



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO. 102 OF 2016**

**BETWEEN**

**ENG. MICHAEL SISTU MWAURA KAMAU.....APPELLANTAND**

**ETHICS & ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT**

**THE ATTORNEY GENERAL.....3RD RESPONDENT**

**THE INSPECTOR GENERAL,**

**THE NATIONAL POLICE SERVICE.....4TH RESPONDENT**

**CHIEF MAGISTRATE'S COURT, MILIMANI.....5TH RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (M. Ngugi, Odunga & Onguto, JJ.) dated 9th of March 2016***

**in**

**Constitutional Petition No. 230 of 2015 consolidated with Constitutional Petition Nos. 305, 324 & 203 of 2015)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant **Eng. Michael Sistu Mwaura Kamau**, who at the material time was the Cabinet Secretary for Transport and Infrastructure, has lodged this appeal against part of the judgment and decree of the High Court dated 9th March 2016 in **Petition No. 230 of 2015** as consolidated with **Petition Nos. 203, 305 and 324**, all of **2015**. The facts leading to this appeal are not in dispute. On 26th March 2015, **His Excellency President Uhuru Kenyatta** gave the State of the Nation Address in Parliament in line with his constitutional obligation. In the address the President presented a report entitled „**The current status of corruption matters under investigation to the Presidency?** dated 20th March 2015. In that report, allegations of corruption were made against several named personalities, among them the appellant who were said to be under investigation by **the 1<sup>st</sup> respondent, the Ethics and Anti-Corruption Commission (“the EACC”)**. Allegedly, in his address, the President directed the EACC to complete investigations

within 60 days and forward the report without delay to the **2<sup>nd</sup> respondent, the Director of Public Prosecutions (DPP)**. He further directed those named in the report to step aside from their public offices, a directive which the appellant duly complied with.

Subsequently, the appellant appeared before the EACC on diverse dates and recorded a statement after interrogation. Between the date when the President issued the directive and the date when the EACC forwarded its report to the DPP, EACC however underwent some fundamental changes. The chairperson, the vice chairperson and the commissioners resigned and ceased to hold office in the EACC. Accordingly, when the EACC report was forwarded to the DPP, the EACC had no commissioners in office.

In the media briefing on 24th May 2015, the EACC through its Chief Executive Officer announced that it had completed investigations and had recommended the prosecution of the appellant for the offence of abuse of office contrary to the **Anti-Corruption and Economic Crimes Act (ACECA)**. On 28th May 2015, the DPP announced that he had concurred with the recommendation of the EACC and made a decision to charge the appellant as aforesaid. Subsequently the appellant was arraigned before the Anti-Corruption Court, Milimani, in **Criminal Case No. 11 of 2015** to answer to the corruption charges.

Aggrieved by the prosecution, the appellant filed a constitutional petition in the Constitutional & Human Rights Division of the High Court, Nairobi, contending that the actions of the EACC and DPP contravened his right to fair administrative action under Article 47 of the Constitution. He further averred that the EACC, by taking directions or directives from the President had violated the provisions of Article 79 as read together with Article 249(2) of the Constitution. In addition he added that at the time the EACC purported to forward the report of its investigations and to make recommendations for his prosecution, it was not properly constituted in accordance with Article 250 of the Constitution. Accordingly, he maintained that the purported investigation and recommendation for his prosecution was null and void in law.

The appellant's petition was consolidated with other petitions, among them Constitutional Petition No. 305 of 2015 filed by **Charity Kaluki Ngilu, (Ngilu)** who at the material time was the Cabinet Secretary for Lands, Housing and Urban Development and was being prosecuted in Criminal Case No. 13 of 2015 arising from the investigations by EACC. The consolidated petitions, which raised three main issues, were canvassed in the High Court before **M. Ngugi, Odunga and Onguto JJ**. The three issues in question were whether the EACC was in law properly constituted in the absence of the commissioners; whether the President's State of the Nation address on 26th March 2015 amounted to an unconstitutional directive to EACC; and whether the intended prosecution was in violation of the petitioners' fundamental rights and freedoms.

In their judgment delivered on 9th March 2016, the learned judges made the following findings;

***(i) The issues raised with respect to the propriety of the institution of the criminal proceedings against the petitioners are issues for determination by the trial court.***

***(ii) The resignation of the members/commissioners did not render the EACC non-existent. It only disabled it from performing some of its core functions.***

***(iii) Whereas the EACC, even in the absence of the commissioners, could continue with its statutory functions, it could not perform one of its core mandate of recommending to the DPP the prosecution of any acts of corruption or economic crimes or violation of Codes of Ethics or other matter prescribed under the EACC Act, the Anti-corruption & Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.***

***(iv) The report that was furnished to the President and which he publicized was the one contemplated under Article 254 of the Constitution and not the periodic report contemplated under Section 27 of the EACC Act. Further, the said report was furnished when two of the three Commissioners were still in office. Accordingly, the action of forwarding the report to the President did not violate the law.***

**(v) The 60 days timelines given to the EACC by the President to complete investigation of the allegations was unconstitutional and amounted to unwarranted interference with the mandate of the EACC.**

**(vi) The DPP was not under obligation to act on the recommendations of the EACC. Accordingly, his decision to prosecute the petitioners was not unlawful.**

Arising from the above findings the learned judges made the following orders;

**(a) We declare that subsequent to the resignation of the Chairperson of the Ethics and Anti-Corruption Commission, Mumo Matemu on 12 May 2015, the 1st respondent was not properly constituted in accordance with Articles 79, 249 and 250 of the Constitution and section 4 of the Ethics and Anti-Corruption Commission Act of 2012.**

