



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

ANTI-CORRUPTION CASE NO. 7 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

GRACE AOKO OMOLO.....ACCUSED

JUDGEMENT

The accused, **Grace Aoko Omolo** is charged with three counts of *abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003*.

The Particulars of the **1st Count** are that on diverse dates between *10th day of March, 2010* and *11th May, 2010* ; at Jogoo House in Nairobi within Nairobi Province, being the Deputy Director Human Resource Management at the Ministry of Education used her office improperly to confer benefit to *Edith Akoth Odera, Augustine Ochieng Anyona, Elizer Gesare Nyagacha, Edna Moraa Bitange, Edward Odek Odera, Ann Chelimo Too, Eric Mutashe Nganyi, Jacinta Auma, Willis Odhiambo Okumu, Victor Odhiambo Ongosi, Lydia Kwamboka Ombui, Sarah Nyaboke Onger, Damaris Achieng Amonde* by issuing them with letters to attend interview while knowing they were not among those shortlisted and published candidates for vacant posts advertised by the said Ministry.

The particulars of the **2nd count**, which is also an abuse of office charge, allege that on diverse dates between *29th March 2010* and *1st April, 2010* at Jogoo House in Nairobi within Nairobi Province, being the Deputy Director Human Resource Management at the Ministry of Education used her office to improperly confer a benefit to *Nyamweya Stephen Manani, Lwya Raphael Mutuku, Mburu Wilson Njoroge, Kelvin M. Oongo, Hillary Kipkemei, Edward Nyangau, Francis Wambua Mwinzi, David Murithi Muchangi, Samuel O. Nyakundi, Geoffrey N. Gichana, Mungai Mburu George, Robert Ouko Abich, Munyao Peter Muinde, Nduda David Nzivo, Miunde Simon Kimuli, Miruka M. Neville, Abuta Walter Otieno, Wangukwa Caleb Omondi, Njiru Weddys Kwanusu, Peter Okoth Arando, Byron Jabura Odondi, Erikana Manyara Makori, Mokabi Evans and Omolo Okoth* by issuing them with letters to attend interview while knowing that they were not among those officially shortlisted and published candidates by said Ministry.

In the **3rd count**, the charge is equally that of abuse of office and particulars are that on diverse dates between *1st day of July, 2010* and *26th August, 2010*; at Jogoo House in Nairobi Province, being Deputy Director Human Resource Management at the Ministry of Education used her office to improperly confer benefit to *Willis Odhiambo Okumu, Edward Odek Odera and Damaris Achieng Amonde* by issuing them with letters of offer of appointment to the said Ministry while knowing that they were neither among those officially shortlisted for interview nor successful for employment after such interview.

A brief outline of the facts of the Prosecution case against the accused as is discernible from the evidence presented is that sometime in 2009; the Ministry of Education was desirous of filling various lower cadre vacancies namely clerical officers, support staff, senior support staff, adult education teacher II, library assistants, store men, coxswain II, artisans and drivers. Those positions were advertised in the newspaper sometime in May, 2009 inviting applications. The total number of advertised posts was 2,660.

The advertisement attracted 204, 620 applications (see P. Exhibit 39).

As at the time data entry into HR data base was completed, P. exhibit 39 shows that **144,667** applicants (*over half of the applicants*) had met the necessary academic criteria.

A ***Pre-Selection Technical Committee*** of ten members chaired by Noor Aden Noor (PW 8) was appointed by the then Permanent Secretary, Prof. Edward Karega Mutahi (PW 6). Its membership was drawn from Human Resource Management Division, Administration and Directorates. The Secretary was the Head of Human Resource Management Division Mrs. Grace Omolo, the accused herein. The ***Pre-Selection Committee*** main responsibility was shortlisting of suitable candidates by ensuring they met the minimum academic qualifications and also reflected the face of Kenya. A key deliverable of this mandate per P. exhibit 39 was the production of ***“names of shortlisted candidates to be published in the daily newspapers and technical report highlighting how the exercise was conducted.”***

The final phase of the recruitment exercise was to be overseen by the seven (7) member ***Final Selection Committee*** also Chaired by Noor Aden Noor (PW 8) with the accused as its Secretary. Its main deliverable was to ***“to come up with a list of selected candidates to fill the various lower cadre posts in the Ministry of Education.”***

Notwithstanding this elaborate design of the recruitment exercise, various complaints on integrity of the process were raised at the time the exercise was coming to an end. The Chairman and Secretary of the Final Selection Committee differed on the manner the final selection exercise was done, there were also complaints from the general public and some Chairmen of Interviewing Panels.

The Chairman of the Final Selection Committee documented his misgivings and shared them with the Permanent Secretary by way of memos.

Efforts by the Permanent Secretary to bring the members of the committee together resolve those issues internally failed for what the prosecution blamed on lack of cooperation on the part of the accused.

Amidst overwhelming number of complaints, the Permanent Secretary ordered an Internal Audit Investigation of the entire recruitment exercise. The Audit Report (***P. exhibit 10- Preliminary Report and P. Exhibit 74-Final Audit Report***) confirmed there were massive irregularities that marred the credibility of the exercise; they included:

- Issuing interview letters to persons who were not in the official published list of shortlisted candidates to enable them attend the interviews
- Issuing letters of appointment to persons who were neither shortlisted nor interviewed

The Audit Report was brought to the attention of Ministry of Finance and the Public Service Commission and in the correspondence that were exchanged between the Ministry of Education and the two Institutions of Government, investigations by KACC were recommended and at one point, the Public Service Commission also ordered a nullification of the entire exercise.

The Permanent Secretary, Prof. James Ole Kiyiapi who had just joined the Ministry just as the exercise was about to conclude appealed the PSC decision citing the ***“social/psychological, political and economic consequences including disruption of Ministry Programmes”*** which the PSC action was bound to cause.

After a series of correspondences the Ministry was directed by PSC to ensure some of the glaring irregularities that had been committed were dealt with. Those candidates who could not be cleared after vetting exercise recommended by the Public Service Commission were terminated but some were cleared. Public Service Commission nevertheless insisted on thorough independent investigations by KACC to bring those who were responsible for the mess that was witnessed to book.

Caroline Wanjiku Mugo (PW 4) testified that she reported to the Ministry of Education in October 2010 to take over as the Head of Human Resource Department from the accused. However, no official hand over took place. She said:

“...There was no official hand over or taking over. The keys were left with Secretary two weeks (sic) not known to me...”

At the time, the recruitment exercise had just been concluded and the Permanent Secretary had just called for an audit to be done following numerous complaints via his letter of **12/10/10- P. exhibit 7**.

Preliminary Internal Audit came out on **10/11/2010- P. exhibit 10** and from the said audit report, **PW 4** prepared her own summary and compiled a report proposing to the Permanent Secretary how the irregularities discovered could be tacked. Her said report was dated **17/11/2010- P. exhibit 6**. On that very day, The Permanent Secretary Treasury letter of 17/11/2010- P. exhibit 11 was received at the Ministry. It was copied among others to Ministry of State for Public Service and KACC among others and it was formally conveying the audit findings that had been drawn to its attention.

The Permanent Secretary Ministry of Public Service in a letter dated **24/11/2010- P. exhibit 12** directed that allocation of personal numbers to recruited staff be suspended. It was followed by another letter dated **14/12/2010- P. exhibit 13** where the Public Service Commission nullified the recruitment and ordered that the positions be re advertised for competitive filling in strict compliance service regulations and instructions.

The Permanent Secretary, Ministry of Education Prof. Francis Ole Kiyaipe wrote appealing the PSC decision on **16/12/2010- P. exhibit 14**.

The Public Service Commission in a letter dated **19/1/2011- P. exhibit 15** conditionally accepted the appeal. Some of the conditions that were to be met included:

- 436 candidates not shortlisted but appointed be rigorously screened to determine their eligibility for appointment
- 239 candidates whose names appeared as successful but not issued with appointment letters be appointed to service
- 344 candidates un-procedurally appointed be engaged on temporary service and discharged by 31/1/2011.
- All 98 vacant posts for driver III be re-advertised for competitive filling
- Persons procedurally recruited be deployed accordingly, that is, 1586.
- The Kenya Anti-Corruption Commission to conduct independent investigations expeditiously.

By way of Internal memo dated **25/1/2011- P. exhibit 16**; **PW 4** wrote to the Permanent Secretary Ministry of Education on the way forward. In the meantime, the Public Service Commission extended the termination date for those not suitably recruited through its letter of **16/3/2011- P. exhibit 18**- from 31/1/2011 to 30/4/2011.

Following scrupulous and methodical screening exercise, a report dated **27/4/2011- P. exhibit 19** was compiled and forwarded to the Public Service Commission via the cover letter- **P. exhibit 20**. Key highlights of this report were 2073 candidates be absorbed while 837 were found not to have been properly recruited.

Upon receipt of this report, the Public Service Commission directed in its letter of **18/5/2011- P. exhibit 21** that:

- Appointment of 1734 candidates procedurally recruited along 339 candidates who were eligible for appointment
- Termination of irregularly recruited candidates w.e.f 30/4/2011.

On **30/5/2011** a meeting attended by among others the Minister for Education, the Minister of State for Public Service and their Permanent Secretaries as well as **PW 4**, Carol Mugwe; Noor Aden Noor (**PW 8**) and Willis Otiemo was held where among the issues of deliberation was an appeal to Public Service Commission to reconsider the decision on 837 candidates it had directed be terminated for having been illegally and un-procedurally recruited.

After the meeting the Permanent Secretary in the Ministry of Education wrote to the Public Service Commission on 1/7/2011. PSC declined that request by the letter of **13/7/2011- P. exhibit 25** and reiterated the contents of it letter of 18/5/2011- P. exhibit 21. PSC only varied its decision to allow one appeal by a Ms. Mwatsuma Eunice Anzazi via its letter of **20/7/2011- P. 26** thus effectively reducing the number of those to be terminated to **836**.

By his letter of *15/8/2011-P. exhibit 27*, the Permanent Secretary Ministry of Education forwarded what he described as final report of verification exercise in which he asked for absorption of 91 persons out of the 837 recommended to be terminated and for removal of 150 names he said were repetitions so that the final list of those to be terminated was to be maintained at 596. He also requested that the effective date of termination be extended to 30/8/2011.

Public Service Commission rejected these requests vide its letter of *24/8/2011- P. exhibit 28*.

Through a letter dated *7/9/2011- P. exhibit 29*; the Permanent Secretary Ministry of Education wrote to Public Service Commission informing it about a Court Order stopping the termination of the 836 candidates.

PSC responded by its letter of *14/9/2011- P. exhibit 30* advising as follows:

- The Court order in Industrial Case No. 1607/2010 was issued on 29/8/2011 long after the Commission's which extended the effective date of termination of services of affected staff to 30/4/2011
- Rejected request for payment of dues up to August 2011 including one month in lieu of notice
- Upheld its decision conveyed via its letter of *24/8/2011- P. exhibit 28* and reiterated that the case remains closed.

Most of the letters referred to above by PW 4 were produced in evidence by the Permanent Secretary, *Prof James Ole Kiyapi (PW 5)*. He produced prosecution exhibits- *7,8,9,10,11,12,13,14,15,18,20,21,22,23,25,26,27,28,30,31,32 and 33*. *PW 4 Caroline Wanjiku Mugo (PW 4)* on the other hand produced *P. exhibits 6, 16 and 17*.

On Cross-examination PW 4 said she was introduced to the accused on 8/10/2010 which was a Friday and took over on 11/10/2010 as the Head of Human Resource.

Prof James Ole Kiyapi (PW 5) testified that he reported to the Ministry of Education in June, 2010 where he worked until April, 2012. He found the recruitment exercise almost completed. He described how it was brought to his attention in the following words:

“...I received briefing from Grace Omolo, Head of Human Resource the the recruitment was complete and I was required to put my signature to the final list to mark the completion of the exercise. In the meantime there had been complaints from persons who claimed they had been shortlisted, left out of interviews. Some of the members of Parliament also raised complaints that persons from their regions had been left out. Some members of staff who had participated in the recruitment exercise also complained of being dissatisfied with the exercise. I asked those who had taken part in the exercise to form a committee to address the complaints with the intention of rationalizing the final report. The team was unable to deliver the mandate after members fell out with the Head of Human Resource. I then tasked the Internal Auditor to conduct audit of the exercise and it revealed malpractices which drew reactions from other departments including Permanent Secretary Treasury...”

Several correspondence were exchanged between him and other concerned departments including Public Service Commission culminating in the nullification of the recruitment exercise via the letter of PSC dated *14/12/2010- P.exhibit 13*. He appealed that decision which he explained was informed by the following reasons:

“...The letter generated a circus and I even received death threats. As a Ministry we were of the view that cancellation was (not) a solution as there were aspects of exercise that were well done, further, we felt we would also be punishing innocent job seekers hence on 16/12/2010, I appealed the Public Service Commission decision...”

On cross-examination he admitted there were resultant challenges which could not be attributed to one person but on the data he said:

“...Grace was the chief custodian of the data, to that extent she was responsible, but there were other people involved in shortlisting, interviews, this mess arose because of confusion in data arising from interview panels which were many...”

He was also shown some notes to which it was suggested that he had also tried to interfere with the process by recommending their employment. In respect to one of the notes he replied:

“...That note I wrote when a Camera man I found at the Ministry complained he had been left out, I wrote and said: ‘take the camera man as a clerk under replacement process, he meets the basic qualifications’...”

On another note showed to him, he stated:

“...This candidate was introduced by an MP; I marked it to Deputy Director Human Resource Management to consider regional balance. This candidate complained of having been left out...”

Concerning the transfer of the accused to the Ministry of Labour, he said he was not privy to circumstances that necessitated her being moved with immediate effect. He nevertheless explained:

“...Grace refused to comply with transfer regulations, she played hide and seek, refused to prepare the handing over report forcing us to resort to locking her out of office...there was no proper handing over from accused to incoming human resource because of lack of cooperation from the accused...”

On overall assessment of the exercise, he said:

“...836 were sent away. The exercise was not totally wasted courtesy of my intervention. The wish of the Ministry was to have all candidates absorbed, but the Public Service Commission rejected our request. There were some not qualified. All we did was to manage a difficult situation. Eventually, we were able to account for the process, but this does not rule out that there were those who were recruited under questionable circumstances, Grace is accountable for herself...”

In re-examination, he asserted:

“...Grace was Secretary of Interview Committee; she was custodian of the data...”

Prof. Edward Karega Mutahi (PW 6) who was Permanent Secretary Ministry of Education from February 2003 to February, 2010 stated that he initiated the request for funding to recruit staff in the Ministry by his letter to the Ministry of Public Service dated *13/1/2008- P. exhibit 34*. The same was approved by the Ministry of Public Service by its letter dated *5/2/2009- P. exhibit 35* allowing the recruitment in financial year 2009/2010. The Ministry of Education advertised the vacancies. He appointed **Aden Noor Aden (PW 8)** to Chair the Committee that was to oversee the keying in of the applicants details but before the process got to the next level he was moved to another Ministry.

Aden Noor Aden (PW 8), a Deputy Secretary at the Ministry of Education at the time told this Court that he was appointed to Chair the selection committee that comprised of representation drawn from Administration and Department of Human Resource by the then Permanent Secretary, Prof. Karega Mutahi. The mandate of the Committee was to ensure the keying in of the applicants for the lower cadre positions and also ensure all those qualified were shortlisted. They were assisted by data entry clerks from TSC to enter the data.

Shortlisting was done and about 12,000 candidates were shortlisted and their names published in the newspaper.

Interviewing panels were constituted and interviews undertaken. Upon completion of interviews, a retreat at the Kenya School of Monetary Studies was scheduled for 1st of June to 10th June, 2010 for purposes of carrying out the selection of successful candidates. However, the Committee could not complete the exercise and PW 8 explained what transpired as follows:

“...we were not able to complete the exercise in the given time as process was tedious and the numbers we were dealing with were many. I advised we continue the exercise back in our offices, but madam Grace said we could not continue as ICT officer was tired and she took all the data in soft copy saying she was going to complete the exercise. The move was against our TOR as well as collective mandate. The whole process was to be completed by the team and not individual. Dissatisfied

with the move by Mrs Omolo, I wrote to Acting Permanent Secretary, Magdalene Wambua reporting on the exercise and pointing out the anomalies...”

The memo referred to above is the one produced by PW 8 dated 21/6/2010- P. Exhibit 38- entitled “*Brief on the Final Selection of Suitable Candidates for lower posts*” where he addressed to the Acting Permanent Secretary as follows:

“...As you are aware the Committee which was appointed to undertake the above exercise went for retreat from 1st to 10th June, 2010 at Kenya School of Monetary Studies to complete the final selection of candidates for the above posts.

Our mandate was to ensure that a balanced, fair and equitable distribution of posts to all districts be done within the stipulated time frame. The final report was to be handed over to you for approval and thereafter the successful candidates was to be disseminated through media to the public.

However, this did not happen. On the last day of the retreat i.e. 10th June, 2010; the Committee had partly done the listing of successful candidates according to the agreed allotment quotas to the districts.

I advised that before we leave the venue we should ensure that distribution of posts to all districts be fairly balanced and no unfilled gaps should be left.

The DDHRM did not agree claiming that ICT officer was fatigued and not in a position to assist in concluding the list of successful candidates. This was not tenable as we could have continued with the exercise the following day and finished it in the office.

Instead, she carried all data and told us she was going to singularly write the report and do the balancing of all posts for all districts on her own at an undisclosed venue. This was in total disregard of terms of reference and collective mandate of recruitment committee.

I had verbally briefed you on those anomalies and before you left for an overseas trip you instructed the DDHRM to present the report to you on your return.

It was after lapse of the 1st week i.e. 17th June, 2010 since the end of the retreat that DDHRM sent me a copy of her report for editing and return to her. On the same day in an exasperated and frantic move, DDHRM alleged that the Ministry of State for Public Service (MOSPS) wanted to cancel the posts and that in order to forestall this she would seek SDS/B and Assistant Minister’s approval for the list of successful candidates to be published urgently in the Daily Nation.

You were briefed accordingly on the same day by SDS/B. On your return I updated you on the issue and pointed out to you that there were serious flaws in the report done by DDHRM...”

The memo then proceeds to pin-point the specific flaws and ends with the following recommendations:

1. That distribution of successful candidates for all cadres done by DDHRM without involving the Committee be cancelled
2. That the recruitment committee redress this anomalous situation by rationalizing and correcting the distribution lists of successful candidates
3. That the committee adopts pro-rata quota formula in distribution of posts to ensure rationalized balanced and fair distribution of posts to all regions of the Country.
4. That affirmative action in terms of gender, disability and marginalized areas be effected
5. That the corrected version of final report by the committee be submitted to MHRAC for ratification/adoption and

thereafter forwarded for approval before release to the public.

Way forward

In tandem with Government policy of eradicating tribalism and nepotism in recruitment of personnel, it is imperative we dispose of this recruitment in most judicious manner as expected by the public.

Submitted to you for your advice and guidance

NOOR ADEN

CHAIRMAN- MINISTERIAL RECRUITMENT COMMITTEE

Noor Aden (PW 8) testified that despite his spirited protestation and refusal to append his signature re to the final report on account of issues raised, Mrs. Omolo (accused) went ahead and forwarded that report of *21/6/2010- Final Selection Report of Suitable Candidates For Lower Cadre Posts- P. exhibit 39.*

In August 2010, the then Permanent Secretary, Prof. James Ole Kiyiapi directed the Committee to carry out a validation exercise of the process following various complaints.

PW 8 called a meeting of all the Chair Persons of interviewing panels and their Secretaries. He also wrote a memo to Mrs. Omolo (accused) to avail all the data and reports from the interviewing panels.

Mrs. Omolo (accused) asked for time to avail the data but even after time was extended, she neither availed the data nor attended the meetings. That is what prompted **Noor Aden (PW 8)** to write the memo to the Permanent Secretary on *30/8/2010- P. exhibit 40* citing lack of cooperation on the part of the accused. The memo forwarded through Director of Administration reads:

RE: Verification Exercise of Clerical Officers, Adult Education Teachers, Drivers, Artisans/Coxswains and Mechanics and Support Staff?

Sir, please refer to the meeting held in your office on 12th August 2010 on the above subject matter which you directed that I chair this committee with DDHRM as the Secretary and other Panel members and come with a report within two weeks.

I called a meeting (copy of the memo attached) and most of the members turned up except DDHRM. I reported this to Director of Administration who summoned Mrs. Omolo to her office to explain her non-attendance in the meeting. She claimed she could not attend the meeting because of the short notice and that she had not assembled all data required and information of all recruitment panel members of the meeting on 17th August.

After consultation with Director of Administration, it was agreed that the meeting be postponed to 24th August, 2010 and DDHRM was tasked to convene the meeting and ensure that all documents used in the recruitment are availed for the exercise.

On 19th August, 2010, I put a reminder to DDHRM, being the Secretary of the committee to call for the meeting of all panel members on 24th August, 2010 as agreed with Director of Administration. She never called for a meeting and never gave me any explanation as the Chairman of the Committee.

I therefore wish to bring this to your attention that this exercise cannot take place due to lack of cooperation and failure of DDHRM to produce the reports which were submitted to her office by all Chairmen of recruitment panels after the interview.

NOOR ADEN

DS/A

CHAIRMAN ON VERIFICATION EXERCISE ON RECRUITMENT.

In January 2011, after the Public Service Commission ordered a screening exercise to be carried out to determine candidates who had been procedurally recruited, Aden Noor Aden was appointed by the Permanent Secretary to chair the Ministerial Recruitment Vetting Committee as per the letter appointing the committee- *P. exhibit 41*.

The Committee came up with the report- *P. exhibit 19*. Other documents produced by him included those that he had made reference to *P. exhibits 38, 40, 41, 19 and 39*.

On *cross-examination* he was categorical he was not participator in the making of the *final selection of suitable candidates for lower cadre post report- P. exhibit 39*.

On being shown the letter dated 21/6/2010- DMFI-3 seeking the approval of the list to be run in the media, he said:

“...I see this; the document was received by Ambassador Wambua. She remarked “approved.” The author was asking for approval and guidance. This was so that the list could be run in the media...”

PW 8 denied having any personal differences with the accused.

Geoffrey Karuru Gachoka (PW 14) a Principal Internal Auditor at the Ministry of Education testified that he was posted to the Ministry in October, 2009 where he found recruitment of lower cadre staff on going.

He testified that in October 2010 the Permanent Secretary asked him to investigate the recruitment exercise. He put together a team that examined various documents used in the recruitment among them the advertisement in the Daily Nation Newspaper of 1/3/2010-*P. exhibit 36*, report on final selection of suitable candidates of lower cadre staff- *P. exhibit 39*, published media version of final selected candidates dated 23/6/2010- *P. exhibit 37* among others.

He first compiled the draft internal audit report dated *10/11/2010-P. exhibit 10* followed by the final audit report of *8/12/2010-P. exhibit 74* which was forwarded to the Permanent Secretary by a letter dated 10/12/2010- *P. exhibit 75*.

Among the key findings of the audit were:

1. 436 candidates in the final list of successful candidates had not been shortlisted for interviews. They were not in the advertised list of shortlisted candidates as per print media dated 1/3/2010- (P. exhibit 36).

- **This defeated the whole purpose of carrying out the shortlisting exercise.**

2. 344 candidates out of the list of selected as per the print media advertisement of 23/6/2010-Daily Nation- (P. exhibit 37) had been appointed.

- **No formal authority approving these appointments was adduced nor was there any evidence of any candidates who may have been placed on the waiting list.**

3. About 239 candidates were successful after the interview and had their names placed in the print media of 23/6/2010- (Daily Nation- P. exhibit 37) but did not receive any formal appointment.

- **This was big number to be assumed to have declined the offer and it was prudent for management to give reasons for every specific case.**

4. Irregular recruitment of drivers-

-60 candidates recommended for appointment were replaced by people who were not shortlisted for interview, did not attend the interview or had been disqualified by interview panel on various grounds.

5. There were also documented allegations of corruption but the audit team could not verify such cases to the extent possible as it required other arms of Government to carry out more detailed investigations.

Some of the recommendations made in the audit report were:

1. Since the Ministry operated under authority of Public Service Commission on issues of recruitment, the matter be referred to PSC for further direction.

2. That given the attendant risks associated officers being driven by drivers whose competence and credibility cannot be guaranteed, the Permanent Secretary should take decisive action with a view to mitigating the risk thereof.

3. That the Ministry should move fast in addressing these issues with a view to address any inconveniences on the part of those genuinely recruited.

On challenges encountered, he the report noted:

“...a lot of information needed for this exercise to bring out all the issues in the best manner possible those documents were not forthcoming...”

The missing documents included the general file recruitment committee minutes and soft copy of various data captured at different levels in recruitment process as there was no proper handing over between the current and former head of Human Resource Department at the Ministry. He produced the final audit report and the letter forwarding the same as *P. exhibit 74 and 73* respectively.

On cross- examination he was asked who was responsible for the missing documents, he stated:

“...Those were confidential documents and could only be in the hands of one person, the person in charge of recruitment process...”

Asked if he interviewed the accused, he said:

“...I called the Head of Human Resource to discuss with her, she declined, that is the accused...”

He was confronted with a handwritten note he had allegedly authored requesting employment of 3 people, he responded:

“I recognize the handwriting. The names are Winnie Wanjiru, Diana Kagenzi, Jacob Muthangia.”

Asked if one of the three was his wife, he admitted. He answered:

“...Yes, Lucy Wanjiru Winnie is my wife. She was employed, she is still there. As to other two, one was employed and the other was not. The one who is employed is Lucy Wanjiru Winnie and Diana Kagenza. The intent of this note was to find out if they were successful in the bid to be employed. They were Kenyans who had qualified and had gone through interview process. I wrote this note to Madam Omolo. They went through interviews. I never saw their score cards...”

Questioned about his relationship with the accused, he disclosed:

“...I am at pain to have Grace Omolo in Court standing beside me. We were together in school. I would not be malicious to her. She was a friend...”

On re-examination he was asked if the documents he relied on were enough to make recommendations he made in his report despite the fact that some were not availed, to which he replied:

“...these documents I relied on suffice. May be those other documents not availed would have assisted to unearth other irregularities but for purposes of this audit, the ones we got sufficed...”

Gregory Onyango Okal (PW 11) was the transport officer at the Ministry of Education at the time. On 8/3/2010; he was appointed the Chair of the interview panel that was to conduct interview drivers. The Ministry of public works seconded two instructors to assist him. Those interviews took place in March/April 2010. He said out of 298 candidates that were shortlisted, nearly all turned up.

However, as the interviews went on, people who were not in the list of shortlisted candidates came with letters from Grace Omolo (accused) which requested that they be interviewed. Those were 25 in number. He produced the said letters in Court as **P. exhibits 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68**. The 26th letter was authored by Mrs. Ronah who was accused deputy- **P. exhibit 69**.

As panelists, he testified that they decided to interview the late entrants but did not grade them.

After the interview, they prepared a report which they submitted to the accused- **P. exhibit 42**.

When the names of successful candidates were published in the Daily Nation of **23/6/2010- P. exhibit 37** he compared those names against those he had submitted.

He noted that some names appearing in the daily nation list were neither shortlisted nor interviewed yet they appeared as successful candidates.

Others listed as successful are those they had interviewed but had decided not to grade since they were not in the list of shortlisted candidates.

The list of successful candidates had also omitted names of candidates they had graded as successful.

He compiled a report- **P. exhibit 70** that showed persons, who despite being reflected as successful did not apply, were not interviewed or were disqualified during the interview. This list comprised **31** individuals.

He also compiled another list of **60 drivers - P. exhibit 69** who had been interviewed, passed the interview but had not been issued with appointment letters.

He passed this information to the Chair of the Selection Committee – Aden Noor (PW 8).

A meeting was called by the Permanent Secretary where he directed that the results of the interview be verified. Subsequently Noor called two meetings but they all flopped due what the witness said was accused’s lack of cooperation. He stated:

“...Mr. Noor twice called the meeting but Mrs Omolo failed to turn up forcing Mr. Noor to inform the Permanent Secretary that we were unable to do so because of Mrs. Omolo’s lack of cooperation...”

Asked why he acted on request to interview people who were not shortlisted, he said:

“...I was avoiding being accused of insubordination. It was about knowing how to handle the situation...”

Elizabeth Wairimu Njihia (PW 1), Michael Gachie Chege (PW 3), Julius Otieno Oloo (PW 9) were all human resource assistants in the Ministry of Education working under the accused, Grace Omolo. They participated in the exercise on her instructions.

Their evidence concerning the process was similar. They stated that every morning they would pick the applicants list. They would ensure results of every interviewee were recorded in the score cards. In the evening, they would surrender the score cards to Grace Omolo.

Elizabeth Wairimu (PW 1) stated:

“We were reporting in office and picking list of applicants...I would record the score cards and later surrender back all documents to Grace Omolo...”

Michael Gachie (PW 3) said:

“...There were other candidates not shortlisted. They were given letters by Grace Omolo. We interviewed them on the strength of the letters by Grace Omolo. We gave marks on the score sheet. We would sign the score sheet and forward to Madam Grace Omolo...”

He identified and produced one letter dated *22/3/2010- P. exhibit 5*.

Julius Otieno Oloo (PW 9) testified:

“...at the end of the day, we would synchronize the score cards after which we would file the cards plus letters introducing candidates and thereafter we would surrender these to the office of DDHRM...”

Andrew Amanga Nyancho (PW 29) a Director of Human Resource at the Ministry of Education produced accused's employment records as P. exhibit 101- promotion letter dated 11/12/2009 and related letters that conveyed that decision *P. exhibit 102* and *103*.

Victor Odhiambo Ongosi (PW 12) and **Edith Akoth Odera (PW18)** testified that their names were not shortlisted though they applied for the advertised jobs. They followed up and were issued with letters signed by the accused allowing them to attend the interview. After the interviews they were successful and were issued with appointment letters.

Eric Mtashe Nganyi (PW 19) testified as much and exhibited the appointment letter- *P. exhibit 86*.

Augustine Ochieng Anyona (PW 21) also testified that he applied for the job of clerical officer II but his name was not among the shortlisted candidates list in the Daily Nation of 1/3/2010- *P. exhibit 36*. However he later received a letter through the post office dated 30/3/2010 signed by Madam Grace Omolo (P. exhibit 90) informing him to attend interview. He attended and when the list of successful candidates was advertised in the Daily Nation of 23/6/2010 (P. exhibit 37) his name of there. He was issued with appointment letter dated *1/7/2010-P. exhibit 91*. He was also issued with posting letter dated *15/7/2010-P. exhibit 92*.

Sarah Ongeri Nyaboke (PW 23) said she had applied for the job of Senior Support Staff after she saw the advert. Her name was not in the list of shortlisted candidates advertised in the daily nation. She got a letter through the post office inviting her for the interview which she did. She succeeded and was issued with an appointment letter dated *9/7/2010-P. exhibit 93*.

Lydia Kwamboka ombui (PW 24) applied for the senior support staff but her name was not among those shortlisted. She nevertheless received a letter through the post office inviting her to go for the interview. Later she was issued with appointment letter on being successful during the interview.

Edna Moraa Bitange (PW 25) also testified she applied for senior support staff position. Her name did not feature in the names of shortlisted candidates but was issued with a letter to attend the interview where she emerged successful.

Jacinta Auma (PW 26) testified that she applied for clerical officer II position in response to the advert but her name did not appear among the shortlisted names that were published in the newspaper. She visited the Ministry of Education and was issued with a letter signed by Mrs Grace Omolo to enable her be interviewed. She was successful at the interview and was subsequently issued with an appointment letter dated *1/7/2010-P. exhibit 92*.

Ann Chelimo (PW 27) and **Elizer Gesare (PW 15)** gave evidence that similar to the other candidates above. Ann Chelimo (PW 27) produced in evidence her letter of appointment – *P. exhibit 95*.

Edward Odek Odera (PW 16) testimony was that he applied for the job of senior support staff but was not shortlisted. He followed up the matter with the Ministry of Education and was advised to leave his documents at the Ministry. Later on, he was called to go and collect his letter of appointment. He disclosed:

“...After that, I was called. It was about three weeks. I was told I go and pick the appointment letter and I was given...”

He produced the appointment letter dated *16/9/2010-P. exhibit 80* and his posting letter as *P. exhibit 82*. He worked for seven months and his appointment was revoked.

Damaris Achieng Amondi (PW 17) testified that she applied for the position of adult education teacher but was not shortlisted. She decided to travel to Nairobi to follow up with the Ministry where she was advised to leave her documents. Later she was called by the DEO's office and issued with posting letter dated *9/9/2010- P. exhibit 83* posting her to Bondo. She also produced the letter confirming she reported on *15/9/2010- P. exhibit 84*. Her appointment was subsequently revoked through a letter dated *27/9/2011- P. exhibit 85*.

Willis Odhiambo Okumu (PW 20) evidence was that at the time he saw the advert in the newspaper he was already late to apply. He nonetheless went to the Ministry and requested if he could be given an opportunity. He described this trip to the Ministry as follows:

“...I went to the Ministry and requested for an opportunity. It was already late. I left my photocopies at the Ministry. I left them with Madam Grace Omolo. I later got a phone call from the Ministry. I cannot recall who called me. He did not tell me his name. He asked me to go and pick the appointment letter. I picked it. I accepted it. I was posted to Migori District Education Office...”

He produced in evidence the letter of appointment dated *25/8/2010- P. exhibit 87*, a file copy thereof as *P. exhibit 87 (a)* and a posting letter dated *31/8/2010-* as *P. exhibit 88*, the file copy thereof *P. exhibit 88 (a)* and a termination letter dated *27/9/2011 as P. exhibit 89*.

On cross-examination he was challenged on his evidence that he met Madam Grace Omolo during his visit, to which he replied:

“...I went to Grace Omolo's office. I knew her that time...”

Benedict Mwhaki Nzioki (PW 30) told this Court she was the Secretary Public Service Commission between February, 2005 to October, 2012.

She explained that although PSC Commission is mandated by the Constitution to recruit, appoint, confirm in appointment and discipline public officers; in exercise of those functions it delegates some of its powers to the Permanent Secretaries who it refers as *authorized officers*.

This was particularly in appointment of persons from in job groups **A** to **L**.

In performance of these functions, they are guided by Public Service Commission Regulations. She produced the PSC regulations of 2005 as *P. exhibit 104*.

She further produced a letter dated *19/11/2008- P. exhibit 105* which the Commission had circulated to all authorized officers instructing them on monitoring of recruitment under delegated powers. In particular, the letter instructed that:

1. All shortlisted candidates are interviewed
2. Interviews are carried out in an objective and transparent manner
3. Consideration be given to gender disability and regional balance
4. Vacancies be advertised and public advertisement be done in media with wide coverage to reach all potential applicants
5. Adequate notice of at least 3 weeks be given to all applicants to apply

She made reference to various correspondence between PSC and the Ministry of Education and produced those letters as *P. exhibits-104, 105, 106 a & b, 107, 108, and 110 respectively*.

On cross-examination she said the Permanent Secretary was contact person between the Ministry and the Public Service Commission. She explained:

“...The authorized officer was the Permanent Secretary. That was the only person the Commission would deal with and hold accountable and the Permanent Secretary Ministry of State for Public Service as all Human Resource officers fell under him. I would call any junior officers, rarely...”

Stephen Yego (PW 28) produced the document examiner’s report dated *17/3/2017- P. exhibit 100* on behalf of his colleague Gideon Rukaria. The exhibit memo which forwarded the exhibits for examination was *P. exhibit 96*. The signatures on the documents marked A1 to A29 (which for purposes of these proceedings are those that were produced as P. exhibits 44, 45, 46,47, 48,50,51,52,53,54,55,56,59,60, 61,62,63,64,65,66,67,68,87 (a),91 and 73) were compared by the document examiner with known signatures of the accused in C1 & C2 i.e. P. exhibit 97 and 98 together with the specimen signatures B1 to B4 which were produced as P. exhibit 99 (a) to (d).

In the opinion of the document examiner the individual characteristics in the said signatures demonstrated forensic evidence of common authorship.

The investigating officer, **Jeremiah Arondi (PW 31)** testified that investigations in this case were triggered by a letter dated *17/11/2010- P. exhibit 11* where the Permanent Secretary Ministry of Finance brought the issue of the audit report to the attention of Director- KACC.

He was appointed as the lead investigator in the case. He visited the Ministry and interviewed the PS Prof. Ole Kiyapi and other officers involved in the recruitment process. He also looked for some of the candidates who had participated in this recruitment and interviewed them.

He also requested for the documents used and any correspondences exchanged concerning the said recruitment to gather more information.

He finally made his findings and recommendations which were reviewed by the Legal Directorate of EACC and subsequently concurred with by the DPP leading to arraignment of the accused in Court to answer to the current charges preferred in the charge sheet.

On cross-examination it was put to him that the effect of the Public Service Commission letter of *19/1/2011- P. exhibit 15* in allowing the Ministry's appeal was to validate the recruitment exercise which he refuted, he answered:

"...There were many issues on this letter and no.4 restated the need for KACC to conduct investigations..."

On being suggested to him on cross-examination that the accused acted within her mandate, he stated:

"...There were instances accused acted outside her mandate...she issued letters to persons who were not shortlisted, letters of offer and posted them. That was outside her mandate. That was not corrected on appeal. In every letter PSC wrote, it still insisted KACC conduct investigations irrespective of directive given..."

He denied he had chosen the accused as the sacrificial lamb saying at the point these investigations began, accused was not even known to her.

He revealed on re-examination that he had even recommended investigations to be carried out on Public Officers that had written notes to canvass for the employment of some people in the said recruitment. He said:

"...I wrote to our Internal Directorate to carry out investigations on Public Officers who were mentioned in their attempt on actions or influencing process of recruitment..."

On 20/7/ 2018, **Grace Aoko Omolo (D.W. 1)** who is the accused herein gave sworn evidence in her defence. This was after this Court gave a ruling on 25/5/18 placing her on her defence.

She stated that she has worked as a Human Resource Officer since 15/1/1982 when she joined the Civil Service as a Personnel Officer 1. She has ever since worked in various Government Ministries earning various promotions and qualifications. She currently holds a PHD in human resource management.

According to her, her roles as the in-charge of human resource in the ministry were:

- Planning, organizing and administration of all human resource activities in the Ministry
- The liaison person between the Ministry and Public Service Commission and the Directorate of Human Resource Management (DPM).

She traced the genesis of this recruitment exercise to a circular dated 25/7/2008 by the then Secretary- Directorate of Human Resource Management, Mr. Titus Ndambuki. In that circular, Government Ministries were given authority to fill vacant positions.

The Ministry of Education identified the vacancies and the Permanent Secretary wrote a letter to the Treasury on 5/2/2009 seeking funding. Authority was granted and the vacant positions were advertised in the newspaper.

The Ministry constituted a Pre-selection Committee of ten people, namely-

Noor Aden- Chairman, Karanja wa Kangethe-member, Mary Mbalu- of PSC-member, Washington Makokha-member, Maliko Chepkonga-member, Samuel Muthama-member, Julius Otieno-member, Duncan Ndegwa-member, Stella Mii- member and Nancy Chege. Two ICT officers, Rebecca Keli and Elosy Ngatia assisted in data capture.

Out of all the said persons, the accused said its only two members, **Aden Noor (PW 8)** and **Julius Otieno (PW 9)** who were called by the prosecution to testify.

It was also the evidence of the accused that the committee was mandated to take minutes which would always be confirmed and signed in subsequent meetings yet none of those minutes were produced in the case before the court against her. She said those

minutes could have confirmed the exercise was conducted transparently as no singular person could facilitate the acceptance of any of the applicants.

The accused further stated that after the short listing of the candidates which was system generated by ICT officers, the same was circulated to all the members of the committee and the said list was then taken to the Acting PS Ambassador Magdalene Wambua by the Committee who approved the shortlisted candidates as presented by the committee.

She said that once approved, the ICT officers then availed a soft copy to the Head of Procurement who by then was a Mr. Momanyi, Senior Principal Procurement Officer. The accused pointed out that the said procurement officer was also not called as a witness yet he was the one who liaised with Nation Media Group and availed the official copy for the advertisement.

The accused also stated that the official short list which had the endorsement of the Permanent Secretary was not produced including the soft copies that were forwarded from the Ministry to the Nation Media Group for publication. She testified that following the publication of shortlisted candidates in the daily nation newspaper, it was discovered that there were repetitions and some names of shortlisted candidates had even been omitted.

She stated:

“...The official list of shortlisted candidates was not produced i.e. one signed by Ambassador Wambua yet it was there. It was the same list given to Momanyi in soft copy to liaise with Nation Media Group. Eventually, there was newspaper cuttings produced. These newspaper cuttings were not accurate, one there was repetition of names, there were omissions when compared with official shortlist, some names were left out...”

As such, a meeting was convened by Acting Permanent Secretary, Ambassador Magdalene Wambua which was attended by members of short listing Committee on *18/3/2010* as well as PSC representative, Madam Mary Mbalu.

According to the accused this is the meeting that resolved that all shortlisted candidates who were omitted in the newspaper advertisement be accorded opportunity to attend the interviews on the strength of letters addressed to the Chairmen of Interview Panels and signed by Deputy Director of Human Resource Management who was the accused.

The accused made reference to final selection of candidates of lower cadre report- P. exhibit 39 in particular paragraph 4.2.3 as being supportive of this fact, and asserted:

“...I signed those letters for the P.S. since that was implementing what was agreed in the meeting. It was in the normal course of my duties to sign for PS as authorized officer...”

She further explained:

“...Apart from those appearing as omitted in official list of shortlisted candidates, no person was issued with a letter whose name was not in official list of shortlisted candidates. I never wrote any letter outside the mandate given to me...”

She said the prosecution did not even produce the minutes of 15/1/2010 which constituted the interview panels which were as follows:

1. Two panels for interviewing clerical officers at KIE
2. Two Panels for interviewing adult education teachers at the Kenya Literature Bureau
3. Two panels to interview senior support staff and support staff grade III at the Kenya Institute of Special Education (KISE).
4. Panel to Interview drivers, coxswains, artisans, electricians, mechanics, carpenters and plumbers at KIHBIT.

Guidelines to panelists were distributed in a meeting on 9/3/2010. According to the accused, all panelists were to sign score cards yet none was produced in court by the prosecution.

She elaborated as follows:

“...I did not see any score card in court. A score card facilitates objective assessment of candidate. In absence of score card, you cannot tell how candidates performed in the interviews. In absence of score card, you cannot tell who attended the interview and who did not. There were various offers of appointment produced in court. Without score cards, it is not possible to know how those candidates performed in the interview. Without score card, it is not possible to know which candidate attended which panel and which day...”

She testified that after completing the score cards, the panelists were surrendering them to an officer in the Human Resource Management Division, *a Mr. Washington Makokha* who was a Principal Human Resource Officer who was responsible for supervising the officers that were keying the information. The accused said this officer was too not called as a witness by the prosecution.

Once the keying of the score cards was completed, the matter was reported to the Permanent Secretary and accused was tasked to identify members who would constitute the *final selection committee*. The Permanent Secretary then was still Acting PS. Ambassador Magdalene Wambua.

The final selection committee consisted of *Aden Noor- Deputy Secretary/Chairman of the committee, Grace Omolo (accused) - secretary, Washington Makokha, Samuel Muthama, Nancy Chege, Mariko Chepkonga, and Mary Mbalu from PSC. The secretariat comprised Elosy Ngatia- ICT officer and Hellen Amunga- secretary.*

The final selection committee came up with the criteria for the selection in a meeting at Kenya School of Monetary Studies on 2/6/2010. That meeting was chaired by Mariko Chepkonga as Aden Noor had excused himself to go to the mosque. It is the meeting that came up with:

- a. Official report of selected candidates- P. exhibit 39
- b. Official report of the persons on the waiting list.

These reports were circulated to all the members by ICT. The accused however pointed out that, that official waiting list was not produced in court as evidence. She said:

“...the official list of those on reserve was also prepared but is not in court...”

She testified that the Acting Permanent Secretary Ambassador Magdalene Wambua approved the final selection of *lower cadre candidates' report-P. Exhibit 39* together with the appendix containing the distribution of candidates according to district and her signature was appearing at pg.58 of the report. She said it is after she approved that the names were forwarded to the nation newspapers for publication of selected candidates.

Desks to receive persons taking up the appointments were created and each level was tasked to perform a specific function in the said process e.g. group 1 was checking on academic certificates and other testimonials, group 2 was to type letters of appointment, group 3 was for opening the personal files, group 4 was to compute the salaries, group 5 was on compliment control, group 6 was the security officers, group 7 was comprising of messagers, group 8 was concerned with documentation and finally, coming at the tail end was the accused whose role was to sign letters of appointment and in her absence, her deputy- Rael Rotich. She explained:

“...The desk I talked about would verify all conditions were complied with until it reached me to sign the appointment...”

Thereafter the selected candidate was to signify in writing acceptance of the offer before posting was done. She stated that nobody testified as to how they accepted the offer.

By the time Prof. James Ole Kiyiapi reported to the ministry, the process was almost complete. When he reported, Acting Permanent Secretary Ambassador Magdalene Wambua reverted to her substantive position of Senior Deputy Secretary 'A'.

On 2/7/2010, when the candidates were already taking up the offers, the incoming Permanent Secretary Prof James Ole Kiyiapi convened a Heads of Department meeting for briefing. The accused presented her brief.

After the meeting, Prof Ole kiyiapi called her and gave her 62 names who he wanted issued with letters of appointment but the accused explained that it was impossible.

On 3/8/2010, he sent someone else to the accused to be considered as a possible replacement but accused declined insisting on abiding by the regulations of public Service Commission.

On 16/9/2010, he again sent someone who he wanted employed as a camera man but accused once more refused because he was neither shortlisted nor selected.

The Internal Auditor - Geoffrey **Karuru Gachoka (PW 14)** who had also just joined the Ministry pushed some notes to the accused seeking employment of some people but the accused rejected those attempts.

She told this court that successful candidates were to take the job offers from *1st July to 31st July, 2010* and there replacement was to take place from *1/8/2010*. She said the waiting list was already in place. She recounted:

“...The waiting list was already signed by the Permanent Secretary. So replacement was done according to waiting list. It was not brought before this court as evidence...”

The replacement exercise went on until *7/10/2010*.

On 8/10/2010, she wrote a memo to the Permanent Secretary, Prof. Ole Kiyiapi requesting that he liaises with Ministry of State for Public Service so that personal numbers could be allocated to those who had taken up the offers.

On that very day, she received a letter signed by Prof. Ole Kiyiapi, Permanent Secretary posting her to the Ministry of labour. She produced the letter dated *7/10/2010- D. exhibit 4*.

She testified the letter did not grant her the opportunity to hand over and was also un-procedural as it contravened section II, clause E-30 of revised code of regulations which required that transfer officers in job group 'P' and above be done by the Central Posting Committee Chaired by Secretary to the Cabinet and Head of Civil Service. She said she received this letter on a Friday and was not allowed any further access to the office and even the lock was changed. She described it as follows:

“...I was never allowed to gain entry and all documents pertaining to recruitment in that office. I was not given opportunity to get my personal effects. I went back and Madam Caroline Mugo who was sent to replace me did not cooperate with me. I was not allowed to do a handing over report. Even when I was confronted with this matter at EACC I was not allowed to go back to the office for purposes of refreshing memory...”

She further said she received the interdiction letter dated 4/3/2011 from Permanent Secretary, Titus Ndambuki and another one dated 29/3/2011 from the Permanent Secretary, Prof James Ole Kiyiapi. She challenged the disciplinary process before the High Court and a judgement of the High Court in petition number *252 of 2011- D. exhibit 9* is the one that has ensured she remains in employment.

She faulted the case against her and denied that any terminations that were effected was as a result of any irregularity, she stated:

“...I saw the witnesses who came here and testified. None of the candidate's employment was revoked because their employment was flawed in any manner...”

And specifically responding to allegations in **count 1** which her Advocate drew her attention to, she replied:

“...The names listed there, I did not assist any of them to get employment. I did not give them letters to attend interview. The alleged letters were not produced before this court to ascertain who issued them, that is, for all 13 listed persons. I was not shown the official short-listing that found the basis of this count either...”

Responding to allegations of **count 2**; she said:

“...I did not assist any of those names to acquire employment irregularly without going through the process...”

On **cross-examination**, M/s Gateru for the State confronted the accused on the testimony of *Willis Odhiambo Okumu (PW 20)* who had testified that he was late in making his application and on visiting the Ministry; he left his documents with the accused only for him to be called and offered a job without even having attended the interview. The accused responded:

“...What he said is not true. I never interacted with him until I saw him in court...”

On whether he issued him with the letter of appointment, she said her role entailed signing appointment letter after going through the verification desks noting that,

“...Okumu’s letter which I signed is dated 25/8/2010 which fall under replacement by those left in waiting list...”

Asked if one could have been in the waiting list without applying; she conceded that this was not possible.

The accused was asked how many repetitions were there in the newspaper advert of shortlisted candidates and she answered:

“...There were 150 repetitions...”

She was given P. exhibit 36 and asked to substantiate, she said:

“...I have sampled two according to this newspaper (p. exhibit 36)

No. 4066 & 4067 – Ochieng Linnet Owino then 3296 and 3230)...

The accused was challenged that according to the memo she wrote to the Acting Permanent Secretary on *1st march, 2010 -P. exhibit 110-* she was the one who forwarded the list of shortlisted candidates and sought approval for the publication of the names in the print media and that she indicates she left a copy with the Ag. PS, she replied:

“...Yes, it was team work between committee members, SPPO, CFO and PS until we got the result in the print media...”

Both the Ms. Gateru for the prosecution and Mr. Opiyo for the accused made closing submissions in this case.

Pertaining to the issue of accused giving interview letters to persons who had not been published as shortlisted candidates; Mr. Opiyo referred this Court to the contents of final selection report of lower cadre staff (P. Exhibit 39 paragraph 4.2) and argued that it provides the justification this was a collective decision and not a unilateral act by the accused; the said paragraph reads:

“...due to large number of applicants, it was noted there were candidates who were shortlisted twice while others were omitted in the final list that was published. Consequently, there was revisit to ensure these candidates were replaced and that those who were omitted in the final list were invited for interviews. Candidates in these categories were therefore invited with letters signed by the Deputy Director and Head of Human Resource Management Division. Likewise candidates who could not appear for interviews on scheduled dates due to various challenges were also given letters for interviews...”

Mr. Opiyo submitted that it bordered on malice to charge the accused when the administrative decision was made by the selection committee to issue the interview letters and was therefore not a personal favour requested by the accused.

He also pointed out that the interviewing panels were not constituted by the accused and they were at liberty to interview the candidates or not. Further, any success or failure depended on one's personal effort in the interview.

He argued that accused was only issuing letters on behalf of the authorized officer who by then was Acting Permanent Secretary, Ambassador Magdalene Wambua and who should have been called to testify and say if accused was properly authorized or not. He argued:

“...It was on behalf of Ambassador Wambua that the purported letters to interview were signed. Prudent investigation would have deemed it proper for her to testify. She was effectively authorized officer for purpose of recruitment...”

He argued that failure to call Ambassador Wambua was fatal to the prosecution case.

Mr. Opiyo submitted that the accused only issued letters of appointment based on results forwarded by interviewing panels.

He also submitted that any irregularities could not be attributed to the accused alone, and if any, they were administrative in nature not criminal.

In the State's final submissions, **M/s Gateru** reiterated that the prosecution had presented credible and overwhelming evidence which proved the charges against the accused beyond reasonable doubt. She submitted that the Prosecution had presented witnesses who confirmed to the Court they were not shortlisted to attend interviews yet the accused provided them with letters to attend and thereafter issued them with appointment letters hence conferring a benefit to them.

Others testified they did not attend interviews and they were not shortlisted yet they were issued with appointment letters such as PW 20, Willis Odhiambo Okumu.

On alleged failure to call some key witnesses, M/s Gateru submitted that the witnesses called by the Prosecution were enough to prove this case against the accused.

The issues in this case can be condensed into the following issues:

1. Whether the accused issued letters to persons whose names were not in the published list of shortlisted candidates in the newspaper advert –**P. exhibit 36** to enable them attend the interviews.
2. If so, whether there was authority to justify the actions of the accused in the circumstances of this case.
3. Whether the accused issued appointment letters to persons who were neither shortlisted not interviewed.
4. If so, whether the accused possessed had relevant authority to justify the action or not.
5. Whether the irregularities, if any, are general system weaknesses for which accused cannot singularly be held to account.
6. Whether the accused is a mere sacrificial lamb who is suffering for not having heeded the actions of superiors who wanted to interfere with this recruitment process.

On the issue whether the accused issued letters to persons whose names were not in the published list of shortlisted candidates in the newspaper

advert of 1/3/2010–*P. exhibit 36* to enable them attend the interviews; this allegation is the subject of *count 1 and count 2*.

To prove **count 1**; the prosecution called various candidates who testified that they participated in the interviews although their names were not featured in the newspaper advert of 1/3/2010 where the names of shortlisted candidates were published- *P. exhibit 36*. They were *Edith Akoth Odera (PW 18), Augustine Achieng Anyona (PW 21), Elizer Gesare (PW 15), Edna Moraa Bitange (PW 25), Ann Chelimo Too (PW 27), Eric Mtashe Nganyi (PW 19), Victor Odhiambo Ingosi (PW 12), Lydia Kwamboka Ombui (PW 24), Sarah Nyaboke Ongeru (PW 23) and Jacinta Nyauma (PW 25)*. These ten witnesses all said when they found their names missing in the newspaper yet they had applied, they went to the Ministry and were either sent letters through the post office permitting them to attend the interview or went and collected the said letters which were signed by Mrs. Grace Omolo, the accused herein.

The other three persons subject of this count are Edward Odek Odera (PW 16), Willis Odhiambo Okumu (PW 20) and Damaris Achieng Amonde (PW 17). I have isolated these three from the rest in count 1 because from their evidence before this Court, they said they were neither shortlisted nor did they attend the interview, all they did was to leave their documents with the ministry and were later called to pick the appointment letter. The allegation in count 1 therefore being that the accused issued them with letters to attend interview while knowing they were not among those shortlisted and published candidates for vacant posts advertised by the said Ministry cannot lie in respect of the three as no letters to enable them attend the interview were in fact given to them by the accused going by that evidence.

On the ten witnesses who said they were given letters signed by the accused to attend the interview yet their names were not among those listed in the newspaper as shortlisted candidates, they did not exhibit the letters that enabled to attend the interview; instead they produced appointment letters which is not count 1 sought to establish. Count 1 was framed in such a way that what was in issue was the letters to attend the interview whilst not shortlisted and not the appointment letters that the witnesses produced.

Out of the 13 persons named in count 1; it is *only Augustine Ochieng Anyona (PW 21)* who produced the letter that was requesting he be interviewed dated *30/3/2010- P. exhibit 90* and the same shows it is signed by Mrs. Grace Omolo. The issue of whether it is accused who signed this letter *P. exhibit 90* should have been confirmed by subjecting the signature to forensic examination but this one did not form part of the documents examined by the document examiner as per his report- *P. exhibit 100* dated *17/3/2017*.

In my view therefore, without the said interview letters of the said persons being produced to ascertain that indeed accused was the one who issued them, and further, considering the fact that even the one which was produced (*P. exhibit 90*) was never examined to verify that the signature indeed belongs to the accused, I would be very hesitant to hold that the Prosecution has established **Count 1** against the accused beyond reasonable doubt in the circumstances.

I will now consider the evidence in support of **count 2**. This charge alleges that the accused used her office to improperly confer a benefit to *Nyamweya Stephen Manani, Lwya Raphael Mutuku, Mburu Wilson Njoroge, Kelvin M. Oongo, Hillary Kipkemei, Edward Nyangau, Francis Wambua Mwinzi, David Murithi Muchangi, Samuel O. Nyakundi, Geoffrey N. Gichana, Mungai Mburu George, Robert Ouko Abich, Munyao Peter Muinde, Nduda David Nzivo, Muinde Simon Kimuli, Miruka M. Neville, Abuta Walter Otieno, Wangukwa Caleb Omondi, Njiru Weddys Kwanusu, Peter Okoth Arando, Byron Jabura Odondi, Erikana Manyara Makori, Mokabi Evans and Omolo Okoth* by issuing them with letters to attend interview while knowing that they were not among those officially shortlisted and published candidates by the Ministry.

Evidence in support of this count was mainly given by Gregory Onyango Okal (**PW 11**) which he also backed up with several letters he said were issued in respect of the above named persons instructing him as the Chairman of the Interviewing Panel to interview them although they were not in the list of shortlisted candidates. He produced the said interview letters in evidence as **P. exhibit 44 to 68**. His testimony was that notwithstanding the above named were not shortlisted, the Panel he was chairing decided it will interview them but not grade them. He was however surprised when the said persons appeared in the newspaper advert of 23/6/2010-*P. exhibit 37* as successful candidates. He prepared a report of those names **P. exhibit 70** and gave it to the Chairman of the Selection Committee, Aden Noor (PW 8).

The said interview letters which had been retained by Gregory Okal (PW 11) were subjected to forensic examination and the report of the document examiner- *P. exhibit 100 dated 17/3/2017* confirmed that the signatures in them were similar and indistinguishable to accused specimen signatures and her known signatures that had been submitted for purposes of examination.

It thus clear beyond pre-adventure that the accused was the one who signed the said interview letters (*P. exhibits 44 to 68*) which

instructed him as the Chairman of the Panel he was presiding over to interview them.

That being the case therefore, the Court must now examine the defence that the accused gave for signing letters that requested the Chairmen of Panels to interview candidates who were not in the published advert of shortlisted candidates.

Firstly, the accused sought to demonstrate that such action was justified and authorized citing the contents of the *final selection report- paragraph 4.2* which she said acknowledged the fact that the issue had been discussed and agreed in a meeting attended by all members of Pre-Selection/ Shortlisting Committee in presence of AG. Permanent Secretary Ambassador Magdalene Wambua that there were names which had been omitted in the advertised list of shortlisted candidates who it was therefore decided they will be invited with letters signed by Deputy Director and Head of Human Resource Division, that is, the accused.

The accused added that this was the resolution made in the meeting of 18/3/2010.

It was thus her defence and submissions of her Advocate that she signed the said letters requesting candidates to be interviewed as part of implementing that meeting's resolution which she was performing on behalf of the authorized officer.

According to the Public Service Commission instruction letter to authorized officers dated *19/11/2008- P. exhibit 105*; one of the key requirements that it emphasized was the need for public advertisement in media with wide coverage. The other requirement was that all shortlisted candidates shall be invited for interview.

It would therefore be in contravention of the Public Service Commission regulation if it were to be established that the accused or indeed any person invited anyone for interview who was not shortlisted.

The accused denied inviting anyone outside the official shortlist that was prepared saying their names had been shortlisted and were in fact contained in the official shortlist only for them to be omitted when the publication was done in the newspaper advert of 1/3/2010-P. exhibit 36.

Several issues arise with regard to these claims by the accused.

Firstly, the minutes of the meeting which was held on 18/3/2018 by the members of shortlisting committee in presence of the Ag. Permanent Secretary Magdalene Wambua were not exhibited to back the contents of the report P. exhibit 39 paragraph 4.2.

Secondly, the official shortlist the accused said the Acting Permanent Secretary had signed and from which those names were omitted was equally not produced in evidence.

The accused blamed the prosecution for withholding that evidence.

The Court must scrutinize these issues to establish where the truth lies.

On the accused relying on *paragraph 4.2 of the P. exhibit 39* which alleges that a decision had been reached to invite people whose names were omitted in the advertisement of 1/3/2010-P. exhibit 36; it must be appreciated that the Chairman of the Shortlisting Committee, Aden Noor (PW 8) disowned that report and even refused to append his signature on it accusing the accused of having retreated singularly to come with it. This complaint was made on 21/6/2010; even before the contents of it were published in the newspaper of 23/6/2010-P. exhibit 37. In a memo he wrote to the Ag. Permanent Secretary on 21/6/2010- P. exhibit 38, he lamented that the accused had denied the Committee the opportunity to finalize that report in their offices when on the final day of retreat that was working on the report, that is 10/6/2010, to quote the memo she "*carried all data and told us she was going to singularly write the report and do the balancing on her own at an undisclosed venue.*"

In fact one of the recommendations by the Chairman of the Committee clearly expressed his frustration. He had recommended in that memo way back even before the advertisement of final selection was carried out in the print media that

“...Distribution of successful candidates for all cadres done by DDHRM without involving the committee be cancelled...”

This coming from the Chairman of the committee who took the trouble to inform the Acting Permanent Secretary in writing even before the names were published in the print media casts serious aspersions on the credibility of that report-P. exhibit 39.

And indeed it came to pass as the Chairman's fears were vindicated by the audit report (P. exhibit 74) which came out a few months later confirming massive irregularities occurred during this recruitment exercise.

A statement which is picked from a report such as **P. exhibit 39** is as controversial as the report itself and thus the court finds it unreliable as a basis for affirming the truth.

The fact that minutes of the meeting of 18/3/2010 were not produced as evidence of authority from which the report is based is also another factor that makes this reported statement in P. exhibit 39 doubtful.

More importantly also is the fact that despite the claim by accused that such a meeting took place on 18/3/2010 in presence of all the pre-selection/shortlisting committee members as well as the Acting Permanent Secretary, Ambassador Magdalene Wambua and PSC representative Mary Mbalu where it was decided that interview letters be issued to candidates whose names were not published in the newspaper advert of 1/3/2010-P. exhibit 36; when Aden Noor Aden (PW 8) and who was the Chairman of the said pre-selection/shortlisting committee testified, the allegations made in the defence of the accused were never put to him on cross-examination as to such a resolution having been passed by his committee.

In the book, Murphy on Evidence, 14th edition; the author comments:

“...where a party's case has not been put to a witness called for the other side, who might have reasonably been expected to be able to deal with it, that party himself will be asked in cross examination why he is giving evidence about matters which were never put on cross-examination on his behalf. The implication of the question is that the party is fabricating evidence in the witness box, because if he had ever mentioned the matter in question to his legal advisers, then they would have put on his behalf at the proper time...”

The accused belated claim about a meeting the defence did not bother to confront the prosecution witnesses with is thus post-scripted and cannot be trusted.

The other line of defence used by the accused was that she could not produce the relevant documents such as the official shortlist and such minutes because when she was transferred she was required to move out forthwith and denied complete access to the office from which she was locked out.

This was contrary to the evidence of the Permanent Secretary (PW 5), James Ole Kiyiapi who testified that it was the accused who played hide and seek and declined to hand over. Moreover, it is apparent that accused never bothered to raise any complaint with anyone that she was not accorded a opportunity to hand over.

In her defence still, accused tried to also avoid responsibility over the custody of documents such as score cards saying the responsible officer who was in charge of them was a Mr. Washington Makokha.

Nevertheless, when her own officers who were working under her testified in this court and who also said they had been appointed by her to guide the interviewing panels; they painted a different picture from that propounded by accused as to who they surrendered the score cards to. They all said it was to the accused and yet, the defence did not contradict them on this testimony during their cross-examination.

PW1- Elizabeth Wairimu Njihia, human resource assistant stated:

“...I would record the score cards and later surrender all documents to Grace Omolo...”

PW 2- Judy Muthoni Nyaga said:

“...we would surrender the score cards to Mrs. Grace Omolo...”

PW 3-Michael Gachie, human resource assistant said:

“...we gave marks on score sheet and forwarded to Madam Grace Omolo...”

PW 9-Julius Otieno, also a human resource assistant said on cross-examination:

“...All members would sign the score cards...I never saw them again once surrendered to the accused...”

With such evidence which came from officers that accused had personally nominated from her own office which the defence did not confront on cross-examination, how does the accused expect this court to believe her story that she was not the person responsible for those score cards and that it was in fact someone else by the name Washington Makokha"

Clearly therefore the custody of the recruitment documents vested with the accused and she cannot shift that responsibility to anyone else.

Another reason why I found it unbelievable that the reason why accused was unable to avail these documents was because of the sudden transfer is because of the documented history of this case.

Long even before these charges were even contemplated, Aden Noor Aden(PW 8) was reporting the accused to the Acting Permanent Secretary Ambassador Magdalene Wambua and later to Permanent Secretary Prof. James Ole Kiyiapi of frustrating the committee's work in the memo of **21/6/2010- P. exhibit 38** by carrying all the documents in soft copies and in the memo of **30/8/2010-P. exhibit 40-** failing to attend the meeting to provide documents to the committee to verify the process in spite of adjourning the earlier meeting allegedly to arrange the documents and being reminded to do so in the subsequent meeting. Gregory Okal (PW 11) corroborated these facts when stated:

“...Mr. Noor called the meeting twice but Mrs. Omolo failed to turn up...”

It cannot therefore be factual for the accused to allege in her defence the failure to produce relevant data was caused by abrupt removal from office; her inability to produce them for the Ministry's internal verification to confirm the veracity of the process is clear indication the transfer issue was just a scape goat to avoid accountability as she began dodging this issue long time ago even before these charges were anticipated or even her transfer.

Having regard to the foregoing, for the accused to expect anyone else to produce data which she was given opportunity by her own Ministry to produce and she failed is unreasonable. She was the custodian of the data as demonstrated, she should have been the one to produce the official shortlist, the score cards and the minutes as when she was at the Ministry and meetings called to produce, she failed to attend and refused to give explanation as per the memo- P. exhibit 40; two, there is clear evidence that when she left the Ministry, no one was handed over those documents.

It would appear to me the accused did not sufficiently discharge her evidential burden (*not the legal burden*) in this case.

The safest conclusion therefore to make is that either those documents never existed or it was only the accused privy to their existence and thus if she wanted to rely on them she ought to have produced them herself.

Without providing those minutes of 18/3/2010 which she claimed authorized her to give letters to persons whose names were not shortlisted as per the newspaper advert of 1/3/2010 and further without exhibiting the purported official shortlist authorized by the Acting Permanent Secretary, the prosecution evidence that she issued the interview letters in count 2 as per letters exhibited by Gregory Okal **P. exhibit 44 to 68** and confirmed by document examiner's report-**P. exhibit 100**; without authority must be upheld

by the Court as it goes contrary to Public Service Commission's letter of Instruction to authorized officers-P. **exhibit 105** which directed that only shortlisted candidates shall be interviewed. Without the minutes of the committee that was the unilateral decision of the accused for which the court must find her culpable.

In any event, even assuming that the entire committee decided to go ahead and issue such letters to persons not shortlisted and allowed them to undergo the interview such a committee would equally be culpable.

Further public advertisement was intended to inspire public confidence in recruitment for public service jobs and a boardroom deal to circumvent that was bound to bring opaqueness into the process and compromise its transparency.

For reasons aforesaid, I do find the 2nd Count against the accused proved beyond reasonable doubt.

In **count 3**; it was alleged that the accused used her office to improperly confer benefit to *Willis Odhiambo Okumu (PW 20)*, *Edward Odek Odera (PW 16)* and *Damaris Achieng Amonde (PW 17)* by issuing them with letters of offer of appointment while knowing that they were neither among those officially shortlisted for interview nor successful for employment after such interview.

Edward Odek Odera (PW 16) testimony was that he had applied for the job that was advertised but he was not in the list of shortlisted candidates that was published in the newspaper advert of **1/3/2010-P. exhibit 36**. He decided to go check out with the Ministry and was asked to leave his documents behind. After a week, he was called to go and pick his appointment letter dated **16/9/2010- P. exhibit 80**.

Damaris Achieng Amonde (PW 17) who produced her letter of appointment dated **9/9/2010- P. exhibit 83** gave a similar version.

Willis Odhiambo Okumu (PW 20) directly implicated the accused who he said was the one he directly dealt with. He said when he learnt about this recruitment he was late already but he decided to try anyway. He visited the Ministry of Education and asked if he could be given an opportunity. He was directed to the office of Mrs. Grace Omolo and left her with his documents. Later he was called to go and collect his letter of appointment.

On cross-examination he maintained he met her at her office and that he knew her. Out of documents taken for forensic examination was the letter of appointment issued to Willis Odhiambo Okumu dated 25/8/2010-P. exhibit 87 where the document examiner confirmed the signature as having similar characteristics and thus evidence of common authorship as those in specimen and known signatures of the accused.

Clearly therefore the evidence of Willis Odhiambo Okumu was corroborated in that regard.

In her defence the accused denied ever issuing any letters to persons who did not undergo the process.

On being confronted about Willis Odhiambo Okumu's letter- P. exhibit 87 during cross-examination; she said she signed it because his name was in the waiting list but pressed further to say if one's name could be in the waiting list when the person had not had been interviewed, she said it could not.

Moreover, it was impossible for Willis Odhiambo Okumu to be in the reserve list when he himself confirmed he neither applied for that job when it was advertised nor attended any interviews.

Consequently there is no way accused could have picked his name from the reserve list.

Further, this waiting/reserve list was never produced. As already found by this Court, the accused being the custodian of the said recruitment records and without evidence of any handing over and, considering that at no point did she even avail those documents at a time when the Ministry wanted to scrutinize process through its internal committee headed by Aden Noor despite being given the opportunity to do so way back even before her transfer from the Ministry came, she cannot now run away from that responsibility by feigning ignorance over the whereabouts of these records; the records were perfectly a matter within her special knowledge and it was her evidential burden to bring them forward if wanted the court to place any reliance on them. This court

cannot base its decision on a non-existent list not brought to its attention.

Consequently, as to whether the accused possessed relevant authority to justify the action of signing the said appointment letter, I find that in the absence of that official waiting list approved by the Acting Permanent Secretary, Ambassador Magdalene Wambua, she has not demonstrated there was in fact any such authority. In any case, if indeed it was Acting Permanent Secretary Ambassador Magdalene Wambua who signed the alleged list as well as the Final Selection Report- P. exhibit 39 amidst protestations which were even put to her in writing by the Chairman of the Final Selection Committee, Aden Noor Aden (PW 8) protests eventually vindicated when the audit (P. exhibit 74) corroborated the existence of massive irregularities, a fact further corroborated by participants in that exercise including officials and candidates; then the said Acting Permanent Secretary Ambassador Magdalene Wambua ought to have been key subject of this investigation just as accused was. Her role in this should not have escaped the investigator and this Court believes the DPP can still follow up on this.

As to whether the irregularities, if any, were general system weaknesses for which accused cannot singularly be held responsible; evidence in this case is inconsistent with such a suggestion as there is evidence of deliberate manipulation with the process to give undue advantage to some people and the present accused has just been placed at the centre of it as evidence has clearly demonstrated. She cannot take refuge in enormity of exercise when evidence shows she deliberately went against the standing instructions of the Public Service Commission.

As to whether the accused is a mere sacrificial lamb who is being persecuted for not heeding to her superiors attempts to interfere with this recruitment process; the court acknowledges that there were indeed attempts made to accused from even some of the witnesses who testified against her. For instance, Permanent Secretary James Ole Kiyiapi(PW 5) conceded on cross- examination that he made such requests on behalf of some people but they did not go through. The Auditor, Geoffrey Karuru Gachoka (**PW 14**) also admitted having pushed a note to the accused with three names of potential job seekers.

In fact this is the reason why Justice Majanja in the case which accused had filed seeking to stop disciplinary proceedings against her and which she presented before this court, *Petition No. 252 of 2011- Grace A. Omolo Versus Attorney General, Permanent Secretary, Ministry of State for Public Service, Permanent Secretary Ministry of Education and Public Service Commission-* the Judge remarked:

“...I hope the petitioner will undergo a fair disciplinary process guaranteed to her by the constitution. I state this because there is evidence that the recruitment process was conducted not only by her but other persons. I have evidence of undue pressure exerted on her by her superiors including persons engaged in preparing the audit report and it is my expectation that the PSC will live up to the highest ideals that the Constitution prescribes in considering the matter...”

That may be so and even though the accused was candid in exposing the above two; from the evidence presented, it is clear she equally did not operate above board either as evidence has proven that there were people she employed and even issued letters of appointment without even having attended the interviews while in the other case, she circumvented the shortlisted list and facilitated others to do the interview knowing well they were not shortlisted and even after the interviewing panel refused to grade them, she went ahead and offered them jobs any way. That was impunity and cannot be remedied by the fact that she resisted attempts from others keen to influence the process.

Moreover, in reaching its findings, the Court did not rely on the evidence of two mentioned witnesses only, it looked at corroboration from other independent pieces of evidence including candidates who had participated in the exercise as well as other untainted officials who took part in the exercise.

My take on that would be that the Public Officers whose documented acts of trying to influence the process by canvassing for others should too have been the subject of an Independent investigation as was recommended by the Investigating Officer. That includes **Permanent Secretary Prof. James Ole Kiyiapi and the auditor, Geoffrey Karuru Gachoka**. This adds to the list the person who acted as **Permanent Secretary, Ambassador Magdalene Wambua** about her role in this process as well. The fact of such an investigation does not exonerate accused culpability concerning very clear acts of commission that have been established through the evidence on record.

An issue was also raised in cross-examination of the investigating officer that because the Public Service Commission had okayed the appeal and the decision to nullify the entire exercise reversed and modified subject to some conditions, then the exercise was

ratified. That is far from the truth. It is to be appreciated that even as the Public Service Commission communicated its decision on conditions to be met in allowing the appeal, independent investigations by EACC was part of the package. Further, the fact that after the screening exercise was done even with concessions made on appeal, a total of 836 people could not be retained for having been recruited un-procedurally shows the rot epitomized by this process for which criminal culpability must attach to everyone responsible.

In the final analysis therefore, I do acquit the accused in count 1 but find her guilty and convict her in both count 2 and 3 under section 215 of the Criminal Procedure Code which have been proven beyond reasonable doubt.

Judgment read, signed and delivered in open court this 14th day of November, 2018.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

14.11.2018

Judgment read in open court in presence of M/s Samita holding brief for M/s Gateru for the state.

Mr. Opiyo for the accused

Court – Kiarie

Accused – Present

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

14.11.2018

M/s Gateru for the State - We have no records in respect of accused. She may be treated as a 1st offender.

Mr. Opiyo in Mitigation on behalf of accused - I would like you to take record of accused as a 1st offender, circumstances surrounding this case which have come up clearly in your Judgment and service rendered to Public Service since 1982.

Accused person is aged 60 years, her last kid is still in Primary School. She has been admitted and certified by National Counsel with disabilities – **Ref. No. NCP/WD/P/4294**.

This was issued last year in physical disabilities in pursuant to Scan Medical condition it has affected a vital organ of the body.

I have original Medical Report dated 11.12.2017.

For confidential reasons, I would want to share it with the court. [Counsel hands, over medical report]. The condition is permanent and require 24/7 medication that can only be addressed through medical facilities outside our Remand Institution.

For those unfortunate disability, I would pray you mitigate the sentence with Human sympathy. She has attended court vigorously from year 2012 to date without any failure. Justice tempered with mercy.

This a rare condition for which I seek Sympathy. I would seek for non-custodial sentence so that accused can continue with her medication.

Consequences of conviction would reverberate also her health status. Employment status and I would plead with you to consider the same.

Court - The Mitigation has been noted especially the medical condition of the accused which from the confidential report presented by her Advocate, appears to be a rare medical condition that the court definitely needs to take into account if indeed she is suffering from it.

The court has noted the enormity of the offences accused committed and Penal consequences they would attract given their effect but before the court moves to pronounce the sentence; it is important to ascertain this rare medical condition for purposes of considering whether or not it would have any impact as mitigating factor.

I thus order that accused shall be examined at Kenyatta National Hospital for independent report to be submitted to this court before sentence. In the meantime, accused bond shall be cancelled.

Commissioner of Prisons is directed to ensure accused is availed to KNH for examination.

Mention 21.11.2018 for the report and sentence.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

14.11.2018

21.11.2018

Coram: L. N. Mugambi [Mr.] CM

Prosecutor – Gateru for the State

Court Clerk – Nancy

Accused – Present

Mr. Opiyo – I am for the accused. I am joined by other counsels namely Mr. Kaluma, M/s Momanyi, M/s Odipo and M/s Ouya for the defence.

M/s Gateru is for the state - It is a mention for a report from KNH.

M/s Gateru for DPP - I am in receipt of a medical report from Dr. Musila Gibson of KNH. The same more or less confirms the findings in the confidential report submitted earlier to the court.

Mr. Opiyo – We appreciate you have made that order and the report is now before you. We wish to ask you to give a small moment for Mr. Kaluma.

Mr. Kaluma – We thank you for the order you made for you to be clear about sentence. What the report confirms is that accused was diagnosed with cancer of rectum.

Following that diagnosis accused underwent a medical surgery in which her large intestine colon and rectum were removed. Her digestive system terminates at the end of small intestines and is diverted at an outside bag i.e. the permanent colostomy bag for storage and disposal.

Accused uses a minimum of 4 each day and they cost a minimum of 4000/= at market rate. The diet of the accused is very controlled to ensure what she eats does exist her body first. It is thus a permanent disability.

That is why it was registered before accused is registered with National Disability. We ask you to consider this mitigating factor in light of sentencing policy.

Prison department brought accused before you today. For over 48 hours, accused could not eat anything at the prison. They had to seek assistance of family to take regulated stuff to feed. It was impossible to them to handle accused, more particularly disposing these colostomy bags.

In terms of sentencing Policy, putting accused under custodial sentence would be for all facts and purpose would be a death sentence executed and swiftly so. It would be undue burden for the state to enable accused serve sentence in custody in dignity. It will be undue burden to prison staff to take care of accused in custody.

We plead with you to exercise mercy on accused. Accused is on her past 60th birthday. As a Public Servant, during trial of this matter, court will confirm even with her condition, she had never failed to appear before you. She has been on half-pay barely surviving on a medical condition with remaining half pay.

I plead with you to consider this matter beyond your Judicial seat and also as a person. I thank you for the time.

M/s Gateru – I had asked the in-charge Langata Women also to present a report.

Court – The court has noted the submission made by the defence in respect to the medical report which has now been received by the court. [Ref KNH/KPCC/HR-ADM20/VOL.1 dated 16th November, 2018 by Dr. Musila].

As the court is conducting a comprehensive sentence hearing, the prison department where accused has been in custody for the last one week is said to have encountered difficulties in handling the accused's specialized medical care.

This needs to be confirmed by the Department itself if it is to count in the court decision making on sentence. I thus order that the in-charge Langata Women Prison file a report for the consideration by the court latest tomorrow.

Mention 22.11.2018.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

21.11.2018

22.11.2018

Coram: L. N. Mugambi [Mr.] Cm

Prosecutor – Gateru for the state [M/s Olajo holding brief]

Court Clerk – Nancy

Accused – Present.

Mr. Opiyo – I appear with Momanyi, Odipo and Ouya for the accused.

M/s Olajo – I hold brief for M/s Gateru for the state. It is for sentencing, prior to that the court had ordered officer in -charge Langata women to file a report. It has been received and in court file. The court can look at it.

Court - Court retires to study the various reports submitted before sentencing. Sentence in one hours time at 11.00 am.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

22.11.2018

Later at 11.00 am

Coram as before

Sentence

Following the conviction of the accused on 14.11.2018 by this court on two counts of abuse of office; the prosecuting counsel, M/s Mercy Gateru informed the court that she has no criminal records in respect of the accused and that the court could treat her as 1st offender.

During mitigation on her behalf, her advocate on record Mr. Opiyo told the court that accused suffers for a special medical condition that in fact necessitated her to be registered with national Counsel of Permanent disabilities as a person with disability via Registration No. NCIP/ND/P/4294.

He also submitted to the court her medical document which the court on preliminary assessment felt required further confirmation if it was indeed a matter that it was to take into account in mitigation.

As a consequence, the accused was ordered examined at KNH for an independent verification. This was to be facilitated by Prison Department after the court cancelled her bail.

Through the medical report dated 16.11.2018 ref: KNH/KPCC/HR-ADM/20/VOL.1 Dr. Musila of KNH confirmed that indeed the accused underwent what he referred to as APR [Abdominal Perineal Resection] at MP Shah Hospital on 5.7.2017 indicating in his conclusion that the patient has what he referred to as

“Patient with Ca Rectum post APR and a Permanent Colostomy”

Her lawyer Mr. Kaluma explained what this means in practical terms in that “her digestive system terminates at the end of small intestine diverting at the permanent colostomy bag for storage and disposal.” Her diet is also special.

The court further sought a report from the prison department in - charge Langata Women Prison on the extent of care, if any, that the accused might require at the facility going by the experience at the facility for the few days she has been at the facility.

In the report dated 21.11.2018, ref: LWIP/AD/2/25/VOL.11/67; the prison department has highlighted the specific concerns which this court must now take into account. This is the background that informs this sentencing

As part of the consideration that goes into this sentencing I have set out the above background since accountability is an important principle in sentencing for reasons leading to a particular sentence to come out explicitly. Moreover, it is also necessary to ensure that the sentence meted promotes the dignity and fundamental rights of those to whom it is directed.

Nevertheless, it is important to remember that it is also the duty of the court to ensure that sentences meted are proportionate to the impact of the offence committed to have the offenders take full responsibility for their action.

In this case, the process the subject matter of these proceedings involved employment of massive state resources. It was also a matter that affected the many suffering desperate job seekers some of whom were deliberately denied an opportunity for employment out of abuse of authority by the actions of accused and her ilk of even dishing out letters to unqualified persons who had neither been shortlisted or never even attended interview.

The sentence meted to person who abuse their offices in this manner to the detriment of the vulnerable who they should exercise their authority to ensure fair play cannot go unpunished and sentence meted must be aimed at conveying the society's displeasure and condemnation for this inconsiderate conduct by persons holding key public office”

Offences of abuse of trust and authority are serious offence for they hurt the public for which the holder is expected to serve. Having said so however, and remembering that accused suffers a complicated medical condition, the decision that the court can take is equally mutilated against by her special condition.

Indeed under the sentencing guidelines, page 40 at paragraph **20.28** the policy direction on terminally ill and elderly offenders is as follows:-

“When imposing sentencing order against terminally ill and elderly offenders, a court should be mindful to ensure that the sentence imposed does not amount to excessive punishment in view of extent of illness and age, as well as in light of offence committed. In particular, the court should ensure that, the sentence imposed does not amount to cruel, in human or degrading treatment. In view of extent of illness and age of the offender ...

Non-custodial sentence should be considered unless, in the light of offence committed and other factors, justice would demand imposition of custodial sentence”.

In the present case, I am persuaded that a non-custodial sentence is appropriate, but which one"

The option provided for under section 48 of Anti-Corruption & Economic Crimes Act is the fine and which I shall now proceed to impose as follows for which I believe would in the circumstance of this case meet the ends of justice in respect of these offences.

Count II – Accused shall pay a fine of Kshs. Seven Hundred & Fifty Thousand [Kshs.750,000/-] in default serve one [1] year imprisonment.

Count III - Accused shall pay a fine of Kshs. Seven Hundred and Fifty Thousand [Kshs.750,000/=] in default serve one [1] year imprisonment in default of payment of fine, sentence shall be consecutive.

Right of appeal 14 days.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

22.11.2018

Mr. Opiyo - May I express my thanks for exercising your Judicial mind appropriately and immensely. We are grateful for that and

request for an order for proceedings and certified copy of Judgment and thank you very much.

There was cash bail of Kshs.100,000/= which can be applied into the fine.

M/s Olajo – We also apply for certified copy of Judgment.

Court – Certified copy of Judgment and proceedings to be supplied as prayed.

Cash bail deposited by accused to be applied toward payment of fine as prayed.

L.N. MUGAMBI [MR]

CHIEF MAGISTRATE

22.11.2018



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