Mangiti & 21 others v Republic (Criminal Appeal E111, E162, E056, E055, E054 & E053 of 2023 & E006 of 2024 & E021 of 2022 (Consolidated)) [2025] KECA 735 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 735 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E111, E162, E056, E055, E054 & E053 OF 2023 & E006 OF 2024 & E021 OF 2022 (CONSOLIDATED)

J MOHAMMED, F TUIYOTT & P NYAMWEYA, JJA

MAY 2, 2025

BETWEEN

PETER OGANDA MANGITI ..... 1ST APPELLANT

ADAN GEDOW HARAKHE ..... 2ND APPELLANT

HENRY NYONGESA PILISI ..... 3RD APPELLANT

HASSAN NOOR HASSAN ..... 4TH APPELLANT

JOHN MUSYOKA MUNYWOKI ..... 5TH APPELLANT

RUTH NJERI KIIRU ..... 6TH APPELLANT

HEZBOURNE MACKOBONGO ..... 7TH APPELLANT

MICHAEL WESLY OJIAMBO ..... 8TH APPELLANT

JAMES M KIRIGWI ..... 9TH APPELLANT

SAMUEL MNDANYI WACHENJE ..... 10TH APPELLANT

SALIM ALI MOLLA ..... 11TH APPELLANT

SAMUEL CLOYD ODHIAMBO ..... 12TH APPELLANT

FRESHIAH W KAMAU ..... 13TH APPELLANT

MOSES OSORO OGOLLA ..... 14TH APPELLANT

KENNEDY NYAMAO ..... 15TH APPELLANT

FLORENCE BETT ..... 16TH APPELLANT

BETTY NJOKI MURIITHI ..... 17TH APPELLANT

JENNIFFER MUTHOMI KINOTI ..... 18TH APPELLANT

STEPHEN LAITITI MUTUNGA ..... 19TH APPELLANT

PETER MAHUNGU MURITU ..... 20TH APPELLANT

FRANCIS KARANJA ..... 21ST APPELLANT

TIMOTHY NDEKERE ..... 22ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeals against the Judgment of the High Court of Kenya Anti- Corruption and Economic Crimes Division at Nairobi (Maina, J.) dated 28th July, 2022 in ACEC Appeal No. 4 of 2020)

JUDGMENT

1. The consolidated appeals herein were all filed against a judgment delivered by the High Court (E. Maina J.) on 28th July 2022 in ACEC Appeal No. 4 of 2020, that allowed an appeal that had been filed therein by the Director of Public Prosecution against the acquittal of the appellants of charges brought against them in the Milimani Chief Magistrates Court (hereinafter the "trial Court") in Anti-Corruption Case No 26 of 2016. The High Court ordered a reversal of the said acquittals, and directed the 1st to 23rd appellants to enter their defences in the trial Court on counts 1, 2, 3, 4, 5, 6 and 7 of the charges against them.

2. A brief background to the consolidated appeals is necessary at this point. The appellants, who were at the time employees and suppliers at the Ministry of Devolution and Planning and the National Youth Service, were charged with eight counts of offences in the trial Court in Anti- Corruption Case No 26 of 2016, arising from alleged irregular procurement and awarding of a tender to Blue Star Enterprises for the procurement of training materials for the Automotive Engineering Faculty of the National Youth Service, and unlawful disposal of public funds in the sum of Kshs 47,600,000/= from the Ministry of Devolution and Planning. The 1st appellant in the consolidated appeals,Peter Oganga Mangiti, was the Principal Secretary of the Ministry; the 2nd appellant, Adan Gedow Harakhe, was the Senior Deputy Director General at the National Youth Service, and the 3rd appellant, Henry Nyongesa Pilisi, was a supply chain management officer at the National Youth Service.

3. The 4th to 15th appellants, namely Hassan Noor Hassan, John Musyoka Munywoki, Ruth Njeri Kiiru, Hezbourne Mackobongo, Michael Wesley Ojiambo, James Kirigwi, Salim Ali Molla, Samuel Mndanyi Wachenje, Samuel Cloyd Odhiambo, Freshiah Kamau, Moses Osoro Ogolla, and Kennedy Nyamao, were members of the Ministerial Tender Committees who participated in the procurement process and award of the subject the tender. Betty Njoki Muriithi and Jenniffer Muthoni Kinoti, the 17th and 18th appellants, were directors of Blue Star Enterprises which was the awarded the subject tender and paid for the training materials it consequently supplied, while Stephen Laititi Mutunga, Peter Mahungu Muritu, Francis Karanja, Timothy Ndekere and Reginah Nyambura Mungai, the 19th to 23rd appellants, were members of the Tender Evaluation Committee of the subject tender.

