IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 304 OF 2009

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

NEDERMAR TECHNOLOGY BV. LIMITED.....RESPONDENT

Consolidated with

CIVIL APPEAL NO. 11 OF 2010

BETWEEN

THE ATTORNEY GENERAL.....APPELLANT

AND

NEDERMAR TECHNOLOGY BV. LIMITED.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court

of Kenya at Nairobi (Nyamu, J.) dated 30th October, 2008

in

H.C. Petition No. 390 of 2006)

****

JUDGMENT OF W. KARANJA J.A.

[1] These two appeals were consolidated by this Court vide its order dated 20th of June 2016, both having emanated from the same judgment in Petition No. 390 of 2006 (J.G. Nyamu, J).

[2] By a notice of motion application dated 24th April 2006, **Kenya Anti-Corruption Commission (**here after the 1st appellant**),** moved the Chief Magistrate's Court at Kibera for an order requiring the respondents in the application, namely Mr. **Andrew Burnard** and **Pritpal Singh Thethy** to surrender

their passports and/or any other travel documents to the 1st appellant.

As can be gleaned from the affidavit in support of that application sworn by one **Henry Murithi Mwithya** on 24th April 2006, the two respondents were believed to be directors of some companies that were being investigated by the 1st appellant on allegations of corruption, and other economic crimes.

In support of the application, Mr. Henry Mwithya on behalf of the 1st appellant deposed that it was investigating *"the contract for the construction and installation of equipment for the National Military Command Center code named 'Project Nexus' for the Department of Defence by Nedermar Technology BV Netherlands"*.

[3] Other than applying for the seizure or confiscation of the passports mentioned above, the 1st appellant had proceeded to seize some assets belonging to the respondent herein, and gone even further and instructed the Ministry of Finance not to pay the respondent for work done under the contract the respondent had entered into with **Government of Kenya,** hereafter **(GoK).** The order sought was granted *exparte* and this is what prompted **Nedermar Technology BV Limited** (hereafter the respondent) to move to the High Court by way of **Petition No. 39 of 2006** seeking the court's protection from the appellants who were threatening and actually violating its fundamental rights.

[4] The Petition was filed under **Section 84 of the retired Constitution of Kenya** and **Rule 12 of the Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms). In the said petition, the respondent herein sought a prolix of declarations, which are reproduced hereunder for a clearer contextualisation of this appeal.

> *(a) A declaration that it is unconstitutional to criminalize the agreement entered into between the Government of the Republic of Kenya and the Petitioner on 19th November 2002 relating to the works code named Project Nexus.*
>
> *(b) A declaration that criminal investigations and/or criminal courts have no business where the dispute is arbitral under the relevant contract.*
>
> *(c) A declaration that criminal investigations and/or criminal courts are not a competent process and/or forum to uphold the principle of party autonomy which underlies arbitral process.*
>
> *(d) A declaration that under the Constitution and our law, a civil right or obligation cannot be determined in a criminal court in view of Section 77(1) and 77(9) of the Constitution and the definition of court in the Civil Procedure Court.*
>
> *(e) A declaration that the 1st respondent is infringing and/or likely to infringe the petitioner's right to protection under the law guaranteed by Section 70(a) of the Constitution.*
>
> *(f) A declaration that the 1st respondent is infringing and/or likely to infringe the petitioner's right not to be deprived of property without compensation protected and guaranteed by Section 70(c) and 75 of the Constitution.*
>
> *(g) A declaration that the 1st respondent is infringing and/or likely to infringe the petitioner's right to contractual benefits in contravention of Section 70(c) and 75 of the Constitution.*
>
> *(h) A declaration that the 1st respondent is infringing and/or likely to infringe the petitioner's right to freely associate with other persons and individuals irrespective of the classification that the 1st respondent has assigned to such persons and that the right is guaranteed by Section 80 of the Constitution.*
>
> *(I) A declaration that the 1st respondent is infringing and/or likely to infringe the petitioner's, its*

directors, shareholders, agents, subcontractors right to freedom of movement.

(j) A declaration that the power conferred by Parliament to the 1st respondent are in general terms and are not to be taken to authorize the doing of acts by the 1st respondent which adversely affect the legal rights of the citizen or the basic principles on which the law of Kenya is based.

(k) A declaration that the 1st respondent is not constitutionally and legislatively conferred with supervisory powers over contracts and/or commercial transactions entered into by the Government of Kenya.

(l) An order prohibiting the respondents from harassing, persecuting, vexing, intimidating and/or otherwise mistreating the petitioner, its shareholders, directors, subcontractors, agents and/or consultants in relation to any aspect of the contract code named Project Nexus of 19th November 2002.

(m) An order prohibiting the respondents from prosecuting and/or instituting criminal charges in any court in the Republic of Kenya in connection with or arising from any aspect of the contract code named Project Nexus of 19th November 2002.

(n) That an order be issued against the respondents directing the respondents to cease forthwith any act of interfering with the petitioner, its shareholders, directors, subcontractors, agents and/or consultants and/or requiring any one of them to surrender their passports to the respondents and/or disclosing any detail regarding the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19th November 2002 on the works code names Project Nexus.

(o) That an order be issued against the 1st respondent restraining the 1st respondent from circulating, disseminating or in any manner publishing material to the effect that the petitioner, it shareholders, directors, subcontractors, agents and/or consultants are suspected of any economic crime or any other crime emanating from the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19th November 2002 on the works code named Project Nexus.

[p) That an order be issued against the respondents directing the respondents jointly and severally not to arrest and/or prefer any criminal charges and/or institute prosecution against the petitioner, its shareholders, directors, subcontractors, agents and/or consultants arising from the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19th November 2002 on the works code named Project Nexus.

(q) That an order be issued against the 1st respondent directing the 1st respondent not to interfere with the contractual rights and obligations entered into between the Government of the Republic of Kenya and the petitioner on 19th November 2002 on the works code named Project Nexus.

(r) An order directed to the 1st respondent to return forthwith the passports which the 1st respondent has seized from the petitioner's consultants and to return all the assets taken by the 1st respondent under the pretext of carrying out investigations on Project Nexus.