**(b) We declare that the ultimatum issued by the President to the Ethics and Anti-Corruption Commission to ensure that the Director of Public Prosecutions received the subject files without delay and that the exercise should and must be concluded within 60 days was a clear violation of the provisions of Article 249(2) of the Constitution.**

**(c) We declare that the Director of Public Prosecutions is at liberty to rely on any source of information in order to institute criminal proceedings whether the information emanates from the Ethics and Anti-Corruption Commission or not as long as the source is not declared to be unlawful.**

**(d) Save for the foregoing we dismiss the other prayers sought in the petitions.**

**(e) For the avoidance of doubt, we decline to prohibit the prosecution of the Petitioners, which we deem to be undertaken in accordance with the constitutional and legislative mandate of the Director of Public Prosecutions.**

**(f) As the issues raised herein were issues of great public interest not restricted to the Petitioners, we make no order as to costs.**

The refusal by the learned judges to bar the appellant's prosecution before the 5th respondent aggrieved the appellant, although he was happy with the other findings. As a result, he filed **Civil Appeal No. 102 of 2016, Eng. Michael Mwaura Kamau & 4 Others**. It is apt to point out that Ngilu also filed a separate appeal, being **Civil Appeal No. 90 of 2016, Charity Kaluki Ngilu v. Ethics and Anti-Corruption Commission & 4 Others** which was heard back-to-back with this appeal and is the subject of a separate judgment, limited to a cross-appeal filed by EACC.

In his memorandum of appeal dated 20th May 2016 the appellant set forth 11 grounds of appeal, which in reality raise six issues for determination, namely whether the High Court erred by:

**i. declining to quash or prohibit the charges against the appellant, even after holding that the EACC was not properly constituted when it forwarded to the DPP recommendations to charge the appellant;**

**ii. upholding the prosecution of the appellant even after finding that the President's directive to the EACC to complete investigations within 60 days was unconstitutional;**

**iii. failing to hold that evidence obtained in contravention of the Constitution was a nullity and could not be relied upon;**

**iv. holding that the propriety of the charges against the appellant and the legality of the evidence upon which they were founded, were issues for determination by the trial court;**

**v. upholding a prosecution which was in violation of the appellant's right to a fair trial under Articles 25(c) and 50 of the Constitution; and**

**vi. failing to follow binding precedent to the effect that an act founded on a nullity is also a nullity in law.**

The appeal was canvassed through written submissions as well as limited oral highlights. On the first issue of appeal, the appellant submitted that the High Court erred by failing to quash the criminal proceedings against him, upon finding that the EACC was not properly constituted in accordance with Articles 79 as read together with 249(2) and 250 of the Constitution, at the time it forwarded its recommendations to charge him, to the DPP. It is his contention that at that time, EACC lacked the capacity to carry out one of its core mandates, of recommending to the DPP to charge him with a criminal offence. It is his further contention that if such recommendations were forwarded by the EACC and relied upon by the DPP, it was in contravention of Article 2(4) of the Constitution and therefore a nullity, rendering the intended prosecution itself a nullity in law. For that proposition, the appellant relied on the case of **Hon. Sam Kuteesa & Others v. The Attorney General Const. Pet. No. 46 and Const. Ref. No. 54 of 2011** where the Constitutional Court of Uganda held that a public body that is not properly constituted cannot purport to carry out its mandate under the law.

On the second issue in the appeal, the appellant submitted that upon finding that the President had violated Articles 79 and 157 (10) of the Constitution by directing the EACC and the DPP to conduct investigations and charge the appellant, the trial court ought to have declared the subsequent charges a nullity. He contended that failure to do so occasioned him a miscarriage of justice and that the process leading to his prosecution was in violation of the Constitution and in particular Article 157 (10). The appellant relied on the case of **Alfred N. Mutua v. Ethics and Anti-Corruption Commission & 4 Others (2016) e KLR** for the proposition that the court has a duty to ensure that the DPP exercises his constitutional mandate having regard to public interest, interest of the administration of justice and the need to prevent abuse of the legal process.

As regards the third issue, the appellant submitted that the recommendation made to the DPP by the EACC to charge him and the decision of the DPP to charge him were a nullity in law, illegal, irregular, null and void because no charge can be founded on an illegality in law. He added that for a charge to be valid, it must follow a lawful and legitimate process. He thus contends that the criminal proceedings pending against him are a nullity as they were instituted through a process that was in contravention of Articles 249(2)(b), 157(10), 250 and 2(4) of the Constitution. For that submission, he relied on the cases of **Omega Enterprises (Kenya) Ltd v. Kenya Tourist Development Corporation Ltd & 2 Others (1998) eKLR** and **Paramount Bank Ltd v Mohammed Ghias Qureishi, Civil Appeal No. 239 of 2001** where this Court held that if an act is void, it is a nullity and courts will not sanction illegalities.

Turning to the fourth issue, the appellant contended that the trial court erred in failing to give a relief having found various violations of the Constitution. In his view, the criminal court, which the High Court held could determine the issues he had raised, does not have jurisdiction to determine constitutional issues. Accordingly, once the High Court came to the conclusion that the process leading to his prosecution was in violation of the Constitution, it ought to have declared the intended prosecution as a nullity.