4. There were eight counts presented at the trial Court by the prosecution. In count 1, the 1st to the 18th appellants were charged with conspiracy to commit an offence of economic crime contrary to section 47 (a)(3) as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act*, 2003; in counts 2 and 3, the 1st appellant and the 2nd appellant were each respectively charged with the offence of 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; while in count 4, the 4th to 12th appellants were charged with willful failure to comply with the law relating to procurement contrary to section 45(2) (b) as read with section 48 of *Anti-Corruption and Economic Crimes Act*, 2003.

5. The 4th, 5th, 6th, 10th, 12th, 13th, 14th and 15th appellants were also charged with willful failure to comply with the law relating to procurement contrary to section 45(2) (b) as read with section 48 of *Anti-Corruption and Economic Crimes Act*, 2003 in count 5; in count 6, the 17th and 18th appellants were charged with fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48 of the *Anti-Corruption And Economic Crimes Act*, 2003, as were the 17th to 21st appellants in count 7. Lastly, count 8, involved a party who is not an appellant in this appeal, one Selesio Karanja, who was a supply chain assistant at the National Youth Service and was charged with the offence of fraudulent practice in procurement contrary to section 40 as read with section 137 of the Public Procurement and Disposal of Assets Act, 2005.

6. The trial proceeded in the trial Court, and 16 prosecution witnesses gave evidence, which we shall revert to later on in this judgment. After the prosecution closed its case on 30th January 2018, the parties filed submissions on whether there was a case to answer. The trial Court (Hon K. Bidali CM) delivered its ruling on case to answer on 9th March 2018 in which, after analysing the applicable law and evidence that was adduced by the prosecution on each count, it found as follows:

> " The upshot of my findings is that the prosecution has failed to establish a prima facie case against the accused persons in respect of the charges in count 1, 2, 3, 4, 5, 6, and 7 and on those counts 1 shall acquit the accused persons under Section 210 of the *Criminal Procedure Code*. In respect of count 8, I find that the prima facie case has been established sufficiently to warrant the 24th accused person be placed on his defense under the provisions of Section 211 of the *Criminal Procedure Code*."

7. Aggrieved, the Director of Public Prosecutions faulted this ruling in its petition of appeal to the High Court, on the grounds that the learned trial Magistrate did not take into account the principles that apply in establishment of a prima facie case and the evidence adduced. The High Court after considering the respective parties' submissions on the said petition, and finding the petition to be properly filed, concluded as follows in its judgment:

> " 94. In conclusion, the evidence adduced by the prosecution as a whole indicates breaches of the procurement process by the Respondents in their respective capacities. Right from the beginning in the choice of the restricted procurement method where there was no urgency, followed by failures by the Tender Evaluation Committee and the Ministerial Tender Committee in the evaluation of the bids, deliberation, and award of the tender to a supplier who was not pre-qualified and finally payment by the accounting officer. Whereas the onus of proof in criminal cases lies with the prosecution to prove the guilt of the accused person beyond reasonable doubt section 111 of the *Evidence Act* shifts that burden to the accused persons in circumstances such as are evidence in this case. Moreover, the law of public procurement and Pubic Financial Management places certain obligations upon public officers and it is encumbent (sic) upon them to, once evidence is led that they breached the law, explain that they acted within the law. (See Section 11 (2)(b) of the *Evidence Act*)".

8. These are the findings that triggered the consolidated appeals before this Court. This Court, by an order dated 24th April 2024, consolidated Criminal Appeals No. E053 of 2023, E054 of 2023, E055 of 2023, E056 of 2023, E111 of 2023 and E162 of 2023, for hearing and determination together, with the lead filed being that of Criminal Appeal No. E111 of 2023. We however noted during the hearing of the consolidated appeals that there were appellants in the consolidated appeals who had filed separate appeals against the same judgment, notably Criminal Appeal No. E021 of 2022 (filed by the 16th appellant) and Criminal Appeal No. E006 of 2024 (filed by the 7th, 8th 9th 12th and 13th appellants), which were also listed before us for hearing. We accordingly heard the additional appeals together with the earlier consolidated appeals, and they are also the subject of this judgment.

