



**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA)**

**CIVIL APPEAL NO. 333 OF 2014**

**BETWEEN**

**PROF. NJUGUNA S. NDUNG’U.....APPELLANT**

**AND**

**THE ETHICS & ANTI-CORRUPTION COMMISSION (EACC).....1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....2ND RESPONDENT**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICESERVICE [IG NPS].....3RD RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....4TH RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Constitutional & Judicial Review Division), (G.V. Odunga, J.) dated 17th day of November, 2014*

*in*

**NAIROBI HC PETITION NO. 73 OF 2014)**

\*\*\*\*\*

**JUDGMENT OF GITHINJI, JA.**

[1] This is an appeal from the judgment of the High Court, (**Odunga, J.**) which dismissed the appellant’s constitutional petition for declaratory orders specified in para. 19 thereof that:

- (a) the allegations in the material tender do not disclose any criminal offence.**
- (b) the allegations against the petitioner have no basis in law.**
- (c) the petitioner’s rights have been violated as particularized above.**
- (d) any compliance with the ruling of PPARB cannot constitute a corruption offence.**
- (e) any action of the respondents that is inconsistent with Constitution be voided to that extent.**
- (f) any or further orders do issue to give effect to the principles of the Constitution.**

[2] In the aforesaid petition, the appellant stated the facts relating to the award of tender for supply, installation and commissioning of the intended Security Management Systems (*ISMIS*) for its use to Horsebridge Network Systems East Africa (*Horsebridge*) and stated that the Daily Nation of 11th December, 2014, published a report that the Director of Public Prosecution (DPP) had consented to the arrest and indictment of appellant with corruption alleging loss of Kshs. 400,000,000/=. The appellant further pleaded that the attempt to arrest and indict him on the material tender was spurious, capricious, arbitrary and violates his equal protection of the law under **Article 27 (1)** of the Constitution; that communication through the media of his arrest when he was abroad on national duties was a breach of his inherent dignity and deprivation of his freedom and contravention of **Article 28, 41 (2) (b)** and **29 (9)**. The other violations of the petitioner’s constitutional rights pleaded included being subjected to psychological torture; rights to a fair administrative action; right to be informed of the offence and right to be presumed innocent.

[3] The petition was supported by the affidavit of the appellant. The 1st respondent (*EACC*) filed a replying affidavit sworn by **Alex M.P Kinyanjui** on 10th March, 2014. The 2nd respondent (*DPP*) also filed a replying affidavit sworn by **Daniel Ithatwa Karuri**, sworn on 5th March, 2014. The 4th respondent (**The Attorney General**) filed grounds of opposition to the petition. By a supplementary affidavit sworn on 21st March, 2014, the appellant responded to the averments of the EACC and DPP in the respective replying affidavits and finally stated that the entire intended prosecution had no legal or factual substratum.

[4] The appellant was at the material time the Governor of the Central Bank of Kenya. He averred that on 11th February, 2014, he was in Paris, France representing the Government in an international meeting and that on that date, the Daily Nation published a headline article indicating that the DPP had ordered the arrest and prosecution of the appellant over an alleged abuse of office arising from an award of Shs.1.2 Billion tender.

The appellant instructed his lawyer who filed the said petition and also an application to restrain the respondents from arresting him and preferring criminal charges against him pending the hearing of the petition. The interlocutory application was allowed by the High Court on 14th February, 2014.

[5.1] The following chronology of events and material facts relating to the intended prosecution were not in dispute.

In May, 2012, the CBK advertised an international tender for supply, installation and commissioning of an Integrated Security Management System in accordance with Public Procurement and Disposal Act (2006 Act) and Regulations, 2006. After the advertisement, six companies namely: **Aua Industria; Orad Limited, Indra Limited, Azicon Kenya Limited, Horsebridge Network Systems EA Ltd and Engineered Systems Solution** submitted their bids. CBK appointed a Tender Opening and a Tender Evaluation committee as stipulated in the 2005 Act.

After the procedures of tender opening and evaluation were completed, three companies, namely, Orad Limited, Azicon Kenya Ltd and Horsebridge Network Systems EA Ltd qualified for the next stage of evaluation.

[5.2] After the requisite evaluation stages were completed, the evaluation committee forwarded its report to the Tender Committee recommending the award of tender to Horsebridge. The Tender Committee considered the report and on 23rd August, 2012, declined to award the tender and directed, *inter alia*, that, a re-evaluation of the tender, be undertaken and tenders by Indra Ltd. and Engineered Systems be allowed to participate in the technical evaluation. The Evaluation Committee complied with the directive and in its Re-evaluation Report dated 7th September, 2012, concluded that Horsebridge had submitted the most technically responsive bid and the lowest evaluated price and it recommended the award to Horsebridge at the quoted price of Shs. 1, 219, 003, 971.421/=. However, on 26th September, 2012, the Tender Committee allegedly determined that the tendering system be terminated.

[5.3] On 8th October, 2012, Horsebridge filed Review No. 51 of 2012 before the Public Procurement Administrative Review Board (*Review Board*) seeking in the main, an order setting aside the decision of the Tender Committee rejecting the recommendations of the Evaluation Committee and an order that the Tender Committee do adopt the decision of the Evaluation Committee and award the tender to Horsebridge. On 6th November, 2012, the Review Board allowed the application for review, directed CBK through its Tender Committee to consider the recommendations of the Evaluation Committee and proceed to finalize the award in accordance with the law within the next 30 days.

[5.4] The decision of the Review Board was presented to Tender Committee at its 148th meeting held on 29th November, 2012.

After deliberations on the decision of the Review Board, the Tender Committee concluded that it had already made a decision on 26th September, 2012 terminating the tender and that what remained is the communication of its decision to the interested parties.

Before the date of the meeting, **Cassian, J. Nyanjwa**, the CBK's Director of Department of Estates, Supplies and Transport had by a letter dated 20th November, 2012, informed all interested parties and the Governor of the fact that the procurement proceedings had been terminated under **section 36** of the 2005 Act.