As regards the fifth issue, the appellant submitted that the decision of the High Court declining to bar and or prohibit the criminal proceedings pending before the 5th respondent amounted to a gross misdirection and error of law. He contended that a prosecution that is founded on a fatally flawed process and in total disregard of the Constitution ought not to be sanctioned, because doing so is an abuse of the court process. For that submission the appellant relied on several on **Joram Mwenda Guantai v the Chief Magistrate Nairobi (2007) e KLR**, **Stanley Munga Githunguri v Republic [1985] KLR 91**, **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another (2006) e KLR** and **Republic v. Director of Public Prosecutions & 2 Others Ex-Parte Praxidis Namoni Saisi (2016) e KLR**.

On the last issue in the appeal, the appellant submitted that the High Court erred in failing to adhere to the

principle of *stare decisis*. In his view the court ought to have applied the reasoning in the case of ***Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation Ltd & 2 Others (supra)*** to wit; an act which is void, is a nullity in law and any proceeding founded on such act is also a nullity in law. He maintained that lower courts are bound to adopt and apply decisions of higher courts when faced with similar issues.

In conclusion, the appellant submitted that the process of investigating, recommending and instituting charges against him emanated from an unlawful process contrary to the clear and mandatory provisions of Articles 79, 157, 249 and 250 of the Constitution. On the basis of the foregoing reasons, the appellant urged us to allow the appeal and grant the reliefs sought.

Opposing the appeal, the 1st respondent contended that at all material times, the EACC was a body corporate with perpetual succession. It therefore had the ability to perform all its constitutional and statutory functions under Article 252 of the Constitution and section 11(1) of the EACC Act, the ACECA and the Leadership and Integrity Act. Those powers, it was urged, are vested in the EACC itself and may be exercised in the absence of commissioners. In EACC's view, the law separates the powers of the EACC secretariat from those of the commissioners and that the powers of the commissioners under section 11(6) of the EACC Act can be discharged in the absence of the commissioners. Relying on section 11(6) of the EACC Act, it was submitted that the substantive role of the commissioners is to formulate policy, give strategic direction, establish strategic linkages with other stakeholders and deal with disciplinary issues that threaten to derail the performance of EACC functions. Accordingly, the commissioners do not undertake operational functions of the EACC. Relying on the Canadian case of ***Just v. R in Right of B.C. (Vancouver No. C822279)***, it was contended that a distinction must be made between policy and operational functions and that the powers of EACC may be properly exercised even in the absence of the commissioners.

With regard to the functions of the secretary, the EACC submitted that he was the chief executive officer as provided for under Article 250(12)(b) and section 16(7) (a) of the EACC Act. As such he was responsible for carrying out the decisions of the EACC and the day-to-day administration and management of its affairs. In the view of EACC, the secretary undertook those functions through the secretariat, which in turn had the widest powers to manage the business, operations and administration of the EACC. Accordingly, it was submitted that it was only the functions specially reserved for the commissioners that were not capable of being performed by the secretary or the secretariat.

The EACC further submitted that the secretary had the necessary power to perform the functions in question in this appeal despite the absence of the commissioners because those functions were functions of the EACC and not of the commissioners. According to the EACC, it was the investigators and other members of the secretariat, rather than the commissioners who conduct EACC investigations and that a recommendation to prosecute is not a boardroom decision by commissioners but is instead based on evidence gathered and evaluated by the secretariat.

As to the issue of the powers to carry out investigations, EACC argued that, Part IV of ACECA, as amended by the ***Statute Law (Misc. Amendments) Act No. 18 of 2014*** and specifically sections 23, 24, 26, 27(1), 28 and 32 guide the conduct of investigations. Accordingly therefore, it was incorrect to claim that an investigation conducted in the absence of the commissioners was invalid. In any case the EACC submitted, the Constitution and the statute did not envisage a situation where the EACC, which had staff with technical and operational capacity and a secretary vested with executive authority, would be paralyzed or closed down due to vacancy in the offices of the commissioners. Further, the 1st respondent submitted that in order to conduct any business of the EACC, meetings are required whose procedure is regulated under Schedule Two to the EACC Act. A quorum is two-thirds of the members together with the secretary who is responsible for executing all decisions of the Commission.

On the issue of whether the presidential address to Parliament amounted to a directive to the EACC, it was urged that under Article 254(2) of the Constitution, the President, the National Assembly or the Senate may require any commission or a holder of an independent office to submit a report on a particular issue and further under Article 254(3) such reports are to be published and publicized. EACC submitted

that it was under those provisions that the President received the impugned report from it. Upon receipt of the report the President made his address to Parliament on 26th March 2015 in accordance with Article 132(1)(c), which enjoins him once every year to report in an address to the Nation on all measures taken and progress achieved in the realization of the national values set out under Article 10 of the Constitution. In the view of EACC, the State officers and public officers mentioned in the report that was presented by the President to Parliament were expected to have upheld the national values and principles of governance spelt out in the Constitution. Therefore, it was the 1st Respondent's position that the President's address dwelt on the Government's commitment to deal firmly with corruption and his address did not amount to an unconstitutional directive.