[5] After hearing the parties, the learned Judge allowed the petition and granted prayers (d) – (r) as indicated above.

Both appellants herein, who were the respondents in that petition, filed separate appeals to this Court, being Civil appeal No. 11 of 2010, **The Attorney General vs Nedermar BV Limited;** and Civil Appeal No. 304 of 2009, **Kenya Anti- Corruption Commission vs Nedermar BV Limited**; which appeals were, as earlier indicated, consolidated pursuant to **Rule 103** of the Rules of this Court, by consent of

all parties on 20th, June, 2016.

[6] The factual background of the matter before the High Court can be summarized as follows. The Government of the Republic of Kenya, (referred to as the employer in the agreement), entered into an agreement with Nedermar Technology BV Limited (respondent), (referred to as the contractor, in the agreement), on 19th November, 2002.

The respondent was supposed to design, execute and complete some works specified in the said contract. Such works included *inter alia* an integrated command control center for the Armed Forces of the Republic of Kenya in what were code names *"Project Nexus"*. This was said to be a project involving National security, hence the use of code names.

According to the respondent, and this is conceded by the appellants, the respondent executed and completed all the works as per the contract and handed over the project to GoK in September 2005. There was no complaint of non-performance or under performance from GoK, and so it would appear that GoK was happy with the respondent's performance. Nonetheless GoK defaulted in making the contractual payments as per the terms of the contract. The agreement in question contained an arbitration clause by which the parties expressed themselves as to their preferred mode of dispute resolution should a dispute arise.

[7] The arbitration clause was crafted as follows:-

Clause 67.1

> *"If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the contract or the execution of the works whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the contract including any disputes as to any opinion, instruction determination, certificate or valuation the parties shall in good faith attempt to resolve such dispute. If such resolution is not possible within a reasonable time either party may refer the matter to arbitration as hereinafter provided."*

Clause 67.3

> *"Any dispute in respect of which amicable settlement has not been reached within the period stated in sub-clause 67.2 shall be finally settled unless otherwise specified in the contract under the rules of the United Nations Commission on International Trade Law or but only with the consent of the contractor in accordance with the 'Arbitration Act (No 11 of 1995) by one or more arbitrators appointed under such Rules. The said arbitrators shall have full powers to review any decision, opinion, instruction, determination, certificate or valuation. Arbitration may be commenced prior to or after the completion of the works provided that the obligations of the Employer and the contractor shall not be altered by reasons of the arbitration being conducted settling the progress of the works."*

There were other important clauses which came into play in the ensuing dispute but I will refer to them as need arises for purposes of this judgment. It is however very important to note from the onset that one of the conditions precedent to the parties entering into this agreement was for GoK through its Chief Legal Advisor (2nd appellant) to carry out due diligence and write a legal opinion on the viability, and legality of the said contract.

This condition was contained in the first schedule to the contract, as hereunder.

Clause 2.1 read as follows:-

> *"As at the date of this contract the employer shall be deemed to have received a legal opinion issued by the Attorney General of the Republic of Kenya to the effect that:*

2.2: The Employer has the power to enter into the Agreement and has taken all necessary actions that are required for the execution, delivery and performance of this agreement.

2.3: This Agreement constitutes a legal, valid and binding obligation of the Employer enforceable in accordance with its terms under the laws of the Republic of Kenya.

2.4: The Employer shall have obtained all necessary licenses, authorizations, requisitions, approvals, consents and exemptions required by and in respect of any governmental authority or agency of or within the Republic of Kenya, and has duly effected any other declarations, filing or registrations with any governmental authority or agency which are required or appropriate in connection with the execution, delivery and performance of this Agreement and the use of any equipment or services whether within or outside of the Republic of Kenya."

[8] It is not disputed that the 2nd appellant did actually conduct due diligence as expected and gave a legal opinion to the effect that the contract was proper and compliant with the law. It was on that basis that the parties proceeded to enter into the contract whose legality is now challenged by the same entity which rendered the opinion in question. I will advert to that issue later on.

It is important to introduce here other pertinent clauses in the said agreement which are germane to this appeal. These include:-

Clause 6.2

"That the Employer has the power to enter into the contract to perform all its obligations hereunder and that all necessary action has been taken to authorize the acceptance of such terms by the Employer in the manner in which they are so accepted."

Clause 6.3

"That when accepted by the Employer in the manner referred below the terms and conditions set out in this contract will constitute obligations legally binding and enforceable in accordance with their terms."

Clause 6.4

"That the performance by the Employer of its obligations contained in this contract will not contravene any law of Kenya (or any other country where the Equipment and services are to be installed, supplied, or provided by agreement, mortgage, or charge or other arrangement to which the Employer is a party or which is or may be binding on the Employer or any of its assets."

Clause 6.6

"That the Employer irrevocably waives all immunity to which it may be or become entitled in relation to that contract, including immunity from jurisdiction enforcement, prejudgment proceedings, injunctions and all other legal proceedings and relief both in respect of itself and its assets, and consent to such proceedings a relief."

Clause 6.7

"The Employer is subject to civil and commercial law with respect to its obligations under the contract and that the execution, delivery and performance of any or all the terms of this contract by the Employer constitute private and commercial acts rather than governmental or public acts and that the Employer and its property do not enjoy any right of immunity from the suit, set off or attachment or execution or judgment in respect of any or all of its

*obligations under the contract , and that the waiver contained in the contract by the Employer of any such right of immunity is **irrevocably binding on the Employer**."(emphasis ours)*

I wish to point out here that the word " *irrevocably"* appears severally in many of these clauses, and in my view it was carefully, and deliberately chosen as a safeguard to ensure that GoK did not thereafter wriggle out of this contract at will.

Clause 73.1

"The contractor and the Employer shall treat the details of the contract and any documents specifications or plans ancillary thereto as private and confidential save insofar as may be necessary for the purpose of the contract thereof and shall not publish or disclose the same to any third party or any particulars thereof in any trade or technical paper elsewhere without the prior written consent of the other party. The parties hereto further acknowledge that in view of the nature of the contract, plans, specifications and drawings referred to are not annexed hereto but have been supplied in a separate document. The parties hereto further agree that the contractor may not discuss or disclose any details of the contract with any governmental departmental ministry or individuals other than the end-user notified to them pursuant to the provisions of clause 2.1 hereof."

