

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
HCCHR PET E538 OF 2023

TRANSPARENCY INTERNATIONAL.....1ST PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER
KATIBA INSTITUTE.....3RD PETITIONER
AFRICA CENTRE FOR OPEN
GOVERNANCE (AFRICOG).....4TH PETITIONER

V

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
GEOFFREY OBIRI.....2ND RESPONDENT
OLIVER MUREITHI.....3RD RESPONDENT
LAW SOCIETY OF KENYA.....INTERESTED PARTY

CERTIFICATE OF URGENCY

I Ochiel J Dudley, Advocate, certify this matter urgent because:

1. This case seeks accountability for the “reckless dereliction of duty” by prosecution counsel” in the Kshs 63 billion Arror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*). The counsel failed to call witnesses citing “firm instructions not to proceed with the matter” The court acquitted the nine accused persons but called for accountability of the prosecution counsel for the prosecutorial misconduct.
2. Petitioners seek, therefore, to lift the immunity of the prosecutorial counsel and to hold them personally liable if the accused persons claim damages for malicious prosecution.
3. Although the public has already lost Kshs 63 billion, it could lose more if, despite this petition, the accused persons sue and are paid damages for malicious prosecution from the public purse. The urgency is plain: the matter should be admitted for a recess hearing.

Dated at Nairobi on 29 of December 2023

OchielJD

Ochiel Dudley

Advocate for the Petitioners

Drawn and filed by

Ochiel Dudley, Advocate

House No. 5, The Crescent, off Parklands Road

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To be served on:

Director of Public Prosecutions

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Geoffrey Obiri

Oliver Mureithi

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CHAMBER SUMMONS

Let all parties attend the Honourable Court virtually on theday of
.....2023 at 9.00am or soon after for hearing of an application
by the Applicants for orders:

- a) This application be certified urgent and be heard ex parte in the first instance.
- b) This matter be admitted for hearing during this court's December recess.

Which application is based on the reasons:

1. Petitioners seek accountability for the “reckless dereliction of duty” by prosecution counsel” in the Kshs 63 billion Aror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*).
2. Petitioners sue to lift the immunity of the prosecution counsel and to hold them personally liable if the accused persons sue for malicious prosecution.
3. Although the public has already lost Kshs 63 billion, it could lose more if, despite this petition, the accused persons sue and are paid damages for malicious prosecution from the public purse.
4. The urgency is plain: the matter should be admitted for a recess hearing.

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NOTICE OF MOTION

TAKE NOTICE that this court will be moved on the ___ day of _____ 2023 for the hearing of the Petitioner’s application for orders that:

- a) This matter be and is certified urgent.
- b) Pending hearing of this application, a conservatory order does issue stopping any public official from paying from any public funds, any damages for malicious prosecution in the Kshs 63 billion Arror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*).
- c) Pending hearing of the Petition, a conservatory order does issue a conservatory order does issue stopping any public official from paying from any public funds, any damages for malicious prosecution in the Kshs 63 billion Arror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*).
- d) The court be pleased to consider *suo moto* whether this petition raises a substantial question of law under Article 165(4).

Which application is founded on the grounds that:

1. Petitioners seek accountability for the “reckless dereliction of duty” by prosecution counsel” in the Kshs 63 billion Arror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*).
2. Petitioners sue to lift the immunity of the prosecution counsel and to hold them personally liable if the accused persons sue for malicious prosecution.

3. Although the public has already lost Kshs 63 billion, it could lose more if, despite this petition, the accused persons sue and are paid damages for malicious prosecution from the public purse.
4. There is no guarantee that the ODPP, Geoffrey Obiri, or Oliver Mureithi would refund the public if the petition succeeds yet the public is sued and pays up for malicious prosecution caused by the ODPP's reckless dereliction of duty.
5. Article 10 and 201(1) require prudent and responsible use of public money.
6. A conservatory order is therefore necessary barring any claim against the public or payment of public funds for malicious prosecution in the Arror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*) until the conclusion of this case.

Dated at Nairobi on 29 of December 2023

OchielJD

Ochiel Dudley

Advocate for the Petitioners

Drawn and filed by

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PETITION

1. Introduction

5. This case seeks accountability for the “reckless dereliction of duty” by prosecution counsel” in the Kshs 63 billion Aror and Kimwarer dams case (*R v Henry Rotich & Others Milimani CMC Anticorruption Case No 20 of 2019*). The prosecution counsel failed to call witnesses citing “firm instructions not to proceed with the matter” The court acquitted the nine accused persons but called for accountability of the prosecution counsel for the prosecutorial misconduct.
6. Petitioners seek, as a result, to lift the immunity of the prosecutorial counsel and to hold them personally liable if the accused persons claim damages for malicious prosecution.

2. Parties

2.1 Petitioners

7. Transparency International Kenya, the 1st Petitioner, is a not-for-profit organisation founded in 1999 to develop a transparent and corruption-free society through good governance and social justice.
8. Kenya Human Rights Commission (KHRC), the 2nd Petitioner, is a nongovernmental organisation whose objectives include promoting human rights and fundamental

freedoms, good governance, and democracy.

9. Katiba Institute, 3rd Petitioner, is a constitutional research, policy, and litigation institute formed to further the implementation of Kenya's 2010 Constitution.
10. Africa Center for Open Governance (AFRICOG), the 4th Petitioner, monitors governance and public ethics issues in public and private sectors. AFRICOG's goal is to address the structural causes of the governance crisis in East Africa.

2.2 Respondents

11. Director of Public Prosecution, sued as 1st Respondent is a state office established by Article 157 and administered through the Office of the Director of Public Prosecutions Act, 2013. The DPP exercises the delegated power of instituting and undertaking criminal proceedings against any person before any court in Kenya over any offence (except court martials).
12. Geoffrey Obiri and Mureithi are prosecution counsel sued in their person capacity because their conduct in the Kshs 63 billion Aror and Kimwarer dams case deprives them of the privilege of immunity.

2.3 Interested Party

13. The Law Society of Kenya, Interested Party, is a legal person founded by section 4 of the Law Society of Kenya (LSK) is founded by section 4 of the Law Society of Kenya Act, 2014. Section 4 requires LSK to 'uphold the Constitution of Kenya and advance the rule of law and administration of justice' and to 'protect and assist' the public in Kenya in legal matters.
14. LSK's other functions relevant to this petition is to ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide. Likewise, LSK must also determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya. It must also formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values

and objects the Constitution of Kenya and facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent. Besides, LSK must protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners.

15. As such, LSK has an identifiable interest and legitimate stake in these proceedings.

3. Legal Foundation

3.1 Constitutional Basis

16. The Constitution's preamble bespeaks Kenyans' desire to live in a country governed by the rule of law.
17. Under Article 1 of the Constitution, all sovereign power belongs to the people of Kenya who have delegated it to state organs and officers like the Respondents.
18. Article 2(1) of the Constitution establishes the supremacy of the Constitution, while Article 2(2) provides that state authority can only be claimed or exercised per the Constitution. Article 2(4) provides that any act or omission violating the Constitution is invalid.
19. Article 3 obligates every person to respect, uphold and defend the Constitution.
20. Under Article 4(2), Kenya is a multi-party democratic state founded on the national values and principles of governance in *Article 10*.
21. The Article 10 national values and principles of governance bind all state organs, state officers, public officers and all persons whenever they apply or interpret the Constitution, whenever they enact, apply or interpret any law or whenever they implement public policy decisions. The values and principles relevant to this Petition include the rule of law, good governance, integrity, transparency, and accountability.
22. Further, under Article 19(3), the rights and fundamental freedoms in the Bill of Rights, (a) belong to each individual and are not granted by the state; (b) do not

exclude other rights and fundamental freedoms recognised or conferred by law unless they are inconsistent with the Bill of Rights, and (c) are subject only to the limitations contemplated in the Constitution.

23. As to scope, under Article 20(1), the Bill of Rights applies to all law and binds all State organs and all persons. Article 20(2) also entitles every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom
24. Notably, Article 20(3) requires this court to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
25. Equally, in interpreting the Bill of Rights, Article 20(4) requires the court, tribunal, or other authority to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; as well as the spirit, purport and objects of the Bill of Right
26. Article 21(1) obligates the state and every State organ to *observe, respect, protect, promote* and *fulfil* the rights and fundamental freedoms in the Bill of Rights.
27. Under Article 22, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or *threatened*. Article 258 confers a similar right of standing concerning the Constitution and beyond the Bill of Rights.
28. By Article 23 and 165(3)(d), the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
29. Under Article 50(1), every person has the right to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

30. Article 73 (1) of the Constitution specifies that authority assigned to a state officer is a public trust to be exercised in a manner that: is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office.
31. Under Article 73(2) the guiding principles of leadership and integrity include: objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices. Also, selfless service based solely on the public interest, demonstrated by —
 - (i) honesty in the execution of public duties; and
 - (ii) the declaration of any personal interest that may conflict with public duties;
 - (d) accountability to the public for decisions and actions;
and
 - (e) discipline and commitment in service to the people.
32. Concerning independence, Article 157(10) forbids the DPP from requiring the consent of any person or authority to commence criminal proceedings and from being under the control of direction or control of any person or authority in the exercise of prosecutorial powers or functions.
33. Not to mention that Article 157(11) requires the DDP to consider the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process in conducting his office.
34. Article 159 vests judicial authority in the courts and tribunals established by the Constitution and outlines principles in discharging judicial authority. A key principle of judicial authority is to ensure that justice is done to all, irrespective of status and to protect and promote the principles and purposes of the Constitution.
35. Article 249 indicates that the objects of the commissions and the independent

offices (like the ODPP) are to: protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism.

36. On that score, under Article 249(2), the DPP, just like holders of independent offices, is subject only to the Constitution and the law; and is independent and not subject to direction or control by any person or authority.
37. Lastly, Article 259 demands interpretation of the Constitution in a manner that: promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

3.2 International Law

(i) Guidelines on the Role of Prosecutors, 1990

38. Adopted in 1990, Guideline 1 requires persons selected as prosecutors must be individuals of *integrity* and *ability*, with appropriate training and qualifications.
39. Further, under Guideline 3 and 4 prosecutors, as essential agents of the administration of justice, must always maintain the honour and dignity of their profession. States must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
40. More precisely, Guideline 12 requires prosecutors, in accordance with the law, to perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
41. That apart, Guideline 13 demands that prosecutors must in the performing their duties, prosecutors must:
 - a. carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

- b. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - c. ...
 - d. consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
42. Specifically, Guideline 15 requires prosecutors to give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
43. Complaints against prosecutors alleging that they acted in a manner clearly out of the range of professional standards must be processed expeditiously and fairly under appropriate procedures under Guideline 21.

(ii) Basic Principles on the Role of Lawyers

44. Principle 12 requires lawyers to maintain the honour and dignity of their profession as essential agents of the administration of justice, at all times.
45. Principle 14 requires lawyers, in protecting the rights of their clients and promoting the cause of justice, to uphold human rights and fundamental freedoms and to act at all times freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
46. Lawyers must always loyally respect the interests of their clients under Principle 15 of the Basic Principles.

(iii) IBA Standards for the Independence of the Legal Profession, 1990

47. Rule 6 of these IBA Standards entitles lawyers to act freely, diligently and

fearlessly in accordance with the legitimate interest of the client, subject only to established rules, standards, and ethics of the profession.

