



**Ombaki & 3 others v Republic (Criminal Appeal 93 of 2018)
[2023] KECA 879 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 879 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 93 OF 2018
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
JULY 7, 2023**

BETWEEN

**BENSON ANYONA OMBAKI 1ST APPELLANT
PATRICK MWAVALA MWALALWA 2ND APPELLANT
WILSON SHIVACHI M'MAITSI 3RD APPELLANT
BERNARD MOSES ONGIGE 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 4th November, 2015 in Nairobi HCCRA Nos. 185, 149, 150, 151, 154 & 155 of 2013))

JUDGMENT

1. This is an appeal from the judgment of Kimaru, J. (as he then was), delivered on November 4, 2015 in Nairobi, and in respect of the above consolidated appeals. The learned Judge upheld the judgment of the trial court which had found the appellants guilty for the offence of fraudulent payment from public revenue for goods not supplied contrary to section 45(2)(a)(ii) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*. The particulars stated that the appellants on or about July 16, 2009, at School Equipment Production Unit (SEPU) offices situated along Ngong Road in Nairobi, they, being persons, whose functions concerned management of public revenue, to wit, the funds of SEPU paid M/s Vulcan Lab Equipment Limited the sum of KShs.75,086,880.00 for goods not supplied. The appellants were upon conviction, each sentenced to pay a fine of KShs.800,000.00 or in default to serve two (2) years imprisonment. In addition, the 1st appellant was sentenced to serve twelve (12) months imprisonment without an option of a fine.



2. During trial, the prosecution called 19 witnesses. In an abridged version of the facts, their evidence was as follows: the appellants were at the material time employees of SEPU, a semi-autonomous government agency under the Ministry of Education. It was established, *inter alia*, to manufacture equipment to be supplied to schools. The 1st appellant was at all material times the Managing Director of SEPU. The 2nd, 3rd and 4th appellants served in various capacities in the same organization. According to the evidence adduced, the Ministry of Education in 2009 undertook to supply science equipment to certain identified secondary schools. In total, it would cost the Ministry KShs. 261,000,000.00 to supply the equipment.
3. In April 2009, SEPU was contacted by the Ministry to identify science equipment that was to be supplied. The 1st appellant in consequence, called a meeting of the Directors of SEPU and informed them of the development. Subsequently, a cheque of KShs. 261,000,000.00 was issued to SEPU by the Ministry of Education on 9th July, 2009. On July 15, 2009, the 1st appellant called a meeting of the Directors of SEPU. Some of the Directors who attended the meeting were PW6, Lydia Nzomo, the then Director of Kenya Institute of Education (KIE), PW7, Charles Imbenzi Imbali, the then Principal of Kenya Technical Teachers Training College, and PW13, Nancy Karimi, the then Managing Director of Jomo Kenyatta Foundation.
4. At the meeting, the 1st appellant informed them that SEPU had received KShs.261,000,000.00 from the Ministry of Education for the purposes aforesaid. He further informed them that the Ministry had insisted that the equipment be supplied within two and a half months. Due to the urgency of the matter, the 1st appellant requested to be allowed to single source the supplier. The aforesaid Directors, however took the view that if the 1st appellant wanted to avoid the procurement procedures under the *Public Procurement and Disposal Act* (PP&DA), he ought to give a justification and seek further clarification from the Ministry. They advised the 1st appellant to otherwise follow the provisions of the (PP&DA).
5. However, it was apparent that the minutes of that meeting that were prepared, were totally different to what the witnesses remembered. They were presented as if the Board had authorized the 1st appellant to procure the equipment from the Vulcan Lab Equipment Limited. Although the 1st appellant insisted that the minutes were genuine, the three members of the Board disowned the minutes.

What is without doubt is that pursuant to the said minutes, the 1st appellant raised a proforma invoice to Vulcan Lab Equipment Limited. In response to the proforma invoice, Vulcan Lab Equipment Limited wrote to SEPU demanding to be paid 33% of the value of the equipment to be supplied in view of the large quantity of the order. Vulcan Lab Equipment Limited required this commitment from SEPU so that they could order the equipment from their suppliers in India.
6. On the very same day, the 1st appellant convened a Procurement Committee meeting to validate the procurement. In attendance were the 2nd, 3rd and 4th appellants. Pursuant to the condition for acceptance of the contract to supply the equipment by Vulcan Lab Equipment Limited, a cheque of KShs.75,086,880.00 was issued. This constituted 33% of the cost of the equipment to be supplied. PW17, Peter Kimani Ndungu, a Compliance Manager with Public Procurement Oversight Authority, and PW18, Maurice John Oduor Juma, the Director General of Public Procurement Oversight Authority testified that the accused persons acted in breach of section 74 of the *Public Procurement and Disposal Act* that required certain action to be taken in the event direct procurement is resorted to. In the case of the appellants, the law was ignored when they directly procured the supply of goods from Vulcan Lab Equipment Limited.