[5.5] On 6th December, 2012, Horsebridge filed a second review application before the Review Board viz. No. 65 of 2012 seeking an order that the decision of the Tender Committee dated 29th November, 2012, be set aside and a declaration that the decision was illegal, unlawful and a nullity in law. The review was sought on the grounds *inter alia*, that, the procuring entity had breached the law by blatantly disregarding the earlier decision of the Review Board dated 6th November, 2012. The CBK opposed the review application on the grounds, *inter alia*, that, the order by the Review Board did not take away the power of CBK under **section 36** of the 2005 Act to terminate the tender.

The Review Board allowed the application on 4th January, 2013, set aside the decision of the Tender Committee dated 29th November, 2012 and awarded the tender to Horsebridge. In allowing the application, the Review Board made a specific finding that the entire tender process was carried out in accordance with the Act; that Horsebridge emerged the lowest bidder on two occasions and that the minutes of the Tender Committee purporting to show that it held a meeting on 26th September, 2012 had been manufactured in an attempt to oust the jurisdiction of the Review Board.

[5.6] By a letter dated 1st January, 2013, the firm of **Ngatia & Associates**, the CBK lawyers strongly recommended to the Director of the Legal Services – CBK that the Bank should file an application for judicial review in the High Court to quash the decision of the Review Board and in addition, sought instructions to do so. The Legal Services Department wrote an internal memo to the Governor recommending that the firm of Ngatia & Associates be instructed to file a judicial review of the decision in the High Court. Despite much pressure to give instructions for filing a judicial review application in the High Court, the Governor in his comments on various internal memos raised various issues which required clarification before a decision could be taken. Ultimately, the Governor by a letter dated 5th March, 2013 explained to the relevant CBK Departments why he did not support further litigation by CBK. He further stated that he agreed with the decision of the Evaluation Committee which was upheld by the Review Board.

Instead his view was that the better option was for aggrieved parties to go to court and for CBK to defend its position in court.

In that letter the Governor indicated that he had already directed Nyanjwa to dispatch award letters to the successful bidder and also to unsuccessful bidders.

Such letters had been dispatched as directed. The letters stated in the relevant part:

**“Further to the Bank’s decision to terminate the procurement proceedings on the above tender, the matter was referred to the Public procurement Administrative Review Board (PPARB) for review and determination. The Bank’s decision has been reversed and the tender awarded to the lowest evaluated bidder.” [Emphasis added].**

[6] By a letter dated 25th July, 2013, the firm of **Gitonga Muriithi & Company Advocates** who stated that they were acting for one of the participants who bid complained to the DPP to commence investigations in particular *“how a tender that was cancelled under the provisions of the Act could be awarded to a supposed “low bidder” while there is no such provision.”*

They referred to a letter dated 30th November, 2012 written by Cassian J. Nyanjwa which stated in the relevant part:

**“This is to notify you that the procurement proceedings on the above tender has been terminated. The termination is as provided under section 36 of the Public Procurement and Disposal Act 2005.”**

The DPP forwarded a copy of the letter to EACC requesting investigations to be conducted. After investigations, EACC recommended to DPP that the Governor (*appellant*) be charged with two offences under the Anti-corruption and Economic Crimes Act (*ACECA*) namely:

- 1. Willful failure to comply with the law relating to procurement contrary to section 45 (2) (5) as read with section 48 of the ACECA and**
- 2. Attempt to commit an offence involving corruption contrary to section 47 (1) of ACECA.**

Upon consideration, the DPP gave consent for the prosecution of the appellant for the offence of Abuse of Office contrary to section 46 as read with section 48 (1) of ECECA.

[7] The basis of the charges appears to have been that:

(i) the appellant while aware of the termination of the tender by the Tender Committee willfully failed to communicate the same to the Review Board. Had this fact been brought to the knowledge of Review Board, it would have held that it lacked jurisdiction to hear the matter pursuant to section 36 (6) of the Act.

(ii) The appellant willfully ignored legal advice from in-house counsel and external counsel to appeal against the decision of the Review Board dated 4th January, 2013 as a result of which the decision of the Review Board became final and binding thereby conferring a benefit to Horsebridge.

(iii)The appellant conferred a benefit to Horsebridge by directing that the contract be awarded to Horsebridge notwithstanding the termination.

[8] Whilst the petition was pending for hearing, Horsebridge filed High Court Judicial Review **JR Miscellaneous Civil Application No. 87 of 2014** on 10th March, 2014 against CBK and joining EACC as an interested party. In that application, Horsebridge sought two orders of mandamus, firstly, to compel CBK to engage it in concluding the tender as directed by the Review Board and secondly, to compel CBK to execute the agreement in respect of the tender.

The CBK’s response to the application was that it was unable to comply with the decision of the Review Board because of the pending investigations against the Governor. It took a neutral stand in the application. On the other hand, EACC opposed the application on the ground that the decision of the Review Board was a nullity having been made in contravention of the procurement law and without jurisdiction.

On that aspect, the High Court (**Korir, J.**) said in part:

**“the invitation by the interested party that the court should find that the decision was a nullity is an invitation to path of lawlessness.”**

Regarding the decision of the Review Board the High Court said:

**“Without commenting on the reasonableness or otherwise of the findings of the Review Board, it is clear that the Review Board gave reasons for reaching the conclusion that the procurement had not been terminated by the time request for Review No. 51 of 2012 was filed by the Applicant. The Review Board also gave reasons as to why it thought the respondent had doctored the minutes for a meeting allegedly held on 26th September, 2012.”**

Ultimately, on 25th September, 2014 the High Court allowed the judicial review application and granted the orders of mandamus to Horsebridge.