(iv) IBA International Principles on Conduct for the Legal Profession, 2011

48. Under International Principle 2, lawyers must at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.
49. Also, International Principle 2 requires lawyers to treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

3.3 Statutory Basis

(i) Office of Director of Public Prosecutions Act, 2013

50. Section 4 of the ODPP Act imposes the following guiding principles in all prosecutorial decisions while exercising the DPP's mandate:
- (a) the diversity of the people of Kenya;
 - (b) impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the office;
 - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
 - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - (g) protection of the sovereignty of the people;
 - (h) secure the observance of democratic values and principles; and
 - (i) promotion of constitutionalism.
51. Section 5 of the ODPP Act, on protection from personal liability, grants a conditional immunity:

No matter or thing done by a member of the staff of the Office or any officer, employee or agent of the Office

shall, if the matter or thing is done in good faith in the execution of the functions, powers or duties of the Office, render the member, officer, employee or agent personally liable to any action, claim or demand whatsoever.

52. Section 34 of the DPP Act on qualification for appointment as prosecution counsel demands that a person qualifies to be appointed as a prosecution counsel only if that person is—
- (a) an Advocate of the High Court of Kenya; or
 - (b) holds legal qualifications that would entitle the person to practice law in Kenya; and
 - (c) is a fit and proper person with due regard to his or her experience conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(ii) Fair Administrative Action Act, 2015

53. Article 47, as read with section 4(1) of the Fair Administrative Action Act, 2015 guarantees every person the right to administrative action that is *expeditious, efficient, lawful, reasonable and procedurally fair*”.
54. In that regard, section 2 of the Fair Administrative Action Act, 2016 defines “administrative action” as extending to the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Therefore, the decision to prosecute is an administrative action that this court has the power to review.
55. Under section 7 of the Fair Administrative Action Act, 2015, this court is entitled to review administrative action, among others, where:
- 56. the administrator: was biased or may reasonably be suspected of bias;
 - 57. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to

- prejudice the legal rights of the applicant;
58. there was an *abuse of discretion* or failure to act in the discharge of a duty imposed under any written law;
 59. the administrative action or decision is unreasonable; or
 60. the administrative action or decision is taken or made in *abuse of power*.

4. Facts of the Case

61. The facts of this matter are straight-forward.
62. On 23 July 2019, in Milimani Chief Magistrates Anti-corruption Court Case 20 of 2019 the DPP charged 24 individuals (mostly public officers) with the loss of Kshs 63 billion in the Aror and Kimwarer dams project. The 24 accused persons faced some 30 counts of various corruption and economic related crimes like abuse of office and conspiracy to commit an economic crime. Eventually, the DPP discharged 15 of those accused persons (some becoming prosecution witnesses). At the end, 9 accused persons remained on the amended charge sheet faced with 30 counts.
63. In September and October 2023 Petitioners noticed press reports indicating that prosecution counsel, Geoffrey Obiri and Oliver Mureithi, were stalling the prosecution of the case. The reports indicated that the prosecution counsel were refusing to call witnesses or to examine any witnesses many of whom were appearing under warrants of arrest. The duo cited “firm instructions not to proceed with the case”.
64. Predictably, on 14 December 2023 the trial court (Hon Nyuttu) acquitted all nine accused persons under section 210 of the Criminal Procedure Code, Cap 75.
65. Aggrieved, Petitioners seek to hold the prosecution counsel personally liable for the “reckless dereliction of duty”. The Petitioners seek to achieve this, by lifting the immunity of the prosecutorial counsel and to have them indemnify the public should any of the acquitted persons sue for claiming damages for malicious prosecution.

5. Particulars of Unconstitutionality

66. First, by failing to call witnesses, in the Kshs 63 billion Aror and Kimwarer dams case, because of “firm instructions not to proceed with the case” the Respondents violated Article 157(10). Article 157(10) forbids the DPP from being under the control of direction or control of any person or authority in the exercise of prosecutorial powers or functions.
67. By the same token, the Respondents violated Article 73(2) requiring objectivity and impartiality in decision making, barring decisions influenced by nepotism, favouritism, other improper motives or corrupt practices. Similarly, the DPP’s decision to halt the prosecution because of instructions from third parties violates Article 249 on the independence of independent office holders.
68. Further, the Respondents’ conduct violates Article 73(1) because the “reckless dereliction of duty” is inconsistent with the purposes and objects of the Constitution; demonstrates disrespect for the people; brings dishonour to the nation and indignation to the office; and weakens public confidence in the integrity of the office of the DPP.
69. What’s more the Respondents recklessness violated section 4 of the ODPP Act requiring impartiality, promotion of public confidence in the integrity of the office, discharge of the functions of the Office on behalf of the people of Kenya, service to the cause of justice while avoiding abuse of the legal process, action in the public interest, protection of the people’s sovereignty, and the promotion of constitutionalism.
70. Second, section 5 of the ODPP Act, 2013 only grants prosecution counsel a conditional immunity “if the matter or thing is done in good faith in the execution of the functions, powers or duties of the Office”. In this case, however, prosecution counsel acted in bad faith, unlawfully, and unreasonably

in a case concerning the loss of Kshs 63 billion by the public. And so, the prosecution counsel's "reckless dereliction of duty" disentitles them to the immunity under section 5 of the ODPP Act.

71. In this case, therefore, since independence of the DPP is subservient to the Constitution, immunity is unavailable to prosecution counsel who exercised their discretion by violating the Constitution and the law and by acting in bad faith.
72. Lifting the prosecution counsel's immunity on the facts of this case is consistent would not make prosecutors less independent and courageous in executing their duties, or interfere with the prosecutors' performance of their public tasks. Instead, limiting the prosecutorial immunity would at least serve a symbolic function, however; it would show that prosecutors are not entirely above the law that holds other mortals financially accountable for their intentional misdeeds in public office.
73. Burdening the public with the loss of a prosecution worth Kshs 63 billion of public funds and payment of damages for malicious prosecution because of prosecution counsel's reckless dereliction of duty violates Article 10 and 201 of the Constitution. Article 10 demands good governance while under Article 201(1) public money must be used in a prudent and responsible way.
74. Third, the DPP's dereliction of duty violates Petitioners' right to fair administrative action under Article 47 and the FAA because the DPP may reasonably be suspected of bias. Also, the dereliction of duty smacks of ulterior motive or purpose calculated to prejudice the legal rights of the public and abuse of power.

6. Reliefs

75. As a result of which the petitioner prays the court for these or other appropriate reliefs:
- a) A declaration does issue that the Director of Public Prosecution and prosecution counsel Geoffrey Obiri and Oliver Mureithi violated Articles 10, 73, 175(10) and (11), and 249 Constitution as read with section 4 of the ODPP Act by their “reckless dereliction of duty” and lack of independence in the Kshs 63 billion Arror and Kimwarer Dams case (in Milimani Chief Magistrates Anti-corruption Court Case 20 of 2019 R v)
 - b) An order be and is issued that the finding of constitutional violation in (a) above is a relevant factor to be recorded and considered should Geoffrey Obiri and Oliver Mureithi seek a state office.
 - c) A declaration be and is issued that Geoffrey Obiri and Oliver Mureithi’s reckless dereliction of duty was not in good faith and disentitles them from claiming immunity under section 5 of the ODPP Act, 2013.
 - d) A costs order against the Respondents to deter future reckless dereliction of prosecutorial duty and to indemnify the public from the unnecessary costs arising from the Respondents’ conduct.

Dated at Nairobi on 29 of December 2023

OchielJD

Ochiel Dudley

Advocate for the Petitioners

Drawn and filed by

Ochiel Dudley, Advocate

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**AFFIDAVIT SUPPORTING THE APPLICATION FOR CONSERVATORY
 ORDERS AND THE PETITION**

I Chris Kerkering of P. O. Box 26586-0100 Nairobi make oath and swear as follows:

1. I am Katiba Institute (3rd Petitioner)’s Litigation Manager familiar with the facts, duly authorized, and competent to swear this affidavit on behalf of the co-petitioners.
2. On 23 July 2019, in Milimani Chief Magistrates Anti-corruption Court Case 20 of 2019 the DPP charged 24 individuals (mostly public officers) with the loss of Kshs 63 billion in the Arror and Kimwarer dams project. The 24 accused persons faced some 30 counts of various corruption and economic related crimes like abuse of office and conspiracy to commit an economic crime. Eventually, the DPP discharged 15 of those accused persons (some becoming prosecution witnesses). At the end, 9 accused persons remained on the amended charge sheet faced with 30 counts.
3. In September and October 2023 Petitioners noticed press reports indicating that prosecution counsel, Geoffrey Obiri and Oliver Mureithi, were stalling the prosecution of the case. The reports indicated that the prosecution counsel were refusing to call witnesses or to examine any witnesses many of

whom were appearing under warrants of arrest. The duo cited “firm instructions not to proceed with the case”.

*I annex copies of reports by K24 (25 September 2023), Daily Nation (26 September 2023), and Citizen TV (4 October 2023) marked as **CK-1, CK-2, and CK-3.***

- 4. Predictably, on 14 December 2023 the trial court (Hon Nyutu) acquitted all nine accused persons under section 210 of the Criminal Procedure Code, Cap 75.

*I annex a copy of the ruling by Hon Nyutu on 14 December 2023 marked as **CK-4.***

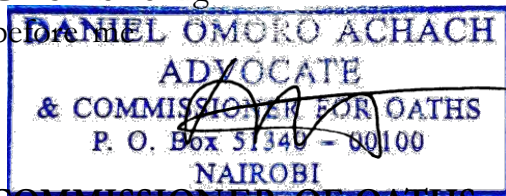
- 5. Aggrieved, Petitioners seek to hold the prosecution counsel personally liable for the “reckless dereliction of duty”. The Petitioners seek to achieve this, by lifting the immunity of the prosecutorial counsel and to have them indemnify the public should any of the acquitted persons sue for claiming damages for malicious prosecution.

- 6. I depose this affidavit in support of the application and the Petition from facts within my knowledge (unless I have disclosed other sources), believing it to be per the Oaths and Statutory Declarations Act, Cap 20.

Sworn at Nairobi this 29th day of December 2023 by

Chris Kerkering)

before me)



COMMISSIONER OF OATHS)

Chris Kerkering
.....
DEPONENT

Drawn and filed by

Ochiel Dudley, Advocate

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This is the Exhibit Marked "CK-1" 22 of 94
Referred to in the Annexed Affidavit Declaration
of.....Chris Kerkering.....
Sworn / declared before me
this.....29.....day of December.....2023..
at.....Nairobi.....

.....
Commissioner For Oaths

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3. Magistrate cites frustrations by DPP in Ksh63B Aror, Kimwarer dams case

Magistrate cites frustrations by DPP in Ksh63B Aror, Kimwarer dams case



By [Nancy Gitonga](#), K24 Digital
On Mon, 25 Sep, 2023 17:42 | 2 mins read



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A magistrate has taken issue with the manner in which the Director of Public Prosecution (DPP) is conducting the Ksh63 billion Aror and Kimwarer dams case against former finance CS Henry Rotich and eight others saying "faceless officers" in the country's prosecution office have thrown the case to a quagmire.

While declining to adjourn the case on Monday, September 25, 2023, Anti-Corruption Chief Magistrate Eunice Nyutu took issue with the instructions being given to two state prosecutors Geoffrey Obiri and Oliver Mureithi over the case.

Nyutu said senior officers seated in the ODPP have been asking the two prosecutors to take out the hearing of the case pending the swearing-in of the new DPP Renson Ingonga.

The magistrate wondered why the senior officers giving those instructions did not want to commit themselves to writing a formal letter to the court.

"It is now three weeks and these faceless officers have been given you (Obiri and Mureithi) oral instructions to secure an adjournment of this matter awaiting the assumption to the office of Ingonga," Nyutu noted.

She proceeded to direct Obiri to present witnesses lined up to testify in the case since she felt frustrated and not working leading to the waste of precious Judicial time.

Following the directive, Obiri presented four witnesses namely Cecilia Ngariuka Cecilia from the office of the Auditor General and three others from Kerio Valley Development Authority Johnanth Ruto, David Juma Onyango and Moses Kipsang Kipchumba.

Upon Obiri being compelled to proceed with the hearing, he said that he had no questions to put the four witnesses who had been brought to court on the strength of a warrant of arrest.

Obiri sought an adjournment saying Ingonga's appointment was gazetted /last week but President William Ruto has been away, so the DPP's swearing-in could not take place.

He asked the court to indulge the DPP for two weeks to peruse the file and give instructions on the way forward.

The magistrate declined the request and ordered the case to proceed Tomorrow(Tuesday) for further hearing.

In the past three weeks over 10 witnesses including former Agriculture CS Peter Munya have been discharged without testifying in the case with the prosecutors urging the court to wait for the new DPP to take office and give fresh directors in the trial of Rotich and his co-accused person.

In the case, former CS finance Rotich is charged alongside his co-accused persons namely Kennedy Nyakundi Nyachiro, Jackson Njau Kinyanjui, David Kipchumba Kimosop, William Kipkemboi Maina, Paul Kipkoech Serem, Francis Chepkonga Kipkech, Titus Muriithi and Geoffrey Mwangi Wahungu are charged with abuse of office over the construction of Arror and Kimwarer dams.

The nine are accused of conspiracy to defraud the government of Kenya USD 501,829,769 by unlawfully initiating and entering into contraction, financing and insurance agreement for the development of Arror and Kimwarer multi-purpose dams.

They face 29 charges of engaging in a project without prior planning, willful failure to comply with procurement laws, Abuse of office and committing an offence of financial misconduct.

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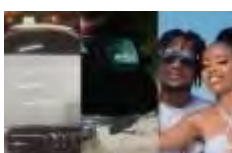
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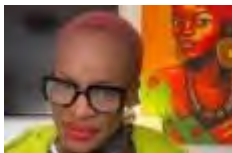
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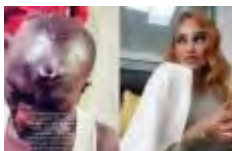
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Henry Rotich dams case: Magistrate expresses frustration with prosecution

Tuesday, September 26, 2023



Anti-Corruption Chief Magistrate Eunice Nyutu. Photo credit: File | Nation Media Group

By Richard Munguti
 NMG

A magistrate has taken issue with the manner in which officers from the Director of Public Prosecutions (DPP) are conducting the Sh63 billion Arror and Kimwarer dams' case against former Finance Cabinet Secretary Henry Rotich and eight others.

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Anti-Corruption Chief Magistrate Eunice Nyutu says "faceless officers" in the country's prosecution office have thrown the case into a quagmire.

While declining to adjourn the case on Monday, Ms Nyutu took issue with the instructions being given to the two state prosecutors – Geoffrey Obiri and Oliver Mureithi – over the case.

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Ms Nyutu said the hearing dates were blocked last year and she cannot take up new matters since her diary shows she is hearing this particular case.

Nyutu noted that senior officers in the ODPP have been asking the two prosecutors to seek an adjournment pending the swearing-in of the new DPP Renson Ingonga. Mr Ingonga was on Monday sworn in as DPP at State House.

Also read: *Sh63bn Arror, Kimwarer dams scam case: Ex-Finance CS Henry Rotich headed for acquittal?*

The magistrate further questioned why the senior officers giving those instructions do not want to commit themselves in writing a formal letter to the court.

"It is now three weeks and these faceless officers have been given you (Obiri and Mureithi) oral instructions to secure an adjournment of this matter awaiting the assumption to the office of Ingonga," Nyutu noted.

She then directed Prosecutor Obiri to present witnesses lined up to testify in the case, to prevent wastage of judicial time.

"The plea to have this case adjourned is hindering the way I work. I am employed and I must be productive. These requests to suspend the trial hinder my work. I need to be accountable. I will not adjourn this case lets proceed. Put the witnesses in the dock," Ms Nyutu ruled.

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Following the directive, Mr Obiri presented four witnesses brought to court on the strength of a warrant of arrest—Cecilia Ngariuka from the office of the Auditor General, and Jonathan Ruto, David Juma Onyango and Moses Kipsang Kipchumba, all from Kerio Valley Development Authority—but said that he had no questions for them.

Mr Obiri sought an adjournment saying Mr Ingonga's appointment was gazetted last week but President William Ruto has been away on official duty, hence the DPP's swearing in could not take place.

Mr Obiri asked the court to indulge the DPP for two weeks to peruse the file and give instructions on the way forward.

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The magistrate declined the request and ordered the case to proceed on Tuesday for further hearing

In the past three weeks, more than 10 witnesses, including former Agriculture CS Peter Munya, have been discharged without testifying in the case with the prosecutors urging the court to wait for the new DPP to take office and give fresh directions in the trial.

In the case, former Finance CS Rotich is charged with abuse of

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Kinyanjui, David Kipchumba Kimosop, William Kipkemboi Maina, Paul Kipkoech Serem, Francis Chepkonga Kipkech, Titus Muriithi^{33 of 94} and Geoffrey Mwangi Wahungu.

The nine are accused of conspiracy to defraud the government of \$501,829,769 by unlawfully initiating a contract, and financing and insurance agreement for the development of Arror and Kimwarer multi-purpose dams.

They face 29 charges of engaging in a project without prior planning, wilful failure to comply with procurement laws, abuse of office, and committing an offence of financial misconduct.

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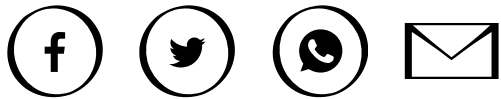
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Arrow and Kimwarer dams case on the brink of collapse as two more witnesses discharged

BW

By [Brenda Wanga](#) Published on: October 04, 2023 09:58 (EAT)

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The case against former Finance Cabinet Secretary Henry Rotich could be on the brink of collapse with the prosecution failing to question, yet again, its own witnesses in the case where the ex-minister is accused of abuse of office in the Ksh.63 billion Aror and Kimwarer dams scandal.

Two witnesses set to testify on Wednesday were discharged as the prosecution, led by State Prosecutor Geoffrey Obiri, told Magistrate Eunice Nyotu's court that the State did not have any questions for them.

The Magistrate however directed the lead prosecutor to proceed with the questioning, leading to Obiri discharging the two witnesses.

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On Monday, the prosecution also failed to lead its witnesses to testify, asking the court to grant it two weeks to enable the new Director of Public Prosecutions (DPP) Renson Ingonga [time to settle in office](#) and give direction on the case.

In what has emerged as a pattern, the prosecution has so far discharged a total of 24 witnesses out of an initial 32 summoned to testify against Rotich and his co-accused.

Among those who had been set to testify but did not include former Agriculture CS Peter Munya who, despite showing up in court earlier in the year, [was not questioned or ordered to testify](#).

Magistrate Nyotu has previously taken issue with the way in which the ODPP has conducted itself in the case's proceedings, especially in asking for adjournment.

"It's very unfortunate that the prosecution shows up in court and claims they have no questions for the witnesses, and claims that they need further directions from the ODPP on the way to move forward in this case which they voluntarily presented before this court," the magistrate said previously.

She further warned that "the court will not condone any form of interference, be it in the name of seeking for adjournment or in the name of not presenting witnesses in court before this court."

Even after the strong warning from the bench, the prosecution again discharged five witnesses barely three weeks later.

Rotich was first charged in 2019 with 27 other officials and entities over his involvement in the Aror and Kimwarer multipurpose dams scandal; the prosecution insisted then that it had sufficient evidence in the case.

In 2021, the prosecution amended the charge sheet dropping charges against nine of the accused persons, including former Treasury PS Kamau Thugge, and charging Rotich and eight others afresh.

The prosecution has asked that the Magistrate recuse herself from hearing the case, a ruling on the same is expected November 19, 2023.

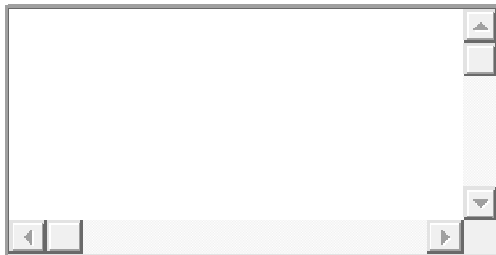
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IN THE CHIEF MAGISTRATE ANTI-CORRUPTION COURT AT NAIROBI

ANTI-CORRUPTION CASE NUMBER 20 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

HENRY KIPLAGAT ROTICH.....1ST ACCUSED
KENNEDY NYAKUNDI NYACHIRO.....2ND ACCUSED
JACKSON NJAU KINYANJUI.....3RD ACCUSED
DAVID KIPCHUMBA KIMOSOP.....4TH ACCUSED
WILLIAM KIPKEMBOI MAINA.....5TH ACCUSED
PAUL KIPKOECH SEREM.....6TH ACCUSED
FRANCIS CHEPKONGA KIPKECH.....7TH ACCUSED
TITUS MURIITHI.....8TH ACCUSED
GEOFFREY MWANGI WAHUNGU.....9TH ACCUSED

RULING PURSUANT TO SECTION 210 OF THE CRIMINAL PROCEDURE CODE

On **Count one**, all the accused persons are charged with conspiracy to defraud contrary to Section 317 of the Penal Code. The particulars of the charge are that between 19th December 2014 and 22nd July 2019, with others not before the court, jointly conspired to defraud the government of Kenya of USD 501,829,769.43 by unlawfully initiating

On the **second count** all the accused persons are charged with engaging in a project without prior planning contrary to section 45(2)(c) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 17th December 2014 and 22nd July 2019, within the Republic of Kenya, being the Cabinet Secretary National Treasury, Chief Economist and head of Europe II Division and Director Resource mobilization department of the National Treasury and Planning, the managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority, and Inspector General of State Corporations respectively, being persons whose functions concern the management of public revenue, engaged in a project for the Aror Multipurpose Dam without prior planning as required under section 26(3)(a) of the Public Procurement and Asset Disposal Act, 2005.

On the **third count** all the accused persons are charged with engaging in a project without prior planning contrary to section 45(2)© as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 17th December 2014 and 22nd July 2019, within the Republic of Kenya, being the Cabinet Secretary National Treasury, Chief Economist and head of Europe II Division and Director Resource mobilization department of the National Treasury and Planning, the Managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority, and Inspector General of State Corporations respectively, being persons whose functions concern the management of

public revenue, engaged in a project for the Kimwarer Multipurpose Dam without prior planning as required under section 26(3)(a) of the Public Procurement and Asset Disposal Act, 2005.

On the **fourth count**, the 4th accused David Kipchumba Kimosop, 5th accused William Kipkemboi Maina, 6th accused Paul Kipkoech Serem and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 19th December 2014 and 5th April 2017 within the Republic of Kenya being the Managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue, failed to comply with Section 29(1) of the Public Private Partnership Act No. 15 of 2013 by failing to effect procurement through a competitive bidding process by awarding a contract to a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna - Itinera joint venture in respect of the Arror Multipurpose Dam project, a company that did not participate in the bidding process.

On the **fifth count**, the 4th accused David Kipchumba Kimosop, 5th accused William Kipkemboi Maina, 6th accused Paul Kipkoech Serem and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 19th December 2014 and 5th April 2017 within the Republic of Kenya being the Managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue, failed to comply with Section 29(1) of the Public Private

Partnership Act No. 15 of 2013 by failing to effect procurement through a competitive bidding process by awarding a contract to a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna – Itinera joint venture in respect of the Kimwarer Multipurpose Dam project, a company that did not participate in the bidding process.

On the **sixth count**, the 4th accused David Kipchumba Kimosop, 5th accused William Kipkemboi Maina, 6th accused Paul Kipkoech Serem and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 19th December 2014 and 5th April 2017 within the Republic of Kenya being the Managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue, failed to comply with Section 66(2) of the Public Procurement and Asset Disposal Act 2005 by failing to conduct the evaluation as set out in the tender document for the development of the Aror Multipurpose Dam project.

On the **seventh count**, the 4th accused David Kipchumba Kimosop, 5th accused William Kipkemboi Maina, 6th accused Paul Kipkoech Serem and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 19th December 2014 and 5th April 2017 within the Republic of Kenya being the Managing director, Head of supply chain management, Manager Engineering services, Deputy Managing Director and Chief Manager Technical services and operations of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue, failed to comply with Section 66(2) of the Public Procurement and Asset Disposal Act 2005 by failing to conduct the evaluation as set

out in the tender document for the development of the Kimwarer Multipurpose Dam project.

On the **eighth count**, the 4th accused David Kipchumba Kimosop and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 5th April 2017, within the Republic of Kenya, being the Managing director and Deputy Managing Director and Chief Manager Technical Services and Operations of the Kerio Valley Development Authority whose functions concern the management of public revenue failed to comply with Section 68(1) of the Public Procurement and Asset Disposal Act 2005, by entering into a contract in respect of the Aror Multipurpose Dam project with entities that did not bid, namely a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna – Itinera joint venture, a company purported to be duly incorporated under the laws of Italy.

On the **ninth count**, the 4th accused David Kipchumba Kimosop and 7th accused Francis Chepkonga Kipkech are charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section of 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 5th April 2017, within the Republic of Kenya, being the Managing director and Deputy Managing Director and Chief Manager Technical Services and Operations of the Kerio Valley Development Authority whose functions concern the management of public revenue failed to comply with Section 68(1) of the Public Procurement and Asset Disposal Act 2005, by entering into a contract in respect of the Kimwarer Multipurpose Dam project with entities that did not bid, namely a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna – Itinera joint venture, a company purported to be duly incorporated under the laws of Italy.

On the **tenth count**, the 4th accused David Kipchumba Kimosop is charged with willful failure to comply with applicable law relating to public procurement contrary to Section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 19th December 2014 and 5th April 2017, within the Republic of Kenya, being the Managing director Kerio Valley Development Authority, whose functions concern the management of public revenue failed to seek approval from the Public Private Partnership Committee before inviting requests for qualifications in accordance with Section 37(1) of Public Private Partnership Act No. 15 of 2013 with regard to the procurement process for the Aror Multipurpose Dam project.

On the **eleventh count**, the 4th accused David Kipchumba Kimosop is charged with abuse of office contrary to Section 46 as read with section 48 of Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 5th April 2017, within the Republic of Kenya, being the Managing Director Kerio Valley Development Authority, the 4th accused used his office to improperly confer a benefit to a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna – Itinera joint venture, an entity that did not participate in the procurement proceedings by unlawfully executing contract number KVDA/RFP/36/2014 – 2015 in respect of Aror Multipurpose Dam project for the sum of USD 277,407,605.50

On the **twelfth count**, the 4th accused David Kipchumba Kimosop is charged with abuse of office contrary to Section 46 as read with section 48 of Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 5th April 2017, within the Republic of Kenya, being the Managing Director Kerio Valley Development Authority, the 4th accused used his office to improperly confer a benefit to a joint venture consisting of Cooperativa Muratori e Cementisti – CMC di Ravenna, Italy and Itinera S.P.A, Italy AKA CMC di Ravenna – Itinera joint venture, an entity that did not participate in the procurement proceedings by unlawfully executing contract number

KVDA/RFP/39/2014 – 2015 in respect of Kimwarer Multipurpose Dam project for the sum of USD 224,422,163.92

On the **thirteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with willful failure to comply with applicable law relating to management of public funds contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, being persons whose functions concern the management of public funds willfully failed to comply with Section 50(3) of the Public Finance Management Act No.18 of 2012 by borrowing money from private foreign banks without any budgetary approval by Parliament and any allocation for the loans being approved by parliament in respect of the Kimwarer Multipurpose Dam.

On the **fourteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with willful failure to comply with applicable law relating to management of public funds contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, being persons whose functions concern the management of public funds willfully failed to comply with Section 50(3) of the Public Finance Management Act No.18 of 2012 by borrowing money from private foreign banks without any budgetary

approval by Parliament and any allocation for the loans being approved by parliament in respect of the Aror Multipurpose Dam.

On the **fifteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with willful failure to comply with applicable law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, irregularly procured through single sourcing an insurance policy paid for by the Government of Kenya to secure the lenders in respect of what was allegedly a Government to Government loan in respect of the Aror Multipurpose Dam as stipulated under Section 74 of the Public Procurement and Asset Disposal Act No. 3 of 2005. Thereby causing the Government of Kenya to suffer a loss of EUR 52,092,311.75 to underwriter of the SACE Insurance.

On the **sixteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with willful failure to comply with applicable law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, irregularly procured through single sourcing an insurance policy paid for by the Government of Kenya to secure the lenders in respect of what was allegedly a Government to

Government loan in respect of the Kimwarer Multipurpose Dam as stipulated under Section 74 of the Public Procurement and Asset Disposal Act No. 3 of 2005. Thereby causing the Government of Kenya to suffer a loss of EUR 42,088,198.65 to underwriter of the SACE Insurance.

On the **seventeenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with committing an offence of financial misconduct contrary to Section 197(1)(o)(i) of the Public Finance Management Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, without lawful authority made an improper payment of public funds amounting to EUR 75,423,148.38 belonging to the Government of Kenya being the total sum paid in respect of the Kimwarer Multipurpose Dam project.

On the **eighteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with committing an offence of financial misconduct contrary to Section 197(1)(o)(i) of the Public Finance Management Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, without lawful authority made an improper payment of public funds amounting to EUR 93,075,714.96 belonging to the Government of Kenya being the total sum paid in respect of the Aror Multipurpose Dam project.

On the **nineteenth count**, the 1st accused Henry Kiplagat Rotich, the 2nd accused Kennedy Nyakundi Nyachiro, the 3rd accused Jackson Njau Kinyanjui and the 4th accused David Kipchumba Kimosop are charged with willful failure to comply with applicable law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between the 19th December 2014 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, Chief Economist and head of Europe II Division, Director Resource Mobilization Department of National Treasury and planning, and the Managing Director Kerio Valley Development Authority respectively, being persons whose functions concern the management of public funds willfully failed to comply with Section 50(1) of the Public Finance Management Act No.18 of 2012 in borrowing loan facilities from financiers namely BNP Paribas Fortis S.A/N.V, Intesa Sanpaolo S.P.A, Unicredit S.P.A, and Unicredit Bank AG, for the Aror Multipurpose Dam by failing to ensure that its financing needs and payment obligations are met at the lowest possible cost in the market which is consistent with a prudent degree of risk, while ensuring that the overall level of public debt is sustainable.

On the **twentieth count** the 1st accused person is charged with abuse of office contrary to section 46 as read with section 48 of the anti-corruption and economic crimes act. The particulars of the charge are that on or about the 18th April 2017, with the Republic of Kenya, being the Cabinet Secretary National Treasury and Planning, the 1st accused person used his office to improperly confer the benefit of contractual rights to the joint venture formed outside of the Republic of Kenya by two Italian suppliers. Cooperativa Muratori & Cementisti – C.M.C. di Ravenna (“CMC”) and Itinera S.P.A., (“Itinera” and together with CMC, the “Italian Exporter”) who allegedly won the international tender launched by Kerio Valley Development Authority (“the Buyer”) creating an obligation against the Government of Kenya by unlawfully executing a Facilities Agreement for the sum of EUR 258, 688,881.72 being the total contractual sum in respect of the Kimwarer multi-purpose dam.

On the **twenty first count** the 1st accused person is charged with abuse of office contrary to section 46 as read with section 48 of the anti-corruption and economic crimes act. The particulars of the charge are that on or about the 18th April 2017, with the Republic of Kenya, being the Cabinet Secretary National Treasury and Planning, the 1st accused person used his office to improperly confer the benefit of contractual rights to the joint venture formed outside of the Republic of Kenya by two Italian suppliers. Cooperativa Muratori & Cementisti – C.M.C. di Ravenna (“CMC”) and Itinera S.P.A., (“Itinera” and together with CMC, the “Italian Exporter”) who allegedly won the international tender launched by Kerio Valley Development Authority (“the Buyer”) creating an obligation against the Government of Kenya by unlawfully executing a Facilities Agreement for the sum of EUR 319,620,697.07 being the total contractual sum in respect of the Aror multi-purpose dam.

On the **twenty second count** the 1st accused person is charged with abuse of office contrary to section 46 as read with section 48 of the anti-corruption and economic crimes act. The particulars of the charge are that on or about the 18th April 2017, with the Republic of Kenya, being the Cabinet Secretary National Treasury and Planning, the 1st accused person used his office to improperly confer the benefit of EUR 42,088,198.65 to SACE S.P.A., a societa per azioni Insurance in respect of the Kimwarer multi-purpose dam.

On the **twenty third count** the 1st accused person is charged with abuse of office contrary to section 46 as read with section 48 of the anti-corruption and economic crimes act. The particulars of the charge are that on or about the 18th April 2017, with the Republic of Kenya, being the Cabinet Secretary National Treasury and Planning, the 1st accused person used his office to improperly confer the benefit of EUR 52,092,311.75 to SACE S.P.A., a societa per azioni Insurance in respect of the Aror multi-purpose dam.

On the **twenty fourth count**, the 1st accused Henry Kiplagat Rotich is charged with willful failure to comply with applicable law relating to the management of public funds contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 18th April 2017 within the Republic of Kenya, being the cabinet Secretary National treasury, willfully failed to comply with Section 68(1)(a) as read with section 68(2)(d) of the Public Finance Management Act 2012 by failing to ensure that the facilities agreement in respect of Kimwarer Multipurpose Dam project entered into between the Government of Kenya and Intesa Sanpaolo S.P.A London Branch, BNP Paribas Fortis S.A/N.V, Intesa Sanpaolo S.P.A, Unicredit S.P.A, and Unicredit Bank AG, was lawful.

On the **twenty fifth count**, the 1st accused Henry Kiplagat Rotich is charged with willful failure to comply with applicable law relating to the management of public funds contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 18th April 2017 within the Republic of Kenya, being the cabinet Secretary National treasury, willfully failed to comply with Section 68(1)(a) as read with section 68(2)(d) of the Public Finance Management Act 2012 by failing to ensure that the facilities agreement in respect of Arror Multipurpose Dam project entered into between the Government of Kenya and Intesa Sanpaolo S.P.A London Branch, BNP Paribas Fortis S.A/N.V, Intesa Sanpaolo S.P.A, Unicredit S.P.A, and Unicredit Bank AG, was lawful.

On the **twenty sixth count**, the 1st accused Henry Kiplagat Rotich is charged with willful failure to comply with applicable law relating to the management of public funds contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 5th April 2017 and 18th April 2017 within the Republic of Kenya, being the cabinet Secretary National treasury, whose functions concern the management of public funds willfully failed to comply with Section 50(1) of the Public Finance Management Act 2012 as read with regulation 26(1)(c) of the Public Finance Management (National Government) Regulations, 2015 by unlawfully

entering into commercial loan agreements for the total sum of Eur 578,000,000 thereby exceeding the national public debt limit set at 50% Of the gross domestic product in net present value terms.

On the **twenty seventh count**, the 1st accused Henry Kiplagat Rotich is charged with willful failure to comply with applicable law relating to the management of public funds contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that between 18th April 2017 and 22nd July 2019 within the Republic of Kenya, being the cabinet Secretary National treasury, whose functions concern the management of public funds willfully failed to comply with Section 50(6) and (7) of the Public Finance Management Act 2012 by failing to pay into the Consolidated fund the proceeds of a commercial loan amounting to USD 501,829,818.93

On the **twenty eighth count**, the 1st accused Henry Kiplagat Rotich is charged with Placing Kenya business other than Reinsurance business with an insurer not registered Under the insurance Act without prior approval of the commissioner of Insurance contrary to Section 20(1) as read with section 20(4) of the Insurance Act. The particulars of the charge are that on or about 18th April 2017 within the Republic of Kenya, being the cabinet Secretary National treasury placed Kenya business other than Reinsurance with an entity known as SACE S.P.A a societa per azioni insurance Which entity he knew was not registered under the Insurance Act without the prior approval of the commissioner of Insurance to secure creditors for the loans Obtained in respect to the Aror and Kimwarer Multipurpose Dam Projects.

On the **twenty ninth count**, the 8th accused person Titus Muriithi is charged with knowingly giving a misleading document to principal contrary to section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on or about 6th August 2018 within the Republic of Kenya, being the Inspector General of State Corporations, knowingly gave a misleading report namely A special investigation

report on Arror and Kimwarer Multipurpose Irrigation Project of Kerio Valley Development Authority to Adan Abdulla Mohamed, the cabinet Secretary Ministry of East Africa Community and Regional Development, Which report he knew contained Misleading information in respect to the Arror and Kimwarer Multipurpose Dam Projects, an act which was detrimental to the Government of Kenya.

On the **thirtieth Count**, the 9th accused Person Geoffrey Mwangi Wahungu is charged with neglect to perform official duty contrary to Section 128 as read with Section 36 of the Penal Code. The particulars of the charge are that between 19th June 2017 and 4th April 2018, within the Republic of Kenya, being the Director General of the National Environment Management Authority (NEMA), willfully neglected to perform his official duties by unlawfully taking action in respect of a forest area in relation to Arror and Kimwarer Multipurpose Dam Projects against the requirement set out under section 48(2) of the Environment Management and Coordination Act.

PROSECUTION CASE

PW1, CHARITY GAICUNJI MUII worked in KVDA – Kerio Valley Development Authority as a purchase assistant supplies and procurement development.

The head of department then was William Maina (5th accused).

PW1 referred the court to an invitation to tender for tender number 36. Tender No. KVDA/RFP/36/2014-15 request for proposal for funding, design, build and transfer for the proposed Arror Multipurpose Dam Development Project on river Arror (AMDDP).

According to the document, KVDA had undertaken a feasibility study and design for development of (AMDDP) and wanted to engage a reputable construction company to undertake the following project components:

- 1) Construction of the dam, appurtenant works, access roads, hydro-power plant of 60 megawatts transmission lines and related facilities.
- 2) Developing 6000Ha of land under irrigation.
- 3) Development of industrial and domestic water supply to support 5000 people.

This was also the case for tender number KVDA/RFP/39/2014-15 for proposed Kimwarer Multipurpose Project. The invitation to tender states that KVDA had undertaken the preliminary feasibility study of development Kimwarer Multipurpose Dam Development Project and wished to engage a reputable consortium of contractors and constituted with capacity to source funding for design, build and transfer with the following components:

- 1) Construction of Luyaho power project (20 megawatts), construction of dam, appurtenant works, access roads, hydro-power plant.
- 2) Developing 2000Ha of land under irrigation.
- 3) Development of industrial and domestic water supply to support 5000 people.

The Qualification requirements were as follows:

Interested parties should provide information indicating their track records, technical qualifications and financial capacity to undertake development of above project, in particular, they should provide the following information:

- 1) Technical profile
 - 1) Profile of consortia members complete with all registration documents and statutory compliance information.
 - 2) Relevant experience in development of hydro-power irrigation and water supply.
 - 3) Profiles of the team to be involved in execution of the project.

- 4) Provide letters of consortia in participation/project (for consortium).
- 2) Financial profiles
 - i. Name and address of bankers.
 - ii. Audited financial statement of the company for the past 3 years.
 - iii. Relevant certificate not limited to certificate of tax compliance from domiciled countries.
- 3) Specific requisite output.
- 4) Sourcing of funds.

The following should be taken into account when sourcing project funds.

- (a) Terms of payment including interest rates, payment period and grace period.
- (b) Credit terms to be within the limit acceptable to national treasury.
- 5) Review of existing visibility studies, designs and tender documents.
- 6) Carry out social-economic, financial, environmental, geo-technical and hydrological study of the proposed works.
- 7) Carry out, design, review of the existing detailed dam and downstream infrastructure design including dam, apartment structures, hydro-electric generation plants where applicable and conveyance infrastructure, water supply and irrigation system and designs as you own.
- 8) Review and adopt development programme for the works.
- 9) Construction and works

Construction phase should be commenced within maximum period of one year from date of signing of contract and construction of work should not beyond duration of 3 years and must meet universally acceptable industrial standards.
- 10) Interested eligible joint ventures of contractors and consulting firms (consultants) are invited to indicate their interest in sourcing for the funds, providing the consulting services for construction of works. Joint ventures

should provide information demonstrating they have required financial capability or banking, technical qualification and relevant experience to perform the services. Interested parties may choose to submit proposals from one or any of the above proposed projects.

The qualifications criteria are:

- 1) Experience in implementation of two – design and billed works of similar nature and complexity in the last fifteen (15) years.
- 2) Necessary equipment for construction of dams, hydro-electric plant where applicable, transmission lines and substation, irrigation and water supply works.
- 3) Experience in similar conditions i.e. in a developing county and tropical region.
- 4) Availability of appropriate skilled staff.
- 5) Ability to mobilize credit for project on acceptable terms as defined in 3.1 above.

Once selected, the joint venture will sign memorandum of understanding (MoU) with KVDA for one year period within which KVDA and the joint venture will mobilize the required resources and enter into the design and build contract.

PW1 also referred the court to the Minutes of tender opening committee meeting held on 18/3/15

According to the minutes KVDA advertised the following tenders in widely used newspaper i.e. daily nation and standard newspaper on 24/12/2014 and 19/12/14 respectively well as authorities website. According to tender opening minutes in relation to Arror dam minute No. 3/03/2014-2015 tender number KVDA/RFP/36/2014-2015 request for proposal for funding, design, build and transfer for proposed Arror Multipurpose Dam Development Project on river Arror. The following bids opened.

1. M/s China Railway Ltd. Reference number RFP/36/B1.
2. M/s Irrico International Ltd. Reference number. RFP/36/B2
3. M/s China Gezhouba. Reference number RFP/36/B3.
4. M/s Trust Management Service Incorporated a Consortium Ltd. Reference number RFP/36/B4
5. M/s Synohydro Corporation Ltd. Reference No. is RFP/36/R5
6. M/s Angelique International Ltd. Reference number RFP/36/B6
7. M/s China Jiangxi International Ltd. Reference number RFP/36/B7
8. M/s China Camc Engineering Ltd. Reference number RFP/36/B8
9. M/s Nani Group Corporation Ltd. Reference No. RFP/36/B9
10. M/s Cooperative Muratori and Cementisti (CMC) Di-Ravena. Reference number RFP/36/B10

PW1 confirmed that the companies which submitted their bids, appear in the register dated 18/5/2015.

The following bidders attached their financial proposals to bid for tender number KVDA/RFP/36/2014-2015 that is,

B5, M/s Synohydro Corporation Ltd.

B7 – M/s China Jangxi International Ltd.

B9 – M/s Nami Group Corporation Ltd.

B10 – M/s Cooperative Muratori & Cementistic (CMC) Di-Ravena.

In respect to Kimwarer Multipurpose Dam project, tender number KVDA/RFP/39-2014-15 it is the testimony of PW1 that there was a request for proposal of funding, design, build and transfer for the proposed Kimwarer Multipurpose Project. The bid documents which were opened were:

M/s China Gezhouba Group Ltd. Reference No. RFP/39/B1

M/s Irrico International Ltd. Reference number RFP/39/BZ .

M/s Syno-hydro Corporation Ltd. Reference RFP/39/B3

M/s China Railway Construction Corporation Ltd. It has no reference number.

M/s Cooperative Muratori and Cementisti (CMC Di-Ravena). Reference number RFP/39/B5

It is the testimony of PW1 that the names in the register are similar to companies in the list of bids submitted. The date of register is 18/3/2015.

The following bidders attached their financial proposal to bid for tender number KVDA/RFP/39/2014-2015. These bidder are;

B3 – M/s Synohydro Corporation Ltd.

B5 – M/s Cooperative Muratori Cementistic (CMC Di-Ravena).

After tender opening and witnessing, an Ad hoc Technical and Financial Evaluation Committee was constituted by the Managing Director in a memo dated 30/3/15. The

exercise was required to be done within 10 days starting from 7th April, 2015 to 16th April, 2015.

PW1 referred the court to the minutes of ad hoc technical and financial evaluation committee meeting held on 7th to 16th April 2015. PW1 was a member of the Committee and it is her testimony that they used the following documents in the tender evaluation:

- 1) Tender document from Aror and Kimwarer.
- 2) Advertisement of RFP dated 19/12/2014.
- 3) change of closing date.
- 4) Private Public Partnership Act the PP regulations.
- 5) Individual project briefs.

The committee evaluated the bid documents.

In an internal memo dated 16/7/2013 the managing director David Kimosop, appointed a tender committee to run for 3 years from date of appointment. It is the testimony of PW1 that the minutes of evaluation committee were forwarded to the tender committee. PW1 referred the court the minutes of Kerio Valley Development Authority tender committee meeting No. 10/05/2014-2015 held on 13/5/2015.

The Kerio Valley Development Authority tender committee went through the comments of the ad hoc of the technical and finance committee in respect of KVDA/RFP/36/2014-2015 request for proposal for funding, design, build and transfer for the proposed Aror Multipurpose Development Project on Aror (AMDDP) and the documentation provided and made the following observations:-

- 1) Bid documents confirmed that the technical and financial information evaluated by the technical and financial evaluation committee were preliminary and not final to warrant ranking towards negotiations.

- 2) That therefore need to invite the best bidders to provide final proposal detailing the technical design, BQs, cost of building works, financial commitment by the financiers.
- 3) The time and cost involved in those works are so enormous and requires commitment by the best bidders.
- 4) It might not be viable to invite so many bidders to this stage due to the above commitments.
- 5) That the committee observes the best reasonable number would be at most 3 qualified.
- 6) That TEC (Technical Evaluation Committee) may consider coming up with the same shall be used as a tool to evaluate.
- 7) In view of the above observations, the committee decided to defer the award since information given was not adequate for award towards negotiations with the successful bidder as per clause 2.1.4 as provided for by public procurement Regulations clause 11(1)(b) – the tender committee revert the report to Technical Evaluation Committee to review the recommendations with the view to allow the best 3 or so qualified bidders to submit their proposal on actual technical design, BQs, cost of project and actual funding commitment of the project by their financiers.

In respect to tender No. KVDA/RFP/39/2014-2015 – Request for proposal for funding, design, build and transfer for proposed Kimwarer Multipurpose Project the tender commit fee made the following observations:

- 1) Bid documents confirmed that the technical and financial information evaluated by the technical and financial evaluation committee were preliminary and not final to provide ranking towards negotiation.
- 2) That there is therefore need to invite the best bidders to provide fund proposed technical design, BQs, cost of building works, financial commitments by the financier.

- 3) The time and cost involved in these works are so enormous and require commitment by the best bidders.
- 4) That the TEC may consider coming up with the TORs of which the same shall be used as a tool to evaluate.

In view of the above observation, the committee decided to defer the award, KVDA/RFP/39/2014-2015 request for proposal for funding, design, build and transfer for the proposal Kimwarer Multipurpose project since information given was not adequate for award towards negotiations, with the successful bidders as per clause 8.1.4. As provided for by public procurement and disposal regulations clause 11(1)(b) – the tender committee reverts the report to technical evaluation committee to review the recommendations with the view to allow the best 3 or so qualified bidders to submit the proposals for actual technical design, BQs, cost of project and actual funding commitment of project by their financiers.”

The tender committee was to referred back the matter to ad hoc, technical and financial evaluation committee for review.

In its meeting 19/5/2015 of Kerio Valley Development Authority – Adhoc Technical and Financial Evaluation Committee recommended as follows:

- i. That the expression of interest for the tender was not done prior to request for proposals posting a challenge during evaluation. (Reference is made to public procurement and disposal act 2005, section 76-84).
- ii. The evaluation done was based on tender document bold and evaluation criteria/grid therein.
- iii. Since the information provided in the tender document was not adequate to identify and shortlist the bidders to 3 for negotiation as advised by the tender committee, it is the view of the members that the ranking earlier given be maintained and the bidders be requested to provide further

information on technical designs, BQs, funding commitment and project implementation schedules.

- iv. Once submitted and evaluated, the best ranked bidder/bidders will be considered for negotiation and subsequent award.

The minutes of evaluation committee were forwarded to the tender committee which subsequently sat on 27/5/2015. PW1 was in attendance. The tender committee went through the Adhoc, technical and financial reviewed report and secretariat comments and made the following observation:

1. That since this is not the final stage, the five recommended bidders may be allowed to proceed to the next stage where they should be requested to submit adequate information on technical design, BQs and respective costing of the project to allow further evaluation and ranking towards negotiations and further decision making by the tender committee.
2. That all the five recommended bidders scored high i.e. above 90 points.
3. Since there was no minimum pass mark. It will be fair to invite all the five bidders. The committee agreed that the five bidders be invited to submit adequate information in technical design, BQs and respective costing of project to allow further evaluation and ranking towards negotiation and further decision making.
4. Clear T.O.R. (Terms of Reference) be provided to the bidders.
5. The committee also agreed to allow 3 months for contractor to submit their proposals. It highlights who the bidders were.
 - B5 – M/s Synohydro Corporation Ltd.
 - B6 – M/s Angelique International Ltd.
 - 37 – M/s China Jiangxi International Ltd.
 - B9 – M/s Nami Group Corporation.
 - B10 – M/s Cooperative Muratori and Cementistic (CMC Di-Ravena).

In reference to Kimwarer Dam Project the tender committee went through the Adhoc Technical and financial evaluation review report and secretariat comments and made following observation:

- Since this is not the final stage, the two recommended bidders may be allowed to proceed to next stage where the bidders should be requesting to submit adequate information on technical design, bill of quantities and respective costing of project to allow further evaluation and ranking towards negotiation and further decision making by tender committee.
- That the two recommended bidders showed high technical score i.e. above 90 points. The members agreed:
 1. The two bidders be invited to submit adequate information on technical design, BQs and respective costing of project to allow further evaluation towards negotiation and further decision making.
 2. Clear T.O.R (Terms of Reference) be provided to the bidders.
 3. The bidder be given 4 months to prepare their bids including updating visibility study.
 4. The companies are;
 - i. Bidder 3 M/s Synohydro Corporation Ltd.
 - ii. Bidder 5 – M/s Cooperative Muratori and Cementistic (CMC Di-Ravena).

The minutes were forwarded to the managing director through internal memo from supplies and procurement manager dated 19/6/15.

PW1 referred the court to regret letters that were prepared in respect to other bidders who did not proceed to the next level.

It is the testimony of PW1 that expression of interest was not done prior to the request for proposal. This was contrary to PPDA sections 76 and 84. Public and that is why evaluation committee pointed it out on the report.

PW1 referred the court to the minutes of the meetings of 28/11/2017 where the meeting was informed that an advance payment certificate for Arror project had been received by the authority on 9th November 2017 for payment. It was discussed and recommended that certificate can be paid as per contract to enable the contractor to start to mobilize for the works.

PW1 also referred the court to Payment vouchers for both Arror and Kimwarer Multipurpose Dam Projects in respect of CMC De Ravena/Itenera

PW1 produced a number of documents including various Minutes, payment vouchers and agreements.

PW2, GIDEON KIPCHIRCHIR ROTICH works at the National Environment Management Authority as a Compliance and Enforcement Officer. He dispatched the environment and impact assessment study report for Arror and Kimwarer dam to the relevant lead agencies, namely ministry of Environment and National Resources, Ministry of Water and Irrigation Ministry of Agriculture, Livestock and Fisheries, Kenya National Commission and Human Rights, National Land Commission, Kenya Wildlife Services, Kenya Forest Services, County Government of Elgeyo Marakwet, Rift Valley Water Catchment area i.e. Water Resources Authority, Elgeyo Marakwet County Director of Environment, Water Environment and National Resources, CEC, Elgeyo Marakwet County.

PW2 referred the court to the study report of Arror dam. It was dispatched on 3/7/2017. The maker of document is Prof. Elijah Biama of Maier Consulting Ltd.

PW2 also referred the court to the study report for Kimwarer dam dispatched on the same date and prepared by Prof. Elijah Biama in May 2017.

PW2 prepared the adverts that were dispatched to the proponents for purposes of public disclosure. The proponent was KVDA – Kerio Valley Development Authority. The Advert was done on 17/8/2017. Attached to the advert is an environmental management plan detailing how the proponent will manage adverse environmental impact during construction of proposed project. It also discloses summary of proposed project and brief description of project and where the public can get the document. It was for the proponent KVDA to print advert in Kenya gazette, local newspaper and also to air it to the local radio.

After dispatching the advert, PW1 waited for the file to mature for review and thereafter allocated file for review to the relevant officers.

The review was done. The purpose of review was to check completeness of the study of both projects and acceptability so that a record of decision can be made in the process. The Arror was file was reviewed by Mr. Mwai. The Kimwarer file was reviewed by Ann Macharia. PW2 was the 2nd reviewer. The concerns they had raised for Arror, is that there was need to seek clearance for KFS – Kenya Forest Service. Another concern, was issue of resettlement and compensation.

For Kimwarer, the concern was the issue of compensation for project affected persons and the issue of clearance from KFS. The other issue was the issue of invasive species i.e. alien species of plants that are not endemic to that particular area. There was another issue of human wildlife conflict.

The issue of RAP was also captured well in law licensing conditions as a pre-condition that proponents would not be licensed unless KVDA had an agreed resettlement action plan with project affected persons.

PW2 did not come across the RAP because it is a separate technical document done by different experts in land economics and sociology. The land experts are different consultants which is the responsibility of KVDA to get their services.

It is further the testimony of PW2 that on 24/7/2017 Kenya Forest Service objected to the proposed project indicating that the report does not address the issue of how loss of forest cover and its diversity will be compensated.

On 28/2/2018 – KFS granted KVDA a provisional authority to access the proposed dam sites in Kipkabus and Chesoi Forest reserves to undertake detailed studies for both Kimwarer and Arror dams.

The provisional authority by KFS was granted on the understanding that during the study, KVDA will cover 400Ha of protected forest from the construction of the two dams on river Arror in a portion of Chesoi forest and river Kimwarer in a portion of Kipkabus forest in Elgeyo Marakwet. The 400Ha were issued from the two dams. It was a provisional access.

Provisional access from KFS was for KVDA to undertake further detailed studies which will entail;

- Biodiversity summary.
- Installation of river gauging and wells including soil and water sampling.
- Geological testing and aerial surveys as stated in your letter (may be from KVDA).
- Provisional authority was issued on understanding that during study KVDA will cover 400Ha for both dams. In respect to both dams – Arror and Kimwarer.
- KVDA shall propose to acquire 560Ha from private land in the same ecological zone and carry out afforestation for review by KFS. The 570Ha was to be bought from the community to compensate 400Ha given by KFS.

Letter concludes that studies be submitted to KFS Board for consideration and determination.

public disclosure adverts disclosing the project, affected persons and interested parties the nature of proposed project in summary, the location and possible impact and mitigation measures during construction.

Publication also indicates reference number of proposed project, the proponent and where the interested parties, stakeholders and any other project affected persons can access the document for their review and if interested send comments to authority within 30 which is indicated in disclosure Advert. That was complied with.

After public disclosure which took 30 days, the authority (NEMA) administratively having looked at them, found file was ripe for review.

Some of the issues that emerged were captured on licensing condition to compel KVDA to comply with those issues before commencing the works. Projects were licensed on 4/4/18 – both for Kimwarer and Aror.

It is PW1 who prepared the conditions for the license which were verified by other technical officers above him for purposes of quality assurance and consistency in decision making.

The conditions have several layers of confirmation by technical officer.

PW3, Isaac Mbugua Kiiru was a member of the KVDA ad hoc technical and financial committee. He Participated in' the evaluation of the lenders for Aror and Kimwarer Multipurpose Dam Projects. It is the testimony If PW3 that upon evaluation of the tenders the committee recommended CMC Di-Ravena for Aror Multipurpose Dam and Sino hydro Corporation for Kimwarer Multipurpose Dam project.

PW4, Fredrick Towett, PW5 Josephat Nyarangi Mutende and PW6 Ann Rono were also members of the KVDA ad hoc technical evaluation committee. They corroborated the evidence of PW3.

PW7, Rosemary Chelimo Maiyo worked at the KVDA procurement and supplies department at the material time relevant to this case. She was involved in the 2nd negotiation meeting between KUDA and Synohydro Corporation Ltd held on 21/12/15 where it was concluded that the company had not demonstrated ability to undertake the project as commercial venture and therefore the 2nd lowest bidder who was CMC DI-Ravenna be invited for further negotiation and if not successful, the tender may need to be re-advertised.

PW7 participated in the final negotiation meeting between KVDA and CMC On 27/01/16. The committee recommended that CMC may be considered for the award.

PW8, Samuel Kona was the Chairman KVDA between 2014 and 2018. At the time that he joined KVDA he found that the Arror and Kimwarer dams were at the stage at which the government was looking for funding. PW8 sat in the board meeting of 15th March 2017 where the board was updated on the progress of The projects. As at the have that PW8 left KVDA no resettlement had taken place because KFS had not provided land for compensation. Secondly the government had not secured land where the people would be resettled. PW8 further testified that the board was updated that the contract and financial agreements had been signed Yet there was no land at that time.

The prosecution Thereafter called another 41 Witness whom hey did not examine, namely:

S/NO	NAME OF WITNESS	DATE TESTIFIED	STATUS
PW9	PETER GATIRAU MUNYA	31/08/2023	DISCHARGED
PW10	BONIFACE MAMBOLEO	12/09/2023	DISCHARGED
PW11	FELISTER KISILU	12/09/2023	DISCHARGED
PW12	MAINA KIONDO	12/09/2023	DISCHARGED
PW13	KIMANI KIIRU	12/09/2023	DISCHARGED
PW14	BENEDICT OMONDI	12/09/2023	DISCHARGED
PW15	WILLIAM OTIENO OGOLLA	13/09/2023	DISCHARGED
PW16	SAMUEL KOSGEY	13/09/2023	DISCHARGED
PW17	MUITUNGU MWAI	13/09/2023	DISCHARGED

PW18	ANNE WAMBUI MACHARIA	13/09/2023	DISCHARGED
PW19	LIVINGSTON BUMBE	14/09/2023	DISCHARGED
PW20	DAVID KIPYEGON	14/09/2023	DISCHARGED
PW21	CECILIA KALUKA	25/09/2023	DISCHARGED
PW22	JOTHAM RUTO	25/09/2023	DISCHARGED
PW23	DAVID JUMA ONYANGO	25/09/2023	DISCHARGED
PW24	MOSES KIPCHUMBA KIPSANG	25/09/2023	DISCHARGED
PW25	PATRICK KIPSANG KIPTOO	26/09/2023	DISCHARGED
PW26	BERNARD MUIRURI NDUNGU	26/10/2023	DISCHARGED
PW27	GEORGE MULACHA	2/10/2023	DISCHARGED
PW28	ROBERT OSUDI	2/10/2023	DISCHARGED
PW29	BEATRICE NJERI GITAU	3/10/2023	DISCHARGED
PW30	PATRICK WAMBUGU NDII	3/10/2023	DISCHARGED
PW31	JUHIA MUHIA	4/10/2023	DISCHARGED
PW32	GEORGE NGUGI KURIA	4/10/2023	DISCHARGED
PW33	BERNARD MUCHERE	5/10/2023	DISCHARGED
PW34	PATRICK KIPSANG	16/10/2023	DISCHARGED
PW35	DAVID OYOTI	16/10/2023	DISCHARGED
PW36	GODFREY KIPTOO	17/10/2023	DISCHARGED
PW37	BINDU KUMAR CHATALAL	17/10/2023	DISCHARGED
PW38	EMILIO MUGO	18/10/2023	DISCHARGED
PW39	IRUNGU NYAKERA	18/10/2023	DISCHARGED
PW40	AGNES ADHIAMBO	19/10/2023	DISCHARGED
PW41	WALTER OKELO OWIDO	19/10/2023	DISCHARGED
PW42	JAPHETH OKOTH	30/10/2023	DISCHARGED
PW43	BERNARD KIBET	30/10/2023	DISCHARGED
PW44	ERICK KINOTI KITHINJI	30/10/2023	DISCHARGED
PW45	MOHAMMED HUSSEIN	30/10/2023	DISCHARGED
PW46	MUSA KATHANJE	31/10/2023	DISCHARGED
PW47	JOHN MUIINDE	31/10/2023	DISCHARGED
PW48	HUDSON MEGIRI	31/10/2023	DISCHARGED
PW49	THOMAS TANUI (I.O)	31/10/2023	DISCHARGED

1ST ACCUSED SUBMISSIONS

In his submissions, the 1st accused took exception to the conduct of the prosecution in calling and failing to examine 41 witnesses. It is his submission that It is an

abandonment of the prosecution designed and calculated to waste judicial time. It is unjustifiably costly and inconveniencing to the accused persons. It is a patent abuse of the legal process in violation of Article 157(11) of the Constitution of Kenya, 2010 (the Constitution).

It is the sort of conduct that this court must censure and deprecate. It cannot be acceptable that the Director of Public Prosecutions (the DPP) being the dominus litis in criminal prosecutions, can be permitted to call witnesses with no intention whatsoever of leading their evidence. He had the option of either withdrawing the prosecution or closing its case at the earliest possible opportunity, without wasting scarce judicial resources.

It is the 1st accused submission the prosecutorial conduct offends Article 10 and Chapter Six on Leadership and Integrity as well as Article 157(11) of the Constitution.

The DPP should never ever be allowed to engage in legal misadventure of this nature in the future.

No evidence of willful disregard and or contravention of the governing procurements laws was adduced.

The prosecution elected not to adduce any evidence regarding the financing and insurance of the two (2) projects. No evidence at all was laid before the court on the role of the National Treasury and its officials or the 1st accused for that matter. The role of the Cabinet Secretary, the Principal Secretary, the Head of the Public Debt Department, the Chief Economist and Head of Europe II Division, Director Resource Mobilization Department and Planning in the two (2) projects in question remains a matter of conjecture.

On alleged abuse of office and failing to comply with Insurance Act charges, the prosecution also failed to adduce any evidence before the Court. The role of the 1st

accused in the alleged failure to comply with law governing management of public finance remain figments of imagination on the part of the prosecution.

2ND AND 3RD ACCUSED SUBMISSIONS

The 2nd and 3rd accused submitted that from the facts set out in the case and the evidence so far on record, the Prosecution did not establish whether any meetings took place and/or whether the 2nd and 3rd accused persons attended any such meetings if at all with any of the other co-accused with the sole intention of defrauding the Government of Kenya USD 501,829,769.43. Further, there is no evidence on record of an express and/or implied agreement amongst the accused persons to defraud the Government.

In support of the above submission they relied on the case of *Rebecca Nabutola* where the Learned Judge held as follows: -

“The first issue to consider is whether or not there was an agreement to execute an unlawful act. An agreement may either be express or implied from the circumstances of the case. As expressed in the Halsbury’s Laws of England Vol. 25 Criminal Law at para. 73

‘It is not enough that two or more persons pursued the same unlawful object at the same place or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.’

They also relied on the case of *Republic v Anne Atieno Adul & 8 others [2017] eKLR* where the Honorable Justice Majanja stated as follows.

“To prove a conspiracy, the prosecution had to establish that the respondents together with others agreed by common mind to defraud the complainant. The inference must be

made both from the actions of the accused and the evidence tendered in court. The Court of Appeal in *Gichanga v Republic [1993] KLR 143* held that:

With respect to the offences of conspiracy the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money.”

It is the 2nd and 3rd accused submission that in respect to the rest of the counts, no witness presented by the Prosecution gave any testimony whatsoever as against the 2nd and 3rd accused. All the witnesses called to the stand testified as to not knowing the 2nd and 3rd accused at all prior to the commencement of these proceedings.

4TH ACCUSED SUBMISSIONS

None of the witnesses, and no material was held out to suggest that there were any meetings, or telephone conversations, or emails, or messages exchanged or and conduct howsoever to suggest that the 4th accused with anyone else planned, or schemed, or plotted, as a matter of conspiracy to effect the alleged USD 502,000,000.00 or any other amount.

In *Ann Wangechi Mugo & 6 others v Republic [2022] eKLR*, the court held:

“To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court

The 4th Accused relied on the similar criteria of law determined in *Moses Kathiari Rukungu – Vs- Republic [2018] eKLR*, Majanja J where it was held that:

“The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more people agree to put in effect a scheme whose ultimate aim would be

the commission of a criminal offence. It will not matter that the Criminal offence proposed to be done may be impossible to be Undertaken. Proof of existence of conspiracy is generally a "matter of inference, decided from certain criminal acts of parties accused; done in the pursuance of an apparent criminal purpose between them". Republic -vs- Brisac [1803] 4 East 164, 71 (as quoted at page 2692 Archibold paragraph 33 -11 (SUPR) (See Njenga and 2 others -Vs- Republic NKU HCCCRA NO. 163 of 2003 [2005] eKLR. "

The tender was awarded under previous tender Act, PPDA 2005 which obligated a Chief Executive Officer to respect the independent decision of a procurement body. The 4th Accused as the CEO did not therefore have a fiat right to overrule the work of the procurement committees in awarding CMC DI-Ravena [Itinera Joint Venture] instead of Syno-Hydro. The tender documents allowed the tender evaluations, tender award committee and negotiations committee to move to the next ranked bidder, whenever the higher/ first ranked bidder unable to meet the requirements of KVDA in the best interest of KVDA, and public.

6TH ACCUSED SUBMISSIONS

It is on record that the 6th accused never sat on the tender committee that awarded, the tenders and it is inconceivable that he would be held liable for the decisions of a committee he never sat in.

The only role the 6th accused played was to initiate the procurement process which was his duty as the engineer who was heading the user department.

9TH ACCUSED SUBMISSIONS

The 9th accused submitted that the prosecution has failed to place the 9th accused as a co-conspirator who conspired with any of the other co-accused to defraud the Government of Kenya of USD 501, 829,769. Neither has the prosecution established any evidence to show that the 9th accused willfully neglected to perform his official duties by unlawfully taking action in respect of a forest area in relation to Arror and Kimwarer multi-purpose dam projects, on the contrary the evidence adduced by the prosecution is as glaring as the day that the 9th accused dutiful performed his duty.

ISSUES FOR DETERMINATION

- Whether the prosecution has established a prima facie case to warrant the accused to be put on their defence.

Section 306(1) of the Criminal Procedure Code provides as hereunder:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

In *Ramanlal Trambaklal Bhatt Vs R [1957] E.A 332 at 335*, the court stated as follows:

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution’s case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case.

Nor can we agree that the questionthere is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.

It may not be easy to define what is meant by a, "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence".

Republic v Jones Mutua Anthony & 3 others [2019] eKLR Justice Odunga held that:

"Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has not been made out. As has been said time and again a prima facie case does not necessarily mean a case which must succeed. In other words, despite finding that a prima facie case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer."

In arriving at this finding, the learned judge relied on the following authorities:

The High Court of Malaya in ***Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution vs. Zainal Abidin B. Maidin & Another*** held that:

"It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See ***Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805***. Further, in

Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:

‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”

The court in *Republic vs. Prazad [1979] 2A CRIM R 45*, King CJ held the very same standard on a prima facie case in the following terms:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

CONSPIRACY

The Black Law Dictionary 9th Edition defines conspiracy as follows;

“An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement’s motive and (in most states) action or conduct that furthers’ the agreement; a combination for an unlawful purpose”.

In Archibold; writing on criminal pleadings, evidence and practice, he observes;

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable.

There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

The Court of Appeal in *Gichanga v Republic [1993] KLR 143* held that;

“With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money”.

Further Halsbury’s Laws of England Vol. 25 observes that;

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose.

Common intention is set out in Section 21 of the Penal Code as follows;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In the matter before me, no evidence has been placed before this court to show that there was a meeting of minds between the accused persons with the sole aim of defrauding the Government of Kenya of USD 501,829,769.43

WILFUL FAILURE TO COMPLY WITH THE APPLICABLE LAW RELATING TO PUBLIC PROCUREMENT

- Letters of award for Arror Dam, dated 4th December 2015, and that of Kimwarer Dam dated 1st February 2016, show the party awarded was and is M/s Comparativa Muratori e Cementisti (CMC DI Ravena) Ltd. No evidence has been adduced to prove that CMC Di-Ravenna and CMC Di-Ravenna Itinera joint venture are in fact two distinct entities.
- No evidence has been adduced to show that Section 66(2) of the Public Procurement and Asset Disposal Act 2005 was not complied with.
- No evidence has been adduced to show that Section 68(1) of the Public Procurement and Asset Disposal Act 2005 was not complied with.
- No evidence has been adduced to show that there was no approval from the public private partnership committee before inviting requests for qualifications in accordance with Section 37(1) of the Public Private Partnership Act
- No evidence was adduced to show that the insurance policy to secure lenders was irregularly procured.
- No evidence has been adduced to show that Section 50(1) of the Public Finance Management Act was not complied with in borrowing loan facilities from the financiers namely BNP Paribas Fortis S.A/ N.V, Intesa Sanpaolo S.P.A, Unicredit S.P.A and Unicredit Bank AG for the Arror Multipurpose Dam project by failing to ensure that its financing needs and payment obligations are met at the lowest possible cost in the market which is consistent with a prudent degree of risk, while ensuring that the overall level of public debt is sustainable.

COMMITTING AN OFFENCE OF FINANCIAL MISCONDUCT

No evidence was adduced to show that there was a was a payment of EUR 75,423,148.38 in respect of Kimwarer Multipurpose Dam project and Ksh 93,075,714.96 in respect of Arror Multipurpose Dam project or that the same was made without lawful authority, if at all.

ENGAGING IN A PROJECT WITHOUT PRIOR PLANNING

Section 26 (3)(a) of the PPDA provides that: -

(3) All procurement shall be-

(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;

The legal duty to have prior planning before engaging in a project is vested on the procuring entity and the accounting officer as per the applicable law.

It has been shown through the evidence of PW1 that the procuring entity for the Arror and Kimwarer dam projects was KVDA. As such, it was the legal obligation of the accounting officer to ensure that the procurement laws were complied with.

No evidence has been placed before this court to establish what role, if any, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused persons played in the procurement process of KVDA. No evidence has been adduced to show that there was no procurement plan in place in respect of the said Arror and Kimwarer Multipurpose Dam.

ABUSE OF OFFICE

- No evidence has been adduced to show that the 1st accused created an obligation against the Government of Kenya by unlawfully executing a facilities agreement for the sum of EUR 258,688,881.72 in respect of Kimwarer Multipurpose Dam project and Eur 319,620,697.07 in respect of Arror Multipurpose Dam.

WILFUL FAILURE TO COMPLY WITH APPLICABLE LAW RELATING TO MANAGEMENT OF PUBLIC FUNDS

Section 45 (2)(b) of the ACEC provides that: -

"An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures"

- No evidence was adduced to show that 1st accused failed to comply with Section 68(2)(d) of the Public Finance Management Act
- No evidence was adduced to show that 1st accused failed to comply with Section 50(1) of the Public Finance Management Act as read with regulation 26(1)(c) of the Public Finance Management (National Government) Regulations 2015
- No evidence was adduced to show that 1st accused failed to comply with Section 50(6) and (7) of the Public Finance Management Act

PLACING KENYA BUSINESS OTHER THAN REINSURANCE BUSINESS WITH AN INSURER NOT REGISTERED UNDER THE INSURANCE ACT WITHOUT PRIOR APPROVAL OF THE COMMISSIONER OF INSURANCE.

No evidence at all was adduced to support this charge

KNOWINGLY GIVING A MISLEADING DOCUMENT TO PRINCIPAL

No evidence was adduced to show that the 8th accused gave a misleading report to anybody. No such report was placed before the court.

NEGLECT TO PERFORM OFFICIAL DUTY CONTRARY TO SECTION 128 AS READ WITH SECTION 36 OF THE PENAL CODE.

On this charge , I am in agreement with the Submissions of the 9th accused person and indeed the evidence of PW2 who is the Compliance and Enforcement Officer at National Environment Management Authority, does show that the process of the issuance of the license was done in a lawfully and procedural manner, following the due administrative process as per the various layers of review before the then Director General, the 9th accused could append his signature.

It was his testimony that the report was prepared by consultants hired by the proponent herein KVDA for the damming project and that the role of NEMA to was to issue review and set conditions before issuing any license to the proponent. PW8 clearly demonstrated to Court that the license issued to the proponent underwent various department reviews before the same could be signed by the then Director General, the 9th Accused. PW8 confirmed to the court that the licenses issued for the Arror and Kimwarer multi-purpose project was conditional and that the license issued was not a ticket to go and construct.

PW8 highlighted the key conditions that the proponent had to fulfil in the construction process. His produced the license and referred to court to the various conditions that were issued under the said license to be fulfilled by the proponent before embarking on the construction. He particularly referred the Court to conditions 2.6 and 2.7 of the license issued.

Condition 2.6 stated thus; “The proponent shall ensure that relocation, compensation and restoration of livelihoods for any project affected persons (PAPs) and develop a consultative plan for emerging issues and grievances redress mechanisms (GRM) and shall be prescribed in the Resettlement Action Plan (RAP).While Condition 2.6 stated thus; “The proponent shall in consultation with Kenya Wildlife Services put in place

measures that mitigate human conflict and shall avoid encroachment to sensitive wildlife area such as migratory corridors or breeding areas” .

Based on the conditions set therein under the issued license, it was a requirement for the proponent to ensure that there was adequate compensation for those people affected by the damming project, this condition was in total fulfillment of his duty at under Section 9 and Section 48 (2) of the Environment Management and Coordination Act No. 8 of 1999.

To this end, the 9th Accused followed the due process and issued a conditional license to the proponent, as to whether the conditions were followed, based on the testimony of PW8, it was not in the place of the 9th Accused to follow up on the same. It has not been demonstrated that the accused person had any role to play after this.

CONDUCT OF THE PROSECUTION COUNSEL

In the instant case before me, the prosecution called a total of 49 Witnesses. In a strange twist of events, out of the forty-nine (49) prosecution witnesses, the prosecution led evidence from eight (8) witnesses only. The rest of the witnesses, numbering forty-one (41) took to the witness stand, they were sworn and thereafter the prosecution declined to examine them claiming that they did not have questions for this witness”

This would appear to be a carefully Choreographed prosecution led acquittal.

The Court in *Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR* held that statutory power donated to any organ is not to be exercised in an unreasonable manner. It relied on the case of *Republic V Commissioner of Cooperatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA 39/97 119991 EALR 245* where the Court of Appeal warned that:

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

Nairobi High Court Miscellaneous Application No. 1769 of 2003 Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi, where It was held:

“So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.”

In their openings statement at the start of the trial, the prosecution made an elaborate speech and highlighted how they would go about proving their case. Prosecution Counsel, Mr. Taib had this to say:

“The genesis of the matter arises out of two projects known as Arror and Kimwarer Multipurpose Dam Projects.

We will demonstrate to the court that accused persons conspired and committed offences they are accused of as they primarily used those projects for their enrichment.

We will show that it is not only 65 billion shillings they planned to steal but total loss Government of Kenya has been exposed to is in excess of 8.0 billion when the contractors are actively pursuing the collection of in arbitration court in and they seem to collect even though there is no dam on the ground.

The facts of the matter is that Cabinet of ministers approved only one dam i.e. Aror Dam project. It did not approve construction of Kimwarer. Even approval of one was on basis that the government would not be funding the project and that KVDA was to source for concession agreement in which the person identified will actually arrange for the design, development, build, operate and transfer the project to Government of Kenya after financing and recompensing the finances for operating the project. W

What happened was that accused persons conspired and managed to float tenders for both projects and awarded the project to company known as CMC Di-Ravena – Itinera Joint Venture. These two projects were awarded by accused persons in breach of all known laws known in procurement. That company did not even exist at the time of the award.

We will prove that CMC Di-Ravena never brought or acquired any tender document.

The company did not submit any bid for construction of the two dams.

It was not one of the companies forming the record at opening of the tenders for those two projects.

It was not considered, and did not form part of record before tender evaluation committee.

Never was CMC Di-Ravena the company recommended by evaluation committee

CMC Di-Ravena was not even a recipient of letters of acceptance from any of those two tenders from KVDA.

Due to impropriety and pure corruption, they were granted two tenders for amount in excess of 65 billion out of thin air.

We will demonstrate now accused conspired with those from Treasury to take loans at high interest rates and borrowed more than they required for construction of the projects.

How they paid in advance more than 18 billion shillings before they could hand over the site of the project. We will prove that.

The land consisting site for project did not even belong the KVDA but was partly owned by Kenya Forest Service and individuals, who refused to transfer the property to KVDA.

Even with that knowledge they did not have land for project they paid 18 billion in advance to the contractor.

They also paid 10% of the value of project in what is known as contingency fund which is only paid at end of project when contingent arises. This was also paid in advance.

There was breach of procurement laws which demands that before tender, there must be approved budget for procuring entity. At the time these projects were floated and commencing contracts signed by non-existent company, CMC Di-Ravena, KVDA did not have approved budget for Kimwarer and Arror. Never was there budget for insurance acquired for 8 billion shillings.

There was no procurement plan as required by the law nor was there public-private Partnership Act under which concessionary is supposed to be administered followed. Accused conspired and proceeded under public procurement and disposal act, 2005 but which they also breached.

We will demonstrate PPDA 2004 was contravened in the following manner;-

- 1) No expression of interest was advertised as required by law. Instead, they used request for proposed method and did so without authorization of tender committee as required by law.

- 2) Instead of using EOI and RFP in two stages, they implemented request for proposal twice.
- 3) Original tenderer was company known as CMC – Di-Ravena of Italy not CMC – Di-Ravena-Itinera Joint Venture. That despite tenderer being CMC-Di-Ravena Italy, as tender progressed, a new company was inserted alongside CMC-Di-Ravena Italy, which was known as Icom of South Africa.
- 4) This Joint Venture was included illegally and with impunity.
- 5) Despite that Joint Venture, the winning bidder was described CMC-Di-Ravena of Italy with no mention of Icom of South Africa.
- 6) It is a fact that letters of award/acceptance of the two projects were issued not to CMC Di-Ravena of Italy, nor Icom of South Africa, but to a new company known as CMC Di-Ravena of South Africa.
- 7) Despite letter of acceptance being issued to CMC Di-Ravena of South Africa, contract documents were not signed by CMC Di-Ravena of South Africa, but not new company known as CMC Di-Ravena Itinera Joint Venture. A company that did not exist at the time of signing the contract.
- 8) We will demonstrate how Cabinet Secretary of Finance breached the law and secured the loan to construct Arror and Kimwarer dams, yet he had no authority to secure loans for state corporations. He had authority only to secure loans for Central Government which was not involved in this case. He secured the loans without any competitive process and against the interest of the Republic of Kenya at interest rate and terms that were prohibitive and not in the interest of the Republic. He also secured without any competitive process and he bought and paid for over 8 billion shillings for an insurance that took care of interest of Italian contractors, not the Government of Kenya and did so without following the procurement process. He took the loans from Italian Banks under two agreements

known as Facilities Agreements which he disguised as Government agreement i.e. Government of Kenya and Government of Italy.

Italian government never signed or negotiated them and government of Italy did not assign of reorganized entities to sign on behalf of Italian government. That was contract between CS Henry Rotich and four private commercial Italian Banks. He breached the law. After taking those loans, he did not bring the proceeds of those loans into consolidated account of Kenya as required by law. That money as we speak is being paid from Italy to an account in United Kingdom from where they are then released back to Italy to contractor without passing through the government consolidated account as required by law. We stated that CS took those loans without lawful authority. He took those loans knowing he was breaching the ceiling of debt set by parliament and without approval of parliament and knowing that those projects did not exist either in budget of national or KVDA. We will show that under two facilities agreement signed by 1st accused, he undertook by contracted obligation to comply with every law they were to comply with, including procurement laws and parliamentary laws relating to debt ceiling, environmental laws that were to be followed. That is not to mention the legal obligation he was under, i.e. law did not allow him to take debt for KVDA. He breached PFM Act procurement Act and further he proceeded in conjunction with other accused to make possible through funding, for the looting of Kshs.65 billion and now 88 billion that contractors are demanding.

We will demonstrate that it is these actions that constitute the charges against the accused. These accused are not normal, ordinary Kenyans. They walked the corridors of power – crème de crème. 1st accused was minister of finance. We will also bring forth that in general terms, when you can take judicial notice. We will prove the corruption that constitutes the charges. We will prove through trail of evidence they left in their walk.

Impunity is calibrated because when they are in power, they never believe they will leave power.”

Eight witnesses later, this tune suddenly changed. The prosecution was no longer interested in prosecuting their case. They developed a sudden change of heart. They informed the court that they had firm instructions not to proceed with the matter. As such, this court has the evidence of only 8 witnesses to proceed with.

In the case of *Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015* while quoting the case of *R vs. Attorney general ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001*; the Court held as follows:-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

I am further guided by the decision of Justice Sifuna in *High Court ACEC Division civil suit E044 of 2022*. where he held that:

“ It is high time investigative bodies such as ARA, EACC, KRA and ODPP disabused Themselves of this reckless habit. Rather than starting court proceedings and thereafter go to investigate, they should first investigate and then based on those findings institute forfeiture proceedings”

In the matter before me, I find that there is need check the reckless habit of the ODPP of commencing proceedings which they have no intention of pursuing to logical conclusion. Such conduct is an affront to the administration of justice and a waste of precious judicial time. It is an insult to the dignity of the court and all the Stakeholders involved in the criminal justice system.

Indeed as justice Sifuna held, such ODPP officers should personally liable for any compensatory damages arising out of suits filed by aggrieved persons against the Government.

As such I hereby order that this ruling be placed before the Attorney General and NCAJ with a view of sparking a conversation on legal reforms on this issue

In the meantime all accused persons are hereby acquitted under section 210 of the Criminal Procedure Code due to lack of evidence as a result of the reckless dereliction of duty by the prosecution.


DATED , SIGNED AND DELIVERED IN OPEN COURT
THIS 11th OF December 2023



BEFORE

E.K NYUTU

SENIOR PRINCIPAL MAGISTRATE

I CERTIFY THIS IS TRUE COPY
OF THE
DATED: 15/12/23

E.K Nyutu SPM
MAGISTRATE
NCAJ
Nairobi