Clause 75.1 is also very important as it forms an integral aspect of this appeal. It was couched as follows:-

*"The Employer agrees that this contract and the transaction contemplated herein **constitute a commercial activity and that this contract and the transactions contemplated herein are subject to the domestic private and commercial law, and not international or public law(emphasis ours)***

and the Employer hereby irrevocably waives any right of immunity which it or any of its property has or may acquire in respect of its obligations hereunder and irrevocably waives any immunity from jurisdiction suit, judgment, set off execution, attachment of other legal process (including without limitation relief by way of invitation and specific performance) to which it or any suit or proceeding arising out of or relating to the contract save and except as limited by the Government Proceedings Act Chapter 40, Laws of Kenya."

I will discuss this clause later on in this judgment.

[9] A dispute as stipulated in the arbitration clause arose after GoK was unable, and /or unwilling to perform its part of the contract by making payments as agreed. The parties fell back on clauses 67.1, 67.2 and 67.3 which I have referred to earlier, with the result that the respondent filed suit at The Hague in Netherlands which suit was to be determined in accordance with the **UNITED NATIONS COMMISSION ON INTERNATIONAL LAW** (**UNICITRAL)**. While the suit was pending hearing and determination at The Hague, pressure back home to investigate this and several other projects over allegations of corruption escalated. It was in the course of these investigations that the application before the Chief Magistrate Kibera Court, which I referred to earlier on was made. The application which was by way of notice of motion dated 24th April, 2006 sought only one principal order to the effect that the court grants orders requiring the two respondents to surrender their passports or any other travel documents to the 1st appellant.

According to the 1st appellant, the two respondents in the application were directly involved in the implementation of the projects that were being investigated, among them, the project code named "nexus" which is the subject of this appeal. As stated earlier, that application prompted the filing of Nairobi High Court Petition Case No. 390 of 2006, which prayers have been reproduced verbatim earlier on in this judgment.

[10] In response to the petition, the 1st appellant, through learned counsel, John Ochuka filed grounds of opposition dated 19th July, 2006, which were buttressed by an affidavit sworn on even date by Julie Adell-Owino, a senior investigator with the 1st appellant.

Other than averring that the said petition was incompetent and defective, the 1st appellant asserted that it has mandate under the Anti-Corruption and Economic Crimes Act to undertake investigations into allegations of corruption and economic crimes, including the investigation which the petition sought to stop. It was the 1st appellant's position that it was carrying out its lawful mandate to investigate transactions that it suspected had some criminal, or corruption related elements and it should have been allowed to carry out such investigations unfettered. According to the 1st appellant, the intended investigations were not a sham and it was not trying to criminalize a civil or commercial matter.

[11] One **Zakary Mwaura**, who described himself as the Permanent Secretary and Accounting Officer in the Department of Defence, swore an affidavit in reply to the petition on behalf of the 2nd appellant. He conceded that the impugned agreement was indeed entered into between the Government of Kenya (GoK) and the respondent, on 19th November, 2002. He confirmed that the respondent actually did the works, or rather performed its part of the contract and Gok paid some money, but stopped further payments following public outcry over alleged grand corruption involving some twenty security contracts, amongst them "project nexus".

Apparently, the 1st appellant's decision to commence the forestalled investigations was prompted by the said public outcry, which included loud complaints from international and other donor communities. Subsequent reports by Auditor General and the Public Accounts Committee (PAC) recommended investigations of all twenty security contracts.

[12] On the issue of jurisdiction, the 2nd appellant appeared to have no issue with the ousting of the Kenyan jurisdiction to resolve disputes that may arise from the said agreement. The contention however, was that the respondent could not file a petition under **Section 75(6) (a) (iii) of the retired Constitution of Kenya** presumably because any forfeiture of property belonging to the respondent was necessary for purposes of investigations, and was justifiable in a democratic society as intimated by that provision of the constitution.

Mr. Mwaura further deposed that the intended investigations had not in any way prejudiced, interfered with, or exposed the security aspects of the equipment and operations of the "project nexus".

The 2nd appellant therefore urged the court to dismiss the respondent's petition.

[13] Learned counsel for the parties filed skeletal submissions, and filed lists of authorities before the High Court, and they also made oral submissions in which they expounded their positions as presented in their pleadings, and affidavits. After hearing the parties and considering all the materials placed before the court, the learned Judge (Nyamu J.) rendered a succinct and incisive judgment in which he found in favour of the respondent herein and granted prayers (d) to (r) sought in the petition.

In determining the vexed issue of jurisdiction, the learned Judge found that the subject matter "project nexus" was based in this country, and the court therefore had territorial jurisdiction to deal with the matter. The learned Judge, a chartered arbitrator in his own right, upheld the supremacy of the arbitral process which the parties herein had freely subjected themselves to.

He made a finding that the transaction between the parties was a purely commercial one, and the parties had specifically excluded the operation of public law in their agreement. He found that the agreement had been crafted only after the Attorney General, now the 2nd appellant, had conducted due diligence and given assurance to the parties that there was no illegality in the said contract. The learned Judge found that the 1st appellant was actually part of the executive arm of Government and has no life of its own. This finding nonetheless is the fundament of several grounds of appeal.

According to the learned Judge, KACC cannot reasonably submit that it is not bound by decisions made by the Government. It was the Judge's view that;

> *"KACC is part of the executive and the fact that it reports to Parliament, or may be mandated by Parliament to undertake its statutory task does not make it entirely, independent of the Government.…… so that for example when the GoK as in this case has contracted that all disputes on performance of the contract should go to arbitration, KACC cannot reasonably submit that it is not so bound as an outfit of the GoK….."*

In short, the learned Judge found that GoK had properly contracted with the respondent;

it was bound by the opinion given by the 2nd appellant; and that the 1st appellant could not criminalize the performance or non-performance of the said contract.