[9] On 17th November, 2014, nearly two months later, the appellant's petition was dismissed with costs to the respondents. In reaching its decision, the High Court reasoned partly as follows:-

**“it is contended that there is sufficient evidence to show that the petitioner was apprised of the termination. It is not for the court to find with finality that the position taken by the respondents is correct. However, if the petitioner ignored material placed before him and as a result a tender which had been terminated by the Tender Committee was given a lease of life as a result of failing to act on the material before him, this Court cannot find at this stage that the facts do not disclose a commission of an offence.**

**If it is proved at the hearing that the petitioner's failure to stop the tender from being wrongfully awarded was willful and was geared towards conferring an undeserved benefit, the respondents may well have a case against the petitioner.”**

[10] Regarding the legal opinions, the High Court said in part:

**“whereas one cannot state with certainty that had the petitioner acted on the opinions, the High Court would have reversed the Review Board, the failure to act on the said legal opinions if it led to a wrongful benefit being conferred on Horsebridge may well form a basis to be presented before the trial court. Whether that offence will succeed is another matter altogether. It may well be that the opinion to appeal came too late or that such opinion was misplaced. For the court to embark on such investigation, this Court would trespass on the jurisdiction of the trial court. The petitioner contends that those opinions were just opinions and he was not bound to give effect to them. That may be so. However, this Court is not in a position to find that the petitioner was justified in ignoring the said opinions especially if by the time they were given the petitioner knew that the tender had been terminated and the effect of not appealing would have been to confer the benefit of a terminated tender on Horsebridge.”**

[11] Finally, on the alleged failure by the appellant to communicate the fact of termination of the tender to the Review Board, the High Court said:

**‘whereas I agree with the petitioner's contention that compliance with the decision of the PPARB does not constitute an offence, here it is contended that the said decision would not have been arrived at had the issue of want of jurisdiction been brought to the attention of the Board in good time. As to whether this was true or whether the failure to do so was wilful is a matter for evidence to be placed before the trial court.’**

[12] The appeal is based on the grounds, *inter alia*, that, the judge erred in law; in allowing the appellant to be prosecuted on grounds that lacked legal and factual substratum; in allowing prosecution of the appellant on non-existent crimes; in criminalizing lawful procurement process and in criminalizing a process that the same court had found lawful.

The appellant also contends that the judgment is narrow, simplistic, opportunistic and oppressive.

In support of the appeal, **Cecil Miller**, the appellant's counsel submitted, among other things, that the intended prosecution has not met the criterion of sufficient evidence to provide a realistic prospect of conviction; that by awarding the contract, the appellant was merely implementing the decision of the Review Board; enforcing the decisions of Review Board which are legal cannot amount to an offence; that none of the companies that participated in the tender challenged the award of contract to Horsebridge; the appellant was justified in not listening to the Tender Committee after the Review Board's decision as the Review Board was very critical of the Tender Committee; the Review Board found that the entire tender process was carried out in accordance with the law; the appellant was bound to obey the decision of the High Court in Judicial Review case No. 87 of 2014; that the decision by the appellant not to follow the opinion of lawyers does not amount to an offence since the contract had been awarded to the lowest bidder; CBK did not have any reason to challenge the decision and that the CBK is, by virtue of **Article 231** of the Constitution, independent and the Governor is also independent and answerable to the Board.

[13] **Ruto** for EACC recited the law and the evidence and submitted, amongst other things, that, the investigations by EACC collected enough evidence to prefer charges against the appellant; court ought not to interfere with the decision to commence criminal proceedings simply on the basis that the appellant's chances of being acquitted are high; a challenge to competence of charges or sufficiency or otherwise of the evidence can sufficiently be examined and determined at the trial; that appellant having had prior knowledge of the termination of the tender failed to bring that fact to the attention of the Review Board and that it was established that the appellant did not heed the legal opinion to ensure proper application of the law as part of his duties.

[14] On his part, **Ashimosi** for the 2nd respondent submitted, *inter alia*, that the evidence in the file showed that the appellant was briefed and was aware of the termination of the tender process; a benefit was conferred to Horsebridge by wilful and deliberate refusal by the appellant to accept the unanimous and well-reasoned advice given to him by CBK's external and internal lawyers; that DPP was satisfied on evidence that the appellant used his office to improperly confer a benefit to Horsebridge; that the DPP's decision was based on sufficiency of evidence and was not actuated by any extraneous consideration nor violate the appellant's fundamental freedoms and rights; that the discretion of DPP should not be lightly interfered with and that the appellant failed to prove violation of his rights or abuse of discretion.

[15] By **Article 157 (6)** of the Constitution, the DPP in exercise of State powers of prosecution may institute and undertake criminal proceedings against any person. By **Article 157 (10)**, the DPP in exercise of his powers does not require the consent of any person and should not be under the direction or control of any person or authority. However, **Article 157 (11)** provides:

**“In exercising the powers conferred by this Article, the Director of Prosecutions shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of legal process.”**

The manner in which the prosecutorial discretion should be exercised and the circumstances in which courts can interfere with the exercise of the discretion has been considered by the High Court and this Court in many decisions, some of which were cited by the trial judge and have also been cited by the appellant in this appeal. It is not necessary to recite those decisions because, in my view, they interpret the law correctly and the problem faced by courts is more often than not, been the application of the law to the facts of the specific case.

It is sufficient to say that in **Diamond Hasham Lalji & another v. Attorney General and 4 others [2018] eKLR** (*Diamond's case*), this Court considered in some detail the applicable law and the circumstances under which the court could interfere with the exercise of the prosecutorial discretion by DPP.

[16] In addition to the provisions of the Constitution, the principles which guide the DPP in exercising his powers are stipulated in section 4 of the office of the Director of Public Prosecutions (*ODPP*) Act No. 2 of 2013 and in the National Prosecution Policy formulated by DPP under powers conferred upon him by section 5 (1) (c) of *ODPP* Act.

The National Prosecution Policy states in part in para. 4 (B) (1):

**“The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted...”**

and in para. 4 (B) (2), the Policy states:

**“The Evidential Test –**

**Public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?”**

[17] The intended prosecution relates to abuse of office in the context of public procurement process.

As the 2005 Act (*now repealed*) shows, the public procurement process is an elaborate statutory process assigning several bodies independent and distinct functions. By section 26 (1), a public entity is required to establish procedures relating to procurement for purposes of ensuring that its decisions are made in a systematic and structured way. Public entities are also required to establish a tender committee, a procuring unit and other bodies for purposes of making decisions on behalf of the public entity (s. 26 (4)).