9. We heard all the said appeals on this Court's virtual platform on 16th December 2024, when learned counsel Ms. Guserwa appeared for the 1st, 2nd and 4th appellants, learned counsel Mr. Rutto appeared for the 3rd appellant; learned counsel Mr. Wandugi appeared for the 6th, 10th,11th 15th, 17th and 18th appellants, and also appeared for the 5th appellant, holding brief for learned counsel Mr. Olonde, and for the 7th, 8th 9th 12th and 13th appellants, holding brief for learned counsel Mr. Osiemo. We were also informed by Mr. Wandugi that the 14th appellant died before the judgment of the High Court was delivered. The 16th appellant was represented by learned counsel Ms Mwangi, holding brief for Mr. Nyakundi, while learned counsel Mr.T.G. Gichuki appeared for the 19th to 22nd appellants, and learned counsel Mr. Kiragu Wathuti appeared for the 23rd appellant. The learned Senior Assistant Director of Public Prosecutions, Mr. Omondi, appeared for the respondent.

10. Counsel for the 1st appellant filed a memorandum of appeal dated 29th November 2023 in Criminal Appeal No. E162 of 2023 and submissions dated 18th September 2024, which were supported and relied on by the 2nd and 4th appellants. The 3rd appellant's counsel and 5th appellant's counsel on their part filed submissions dated 14th November 2023 and 18th December 2024 respectively, and relied on the grounds of appeals filed in the various consolidated appeals. Counsel for the 6th, 10th, 11th 15th, 17th and 18th appellants filed individual memoranda of appeal for each of the appellants in Criminal Appeal No. 111 of 2023 and joint submissions dated 6th December 2023. The counsel for the 7th, 8th 9th 12th and 13th appellants on the other hand filed a joint memorandum of appeal dated 16th January 2024 in Criminal Appeal No. E006 of 2024 as well as joint submissions dated 12th November 2024, while the counsel for the 16th appellant filed a memorandum of appeal dated 25th August 2022 in Criminal Appeal No. E021 of 2022 and submissions dated 10th December 2024. Counsel for the 19th, 20th, 21st and 22nd appellants filed individual memoranda of appeal for each of the appellants in Criminal Appeals No. E056, E055, E054 and E053 of 2023 respectively and joint submissions dated 29th November 2024. Lastly, the counsel for the 23rd appellant filed submissions dated 12th November 2024, and relied on the grounds of appeals in the consolidated appeals

11. This being a second appeal, our jurisdiction is restricted by dint of Section 361(1) of the *Criminal Procedure Code* to matters of law only, as stated in Karani v R [2010] 1 KLR 73:

> "By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.".

12. This Court further set out the implications of this restriction in Karingo v. Republic [1982] KLR 213, namely that this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. Lastly, in Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others [2014] eKLR, the Supreme Court clarified that "matters of law" constitute the following three elements in relation to this Court's jurisdiction as the second appellate court:

    a. the technical element: involving the interpretation of a constitutional or statutory provision;

    b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and

    c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

13. The consolidated appeals raise three common issues of law that are set out in the various memoranda of appeals filed by the appellants, namely, whether the petition filed in the High Court was incompetent, whether the learned Judge of the High Court properly evaluated the evidence adduced in the trial Court in reaching the conclusion that a prima facie case had been made out by the prosecution, and whether the learned Judge properly applied the legal principles on the establishment of a prima facie case.

14. The 1st 2nd and 4th appellants' case in this respect was that the findings by the learned Judge that the appellants had a case to answer with regard to the offence of conspiracy to commit an offence; the 1st appellant had a case to answer with regard to the offence of abuse of office; the 1st appellant had executed the contract with Blue Star despite the procurement irregularities; and there were breaches of the procurement process by the appellants in their respective capacities, were not supported by any evidence placed before the trial Court. Furthermore, that the learned Judge erred in law in finding and holding that the 1st appellant did not enjoy any immunity under section 138 of the Public Procurement and Disposal Act, and shifted the burden of proof in the subject criminal proceedings from the prosecution to the appellants.