7. In their defence, the appellants asserted that they were compelled to procure the equipment in the manner that they did in view of the urgency of the matter. They argued that they had complied with the law with regard to the procurement processes. In particular, they testified that they had undertaken a market survey through catalogues that enabled them to identify Vulcan Lab Equipment Limited as the supplier who would give them best value for the money. The 2nd to 4th appellants added that they were mere subordinate members of staff at SEPU and could therefore not have been involved in the scheme.
8. The trial court convicted the appellants and sentenced them as aforesaid. Aggrieved, the appellant appealed to the High Court at Nairobi. By a judgment dated November 4, 2015, the High Court held that the appeal lacked merit and dismissed it in its entirety.
9. The appellants being dissatisfied by the decision of the High Court, each filed their appeals raising 14 grounds. We shall collapse them into the following, they complain that both courts below: erred in law by convicting the appellants on an alternative count that was not proved by the prosecution beyond reasonable doubts; by failing to find that the prosecution of the appellant was unlawful as it was contrary to the mandatory provisions of section 35, 36 and 37 of the *Anti-Corruption and Economic Crimes Act*; by failing to observe that the powers of KACC to investigate procurement proceedings under the *Anti-Corruption and Economic Crimes Act* were repealed by the provisions of the *Public Procurement and Disposal Act*, 2005; by failing to observe that the investigations of procurement proceedings conducted by the KACC were contrary to provisions of sections 5, 102, 103, 104 and 105 of the *Public Procurement and Disposal Act*, 2005 and, therefore unlawful and null and void; by failing to make a finding that a lawful and a valid contract for sale of goods existed between SEPU and Vulcan Lab Equipment Ltd and were still bound by the terms and the conditions of the contract for sale of goods executed on 16th July 2009; misdirected itself when it failed to observe that SEPU did not lose any money as the goods paid for were ascertained and title thereof had passed to SEPU; by failing to observe that the evidence presented by the prosecution was insufficient and could not sustain a conviction; by holding that sections 74 & 75 of the *Public Procurement and Disposal Act* were violated whereas, the appellant had authority from the Ministry to single source the supplier as provided by the said sections; by failing to observe that the appellants were not mandated to make any payments; by neglecting the fact that the trial court visited a go down of Express (K) Limited where the goods were kept and labeled “Ministry of Education, Not for Sale”, a clear indication that the goods had been supplied, and hence the payment was legal; and, lastly, by failing to put into consideration that the special tender committee minutes were always subjected to a further scrutiny by the board which had the mandate to either approve or reject the proposals in the minutes.
10. At the hearing of the appeal, the appellants appeared in person whereas the respondent was represented by Mr. Omondi, learned prosecution counsel. The 1st appellant opted to withdraw his appeal and Mr. Omondi not objecting, his appeal was accordingly marked as withdrawn pursuant to rule 70 of this Court’s rules. The 2nd to 4th appellants however, chose to pursue their respective appeals. The remaining appeals were consolidated and proceeded to hearing.
11. The 2nd appellant in his written submissions stated that both the trial and the first appellate court erred by convicting him on an alternative count that was not proved by the prosecution beyond reasonable doubts, since the prosecution did not avail any evidence regarding the position held by the appellant at SEPU. He submitted that had both courts considered the position held by him, they would have concluded that the 2nd appellant was not in a position to make any payments on behalf of SEPU as he was only a subordinate member of staff and always worked under instructions from his bosses. Further, that he was not a signatory to any account at SEPU, and therefore, he had no mandate in making any



