and Weights and Measures Officer in the Department of Industrialization, Trade and Cooperatives, IFMIS Accountant and the CECM Department of Water, Environment, Tourism and Natural Resources respectively at Nyandarua County Government, attempted to commit an Economic crime to wit, making fraudulent payments for services not rendered to 6 suppliers in regard to a purported Investment Conference which was never held.

- ii) **Count II: Conspiracy to Commit an Offence of Economic Crime contrary to Section 47A(3) as read with Section 48(1) of ACECA:** The particulars are that between 25/06/2018 and 26/06/2018, within Nyandarua County in the Republic of Kenya, being CECM, Accountant, Head of Procurement, Supply Chain Management Assistant and Weights and Measures Officer in the Department of Industrialization, Trade and Cooperatives, IFMIS Accountant and the CECM Department of Water, Environment, Tourism and Natural Resources respectively

at Nyandarua County Government, conspired with one another to commit an Economic crime to wit, making fraudulent payments for services not rendered to 6 suppliers in regard to a purported Investment Conference which was never held.

iii) **Count III: Knowingly Making a False Statement to One's Principal Contrary to Section 41(2) as read with Section 48 (1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003** where it is alleged that the 1<sup>st</sup> Accused, on or about 06<sup>th</sup> July 2018, within Nyandarua County in the Republic of Kenya, being the CECM in the Department of Industrialisation, Trade and Cooperatives at Nyandarua County Government, made a false document to Nyandarua County Government that the services towards the Investors Conference had been satisfactorily offered, a statement which she knew to be false.

iv) **Count IV: 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**, where the

particulars allege that the 1<sup>st</sup> Accused on or about 06<sup>th</sup> July 2018, within Nyandarua County in the Republic of Kenya, being the CECM in the Department of Industrialisation, Trade and Cooperatives at Nyandarua County Government, used her office to improperly confer a benefit to 6 suppliers by signing a commitment form confirming that the services in regard to the investors conference had been satisfactorily offered yet the services had not been offered.

- v) **Count V: Wilfully Failing to Comply with the Applicable Procedures and Guidelines Relating to Incurring of Expenditure Contrary to Section 45(2) (b) as read with Section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003** against the 2<sup>nd</sup> Accused, the particulars of which are that between 25<sup>th</sup> June 2018 and 10<sup>th</sup> July 2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she wilfully failed to comply with the law relating to incurring

of expenditures, to wit, **Regulation No 98(2) of Public Finance Management Regulation of 2015** by approving payments of Kshs 12,998,000 for services for an Investors' Conference that did not take place.

vi) **Count VI: Fraudulently Making Payment from Public Revenue contrary to section 45(2)(a) as read with section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003**, against the 2<sup>nd</sup> Accused, alleging that between 25/06/2018 and 10/07/2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, being person concerned with the administration and management of public property/ revenue, she fraudulently made payments of Kshs 12,998,000 from public revenue to 6 suppliers for services not rendered.

vii) **Count VII: 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**, against the

2<sup>nd</sup> Accused, alleging that between 25/06/2018 and 10/07/2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she used her office to improperly confer a benefit to 6 suppliers by approving payments of Kshs 12,998,000 to the said suppliers for services of an Investors' Conference that did not take place.

viii) **Count VIII: Wilfully Failing to comply with the Applicable Procedures and Guidelines Relating to Procurement contrary to Section 45(2)(b) as read with Section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003** against the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused whose particulars allege that between 24<sup>th</sup> May 2018 and 25<sup>th</sup> May 2018, within Nyandarua County in the Republic of Kenya, being the Tender Evaluation Committee members at Nyandarua County Government, jointly wilfully failed to comply with the law relating to procurement, to wit, **Section 80(2) of the Public Procurement and Asset Disposal Act, 2015**

(hereinafter abbreviated as PPADA) by recommending award of tenders for the Investors' Conference without following the criteria provided in the Request for Quotation.

ix) **Count IX: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA** where the 3<sup>rd</sup> Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being the head of procurement in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

x) **Count X: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA** where the 4<sup>th</sup> Accused has been charged, with allegations that between

17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, as a Supply Chain Management Assistant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation for Shatress General Merchants Limited purporting to be the genuine Requests for Quotation filled by the said supplier.

