IN THE COURT OF APPEAL

AT NYERI

CORAM: OUKO (P) KOOME, MAKHANDIA, MURGOR & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 27 OF 2013

BETWEEN

ETHICS AND ANTI -CORRUPTION COMMISSION.....APPELLANT

AND

JAMES MAKURA M'ABIRA.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nyeri (Wakiaga, J.) dated 25th October, 2012

in

Const. Pet. No. 3 of 2012)

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JUDGMENT OF THE COURT

[1] This is an old appeal, but its longevity in this Court can be attributed to an order made at the request of the appellant directing that the appeal be heard by an enlarged bench of five (5) Judges. With the increased frequency of such requests to empanel enlarged benches, (some justified and others not) coupled with the dwindling number of Judges in this Court, this Court, has expressed itself and given guidelines on when an enlarged bench may be constituted by the President of the Court. We think it is apt to reiterate what was stated in **Multichoice (K) Ltd vs. Wananchi Group (K) Ltd & 2 Others Civil Appeal No 368 of 2014** where an enlarged bench was constituted to provide an interpretation of whether a party who has filed an application for review under ***Order 45*** of the **Civil Procedure Rules** was barred from filing a notice of appeal at the same time over the same dispute.

[2] In the lead judgment **Ouko**, **(P)**, set a criterion that justifies an enlarged bench by reviewing several decisions of this Court, its predecessor and even some English cases. This is what he posited in a pertinent paragraph: -

> ***"I take advantage of this appeal to, briefly outline, what in my view***
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> ***I consider is the correct practice and the proper circumstances for constituting a bench of more than three judges in this Court because the long-held practice appears to have been lost along the way. In the past it was the function of the President of the Court (in the years -1954 to 1977- when the predecessor of the Court had President) or the Presiding Judge in the years immediately preceding the promulgation of the 2010 Constitution, to constitute such benches. Today acting on an oral application, a three-judge bench would direct that the President of the Court constitutes an enlarged bench, like it happened here or in Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No 145 of 1990. Sometimes, in response to mail from advocates, the Presiding Judge or President would impanel the bench.***
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> ***As way back in history as 1954, it was recognized by the predecessor of this Court, in the case of Income Tax V. T (1954) E.A 549, that the role of empaneling a five-Judge bench rested with the President of the Court. Spry Ag. V.P explained the process and circumstances of doing so as follows:***
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> > ***"I would also remark that where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges, although a bench of three has the same powers (see***

Lands Commissioner vs. Bashir, (1958) E.A. 45)" (My emphasis).

See also Nguruman Limited vs. Shompole Group Ranch & Another, Civil Application No. NAI 90 of 2013.

From decided cases the following two situations have been identified as some of the grounds convening a five-judge bench. In the first place, such a bench will be constituted where the Court is being asked to depart from one of its own previous decisions as was stated in Income Tax V. T (supra) and reiterated thus in P.H.R. Poole vs. R (1960) E.A 62:

> ***"A full court of appeal has no greater powers than a division of the court; but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that a matter should, if practicable, be considered by a bench of five judges."***

In the case of Peter Mburu Echaria vs. Priscilla Njeri Echaria, Civil Appeal 75 of 2001, the Court reiterated that:

> ***"Dr. Kamau Kuria intimated before the appeal was heard that he was asking the court to depart from the decision in Kivuitu's case and thus asked for a bench of five judges in accordance with the practice recommended in Poole v R [1960] EA 62. That is why this bench is so constituted. This Court while normally regarding its own previous decisions as binding is nevertheless free in both civil and criminal cases to depart from such decisions when it is right to do so. (See Dodhia v National & Grindlays Bank Ltd & Another [1970] EA 195."***

See also Joseph Kabui vs. R. (1) [1954], 21 E.A.C.A. 260 on that point. Secondly, the Court may wish to review its conflicting opinions or opinions that have ignored or without justification departed from settled law."

[3] In summary, the Court settled the guidelines as aforesaid. In this case although counsel for the appellant did not devote much time on the issue; we were being asked to depart from the decision of this Court in **Nicholas Muriuki Kangangi vs. AG [2011] eKLR** ***(Kangangi case)***. The appellant's argument being that the said decision was made *per in curriam* as the interpretation given to ***Sections 35,*** as read with ***36*** and ***37*** of the **Anti-Corruption and Economic Crimes Act (ACECA)** was a departure from what the law provided.