- payments. That he ought not to have been convicted on the basis of raising a requisition, and hence, his conviction and sentence was illegal.
12. Secondly, that both courts erred in law by failing to find that the prosecution of the 2nd appellant was unlawful as it was contrary to the mandatory provisions of sections 35, 36 and 37 of the [Anti-Corruption and Economic Crimes Act](#), as no evidence was tendered in court to show that any investigation report was forwarded to the Attorney General. He cited the case of [Esther Theuri Warulru \(SP\) & Another vs. Republic](#) [2011] eKLR, [Nicholus Muriuki Mwangangi vs. The Attorney-General](#), Civil Appeal No. 331 of 2010, [John Faustin & Another vs. Republic](#) [2014] eKLR, to support the argument that the Statute mandatorily required the preparation of a report on the result of investigations and recommendation by the Ethics and Anti-Corruption Commission, which is then forwarded to the Attorney General. That also the powers of Kenya Anti-Corruption Commission to investigate procurement proceedings under the [Anti-Corruption and Economic Crimes Act](#), 2003 were repealed by the provisions of the PP&DA therefore, the investigations of procurement proceedings conducted by the KAAC, were contrary to provisions of sections 5, 102, 103, 104 and 105 of the [PP&DA](#), thus, unlawful, null and void.
 13. He further, submitted that the two courts below made an error when they failed to find that a lawful and a valid contract for sale of goods existed between SEPU and Vulcan Lab Equipment Ltd executed in July, 2009. As such, the payment of funds to Vulcan Equipment Ltd was not fraudulent as it was pursuant to a valid contract for sale of goods. He further submitted that having been acquitted of conspiracy to commit an offence, he cannot be found guilty on an alternative count of fraudulent payment. That both courts erred by holding that sections 74 & 75 of [PP&DA](#) were violated whilst the appellant had authority from the Ministry to single source the supplier as provided by the said sections.
 14. The 3rd appellant's submissions were similar to those of the 2nd appellant save for the submission that he was convicted on an ambiguous charge as the particulars in support of the charge, did not reveal the alleged offence committed as it omitted to state that the appellants fraudulently paid for goods not supplied. The charge was therefore defective which violated his right to a fair trial as provided for by the [Constitution](#), and thus, any conviction arising from such a charge was null and void ab initio. The 4th appellant's submissions was similar to the other appellants, save to add that advance payment was made in conformity with the existing contract. The payment was therefore neither fraudulent nor unlawful, and even if it was, it was not proved.
 15. Mr. Omondi on the other hand, submitted that the prosecution had established the case against the appellants beyond reasonable doubt. That the first appellate court properly exercised its statutory duty to reconsider and re-evaluate the evidence adduced before the trial court and reach its own independent determination as held in the case of [Njoroge vs. Republic](#) [1987] KLR 19. That the evidence adduced proved that the appellants were aware of the law but chose to ignore the provisions of the [PP&DA](#) under the cover of urgent need. It was clear in evidence, that the appellants were intent on continuing with the unlawful direct procurement irrespective of the advice that they were given by the Board of Directors.
 16. Under section 74(2) & (3) of the [PP&DA](#), direct procurement could be invoked where there was urgent need for the goods, works and services to be procured. Under section 74(3)(c) of the [Act](#), the circumstances that give rise to the urgency must be such that they were not foreseeable, and was not a result of dilatory conduct on the part of the procuring entity. Further, that there were concurrent findings of the trial court and the first appellate court that the appellants willfully breached the mandatory requirements the [PP&DA](#). It did not matter whether the goods were supplied later as the commission of the offence was complete upon part payment of the consideration by the appellants to



Vulcan Lab Equipment Limited. Any later supply of the goods could not mitigate or afford a defence to the appellants. Counsel therefore, urged us to dismiss the appeal.

17. This is a second appeal. Our mandate has been enunciated in a long line of cases decided by the Court to be that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See *Maina vs. Mugiria* [1983] KLR 78, *Kenya Breweries Ltd vs. Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga* [2016]eKLR.
18. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties; the issues that fall for our determination are whether there was compliance with sections 35(1) (2), 36 and 37 of the *ACECA*, and the consequences of non-compliance, and whether there was sufficient evidence to sustain a conviction of the appellants.
19. As to the first issue, we have looked at the record and noted that the issue was not raised in the two courts below. Had the issue been raised, the two courts would have made a determination which this Court would have reconsidered. When the issue is raised in this Court for the first time, that makes this Court a trial court on the issue and prejudices the party who is not satisfied with the conclusion of this Court who would have wished to appeal. See *Republic vs. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR as cited in *Frera Engineering Company Limited vs. Morris Mureithi Mutembei* [2020] eKLR where the court stated that:

“...It is in the discretion of the court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy vs. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda vs. Abn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned Judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

We therefore decline the invitation to entertain the issue. As to whether the case was proved against the appellants to the required standard, we find this ground encompasses most grounds of appeal filed by the appellants. It is also not necessary to regurgitate the facts of the case since we have already set them out elsewhere in this judgment.

20. Suffice to state that from the record, PW17 and PW18 confirmed that the appellants acted in breach of section 74 of the *PP&DA* that required certain actions to be taken in the event direct procurement is resorted to. In the case of the appellants, the law was ignored when they directly procured the supply of goods from Vulcan Lab Equipment Limited.
21. SEPU is a semi-autonomous Government agency. Although it is registered as a company limited by guarantee, nevertheless, when procuring goods, it was required to comply with the provisions of the *PP&PA*. The Act provides the framework within which policies relating to procurement were to be implemented at the time material to this case. That Act has since been replaced by the *Public*



Procurement and Assets Disposal Act, 2015 but for the purposes of this case, regard shall be taken to the Act of 2005 as that was the law in force then.