[14] The learned Judge found that the contract was valid and it was unacceptable for the 1st appellant to attempt to frustrate a commercial transaction by imputing illegality or criminality into the same. More specifically, and in my view at the core of this appeal, was the learned Judge's finding that the 1st appellant *"…is equally bound by the representations of the Honourable Attorney General and the GoK….."*

Expounding on the same issue, the learned Judge went on to pronounce himself as follows:-

> *"Where Hon., the Attorney General has advised the GoK or given an opinion, KACC is part of the Government as stated above, or where the Attorney General makes representations or gives an opinion to other contracting parties, he does so in all those capacities because he is the overall Chief Legal Advisor to the Government by virtue of* ***Section 26 of the Constitution****. When the Attorney General changes course, as he has sadly and unfortunately done in this case, by contending that the exclusion clause of public law is illegal, (the court does not agree), while he was instrumental in its crafting, including making clear representations concerning the legality and validity of the contract which are clearly binding on him and GoK, he loses the high moral ground, that office is obligated to occupy or expected to occupy. He further undermines the public morality of the state and also undermines his ability to effectively discharge his duties under* ***Section 26 of the Constitution…****"*

I have found it necessary to quote above the learned judge *in extenso*, as those findings form the basis of several grounds of appeal in the memoranda of appeal by both appellants.

[15] Being aggrieved by the said judgment, the appellants filed separate appeals. The first appellant was the first to file its appeal on 16th December, 2009, while the 2nd appellant filed its appeal on 26th January, 2010. In support of its appeal, the 1st appellant proffered 21 grounds, while the 2nd appellant proffered 33 grounds of appeal. As would be logically expected, as the two appeals emanate from the same judgment, these grounds overlap in many areas. I will summarise them into broad clusters and deal with them together. In my view, these grounds may be summarised into the following broad grounds.

> *1. Supremacy/Application of arbitration law over municipal law UNCITRAL (to wit choice of law between domestic law & arbitration).*
>
> *2. The import or impact of the Attorney General's opinion in the matter.*
>
> *3. Exclusion of public law/criminal law in the contract was it against public policy?*
>
> *4. Was the contract exclusively a commercial transaction, or was it a public interest matter?*
>
> *5. Was the contract excluded from criminal inquiry?*

6. Jurisdiction:

Could criminal acts and allegations of corruption be determined through arbitration?

7. Was the KACC part and parcel of GoK, or could it investigate acts of GoK?

8. Confidentiality of the contract.

Pursuant to this Court's order dated 8th March 2016, parties filed written submissions. Learned counsel for the 1st appellant filed his submissions on 29th March 2016, while the respondent's submissions were filed on 21st April, 2016. No submissions were filed on behalf of the 2nd appellant. Learned counsel were given an opportunity to highlight their written submissions when the appeal came up for hearing.

Reiterating the his written submissions, Mr. Muraya, learned counsel appearing for the 1st appellant gave a brief history of the matter, which history we have summarised earlier in this judgment. He told the Court that the import of the impugned judgment and all the orders granted therein was to stop any further investigations into the contract, the subject matter in this appeal and all other related contracts. Learned counsel submitted that the said orders stopped the 1st appellant from executing the mandate, bestowed on it under **Section 7 of the Anti-Corruption and Economic Crimes Act**. According to learned counsel, Kenyans had lost money as a result of the said contracts, and there was strong suspicion that there was fraud/or acts of corruption involved in the contracts. Learned counsel cudgeled the contract in question and particularly its exclusion clauses (which I have reproduced earlier on in the judgment).

He submitted that these exclusion clauses were against public policy; that there was serious suspicion of corrupt practices involved and these were outside the ambit of the arbitration agreement; that the parties should not have been allowed to shield themselves, or hide themselves behind the facade of the exclusion of public law and criminal law, and also of confidentiality of the said contract.

[16] Learned counsel conceded that the arbitral process was conducted to conclusion. A suit was filed against the non-performing party (GoK) at The Hague; judgment was given against it; and the money owed was paid. In short the dispute has already been settled in full. That notwithstanding, it was learned counsel for the appellant's strong view that the appeal should be determined, as the impugned judgment impacted other similar investigations. He opined that if the impugned judgment was allowed to stand, then "*operations of the Ethics and Anti-corruption Commission (EACC) would grind to a halt*". In my view however, that statement was an exaggeration of the actual situation, because to my knowledge, EACC which is the successor of KACC is still vibrantly in operation and has not ground to halt during the pendency of this appeal. Learned counsel urged the Court to allow the appeal.

[17] In support of the appeal, Mr.Warui, learned counsel appearing for the 2nd appellant, adopted the submissions by counsel for the 1st appellant. He added that that the 1st appellant could investigate matters touching on a contract that had been entered into before the enactment of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). His argument was that even if there was no saving clause in ACECA, the 1st appellant could still fall back on **Section 23(3)(e) of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya)**, to continue with the investigations of alleged crimes that had been committed before the repeal of the Anti-Corruption and Economic Crimes Act 2003.

Moreover, according to Mr. Warui, **Section 71 of the ACECA** was a saving clause, and offences committed prior to the enactment of ACECA could still be investigated. He joined Mr. Muraya in urging the Court to allow the appeal.

[18] On his part, Mr. Ogicho, learned counsel for the respondent strongly opposed the appeal.

First and foremost, he believes that this appeal has been overtaken by events, as all the issues raised have been resolved and matter closed. He informed the Court that pursuant to the agreement clause in the contract, arbitral proceedings had been commenced at The Hague after a dispute arose between the

parties. The arbitration was done and all issues arising from the arbitration were resolved. The outstanding payments were also made and the 2nd appellant completed its part of the contract 100%. Counsel submitted that the substratum of the appeal had already dissipated and this Court should not therefore be engaged in an academic exercise.

Second, counsel submitted that the learned Judge was correct in giving the arbitral process supremacy over domestic law and thus respecting the choice of the parties to exclude public law. He submitted that the contract was purely a commercial one, and further that the parties only signed the contract after the 2nd appellant gave its opinion that the contract was totally within the law. He opined that it would be oppressive and vexatious to allow the 2nd appellant to renege on that undertaking.