Defending the President's speech further, the EACC submitted that the President did not direct it on the manner in which it was to carry out investigations; did not make reference to any specific individual named in the report; did not in any way interfere with the process of investigation and neither did he make a determination on who should be recommended for prosecution. In any event, the EACC urged, investigations were already underway at the time the President made his address to Parliament and therefore it discharged its functions without control or direction from any arm of Government, especially the President. In addition, it argued that the alleged directive did not affect or compromise the manner in which it carried out investigations because it did not act on the basis of the alleged directive; that even if the investigations conducted by the EACC were irregular, the DPP had powers to prosecute based on information obtained from any other sources; and that he was entitled to use such information and make independent decision on whether to prosecute or not. For that submission, EACC relied on *Uganda v. Jackline Uwera Nsenga - Criminal Session Case No. 0312 of 2013* where it was held that it is only the DPP who decides the charges to prefer in each file forwarded to him. Similarly on the authority of *Charles Okello Mwanda v. Ethics & Anti-Corruption Commission & 3 Others (2014) eKLR* and *Thuita Mwangi & Another v The Ethics & Anti-Corruption Commission & 3 Others, HC Pet. Nos. 153 and 369 of 2013* the EACC argued that although the police may advise on possible charges while forwarding the file, such an opinion would only be advisory and not binding on the DPP. It was therefore the EACC's position that the DPP had the mandate to decide whether to prosecute or not, and that decision was made independently and no person, including the President, could direct him.

Next the EACC submitted that the decision to prosecute is not based on the source of information but on the evidence available to the DPP and that the issue whether the evidence available is sufficient or not is best left to the trial court. In EACC's view, any challenge to the nature and quality of evidence used by the DPP should be raised before the criminal trial court. The case of *Erick Kibiwott & 2 Others v. Director of Public Prosecutions & 7 Others (2014) eKLR* was cited to underline the view that it was the exclusive mandate of the trial court to deal with the merits of the issues raised in the trial.

Lastly, on whether the constitutional rights of the appellant were violated, the EACC submitted firstly, that the appellant failed to plead with precision and particularity his fundamental rights and freedoms that were violated and the manner of the violation. *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR* and *Annarita Karimi Njeru v. Republic [1976-1980] KLR 1272* were invoked as the basis for that requirement. Secondly, EACC submitted that the National Prosecution Policy sets out in detail the considerations that the DPP takes into account before sanctioning a prosecution and that the appellant had failed to prove that the DPP had taken into account extraneous considerations or failed to take into account relevant considerations. We were accordingly urged to find that there was no basis for interfering with the DPP's discretion to charge the appellant.

In their joint submissions, the DPP and the Inspector General of the National Police Service reiterated that the report presented by the EACC to the President and the publication thereof was in discharge of a constitutional duty and therefore constitutional. They submitted that the President's statement requiring the EACC to expedite and conclude investigations and submit the files to the DPP within 60 days did not amount to a directive and that the President neither directed the EACC on how to conduct the investigations, nor the DPP on who to prosecute. They asserted that the President was merely requesting the EACC and the DPP to expedite the exercise, which would not amount to interference. In any event, they claimed that the investigations of various matters had commenced long before the alleged directive by the President.

To them, the DPP made his decision whether or not to charge the persons as recommended by the EACC independently on the basis of sufficiency of evidence available to him and the public interest underlying prosecution of anti-corruption cases. It was therefore their contention that the appellant had failed to prove that the decision to prosecute him was informed by the alleged directive of the President.

On whether the EACC exists separate from the commissioners, the said respondents submitted that the Constitution and the EACC Act makes a distinction between the EACC and the commissioners by virtue of when and how they came into existence. In their view, the EACC came into existence by operation of the law and not upon the assumption of office by the commissioners. They contended that the EACC is a body corporate with perpetual succession and is therefore distinct from the commissioners and is capable of surviving the life of its commissioners. In addition, they submitted that under sections 9 and 10 of the EACC Act, a vacancy may occur in the office of the chairperson or commissioner and in such eventuality, the law anticipates a replacement, meaning that EACC continues even in the absence of commissioners.

These respondents further contended that in terms of section 11(6) of the EACC Act, the EACC undertakes both advisory and technical roles. In that regard, they argued that the EACC plays an oversight role as a steward on policy formulation and strategic direction, while the technical function is carried out by the secretariat. Investigations and making of recommendations regarding prosecution of suspects is a technical role undertaken by the secretariat, which continues being undertaken even in the absence of the commissioners. In their view, a recommendation made to the DPP to prosecute does not amount to a decision since it does not have any legal effect.

They further submitted that the secretary to EACC derives his powers from Article 250(12) of the Constitution and the EACC Act and as the Chief Executive Officer, he has authority to ensure implementation of the core mandate of EACC. In their view the High Court erred by finding that in the absence of commissioners, EACC could not perform its core mandate of investigating and recommending to the DPP persons to be prosecuted. They submitted that the court ignored public interests in the fight against corruption; that the court should not usurp the constitutional mandate of the DPP by halting the prosecution of the appellant; and that the proper forum for the appellant to demonstrate his innocence and to challenge the correctness or otherwise of the evidence would be in the criminal trial court which is mandated to determine the sufficiency and veracity of the evidence tendered.

Lastly, the two respondents contended that the appellants had failed to prove that their fundamental rights and freedoms had been violated. They therefore urged us to dismiss the appeal with costs.

On their part, the Attorney General (the 3rd respondent) and the Chief Magistrates Court, Milimani (the 5th respondent) submitted that the mandate of prosecuting criminal cases lies with the DPP. Under Article 157 of the Constitution, the DPP has powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct. Accordingly, courts ought not to interfere with the mandate of the DPP unless there exists compelling reasons to do so. They cited the case of ***George Joshua Okungu & Another v. Chief Magistrates Court, Nairobi & Another (2014) eKLR*** to demonstrate circumstances under which the court may interfere. In their view by deciding to charge the appellant, the DPP acted impartially, independently, competently and professionally after taking into account the totality of the evidence, the circumstances of the case and the public interests underlying prosecution of corruption cases.