15. The 1st, 2nd, and 4th appellants' counsel reiterated in submissions that the grounds of appeal as filed by the Respondent lacked merit and should have been dismissed,as there was no evidence to support the charges of conspiracy or abuse of office as all the appellants executed their statutory responsibilities and duties executed as required of them. In particular, that the 1st appellant ensured that as the Accounting Officer he had appointed the Tender Opening Committee, the Tender Evaluation Committee and within the parameters of Regulations 7, 8 and Section 27 (2) of the Public Procurement and Disposal Act of 2005; he executed his duties and did not abuse his office since he had appointed various persons to different tender committees, the duty to supervise their attendances at the meeting fell on the Chairman to the said Committees and the procuring entities; and the 1st appellant implemented the awards made by the Tender Committee and he had no way of checking whether the supporting minutes that supported the award were genuine or not. Lastly, that section 138 of the Public Procurement and Disposal Act provide immunity to a person acting in good faith while discharging his duties.

16. The above grounds and submissions were also reiterated by the 3rd appellant, who in addition urged that the learned Judge did not consider the evidence given by the witnesses in respect to each count as against the appellants to warrant them being placed on their defence.

17. The 5th appellant additionally submitted that the learned Judge failed to state the different roles the appellants herein played and failed to disclose the particular offences the 5th appellant was being asked

to answer to and the reasons why, and the findings of the High Court puts the trial Court in a position where its hands are bound and it cannot reach a different verdict other than a collective conviction of all the appellants, whereas the evidence on record suggest the contrary. It was thus submitted that the High Court condemned the 5th appellant without independent evaluation of the tendered evidence and it was prejudicial to collectively condemn all the appellants without giving reasons, and this infringed on the said appellant's rights to fair hearing and fair administration of justice.

18. Counsel for the 6th, 10th, 11th, 15th, 17th and 18th appellants and for the 7th, 8th, 9th. 12th, and 13th appellants raised similar grounds and arguments when faulting the judgment of the High Court. In particular, that the learned Judge erred in law by failing to have regard to the objection that the appeal was incompetent and instead chose to sanitize and improve the incompetent appeal; holding that the prosecution adduced substantial evidence on the concerted efforts of the 1st to 18th appellants in the award of the tender and that they should have been placed on their defense in count one even when the Respondent chose not to appeal the trial courts' findings in respect to count one of the charge sheets, thereby granting orders which had not been sought; failing to consider and appreciate the fact that the prosecution witnesses, who confirmed that the request for the usage of restricted tendering together with the justification came from the user department as required by law and was not a creation of the Ministerial Tender Committee; by overturning the decision of the trial court, which undertook a detailed analysis of the evidence, on the basis that there was no urgency and the goods were overpriced without analyzing the evidence on record; and finding that the goods were overpriced with no basis, as PW 11 was clear that when computing market prices for the Items that were the subject matter of the procurement, he did not find the specific models in the market and proceeded to Ruaraka National Youth Service premises where they saw the specialized equipment, and it was on record that the values he offered were estimates and from completely different equipment.

19. Additionally, that the learned Judge relied upon and using extrinsic evidence which fact greatly prejudiced the appellants; sought to have the appellants make rebuttals which directive is a violation of the presumption of innocence and a shifting of the burden of the proof; directed that the appellants be put on their defense, when the evidence on record was exonerating; failed to consider the fact that the ruling of the trial Court was the exercise of judicial discretion and no material to show improper exercise of the discretion such as would justify interference; misconstrued the evidence particularly that of PW 12, PW 11 and PW l, and disregarding all the exonerating evidence; failed to consider that the 6th, 7th and 9th appellants never ever sat in the meeting that discussed the procurement and that there was no evidence against them; and failed to consider that the 17th and 18th appellants were merchants who had delivered the procured items and had nothing to do with procurement process and all available evidence exonerated them.

20. On the competency of the appeal before the High Court, counsel for the 6th, 10th, 11th, 15th, 17th and 18th appellants submitted that the petition offended the provisions of section 350 of the *Criminal Procedure Code*, as it was a generalized petition against 23 persons whereas the law required a separate appeal for each party, and did not prefer any specific grievance against any of the appellants capable of attracting rebuttal. In addition, that the petition did not include the mandatory documents that are required, and even after being directed to do so, the Republic did not file the documents as required by way of a supplementary record, and instead availed them irregularly and as a consequence the proceedings never became part of the record. The counsel reiterated that use and reliance on the same by the High Court was subsequently improper as the court effectively relied on extrinsic materials.