In support of that submission, he relied on this Court's decision in **Stanley Munga Githunguri vs R [1986] KLR1** where the Court referring to an undertaking by the Attorney General not to prosecute, but later reneging on the said undertaking and preferring charges against the applicant therein, pronounced itself as follows:-

> *"The applicant was entitled to the order of prohibition sought because, first, as a consequence of what had transpired and also being led to believe that there would be no prosecution, the applicant may well have destroyed his evidence, and, secondly, in the absence of any fresh evidence, the right to change the decision to prosecute the applicant had been lost, the applicant having been publicly informed that he will not be prosecuted and property restored to him. The prosecution of the applicant would be an abuse of the process of the Court, oppressive and malicious, and it would not be in public interest to continue with that prosecution."*

Counsel urged the Court to uphold that finding and make a finding that the Attorney General could not renege on his earlier opinion.

[19] Counsel's other submission was that the contract in question was signed on 19th November, 2002 when the Anti-corruption Commission did not even exist. In his view, the said commission did not have authority to investigate issues arising from the said contract, because the alleged economic crime that they intended to investigate did not exist as an offence as at 19th November, 2002. Counsel invoked in aid the provisions of **Section 77(4) of the retired Constitution**, which provided that no person would be held to be guilty of an act or omission that did not constitute such an offence as at the time it took place. Counsel ultimately urged the Court to dismiss this appeal and uphold judgment of the High Court.

[20] In rejoinder, Mr. Muraya, submitted that the contract was still continuing as at the time the Economic Crimes Act was enacted, and so the 1st appellant was in order to investigate the same. He also added that disputes of a criminal nature and matters of public interest fall outside the purview of the Arbitration Act.

I will now consider the record of appeal as presented before the Court, the written submissions filed by counsel, and their oral submissions in Court, the legal authorities cited, along with the grounds of appeal summarized earlier, and the relevant law.

[21] As this is a first appeal, I am enjoined to remain loyal to **Rule 29 (1)(a) of this Court's Rules** which Rule has been amplified and applied in a litany of decisions of this Court, for instance **Selle vs Associated Motor Boat [1968] EA 123**, **Kenya Ports Authority vs Kuston (K) Limited [2009] EA at pg 212** and many others.

In the latter case, this Court held:-

> *"on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses….. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence."*

(See also Jivanji v Sanyo Electrical Company Limited (2003 KLR 425)

I will re-evaluate the evidence adduced before the trial court and arrive at my own decision as to whether the learned Judge erred in arriving at the judgment appealed against. I will proceed by taking the broad grounds of appeal as summarized, and apply the evidence adduced in support and against them and apply the law as I understand it.

[22] I start with the issue of the application of arbitration law as opposed to the municipal law. A good starting point on this issue is the contract agreement itself. I had earlier on reproduced clause 67.1 of the contract in question in full and I need not repeat it here. The said clause expressly provided that in case a dispute *"of any kind whatsoever"* arose between the parties to the contract, arising out of the contract, and disputes are bound to occur in many commercial transactions, the parties would in the first instance try to resolve the same amicably. If perchance no expeditious resolution was foreseeable within a reasonable time, then the aggrieved party would be at liberty to refer the dispute to arbitration.

The contract was, so to say, pronouncing the supremacy of Arbitration as the parties' preferred law of choice for *vis-a-vis* Municipal Law. It was the express and unequivocal intention of the parties to be governed by arbitration as opposed to Municipal Law in resolving any disputes that would arise in the normal course of their business. Clause 67.3 then went on to prescribe that the law of arbitration to be applied in the first instance was the United Nations Commission on International Trade Law (UNICTRAL) or, but only with the consent of the respondent, in accordance with the Arbitration Act (No. 11 of 1995). I should point out here that the Arbitration Act (No. 11 of 1995), which is the Arbitration Law in Kenya is modeled under the UNICITRAL Law and replicated almost word for word.

It would not therefore have made much of a difference which of the two was being applied, save for may be where the seat of the arbitration would be. In this case the parties had agreed that the seat of arbitration would be at The Hague in the Netherlands. Was there anything wrong then in parties deciding to resolve their disputes by way of arbitration? On the face of it, the answer to this is *"No"*.

I say so because parties to a contract have a right to choose the law that should govern their transactions. If they make arbitration the preferred mode of dispute resolution, then their choice must be respected. Parties enjoy the autonomy of choice in such cases. That autonomy must be respected, subject of course to some caveats set out in arbitration law, which recognise that not all disputes are arbitrable. Such disputes include matters of a criminal nature, public interest disputes, or matters that clearly go against public policy. An arbitration agreement in respect of these types of disputes is not enforceable. The crux of the matter here is whether the ouster or exclusion of International Public law, or Criminal Law in the contract in question was against public policy.

In my view, **Section 29 of the Arbitration Act** avails the answer. It provides as hereunder:-

"29. Rules applicable to substance of dispute

1. ***The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.***

2. ***The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not to its conflict of laws rules.***

3. ***Failing a choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.***

4. ***The arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, only if the parties have expressly authorized it to do so.***

5. ***In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable."***

This provision mirrors Article 33 of the UNICITRAL RULES, which governed the arbitral process herein. Does this therefore mean that parties can opt out of a legal regime that is otherwise applicable to similar transactions, and in so doing immunise itself from any adverse repercussions of such law? It is the appellant's contention that the arbitral clause immunised the parties from any criminal culpability and that of itself was contrary to public policy.

[23] In order to put this submission in proper context, it is important to revisit clause 75.1 of the Contract, which has been reproduced verbatim earlier. In this clause, the parties agreed that the contract and the transaction in question constituted a commercial activity, which was subject to domestic private and commercial law, to the exclusion of International or Public law. In the same clause, GoK categorically and irrevocably waived any right of immunity from jurisdiction suits, judgment, set off, attachment, execution, attachment or any other legal process.