In any event, it was the submission of these respondents that the President's directive did not compromise investigations and was not unlawful because it did not direct the EACC whom to recommend for prosecution and neither did it direct the DPP who to prosecute. As far as they were concerned, the decision by the DPP to prosecute is independent of any recommendations made by investigative agencies including EACC. Similarly, they were of the view that the issues raised by the appellant in this appeal were in law for determination by the criminal trial court.

Having considered the record of appeal, the memorandum of appeal, the oral and written submissions, as well as the authorities that were cited, we are of the view that the following are the issues for determination in this appeal;

**(a) Whether in the absence of commissioners the EACC was properly constituted to carry out investigations and make recommendations to the DPP to charge the appellant.**

**(b) Whether the Presidents address to Parliament amounted to an unconstitutional directive to the EACC and the DPP.**

**(c) Whether in the circumstances of this appeal the DPP acted on the recommendations of the EACC.**

On the first issue, two important facts are not in dispute. Firstly, the chairperson of the EACC, **Mumo Matemu** and the commissioners **Jane Onsongo**, and **Irene Keino**, resigned on 12th May 2015, 31st March 2015, and 30th April 2015 respectively. Secondly, the investigations touching on the appellant that culminated in the charges against him were concluded after the commissioners of EACC had resigned.

In the High Court, it was submitted that the functions of the commissioners as spelt out in section 11(6) of the EACC Act are policy formulation, ensuring that the EACC and its staff, including the secretary perform their duties to the highest possible standards in accordance with the Act, and giving strategic direction to the EACC. On this issue, the learned judges found that the commissioners appoint the secretary; he is answerable to them and that the power to remove him from office rests with them. They therefore concluded that the secretary could not be placed on the same plane as the commissioners. They also held that the powers vested in the EACC could not be singularly exercised by the secretariat because the secretariat can only carry out its functions when the EACC is properly constituted since it implements the decisions of the EACC. The High Court therefore concluded that if commissioners are not in office, the secretariat alone cannot investigate economic crimes and recommend to the DPP persons to be prosecuted. The appellant support this finding while the respondents are of the contrary view.

In this Court, the EACC contended that its secretary has power to conduct investigations and forward recommendations to the DPP even in the absence of commissioners. That position is informed by the view that investigations are not conducted by commissioners but by the investigators and other members of the secretariat. It was the EACC position that under section 11(6) of the EACC Act, commissioners perform specific duties, namely the formulation of appropriate policies and offering strategic direction. Those duties do not include operational functions and neither the Constitution nor any other law envisages paralysis of the EACC on account of vacancies in the office of the commissioners.

The EACC is established pursuant to the provisions of Article 79 of the Constitution, which provides that;

**“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this chapter”.**

As a result, Parliament enacted the **Ethics and Anti-Corruption Commission Act, No. 22 of 2011**. The Act makes provisions, among others, on the functions and powers of the EACC, qualifications and procedures for the appointment of the chairperson and members of the commission. It is therefore clear that once the Act was enacted and the EACC established, it acquired the status and powers of a commission under Chapter Fifteen of the Constitution. Under Article 249(1) of the Constitution, the EACC exists to, *inter-alia* protect the sovereignty of the people of Kenya, secure the observance by all state organs of democratic values and principles and promote constitutionalism.

It is also important to reiterate that pursuant to the provisions of Article 253 of the Constitution, the EACC is a body corporate with perpetual succession and capable of being sued and suing in its own name. To our mind that means that the EACC is an autonomous legal person, it has separate legal personality and continues to exist independently of any of its members. What is heavily contested in this appeal is whether the EACC can effectively carry out its legal mandate in the absence of its commissioners.

To be able to determine the above question, we must first understand the functions of the EACC, the commissioners and the secretary. In that context, and in addition to the functions of the EACC as set out under Article 252 and Chapter Six of the Constitution, the EACC has additional functions under section 11 (1) of the EACC Act and its powers are set out under section 13 of the EACC Act. Happily, in this appeal, none of the parties disputes the functions of the EACC as stipulated under section 11 of the EACC Act.

On the first issue in this appeal, we are unable to agree with EACC's contention that the secretariat on its own can investigate and make recommendations to the DPP in the absence of commissioners. Firstly, section 2 of the EACC Act defines 'commission' to mean the EACC as established under section 3 of the EACC Act. Section 3 of the EACC Act then establishes the EACC whose composition is provided for under section 4. Under that section, the composition of the EACC shall consist of a chairperson and four other members appointed in accordance with the provisions of the Act. This provision is in line with Article 250(1) of the Constitution, which provides that each of the constitutional commissions shall consist of at least three but not more than nine members. As regards the secretary, Article 250(12) of the Constitution requires each commission to have a secretary who it appoints and is the chief executive officer. Similarly, section 16 of the EACC Act has mandated the EACC to appoint, with the approval of the National Assembly, a suitably qualified person to serve as its secretary. Under section 16(7) of the Act, the secretary is the chief executive officer of the EACC, the accounting officer, and is responsible for carrying out the decisions of the EACC, the day-to-day administration and management of the affairs of the EACC, supervision of the employees and perform such other duties as may be assigned by the EACC.