21. Counsel further submitted that the learned Judge of the High Court misunderstood the import of section 210 of the *Criminal Procedure Code* and the principles set out in Ramanlal Bhatt v Republic (1957) EA 332 that restate the requirement for sufficient cogent evidence and warns against the

possibility of shifting the burden in the exercise of establishing as to whether or not a prima facie case has been made, which had been properly analyzed by the trial Court. The counsel analyzed in detail the evidence adduced in relation to the offences faced by the appellants, to illustrate that there was insufficient evidence to support the charges and the High Court erred in interfering with the trial Court's decision on this account.

22. The 16th appellant's case was that she was wrongly charged, and that the learned Judge did not consider the evidence adduced in the trial Court that the 16th appellant did not participate in two critical meetings that led to the awarding to the tender to Blue Star Enterprises being the meetings on 16th December 2014 and 30th January 2015, and the evidence of the Investigating Officer that he did not establish any offence committed by the 16th appellant and she was only charged because she was a member of the Ministerial Tender Committee.

23. The 19th to 22nd appellants on their part faulted the holding by the learned High Court Judge that the prosecution adduced substantial evidence that the said appellants were not properly appointed to the Tender Evaluation Committee because the Committee was appointed by the 1st appellant after the tender had already been awarded, and stated that the learned Judge failed to consider the evidence of the prosecution witnesses who confirmed that the appellants were properly appointed to the Committee in compliance with Regulation 16 (2) of the Public Procurement and Disposal Regulations 2006 as amended by *Legal Notice No. 106 of 2013*. Further, that the learned Judge erred when she found that the Report generated by the appellants was undated and unsigned without analyzing the evidence on record which suggested otherwise, and failed to consider the fact that PW16 testified when he took over the Investigation of the matter, the Original Report had been handed over to his predecessor at the Ethics & Anti-Corruption Commission and what was handed to him by PW l was a copy.

24. The said appellant's counsel submitted that from the testimony of PW l, PW 4, PW 5 and PW 14, it is apparent that the Technical Evaluation Committee, in which the 19th to the 22nd appellants were members, did comply with the entirety of Section 66 of the Public Procurement and Disposal Act, 2005 Regulations 49 to 51 of the Public Procurement and Disposal Regulations 2006 which provide for the procedures to be followed in the evaluation of tenders, and in particular, that they followed the criteria in the Tender documents and thereafter prepared an Evaluation Report which recommended the lowest evaluated bidders in the various categories to be awarded the contract.

25. Similar submissions were made by the counsel for the 23rd appellant, who reiterated that the learned Judge disregarded that the oral testimony of the witnesses and the conclusiveness of the evaluation report which showed that indeed a technical evaluation was carried out. Instead, that the learned Judge erred in shifting of the burden of proof, to the appellant whereas the evaluation report constitutes proof that evaluation was carried out, and the Prosecution did not bring out any irregularities in the evaluation report to warrant a shift of the burden of proof. Accordingly, that the learned Judge therefore erred by issuing a blanket order that all the appellants be put on their defence without considering and analysing all the evidence tendered, and counsel placed reliance on the decision in the case of AG v Republic [2022] KEHC 11299 (KLR) on the duty of the Court in this regard.

26. The learned Senior Assistant Director of Public Prosecutions who appeared for the respondent conceded that the weight of the evidence on record was not sufficient to place any of the appellants on their defence. While referring to the principles set out in Ramanlal Bhatt v Republic (supra) and Woolmington v DPP (1935) A.C 462 the counsel submitted that the burden rests with the prosecution throughout to present evidence which establishes a prima facie case and does not and could not be shifted to the accused. Counsel was of the opinion that the learned Judge misconstrued and misapplied the provisions of Section 111 of the *Evidence Act*, which only deals with the evidential burden as opposed to the legal burden of proof. It was counsel's position that the legal burden squarely rests upon

the prosecution to adduce sufficient evidence which establishes a prima facie case which a reasonable court, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence. Therefore, that the direction by the learned Judge that the appellants be put on their defence to explain the irregularities amounted to calling upon the appellants to adduce evidence to fill in the gaps of the prosecution case, contrary to the holding in Ramanlal Bhatt v Republic (supra).