A cursory look at that clause will confirm that GoK, an equal party in the contract, shod itself of all manner of immunity, including that on jurisdiction. One would wonder why this was so given the fact that GoK would have been expected to be the stronger party in the negotiations before penning the contract. But again, these were parties with full capacity to negotiate and consent on what they believed was in their interest, and we must respect their choice. It is also imperative to note and appreciate that, pursuant to Clause 2.1 of the first schedule to the contract, parties had sought and obtained the legal opinion from the 2nd appellant, without which they were not prepared to enter into the contract in question. Indeed, GoK did get the said legal opinion from non-other than the 2nd appellant, who by virtue of **Section 26 of the retired Constitution of Kenya**, was the overall Chief Legal Advisor of the Government. We say "2nd appellant" because the "Attorney General" is an institution and is not defined by the person occupying that office. I will revert to this issue shortly.

Under clause 2.3 of the first schedule, the agreement constituted a legal, valid and binding obligation on the part of GoK, and the same was enforceable under the laws of Kenya, which nonetheless, as we have seen earlier, excluded Public Law. It is clear from the foregoing that parties deliberately excluded the application of International and Public law. From the view point of the parties, at least as at the time they entered into the contract, theirs was a purely commercial transaction; which was governed by the Law of Contract.

[24] The appellants nonetheless think otherwise. Their contention is that shielding or insulating the contract from application of Criminal Law was contrary to public policy. According to the appellants, since the agreement was against public policy, then the same was void and unenforceable in law. After all, criminal matters are not arbitrable, and hence the submission that the arbitral court lacked jurisdiction to deal with the dispute.

I may point out here, before I go too far, that as at the time we heard this appeal, the arbitral process at The Hague had already been concluded and the award of the arbitrator implemented in full. That was the reason why the respondent submitted strongly that this appeal was moot and nothing but an academic exercise. The appellants nonetheless insisted that the appeal should be heard and the issues arising from the appeal be determined as they might impact other similar contracts.

I must reiterate however, that as rightly submitted by learned counsel for the respondent, this appeal was against a specific judgment which dealt with a specific challenge on one particular contract described as "Project Nexus". It was not a judgment *in rem* which can be applied across the board to any other contracts, as opined by counsel for the appellants. I find no problem in determining this matter on its merits for whatever it is worth.

[25] That said, I now revert to the issue of arbitrability of the contract and whether indeed the contract was against public policy. Were there any criminal elements involved in the contract herein, or are the appellants just trying to impute criminality into an otherwise purely commercial transaction?

On this issue, the learned Judge had no doubt, and I agree with him on that issue, that a commercial transaction can mutate, or give rise to criminal activity both before and after commencement. If this were to happen, then it would be contrary to public policy and against public interest to bar investigative agencies from carrying out investigations in respect of such contracts.

It was the learned Judge's finding however, that the appellants had not identified any specific aspects of criminality in the contract that called for investigations. The 1st appellant's intention was to carry out general investigations, and tear apart the substance of the contract to determine the value, performance of the parties etc which would have interfered with the work of the arbitral tribunal which was already seized of the matter.

The learned Judge read bad faith (*mala fides*) in the appellants attempt to do so; more so when the 2nd appellant was instrumental to the drafting of the said contract, in the sense that had it not been from the assurance given by the 2nd appellant, the respondent would possibly have declined to enter into the contract. The parties chose the law they wanted to be bound by, and for good reason, we think, given that GOK, as a stronger contracting party would have had undue advantage over the respondent if the contract had been subjected to Public Law.

[26] I must also look into the circumstances preceding the signing of the said contract.

It is important to note that the parties to this contract had the requisite capacity to enter into the contract. It is equally important to note that before entering into the contract, they did due diligence and were totally informed of the purport, and ramifications of the contract they were committing themselves to. They both chose the law that was to govern their contract and their preferred dispute resolution mechanism. There was no coercion of any nature; misrepresentation; fraud or any such elements on either side. There was an absolute meeting of minds *(consensus ad idem*), and the contract was totally voluntary. If the parties chose to be governed by the UNICITRAL Rules as I have pointed out earlier, then the 1st appellant would be out of step to question that decision, unless of course it can establish that the said agreement was fraught with criminality, which would include fraud, misrepresentation and acts of bribery, or that the contract offended public policy.

Was the exclusion of Public Law in this contract against public policy as intimated by the appellants? Was the exclusion of Criminal Law against public policy?

[27] There is need to understand that one of the parties to the contract, namely GoK was and still is the repository of all matters of public policy, and through the 2nd appellant had the constitutional mandate and responsibility to protect the interests of the entire populace of this great nation.

Under **Section 26 of the retired Constitution of Kenya**, the 2nd respondent was the chief legal advisor of the Government. When GoK decided to enter into a contractual relationship with the respondent herein, it sought advice from the 2nd appellant. As a precaution and not intending to run afoul the laws of the country, the respondent also insisted that it would not enter into the contract in question before the necessary legal advice was given by the 2nd appellant. The said legal advice was given, and the said advice was followed to the letter when clause **75.1** which I have replicated earlier was drafted. That was the clause that stripped GoK of all manner of immunity and prescribed the legal regime that was to govern the parties. The said advice was also relied upon when the arbitration clause was crafted. The said clause, which I have also cited earlier, provided that all disputes arising from the contract would be determined by way of arbitration.

[28] I will now determine whether there were any aspects of criminality in the said contract. No aspects of criminality were pointed to the Court by the appellants. What I see from the contract is a commercial contract where one party was supposed to supply and install some specified security related equipment, and another party who was ready and willing to pay for the same. Out of caution, the respondent demanded an assurance that the said contract was totally compliant with the law of the land and that assurance was given by none other than the Principal legal advisor of the Government. By this time,

pursuant to **Section 26(3) of the retired Constitution** all power to institute and undertake criminal proceedings reposed on the 2nd appellant. **Section 26(4)** went a step further and authorized the 2nd appellant to require the Commissioner of Police to investigate any matter which in the 2nd appellant's opinion related to any offence or suspected offence, and the Commissioner was compelled to comply with such instructions.