Further, a procurement unit is required to be manned by professionals (s. 26 (7)) and each employee of a public entity; a member of a board or committee is required within his area of responsibility to ensure that the Act, Regulations are complied with (s. 27 (3)).

[18] **Article 23 (1)** of the Constitution establishes the Central Bank of Kenya and **Article 23 (3)** provides that CBK shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions. By section 3 (2) of the Central Bank Act, CBK is a body corporate and by section 13 (1), the Governor is the Executive Officer of the CBK and is responsible for the management of the Bank.

Section 10 establishes a Board of Directors of the Bank and its functions include keeping the performance of the Governor in discharge of his responsibilities under constant review.

[19] The grounds of the petition and the grounds of appeal are in essence that the allegations against the appellant and the charges lacked legal and factual substratum and did not constitute a corruption offence.

The three pillars on which the decision to prosecute was made have been summarized in para. 7 above.

[20] As regards the first one, that is, failure to communicate the fact of termination of the tender to the Review Board, the respondents contended that had the fact of termination been communicated, the Review Board could not have reached the decision dated 6th November, 2012 in Review No. 51 of 2012.

In the appellant's letter dated 5th March, 2013 addressed to Nyanjwa and **Abuga**, the appellant asks the question:

*“why were the minutes of 26th withheld by our staff”*

The appellant states further that the issue has not been explained and refers to the withholding of the minutes as an institutional black spot.

The CBK had a Tender Committee, Legal Department, Procuring Unit all established under the 2005, Act which were directly responsible for the communication of the termination of the tender. Those institutions are required to make decisions on behalf of the procuring entity and have a legal duty to ensure that the provisions of 2005 Act are complied with.

In those circumstances, it would *prima facie* be unreasonable of the EACA to attribute the failure to inform the Review Board of the termination solely on the appellant. Furthermore, the Review Board a quasi-judicial body, in its later decision of 4th January, 2013 in Review No. 65 of 2012 made a finding that the minutes of Tender Committee purporting to show that it held a meeting on 26th September, 2012 which terminated the tender had been manufactured in an attempt to oust the jurisdiction of the Review Board. It is therefore speculative for respondents to contend that had the minutes been available to the Review Board in Review No. 51 of 2012, it could have reached a different decision on the authenticity of the minutes.

[21] The second pillar is that the appellant wilfully ignored the legal advice to appeal against the decision of the Review Board in Review No. 65 of 2012, thus, rendering the decision final and binding seems to have greatly influenced the decision to prosecute. The appellant addressed this issue in his letter dated 5th March, 2013. He stated that he had carefully analysed the decisions of the Review Board, considered *inter alia*, the reasons given, the image of the Bank, the legal fees implications considering that the two appearances before the Review Board had cost a staggering Shs. 19 million, that the lawyers would like to go on forever; that the tender was awarded to the lowest bidder and thus there was no justification for appealing and that the losing bidders had not appealed. The letter reveals that the appellant was also of the view that the CBK should not engage in legal tussles which would involve the Bank Evaluation and Tender Committees and that the image of the bank had to be protected.

The decision not to appeal was a discretionary administrative decision partly based on policy considerations by the Chief Executive Officer of the Bank who was subject to the superintendence of the Board of Directors. It was not contended that the Board of Directors had a different view. The reasons that the appellant gave for not appealing were apparently in the best interest of the Bank and apparently rational. There was no statutory or legal duty for the appellant to appeal.

[22] Lastly, as regards that third pillar, it is *prima facie* evident that the benefit that Horsebridge enjoyed was conferred by the public procurement process which the Review Board affirmed to have been carried out in accordance with the 2005 Act. The award of the tender to Horsebridge was validated by two decisions of the Review Board. The High Court further gave the procurement process a stamp of legality when it issued orders of mandamus on 25th September, 2014 in JR Misc. Application No. 87 of 2014. The appellant's further list of authorities show that EACC, the 1st respondent filed Civil Appeal No. 69 of 2015 against the grant of orders of mandamus by the High Court and that the Court of Appeal dismissed the appeal on 10th March, 2017.

[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.

The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly. In **Diamond's case (supra)**, the court said in part at para. 42:

**“The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”**

In the same case, the court said at para. 45:

**“In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”**

[24] The charges against the appellant were largely dependent on documentary evidence and most of the facts were not in controversy. The High Court was called upon to find out whether or not the omissions allegedly committed by the appellant *prima facie* constituted the alleged criminal offences under the procurement law.

A decision on that issue could have been made without embarking on a trial by scrutinizing the documents and upon consideration of the circumstances of the case and the law.

In my respectful view, the High Court erred in law by failing to scrutinize the charges, the relevant documents including the decisions of Evaluation Committee, Tender Committee, Review Board and the High Court proceedings and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction.

For reasons stated in paras. 20, 21 and 22 above, I am satisfied that the charges had no legal or factual foundation and thus there was no realistic prospect of conviction.

I am further satisfied that intended prosecution is oppressive and violates the appellant's constitutional rights as pleaded particularly the right to a fair administrative decision that is lawful, reasonable and procedurally fair.

The 3rd and 4th respondents who did not appear at the hearing had no role in the prosecution. They were wrongly joined in the petition.

[25] I would for the reasons stated allow the appeal and make appropriate consequential orders.

As **J. Mohammed, JA** agrees, the majority judgment of the Court shall be as follows:

- (i) The appeal is allowed with costs both in the appeal and in the High court against the 1st and 2nd respondents, jointly and severally.
- (ii) The judgment of the High Court dismissing the petition with costs is set aside and substituted with a judgment allowing the petition as against the 1st and 2nd respondents. The petition is dismissed against 3rd and 4th respondents.
- (iii) Declaratory orders sought in paragraph 19 of the Petition as summarised in paragraph 1 of this judgment are granted against the 1st and 2nd respondents.
- (iv) A judicial review order of prohibition is granted prohibiting the 1st and 2nd respondents from charging and prosecuting the appellant on the charges framed.
- (v) The appeal against the 3rd and 4th respondents is dismissed with no order as to costs.