Accordingly we take the view that the secretary is an employee of the EACC. He or she is appointed by the commissioners and as correctly held by the High Court, is not on the same level as the commissioners. We are satisfied that the High Court was right when it stated that:

***“to contend that the secretary, who is an appointee of the commission, is part of the commission would mean that the commission would, where the commissioners are nine, be composed of a membership of ten. One only need to mention this to realize how ridiculous this argument is. We have no hesitation at all in holding that the secretary of the commission is not a member of the commission as contemplated under Article 250(1) of the Constitution”.***

Secondly, the respondents urged us to find that the EACC could exercise its functions through the secretariat, whether or not the commissioners were in office. In particular, the EACC submitted that the making of recommendations to the DPP was a function of the secretariat and not the commissioners, whose absence could not affect the technical operations of the EACC. To our mind, the functions of the EACC are distinct and separate from those of the commissioners and the secretariat. In that context, section 11 (1) of the Act provides for the functions of the EACC. The EACC shall,

***(a) in relation to State officers—***

***(i) develop and promote standards and best practices in integrity and Anti-corruption;***

***(ii) develop a code of ethics;***

***(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti- corruption;***

***(c) receive complaints on the breach of the code of ethics by public officers;***

***(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution; (emphasis provided)***

***(e) recommend appropriate action to be taken against State officers or public officers alleged to***

*have engaged in unethical conduct;*

*(f) oversee the enforcement of codes of ethics prescribed for public officers;*

*(g) advise, on its own initiative, any person on any matter within its functions;*

*(h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality;*

*(i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and*

*(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures. (Emphasis added).*

In addition to the above functions, section 13 of the EACC Act sets out the powers of the EACC as follows;

*“13 (1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law.*

*(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to*

*(a) educate and create awareness on any matter within the Commission’s mandate;*

*(b) undertake preventive measures against unethical and corrupt practices;*

*(c) conduct investigations on its own initiative or on a complaint made by any person;*

*(d) conduct mediation, conciliation and negotiation; and*

*(e) hire such experts as may be necessary for the performance of any of its functions.” (Emphasis added).*

The functions of the commissioners are provided for under section 11(6) of the EACC Act as follows;

*(a) assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary perform their duties to the highest standards possible in accordance with this Act,*

*(b) give strategic direction to the Commission in the performance of its functions as stipulated in this Act; (emphasis added).*

*(c) establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sector;*

*(d) deal with reports, complains of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff; and*

*(e) deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission*

**or its staff.”** (Emphasis added).

It is clear from the provisions of both section 11(1) and 11(6) that the Act has separated the powers of the EACC and those of the commissioners. This in our view is not in vain. The EACC has been given powers and functions, which can only be exercised and performed by the commissioners. The law also recognizes that the commissioners may not have the technical, professional and administrative skills needed to perform all the aforesaid functions and in that regard has mandated EACC to recruit appropriate staff to help in discharging its functions. Such staff, who form the secretariat, is ultimately subject to the direction, control and oversight of the commissioners. It is the core mandate of the EACC under section 11(1)(d) of the EACC Act to:

***“...investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution”.***

From that provision, it is crystal clear to us that the functions of investigating and making recommendations to the DPP belong corporately to EACC and not to the secretary or the secretariat alone. The investigations and the recommendation to the DPP must be authorised and sanctioned by the commissioners who are required to exercise oversight over the secretariat and overall, to give strategic direction to EACC in the performance of its actions under the Act. That is the position notwithstanding section 23 of ACECA, which empowers the secretary or a person authorized by the secretary to conduct investigations on behalf of EACC. A proper reading of ACECA together with the EACC Act cannot justify the conclusion that officers to whom specific powers of the EACC have been delegated can purport to bypass the EACC commissioners who are ultimately responsible and accountable to Kenyans for the proper discharge of EACC’s constitutional and statutory duty.

Additionally section 35 of the ACECA provides;

***“...following an investigation, the commission shall report to the DPP on the results of the investigation. The commission’s report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime”.***

To our mind this provision makes it abundantly clear that upon the conclusion of the investigations, even if undertaken by the secretary or the investigator, it is the EACC, meaning the commissioners, who are expected to report to the DPP on the results of the investigations and make appropriate recommendation. We do not see anything in the law that empowers the secretary to bypass the commissioners and report or make recommendations directly to the DPP. Section 16(7) (f)(i) and (iv) of the EACC Act which makes it the responsibility of the secretary to carry out or execute the decisions of the EACC and to perform such other duties as the EACC may assign him is also consistent with the view that we have taken.

The respondents further contended that the meetings of the EACC under the second schedule to the EACC Act are in reference to the functions assigned to the commissioners, namely policy, strategy and discipline. In its view, the operational decision, among them investigations and recommendations, are the responsibility of the secretary and not of the commissioners. We have already found that the power to undertake investigations and make recommendations is one of the core functions of the EACC and is undertaken by the commissioners with the help of the secretary and other staff of the EACC as the commissioners may direct from time to time. If the commissioners are not in office, it would therefore follow that the business of EACC as contemplated under paragraph 5 of the Second Schedule to the EACC Act as read with section 11(1)(d) of the EACC Act cannot be undertaken.

We are also in agreement with the finding of the High Court that the decision transmitted to the DPP recommending the prosecution of the appellant without the sanction of the commissioners was in violation of the provisions of Article 250(1) of the Constitution, section 11 of the EACC Act and section 35 of the ACECA. See also the persuasive decision of the Uganda Constitutional Court in ***Hon. Sam Kuteesa & Others v. The Attorney General (supra)*** where it was held that the Inspector General of

Government could not prosecute independently of or in the absence of a properly constituted Inspectorate of Government, upon which the Constitution of Uganda vested the power to prosecute corruption offences.

The second issue in this appeal, as was in the High Court, is whether upon receiving the aforesaid report, the address by the President constituted a direction to EACC in violation of the Constitution. It is not contested that under Article 254 (2) of the Constitution, the President, the National Assembly or the Senate may at any time require a Commission or holder of an Independent Office to submit a report on a particular issue. Under Article 254(3) such reports shall be published and publicized. The report in issue in this appeal was given to the President by EACC at his request. That much is clear from the replying affidavit sworn by **Eng. Bowen Kanda**, an EACC investigator, on 13th August 2015.

Upon receiving the report, the President on 26 March 2015, in the special sitting of Parliament for the Annual State of the Nation Address stated as follows;

***“Today, however and for the sake of transparency, I take the extra-ordinary step of attaching the afore-mentioned confidential report from the CEO of the EACC as an annexe to my annual report on values to Parliament. As a consequence, I also hereby direct that all officials of the national and county governments that are adversely mentioned in this report, whether you are a cabinet secretary, principal secretary, or chief of a state institution, to immediately step aside pending conclusion of the investigations of the allegations against them. I equally expect that the other arms of government, namely, the legislature and the judiciary will also do the same. Further the investigating authority must ensure that the DPP has received the subject files without delay. I also want to caution that this should not be an open-ended process. Justice must be expeditious as justice delayed is justice denied. Therefore, the exercise should and must be concluded within the next 60 days. Let me reiterate that it is not my place to determine the guilt or otherwise of any of the people mentioned in the said report. However, the time has come to send a strong signal to the country that we will not accept anything less than the highest standard of integrity from those that hold high office”.*** (Emphasis added).

The appellant submits that the President in this address directed the EACC to forward the files to the DPP within 60 days in violation of the Constitution. On their part, the respondents contend that the above statement did not amount to a directive to the EACC or the DPP in violation of their constitutional independence.

Article 132(1) of the Constitution enjoins the President once every year to report in an address to the Nation all measures taken and progress achieved in the realization of the national values and principles set out under Article 10 of the Constitution. It bears repeating that those values include national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, social justice, inclusiveness, equality, human rights, good governance, integrity, transparency and accountability. The makers of the constitution included these national values as the basis of our nationhood, transformation and revival. At the heart of the last four national values lies a national obligation to undertake a concerted and sustained fight against corruption. Otherwise put, corruption is one of the pernicious practices that undermine the values of good governance, integrity, transparency and accountability, human dignity, human rights, equity and equality, and social justice.

This Court has had occasion to observe that there runs through the entire Constitution an unequivocal and consistent anti-corruption theme. (See ***Ethics & Anti-Corruption Commission v. National Cereals & Produce Board & Another*, CA No. 9 of 2012** and ***Ethics & Anti-Corruption Commission v. The Chief Magistrates? Court Milimani & 4 Others*, CA No. 313 of 2014**). Accordingly, and with respect, it is narrow and artificial to perceive the fight against the monster of corruption that threatens the very foundation of this nation, as the exclusive responsibility of EACC. Though the Constitution and the EACC Act provide that in the discharge of its mandate, the EACC is independent and not subject to the control or direction of any other person or authority, it is equally clearly that is the responsibility of every Kenyan to be involved in waging this war.

Granted the obligations vested in the President by the Constitution as regards realization of the national values and the express requirement to annually to report to the Nation on the measures taken to realize these national values, the President cannot be faulted for focusing on the fight against corruption or for urging institutions that have the constitutional mandate towards realization of the national values, to work harder and show results of their work.

Subject to the foregoing, however, the appellant has a genuine grievance that the President not only directed the EACC to present its report to the DPP, but also set specific deadline within which that was to be done. Well meaning as the directive may have been, it gave the impression, and we believe any reasonable person would have perceived it as such, that the President was directing the EACC on how and within what period to discharge its mandate. The setting of the deadlines, by the President rather than by the EACC itself, within which to conclude investigations and submit report to the DPP can reasonably be perceived as undue interference with the EACC in the discharge of its mandate, much as it is not the only institution which is concerned with the fight against corruption. Such deadlines also have implications for the quality of investigations, the focus being shifted more to the deadline itself rather than careful consideration of all the evidence for or against the person being investigated.

It is important to remind ourselves the reasons why the Constitution in Article 249(2) found it necessary to shield some institutions from interference or control by any person or authority. The Supreme Court adverted to the rationale in ***In Re The Matter of the Interim Independent Electoral Commission, Const. App. No 2 of 2011*** as follows:

***“It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government...The several independent Commissions and offices are intended to serve as „people’s watchdogs? and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”. While bearing in mind that the various Commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.”***

In our view therefore, the High Court cannot be faulted for concluding, in the circumstance of this appeal that the President’s directive to the EACC to submit its report to the DPP within a timeframe set by the President himself rather than the EACC was not consistent with the constitutional and statutory independence of the EACC. It should be remembered that the Constitution has set out elaborate accountability mechanisms for constitutional commissions and independent offices, which ought to be resorted to in the event that they fail to properly discharge their constitutional mandates. Accordingly while it is the responsibility of all Kenyans, led by the President, to combat the nefarious corrupt practices that threaten our national fabric, the golden thread of rule of law, human rights and constitutionalism that runs through the Constitution demands that the battle against corruption must be waged within the law. We have not seen any reason to believe that observing the rule of law is synonymous with condonation of corruption. Experience from other jurisdictions vividly demonstrates that it is possible to effectively combat corruption within a rule of law framework.

On the last issue in this appeal, the appellant contended that the DPP could not have validly acted on the recommendations of the EACC because it was not properly constituted. On their part, the respondents contend firstly, that nothing stopped the DPP from acting on the report forwarded to him by the EACC if he was satisfied that there was sufficient evidence to sustain a trial of the appellant. Secondly, that the DPP is an independent office and his decision to charge the appellant could well have been on the basis of information received from any other source. We shall start with the first issue.

Article 157(1) of the Constitution establishes the office of the DPP. Under Article 157(10), the DPP does not require the consent of any person or authority to commence criminal proceedings and in the exercise of his powers he is not under the direction or control of any person or authority. Accordingly, the DPP discharges his functions and exercises his powers independently and he has the authority to exercise his discretion on whether to prosecute or not.

However, while exercising his mandate, the DPP must, under Article 157(11) of the Constitution as read with section 4 of the ***Office of the Director of Public Prosecutions Act No. 2 of 2013***, have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Upon receiving the report and recommendations of the EACC, the DPP is expected to exercise his discretion to either prosecute or not to prosecute independently, guided only by the Constitution, the law, and the evidence. He is not a rubber stamp, to mechanically approve the recommendations of the EACC.

This brings us to the issue whether the decision to charge the appellant was based on information received from other sources. The DPP has the power to direct Inspector General of the National Police Service to investigate any information or allegation of criminal conduct. We readily agree with the respondents that the DPP can receive evidence from any source before determining who to charge and with what offence. That evidence does not have to come from the EACC alone. The important question in this appeal is whether there was any evidence to suggest that the DPP made his decision to prosecute the appellant on the basis of evidence from other sources, other than the report and recommendations of the EACC.

In the High Court, the appellant relied on a newspaper report in which the DPP was quoted as saying that he was working to meet the deadline of 60 days given by the President to complete the cases. The High Court rightly declined to admit that newspaper reports in evidence and concluded that it did not have sufficient material to enable it find that the decision of the DPP to prosecute the appellant was based on recommendations by the EACC.

The record however suggests otherwise. On 15th September 2015, Frederick Ashimosi Shitambasi swore an affidavit on behalf of the DPP in which he deposed as follows in the pertinent paragraphs:

***“1. THAT Ethics and Anti-Corruption Commission (EACC) received a complaint that the petitioner together with other members of the ministerial tender committee were involved in an alleged corruption. They completed investigation and forwarded the file pursuant to section 35 Anti-Corruption and Economic Crimes Act (ACECA) and section 11 of the EACC Act to the DPP to make a decision on whether or not to charge the suspects.***

***2. THAT upon receiving the report from the EACC the DPP independently reviewed the files and analyzed the evidence and was satisfied based on sufficiency of evidence in making decision to charge the petitioners in Anti-Corruption case No. 11 of 2015 Chief Magistrate Court Nairobi Republic v Eng. Michael Sistu Mwaura Kamau and others.***

***3. THAT in reaching the decision to charge the petitioner, the DPP acted impartially, independently, competently and professionally after considering the totality of the evidence, the circumstance of the case and public interest underlying prosecution of corruption offences.***

***4. THAT the DPP considers the recommendations forwarded by the 1st Respondent pursuant to Article 35 of the ACECA and in exercise of his constitutional mandate conferred by Article 157 of the constitution, 2010 and makes a decision on whether or not to charge based on sufficiency of evidence and the public interest underlying prosecution of corruption cases.***

***5. THAT in arriving at said the decision, the DPP did not abrogate, breach, infringe or violate any provisions of the constitution or any human rights and fundamental freedoms of the petitioners, or any other written law or regulations made thereunder”.*** (Emphasis added).

The above depositions are a clear confirmation that the DPP formed his decision to prosecute the

appellant on the basis of the report and recommendations from the EACC rather than from other sources. The DPP did not adduce any evidence to suggest that indeed his decision was based on other sources different from the EACC report and recommendations. In our view, in the circumstances of this appeal, the assertion that the DPP acted on evidence from other sources is pure conjecture. The evidence on record is more consistent with the DPP having made his decision on the basis of the evidence and recommendations from the EACC.

Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.

We have already adverted to the great emphasis that the Constitution lays on integrity of State and public officers and the strong and consistent anti-corruption theme that runs through the Constitution. Article 79 of the Constitution expressly enjoins Parliament to enact legislation to establish an independent ethics and anti corruption commission with the status and powers of a constitutional commission, for the purposes of ensuring compliance with and enforcement of the provisions of Chapter six of the Constitution on leadership and integrity. The EACC was established pursuant to the provisions of Article 79. In ***Ethics & Anti-Corruption Commission v. The Chief Magistrates? Court Milimani & 4 Others (supra)*** this Court observed as follows:

***“...the current Constitution is heavy-laden with anti-corruption principles and values, such as good governance, integrity, transparency and accountability, to the extent that it has dedicated a separate and distinct chapter, being Chapter Six, to issues of leadership and integrity. Among the functions of EACC is to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or any other matter prescribed by the Act or any other enactment pursuant to Chapter Six of the Constitution and to recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.”***

This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law.

Ultimately we allow the same; set aside the orders of the High Court dated 9th March 2016 dismissing the appellant's petition, and substitute therefore an order allowing the petition. On costs, we direct each party to bear its own costs on account of the public interest issues raised in the appeal. It is so ordered.

**Dated and delivered in Nairobi this 14th day of July, 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**