It is imperative to note that the 1st appellant was not in existence then. The 2nd appellant must have studied and researched on the issues raised in the contract in question and satisfied itself that indeed there were no aspects of criminality involved before giving it a nod. In any event, if there were any criminal aspects that crept into the contract that GoK as a party to the contract had not anticipated, it was for GoK as a party, to raise the red flag and intimate that a dispute had arisen which was not arbitrable on account of its criminal nature, and seek recourse elsewhere, as provided under the UNICITRAL Rules. This did not happen, and it is curious, as posited by the learned Judge as to who instructed the 2nd respondent to initiate the investigations which the learned Judge stopped. It is also apt to note that under the principle of separability in arbitration law, it would have been possible to separate those aspects of the dispute that were not arbitrable from the rest of the arbitration agreement which would then have been left intact.

Therefore, even assuming that there were some acts of criminality that crept into the contract, and I find no evidence that there were any, then that would not have called for the nullification of the contract. This is so because, under the principle of separability, the arbitration clause in a contract is considered to be separate from the main contract, and as such it survives the termination of the contract. If there was need therefore to challenge the arbitration clause in the contract in question, that could have been done separately without impugning the entire contract. That challenge would nonetheless have had to be taken before the arbitral tribunal, as it was the only forum with jurisdiction to determine that issue under **Article 16 of the UNICITRAL MODEL**, which provides:

> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not entail ipso jure invalidity of the arbitration clause."*

This principle is repeated in **Section17 of our Arbitration Act**.

I agree with the learned Judge, and hold the view that if indeed there were any issues of alleged fraud, bribery, corruption etc, those were issues that fell squarely under the jurisdiction of the arbitral tribunal as per the agreement of the parties, and that should have been the first port of call for GoK, as it seems to have been the party complaining through the 1st appellant.

[29] This brings me to the second issue of exclusion of Public Law.

On the issue of exclusion of the application of Public Law, the appellants contended that the said exclusion was illegal and it rendered the contract unenforceable. I posit, was such exclusion against public policy of Kenya? If the answer is in the affirmative, then obviously such exclusion would render the entire contract illegal. Under clause **75.1** of the agreement, the parties excluded Public Law and opted for "*domestic private and commercial law, and not international or public law*". What then is Public Law?

Black's Law Dictionary defines Public Law in the relevant part as:-

> *"The body of law dealing with the relations between private individuals and the government and with the structures and operation of the government itself. Constitutional law, criminal law, and administrative law taken together."*

Criminal law, and Constitutional law, and Administrative law were therefore expressly excluded by the

parties. Was this against public policy of this Country?

This once again takes me to the agreement itself. As expressly stipulated in the agreement this was a purely commercial transaction. There were no aspects of criminality anticipated as at the time of entering into the contract. There was no evidence advanced to show that the said exclusion was done in bad faith by parties who intended to engage in criminal acts, or flout the law in any other way. In order to ensure compliance with the law, and out of abundance of caution, the respondent had insisted on an assurance from GoK that everything was in order. That assurance was given. In our view, on the face of it, there was no affront to public policy in the said contract. Be that as it may, as stated earlier, if the contract was deemed by any party to be against public policy, then that issue ought to have been raised before the tribunal that was seized of the matter, for determination, and not before our local courts.

[30] The elephant in the room in this case, is the fact that before these clauses were crafted and included as part of the contract, the 2nd appellant gave what in its view must have been a considered opinion on the said exclusion. The 1st appellant decided, on behalf of the Government, that it was okay to include the exclusion clauses. Having done so, as stated by the learned judge, the 2nd respondent lost the high moral ground to turn round and criminalise what it had endorsed in the first place. This is an atrocious agony or burden the 2nd appellant has to bear, heavy and painful as it may be. As I stated earlier, the Office of the Attorney General of the Republic of Kenya, is not defined by the occupant. It is an institution with institutional memory and not an individual. The Office of the Attorney General gave the opinion in question, it is bound by it, and must live with it. The 2nd appellant cannot run away from that issue. The doctrine of estoppel finds itself a good home in this case.

[31] Flowing from the above analysis, it is clear that I am in agreement with the learned Judge that the opinion of the Hon. Attorney General on the legality of the contract in question was binding on the Government of Kenya. The government could not sidestep it, or hide behind the 1st appellant to shield it from its earlier commitments. It is important in my view that when a Government, through its principal legal advisor, makes an undertaking, it must be held to account and should not be allowed to renege on it.

Morality, transparency, accountability, fidelity to the law and such other acclaimed virtues must start from the top and permeate to the other echelons of society. This accords with good governance, and promotes good order in the society.

I endorse the finding of the Supreme Court of Uganda in **Bank of Uganda - v – Banco Arabe Espanol [2007] EA 333** where the court expressed itself in the following words:-

> *"In my view, the opinion of the Attorney General is authenticated by his own hand and signature regarding the Laws of Uganda and their effect or binding nature or any agreement contract or other illegal transaction should be accorded the highest respect by Government and public institutions and their agents. Unless there are other agreed conditions, third parties are entitled to believe and act on that opinion without further enquiries or verifications, it is also my view that it is improper and untenable for the Government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest to question the correctness, or validity of that opinion in so far as it affects the rights and interests of 3rd parties." (Kanyeihaba JSC)*

This case falls on all fours with the above cited case from the Supreme Court of Uganda.

I appreciate that it only has persuasive force, but indeed it represents good law in this area. Closer home, the *locus classicus* case of **Stanley Munga Githunguri vs Republic 1986 KLR 1** is still good law.

This Court held at page 21:

> *"In addition, an undertaking was given officially that the applicant would not be prosecuted. That undertaking must be honoured in the circumstances of this case not only because it came from the High Office of the Attorney General of the Republic of Kenya, but also the*

members of the society are entitled to an orderly and tranquil life and not to be subjected to vicissitudes of law especially when there have been subsequent fresh events to justify it."

The 2nd appellant cannot be allowed to run away from the opinion it now seeks to impugn. It is also worth noting that, even after investigations, the 1st appellant would still have been required, by law, to submit the investigations to the 2nd appellant with the appropriate recommendations as to what charges to prefer if any. The last word therefore, lay with the 2nd appellant. Therein would lie the conundrum. Would the 2nd appellant then ignore its legal opinion and prosecute? Certainly not. We find that the 1st appellant was also bound by that legal opinion. The learned Judge was right on this issue and we cannot fault him. Indeed what the respondent was trying to avoid by taking the said precautions came to pass, when GoK refused to complete its part of the contract and through the acts of the 1st appellant tried to frustrate completion of the same.

Grounds 4, 5 of the 1st appellant's grounds and all related grounds must therefore fail.

32. This brings me to the issue of whether KACC had power to investigate alleged offences that had been committed before its inception. There is no doubt that the 1st appellant was created by an Act of Parliament i.e the **Anti-Corruption and Economic Crimes Act, 2003 (ACECA)**. As the date here clearly manifests, the appellant was not in existence as at the time the impugned contract was entered into. Its mandate under Section 7(1) of the Act includes:-

(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.

The offences of corruption hitherto used to be investigated by the police under the prevention of Corruption Act Cap 65 of the Laws of Kenya (repealed). This Act used to deal with prevention of corruption and other matters "*incidental thereto and connected therewith…"* There was then no offence known as "Economic Crime". The appellants argue that upon repeal of Cap 65, any offences which were corruption related could still be carried forward and investigated under the Anti-Corruption & Economic Crime Act (ACECA) pursuant to **Section 23(3)(e) of the Interpretation and General Provisions Act (Cap 2 of the Laws of Kenya)**.

This section provides as follows:-

23(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not

a. …..

b. …..

c. …..

e. Affect an investigation, legal proceedings or remedy in respect of right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigations, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment, may be imposed as if the repealing written law had not been made.

In my view, this clause would only apply where some investigations or other cause of action had already crystallised under the repealed law. If no such right had already accrued, then a subsequent Act of Parliament would not operate retroactively to create an offence that was not in existence in the old law, or purport to start an investigation which had not been started within the parameters of the repealed law. In my view, **Section 23(3)** (a) was more spot on in the circumstances of this case. The same provides as follows.

> **23(3)** Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not:-
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect.*

No investigations had been instituted under the repealed Act. There was no investigation to be saved under **Section 23(3)(e)**. Part of the investigation 1st appellant was seeking to conduct was in respect of "Economic Crime". There was no offence known as "Economic Crime" prior to the enactment of ACECA.

Section 77(4) of the retired Constitution provided a safeguard against retroactive application of a statute in criminal matters. For ease of reference, the same provided as follows:-

> *"no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was imposed."*

The 1st appellant could not therefore purport to apply ACECA retroactively.

Mr. Warui submitted that the investigations were saved by **Section 71 of ACECA**.In my view that section would only have saved investigations that had already commenced for offences which were defined. **Section 71 (3) of ACECA** must have been meant to address issues such as those raised by Mr. Warui. The same provides;

> *71. (1)….*
>
> *(2)….*
>
> *3. For greater certainty, this section*
>
> *a. does not apply with respect to any act or omission that at the time it took place, was not an offence; and*
>
> *b. is not to be construed as authorizing the imposition of a penalty ,that under Section 77 (4) of the Constitution could not be imposed.*

I however hasten to state that the 1st appellant would have been at liberty to investigate issues of corruption, fraud or other acts of a criminal nature even if they were alleged to have been committed before its inception. This would be so because those offences were clearly defined then and punishment prescribed.

Moreover, as stated earlier on, this issue has been overtaken by events as the contract was fully performed and that chapter closed. I need not therefore expend more time discussing it. Further, as I have stated earlier on, as rightly found by the learned Judge, this was a purely commercial contract, which following the advice of the 2nd appellant had excluded the application of Criminal Law. That legal advisory/opinion in my view is bound to haunt the appellants for a long time as far as this and other similar contracts were concerned.

[33] On the issue of confidentiality of the contract, in my considered view, there was nothing untoward about that, given that the contract was in respect of National Security installations. GoK was the best Judge of what amounted to National Security and the 1st appellant cannot purport to know better. In my view, the need to preserve National security both within and without the country's boarders ranks high the public interest concerns. As held by the House of Lords in **The Zamora (1916) 2 AC .77,**

> *"Those who are responsible for the National security must be the sole judges of what National security requires. It would be obviously undesirable that such matters should be subject of evidence in a court of law, or otherwise discussed in public"*

I hold the view that matters of genuine National Security call for strict confidentiality, and they override any other public interest concerns. As is indeed the practice world over, the security of a country reposes in the Government of the day, in this case, one of the contracting partners. If the Government's view was that the contract called for confidentiality, then the 1st appellant had no locus to question that classification.

[34] Lastly, there is the impugned finding of the learned Judge to the effect the 1st appellant was part of the Executive arm of Government; it was not entirely independent of Government; that it was not a fourth Arm of Government, and that it was not clear who had instructed it to carry out the investigations in the first place. I must say that these comments were orbiter and must not be taken out of context. To my understanding, what the learned Judge meant was that 1st appellant was bound by the opinion given by the 2nd appellant, which it had made as the principal legal advisor of GoK. I alluded to this earlier when I said that the 2nd appellant having no powers of prosecution itself, would still have to submit its investigations to the 1st appellant with recommendations to prosecute. The ball would still end up in the 2nd appellant's court, and the investigations would still come a cropper as the 1st appellant's advisory/opinion would still rear its ugly head. That in my view is what the learned Judge must have meant when he opined that the 1st appellant had no life of its own. It is a creature of statute which is answerable to Parliament, and even though it can carry out investigations on any institution or person, it must do so within the defined parameters of the law, and look up to the 2nd appellant to prosecute.

In conclusion therefore, I find that this appeal lacks merit. I would dismiss it with costs to the respondent. As Azangalala J.A agrees, this appeal is hereby dismissed with costs to the respondent. This judgment is delivered pursuant to **Rule 32(3) of the Court of Appeal Rules**, Mwilu J.A (as she then was) having ceased to be a member of this Court upon her elevation to the position of Deputy Chief Justice/ Vice President of the Supreme Court of Kenya.

Dated and delivered at Nairobi this 24th day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF AZANGALALA, J.A.

I have had the benefit of reading in draft the Judgment of W. Karanja, J.A., and concur in the reasoning and conclusions expressed in the Judgment and have nothing useful to add. I agree that the appeal be dismissed with costs.

Dated and delivered at Nairobi this 24th day of March, 2017.

F. AZANGALALA

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JUDGE OF APPEAL