**xi) Count XI: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA** where the 5<sup>th</sup> Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being a Weights and Measures Officer, in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation for Beazzer Supplier purporting to

be the genuine Requests for Quotation filled by the said supplier.

xii) **Count XII: Making a Document Without Authority**

**contrary to Section 357(a) of the Penal Code** whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 3<sup>rd</sup> Accused, being the Head of Procurement in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

xiii) **Count XIII: Making a Document Without Authority**

**contrary to Section 357(a) of the Penal Code** whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 4<sup>th</sup> Accused, being a Supply Chain Management Assistant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua

County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation for Shatress General Merchants Limited purporting to be the genuine Requests for Quotation filled by the supplier.

xiv) **Count XIV: Making a Document Without Authority contrary to Section 357(a) of the Penal Code** whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 5<sup>th</sup> Accused, being a Weights and Measures Officer, in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation for Beazzer Suppliers purporting to be the genuine Requests for Quotation filled by the supplier.

xv) **Count XV: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA** where the 7<sup>th</sup> Accused has been charged, with allegations that between

17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being the CECM for the Department of Environment, Tourism and Natural Resources, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

xvi) **Count XVI: Making a Document Without Authority contrary to Section 357(a) of the Penal Code** whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 7<sup>th</sup> Accused, being the CECM for the Department of Environment, Tourism and Natural Resources, at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

2. The accused persons denied the truth of each charge in their respective counts, and consequently, the matter proceeded for hearing. After hearing all the witnesses for the prosecutions, and going through the entire case for the prosecution, the evidence contained therein, and the submissions thereon<sup>1</sup>; on 28.10.2025, I came to a conclusion that a *prima facie* case had been disclosed with respect to the 2<sup>nd</sup> accused person, **Regina Wairimu Wacira**, in the 5<sup>th</sup> Count only. Pursuant to the finding, I did call upon her to make her defence in that count as required under section 211 CPC

3. I however, did not find such a case disclosed with respect to the other accused persons herein and in all the remaining counts. The charges against all the accused persons herein in all the counts, except count V, were therefore dismissed pursuant to the provisions of section 210 of the Criminal Procedure Code. Consequently, all the Accused persons herein were acquitted of the offences of Attempt to Commit an Economic Crime c/s 47A (1) of the ACECA, and Conspiracy to Commit an Offence of Economic Crime contrary to Section 47A

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<sup>1</sup> Submissions by the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> accused persons only.

(3) as read with Section 48(1) of the same Act. The 1<sup>st</sup> Accused person was further acquitted of the offences of Knowingly Making a False Statement to One's principal c/s 41(2) as read with 48(1)(a) of the same Act and Abuse of Office c/s 46 as read with section 48(1) of the same Act. The 2<sup>nd</sup> Accused was acquitted of the offences of Fraudulently Making Payment from Public Revenue c/s 45(2)(a) as read with section 48(1)(a) of the same Act and Abuse of Office c/s 46 as read with section 48(1) of the same Act. Meanwhile, the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused were also acquitted of the offence of Wilfully Failing to Comply with the Applicable Procedures and Guidelines Relating to Procurement c/s 45(2)(b) as read with section 48(1)(a) of the same Act. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Accused were acquitted of the offence of Fraudulent Practice in a Procurement Process c/s 66(1) as read with Section 176(1) of the PPADA. Finally, the 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Accused persons were acquitted of the offence of Making a Document without Authority c/s 357(a) of the Penal Code.

4. The 2<sup>nd</sup> Accused was, after a full trial where her defence was considered, finally found guilty and convicted pursuant to the provisions of section 215 of the CPC, of the offence of Wilfully Failing to Comply with the Applicable Procedure and Guidelines Relating to Incurring of Expenditure c/s 45(2)(b) as read with section 48(1)(a) of the ACECA as charged in the 5<sup>th</sup> Count. This conviction is the subject of the sentence ruling herein.

### **GENERAL LEGAL PRINCIPLES GOVERNING SENTENCING**

5. Sentencing is the process by which a court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial. Courts are required to act objectively and impartially<sup>2</sup> and remain accountable to the public for their decisions and actions, including those that relate to sentencing<sup>3</sup>.

6. It is generally trite that sentencing is a discretionary power of the court. However, the discretion should be exercised judiciously, dictated by relevant factors including but not

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<sup>2</sup> Constitution of Kenya 2010, Article 73 (2) (b).