Orders accordingly.

**DATED and Delivered at Nairobi this 20th day of December, 2018.**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

DEPUTY REGISTRAR

## **JUDGMENT OF OKWENGU JA**

### **Background**

[1] The events leading to this appeal were triggered by the process of procurement of the tender for the supply, installation and commissioning of the Integrated Security Management Systems [ISMS] for use in Central Bank of Kenya (the Bank). The appellant Prof Njuguna Ndung'u was at the material time the Governor and the Chief Executive of Central Bank of Kenya. Following an advertisement calling for bids, six companies that is AUA Industria, Ovad Limited, Indra Limited, Axicon Kenya Limited, Horsebridge Network Systems EA (herein Horsebridge) and Engineered Systems Solution, offered their bids for the tender.

[2] A dispute arose concerning the award of the tender, after the Bank's Tender Committee (Tender Committee) declined to award the tender to Horsebridge who was found to be the lowest tenderer following the evaluation of the bids. Horsebridge filed an application in the Public Procurement & Administrative Review Board (Review Board) against the decision of the Tender Committee not to award it the tender. The Review Board ordered that the tender be awarded to Horsebridge. Notwithstanding internal and external legal advice given to the appellant questioning the Review Board's jurisdiction and advising the appellant to appeal against the decision, the appellant directed the Tender Committee to comply with the order of the Review Board.

[3] In the meantime the 1st respondent that is the Ethics and Anti-Corruption Commission (EACC), had initiated investigations into the procurement process following a complaint that had been received. Subsequently a report appeared in a local Daily Newspaper that the 2nd respondent, that is the Director of Public Prosecution (DPP), had consented to the prosecution of the appellant on charges of corruption in regard to the procurement process.

### **The Petition**

[4] The newspaper report prompted the appellant to file a petition in the High Court's Constitutional and Human Rights Division in an attempt to stop the prosecution proceedings against him. The appellant contended that as the Chief officer of the Bank he was not involved in the tender procurement process; that the decision to award the tender to Horsebridge was made by the Review Board; that the allegations that there was loss to the Bank was spurious as Horsebridge was the lowest tenderer; and that the legal advice given whether internal or external could not override the established law.

[5] The appellant therefore sought declaratory Orders: that the allegations made on the material tender, did not disclose any criminal offence; that the allegations against the appellant did not have any basis in law; that the appellant's rights had been violated; that compliance with the ruling of the Review Board could not constitute a corruption offence; and that any action of the respondents that was inconsistent with the Constitution be voided to that extent.

[6] The appellant's petition was opposed by each of the respondents. EACC contended that its investigations revealed that the appellant as the Governor and accounting officer of the Bank had willfully failed to comply with the law relating to procurement procedures in relation

to the ISMS tender for the Bank. This was because the appellant directed that the contract be given to Horsebridge notwithstanding the fact that the Tender Committee had terminated the tender; and that in doing so the appellant irregularly conferred or attempted to confer a benefit on Horsebridge. EACC therefore maintained that it acted within its powers in recommending the prosecution of the appellant.

[7] On its part, the DPP asserted that he had acted in accordance with his mandate as the report submitted to him by EACC revealed evidence that was sufficient to establish criminal culpability on the part of the appellant for the offence of abuse of office in regard to his conduct in the ISMS procurement process for the Bank. The DPP asserted that the conduct of the appellant resulted in the decision of the Review Board that the tender be awarded to Horsebridge becoming final, thus irregularly conferring a benefit on Horsebridge. The DPP objected to the petition maintaining that it was being used by the appellant to subvert the criminal law process; and that the proceedings were incompetent as no constitutional issue had been raised. The Inspector General of Police and the Attorney General (3rd and 4th respondents) who were also made party to the petition also objected to the petition.

### **The High Court Judgment**

[8] The learned judge upon hearing the parties and considering the written and oral submissions delivered a judgment in which he noted *inter alia*, that EACC and the DPP had the mandate to carry out investigations, and initiate prosecutions respectively; that the exercise of this mandate has to be guided by the Constitution and the principles of natural justice; that the criminal process has inbuilt safeguards intended to safe guard the right to a fair trial; and that the exercise of discretion to prosecute is not one to be lightly interfered with, but where the court is satisfied that the discretion is being abused, or used to achieve a purpose not geared towards the vindication of a criminal offence it will interfere.

[9] The learned judge made findings which in a nutshell were: that it was premature to determine whether the appellant was likely to be subjected to an unfair trial as the prosecution of the criminal case was yet to begin; that the circumstances presented to the court, to wit that the appellant as the accounting officer of the Bank, willfully failed to stop the tender from being wrongfully awarded, and that his action was calculated towards conferring an undeserved benefit on Horsebridge, may if proved, establish a case against the appellant. On these premises the trial judge dismissed the appellant's petition.

### **The Appeal**

[10] Being dissatisfied with the judgment the appellant lodged this appeal in which he has raised 16 grounds of appeal. The grounds include: that the judgment lacked substratum; that the charges proposed against the appellant lacked legal and factual substratum; that the trial judge erred in criminalizing a lawful procurement process and in allowing the respondents to give evidence from the Bar; that the judgment is bad in law as there was no nexus between the ratio *decidendi* and the decision; that the judgment is contrary to *stare decisis* on similar cases; that there is no nexus between the judgment and the proceedings; that the judgment is simplistic, opportunistic, narrow and oppressive; and that the judgment is completely erroneous.

### **The Submissions**

[11] The appellant was represented in this appeal by the firm of Miller & Co Advocates who filed written submissions together with accompanying authorities. The submissions were orally highlighted in court by Mr. Miller who appeared during the hearing of the appeal together with Mr. Wena. EACC filed written submissions and accompanying authorities. EACC was represented in the appeal by learned counsel Mr. David K. Ruto who highlighted the written submissions during the hearing of the appeal. The DPP also filed written submissions and authorities and was represented during the hearing of the appeal by Mr. Ashimosi, an Assistant Director of Public Prosecutions, who orally highlighted the submissions. The 3rd and 4th respondents did not file any submissions nor were they represented during the hearing of the appeal.

### **The Submissions for the Appellant**

[12] For the appellant it was submitted that although under Article 157 of the Constitution and section 4 of the Office of Public Prosecutions Act No 2 of 2013, the DPP has discretion to initiate prosecutions, that discretion must be exercised having regard to public interest, the fundamental principles in the Constitution, and the need to avoid abuse of the legal process. Several cases were cited including **Joram Mwenda Guantai v Chief Magistrates Court [2007] 2 EA 170**; **Meixner & Another vs. Attorney General [2005] 2 KLR 189**; and **Kuria & 3 others v Attorney General [2002] KLR 69**, in support of the proposition that although the court cannot interfere with the exercise of the discretion to prosecute if the discretion is being exercised lawfully, it can interfere if the prosecution amounts to abuse of the process of the court; or the prosecution is motivated by extraneous or ulterior matters not consistent with the goals of justice; or if compelling the accused to stand trial would violate the fundamental principles of justice.

[13] In regard to the issue whether the prosecution of the appellant amounted to an infringement of his constitutional right, it was submitted that the intended prosecution against the appellant was based on three allegations. These were: that the appellant awarded a contract to Horsebridge contrary to the advice of the Tender Committee; that the appellant signed the contract with Horsebridge contrary to the advice of the Tender Committee; and that the appellant ignored the legal opinion and or advice from external lawyers, to appeal the decision of the Review Board awarding the tender to Horsebridge.

[14] It was asserted that the intended prosecution against the appellant had not met the criteria for the exercise of the DPP's discretion; as in awarding the contract to Horsebridge the appellant was merely implementing the decision of the Review Board delivered on 4th January 2013 wherein the Review Board set aside the decision of the Bank cancelling the tender, and ordered that the tender be awarded to the lowest bidder who was Horsebridge; and that the appellant's action of complying with an order of a statutory tribunal could not amount to abuse of office.

[15] In addition, reference was made to a ruling made by the High Court (**Korir J**) requiring the Bank to execute the contract that was subject of the Tender with Horsebridge, within 30 days from 25th September 2014. It was pointed out that the appellant was under an

obligation to obey that ruling; that the decision of the appellant not to follow the opinion provided by the external lawyers to challenge the decision of the Review Board did not amount to an offence for which the appellant could be prosecuted; and that none of the other bidders complained about the award to Horsebridge or challenged the decision of the Review Board to award the tender to the lowest bidder.

[16] It was maintained that the legal opinion by the external advocate was not binding on the appellant who as the Governor of the Bank was independent and only answerable to the Board; that the said opinion was in conflict with the factual position and unsustainable as the Bank could not challenge the award to the lowest bidder. In addition, it was argued that the appellant was not a member of the Tender Committee, nor did he participate in the procurement process, and therefore the intended charges against him for a process that he did not participate in were a violation of his constitutional rights. Submissions for EACC

[17] For EACC it was submitted that the EACC investigations revealed that there was sufficient evidence to justify the intended charges against the appellant of “Willful failure to comply with the law relating to procurement” contrary to **section 45(2)(5)** as read with **section 48** of the Anti Corruption and Economics Crime Act (ACECA); and the charge of “Attempt to commit an offence involving corruption” contrary to **section 47A(1)** of the ACECA. It was therefore asserted that the charges were anchored on the law.

[18] EACC agreed with the position taken by the trial judge that the criminal process provides safeguards that ensure that an accused person is afforded a fair trial, and that the trial court is better placed to consider the evidence in order to determine the guilt of an accused person. EACC argued that a challenge to the competence of the charges facing the appellant or sufficiency or otherwise of the evidence intended to be produced by the prosecution could only be appropriately made before the court trying the criminal case in line with the provisions of the Criminal Procedure Code. EACC pointed out that a trial magistrate has powers under **section 89(5)** of the Criminal Procedure Code to reject a charge if it does not disclose an offence, and thus it was premature and inappropriate for the appellant to complain before a Constitutional Court about a defective charge.

[19] On the propriety of the procurement process, reference was made to the purpose and objectives of the **Public Procurement and Disposal Act No 3 of 2005** (now repealed) (herein referred to as the Act), as set out under **Section 2**, as well as **Section 27(3)** of the same Act that placed an obligation upon employees of a public entity and each member of a Board or Committee of the public entity to ensure, that the Act, the regulations, and any directions of the Authority are complied with.

[20] Counsel for EACC maintained that as an employee of the Bank, which is a public entity, and having prior knowledge of the termination of the tender process by the Tender Committee, the appellant had a responsibility to communicate the termination of the tender process to the Public Oversight Committee in line with **section 36** of the Act, and also to inform the Review Board of the termination of the tender process, but failed to discharge this responsibility. In addition, the appellant acted contrary to the legal opinion given to him by the internal and the external lawyers of the Bank.

[21] Furthermore, counsel for EACC, vilified the appellant for failing to communicate the termination of the tender process to the Review Board, or challenging the decision of the Review Board while being aware that the Tender Committee had resolved on 26th September 2012 that the tender process be terminated, and that under **section 36(6)** of the Act, a decision to terminate the tender process is not subject to review by the Review Board. Finally, counsel submitted that the award of the Tender to Horsebridge for a bid of kshs 1.2 billion was way above the budgeted amount of kshs, 800 million.

#### **Submissions for DPP**

[22] For the DPP, it was submitted that following investigations carried out by EACC, an investigation report was forwarded to the DPP who analyzed the evidence independently and made a decision that the evidence was sufficient to sustain the prosecution of the appellant for the intended charges. The DPP highlighted that the investigations had revealed that on 29th November 2012, a special meeting of the Tender Committee discussed the ruling of the Review Board that was delivered on 6th November 2012, and reiterated the position it had taken in a meeting held on 26th September 2012 declining to award the tender, and instead terminating the process; that the appellant was briefed and was aware about the termination of the tender process; that the Review Board in a subsequent ruling delivered on 4th January 2013 allowed a request for review lodged by Horsebridge and set aside the decision of the Tender Committee, and ordered the award of the tender to Horsebridge.

[23] The DPP submitted that the fact that the Bank did not appeal against the decision of the Review Board of 4th January, 2013, acted in favour of Horsebridge as the award made by the Review Board, became final and binding on the parties; and this award was confirmed by an order of mandamus given by the High Court (**Korir J**) directing the Bank to execute the contract with Horsebridge. The DPP maintained that the appellant used his office to improperly confer a benefit on Horsebridge; that the circumstances were sufficient to establish an offence under **Section 46** of the ACECA; and that the decision to charge the appellant was not actuated by any extraneous consideration, nor did it violate the appellant's fundamental rights and freedoms, or any law or principles of natural justice.

[24] The DPP asserted the legal position that courts should not usurp the constitutional mandate conferred on the DPP under **Article 157** of the Constitution, or that of the Investigation Authority, in exercising the discretion to undertake prosecution. Relying on case law the DPP conceded that the exercise of the discretion to prosecute was subject to the Constitution and the Bill of Rights. The DPP identified and explained some of the circumstances in which the discretion to prosecute could not be interfered with. For instance the fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not a ground for halting those proceedings; the fact that a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a court to halt a criminal process undertaken in good faith since that defence is open to the petitioner in the criminal proceedings; and stay of the criminal process cannot be justified on the ground that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit.

[25] The DPP also drew the Court's attention to **Joram Mwenda Guantai –versus- The Chief Magistrate, Nairobi** (supra), for the proposition that the court has the power to intervene if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, and **Meixner & Another versus Attorney General** (supra), for the proposition that the High Court cannot interfere with the exercise of the discretion of the Attorney General in undertaking a prosecution, if the discretion is exercised lawfully, but can interfere

with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution; that judicial review is concerned with the decision making process and legality of the decision and not with the merits of the decision itself; that the trial court is best suited to address the evidence; and that the judicial review court ought not to usurp the functions of the trial court.

[26] The DPP submitted that the prayers in the appellant's petition called for analysis and examination of the facts and evidence on the basis of which the guilt, innocence or otherwise of the appellant could be determined, and that the prayers sought ought not to be granted, as the proper forum for consideration and resolution of the factual and evidentiary matters was the trial court in the criminal trial process.

[27] The DPP also referred to *Kuria and Others versus AG (supra)*, in which the Court of appeal underscored the need to balance public interest underlying every criminal prosecution with the protection of the private interests of the person threatened with prosecution, or being prosecuted. In regard to media publicity the DPP relied on *Deepak Kamani versus AG* CA No. 152/2009, wherein this Court held that media publicity *per se* does not constitute a violation of a party's right to fair hearing. The DPP concluded the submissions with an assertion that the appellant had failed to prove violation of his fundamental rights or freedoms; or infringement of any law or breach of rules of natural justice; or abuse of discretion; and that the appeal has no merit and should therefore be dismissed with costs.

[28] I have carefully considered the grounds of appeal, the record of appeal and the submissions made by the parties, as well as the authorities cited. It is not disputed that the Bank initiated a procurement process that became controversial as a result of two applications for review being made to the Review Board against the decision of the Tender Committee, first, rejecting the recommendation of the Evaluation Committee, and in the second decision, declining to finalize the award to Horsebridge the lowest bidder on the ground that the Tender Committee had in an earlier meeting of 26th September 2012 resolved that the tender process be terminated. Another complaint was subsequently made to the DPP and EACC when the tender was awarded to Horsebridge and this led to investigations concerning the propriety of the procurement process. The investigations resulted in the decision of the DPP to initiate criminal proceedings against the appellant. [29] Under **Article 157** of the Constitution, the DPP has the discretion to initiate criminal proceedings. Article 157(11), states expressly that:

***“In exercising the powers conferred by this Article the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”***

[30] Therefore, it is evident that the discretion of the DPP to initiate prosecutions must be exercised in accordance with **Article 157(11)** taking into account the principles and values of the Constitution. In determining the petition before it, the High Court was obliged to consider whether in exercising his discretion to initiate prosecutions against the appellant, the DPP properly exercised his discretion. In doing so, the High Court had to consider the circumstances presented before it and determine whether the DPP was properly guided by the Constitution or abused his discretion by being motivated by factors other than the vindication of justice; or by taking into account extraneous factors. Critical to that consideration, was the issue whether the DPP acted in violation of the appellant's fundamental rights and freedoms.

[31] The following extract of the judgment reveals that in considering whether the DPP properly exercised his discretion, the learned judge of the High Court adopted a cautious approach:

***“75. The starting point is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it is agreed, is not without more a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.”***

[32] I am in agreement with the learned Judge's approach to the law. As already noted, the discretion of the DPP to initiate prosecutions is a constitutional power conferred through **Article 157** of the Constitution. To interfere with the exercise of that power is to interfere with the Constitution. The role of the High Court as the guardian of the Constitution is not to hinder the DPP from exercising his constitutional powers, but to ensure that the DPP exercises his powers in accordance with the Constitution. This means that the High Court had to be satisfied that the decision taken by the DPP to prosecute the appellant was to advance the key values and principles of governance espoused in the Constitution, and does not violate the fundamental rights and freedoms enshrined in the Bill of Rights.

[33] At paragraph 86 of his judgment the learned Judge directed himself as follows:

***“86. It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt.”***

[34] I could not have put it any better. The learned judge properly appreciated the discretionary power of the DPP in initiating prosecutions, and the parameters within which the court could intervene. The question is whether the learned judge properly applied the law in coming to the conclusion that the actions contemplated by DPP and EACC did not infringe on or threaten to infringe on the appellant's fundamental rights, and that the circumstances presented by the appellant did not meet the threshold for prohibiting DPP and EACC from carrying out their constitutional mandate.

[35] The complaint that led to the decision of the DPP to prosecute the appellant was anchored on the Bank's ISMS procurement process. As already noted, the process became controversial. Primarily, the process was one leading to contractual rights that would ordinarily be enforceable through a civil suit. However, as the procuring Bank is a public entity within the meaning of section 3 of the Act, the probity of the procurement process is a matter of public interest, and the Constitution requires by dint of **Article 227** that the contract shall be done in a system that is "fair, equitable, transparent, competitive and cost effective."

[36] Although the Act was enacted before the 2010 Constitution, its purpose as stated under **section 2** of the Act is clearly in consonance with the Constitution. That section states that the purpose of the Act is as follows:

*“(a) to maximize economy and efficiency; ?*

*(b) to promote competition and ensure that competitors are treated fairly; ?*

*(c) to promote the integrity and fairness of those procedures; ?*

*(d) to increase transparency and accountability in those procedures; ?*

*(e) to increase public confidence in those procedures;*

*and ?*

*(f) to facilitate the promotion of local industry and economic development.” (Emphasis added).*

[37] Needless to state that the purpose of the procedures provided under the Act are intended to achieve the same ideals that are posited by **Article 227** of the Constitution, which is a system of procurement that is "fair, equitable, transparent, competitive and cost effective" and therefore it was imperative that these procedures be followed.

[38] It is common ground that the appellant was the Chief Executive of the Bank. Under **section 27** of the Act, although the appellant was not a member of the Tender Committee, as the Chief Executive of the Bank he was the Accounting officer within the meaning of section 3(1)(a) of the Act, and therefore responsible for ensuring that the provisions of the Act and all Regulations relating to the procurement process were complied with in the tender process for the ISMS for the Bank. The appellant cannot avoid responsibility by shifting the blame to the Tender Committee or the Tender Evaluation Committee.

[39] The circumstances that were placed before the trial judge left no doubt that the award of the tender relating to the ISMS for the Bank was full of intrigues. This is evident from the proceedings of the Review Board relating to the complaint by Horsebridge concerning the award of the tender. Besides, the observations by the Review Board concerning the propriety of the minutes of the Tender Committee meeting alleged to have been held on 26th September, 2012 and in which the procurement process for the ISMS for the Bank was alleged to have been terminated, raised a red flag concerning the manner in which the procurement process was being undertaken.

[40] The fact that neither the Review Board nor the Public Oversight Authority was informed of the alleged termination of the procurement process, are matters that were subject of the investigations undertaken by EACC. Of interest also to the investigators, was the ignored internal and external advice given to the appellant to appeal the decision of the Review Board. This advice was anchored on the Review Board's want of jurisdiction, arising from the alleged termination of the procurement process, and which failure to challenge, resulted in the decision of the Review Board that the tender be awarded to Horsebridge, being *fait accompli*.

[41] There is no doubt that the procurement process for the ISMS raised questions of public interest. I do not find it appropriate to delve into these questions except to observe that the issue whether in the circumstances obtaining the appellant as the Chief Executive of the Bank, properly exercised his authority in ensuring that the procedures and the procurement process for the ISMS for the Bank were followed, or whether the appellant exercised his authority in a manner that irregularly conferred a benefit on Horsebridge is one that EACC had powers to address. This is the subject of the criminal charges that were proposed against the appellant. Whether there was substance in such criminal charges, and whether the same could be proved was not a matter for consideration by the High Court, but a matter to be addressed in the criminal trial. Suffice to state that there was a sufficient legal and factual basis for the investigations.

[42] The procurement of the ISMS for the Bank was a matter of public interest given the value of the contract and the fact that it involves a public entity. While the complaints may have originated from disgruntled bidders, the investigations undertaken by EACC and the decision by the DPP to prosecute the appellant were undertaken pursuant to powers underpinned by the Constitution, and not motivated by any malice.

[43] The Act imposed upon the appellant a heavy responsibility in ensuring the propriety of the procurement process. In light of the controversy that surrounded the ISMS tender process, it was only proper that the constitutional values of transparency and accountability be achieved through a public trial process that would engender public confidence in the administration of justice by addressing any issues regarding criminal culpability.

[44] In his petition, the appellant contended that his constitutional rights in regard to equality and freedom from discrimination under **Article 27**; right to dignity under **Article 28** and right to freedom and security of the person under **Article 29** were violated. In particular, the appellant took issue with the fact that he was the only one to be charged when he was not a member of the Tender Committee or the Evaluation Committee.

However, as the Chief Executive of the Bank, the appellant was in a special position. He was not in an equal position with other officers of the Bank as he is the “whipping boy” who must take responsibility for the Bank’s actions including actions, relating to the procurement process for the Bank.

[45] In addition, it is clear that the appellant was fully involved in the procurement process as the exhibits produced reveal that he was informed and consulted at all stages, including the plea for the Bank to appeal the decision of the Review Board. Besides, the appellant was the one who eventually gave his officers the go ahead to award the contract to Horsebridge as directed by the Review Board.

[46] In moving to court to stop his prosecution even before the charges were brought, the appellant jumped the gun. The prosecution had barely started. There was nothing to stop EACC and the DPP from carrying out further investigations and prosecuting any other officer of the Bank that may be culpable in breaching the law in the procurement process of the ISMS for the Bank. The fact that the appellant was the first person targeted did not reveal any discrimination given his position in the Bank. I find that there was no discrimination nor was the appellant’s right to freedom contravened or threatened with contravention. Nor has the appellant demonstrate any violation or threatened violation of any constitutional rights by the actions taken by the EACC and the DPP.

[47] I come to the conclusion that the learned judge of the High Court came to the right decision in finding that the appellant’s petition had no merit. Accordingly, I find no substance in this appeal and would have dismissed it in its entirety, and awarded costs of the appeal to the EACC and the DPP. Unfortunately, my brother and sister Judges are of a contrary view. The final orders shall therefore be as proposed by Githinji JA.

**DATED and delivered at Nairobi this 20th day of December, 2018**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**