[4] That said, because we, as the first appellate court are expected to consider this appeal by way of a re- hearing, it is our duty to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact. We also recognize that, this matter was disposed of based on pleadings, affidavit evidence and submissions, and although no oral evidence was adduced, that does not lessen our duty of inferring and reaching our own conclusions. This duty was succinctly explained in the now famous decision of this Court in **Selle vs. Associated Motor Boat Co. Limited (1968) EA 123** as follows: -

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions… In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

[5] The appeal emanates from a Ruling by **Wakiaga, J.** delivered on 25th October, 2012. The Petition before the learned Judge was by the respondent and his prayers were mainly, for a declaration that the criminal charges he was facing in **Embu**

Chief Magistrates' Court in AC NO. 3 OF 2011 - Republic vs. James Makura M'Abira were unconstitutional; judicial review orders in the nature of *certiorari* to remove the said criminal proceedings to the High Court and quash them, and finally compensation for breach of his constitutional rights to a fair trial and equal treatment before the law. In the said petition, the appellant had cited numerous **Articles** of the **Constitution; 22, 23, 157, 165, 258** and **259** of the Constitution as the ones that were violated by the appellant.

[6] A brief factual background will contextualize the matter. The respondent was employed at the State Law office as a Senior State Counsel based at Nyeri office. On 22nd June, 2011 he was arrested and charged with three counts of soliciting for a benefit contrary to ***Section 39 (3) (a)*** as read with ***48 (1)*** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003** (ACECA). The particulars of the 1st count were that the respondent corruptly solicited for a benefit of Ksh. 50,000 from ***Peter Chaina Magere*** as an inducement so as to recommend prosecution in a case that was referred to him for perusal and advise by the Criminal Investigation Department. The second and third counts similarly stated that the respondent being a Senior State Counsel employed by a public body, to wit the State Law office, corruptly received Ksh. 25,000 from ***Peter Chaina Magere*** as an inducement

so as to recommend prosecution in a case referred to him for perusal and advice by the Criminal Investigation Department.

[7] The respondent was arraigned in court and charged with the above offences at first before the Chief Magistrate's Court in Nyeri but the matter was later transferred to Embu Chief Magistrate's Court in AC No 3 of 2012. As a result of those charges, the respondent filed a Petition before the High Court in Nyeri challenging the said charges which he alleged contravened ***Articles 22, 23, 157, 165, 258*** and ***259*** of the Constitution. The said charges were however withdrawn and the respondent was charged afresh before the same court in **Anti-Corruption Case No 9 of 2012** after a recommendation was made by the ***Director of Public Prosecutions*** **(DPP)** one year later. The respondent's complaint was that he was arrested by officers from the defunct ***Kenya Anti-Corruption Commission*** **(KACC)** who had usurped the role from the ***Attorney General*** **(AG)** as he was the prosecutor then, until that role was assumed by the **DPP** in June, 2012 when the **DPP** wrote a letter dated 4th June, 2012 directing the withdrawal of the matter and ordering fresh prosecution, the respondent's position was that the whole prosecution should be declared null and void.

[8] The respondent further complained that KACC proceeded to arraign him in court on 29th June, 2011 without making a recommendation to the AG as was required under the provisions of **Section 35** of the **ACECA**; that he was not supplied with the relevant materials such as the visual and audio tape recordings to enable him prepare for the hearing which was a breach of his right to a fair trial; that the recommendation which was made to the Office of the ***Director of Public Prosecutions*** **(ODPP)** pursuant to ***Section 11*** of the **Ethics and Anti-Corruption Commission Act of 2011** after one year since the respondent was arraigned in court could not cure the defect as his rights were already violated. Finally, the respondent was of the view that the charges that were brought against him were irregular, unprocedural, unlawful and null and void. For those reasons he sought the aforesaid orders.

[9] Upon hearing the matter, the learned Judge ruled that the prayers seeking declaratory orders, and judicial review orders of certiorari were overtaken by events. He however went ahead to award the respondent damages in the sum of Ksh. 100,000 for breach of constitutional rights for reason that the respondent was not afforded equal treatment before the law. From the onset, we can state that this appeal raises two issues that is; whether the learned Judge should have quashed the criminal charges that were laid before the respondent in Embu **Chief Magistrate's Court** in **AC No. 3 of 2011** and whether the learned Judge exercised his discretion wrongly in awarding the respondent the said damages.