<sup>3</sup>Constitution of Kenya 2010, Article 10 (2) (c), Article 73 (2) (d). See also Fatuma Hassan Salo v. Republic Criminal Appeal No. 429 of 2006 [2006] eKLR in which the court emphasized that the discretion during sentencing 'must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle'

limited to the purposes of sentencing, evidence adduced by the prosecution for or against the accused; evidence adduced in mitigation by the accused and diverse principles enunciated thereon by superior courts.<sup>4</sup>

7. Although the court is reposed with discretionary power in this regard, as expressed in ***HSBC Bank PLC v Chevalier-Firescu [2024] EWCA Civ 1550***, at paragraph 74, it is trite that no power, however widely expressed, confers an unfettered discretion on a decision-maker. This court is thus of the Judicial persuasion that although it cannot be gainsaid that this court is clothed with discretionary power in sentencing, it will certainly be incorrect to hold that its unfettered.

8. The principal guiding edict of discretionary power is that it ought to be exercised to serve, and not defeat justice. It should thus be exercised judiciously, which essentially mean that the exercise thereof should not be fickle, capricious, volatile, impulsive, arbitrary, whimsical, but it should be rationalized

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<sup>4</sup> See the judicial view of the Court of Appeal in Shadrack Kipchoge Kogo v Republic [2015] eKLR.

with rules of reason, justice, facts and the law. Speaking of discretion, Lord Halsbury L C, in the case of **Sharp v Wakefield [1891] 64 LT Rep 180 Ap Ca 173** held that:

***When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humor. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself.***

9. In **Rooke's case, 5 Rep 99b (1598)**, as cited with approval by Mativo, J. (as he then was) in **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR**, the court attempted a definition of discretion as follows:

***Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigor of it, but in no case does it contradict***

**or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with.**

10. Pursuant to section 216 of the CPC, it's incumbent upon this court, before handing down a sentence under section 215 of the CPC, to invite the accused to give evidence relative to properly informing the court to pass an appropriate sentence. It reads thus: **'The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.'**

11. Some of the principles which act as guiding rays include proportionality<sup>5</sup>, equality, consistency, uniformity, impartiality

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<sup>5</sup> The principle of proportionality is grounded within the concept of just deserts and is embraced by common law. In *Hoare v The Queen* (1989) 167 CLR 348, it was stated that 'a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.' The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) recognize the principle of proportionality but emphasize that with respect to juveniles, the response should not only consider the gravity of the offence but also the personal circumstance of the juvenile. Article 50 (1) of the Constitution of Kenya 2010 upholds the right to have a fair determination of a matter. Fairness demands that the sentence imposed should neither be excessive nor less than is merited. See for instance *Caroline Auma Majabu v. Republic Criminal Appeal No. 65 of 2014* [2014] eKLR where a sentence of life imprisonment and a fine of Kshs. 1,000,000 for having been found in possession of heroin worth Kshs. 700 was found to be excessive. See also *Republic v Sigei* (Criminal Case 18 of 2020) [2022] KEHC 14972 (KLR) (9 November 2022) (Judgment), where the High Court stated, 'Sentences

and parity<sup>6</sup>; transparency and accountability<sup>7</sup>, inclusiveness<sup>8</sup>, respect for human rights and freedoms, appropriateness, and adequacy. In the High Court decision in **Maureen Kathure v Republic [2018] eKLR**, Gikonyo, J. restated the purpose of sentencing afore-outlined and further set out some principles in sentencing in the following words:

***Imposition of punishment is a matter for the discretion of the court. Except, the court must consider the facts and circumstances of each case in order to impose punishment... Thus, in exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation. In assessing proportionality, take into account mitigating and aggravating factors, the impact of the crime on the victims and the need to make any order for compensation or forfeiture. I need not remind that victims of crime now occupy rightful position in the Constitution...That is not to say, however, that prison terms cannot be imposed alone where there is an option of fine if it is the most***

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must be commensurate to the offence committed by an Accused. (pg11)'. See also, Thomas Mwambu Wenyi v Republic [2017] eKLR

<sup>6</sup>Constitution of Kenya 2010, Article 27; Article 73 (1) (a) (iii); Article 73 (2) (b)

<sup>7</sup> Constitution of Kenya 2010, Article 50; Article 73 (2) (d))

<sup>8</sup> Constitution of Kenya 2010, Article 50; Article 10 (2) (b) identifies inclusiveness as one of the national values and principles of governance

***appropriate sentence in the circumstances of the case.***

12. In the Supreme Court of India decision in ***Alister Anthony Pareira v State of Maharashtra, [2012] 2 SCC 648***, cited and adopted in ***Mareen Kathure v Republic [2018] eKLR***, by Gikonyo, J., it was held that a sentence should be: '***... appropriate, adequate, just and proportionate... commensurate with the nature and gravity of the crime and the manner in which the crime is done... motive for the crime, nature of the offence and all other attendant circumstances***'.

13. Of all the offenders, first offender convicts are the most favorite children of the law and in that light, a lot of judicial ink has been shed in their favour. For instance, Madan, J. (as he then was), had occasion to give directions to subordinate courts to the effect that where fine is an option, it should be given priority irrespective of an Accused person's earning capacity unless the circumstances of the case irresistibly preclude this mode of punishment. In ***Mita v R [1969] EA***

(hereinafter 'the **Mita case**'), Madan, J. (as he then was) stated that

***Before passing sentence, the learned Magistrate pointed out that the appellant was a first offender, [who] appeared sorry and repentant. He added that this was, however, a very violent and unattractive act, although the appellant may have been provoked by the attempt to expel her from the premises ...The learned Magistrate ended up by saying he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money ...With respect I think the learned Magistrate did not assign enough emphasis to the appellant's contrite condition and the fact that she was a first offender ...I am also of the opinion that the learned Magistrate misdirected himself when he said the act of biting a man's face is hardly justifiable. At no stage has the appellant tried to justify her act ...I think irrespective of an accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment which is not the case here...I think the interests of justice will be met if I set aside the sentence of imprisonment and substitute therefor a fine of Kshs 400/=; in default, two months' imprisonment.***

14. While pronouncing himself on the stiffer fines for first offenders in lieu of imprisonment - where circumstances call for it - Makhandia, J. (as he then was) in **Hamdi Hale Ahmed v Republic, Criminal Appeal No 19 of 2007** (hereinafter '**the Hamdi case**'), citing in approval the principles laid in **James v Reg. (1950) 10 EACA** (hereinafter '**the James case**'); **Nilsson v Republic [1970] EA 599** (hereinafter '**the Nilsson case**') and **Wanjema v Republic (1971) EA 493** (hereinafter '**the Wanjema case**'), stated as follows:

***I do not think ... that was good-enough reason to tilt [the learned Magistrate's] hand towards a custodial rather than a non-custodial sentence. The same result can be obtained by imposing stiffer fines. The record also [reveals] that the learned Magistrate did not even consider the appellant's mitigation and the fact that he was a first offender. The appellant having been a first offender, a foreigner and considering our already over-stretched prison facilities, I would imagine that the most appropriate sentence would have been a fine and a repatriation order. Why should the Government be called upon to maintain a person in prison who is bound to be repatriated on completion of the prison [term]? Does it not make***

***more sense that such a person be fined and repatriated forthwith, rather than the Government being called upon to spend the meagre resources on him in prison.***

15. In embracing the reasoning of Makhandia, J. (as he then was), in ***Khali Abdiaziz Mohammud & 2 others v Republic [2007] eKLR*** (hereinafter 'the ***Khali case***'), JB Ojwang, J. (as he then was), added his voice to the reasoning that first offenders should not be disproportionately punished by saying as follows:

***It is clear too from other High Court decisions, as I have noted from the judgment of Makhandia, J aforesaid, that there is now a trenchant body of jurisprudence on sentencing, which carries a policy discouraging overkill in the imposition of prison terms, where the outcome of a prison term, far from inuring to the benefit of Kenya and Kenyans, merely dispenses vengeful penalty against aliens. Rather than teaching-a-lesson to an alien who will in any event depart, the policy of the law should be no more than to discourage a repeat of the offence; and the positive element in this policy will be advanced by allowing the alien to return to his own country with***

***the good-will to be law-abiding there, among his compatriots.***

16. In ***Joseph Simiyu Mukwei v Republic [2017] eKLR*** (hereinafter 'the ***Simiyu case***'), S Githinji, J. added his voice too. His Lordship reasoned that where an offence has an option of a fine and the offender is a first offender, then it is prudent and fair to consider fine as the first option and further argued that since fine counts a revenue to the state, it should be born in mind that when one is imprisoned in circumstances where the prisons are congested, a custodial sentence is a burden to the state and the tax payer. His Lordship stated that

***On the sentence, there could be an issue. The circumstances under which the offence was committed, the nature of injuries sustained by the complainant and appellant's Mitigation, should at least have been weighed to give him a fine option. Given that our prisons are congested, custodial sentence is a burden to the state and the tax payer, where an offence is fineable, and the convict is a first offender, and there are no other aggravating circumstances, it's always prudent and fair to consider fine as an option. Fine when paid is an***

***income, while jail sentence is an expense to the state...***

17. Sentences are imposed to meet the following objectives.

There will be instances in which the objectives may conflict with each other - insofar as possible, sentences

imposed should be geared towards meeting the objectives in totality.

i. Retribution: To punish the offender for their criminal conduct in a just manner.

ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.

iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.

iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to

promote a sense of responsibility through the offender's contribution towards meeting those needs.

v. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society.

18. Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for cases where the offence is so serious that neither a fine nor a community sentence can be justified. The length of that sentence will depend on the maximum penalty allowed by law and the seriousness of the offence among other factors. The court should bear in mind the high rates of recidivism associated with

imprisonment and seek to impose a sentence that is geared towards achieving the sentencing principles and objectives set out in the above paragraphs. In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be considered:

- i) Gravity of the offence: In the absence of aggravating circumstances, or any other circumstance that renders a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided with respect to sentences that have been adjudged as deserving less than three (3) years.
- ii) Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences except where the seriousness of the offence crosses the custody threshold.
- iii) Conduct of the offender: non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
- iv) Protection of the community: Where there is evidence that the offender is likely to pose a threat to the community, a

custodial sentence may be more appropriate. The probation officer's report should inform the court of the risk posed by the offender to the community in order to inform sentencing.

v) Offender's responsibility to third parties: Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons who depend on them, a court should consider if, in light of the nature and seriousness of the offence, the objectives of sentencing can be met with a non-custodial sentence or a suspended sentence. The court should enquire into the offender's personal circumstances and, where appropriate, seek the assistance of a pre-sentence report.

19. Where the option of a fine is provided in the law, the court must first consider it before proceeding to impose a custodial sentence<sup>9</sup>. If in the circumstances a fine is not a suitable sentence, then the court should expressly indicate the reasons why it is not appropriate to impose a fine<sup>10</sup>. The fines should

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<sup>9</sup> Anis Mihidin v Republic HCCRA No. 98 of 2001. See also Mohamed Ahmed v Republic [2018] eKLR

<sup>10</sup> See Fatuma Hassan Salo v Republic [2006] eKLR where it was stated that, 'where an option of a fine is given, the court has to give reasons as to why a fine is inappropriate.

not be so excessive as to render the offender incapable of paying and thus liable to imprisonment<sup>11</sup>.

20. In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm. The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative) during the sentence hearing. Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence. The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

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<sup>11</sup> Penal Code, section 28. See *R v Mureto Munyoki* 20 [KLR] 64 in which it was stated, 'it is a first principle in inflicting fines that the capacity of the accused to pay should be considered'

21. Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender. Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

### **LEGAL PRINCIPLES WHICH GOVERN SENTENCING IN CORRUPTION AND ECONOMIC CRIMES**

22. There are two classifications of punishments under ACECA namely discretionary punishments and mandatory punishments. Section 48(1)(a) of ACECA houses the discretionary sentence. The dichotomy is reflected in the text of section 48 of ACECA which provides that a person convicted of an offence under this part shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both.

23. Part of the principles which govern discretionary power of the court in sentencing is that whenever there is an option of a fine in ACECA, the Court should first consider a fine as the punishment, unless the factors placed before the court militate

against imposition of a fine, in which case the trial court is at liberty to consider a more punitive sentence. The trial court having pronounced a justification of imposing a custodial sentence for a first offender in **Boniface Okerosi Misera & another v Republic [2018] KEHC 5298 (KLR)** (hereinafter '**the Okerosi case**'), at paragraphs 100-103, Ong'udi, J. substituted the custodial sentence with a fine. For the same reasons, in **John Faustin Kinyua v Republic [2020] eKLR** (hereinafter '**the Kinyua case**'), at paragraphs 104-106, J. Onyiego, J. substituted the custodial sentence with a fine.

#### **DETERMINATION OF THE APPROPRIATE SENTENCE**

24. In determining the appropriate sentence to mete out to the 2<sup>nd</sup> accused, this court has addressed its mind to article 50 of the Constitution; the CPC and in particular sections 215 and 216 thereof; section 45(2)(b) of ACECA read with section 48 of ACECA; the broad principles applicable to sentencing generally (afore-discussed); the specific principles which govern sentencing in anti-corruption and economic crimes; the Sentencing Policy Guidelines, 2023 (which policy is intended to

promote transparency, consistency and fairness in sentencing as enunciated in **Michael Kathewa Laichena & another v Republic (2018) eKLR**); the submissions of the appropriate sentence as advanced by learned Counsel, **Mr Nderi**, representing the accused and learned prosecution counsel, **Mr. Macharia**, representing the state.

25. In his oral submissions, learned prosecution counsel, submitted that the accused is a first offender. In his oral submissions, learned counsel representing the accused submitted that his client is a first offender and that his client is a single mother of 2 school going children. That she is thus the sole bread winner for herself and the 2 dependant children. Counsel therefore pleaded for a lenient fine noting that the accused has been out of employment for a considerable period of time. Counsel further pleaded with the court to take note of the fact that no money was lost.

26. In particular, this court has considered the mitigating factors prevailing in favour of the 2<sup>nd</sup> accused which include:

- i. Absence of any prior convictions or any relevant/recent convictions.
- ii. Unchallenged evidence of 2<sup>nd</sup> accused's general good character demonstrated by the witnesses' testimony herein.
- iii. 2<sup>nd</sup> Accused's demonstration or expressed remorse evidenced by cooperation with the authorities,
- iv. High possibility, as submitted, that the offender became involved through coercion, intimidation, or exploitation that did not rise to an affirmative defence,
- v. The 2<sup>nd</sup> accused is a single mother and therefore the sole or primary caretaker for dependent relatives, being 2 school going children.
- vi. There shall be negative consequences of the incarceration of the 2<sup>nd</sup> accused on other vulnerable persons dependent on her being the 2 school-going children
- vii. The 2<sup>nd</sup> accused has been out of employment for a considerable period of time;

27. This court, on the other hand, finds no aggravating factor prevailing against the 2<sup>nd</sup> accused. Besides, this court has addressed its mind to other factors such as the maximum sentence for the offence and the fact that that no public property was obtained by the 2<sup>nd</sup> accused or lost.

28. Now therefore, having carefully considered the purpose of sentencing in the context of the mitigating factors; and there having been no previous criminal records against the 2<sup>nd</sup> accused considered in the edict that first offenders are the most favorite children of the law - guided by the enunciations in the ***Mita case***; the ***Hamdi case***; the ***James case*** ; the ***Nilsson case***; the ***Wanjema case***; the ***Khali case***; the ***Simiyu case***; the ***Okerosi case***; and the ***Kinyua case*** discussed herein above - this court forms the opinion that in accordance with the principles of sentencing under the said Sentencing Policy Guidelines, being a first offender, a non-custodial sentence is the most appropriate in this case. The non-custodial sentence should however tilt towards achieving the overall purpose of sentencing namely retribution;

deterrence; rehabilitation; restorative justice; promotion of a sense of responsibility; community protection; and denunciation.

29. Reasons wherefore the 2<sup>nd</sup> accused is sentenced pursuant to section 48(1)(a) of ACECA which prescribes a discretionary punishment, to pay a **fine of Kshs 100,000**, default of which she shall serve a term of **imprisonment of one year**.

***14 days right of appeal explained***

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT**

**NAKURU THIS...31<sup>st</sup> ...DAY OF ...March., 2026**

.....

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

*In the presence of;*

**Prosecution's Counsel: Macharia**

**1<sup>st</sup> & 7<sup>th</sup> Defence Counsel: n/a**

**2<sup>nd</sup> Defence Counsel: Nderi**

**3<sup>rd</sup> Defence Counsel: n/a**

**4<sup>th</sup> Defence Counsel: n/a**

**5<sup>th</sup> Defence Counsel: n/a**

**6<sup>th</sup> Defence Counsel: n/a**

**1<sup>st</sup> Accused: n/a**

**2<sup>nd</sup> Accused: Present**

**3<sup>rd</sup> Accused: n/a**

**4<sup>th</sup> Accused: n/a**

**5<sup>th</sup> Accused: n/a**

**6<sup>th</sup> Accused: n/a**

**7<sup>th</sup> Accused: n/a**