27. The counsel further referred to the learned Judge's analysis of the evidence, and in particular on the reliance on the evidence of PW1, PW11, PW12 & PW16 to arrive at a conclusion that there were breaches of procurement processes by the appellant, and submitted that the learned Judge did not properly evaluate the entire evidence of the said witnesses, which did not support the finding. In particular, that the evidence of PW1 and PW12 was that the subject procurement was planned and budgeted for and further that the request for the choice of a restricted tender was also duly made by the Procurement entity to the Ministerial Tender Committee. Further, that documentary evidence was tendered by PW1 confirmed that all the procurement processes were done in accordance with the law and confirmed that indeed Blue Star Enterprises was one of the pre-qualified bidders. In addition, that there was substantial evidence by the majority of the prosecution witnesses that there was nothing wrong with the choice of the procurement method and the processes undertaken, and their testimonies materially exonerated the appellants from any wrongdoing in the procurement process. Lastly, that PW16, who attempted to fault the procurement process, did not adduce any tangible evidence to prove his assertion or contention, and he testified that he made a recommendation that some of the appellants should not be charged.

28. On the first issue of the competence of the appeal before the High Court, the main argument by some of the appellants, while relying on section 350 of the *Criminal Procedure Code*, was that it was "a composite appeal" that instead lumped all the appellants together. It is notable that section 350 of the *Criminal Procedure Code*, Cap 75, relates to the procedure for appealing a judgment, and provides that that appeals must be filed in writing, usually accompanied by a copy of the judgment or order being appealed, and presented by the appellant or their advocate. It does not make any distinction between appeals filed against single and those filed against multiple respondents, and the sameprocess is followed, with the additional steps only being in relation to service of notice and pleadings, whereby all multiple respondents will be required to be served.

29. A related argument was that the appeal did not prefer any specific grievance against any of the appellants. Again it is notable that what is required in the petition of appeal filed by an appellant by section 350(2) are the "particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred" and this can only be in relation to its findings on the specific charges before it. The context of a criminal trial is a charge against one or more accused persons, and the law and procedure that is required to be followed in proving or disproving the charge, and any errors complained of arise from the requirements in this regard.

30. Lastly, it was argued that the appeal was not competent for not including the proceedings and judgment complained of, and in the correct manner. This argument is however not in consonant with the provisions of section 353 of the *Criminal Procedure Code* that it is the High Court that furnishes the respondents or their advocates with a copy of the proceedings and of the grounds of appeal, and not the appellants. In addition, under section 362, the High Court has the power to call for and examine the record of any criminal proceedings before a subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and the regularity of any proceedings in the subordinate court.

31. In light of the above provisions of law, we cannot fault the learned Judge of the High Court in admitting the appeal after holding as follows:

> " 61... I am not persuaded that the same (the appeal) offends the provisions of section 350 of the *Criminal Procedure Code* as alleged. From the petition it is clear that the same challenges the acquittal of the respondents under section 210 of the *Criminal Procedure Code* on all the counts. It is the appellant's contention that the trial court ignored the overwhelming evidence it adduced against the respondents and therefore arrived at a wrong decision both in matters of fact and law. I do not consider that the petition is incompetent for not making reference to each and every count. It is clear from its wording that it challenges the whole decision of the trial court. I am also not persuaded that the appeal is incompetent for lumping all the twenty-three respondents together.
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> Indeed, I find that even had the appeals been filed separately the logical thing would have been to consolidate them as they arise from the same file and ruling. Moreover, as submitted by counsel for the appellant no prejudice has been demonstrated to have been suffered by the respondent by reason of the "composite" appeal. As for the argument that the appeal is incompetent for being incomplete, I indeed find that the exhibits in the lower court were not included in the record of appeal. That is not however fatal as in my view as that is cured by the fact that the record of the trial court was forwarded to this court and this court was able to access the exhibits. As for the impugned ruling the same was included in the record of appeal. My finding on this issue therefore is that this appeal is competent and it is properly before this court."

32. On the second issue as to whether there was proper evaluation of the evidence by the learned High Court Judge, the role of that Court, being the first appellate Court, was to analyze and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence (See Okeno v. R [1972] EA 32). The duty of the first appellate Court in examining the entire evidence on record was emphasized by the Supreme Court of India in K Anbazhagan v State of Karnataka and Others, Criminal Appeal No 637 of 2015 as follows:

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the judge to see that justice is appropriately administered, for that is the paramount consideration of a judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed."

33. The first appellate court has a duty to scrutinize the evidence so as to be able to determine if the lower court's findings can be supported, and to weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing

and seeing the witnesses. In the present appeal, the High Court commenced its evaluation by correctly noting the applicable principles as follows:

> " 64. On this issue, it is pertinent for the court to consider the evidence adduced by the prosecution witnesses in respect of each of the 7 counts so as to make a finding on whether based on the evidence the court can convict the accused persons should they elect to remain silent when put on their defence. This echoes the finding of the court in the case of Ronald Nyaga Kiura v Republic [2018] eKLR
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> 'It is important to note that at the close of prosecution, what is required in law at the stage is for the trial court to satisfy itself that prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person. This is well illustrated in the cited Court of Appeal case of Ramanlal Bhat v Republic [1957] EA 332. At that stage of the proceedings the trial court does not concerned itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.' "

34. In the analysis of the evidence under the different counts that followed, the High Court proceeded to identify the applicable law on each count, but only evaluated selected evidence and not the entire evidence adduced on the counts, and more critically without reference to any particular accused persons. It is notable that the principles the High Court had itself cited on the establishment of a prima case apply with reference to "an accused person", and the evidence must be sufficient to put the accused person on his or her defence. The evaluation of the evidence must therefore be with reference to each accused person, and it is at this point that the High Court erred in treating the appellants as a composite, when the charges brought against each one of them were individual.

35. Accordingly, as regards count 1, the High Court found as follows:

> " 68. A total of 16 witnesses gave evidence for the prosecution. PW16 a forensic investigator at Ethics and Anti-Corruption Commission testified that tender No NYS/RT/29/2014-2015 for the supply of training equipment was not captured in the 2014-2015 procurement plans. That the entire tender process was irregular; the procuring unit, the NYC did not give proper justification for use of restricted tendering as opposed to open tendering and the Ministerial Tender Committee (MTC) erred in awarding the tender to Blue Star Enterprises through restricted tender when the said company had not been pre-qualified by the Ministry of Devolution. Also, that the supplied goods were grossly overpriced by all the bidders and there was collusion between the officials who represented the National Youth Service at the Ministerial Tender Committee and the Directors of Blue Star Enterprises hence the charge in count 1."

36. On the aspect of the procurement method of restricted tendering under the said count, the High Court proceeded to find as follows:

> " "71. The evidence of PW12 Deputy Director National Youth Service was that the procurement was irregular ab initio. That the Annual Procurement Plan for the year 2014/2015 PExh 39 did not contain a budget for the purchase of training materials yet there cannot be a procurement without a budget.
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> 72. PW1 the Chief Supply Chain Management Officer at National Youth Service testified that the tendering process requires that bids are submitted to the Tender Evaluation Committee first, which evaluates the bids against the set criteria and submits a report to the Ministerial Tender Committee. He also testified that the award was irregular as Blue Star was not prequalified for the supply of goods to the Ministry of Devolution for the financial year 2014-2015. Regulation 54 of the Public Procurement"

37. It is notable in this regard that the 1st to 18th appellants had been charged with Count 1, yet no reference was made by the High Court to the evidence against any of them that warranted a finding of a prima facie case in relation to the said count. There was also conflicting evidence that exonerated the appellants on this count, and in particular, PW1 and PW4 confirmed that the procurement was triggered by the user department at National Youth Service and requisitioned by the Director General, National Youth Service who proposed the use of restricted tender method; that the accounting officers did not sit in any of the committees; and that the procurement processes were adhered to. PW16 also testified that he did not recommend the charging of the 1st, 7th, 8th, 9th, 13th 14th, 17th and 18th appellants as there was no evidence of their culpability.