[10] The appellant was aggrieved with the aforesaid orders and in the memorandum of appeal, the appellant raised some five (5) grounds of appeal to wit, the learned Judge erred in law for holding that; the written consent of the DPP is required as a matter of law prior to the institution of any criminal charges under the **ACECA**; in failing to find that the Nyeri Anti-Corruption case No. 4 of 2011 which was transferred to Embu had been instituted by a competent public

prosecutor acting under the delegated authority by the AG; in holding that the respondent's constitutional rights to equal protection by the law were violated in the absence of any evidence and by awarding damages when no evidence was adduced to demonstrate that the loss suffered by the respondent was directly related to the alleged breach of constitutional rights and without any quantification of loss.

[11] The appeal was opposed by the respondent who also cross-appealed stating that the learned Judge erred in law in holding that; violation of the respondent's constitutional rights by charging him without adherence to the statutory prerequisites did not render the trial a nullity; in awarding damages of Ksh. 100,000 which was inordinately low without hearing parties on the argument on quantum/assessment of damages; in finding that criminal proceedings predicated on evidence of entrapment which were illegally obtained constituted an unfair trial and in failing to hold that the pre-trial prosecutorial process which was not properly conducted rendered the criminal proceedings null and void and ought to have been withdrawn. The respondent therefore prayed that the appeal be dismissed, his cross appeal be allowed, entreating this Court to declare the criminal proceedings in Embu Chief Magistrate's Court in AC No. 3 of 2012 to be quashed and to make an appropriate award of damages with costs.

[12] During the plenary hearing of the appeal, ***Mr. Muraya*** appeared for the appellant. He relied on the appellant's written submissions, list of authorities and made some brief highlights. Counsel combined the arguments and submitted that the respondent was from the onset being prosecuted by the Public Prosecutor and not KACC; he also referred to the record from the date when plea was first taken which showed that the prosecution was conducted by qualified police prosecutors who were duly appointed by the AG pursuant to ***Section 85*** of the **Criminal Procedure Code (CPC)** and that when the respondent filed **H.C Misc. Appl No. 33 of 2011** seeking to have the matter transferred to Embu Chief Magistrate, the application

was defended by ***Mr. Kaigai***, who was then a Provincial State Counsel in the AG's office and therefore, throughout the proceedings, the matter was handled by qualified prosecutors and at no time did officers or agents from KACC handle the prosecution.

[13] Counsel for the appellant went on to submit that KACC carried out the investigations but was not the prosecutor as the charge sheet indicated that the prosecutor was **"Republic of Kenya through KACC".** Also because the prosecution was initiated before the report under ***Section 35*** of the **ACECA** was given to the AG, and as was held in the case of ***Kangangi case* (supra)** was the reason behind a letter dated 4th June, 2012 by the DPP, directing the charges to be withdrawn under **Section 87 (a)** of the **CPC** and to have the respondent re-arrested and charged afresh with the same charges as earlier recommended.

[14] Counsel therefore urged that the decision in the ***Kangangi case***, especially the holding that the AG was mandated under ***Section 35*** of **ACECA** to give written consent before any prosecution is instituted was made *per incuriam* and amounted to an error in the interpretation of the law. That the reading of the said

Sections 35, 36 or even ***37 (4)*** could not be interpreted to mean that KACC/EACCC must obtain written consent of the AG/DPP before it can lay charges for offences under **ACECA**. Thus, the learned Judge was faulted for stating that the written consent of the AG was mandatory and it was on that wrong premise that he proceeded to award damages for unequal treatment of the respondent. According to counsel, those provisions were meant for accountability purposes at the stages of investigations and prosecution. Counsel also referred to ***Section 12*** of the **Prevention of Corruption Act (PCA)** (repealed) which was omitted or deleted in the **ACECA** that repealed the entire **PCA**. Counsel also made extensive reference to the Hansard to draw out the policy objective of **ACECA** following the discussion in Parliament which was to assign specific responsibility of investigation to KACC and prosecutorial powers to the DPP which was a total departure from the previous provisions. Thus, counsel urged us to find that the Legislature had no intention to provide for written consent or any other form of authorization by the DPP before prosecution and to find that if it did, nothing would have stopped Parliament from stating so expressly.

[15] Counsel for the appellant also made reference to a decision by this Court in the case of **Susan Mbogo Ng'ang'a vs. Attorney General (Sued for and on behalf of the Nyeri Chief Magistrate's court,) & 2 Others Civil Appeal No. 66 of 2016 (*Susan Mbogo case*)** and stated that the facts therein were at all fours with the instant appeal as the appellant was challenging the decision by **Ngaa, J**. dismissing her constitutional petition. ***Susan Mbogo*** was impugning the criminal charges against her and the charge sheet which was drawn in the name of

"**Republic of Kenya through KACC**" and that written consent from the DPP had not been obtained prior to the appellant being charged under the **ACECA** just like in the instant case. In the ***Susan Mbogo case***, this Court agreed with the trial Judge when he ruled that, whereas under ***Section 12*** of the repealed **PCA**, prosecution for an offence under the Act could not be instituted **"except by or with the written consent of the Attorney General**", no such equivalent provisions were made in **ACECA**. This Court therefore agreed with the learned trial Judge's analysis of the provisions of ***Sections 12* of PCA** which he compared with **Section 35 of ACECA** and his conclusion was: -

> "***The legislature was fairly categorical here that a prosecution under the Prevention of Corruption Act Chapter 65 must be preceded by a written consent from the Attorney General; its intention was quite clear from the outset leaving no doubt that any prosecution without the written consent from the Attorney General would have been fatal. There is no such express provision in the Anti- Corruption Act*** (sic)."

Counsel therefore urged us to allow the appeal as there was no basis upon which the learned trial Judge could have awarded damages based on his findings that the respondent's constitutional rights were violated which finding was based on a misinterpretation of ***Section 35* of ACECA**.

[16] The respondent who was acting in person, being an advocate opposed the appeal and relied on his written submissions and list of authorities also to support thereof as well as his cross-appeal. He principally sought orders to quash the criminal case at Embu and to enhance the award of damages of Ksh. 100,000 which he submitted was too low and urged us to award him a reasonable sum. The respondent supported the decision of the learned trial Judge in his interpretation of the provisions of ***Section 35*** of **ACECA**. According to the respondent, KACC/EACC are enjoined to carry out investigations, and then make a report to the AG/DPP with the recommendation on whether or not a suspect should be charged for corruption or economic crimes. The respondent cited the

Kangangi case (supra) and the case of **Esther Theuri Waruiru & Another vs. Republic Nairobi Criminal Appeal No. 48 of 2008** to illustrate that this Court settled the issue that the powers of KACC /EACC as the case may be to prosecute any person or group of persons was subject to the directions of the AG and hence in his view the requirement under ***Section 35*** of the **ACECA**, that a report of any investigation be made to the AG was not an option but mandatory.

[17] The respondent went on to submit that although the charge sheet upon which he was being tried was signed by the officer in charge of Nyeri Police Station, there was sufficient evidence to show that it was officers from KACC who arrested him and took him to the police station. This was also demonstrated by the charge sheet which showed the complainant as "**Republic of Kenya through**

KACC" and in his opinion the real prosecutor was KACC. Thus, the respondent was able to demonstrate that the charges that were laid against him were without a foundation as the proper procedure was not followed. The respondent also countered the submissions by the appellant that ***Sections 35, 36*** and ***37*** of **ACECA** were meant to ensure institutional accountability by stating that they were meant as checks and balances as KACC cannot be an

investigator and prosecutor at the same time. That the appellant violated the provisions of **Article 27** of the Constitution by subjecting the respondent to differential treatment. The respondent urged us to take judicial notice that when high profile individuals are involved, the appellant always sought consent from AG/DPP which was not the case here.

[18] On his cross-appeal, the respondent submitted that since the learned Judge correctly found KACC had derogated from the provisions of ***Section 35*** of **ACECA**, and followed the ratio in the **Kangangi's case** (supra), he ought to have declared the criminal proceedings a nullity and also prohibited the appellant from continuing with any charges against him due to the abuse of power by the appellant. For this preposition the respondent relied on the case **George Otieno Guya & 2 Others vs. the Chief Magistrate's Court**, **High Court at Nairobi Misc Civil Appl, No, 305 of 2001**. On the assessment of damages, the respondent urged us to assess damages based on the fact that following the said arrest and subsequent arraignment in court, he was interdicted from employment and suffered financial loss and mental anguish. He made reference to many cases among them **Koigi wa Wamwere vs. Attorney General, Petition No 737 of 2009 eKLR 2012** where the plaintiff was awarded damages of Ksh. 12 million for unlawful arrest, torture and being charged with trumped up charges that were subsequently withdrawn. This being a first appeal, the respondent urged us to re-assess the damages while bearing in mind that since his interdiction, he earns one half of his salary; he reports to the office twice a week and he is not able to engage in private practice.

[19] In a brief rejoinder, ***Mr. Muraya*** emphasized that ***Section 35*** of **ACECA** was meant to cure the mischief or lacuna that existed under the repealed ***Section 12*** of **PCA** being the inaction that existed in the office of the AG when files consisting investigations of high profile cases of corruption and economic crimes were sent to that office for written consent. It is for that reason the law mandated the AG to give a report to Parliament on the status of the cases sent to his office. The criminal case was withdrawn due to the misapprehension arising from the interpretation of the **Kangangi *case*** (supra). The respondent was charged a fresh with the same offence and therefore there was no violation of rights for which he could be awarded damages. Counsel urged us to allow the appeal.

[20] We have considered the record of appeal and deliberated on the rival submissions, the law and authorities cited, some of which we have captured in the foregoing summaries. We discern, as already stated, two issues which fall for our determination arising from the appeal and the cross appeal. They are whether the leaned Judge erred in the way he interpreted the provisions of ***Section 35*** of A**CECA** and the award of damages.

[21] On the first issue, whether the learned Judge erred by holding that under ***Section 35*** of **ACECA** it was mandatory for the appellant to seek and obtain written consent to prosecute from the AG before laying the charges against the respondent, we think it is necessary to reproduce the said section verbatim; it is titled "**investigation report"** and provides that: -

> **"(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.**
>
> **(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime**."

Counsel for the appellant argued that the interpretation ascribed to the above section in the ***Kangangi case*** (supra) was made *per incuriam*. The gist of the findings in the ***Kangangi case*** can be seen in the following excerpt on page 5 of the said judgment: -

> **"It is clear from the provisions of this section that under *section 36.(2)*, the Attorney-General can reject a recommendation by the Commission that a person be prosecuted for corruption or economic crime. This is made even clearer under the provisions of *section 37* which obliges the Attorney-General to prepare an annual report on prosecutions for corruption or economic crimes. S*ection 37 (1)* and *section 37 (6)* obliges the Attorney-General to lay each annual report before the National Assembly within a specified period. *Section 37 (4)* specifically provides: -**
>
> > ***"The annual report shall also indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted and shall set out succinctly the reasons for not accepting the recommendation."***
>
> **What clearly emerges from these provisions is that KACC must report its investigations to the Attorney-General and in the**

report it may recommend the prosecution of a person for corruption or economic crime. The Attorney-General may, in turn, either accept or reject the recommendation to prosecute and the only check on the power of the Attorney-General to accept or reject KACC's recommendation to prosecute lies in the National Assembly. Where the Attorney General rejects the recommendation to prosecute his report to the National Assembly: -

> **"*shall set out succinctly the reasons for not accepting the recommendation.*"**

The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the Act. In the case before us there is no evidence that this procedure was followed. Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or

not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney-General. As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void. That is what the appellant contended before us. We accept that contention by the appellant.

In view of that position, we do not think it is necessary for us to consider whether police officers can prosecute cases arising under the Act before the anti-corruption courts. Perhaps it may be safer for the Attorney-General to specifically appoint officers to be prosecutors for the purposes of the Act. The Attorney-General has power to do so under *section 85* of the Criminal Procedure Code. But we take no concluded view on that issue.

What orders should we make in the appeal " In his memorandum of appeal the appellant asks us for four orders, namely: -

…

…We can straight-away say that we cannot acquit the appellant on the charges he is facing in the Magistrate's court. The merits of those charges have never been a matter before this Court or the courts below. What we have agreed with the appellant is that the process which was used to bring the charges before the Magistrate was faulty as not being in conformity with the provisions of the Act. Accordingly, under prayer (d) in the memorandum of appeal, we order that the three charges before the Magistrate's court be forthwith terminated, the charges not having been brought to court in accordance with the Act. The termination, however, does not prevent KACC from complying with the provisions of the Act and reinstituting the charges should it be deemed necessary. We repeat that we have rejected the appellant's prayer that he be acquitted on the charges."

[22] The *ratio decidendi* which we discern from the ***Kangangi case*** is clearly summarized by a subsequent judgment of this Court in the case of ***Susan Mbogo Ng'anga*** (supra). In it this Court discussed at length the case of ***Kangangi***; this is what this Court stated in some key paragraphs in the ***Susan Mbogo Ng'anga's case***: -

> **"35. There is therefore ample authority for the proposition advanced by the appellant that the power to prosecute under the ACECA resided with the Attorney General (and now with the Director of Public Prosecutions).**
>
> **36. There is then the question whether the prosecution of the appellant in the case giving rise to this proceeding is a prosecution by EACC or by its predecessor KACC" Although the appellant asserts that the charge sheet initiating the criminal proceedings was "*drawn and presented jointly and severally*" by KACC and the**
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> **Officer in charge, Kiambu Police Station, that assertion is not borne out by the record. The "*Kenya Police Charge Sheet*" is exhibited at page 22 of the record of appeal and bears the signature, on the face of it, of the Officer in Charge, Kiambu Police Station. In the body of the charge sheet, the complainant is indicated as "*Republic of Kenya through KACC*."**
>
> **37. Although KACC is vested with the power under Section 32 of the ACECA Act "*to arrest any person for and charge them with an offence, and to detain*", we do not construe the reference in the charge sheet to the complainant as "*Republic of Kenya through KACC*" to mean that the charge against the appellant is by KACC.**
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> **We are fully in agreement with the learned Judge of the High Court when he stated in his judgment that:**
>
> > **"*It is clear from the foregoing facts that at no point did KACC ever institute or prosecute the criminal charges; the charges were drawn and filed by the Attorney General or at his behest and he or the Director of Public Prosecutions or their agent or agents subsequently conducted the trial on behalf of the state.*"**
>
> **38. In effect, the appellant's petition before the lower court and by the same token this appeal, are founded on the wrong premise that her prosecution is by EACC".**

[23] Both cases, that is the ***Kangangi a***nd ***Susan Mbogo Ng'anga*** cases authoritatively state that the power to prosecute were then vested in the AG (now in the DPP), whereas the power to investigate was vested in KACC (now EACC). This is stated under ***Part IV*** of the Act which is headed "INVESTGATIONS" and states that the Director of KACC or a person authorized by him may conduct

investigations on behalf of KACC. The provisions of that part are consistent with those in ***Section 7*** in ***Part III*** that sets out the functions of KACC. ***Section 7 (1)***

(a) and ***(b)*** states the first function of KACC as: -

> ***"(a) to investigate any matter that in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur –***
>
> ***(i) Conduct constituting corruption or economic crime;***
>
> ***(ii) Conduct liable to allow, encourage or cause conduct constituting corruption or economic crime.***
>
> ***(b) to investigate the conduct of any person that in the opinion of the Commission, is conducive to corruption or economic crime."***

[24] What happens after the investigations are completed, the two decisions are also in agreement, a position that we too agree was right, in that the power to prosecute under **ACECA** resided with the AG (now DPP). That the KACC was obligated under ***Section 35*** of ACECA to submit the investigation report to the AG with recommendation that the person may be charged with the economic crimes. The decision whether to charge or not resided with the AG. This to us, is for the simple reason that an investigator cannot also be the prosecutor. It is also necessary to point out that the court in the ***Kangangi case*** having found that a procedural step under **Section 35** of **ACECA** was not followed, observed that the omission did not bar the appellant therein from being re-charged with the same offences upon the procedure being followed. The Court declined to quash the charges on the grounds that the merits thereto were not discussed.

[25] In the same manner, we cannot fault the learned trial Judge in the instant appeal for declining to quash the criminal charges as the merits thereto were not before the High Court. This is the thread that runs in many decisions that a procedural misstep during pretrial in criminal cases has no bearing on the culpability of the suspect and cannot be taken to vitiate a charge which is predicated on a valid or lawful complaint before the case is tried and concluded in court. This therefore disposes the first issue raised in the respondent's cross-appeal where he sought an order quashing the criminal proceedings. We reiterate that a procedural error in pre-trial cannot guarantee an acquittal or discharge as the merits of the charge, which has a whole life of itself hinged on a complaint with complaint(s) and witnesses were not determined.

[26] There is nonetheless a small dichotomy in the ***Kangangi's case,*** being the holding that KACC had purported to institute the prosecution although the charge sheet indicated the complainant as **"Republic of Kenya through KACC"**

whereas in the ***Susan Mbogo case*** this Court agreed with the learned trial Judge that the charges although drawn in the same fashion , could not be construed to have been presented by KACC as the charge sheet was signed by the officer in charge of the police station who was prosecuting on behalf of the AG/DPP. The issue before us is not who drew the charges because also as in the above cases the charge sheet was signed by the officer in charge of Kiambu Police Station, and there was no argument that he was not an authorized prosecutor under the then ***Section 85*** of the **CPC**. The issue here is that the investigative report was not submitted to the AG prior to the charge being laid in court and the specific statement made by the learned trial Judge stating that the charges were a nullity because the written consent of the AG/ DPP had not been obtained before the respondent was arraigned in Court.

[27] We have gone over the ***Kangangi case*** and we have not found any equivocal statement made therein that the written consent to prosecute that was required under the repealed ***Section 12*** of the **PCA** was imported lock, stock and barrel or even impliedly into ***Sections 35***, as read with ***Sections 36*** and ***37*** of **ACECA** so as to require consent to be in writing. In the ***Kangangi case***, the court stated that:

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> **"…Under Section 35, KACC/EACC must report the results of any investigations to the Attorney-General and its report may include a recommendation that a person be prosecuted for corruption or economic crime. The provisions of *sections 36* and *37* throw further light on what is to happen after a report is made to the Attorney-General.**
>
> ***36 (1) The Commission shall prepare quarterly reports setting out the number of reports made to the Attorney-General under section 35 and such other statistical information relating to those reports as the Commission considers appropriate.***
>
> ***(2) A quarterly report shall indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted.***
>
> ***(3) The Commission shall give a copy of each quarterly report to the Attorney-General.***
>
> (***4) The Attorney-General shall lay a copy of each quarterly report before the National Assembly.***
>
> ***(5) The Commission shall cause each quarterly report to be published in the Gazette."***

[28] We have also considered the above provisions against the backdrop of ***Section 12*** of the repealed **PCA** which provided that: -

> **"12. A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney-General."**

The question we have asked ourselves is whether this section is what mutated to ***Sections 35, 36*** and ***37*** to mean that a '*written consent'* to prosecute offences under **ACECA** was required when the investigative report is furnished to the AG. We appreciate that the ***Kangangi's case*** was decided under a different regime when prosecution was carried out under the direction of the AG and the DPP was part of that office. For that reason, we think we need not belabour the issue of written consent to prosecute so much as the mandate of the DPP is now settled by the Constitution itself that spells it out under **Article 157 (6) (b) and (c)**. It is the DPP who institutes all criminal proceedings for all the offences including offences under **ACECA** so that the DPP cannot give consent to him/herself.

[29] However, for the instant scenario, we also find that, if Parliament intended there to be a 'written consent', before any prosecution was undertaken, nothing would have stopped it from expressly saying so under ***Section 35*** while bearing in mind that it repealed ***Section 12*** of the PCA. We say so also drawing an analogy that at the time all prosecutions were vested in the AG, which role, in most cases was discharged through police prosecutors, who were not wholly answerable to the AG and there was no independent office of public prosecution, consent was a necessity to avoid misuse of prosecutorial powers by the same investigators. We therefore, agree with the submissions by the appellant that the requirement under the said sections of **ACECA** did not require 'written consent'

because in any case, the AG was the prosecutor and did not require to give himself consent; that the requirement to present the investigative reports and to make recommendations was meant for public accountability. For example, if EACC, submits an investigation report with recommendations to the DPP, and DPP fails to take action, it will be easy to know where the blame lies; similarly,

if EACC fails to carry out investigations and to submit reports, the blame will not be on the DPP. In this we have also drawn a further similarity by noting the raft of amendments that were effected under the **Criminal Law (Amendment Act No 5 of 2003**) which amended all the statutory provisions that required the consent of the AG in criminal prosecution.

[30] The last issue is whether, the respondent was entitled to damages for violations of his constitutional rights? This is what the learned Judge stated in his own words before awarding the general damages of Ksh. 100,000 to the respondent: -

> **"Since the law required that the 3rd respondent seeks the consent of the Attorney General before instituting any proceedings and since it is not disputed that the 3rd respondent did not comply with this mandatory provision of the law; I agree with the petitioner that his rights to equal protection of the law as entrenched under Article 27 of the Constitution of Kenya were violated. I however, fail to see how this action by the Respondent amounted to violation of the Petitioner's constitutional right to fair trial as stipulated vide Article 50 of the Constitution.**
>
> **Since Embu Anti-Corruption Case No 3 of 2011 has been withdrawn and terminated, I find that the Petitioner's prayers numbers 5, 6, 7 and 9 of the petition before this Court have been overtaken by events.**
>
> **Having found as a fact that the 3rd respondent violated the Petitioner's constitutional right to equality before the law, I am of the considered opinion that the Petitioner is entitled to compensation under Article 23(3) of the Constitution of Kenya.**
>
> **It is trite law that under the said article of the constitution a breach of the fundamental rights will in appropriate cases attract the remedy of general damages and since none of the parties before me addressed me on the appropriate award in respect of the breach and since I have found that the petitioners rights to equal treatment of the law was breached by the 3rd respondent and having taken into account the fact that the petitioner has been on half salary since his arrest and** (sic) **arraigned in court in violation**
>
> **of his aforesaid I award the same general damages of Ksh. 100,000 against the 3rd respondent"**

[31] We have found that the holding by the learned Judge that the AG needed to give a written consent to the prosecutor who laid the charges against the respondent was an erroneous interpretation of ***Section 35***, as read with ***Sections 36***, and ***37*** of the **ACECA**. The particular wordings that written consent was needed were not *ipso facto* expressly stated in the ***Kangangi case*** but what the court stated was that KACC/EACC was mandatorily required to forward the investigations report to the AG who instituted the prosecution. It is common ground that KACC did not forward the investigation report regarding the investigations in the respondent's case to the AG before the charges were laid by a police prosecutor. It is also common ground that the police prosecutor was duly appointed by the AG under ***Section 85*** of the CPC. Thus, the question we have asked ourselves is whether this procedural misstep amounted to a violation of the respondent's constitutional right to equal protection of the law as the learned trial Judge ruled?

[32] Put another way, did the procedural misstep amount to a violation of the respondent's equal treatment before the law? We do not think so, because the AG/DPP did not decline to charge the respondent. As stated in the forgoing paragraphs, the report seems to have been submitted subsequently to the relevant office, being the DPP, charges were withdrawn, consent given and the respondent charged a fresh with the same offences. The respondent did not adduce any evidence to support the allegations of differential treatment or how that procedural mistrial amounted to unequal treatment before the law. There are no allegations

that the prosecution was biased, irrelevant or malicious. Since the prosecution was continued after the consent was given, we also find that there was nothing inherently unequal or that even pointed to the net injury or inconvenience that the respondent suffered as the learned Judge did not make any findings that the respondent was treated unfairly.

[33] Another disturbing aspect of this award is the quantum. The learned Judge acknowledged in the above excerpt that none of the parties addressed him on the matter of damages. This therefore lends credence to the appellant's submission

that the award was randomly made without consideration of the guiding principles in awarding damages that are pegged on the damages/ injuries or pain suffered as the case may be. We find that the award of general damages of Ksh 100,000 was not supported by any evidence to demonstrate that the respondent was subjected to differential or unequal treatment before the law and how he suffered damages. This therefore also disposes the second ground in both the appeal and cross-appeal.

[34] In conclusion, we find and hold that the learned Judge erred by interpreting the ratio in the ***Kangangi's case*** to mean that failure to give 'written consent' to prosecute economic crimes under ***Section 35*** of the **ACECA** renders the charges null and void. That although some statements were *ipso facto* made in ***Kangangi's case***, they were largely *obiter dictum* and the real ratio in the said decision did not state that a suspect who is charged with economic crimes before the investigation report is laid before the AG, the charges were null and void. That the ratio in ***Kangangi's case*** was that it was mandatory for KACC to submit the investigation report to the AG who had then the mandate to prosecute. That the decision in ***Kangangi's case*** as far as ***Section 35*** of **ACECA** was concerned was not made *per incurriam.* Accordingly, it is still good law. We do therefore decline the invitation by the appellant to depart from the same. That the respondent did not adduce evidence to demonstrate how the procedural misstep in the pretrial, amounted to a violation of his constitutional right to equal treatment before the law. The award of general damages of Khs.100,000 was erroneous as it was not based on any evidence.

[35] The upshot of the foregoing is that we find merit in the appeal, which we allow, and dismiss the cross-appeal. We make no orders as to costs bearing in mind that the respondent was finally acquitted of the said charges. Orders accordingly.

Dated and Delivered at Nairobi this 24th day of July, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

A K. MURGOR

…….

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR