

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
IN THE ANTI - CORRUPTION COURT AT NAIROBI
MILIMANI ANTI-CORRUPTION NO. 21 OF 2015
REPUBLIC - VS - EVANS NGIBUINI AND 10 OTHERS

RULING

The 1st 2nd 3rd and 4th accused are charged in count one with offence of misleading a person, contrary to section 135(1) B as read with section 137 of the public procurement and Disposal Act of 2005. The particulars are that on 10th of September 2013 at the National Water Conservation and Pipeline Corporation (NWCPC) offices in Nairobi, within Nairobi County being members of the end, WPCPC Procurement Oversight Committee of the board. Jointly mislead tender committee by approving the signing of the contract for structural cabling of NWCPC headquarters to telecommunication today Limited company that did not meet my set out in the tender documents.

And on count 2, the 1st, 2nd, 3rd and 4th accused are charged with inappropriate influence, one evaluation contrary to Section 30(1) (b) as read with section 38(2) of the public procurement and Disposal Act of 2005; the particulars being that on the 10th September 2013 at the national water conservation and Pipeline Corporation (NWCPC) offices in Nairobi, within Nairobi County, being members of the national water conservation and pipeline Line Corporation Procurement Oversight Committee of the board who are not entrusted with evaluation and comparison of new structure cabling of the headquarters of office block jointly and in appropriately influenced evaluation process by recommending the preparation signing of the contract awarding the said tender to telecommunication today limited a company that had not met the requirements set out in the tender document on count 3. A5, A6 A7 A8 A9 A10 and A11 are charged with wilful failure to comply with the law or applicable procedures and guidelines relating to procurement Contrary section 45 2(b) as read with Section 48(1) (a) of anti-corruption and economic crimes act of 2003; Particulars are that on 24th July 2014 while at the National Water Conservation Pipeline Corporation NCPC offices, in Nairobi with in Nairobi County

being members of the tender committee jointly and wilfully failed to comply with the law relating to procurement with section 27(3) as read with regulation 10(2) (a) of the public procurement and disposal regulations 2006 by awarding the tender for structural cabling to telecommunication today limited a company that did not meet the requirements as set out in the tender document. On count 4, Accused 5 to accused 11 are charged with the offence of abuse of office contrary to section 46 as read with Section 48 of the anti corruption and economic crimes act of 2003; The particulars being that on the 24th day of July 2014 at the National Water conservation in Pipeline Corporation NWPC offices in Nairobi, within Nairobi County being members of the tender committee of NWPC used their offices to improperly confer a benefit of Ksh.41,051,146.33 to telecommunications today limited for the tender for supply, delivery, installation and commissioning of new structured cabling of the headquarters office block to telecommunication today limited; a company that did not meet the requirements as set out in the tender document. And on count 5, the first accused is charged with an offence of abuse of office Contrary to Section 46 as read with Section 48 of the anti corruption and economic crimes act of 2003; That on

24th July, 2014 at NWCPD offices Nairobi, being the Ag. Managing Director of NWCPD improperly used his office to confer a benefit of Ksh.41,051,146.33 to telecom today limited by signing the notification of award letter awarding the tender for supply, delivery, installation, testing and commissioning of new structured cabling of the headquarters office block to the said company that did not bid.

The prosecution called a total of 7 witnesses. The prosecution case can be summarised as follows. PW1 is an employee of national water conservation and pipeline corporation NWCPD. She's in the planning and Design Department. In her testimony, she stated that on the 2nd day of July 2014 she received the memo from the then acting director, who is the first accused dated 30th June 2014 appointing her to a committee to evaluate the tender within 14 days with due diligence and independently from each other. The committee was also expected to prepare a report on the final ratings and that was to be submitted to the tender committee. As for the non-responsive tenders, reasons were to be given. They were expected to recommend the award to the lowest evaluated bidder. Upon receiving the tender document, she called the committee and agreed on outlining issues. The

letter appointing the committee was produced as exhibit number one. The witness stated that they looked through the tender document where criteria was set. The main works were contained in the tender document and the instructions to the Tender were stated there in. Amongst the preliminary issues, they checked were certificate in incorporation, the PIN, VAT and Income tax compliance. She stated that the committee evaluated the bids from 19 firms that had returned the tender and those firms included, Telecommunication today. Of the 19 only 7 replied. In the mandatory evaluation category, 7 firms qualified. The committee then proceeded to stage 2, which consisted of technical evaluation at this stage, the committee checked for installation designs amongst other issues. The pass mark was 70% 4 out of 7 qualified and telecommunication today was amongst the four subsequently, they proceeded to open the financial evaluation. That report has been produced is exhibit 3. At page 18 of the report they recommended the responsive firms. The criteria use was to check for tender security that is 2% of the tender sum to check for specifications to be adhered to or its equivalent, the bill of quantities, which had list of items amongst other issues. After applying this criteria, the firm that qualified

was Telecom communication today. NWCPC as the client had a right to conduct due diligence and as a committee. They did due diligence before recommending the final award. The committee proceeded, to the registered offices of the company telecommunication today. Situated at Kimathi House suit number 205 at the junction of Kenyatta Avenue. PW1 stated that the company didn't know that they were visiting but that the procurement officer called them just before they arrived at the premises. They established that the company existed, they had 2 offices. They also had members of staff. The Proprietor was Keneth Kamwere. They did due diligence, including enquiring about the models of the equipment that was to be used. They prepared a report which was presented to the tender committee. According to PW1 their job ended there. After a couple of days, they received the memo addressed to the managing director from the project engineer, Nicholas Kandie. That Memo is dated 27th August 2014. The memo was minuted to the general manager corporate and legal services. The memo requested for the opinion of the Corporation Legal Services Department, on the registration of the winning bidder and that the evaluation committee was to provide justification and comments. PW1 stated that engineer

Nicholas, had alleged anomalies in the company registration i.e that the firm did not avail VAT, PIN, audited accounts and experience. In his view the firm was not qualified.

PW1 addressed the technical issues while the registration issues were dressed by the legal department. Eventually, a report was prepared to the managing director. The committee confirmed its earlier decision and still recommended telecommunication Today. That report is in the form of an internal memo produced as exhibit number 6. Under cross examination, she stated the 1st accused was the acting managing director of NWPC and that he appointed her to chair the evaluation committee and that he never give her any other instructions. The technical evaluation report was adopted but that he did not know about the second stage. She stated that they did due diligence before recommending telecommunications today. She further stated that the 1st accused did not influence her in any manner whatsoever. PW1 further clarified that the Evaluation Committee recommends to the tender committee to deliberate and make a resolution. The Corporation Tender Committee, consists of heads of departments including the ICT officer amongst other specialists. She further stated that she did not deal with the

registration of the company communication today because that was marked to the legal department. However there was a certificate of incorporation for telecommunication today limited. But she did not know why the certificate was admitted. Under further cross examination. She could not state of the difference between a business name on the one hand and a limited liability company. The second prosecution witness. Ngari Gitundu was also a member of evaluation committee. His evidence was similar to that of PW1 in all material respects. He stated that upon receipt of the memo from the engineer Kandie the committee confirmed their earlier decision. Under further cross examination, he stated that they had looked at the personnel and experience of the company during evaluation whether they had done similar works, but he was not aware of the reasons why the bid was not wanted. Prosecution witness number 3 was engineer, Nicholas KANDIE. In his evidence he stated that he was a civil engineer and in the year 2014 he was working with the national water conservation and Pipeline Corporation as a project engineer on 3 projects, including the subject project being the headquarters building for the NWPC. On the subject tender being NWC/ONT/113/2013 – 2014, he was the project engineer. He

clarified that the main contract was awarded to NK brothers Limited and that the one for structured cabling was awarded to telecommunication today. In his evidence he stated that upon, scrutinising the tender documents he noticed some anomaly. Specifically, he had a problem with the legal entity which was awarded the contract. Subsequently he wrote an advisory opinion produced as exhibit 5. In that opinion, he raised concerns about, the entity that had been sub-contracted by the main contractor to do the structured cabling. From reviewing exhibit 5, the sum total of PW3's evidence was that he was not satisfied that telecommunication today limited had the experience and expertise to do the work, and that if there was a contract awarding the subject tender to telecommunication today limited then they did not have the requisite experience. He stated that the memo he wrote was circulated to members of the committee but he was not sure who was awarded the contract.

Under cross examination he stated that there was an earlier tender and he participated in the evaluation. However, the company that was recommended for the award was not given the job. He confirmed that telecommunication Today Limited received some payments for the contract and that those payments were

approved by management. Under further cross examination PW 3 stated that the project was to be completed within 6 months. But by the time he was leaving the NWCPC, the project was behind schedule. He further stated that she would approve payments after consultation with management who advised him to process the payment. He was not aware of any investigations conducted against him. The first time he raised the queries, he had the interest of the corporation at heart.

PW 5 Kenneth Karaya Kamwere is a businessman. He is the proprietor of telecommunication today registered as a business name since 10th March 2008. He is also director of telecommunication today limited a company incorporated on 6th of May 2014 and his sister Catherine is a share holder of the same company.

In his evidence, he stated that he applied for the subject tender using his business my name Telecommunication today. He later incorporated a company known as telecommunication today limited, and he notified in NWCPC that he intended to use the Limited liability company for the subject tender. Under Cross-examination, he clarified the award was made to

telecommunication today, which award was accepted by the business name. However, during the signing of the contract with the main contractor, he changed to a limited liability company, telecommunication today limited. They performed the contract and had some interim certificates, but payments were delayed. Under cross examination he stated that he was aware they was supposed to change from a sole proprietor to a limited liability company and that on the 29th of September 2014 wrote to the managing director NWPC. He stated that the idea to draft the contract as it is was suggested by the 5th accused and the company accepted. He had submitted certificates and received payments for work done. PW6 Margaret Wangui is a state counsel attached to the registrar of companies. Her evidence was that telecommunication today was registered as a business name on 10th March 2008 and the proprietor is Kenneth Kamwere. Further, she stated that telecommunication today limited company was registered on 6th May, 2014 and the proprietors were Kenneth Kamwere and Catherine Kamwere.

She stated that when a business name is changed to a limited liability company, then the proprietor ought to fill in a notice of cessation. In this Case no such notice was issued. PW7 Rachel

Muindi was the investigating officer. Once assigned the task of investigating the case she requested and received, approved procurement plans, tender notices, letters of appointment for tender opening and tender evaluation, Evaluation reports, minutes, Notification of the award of the contracts and the inspection and acceptance Committee reports. Immediately upon completing her investigations, she forwarded the file to the EACC Legal Department with recommendations that the file be closed. On 1st of July 2015 PW7 received directions that further investigations be conducted, which included confirming the legal status of the 2 subject companies that is the telecommunication today, and Telecommunication Today Limited. She then received directions to charge members of the corporation tender committee.

Under Cross Examination she stated that the 2nd, 3rd and 4th accused were directors at the NWPC and that to her knowledge the award to telecommunication today was proper. She stated that the tender committee usually relies on the report of the Evaluation Committee. She clarified that the contract was signed by telecommunication today limited as opposed to telecommunication Today, the business name which was the

successful bidder. The investigating officer further stated that she did not produce the minutes of the procurement oversight committee of the board because she was not the author.

At the close of the prosecutions case the defence submitted that no Prima facie case had been made out. In respect of count one Mr. Kamunya submitted that the charge must fail due to the failure by the prosecution to include minutes of the Procurement Oversight Committee of the board and that there was no evidence showing that the 1st accused was a member of such a committee; and that there indeed was no evidence showing that such a committee even existed. He further submitted that there is no evidence showing that the first accused mis-led the corporation tender committee to award any contract. He submitted that there is no evidence showing that on the 24th July 2014, the first accused offered a benefit to telecommunication today limited because the award was to telecommunication today, a different legal entity. Mr. Kamunya further submitted that neither *actus reus* nor *mens rea* was established.

Mr. Andere who appears for the 2nd , 3rd and 4th accused Persons also submitted that in the absence of testimony from members of the committee, it was not possible to establish undue influence by his clients. He submitted that the evaluation committee members finished their work in September 2014 and by the time of the alleged undue influence on the 2 committee's they did not exist. He further submitted that from the evidence of the investigating officer the tender was advertised on 16th June 2014 and awarded on 24th July 2014 and that by the time the accused allegedly offended the provisions of the act on 10th September, 2013, the committees were not yet constituted. The fifth accused in his submissions stated that once members of the tender committee made an award, they became *functus officio* and that if the companies existed with similar names then that was the mistake off the Registrar of companies. Mr. Githui who appeared on behalf of the 6th 7th 9th 10th and 11th accused persons submitted that wilfull failure as alleged against his clients means intentional or deliberate failure to adhere to the law and that, the evidence on record shows that his clients discharged their duties diligently and confirmed that award to telecommunication today. He further submitted that there is no evidence of a benefit

conferred upon the accused. Mr. Kurgat appearing for the 8th accused person referred the court to the provisions of Article 227 of the constitution and the celebrated case off ***Bhatt Versus Republic*** at page 332 and 335.

He submitted that there was no evidence showing any of the accused persons benefited. Mr. Kurgat further submitted that the evidence adduced is illegal and cannot form the basis off the prosecution because at the time that charges were recommended to the director of public prosecution, there was not in place a Commission known as the EACC. Counsel for the 8th accused referred to the case of ***Busia County government Versus the ethics and Anti Corruption Commission. Petition no. 382 of 2015***. In that case the judge held:

“I find that at the time of the impugned investigations the EACC was not properly constituted.”

In his reply Mr. Chigiti, appearing for the state submitted that the case had been established to the required standards, and that evidence was sufficient to establish a Prima facie case against all the accused persons. He submitted that the tender

was awarded to telecommunication today limited a company which did not bid and neither was it qualified.

At the close of the prosecution's case the following issues are incontrovertible;

- That as at the 2nd July 2014 the 1st accused was the acting director in NWCPC.
- That on the 30th June, 2014, the 1st accused did set up a committee to evaluate the tender for the supply of structured cabling for the NWCPC headquarters building.
- That telecommunication today was one of the bidders.
- That after conducting technical evaluation and financial evaluation, NWCPC tender committee recommended an award to telecommunication today.
- That on 22nd July 2014 the evaluation committee did a due diligence report, which was forwarded to the corporation tender committee along with Evaluation Committee report.
- That PW3, raised a query vide a memo dated 27th August 2014 which memo was responded to by the evaluation committee. The committee upheld it's earlier decision.

- It is incontrovertible that the prosecution did not produce any documentation from NWCPC Procurement Oversight Committee of the Board's decisions, which according to the investigating officer could not be availed because "**she was not the author.**"

The rival parties have relied on the case of **Ramanlal Tranbakkal Bhatt - Vs - Republic 57 EA 332 at 334 and 335**. In that case it was held. **"It may not be easy to define what is meant by a prima facie case but at least it must be one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence."** It is in this context that this court will determine whether a prima facie case has been established. In the particulars of the charges in count one of the charge, it is alleged that the offence was committed on 10th September 2013. As at that time the tender had not been advertised and the tender evaluation Committee had not been constituted. There is no evidence tendered by the prosecution showing that the Procurement Oversight Committee of the board existed; Who

its members were, and how if at all they mis-led the committee which was, from the evidence, constituted one year later. There is also no evidence showing that the Procurement Oversight Committee of the board, if at all it existed, approved the signing of the contract awarding the tender for structural cabling of NWCP Headquaters office block to telecommunication today limited.

As concerning the second count the offence is also alleged to have been committed on the 10th day of September 2013. As stated earlier at that time, the tender evaluation committee had not been constituted. The memo constituting the committee is dated 30th June, 2014. The tender had not even been advertised. It has not been shown that the 1st 2nd 3rd and 4th accused persons were members of the national water conservation and pipeline Corporation Procurement Oversight Committee of the board. There is no scintilla of evidence showing inappropriate influence on the evaluation process because at that time there was no evaluation and the company known as telecommunication today limited was not even incorporated. From the prosecutions evidence it was incorporated on 6th May 2014, six months later.

Concerning count 3 the 5th 6th 7th 8th 9th 10th and 11th accused are said to have wilfully and jointly failed to comply with the law relating to procurement that is contrary to section 27 (3) as read with regulation 10(2) (a) of the public procurement and disposal regulations 2006 by awarding the tender for structural cabling to telecommunication today limited. As stated earlier in the body of this ruling, the company that was recommended for award by the corporations tender committee was telecommunication today; a business name. The notification of the award issued by the first accused was to the same business name Telecommunication today. The acceptance of the award is by telecommunication today. The contents of exhibit 13 attest to this fact. There is nothing on record showing that the 7 accused who are the subject of Count 3 awarded the tender to telecommunication today Limited.

Having clearly demonstrated from the evidence on record that the 7 accused did not recommend an award to telecommunication today limited, they cannot be said to have abused their offices by conferring a benefit of Ksh.41,051,146.33 to telecommunication today limited. The logic behind this finding is that the Company recommended for award i.e telecommunication today, a business

name, is a separate legal entity as demonstrated by PW6 a state Counsel attached to the registrar of companies.

As concerning the charge in count number 5, the first accused, is alleged to have abused his office contrary to section 46 as read with Section 48 of the anti corruption and economic crimes Act 2003 by improperly using his office to confer a benefit of Ksh.41,051,146.33 to telecommunication today limited by signing the notification of award letter awarding the tender for supply, delivery, installation, testing and commissioning of new structured cabling of the headquarters office block to the company Telecommunication Today Limited, a company that did not bid. In support of this charge the prosecution tendered **exhibit 13** the said notification of award. Amazingly that exhibit notifies another legal entity telecommunication today, of their success in their bid.

Mr. Kurgat appearing for the 8th accused further urged this court to find that at the time, the EACC investigated this case, the Commission was not properly constituted and hence their actions were Null and void **abi-nitio**. He further submitted that the evidence gathered was illegal and could not form the basis of the

charges. He stated that the evidence on record shows that 3 commissioners of the EACC were not in office at the time this case was in being investigated. The investigating officer in her cross examination stated that the commissioners of the EACC were appointed last year i.e 2016 whereas the charge was preferred in 2015 and that by that time there were no Commissioners in office. Article 250 (i) of the constitution provides that each Commission shall consist of at least 3 but not more than 9 members. The same article for the provides that there shall be a secretary to the commission who shall be appointed by the Commission and Chief Executive Officer of the Commission. Section 4 of the EACC Act provides that the Commission shall consist of a chairperson and 2 other members appointed in accordance with the provision of the constitution and the act. Section 11(1) (d) of the EACC Act provides for the functions of the Commission; to investigate and recommend to the director of Public prosecutions. In the case of **Michael Sistu Mwaura Kamau and 12 Others - Vs - the ethics and Anti Corruption Commission and 4 others the High Court** stated that any steps of the commission including any investigations or recommendations ought to be under the hand of the chair for the

time being of the Commission and that any decision purportedly transmitting a report to the DPP recommending prosecution without sanction of the commissioners would not be in compliance with the law. He further submitted that in the absence of Commissioners, the EACC had no power to recommend to the director of public prosecution on who to prosecute.

The decision referred to by Mr. Kurgat and the 5th accused challenging the EACC's power to recommend institution of charges to the DPP was also the subject of **Civil Appeal No. 102 of 2016 Michael Sistu Mwaura Kamau – Vs – EACC and 5 Others**. The Court of Appeal has this to say:

Additionally section 35 of the ACECA provides;

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

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

The court further stated;

“We are also in agreement with the finding of the high Court that the decision transmitted to the DPP recommending the prosecution of the appellant without the sanction of the commissioners was in violation of the provisions of Article 250(1) of the Constitution,

section 11 of the EACC Act and section 35 of the ACECA. See also the persuasive decision of the Uganda Constitutional Court in Hon. Sam Kuteesa & Others – Vs – The Attorney General (Supra) where it was held that the Inspector General of Government could not prosecute independently of or in the absence of a properly constituted Inspectorate of Government, upon which the Constitution of Uganda vested the power to prosecute corruption offence.....”

Further, the Court of Appeal stated;

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

Constitution, the law, and the evidence. He is not a rubber stamp, to mechanically approve the recommendations of the EACC.....”

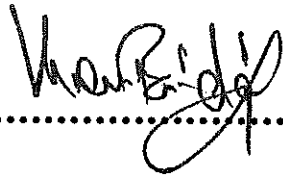
The court of appeal finally stated;

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

The above stated context applies to the circumstances of this case based on the evidence adduced by the prosecution witnesses and I have nothing useful to add.

In conclusion, for reasons already stated earlier in this ruling I am satisfied that the prosecution has failed to establish a Prima facie case against any of the accused persons in respect of all the charges. It is rather unfortunate that the evidence on record clearly shows that public funds were used to pay an entity known as telecommunication today limited, which neither bid, nor was awarded a tender. It is this courts recommendation to the ODPP that those who paid this entity be brought to account by way of appropriate charges. The prosecution must have known, that to prove the allegations in the charge then the evidence of the National water conservation and Pipeline Corporation Procurement Oversight Committee of the board ought to be presented to court. The particulars of the offence, which must all be proved clearly state that this is the board that mis-led the tender committee in counts 1 and 2. But the investigating officer when questioned by the court why such minutes or other documentation was not tendered in evidence her simple answer was that the evidence was not presented to the court because she was not the author of those minutes or documentation from procurement oversight committee of the board. The EACC had intended to close this file for lack of evidence. That indeed was

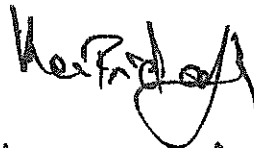
the initial findings of the investigators. Even upon further investigations there is no evidence in support of any of the charges. I will therefore acquit all 11 accused Persons under the provisions of Section 210 of the criminal procedure code in respect of all the charges.



HON. K. BIDALI,

CHIEF MAGISTRATE.

Ruling delivered in open
court on 1st August 2017



Mr Chigiti for State
Mr Kamunye for the 1st accused
Mr Ndubi for the 2nd 3rd and 4th
Mr Kungat for the 5th and
Mr Githani for the 7th 8th 9th 10th and
11th accused.

Mr. Thurgood: on behalf of all
appeared for a regard of
Cash bail to the depositions and
these who produced such documents
the same as returned to them
also request for a certified copy of
the witness: I pray for a
Mr. Chung: I pray for a
Copy of the proceedings and
Order Bail and the depositions
to be returned to the depositions
Certified copy of proceedings and
witness be provided to the depositions
and Prosecution