38. These lapses by the High Court were replicated in the evaluation of the evidence adduced in relation to the remaining counts. Of note in this regard was the evaluation of the evidence with regard to counts 4,5, and 7, in which the learned Judge of the High Court did not make reference to the evidence adduced by any of the witnesses and found as follows:

> " 88. In count 7, the Appellant reiterates that the Tender Evaluation Committee was appointed on February 2, 2015, 2 days after the award was done. That the evaluation report is undated and it cannot be ascertained if the meeting took place at all.
>
> 89. In counts 4 and 5, the Appellant submits that all the members of the Ministerial Tender Committee, that is the 4th to 15th respondents are culpable as they failed to review the selection of the procurement method in breach of section 27 Public Procurement and Disposal of Assets Act. That the Ministerial Tender Committee did not comply with section 74 of the Public Procurement and Disposal of Assets Act 2005 on restricted tendering; they failed to undertake due diligence which would have shown that
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> 89. It is my finding that the prosecution raised palpable issues exposing the failures of the two committees to deliberate on the tender and to reject the procurement method as there was no urgency and the goods were overpriced. Accordingly, the trial court should have put the 4th to 15th respondents on their defense in respect of those charges."

39. This finding by the High Court was therefore based on the submissions made by the appellant in the High Court, and notwithstanding evidence by PW l, PW3 , PW 4, PW 5, PW8, PW 11, PW12, and PW14 that the subject procurement was undertaken according to the relevant laws and procedures; it was budgeted for; a technical evaluation was undertaken within time, and that the original report of the evaluation committee on the subject tender was forwarded to the EACC officers on request and what was produced in evidence was an undated copy.

40. It is therefore our finding that having in the first place admitted the appeal before it on the basis that it was brought against all the counts involving the accused persons, the High Court evidently erred by ignoring and failing to evaluate the totality of the evidence adduced by all the witnesses as regards the charges that were brought against all the appellants. The consequence is that the finding by the High Court that the threshold of a prima facie case had been met was not supported by the evidence that was analysed. We also note in this respect that the trial Court did analyse the entire evidence adduced in relation to each count and as against each of the accused person, and there was therefore no justifiable reason to overturn its findings in this respect.

41. The last issue is that of the application of the law on the determination of a prima facie case. The main argument made in this respect was on the burden and standard of proof in the establishment of a prima facie case. The law is settled as set out in Ramanlal Bhatt v Republic (supra) that the burden rests with the prosecution to establish a prima facie case as follows:

> " Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, 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 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."

42. The question that the court has to deal with and answer at this stage is therefore, whether based on the evidence before it, and after properly directing its mind to the law and the evidence the Court may convict the accused if he or she chooses to give no evidence. It was therefore explained by the High Court in Ronald Nyaga Kiura v Republic [2018] eKLR as follows:

> " 22. It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of Ramanlal Bhat v Republic [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally

beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

43. In the present appeal, taking into account the evaluation undertaken by the learned Judge of the evidence on record, we are of the view that the appellants should not have been called upon to enter their defence, for the reasons that there was insufficient evidence that linked appellants to each of the charges brought against them, and there was also sufficient evidence on record exonerating the appellants which was not evaluated by the learned Judge. The learned Judge also relied on section 111 of the *Evidence Act*, which was not applicable at this stage of the proceedings of case to answer.

44. It must be emphasized that at this stage the burden and standard of proof wholly rests on the prosecution, and any gaps in the evidence on the ingredients of the offence that need to be further explained should be construed in the accused person's favour as an indication that no prima facie case has been made out. After an accused person is put on their defence, the legal burden still remains on the prosecution to prove the offence, and it is only the standard which changes to one of beyond reasonable doubt.

45. The Supreme Court of Kenya in this respect explained the circumstances when section 111 of the *Evidence Act* is applicable in its decision in Republic v Mohammed & another [2019] KESC 48 (KLR) as follows:

> "46...Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction. Such a situation would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased's death, the accused person is the one who was last seen with him. This being our view, we find that the Court of Appeal erred in its decisions in the said cases of Douglas Thiong'o Kibocho v Republic [2009] eKLR, and Milton Kabulit & 4 Others v. Republic [2015] eKLR that admissions made to Police in the course of investigations are admissible under Section 111(1) of the *Evidence Act*. As stated, that section cannot be invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary."

46. We accordingly allow the consolidated appeals herein, and hereby set aside the judgment of the High Court delivered on 28th July 2022 in ACEC Appeal No. 4 of 2020, in its entirety. The result is that the ruling by the Milimani Chief Magistrate's Court delivered on 9th March 2018 in Anti- Corruption Case No 26 of 2016 acquitting all the appellants in the consolidated appeals is hereby reinstated.

47. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY, 2025 BY

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR