

POLICE 5

NATIONAL POLICE SERVICE

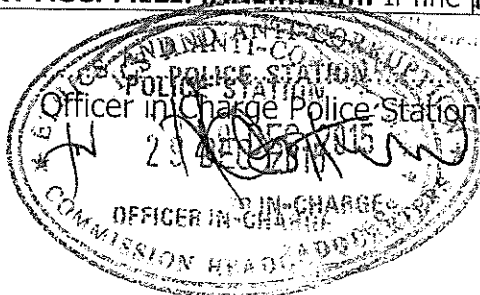
CHARGE SHEET POLICE CASE No. **148/32/2015**

DATE TO COURT. **29/12/2015**

O.B No. 4/22/12/2015

COURT FILE NO: ACC...**29/12/2015**.....

Christian Names in full or Name	Surname or Fathers Name	Identity Certificate No	Sex	Nationality Or Tribe	Apparent Age	Address (Include District and Loc)
GABRIEL IRUNGU	MBURU	0237834	M	KIKUYU	A	MURANGA
CHARGE COUNT I	WILFUL FAILURE TO COMPLY WITH APPLICABLE PROCEDURES AND GUIDELINES RELATING TO TENDERING OF CONTRACTS, CONTRARY TO SECTION 45(2) (b) AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.					
PARTICULARS OF THE OFFENCE (See Second Schedule of C.P.C	<p>GABRIEL IRUNGU MBURU: On or about the 5th day of March, 2012 at Nairobi, within Nairobi City County, being a person employed by a Public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer and being the Project Manager in respect of Tender No. NBI-D07/13/2011-2012 for office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first floor embankment plaza phase II, willfully failed to comply with the law relating to procurement to wit section 27(3) of the Public Procurement and Disposal Act by authorizing Mweha Enterprises Limited to commence works in the said Tender without subjecting this Tender to a competitive bidding process.</p> <p>{FOR OTHER COUNT(S) SEE ATTACHED SHEET}</p>					
If Accused Arrested	Date of Arrest	Without or with Warrant	Date Apprehension Report to Court	Bond or Bail and Amount	Is Application made for Summons to issue	
YES	22/12/2015	W/O	ON CASH BAIL OF KSHS. 30,000/= RECEIPT NO. 1013770	NIL	
Remanded or Adjourned to						
Complainant & Address	REPUBLIC OF KENYA THROUGH ODPP (EACC)					
WITNESSES	<p>1. John Okiro Misiga AND 2. OTHERS TO BE STATED</p>					
Sentence..... Court and Date	<p>CM'S COURT ACC. MILIMANI..... If fine paid 29 DEC 2015</p>					

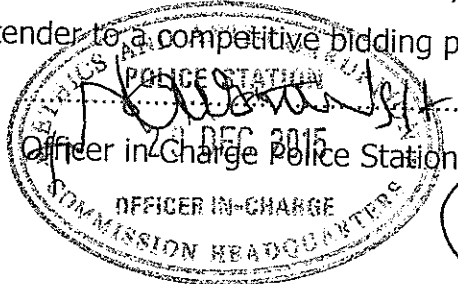


COUNT II:

ABUSE OF OFFICE CONTRARY TO SECTION 46 AS READ WITH SECTION 48(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.

PARTICULARS OF THE OFFENCE (See Second Schedule of C.P.C)

GABRIEL IRUNGU MBURU: On or about the **5th** day of **March, 2012** at Nairobi, within Nairobi City County, being a person employed by a Public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer, used his office to improperly confer a benefit on Mweha Enterprises Limited by authorizing the said Mweha Enterprises Limited to commence works in tender no. **No. NBI-D07/13/2011-2012** for office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first floor embankment plaza phase II, for Kenya Trade Network Agency without subjecting the tender to a competitive bidding process.



C 29/12/2015

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT THE ANTI-CORRUPTION COURT AT NAIROBI
ANTI-CORRUPTION CASE NO. 29 OF 2015

REPUBLIC.....PROSECUTOR
VERSUS
GABRIEL MBURU IRUNGU.....ACCUSED

JUDGMENT

The accused person herein, namely Gabriel Mburu Irungu faces two counts. The first count is a charge of willful failure to comply with applicable procedures and guidelines relating to tendering of contracts contrary to section 45(2) (b) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, the particulars of which allege that the accused person,

“On or about the 5th day of March 2012 at Nairobi, within Nairobi City County, being a person employed by a public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer and being the Project Manager in respect of Tender No. NBI-D07/13/2011-2012 for the office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first

floor embankment plaza phase II, willfully failed to comply with the law relating to procurement to wit section 27(3) of the Public Procurement and Disposal Act by authorizing Mweha Enterprises Limited to commence works in the said Tender without subjecting this Tender to a competitive bidding process.”

The second count is of abuse of office contrary to section 46 as read with section 48(1) of the Anti-corruption and Economic Crimes Act, 3 of 2003, whose particulars are that the accused person,

“On or about the 5th day of March 2012 at Nairobi, within Nairobi City County, being a person employed by a public body to wit, the then Ministry of Public Works, as the Nairobi City County Works Officer, used his office to improperly confer a benefit on Mweha Enterprises Limited by authorizing the said Mweha Enterprises Limited to commence works in tender no. No. NBI-D07/13/2011-2012 for office refurbishment to include acoustic ceiling, gypsum ceiling decoration, air conditioning, improvement and washroom at the first floor embankment plaza phase II, for Kenya Trade Network Agency without subjecting the tender to competitive bidding process.”

The accused person denied each of the two counts. A total of

thirteen prosecution witnesses testified and the accused person when placed on defence gave sworn evidence and called one defence witness.

From the evidence adduced by the prosecution witnesses who testified, a summary of facts of the prosecution's case is that the accused person was at the material time the County Works Officer, Nairobi County. At the material time, an entity by the name Kenya Trade Network Agency, otherwise commonly known (and hereinafter referred to) as KENTRADE, had just moved its offices from Forodha House to Embankment Plaza. PW1 (Isaac Okoth Omogi) worked as the head of procurement at KENTRADE from the year 2011 to 2012, and was among the first officers to be seconded thereto by the then Ministry of Finance. He joined when KENTRADE offices were still located at Forodha House and they started the process of acquiring new offices at Embankment Plaza in Upper hill. At the time of acquisition of the offices, the same was just a hall so the first step was to have the office partitioned. On behalf of the acting chief executive officer of KENTRADE, he wrote a letter dated 5/9/2011(Exh. 1) requesting ministerial tender committee to allow them to go for restricted tendering. After they

got estimates and the funds, they requested the Public Works to supply them with a list of prequalified firms. The estimated cost of the project was Ksh. 19,503,926.80. The ministerial tender committee accepted the request, and thereafter the tender was awarded to Mweha Enterprises Ltd. The contract was between Mweha Enterprises Ltd and the Financial Secretary (exh. 2) which, he stated, was for the purpose of new office partitioning of the first floor Embankment Plaza. But still there were some works that were not completed; because they had not done electrical work, mechanical work, some decoration work, ceiling, reception desk, among other works that they were supposed to do. So he was instructed by Mr. Alex Kabuga who was the accounting officer to start the process.

He wrote a letter to the County Works Officer; dated 25/6/2012 from KENTRADE which he signed on behalf of the Chief Executive Officer (exh. 3) asking for review of Bill of Quantities. They got a response and the first estimate given was Ksh. 10,200,001.80. He wrote another letter dated 18/7/2012 to the County Works Officer (exh. 4) that the proposed office refurbishment included, acoustic ceiling, gypsum decoration, air condition improvement and

washroom improvement at the first floor Embankment Plaza Phase II.

He further stated that he had also written another letter dated 30/4/2012 (exh. 5) addressed to the County Works Officer on behalf of the Chief Executive Officer, KENTRADE, the subject of which was the proposed new office partitioning, 1st floor Embankment Plaza, asking that he comes up with estimates and Bill of Quantities. The scope of the work was to include painting and decoration, ceiling finishes, skirting, toilets, floor finishes, mechanical, electrical and reception centre among others; and he requested that the costs be indicated and list of firms be submitted for the Tender Committee's approval if the allowable sum was within the restricted tendering. The allowable sum at the time was Ksh. 20 million, and at that time the committee to approve was the Corporation Tender Committee. He stated that they got a response; but before they got the response there was a letter by the Chief Executive Officer dated 30/4/2012 whose contents were similar to those of exh. 5 – with a similar reference number (exh. 6). Then there was a response dated 4/5/2012 signed by Architect G. I. Mburu, the County Works Officer, Nairobi County – reference No.

DOT/GEN/18/CA/14 (exh. 7) addressed to the Chief Executive Officer KENTRADE indicating the cost of the works to be done as Ksh. 11,431,510/=, and also giving names of ten entities (which he referred to as firms) and asking them to seek authority of Ministerial Tender committee to secure the works, and indicating that the estimates are valid within thirty days. Architect G.I. Mburu also wrote another letter dated 4/5/2012 referenced GO7/GEN/18/CA/13 (exh. 8) giving a breakdown of how the amount of Ksh. 11,431,510/= came about, and the letter was marked to him for his action by the Chief Executive Officer of KENTRADE, Mr. Alex Kabuga. He stated that they also received revised estimates for the works to be done, which then came down to Ksh. 10,200,001/80, vide a letter dated 25/6/2012 referenced CQS/DIO/GEN/VOL.IV(F.29) from Quantity Surveyor by the name Rose J. Kotut (exh. 9). Ten firms submitted Tender Documents, prepared by the County Works Officer on 30/6/2012, bearing different dates in the month of July 2012 (exh. 10-18). The first phase had been completed so the second phase was to be treated as independent contract and, he stated, he was not aware of any contract awarded in respect of the second phase.

He further stated that he attended Corporation Tender Committee meeting of 16/7/2012 as the secretary and signed the minutes of the same (exh. 19) on 1/8/2012. The meeting, he stated, deliberated on the issue of proposed office refurbishment which included decoration, painting, finishes, and acoustic ceiling, and made recommendation that there should be confirmation of availability of funds by the accounting officer, and Board Approval of the works already done; that documentation be provided for the tender committee.

On cross-examination, he stated that KENTRADE was a customer in the two transactions, both phases were done by Mweha Enterprises, he saw the firm on site and the works were properly done. At the time of the first phase they did not have enough money to complete both phases. In the first phase the contractor was picked by Ministry of Finance, and for the second phase KENTRADE was to pick the contractor. He saw the accused person for the first time in court though he communicated with him in writing, and that Ministry of Public Works as consultants cannot do anything without approval of the actual customer. After giving a list of firms, Public Works people would wait for response from

KENTRADE and would only go to the site to supervise. He further stated that it is the client that pays the contractor, and that the county works officer prepares a voucher for the client to pay to the contractor directly. Payment was done for the first phase; but for the second phase payment is yet to be made. He further stated that he did not have any complaint on tendering and procurement, and that he was just called by anti-corruption officers to make a statement. That the two phases are independent of each other and that procurement regulations are to be followed in each and every phase.

PW2 (John Okiro Misiga) testified that from year 2011 to 2012 he was working for KENTRADE where he was deployed as Chief Finance Officer. He was also a member of the tender committee. On 6/5/2015 he was called by an officer called Juma from Anti-corruption Commission who told him about a letter he had written to Public Works in Nairobi and asked him to go and see the same. He stated that he signed letter dated 22/3/2012 which he signed on behalf of the then acting chief executive officer Mr. Kabuga referenced KTNA/GEN/VOL. 1 (folio 15), whose subject was the proposed ceiling, decoration and services installation to the new

offices at Embankment Plaza for KENTRADE (exh. 20), confirming availability of funds for the works which were to be tendered for, which were catered for in the budget, and told them to follow procurement process – to prepare tender documents and submit at least ten firms for consideration by the corporate tender committee. He also did another letter, with the same contents confirming availability of funds, on direction of the acting chief executive officer (exh.21) after the two of them discussed cost of the works which was coming to Ksh. 5.7million which, he stated, was available. He produced an extract of budget showing that the project was initially allocated Ksh. 18,200,000. Then the budget was reviewed upwards by an additional Ksh. 10 million and approval obtained for the same from the Board. On 30/6/2012 he was transferred from KENTRADE, and by that time phase one had been done, though he was not aware whether it had been completed.

PW3 (Richard Matu Macharia) stated that he is the managing director of Mweha Enterprises Limited. He was invited to bid for partition and renovation works for KENTRADE Embankment House, and filled quotation and took it back to County Works Office

for evaluation, and signed a contract for the works (exh. 2) on 15/11/2011. He stated that the works were done up to a certain level then it was found that there were some major works that had not been taken into account in the document, of which they notified the late Architect Musembi. The first phase tender was number NBI-DO7/13/2011-2012 and its cost was Ksh. 19,451,390/40.

He further stated that normal procurement procedure was to be followed in phase II. That, at the beginning the client was to vary the contract 'but it exceeded the 10% as allowed by law', 'so the new phase was to be documented.' The instructions he received to undertake the remaining works on phase two came much later after they had done their bids, he stated (though that statement is not accurate when looked at alongside exh. 23). The instructions were given via a letter dated 5/3/2012 by Architect G.I. Mburu the County Works Officer addressed to the director Mweha Enterprises referenced CQS/DO7/55/2011-2012 (Exh. 23). The letter instructed him to proceed with completion works (that is phase II) with immediate effect upon receipt of the letter as other matters were being addressed. So he proceeded with the works as detailed

the bid document; there were some ceilings to be done, wash room for the CEO and the chairman, air conditioning, electrical works and some gypsum works. So he did about 90% of the works, and an appraisal was done after he started having problems with the client as they were not facilitating signing of the contract. An appraisal was done to the tune of Ksh. 8,752,851/92 vide a letter dated 4/9/2014 signed by Chief Executive Officer KENTRADE – the subject being proposed office refurbishment to include acoustic ceiling, gypsum ceiling, decoration, air conditioning improvement and washrooms at 1st floor Embankment Plaza Phase II (exh. 24).

He further stated that he had filled in tender document dated June 2012 and submitted the same on 26/7/2012. He had received the letter to proceed with the works before the documents were submitted. No contract had been signed and that is what led them to stop the work at some level. He stated that his company was never paid for the works appraised, and that made the company to file High Court Civil Case No. 512 of 2013 at Milimani Law Courts. In the course of his testimony he referred to pleadings and documents relating to the said matter (exh. 25).

On cross-examination by the advocate for the accused person he stated that he did everything legally except that the contract which was to be signed between Mweha Enterprises Ltd and KENTRADE was missing. He received a letter dated 22/6/2012 from the Chief Executive Officer of KENTRADE to Mweha Agencies; which was approval for installation of sandal ware which was part of the whole scope of phase II. On many occasions Mr. Kabuga had tried to instruct him verbally to do the works which, he stated, was not ethical. Nothing illegal occurred during the transactions, and he knew Mr. Mburu as the project manager and the County Works Officer, he stated. He was called to record statement much later after he sued KENTRADE.

PW4 (Beatrice Kosgei) stated that she is the corporation secretary and the head of legal affairs KENTRADE. When she reported on 1/8/2012 the offices at Embankment Plaza had been partitioned ready for occupation. Immediately she reported she was appointed to the tender committee as a member, by the chief executive officer Mr. Alex Kabuga (deceased), and attended her first meeting on 4/9/2012, the subject of which was tender award for refurbishment of 1st floor Embankment Plaza. They went through

documents that had been submitted by a total of ten firms that had been invited to bid for the tender. In its deliberation, she stated, the tender committee realized that they needed more information as they were still new in the organization. Phase I (one) was already completed and the meeting was to award tender for refurbishment, ceiling and other works which were omitted in the first phase; but the ceiling was already in place. The meeting therefore decided not to award the tender, and the minutes for the meeting were produced as prosecution exhibit 26. The matter was again discussed on 7/9/2012, 25/9/2012, and lastly on 23/10/2012 when the committee rejected the award, for the reasons that during the first phase of procurement, KNETRADE had exceeded the financial ceiling prescribed for using restricted tendering method in the first schedule; because the first phase had been varied up to Ksh. 22 million against the limit of Ksh. 20 million so it was not proper to use restricted tendering method. The second reason was that using restricted tendering method to procure phase II would amount to splitting procurement which is contrary to section 30 (1) of the Public Procurement and Disposal Act. Minutes for the said meetings were produced as prosecution exhibits 27, 28 and 29. She

further stated that as they were seated in the boardroom they could physically see the ceiling so they did not award as what they were to award was already in place. The works had been commissioned by County Works Office. As they were going through documents, she stated, there was a letter dated 5/3/2012 from County Works Office asking the contractor, Mweha Enterprises, who was on site to proceed. The letter, she stated, was signed by Architect G.I.Mburu. She stated that the letter (exh. 23) was written about four months before the committee's deliberations, and that the commissioning of phase II was not properly done because the work was done yet there was no contract. She was not aware whether Mr. Kabuga had written any letter to the County Works Officer to authorize the works. The project manager was one Mr. Musembi. She never dealt with the accused person herein; but only saw his name in papers, she stated.

PW5 (Joanne Kweyu) stated that she joined KENTRADE as the procurement manager in charge of procurement on 3/7/2012. She attended all the meetings that PW4 attended, and her evidence was largely in tandem with that of PW4. When she was summoned by the investigators, she was told that it was the CEO who was being

investigated, and her statement touched on various issues; not Mr. Mburu the accused. She made references to the minutes produced as prosecution exhibits 27, 28 and 29 in the course of her testimony.

PW6 (Simon Kiplangat Cheruiyot) stated that he is the General Manager KENTRADE, where he has worked with effect from 1/8/2012, and the Chairperson of the tender committee. Referring to the minutes produced as prosecution exhibits 26, 27, 28 and 29 he stated that he chaired the meetings, and the tender committee rejected the request for refurbishment, on 23/10/2012 for reasons put down in the minutes. From where the committee was sitting, there was already ceiling in place though one of the requests was for provision of acoustic ceiling, gypsum decoration and air conditioning; all of which were already in place. He stated that he chaired the meetings, and that he is aware that Mweha Enterprises Ltd has sued KENTRADE for non- payment of dues arising from works which the committee did not award. His testimony was largely similar to that of PW4 and PW5.

PW7 (Rose Jematya Kutut) stated that at the material time she was

working as the quantity surveyor at the County Works Office, Nairobi County. She came into the project in late 2011 when she took over from Nicholas Kiokora. By the time she went to the project the contractor who was on site was Mweha Enterprises and the works were ongoing. In one to the site meetings they realized that there was discrepancy in that the previous quantity surveyor had not factored in ceiling finishes, and after consultations it was agreed that ceiling finishes had to be done. Project Mechanical Engineer from public works, she stated, also indicated the need to have mechanical ventilation. Introduction of ceiling gave rise to the need for electrical works. So the client (KENTRADE) was advised that the allowable variation was 15% and advised them to sort out procurement process for other items which could not be accommodated within the 15%. The Bill of Quantities (exh. 30) was forwarded to the client vide letter dated 12/6/2012 (exh. 9) which also asked the latter to confirm availability of funds so that tendering process could commence. Referring to exhibit 23, she stated that the letter by Architect G.I. Mburu the County Works Officer Nairobi County dated 5/3/2012 precedes the Bill of Quantities. KENTRADE and its managing director were aware and

participated in the construction of Phase II, she stated.

PW8 (Jane Njoki Mugambi) stated that she worked with Kenya Trade Network Agency as Human Resource and Administration Manager, and had a short stint as the chairperson of the tender committee of KENTRADE. When she was appointed the chair of the committee she found the tendering process for partitioning of Embankment offices ongoing, and from where she took over they were to approve a tender for ceiling, air conditioning, among other works. That was phase II. She attended her first meeting on 16/7/2012 but they could not make a decision and requested the management for further information that they needed from the management and the board; including confirmation of availability of funds for the project to continue, and availing of more documentation. She signed minutes for the meeting held on 16/7/2012. Referring to exhibit 23, she stated that the same was not procedural because it was referring to the same project in respect to which the information sought should have been availed and contract awarded before authority is given to the contractor. She also stated that she was a member of the inspection team before she joined the tender committee. On cross-examination she

stated that the CEO gave authority. She decided to resign after the meeting because the project they were to approve already existed, and her feeling was that there was already verbal communication between the CEO and the contractor to do the ceiling; because the ceiling was already there but there was no documentation and she thought they were being used as rubber stamp.

She further stated that the project manager was under a lot of pressure from the CEO to make decisions and the latter promising that documentation would come. The CEO passed away, she stated.

PW9 (Stephen Kalomit Yego) stated that he works with the Ethics and Anti-corruption Commission as a forensic documents examiner, and has undergone trainings in various institutions he enumerated. In respect of this case the investigating officer namely Ditim Musi, vide an exhibit memo dated 11/12/2015 brought to him a document labeled 'A1' which was a letter of authorization to complete works and services, installations at first floor of Embankment Plaza for KENTRADE, Ministry of Finance. It was a letter dated 5/3/2012 authored by Architect G.I. Mburu, County Works Officer Nairobi County (exh. 23). The request of the investigating officer was to determine whether a signature

underlined by red ink on the document was made by the same author when compared with specimen signatures provided on documents marked B1 to B5 of Gabriel Mburu Irungu.

He did examination of the document on 14/12/2015, and his findings were that the specimen signatures on documents marked B1 to B5 were similar and in his opinion they were made by the same author; and on comparative examination of the same with the signature pointed with a red arrow on exhibit marked A1, he formed an opinion that they were made by the same author. He explained characteristics in the signatures that provided him with forensic evidence of common authorship. He produced his examination report as prosecution exhibit 31.

PW10 (Jacob Mugeni Oduor) was also a documents examiner. Documents were submitted to him on 27/8/2015 by Mr. Nditim Musi; being documents marked A1 to A8 as the 'disputed or questioned document', and B1 to B6 which are specimen signatures for Gabriel Irungu Mburu, C1 to C6 being specimen signatures for John Okiro Misiga, D1 to D6 being specimen signatures for Isaac Okoth Omogi and E1 to E6 being specimen

signatures for Jane Njoki Mugambi. He examined the documents on 28/8/2015 and his findings were as follows:

1. A1 and A2 were signed by the author of specimen signatures marked B1 to B6; that is Gabriel Irungu Mburu.
2. Signature underlined in red on A3 is similar to specimen signatures on C1 to C6 which are specimen signatures for John Okiro Misiga.
3. Signatures underlined in red ink on A4, A5 and A6 are similar to specimen signatures marked D1 to D6 which are the signatures of Isaac Okoth Omogi.
4. Signatures underlined in red ink on A7 and A8 are similar to specimen signatures for Jane Njoki Mugambi.

The similar signatures were made by the same author, he stated. He produced his report as prosecution exhibit 32.

PW11 (Eva Thiga Njoroje) stated that she is a Human Resource Officer in the Ministry of Land, Housing and Urban Development. She produced documents relating to the accused person's employment as prosecution exhibits 33, 34, 35 and 36 and stated that the accused person's designation is Senior Superintendent Architect seconded to Nairobi County. She outlined different departments that exist in the ministry.

PW12 (Francis Wambua Munyalo) is an officer from the Ethics and Anti-corruption Commission, and his duties are principally investigation of corrupt practices and any other matter assigned to him by the commission. On 14/4/2015, together with his colleague namely Juma Musi, they received instructions from their immediate supervisor namely engineer Akaki to investigate allegations of corruption made against Chief Executive Officer of KENTRADE namely Alex Kabuga who was alleged to have awarded some contracts irregularly without following procurement law.

In the course of his investigations he collected documents and interviewed witnesses. In his testimony, he gave details of what he established in his investigations, and his evidence basically corroborated evidence of the other prosecution witnesses; and it was the same case with the evidence of PW13 (Mr. Ditim Wanyanje Juma Musi) who jointly investigated the matter with PW 12. PW13 also produced documents (exh. 38 and 39) to show that Daniel Musembi of Nairobi County Works Office and Alex Kabuga who was the Chief Executive Officer of KENTRADE are both deceased.

The accused person in his testimony stated that he is a Senior

Superintendent Architect, and is the County Works Officer in the department of Public Works in the larger ministry of Infrastructure and Transport. The County Works Office has many departments each of which has independent office and officers of various cadres; which he outlined in his evidence. The office of County Works Officer coordinates other departments. Any incoming proposal or request is usually addressed to the County Works Officer who then marks the same to the county architect and copies the same to the other county heads. The county architect then assigns an architect to handle the project and other county heads would also assign individual officers to handle the project. These, he stated, are the project officers who liaise with the client. The project architect becomes the coordinator of other project officers, each of whom has defined role. Each of the officers performs roles in consultation with own section head or county head. Once the final drawings are done the tender documents are prepared and project would be ready for tendering. The same project officers are the ones who do the supervision and valuations for payment certificates and the same officers prepare completion certificates and handing over certificates. He stated that the county works officer has no role

when all these is going on, and only comes in if there are correspondences touching on the project that are to be sent out to the client, which he (the County Works Officer) would sign. For example, a document concerning building works would be prepared by the secretary then the project architect would proof read and once satisfied that the same is okay, he would initial a copy which would then be delivered to the County Works Office together with other copies for signature. Dispatch of the same would be done by the project officer or assigned messengers.

He further stated that his office does not procure, and it is the client who procures the services of contractor. The Bill of Quantities and the drawings are forwarded to the client, and it is upon the client to do the procurement through their tender boards or tender committees. He described the processes and procedures in detail.

He stated that after the request from KENTRADE was received, the county works officer marked it to the architect – with copies to the other county heads. The county architect assigned the project to the late architect Musembi, and head of departments that were involved appointed an officer each. After the appointments were

done, drawings and Bills of Quantities were prepared. He stated that the tendering and procuring of the works were done by the client. The same was awarded to Mweha Enterprises by the client - for phase one of the project, and the implementation started. There were project officers supervising who held site meetings together with the client. He never attended any site meeting, and did not visit the site.

He stated that he had no problem with implementation of the project. There were some works that needed to be done but were not captured in the documentation. Part of those was incorporated in phase one as 15% variation and those that were not completed were put in phase two. The contractor did not stop but went on and implemented phase two as the same was continuous, because the project officers, the contractor and client agreed in their site meetings to have the same contractor implement phase two as the contractual issues were being formalized. The contractor however realized that formalization of the contract was not being done so he stopped after having done 90% of the works, as he realized that payment might be a problem because he had no contract. The accounting officer, he stated, was the chief executive officer of

KENTRADE, Mweha Enterprises was the contractor, and County Works Office was project manager.

He stated that the letter produced as prosecution exhibit 23 was signed by him, but was written by the late architect Musembi - who was the project architect - and taken to his office for signature and dispatch to the client just like any other correspondence. He had no reason to doubt what the project architect told him as the county architect had approved. Such a letter would not be written without instructions from the client. All instructions given by a project manager or architect or the county works office are usually given on behalf of the client. It is the client who chooses whom to write to, he stated.

His office was not aware whether any tenders had been awarded by the client, and the letter states clearly where he got authority from, and his office does not procure, he stated. It is the client who does the procurement.

He further testified that no benefits were conferred to anybody, and no money was paid even to the contractor in respect of phase two

as his office would not have prepared any payment where no contract had been signed. He has not heard of any complaint of a technical nature. The client was satisfied. There was no complaint of overpayment of any nature, inducement, bribery or conferment of benefit to anybody. In the course of investigations, the investigation Mr. Juma (PW 13) had told him that if there was to be any case he would be a witness. The person who was being investigated was Mr. Alex Kabuga who was in the list that the President read in Parliament. Later on he was charged, to his dismay. He does not agree with the charges, he stated.

He further stated on cross-examination that no acceptance letter was in this case given to contractor and copied to his office before he gave the authorization. There was no contract he was aware of before the authorization was done. There was an anomaly as the client is not supposed to write to the contractor directly, and the letter dated 12/6/2012 that had been written by the client to the contractor was wrong. He became aware during the proceedings that the tender committee had rejected the tender, he stated.

DW2 (Kariuki Moses Kimani) stated that he is a Chief

Superintending Quantity Surveyor in the County Works office. The county works office is basically a service department that supervises other departments headed by section heads who are professionals. They usually get requests from clients who are other government departments and ministries, and upon receipt of request a team consisting of all departments is constituted to carry out estimates. His explanation as to the processes and procedures within their office was basically the same as what the accused person explained in his testimony. The county works office does not do procurement, but only gives technical advice on matters relating to construction works, and final decisions on award are made by the client who then communicates the same to the county works office, he stated. In normal circumstances, he stated, the project architect would draft a letter then take to county architect who in turn would take the same to County Works Officer for signature. He stated that he was not involved in the matter that gave rise to this trial.

That is a summarized outline of the evidence adduced during the trial, and I have deliberately done so in this judgment to facilitate ease of understanding the same. I have considered the evidence on

record as a whole as required (see: ***Okethi Okale & Others v Republic (1965) EA 555***) and the able submissions made by Mr. Mutinda advocate for the accused person and Mrs. Kahoro for the prosecution. I must first of all express my gratitude to counsel who conducted this matter for their high levels of commitment to duty and professionalism; as that is what enabled this court to have the matter concluded expeditiously. I also thank the accused person herein for attending all scheduled court sessions without fail, and witnesses who appeared before court to give their evidence as and when required.

The two charges are basically grounded on the same set of facts, and therefore I will deal with the two counts side by side. In relation to the first count, the point for determination is whether there is proof beyond reasonable doubt that the accused person willfully failed to comply with applicable procedures and guidelines relating to tendering of contracts, to wit section 27(3) of the Public Procurement and Disposal Act as alleged in the particulars of offence to that count reproduced herein before. The burden lies on the prosecution at all times to prove every criminal charge beyond reasonable doubt as required.

From the evidence adduce by the prosecution and the defence, outlined herein, there is no dispute that the accused person at the material time held a public office as the County Works officer, Nairobi County. The documents produced in evidence by PW11 are sufficient proof that the accused person was at the material time, and still is a public officer and is a Senior Superintendent Architect.

There is also no dispute that there were two phases of works that were being undertaken at the premises of KENTRADE. From the evidence on record, phase one of the works had no issue. The case arose from phase two of the project. The evidence on record, particularly of PW1, PW3, PW4, PW5 and PW6 shows that although bids were invited and entities submitted their tender documents, there was no award of tender for the works that constituted phase two aforementioned. By the time the tender committee was deliberating on the second phase, part of the works that were being tendered for had already been completed and they could physically see the ceiling in the boardroom where they held the meetings. The minutes produced as prosecution exhibits 26, 27, 28 and 29

indicate deliberations that took place and agree with the testimonies of those witnesses that indeed the tender was not awarded. PW3 who is a director of Mweha Enterprises Limited that did the works confirmed in his testimony stated that he submitted his company's tender documents in July 2012, yet he had received a letter dated 5/3/2012 (exh. 23) authorizing him to proceed with the works. From the evidence of PW3, PW4, PW5, PW6 and PW8, it is clear that the tender process for phase two was merely meant to sanitize execution of the works that constituted phase two by Mweha Enterprises Ltd. The evidence adduced by two forensic documents examiners who testified as PW9 and PW10, and the reports produced as prosecution exhibits 31 and 32 agree with the evidence of the accused person that indeed the accused person was the one who signed that letter dated 5/3/2012 which authorized Mweha Enterprises Ltd to proceed with the works. That was not only not procedural, but also unlawful.

In his submissions, Mr. Mutinda for the accused person submitted that the accused person did not act willfully and therefore lacked ***mens rea***. The submission is premised on the evidence adduced by the accused person to the effect that the letter was drafted for his

signature by project architect, and approved by the county architect who initialed for him to sign. He trusted his officers and had not been to the site. But it is also on record that the accused, from his testimony, knew that the works that had not been documented to be done in phase one of the project, and which were not covered under the 15% variation, were to constitute phase two. He testified that tender documents would be prepared in the county work officer's after bills of quantities are prepared so that the client could proceed with tendering process. But in this case, from the evidence outlined herein, even the Bills of Quantities had not been prepared by the time the accused person was signing exhibit 23. All indications, from the evidence on record, are that the accused acted knowingly when he signed that document. In any case, by signing the same he assumed responsibility for its contents.

Mr. Mutinda also submitted that the accused was not the one to comply with section 27(3) of the Public Procurement and Disposal Act because that was the responsibility of the client. His submission that the accused person was not an employee of the client (KENTRADE) is correct. However, from the evidence on record, he had a duty to ensure that an authorization to any entity

to proceed with the works was preceded by all prerequisite documentation like Bills of Quantities and preparation of tender documents and written confirmation from the client of award of tender to an entity before writing such authorization letter. The accused person herein is also caught by the provisions of section 20(1) (a) and (b) of the Penal Code, because he falls within definition principal offender in the circumstances of this case.

For these reasons I find that the evidence on record proves the first count against the accused person beyond reasonable doubt as required. I find the accused person guilty of the first count.

In relation to the second count, the point for determination is whether there is proof beyond reasonable doubt that the accused person abused his office as alleged in the particulars of offence to the said count reproduced herein. I have already found in the course of dealing with the first count that the accused person is a person employed by a public body as detailed in the evidence of PW11, which is also corroborated by the evidence of the accused person and of DW2. Indeed that fact is not disputed. I have also found that the prosecution has proved beyond reasonable doubt

that the accused person authorized Mweha Enterprises Limited to proceed with the works detailed in the particulars of offence to count number two even before the Bills of Quantities for the works was prepared, and before bids were prepared and submitted to the client namely Kenya Trade Network Agency, and even before a competitive bidding process could begin. These have been proved beyond reasonable doubt as is clearly explained in my analysis of evidence in regard to count number one herein above.

The key question is whether the accused person in so doing conferred a benefit to Mweha Enterprises Limited. From the evidence on record, the works were not paid for, as there is no contract document signed in respect thereof between Mweha Enterprises Limited and Kenya Trade Network Agency. The defence counsel submitted that there was no benefit, and the accused person stated so in his evidence. **Section 2(1) of the Anti-corruption and Economic Crimes Act** under which the second count is preferred defines 'benefit' as follows:

“benefit” means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.”

There is no doubt that the accused conferred an advantage to Mweha Enterprises Limited by authorizing it to proceed with the works that constituted phase two of the project. Mweha Enterprises Ltd did execute works irregularly as a result of the unlawful advantage, even before the bidding process began, and is now claiming payment for the works done in respect of phase two – and the court trying the civil case will certainly make a determination on the issue of whether or not Mweha Enterprises Ltd is entitled to the claim.

For these reasons, I find that the second count too has been proved by the prosecution against the accused person beyond reasonable doubt as required, and I therefore find the accused person guilty of the same.

In summary, I find the accused person guilty of each of the two counts aforesaid, and I accordingly convict him of the same under section 215 of the Criminal Procedure Code.

L. O. ONYINA

SENIOR PRINCIPAL MAGISTRATE

18.11.2016

Dated, signed and delivered in open court this 18th day of November, 2016 in the presence of the accused person, Mr. Mutinda for the accused person, Mrs. Kihoro for the prosecution, and Erick- court clerk.

L. O. ONYINA
SENIOR PRINCIPAL MAGISTRATE
18.11.2016

MRS KAHORO; He is a first offender. The prosecutions plea is that the court makes a sentence in accordance with the laid down law. That is all.

MR. MUTINDA (MITIGATION)

The accused person is remorseful. As pointed by the prosecution, he is a first offender. The accused person has worked for the Kenya government for thirty years. He has given good service. No complaint has been raised with this matter. We are praying for a lenient non-custodial sentence. As pointed out throughout the trial, not a single cent of the

tax payers money is lost or is going to be lost. We also pray that you consider that there is no allegation of the accused person benefiting in any way. He was simply a victim of the circumstances that led to this offence. No personal benefits accrued to him. I urge your honour to be lenient, and give a modest non-custodial sentence in this matter.

L. O. ONYINA

SENIOR PRINCIPAL MAGISTRATE

18.11.2016

SENTENCE: I have taken note of the fact that the accused person is a first offender. I have taken note of the mitigation made on his behalf by Mr. Mutinda Advocate. I have also noted the accused person demeanor during the trial. I have also taken into account the circumstances surrounding commission of the offences of which the accused person has been convicted. Although the court is not ignorant of public clamour to have those convicted of corruption related crimes sentenced to jail, each case must be treated based on its own peculiar circumstances and merits. I have also taken into

account the age of the convict. He says he is aged 57 years old. That is the response he has given when asked that question. I have also taken into account the sentences provided for the offences, under section 48(1) of the Anti Corruption and Economic Crimes Act which in this case is a maximum fine of Kshs. 1 million. That is in relation to non-custodial sentence which in this case, I consider merited. The economic gain derived from phase II by Mweha Enterprises Ltd is not easy to quantify because the evidence on record makes no mention of projected or estimated mark up the said company would derive from the works done for phase two of the project. Therefore in these circumstances the second leg of sentence provided at Section 48 (1) of the Act that relates to quantifiable benefit may not be practical to impose in the circumstances of this case. Taking all those into account, the convict is sentenced as follows;

(1) In relation to court number one, the convict is sentenced to a fine of Kshs. 700,000/= in default one year imprisonment.

(2) On count number two, the convict is sentenced to pay a fine of Kshs. 700,000/= in default one year imprisonment.

The accused is accordingly informed of his right to appeal within fourteen days from the date hereof if not satisfied with this Judgment, or Sentence.

L. O. ONYINA

SENIOR PRINCIPAL MAGISTRATE

18.11.2016

MR. MUTINDA; I apply for certified copy of the Judgment or sentence.

HON. ONYINA SPM

COURT - The proceedings be typed, and any of the parties may be supplied with certified copies of proceedings and/or Judgment upon payment of the requisite prescribed fee for the same to be assessed in the normal manner.

L. O. ONYINA

SENIOR PRINCIPAL MAGISTRATE

18.11.2016