22. Direct procurement was and is still permitted under the PP&DA, provided it meets the parameters set out in section 29 of the Act. Section 29 of the Act required that all procurement be processed by way of open tendering. However, it allowed procuring entities to use alternative procurement such as restricted tendering or direct procurement. Alternative procedure was however to apply only where:

- “a) The procurement entity had obtained the written approval of its tender committee; and
- b) the procurement entity recorded in writing the reasons for using the alternative procurement procedure.”

23. From the record, the minutes relied on from the appellants were disowned by the Directors as they distanced themselves from the 1st appellant’s decision stating that they only asked him to follow the law or get instructions from the Ministry. To further compound the malafides of the scheme by the appellants, the invitation to the meeting of the tender committee, was restricted, rushed and on short notice. Indeed, it was convened on the same day after the Board of the Directors meeting. In attendance, were all the four appellants who passed the resolution to single source the equipment. These appellants cannot now be heard to claim that they were members of the subordinate staff who had no role in the commission of the offence. Moreover, section 74 of the Act provides that direct procurement was to be used only as long as the purpose was not to avoid competition and only if:

- “a. There was only one person who could supply the goods, works or services and;
- b. There was no reasonable alternative or substitute for the goods, works or services. (See Section 74 (2).)”

24. It was not demonstrated that only the Vulcan Lab Equipment Ltd was capable of supplying the equipment, or even, that there was no reasonable alternative for the supply of the same. In so far as the procurement was a direct and single sourced, it violated section 74 (2) of the Act. In regard to the assertion that the procurement was done directly due to urgency, section 74(3) of the Act states:

- “A procuring entity may use direct procurement if the following are satisfied: -
- a. there is an urgent need for the goods, works or services being procured;
 - b. because of the urgency the other available methods of procurement are impractical; and
 - c. the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.”

25. Given the above factual background in this case, there is no doubt that the procurement laws were deliberately and fraudulently flouted. Were the appellants aware of the non-compliance? Section 27 of the Act provides as follows:

- “(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.
- 2. The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1)



3. Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.
 4. Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.
 5. The accounting officer may use the procurement until and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.
 6. The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed.”
26. Clearly, under section 27(4) of the Act, the appellants were under a strict duty to comply with all the provisions of the law and the regulations made thereunder. The appellants were hence legally deemed to be aware of not only the procurement processes but also the need to comply with the law.
27. We have noted that the minutes of the meeting which was said to have sanctioned the procurement process were subsequently doctored to suggest that the Board had authorized the 1st appellant to single source the equipment from the Vulcan Lab Equipment Limited. Although the 1st appellant insisted that the minutes were genuine, the three members of the Board who attended the meeting disowned the minutes. We have gone through the record and are in agreement with the two courts below that the Directors who were said to have assented to the minutes disowned the same, hence cannot be said to have given a go ahead. It was their testimony in the trial court that they were not aware of what the minutes contained, and we agree with the findings of the two courts below that the minutes could not be relied on. Further and as long as the contract between SEPU and Vulcan Lab Equipment Limited was anchored on falsified minutes of the Board of Directors meeting, it was fraudulent, illegal and invalid. Accordingly, the appellants cannot argue that the payments were made pursuant to a legal contract.
28. We are satisfied just like the courts below that the entire procurement process was an illegality *ab initio* as it was against the established procurement laws. The fact that the appellants made a prepayment to the Vulcan Lab Equipment Ltd, compounded the illegality. The law did not allow the appellants to make a prepayment of such a colossal sum of money when no goods had been supplied. This was also the concurrent findings of the two courts below, with which we agree with them.
29. Put into context, it means that the appellants were actually financing Vulcan Lab Equipment Ltd to supply the equipment. The appellants therefore fraudulently and illegally paid to Vulcan Lab Equipment Ltd the said sum of KShs.75,086,880.00 for goods not supplied and the mere averment in their defence that the said goods were supplied later, did not alter the procedural requirement and the illegality of the process. The offence had already been committed and the assertion can only be considered as a mitigating factor. As already stated, all the appellants were in one way or another involved in the scheme. Some attended the tender committee meeting whereas others were involved in processing the Illegal payment. They cannot be heard to say that they were mere subordinate staff who knew nothing about the fraudulent scheme.
30. We agree with the findings of the two courts below, which findings were concurrent that the appellants violated the statutory duty bestowed on them. The charges laid against them were clear and



unambiguous, contrary to what the appellants claimed and they were succinctly proved to the required standard. In the upshot, we dismiss the consolidated appeals in their entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

