



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 680 OF 2010

ZAKAYO KIPKEMOI ARAP CHERUIYOT.....1ST APPLICANT

JOHN AGILI ALAO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The parties to the application

1. Zakayo Kipkemoi Arap Cheruiyot is the first applicant [first accused]. The first applicant and first accused is used interchangeably.
2. John Agili Alao is the second applicant [second accused]. The second applicant and the second accused is used interchangeably.
3. The Republic of Kenya is the Respondent.

The case to be prohibited

The case sought to be prohibited/terminated is CMCRC No 338 of 2005: **REPUBLIC -VS- ZAKAYO CHERUIYOT & JOHN AGILI ALAO.**

Background

The first Applicant herein, **Zakayo Kipkemoi Chereuiyot**, was at all material times the Permanent Secretary in the Office of the President, Provincial Administration and Internal Security.

The second Applicant herein, **John Agili Alao**, was at all material times the Finance Officer in the Office of the President.

The charges against the two are as follows:-

COUNT 1: ABUSE OF OFFICE CONTRARY TO SECTION 101 (1) OF THE PENAL CODE

Zakayo Kipkemoi Arap Cheruiyot

“On diverse dates between June 1999 and August 2001 within Nairobi Province, being a person employed in the Public Service, to wit, Permanent Secretary in the Office of the President, in abuse of authority of your said office, arbitrarily proceeded with procurement of the CID Forensic Science Laboratory Project while there were no technical specifications for the project in place, an act which was prejudicial to the Government of Kenya”

COUNT 2: ABUSE OF OFFICE CONTRARY TO SECTION 101 (1) OF THE PENAL CODE

Zakayo Kipkemoi Arap Cheruiyot

“On diverse dates between June 1999 and August 2001, within Nairobi Province, being a person employed in the Public Service, to wit, Permanent Secretary in the Office of the President, you, in abuse of th authority of the said office arbitrarily and without regard to the Public Procurement procedures failed to ensure that Anglo Leasing and Finance Ltd. and Forensic Laboratories Ltd. had the requisite legal capacity to enter into a contract with the Government of Kenya, an act which was prejudicial to the said Government of Kenya.”

COUNT 3: ABUSE OF OFFICE CONTRARY TO SECTION 101 (1) OF THE PENAL CODE

John Agili Alao

“On diverse dates between June 1999 and August 2001 within Nairobi Province, being a person employed in the Public Service, to wit, Finance Officer in the Office of the President, in abuse of authority of your said office, arbitrarily proceeded with procurement of the CID Forensic Sciences Laboratory Project while there were no technical specifications for the project in place, an act which was prejudicial to the Government of Kenya.”

COUNT 4: ABUSE OF OFFICE CONTRARY TO SECTION 101 (1) OF THE PENAL CODE

John Agili Alao

“On diverse dates between June 1999 and August 2001, within Nairobi Province, being a person employed in the Public Service, to wit, Finance Officer in the Office of the President, you, in abuse of the authority of the said office arbitrarily and without regard to the Public Procurement procedures failed to ensure that Anglo Leasing and Finance Ltd. and Forensic Laboratories Ltd. had the requisite legal capacity to enter into a contract with the Government of Kenya, an act which was prejudicial to the said Government of Kenya.”

The genesis of the charges emanate from contracts entered into on the **16th day of August, 2001** between the Government of Kenya, **on the one hand**, and M/s Anglo Leasing and Finance Ltd **and** M/s Forensic Science Laboratory **on the other hand**, for financing and construction of CID Forensic Science Laboratory Project.

The transaction was, *inter-alia*, governed by **Government Contracts Act [Cap 25]** Laws of Kenya. In which case they were to be signed by the **Permanent Secretary in the Office of the President and Internal Security** (first Applicant) and countersigned by the **Permanent Secretary Treasury** as required and/or enjoined by **External Loan and Credit Act [Cap 422]** Laws of Kenya.

Before the contracts came into being a joint proposal of the establishment, financing and implementation of the said project was first **tabled before the cabinet** which discussed and approved the same on **27th July, 2001**.

Subsequently approvals and legal opinion were sought and obtained from:-

- a. The Attorney General's Office vide a letter, dated **15th June, 2001**, to the Permanent Secretary Provincial Administration and Internal Security, seeking the attention of the second Applicant herein, **John Agili Alao**, to the effect that all instruments have been found/established to **be in order from a legal point of view**. That since the transaction was under the **Government Contracts Act [Cap 25]** Laws of Kenya the same ought be signed by the Permanent Secretary Office of the President and Internal Security and countersigned by the Permanent Secretary Treasury as enjoined by the **Government Contracts Act [Cap 422]** Laws of Kenya.
- b. A letter dated **23rd August, 2001** was forwarded to the Permanent Secretary, Provincial Administration and Internal Security Office seeking the attention of the second accused herein, **John Agili Alao**, by the then Minister for Finance and Planning, **Hon. C. Okemo**, enclosing duly signed sets of original contracts. The letter stated that the Minister was satisfied that the Office of the President, which is the procuring entity had **duly followed the prescribed procedures** under Legal Notice No. **51 paragraph 3.2** and therefore authorized the execution of the contracts.
- c. The Attorney-General's opinion dated **3rd August, 2001** is at page 66 of exhibits marked "**Z K 5.**" He opined that the Government of Kenya has the power to enter into the agreements and has taken all necessary actions which are required for the execution, delivery and performance of the agreements. That the agreements constitutes legal, valid and binding obligation on the Government of Kenya and is enforceable in accordance with its terms. That he has executed the Promissory Notes which are legal financial instrument of the Government of Kenya evidencing the Government of Kenya's debt to **Silverson Establishment**.

It suffices to say that the Hon. The Attorney General thus gave his **seal of approval** to the contracts and stated **eloquently** that they constituted legally binding obligations on the Government of Kenya evidencing Kenya's debt to Silverson Establishment.

In the light of the foregoing it cannot be gainsaid that the Attorney General's legal opinion informed the basis of the execution of the subject agreements and/or contracts.

Unfortunately thereafter, it emerged that there were several irregularities in the course of execution of the subject agreements/contracts and implementation of the project leading to losses thereby culminating in the charging of the two (2) Applicants with criminal charges (four counts) as hereinabove.

Before the hearing of the criminal case against them, [**CMCR.C NO. 338 OF 2005**] the two Applicants filed an application by way of Notice of Motion dated 9th May, 2001 seeking several orders.

The application

By a Notice of Motion dated **9th May, 2005**, pursuant to the provision of **Section 67 (1)** of the Constitution of Kenya, **Section 3** of the **Judicature Act, [Cap 8]**, **Section 15** of the **Magistrate's Courts Act, [Cap 16]**, and the Inherent Powers of the court, the Applicant seeks orders that:-

1. This Honourable Court be pleased to refer to the High Court of Kenya for decision the following

questions, *namely*:-

- a. whether the words “*any person*” and “*that person*” in **Section 26 (3) (a)** of the Constitution includes a person whose acts or omissions constituting the alleged offence were *prior* to and or *after* their occurrence scrutinized, approved and confirmed as legally valid and binding by the Attorney General"
- b. whether it is constitutionally permissible under **Section 26 (3) (a)** of the Constitution for the Attorney – General, to institute criminal proceedings against an accused person in respect of execution of a Government Agreement;
 - i. which the Attorney General, as the Principal Legal Advisor to Government has, both *prior* to and *after* the execution thereof, scrutinized and given an opinion thereon confirming its legal validity and enforceability;
 - ii. which prior to its execution has been discussed and *approved by the Cabinet*, of which the Attorney – General is a member;
 - iii. when the Attorney – General has entered a *nolle prosequi* in his own favour terminating a private prosecution lodged against him over his opinion confirming the legal validity and enforceability of the same agreement.
- c. If the answer to (a) or (b) above in the *negative*; whether the present criminal charges against the accused are:-
 - i. unconstitutional and illegal;
 - ii. an abuse of power and the process of the court by the Attorney – General;
 - iii. vexatious and oppressive;
 - iv. contrary to due process, and/or
 - v. contrary to public policy.
- d. If the answer to (c) above is in the *affirmative*, whether the High Court should, in the circumstances of this case and under its powers under **Section 65 (2)** and **123 (8)** of the Constitution, *prohibit* and or *permanently* stay the prosecution of the said Applicants in respect of the said charges or similar charges.

The application is premised on the grounds that:-

- a. the first Applicant is charged with a Criminal offence before this Honourable Court with two counts of abuse of office contrary to **Section 101 (1)** of the **Penal Code (Cap. 63)**. The second Applicant is equally charged before this Honourable court with two counts of abuse of office contrary to **Section 101 (1)** of the **Penal Code [Cap 63]**.
- b. the alleged offences arise from Agreements entered into on **16th August, 2001** between the **Government of Kenya**, on the one part, and **M/s Anglo Leasing and Finance Ltd and M/s Forensic Laboratories Ltd**, on the other, for the financing and construction of the CID Forensic Science Laboratory Project.
- c. the establishment, financing and implementation of the said Project was discussed and approved for execution by the Cabinet on the **27th July, 2001**.
- d. prior to the execution of the said Agreements, the drafts thereof were scrutinized and *approved* for execution by the Office of the Attorney General.
- e. before execution, the Attorney- General himself scrutinized the said Agreements and gave a

legal opinion confirming that:-

- i. all necessary actions required for the execution, delivery and performance of the Agreements had been taken;
 - ii. all approvals, consents and authorization had been obtained;
 - iii. the Agreements constituted a legal, valid and binding obligation on the Government and was enforceable as such.
- a. the Law Society of Kenya (LSK) instituted a private prosecution against the Hon. Attorney-General, **Hon. Amos Wako**, in March 2005 over the said legal opinion. The Attorney- General, **Hon. Amos Wako**, entered a **nolle prosequi** in his own favour and thereby terminated the private prosecution aforesaid.
- b. Under Section 26 (3) (a)** of the Constitution the Attorney-General has powers to institute and undertake criminal proceedings against “**any person**” in respect of **any offence** alleged to have been committed by “**that person.**”
- c. the words “**any person**” and “**that person**” in **Section 26 (3) (a)** aforesaid do not include a person whose acts or omissions constituting the alleged offence were, **prior** to and or **after**, the occurrence thereof, scrutinized, approved and confirmed as legally valid and binding by the Attorney- General.
- d. it is **NOT** constitutionally permissible under **Section 26** of the Constitution of Kenya for the Attorney- General to institute criminal proceedings against an accused person in respect of execution of Government Agreements:-
- i. which the Attorney- General, as the Principal Legal Advisor to Government, has, both prior to and after the execution thereof, scrutinized and given an opinion thereon confirming its legal validity and enforceability;
 - ii. which prior to its execution has been discussed and approved by the Cabinet, of which the Attorney- General is a member;
 - iii. when the Attorney- General has entered a **nolle prosequi** in his own favour terminating a private prosecution lodged against him over his opinion confirming the legal validity and enforceability of same agreement.
- a. the present criminal charges are accordingly:-
- i. unconstitutional and illegal;
 - ii. an abuse of power and the process of the court by the Attorney- General;
 - iii. vexatious and oppressive;
 - iv. contrary to due process; and/or;
 - v. contrary to public policy.
- a. In the circumstances, a question as to interpretation of **Section 26 (3) (a)** of the Constitution has arisen within the meaning of **Section 67 (1)** of the Constitution and the applicant hereby requests that that question be referred to the High Court of Kenya for interpretation.
- b. The questions raised by the applicant are substantial and are neither frivolous nor vexatious, in that:-

- i. the criminal offences with which the Applicants are charged are serious and the outcome of their trial may affect their liberty;
 - ii. the allegations forming the basis of the charge do gravely and adversely affect the applicant's image, reputation and standing in society;
 - iii. the issues raised herein are of great and fundamental importance to our Constitution and Criminal Jurisdiction and administration of criminal justice;
 - iv. Subordinate courts have no powers to check abuse of power by the Attorney- General.
- a. If further proceedings herein are not stayed, and the High Court ultimately decides in favour of the Applicant, the decision of the High Court would be rendered nugatory, its orders or directions ineffectual and the purpose of the Reference would be defeated.

Which Application is predicated upon the annexed affidavit of **Zakayo Kipkemoi Arap Cheruiyot** sworn on the **9th day of May 2005**.

The second applicant **John Agili Alao**, relied on and adopted the contents of the said affidavit, of the first applicant, and supported the motion with equal force.

The Applicants case

The Applicant foremost contention is that **“any person”** and **“that person”** in **Section 26 (3) (a)** of the Constitution do not include a person whose acts or omissions constituting the alleged offence were **prior** to and/or **after** their occurrence scrutinized, approved and confirmed as legally valid and binding by the Attorney-General.

That the Applicants did not act **“arbitrarily.”** They were executing their mandate within the rules/law. **That cannot constitute abuse of office.**

The first Applicant signed the contracts forming the basis of the charge herein. The said contracts are to be found at **page 12 to 38** of the annexures to the affidavit in support of the application marked as exhibit **“ZK5.”**

The 2nd Applicant did **NOT** sign the contracts. However, he was the officer tasked by the first Applicant to communicate with the office of the Attorney-General (AG), from time to time with regard to the said contracts, in his capacity as the Finance Officer in the Office of the President, Internal Security and Provincial Administration.

The first Applicant's communication with office of the Permanent Secretary/Secretary to the Cabinet and Head of the Public Service was on **30th July, 2001**, the letter states:-

“I refer to the recent Joint Memorandum by the Minister of State and the Minister for Finance on the above subject and wish to inform you that Cabinet has considered the issues contained therein and approved, as requested:

- i. **use of lease financing for the high priority security projects of housing, transport and forensic laboratory; and**
- ii. **use of suppliers credit for essential security equipment and supplies.**

The Minister of State responsible for Provincial Administration and Internal Security and the Minister for Finance to take the necessary action.

You may initiate action along the lines already approved by the Cabinet.

The relevant Minute extract will be sent to you soon.

Yours

Sincerely,

S. J. Kosgei

PERMANENT SECRETARY/SECRETARY TO THE

CABINET AND HEAD OF THE PUBLIC SERVICE

c.c.

Mr Mwaghazi Mwachofi

Permanent Secretary

Ministry of Finance and Planning

NAIROBI.”

Accordingly, the Minister for State responsible for Provincial Administration and Internal Security and the Minister of Finance was tasked to take the necessary action. The Cabinet minutes is at **page 41** of the annexures to the application marked as exhibit “**ZK5**”.

On 10th August 2001, the Hon. Minister of Finance, **Chrisanthus Okemo**, wrote to the first Applicant thus:-

“..... due to recession and poor economic performance of the economy, the Government could not internally raise the necessary resources to fund the identified priority projects. In view of this, the committee asked your office to explore the possibility of getting external Commercial Funding at favourable rates long term repayment period.

The office of the President proceeded to request for expression of interest from local and international firms which could undertake the project on a turn key basis with a grant element of not less than 35%.

The committee was briefed on a stage by stage basis on the progress made towards obtaining credit financing and supply and was authorized at every stage to proceed to implement the committee's decisions.

On advise by my Permanent Secretary Ministry of Finance, the Office of the President was requested to rescind the credit financing arrangement and proceed with the export lease purchase agreements as the best financing and procurement option for the Government for such high security projects.

Consequently in a meeting of 10th May, 2001, I authorized the Office of the President to proceed with the lease financing option. The Office of the President sought and secured lease financing for:-

- **Transport**
- **Housing**
- **Forensic Science Laboratories**

Based on the foregoing, the Cabinet Paper was prepared for approval by Cabinet. The Cabinet approved the Joint Memorandum Proposal on 27th July, 2001.

Consequently, I am satisfied that the Office of the President which is the procuring entity has followed the prescribed procedures under Legal Notice No. 51 Para 3.2 and therefore, authorize the execution of the contracts in the light of the Cabinet approval.

Yours sincerely,

HON. CHRISANTHUS OKEMO, EGH M.P MINISTR

MINISTER OF FINANCE AND PLANNING

Copy to:-

Dr. Sally J. Kosgei, C. B. S

Permanent Secretary, Secretary to the Cabinet and Head of the Public Service

Office of the President

NAIROBI

The Mwaghazi Mwachofi

Permanent Secretary

Ministry of Finance and Panning

NAIROBI”

The first correspondence with the Attorney-General by the Second Applicant was on **5th March, 2001**. It states in part:-

“The Office of the President is entering into two agreements for two priority security projects. Before signing the agreements, we require the opinion of the Office of the Attorney-General on the contracts and financing agreements.

I hereby forward the following documents for your opinion.

(A) Procurement of Security Vehicles

- i. ***Contract Agreement with Layland Export Ltd (U.K).***
- ii. ***Financing Agreement with Silverson Establishment.***

(B)

- i. ***Contract Agreement with Forensics Laboratories Ltd. (U.K).***
- ii. ***Financing Agreement with Anglo Leasing & Financing.***

We request your response by Wednesday noon as we need to have documents ready for a meeting on Wednesday.

J.F.A AGILI, HSC

FOR: PERMANENT SECRETARY/

PROVINCIAL ADMINISTRATION”

On ***19th March, 2001*** The Attorney-General replied ***[at page 53 of the exhibits marked “ZK5”]*** confirming that the documents were in order from a legal point of view. That subject to Treasury approval of the financial payment and taxation provisions, he may proceed to sign the contracts.

Based on the Attorney-General legal opinion, as aforesaid, the contracts were executed by the parties involved. In this regard it is significant to note that the first and second Applicants handled and executed the contracts for and on behalf of the Government of Kenya in their official capacities as public officers.

On ***28th May, 2001*** the second Applicant forwarded the following documents for the opinion of the Attorney-General to wit:-

“A. Security Vehicles

- i. ***Lease Purchase Agreement for Security Vehicles***
- ii. ***Export Lease-purchase Financing Agreement Contract No. GOK/VEH/2001/01/A.***

B. (i) Lease Purchase Contract for Forensic Science Laboratory

(ii) Credit Financing Agreement No.

KENYA/CR/FLL/2001

We request for you response Thursday noon as we need to have documents for a meeting scheduled early next week:-

J.F.A. AGILI, HSC

FOR: PERMANENT SECRETARY

PROVINCIAL ADMINISTRATION”

On ***31st May, 2001*** the Attorney-General wrote to the Permanent Secretary Provincial Administration

Internal Security Office of the President [Att: J.F. Agili, HSC] as follows:-

“.....
..... **We have examined the documents forwarded to us against the foregoing legal and financial principles and we are satisfied that the respective rights and obligations of the parties under the two transactions adequately reflect the legal rights and obligations of the parties to an international financial leasing transaction.**

In particular we are satisfied that

a) The supplier's obligations to consign the equipment ordered by the Government and to install the same is clearly reflected in the draft contracts, the supplier's legal responsibility to deliver the equipment is also captured in the draft contracts.

b) The Government as the lessee had the complete freedom to choose the equipment and agree with both the suppliers and the finance companies the conditions of the supply and financing of the equipment. As a result, the Government, as the lessee, has in the draft contracts, assumed a broad spectrum of obligations consistent with an international finance lease.

c) The Government's obligations to pay rentals to the finance companies, to maintain, repair, insure and meet all charges connected with use of the equipment are all clearly set out in the draft instruments.

d) The lessors have adequately made provision in the draft instruments to govern the duration of the leases, the payment of rentals, and to assure the lessee of the quiet possession and use of the equipment for the intended purposes.

In our Opinion, we are satisfied that the draft instruments have provided for the requisite economic and legal requirements of any international finance lease; namely the furnishing of credit to the Government for the hiring of the respective equipment for use for specific lease periods.

Subject to agreement of the Ministry of Finance on the payment, and fiscal provisions of the draft documents, you may proceed to sign the contracts and keep us fully posted of the progress.

With Kind regards.

Yours faithfully,

DAN K. AMEYO

CHIEF – STATE COUNSEL

FOR: ATTORNEY-GENERAL.”

On **15th June, 2001** the Chief State Counsel, **Dan Ameyo**, on behalf of the Attorney-General wrote to the first Applicant [J. F. A. Agili] thus:-

“..... **we now find the instruments in order from a legal point of view. You may proceed and sign the same as long as you and**

Treasury agree in the financial and payment terms as envisaged therein.

We draw your attention to the various terms, conditions and covenants spelt out in the documents and urge you to timely meet the obligations and assurances given to avoid default and its devastating consequences.

You sought our advice as to who could be the signatory to these documents. In our view the primary obligation of Government envisaged in the Agreements is to pay rentals for the leased equipment, a matter that should be budgeted for under the relevant Ministry's vote. We do not consider this as a loan or credit-raising transaction within the meaning of the External Loans and Credits Act (Cap. 422). In our opinion, therefore, the transaction falls under the Government Contracts Act [Cap. 25] to be signed by your Permanent Secretary and countersigned by Permanent Secretary, Treasury as required under Cap. 422.

Kindly keep us fully posted as we have post-signature responsibility to issue an opinion in respect of each document.

Regards

DAN K. AMEYO

CHIEF STATE COUNSEL

FOR: ATTORNEY-GENERAL.”

On **23rd August, 2001**, the Treasury wrote to the Permanent Secretary Ministry of Finance and Planning [Att: J.F A. Agili] thus:-

.....**forwarded herewith please find the following:-**

- 1. Three (3) original Contract documents No. GOK/OP/VEH/2001/01 on Export Lease-Purchase Financing Agreement for Security Vehicles duly signed by the Permanent Secretary/Treasury.**
- 2. Three (3) original Contract document No. KENYA/OP/FSL/2001/01 on Export Lease-purchase Financing Agreement for the Kenya Police Sciences Laboratory duly countersigned by the Permanent Secretary/Treasury.**
- 3. Twenty Three (23) original Promissory Notes – Notes No. KENYA/OP/FSL/2001/01:006 duly signed by the Minister for Finance.**
- 4. Twenty Five (25) original Promissory Notes – Note No. GOK/OP/VEH/2001/01:025 duly signed by the Minister for Finance.**
- 5. One (1) original Pre-advice Letter on Contract No. GOK/VEH/2001/01/A duly signed by the Financial Secretary/Treasury.**
- 6. One (1) original Pre-Advice Letter on Contract No. KENYA/CR/FLL/2001 duly signed by the Financial Secretary/Treasury.**
- 7. Please note that we have retained one of each original contract document for our custody.**

Please note that you will need to obtain Legal Opinion from the Attorney-General on the Promissory Notes. You should also revert back to us with a copy of the legal opinion from the Attorney-General.

Please take the necessary action.

M.M. BYAMA (MRS)

FOR: SECRETARY PERMANENT SECRETARY/

TREASURY”

On the same day (read 23/8/2001) the second Applicant wrote to the Attorney-General as follows:-

“High Security Projects Promissory Notes

- 1. TWENTY THREE (23) ORIGINAL PROMISSORY NOTES NO. KENYA/CR/FLL/2001/001:023 FORENSIC SCIENCES LABORATORY***
- 2. TWENTY FIVE (25) ORIGINAL PROMISSORY NOTES – NOT NO. GOK/OP/VEH/2001/01:025 SECURITY VEHICLES***

Forwarded herewith please find the above referred Promissory Note in respect of the above Security Projects:-

- 1. VEHICLES***
- 2. FORENSIC SCIENCE LABORATORY***

You are hereby requested to give a Legal Opinion on the validity of the Promissory Notes issued to the lessor's favour.

The Contract Agreements for each of the projects are also enclosed for your perusal and record.

J. F. A. AGILI

FOR: PERMANENT SECRETARY/

PROVINCIAL ADMINISTRATION”

The Attorney-General by the letter of ***24th August, 2001*** returned the Twenty Three (23) original Promissory Notes – Note KENYA/OP/FLL/2001/01:023 FORENSIC SCIENCES LABORATORY and Twenty Five (25) original Promissory Notes – Note No. GOK/OP/VEH/2001/01:025 SECURITY VEHICLES. The said letter states in part thus:-

“..... We Forward herewith two separate Legal Opinion in respect of each Agreement duly signed by the Hon. Attorney-General. We also return the original signed Promissory Notes.

Kindly keep us posted of future developments.

Kind regards.

Yours faithfully

DAN K. AMEYO

CHIEF STAFF COUNSEL

FOR: ATTORNEY-GENERAL”

At page 66 of **exhibit “ZK5”** is the opinion of the **Attorney-General** which states:-

OPINION

1. **“as Attorney-General and Principal Legal Advisor to the Government of Kenya (THE LESSEE) I am required to give an opinion in respect of the Export Lease-Purchase Financing Agreement dated 16th August, 2001 and the Promissory Notes marked Silverson Establishment GOK/OP/VEH/2001/01 to 25 issued by the LESSEE to Silverson Establishment (THE LESSOR).**

I have examined such laws and documents as I considered necessary for the purpose of this Opinion. In particular, I have examined the provisions of the Export Lease-Purchase Financing Agreement dated 16th August, 2001 (THE AGREEMENT).

2. In my Opinion:-

(a) The LESSEE has the power to enter into the Agreement and has taken all necessary actions which are required for the execution, delivery and performance of the

AGREEMENT:

(b) The AGREEMENT constitutes legal, valid and binding obligations of the LESSEE and is enforceable in accordance with its terms, and

- c. **I have also examined instruments described as Promissory Notes marked Silverson Establishment/GOK/OP/VEH/2001 to 025 dated 17th August, 2001 signed for the LESSEE by Hon. Chirs Okemo, the Minister for Finance in the Government of the LESSEE.**

In my opinion the Promissory Notes are legal financial instruments of the LESSEE evidencing the LESSEE's debt to the LESSOR and are adequate for the purpose for which hey are intended and are enforceable in accordance with their terms.

DATED this 3rd day of August 2001

S. AMOS WAKO, EBS EGH, MP

ATTORNEY-GENERAL”

In a letter dated **4th September, 2001** the Chief – State Counsel [**Dan Amayo**] confirmed to the first applicant:-

“j) that Hon. Attorney-General signed both the legal opinions in his presence on 3rd September, 2001.”

On **3rd day of March, 2003** The Law Society of Kenya [**LSK**] through Gitobu Imanyara Advocate filed

an application by way of **Notice of Motion dated 3rd March, 2005** in the **ANTI CORRUPTION COURT AT NAIROBI**, seeking leave to conduct a private prosecution against **Hon. Amos Wako**, the Attorney-General in connection with criminal offences arising from the subject contracts which form the basis of the charges against the two Applicants.

On the **8th day of March, 2005** the Hon. Attorney-General entered a **Nolle Prosequi** against himself.

A. O. Muchelule Esq [The Chief Magistrate Milimani as he then was] accepted the **Nolle Prosequi** and discharged the Attorney-General.

Against that backdrop of evidence, the Applicants contend that the charges against them are not tenable in law. That their prosecution is unconstitutional, selective, actuated by malice, vexatious, oppressive and, contrary to public policy in that:-

- i. all procurement procedures we adhered to as can be discerned from correspondence between the parties;
- ii. the first correspondence **[at page 39 of "exhibit ZK5"]** a letter from **Sally J. Kosgei** then Cabinet Secretary/Secretary to the Cabinet initiated the process;
- iii. the second correspondence was from **Hon. C. Okemo [at page 43 – 45 of "exhibit ZK5"]** then Minister of Finance confirmed that the Cabinet approved the joint memorandum proposal of 27th July, 2001. That he was satisfied that the Office of the President which is the procuring authority/entity has followed the prescribed procedures under Legal Notice No. 51 paragraph 3.2. Accordingly, he authorized the execution of the contracts in the light of Cabinet approval.

The two letters aforesaid underscored the fact that the contract was in respect of High Security Projects. **That a joint Ministerial meeting had cleared the same. That the Office of the President, the procuring authority had followed the prescribed procedures under Legal Notice No. 51 paragraph 3.2.**

The **subject procurement** was authorized in the interest of national security and national defence **in line with the Regulation 3 (2) of the Exchequer, Audit and Public Procurement (Regulations 2001)**. Yet the Applicants are charged **inter-alia**, with breach of Procurement Regulations which is done by a committee consisting of more than the Applicants.

The said authorization, the Applicants contend, was equally in line with **Section 7 of The External Loans and Credit Act [Cap 422]** of the Law of Kenya which provides thus:-

"Capital sums borrowed and the credit obtained under this Act up to the date of the report, and any further information which he considers appropriate.

6. (1) **The total indebtedness of the time being out-standing in respect of the principal amounts of moneys borrowed or credit obtained shall not exceed the equivalent of the sum of six hundred and fifty million pounds calculated higher sum as the National Assembly may by resolution approve.**

(2) The Minister shall report to the National Assembly in writing (by way of the annual appropriation accounts or otherwise) the amount of indebtedness mentioned in sub-section (1) outstanding at the end of each financial year.

7. (1) **The Minister, or any person specially authorized by him in writing in that behalf, may**

execute such instruments as may be required in connection with this Act.

(2) Subject to subsection (1), nothing contained in this Act shall vitiate any agreement or other instrument.

- 8. The Minister may make regulations providing for such matters as appear to him to be necessary or expedient for the purpose of facilitating the implementation of the Act.**
- 9. Any Moneys borrowed or credit obtained in currencies other than Kenya currency before 1st July, 1978 by or on behalf of the Government under any of the statutes repealed by Part XIII of the Finance Act, 1978 or under the Special Loan (Commonwealth Development Corporation) Act and owing on or after that day, shall be deemed for the purposes of Section 6 of this Act to have been borrowed or obtained under this Act.”**

Accordingly the Applicants were basically **executing a lawful mandate**, which in law, does not amount to abuse of office. In this regard the Applicants called in aid **Section 6** of the **Government Contract Act [Cap 25]** which provides thus:-

“6. (1) No public officer shall be liable to be sued personally upon any contract which he makes in that capacity; but a public officer shall be personally liable if he expressly pledges his personal credit or if he contracts otherwise than as the agent of the Government.

(2) No public officer acting on behalf of the Government shall be liable to be sued for breach of an implied warranty of his authority to enter into any contract.

- 6. Any authorization given under Section 2 shall be in the appropriate form set out in the First Schedule.**
- 7. (1) Notwithstanding anything contained in this Act, but subject to the provisions of any other written law, no contract to which this Act applies and which is made on or after the 16th June, 1978, shall bind the Government in respect and to the extent of –**

(a) any provision therein for the exemption, waiver, remission or refund of tax or duty payable under the several written laws specified in the Second Schedule: or

(b) any expenditure specified therein to be made by or on behalf of the Government in excess of the sum of two hundred and fifty thousand shillings, or the equivalent thereof in the currency denominated in the contract, calculated at the rate of exchange prevailing at the of its signing.

Unless such contract is signed or countersigned by the Permanent Secretary or Deputy Permanent Secretary to the Treasury or a person or persons specially or generally authorized by either of them in writing in that behalf.

- 2. This section shall not be construed as enabling any exemption, waiver, remission or refund of any tax or duty payable under any written law to be given otherwise than as may, by that or any other written law, be provided.**
- 3. In this section “expenditure” does not include expenditure which may contingently or incidentally arise under collateral or incidental provisions of a contract.**
- 4. The Minister for the time being responsible for finance may, by order in the Gazette, amend:-**

(a) the Second Schedule.

9. For the avoidance of doubt it is declared that agreements made or other instruments given under the Internal Loans Act, the External Loans Credits Act and the Guarantee (Loans) Act are not contracts to which this Act applies.”

The Applicants further contend that the power to borrow money is donated by the **Government Financial Regulations and Procedures**. In particular **Regulation 3 (Treasury – Chapter 3)** of the Government Financial Regulations and Procedures which provides thus:-

3.1 In accordance with the Interpretation and General Provisions Act (Cap. 2) Revised Edition 1983 (1970):

“The Treasury means the Minister for the time being responsible for Finance, and such other officer or officers of his Ministry as may be deputed by him to exercise and perform on behalf of the Treasury “any powers or duty conferred or imposed on the Treasury by any written law”

3.1.1 Treasury Delegation:

The **Legal Notice No. 729 of 1961** provides for Treasury delegation as follows:

“In exercise of the powers conferred in that behalf by Section (1) of Section 3 of the Interpretations and General Provisions Ordinance, 1956, the Minister of Finance hereby deposes the Permanent Secretary to the Treasury to exercise and perform on behalf of the Treasury the powers and duties conferred and imposed on the Treasury by the Exchequer and Audit Act, Cap 41”

Against that backdrop of evidence it is clear that **Regulation 3 (1)** gives the Treasury the power to borrow hence the involvement of the Treasury in procuring monies for projects such as the one in issue.

The Applicants further contend that **Regulation 5** of the **Accounting Officer – Appointment and Responsibilities Act [Cap 5]** embodies the framework of responsibilities of the Accounting Officers. That what the applicants did was squarely within the confines of the said regulations and hence lawful.

The Applicants equally contend that **Regulation No. 9** of the **Borrowing by Government Act [Cap 9]** embodies the procedure of how the Government goes about external borrowing. That the subject borrowing was done within the confines of the said Regulations and hence regular, within their mandate and consequently lawful.

It was the Applicant's last and final position that in the light of the sum total of the evidence tendered herein, backed by various annexures to the application and the sections of the law quoted hereinabove, the charges against them are not tenable in law and hence unconstitutional, abuse of the process of the court, vexatious oppressive and contrary to public policy.

The foregoing apart, the Applicants **alternative** contention is that, in any event, the intended prosecution is being done **selectively** which amounts to **discrimination** under the **Bill of Rights** enshrined in the old Constitution of Kenya in that:-

- i. investigations leading to the charging of the Applicant's was done by KACC who zeroed in on the two Applicants and one **Francis Sang** [former CID Director,] as can be discerned from the replying affidavit of **Emilly Kamau**, sworn on 11th day of March 2005 in reply to the Motion herein. In that affidavit is annexure 2 titled **“Press Statement”** which is telling. At (B) the

Attorney-General says:-

“KACC /INQZI /16.06.04

KACC HAS RECOMMENDED THAT THE FOLLOWING BE PROSECUTED FOR OFFENCES UNDER THE PENAL CODE.

- 1. ZAKAYO CHERUIYOT.**
- 2. JOHN F. A. AGILI.**
- 3. FRANCES SANG.**

I AM SATISFIED THAT THERE IS ON THE FILE SUFFICIENT AND ADMISSIBLE EVIDENCE TO ESTABLISH A PRIMA FACIE CASE IN COURT OF LAW AGAINST ZAKAYO CHERUIYOT AND JOHN F. A. AGILI AND HAVE CONSEQUENTLY DIRECTED THAT THEY BE PROSECUTED. HOWEVER, AGAINST MR. FRANCIS SANG, THERE IS NO SUFFICIENT EVIDENCE TO PROVE ANY OFFENCE UNDER THE PENAL CODE. HE MADE A LENGTHY STATEMENT ON HIS ROLE IN THE MATTER WHICH HAS NOT BEEN CONTRADICTED BY ANY OTHER WITNESS. HE WAS NEITHER INVOLVED IN THE EXECUTION OF THE CONTRACT NOR IN THE PROCUREMENT PROCESS. HE SHOULD THEREFORE BE INVOLVED IN THE CASE AS A PROSECUTION WITNESS.”

On the basis of **Press Statement** the Applicants contend that removal of **Franics Sang** from the charge sheet amounts to **selective prosecution** and hence violates the Applicant's right to fair administrative action under the old Constitution of Kenya.

The forgoing apart, the Applicant's further contend that in the **same vein** the Attorney-General equally removed himself from prosecution when the Law Society of Kenya (LSK) put in motion a private prosecution proceedings against him as exhibited at page 120 of the annexures titled “ **NOLLE PROSEQUI** ”

Against that backdrop of evidence, the Applicants raised three questions which they sought reference to the High Court for Constitutional interpretation under **Section 67 (1)** of the old Constitution of Kenya (since repealed) thus:-

1. Whether the words “ **any person** ” and “ **that person** ” used in **Section 26 (3) (a)** of the Constitution includes a person whose acts have been sanctioned, acquiesced and confirmed by the Attorney-General (AG) as legally binding and valid;
2. Whether it is constitutionally permissible for the Attorney-General to prosecute a person carrying out instructions of the Cabinet of Kenya in execution of Government Contracts where the Attorney General having himself given a seal of approval to the contract, can turn around and prosecute a civil servant for carrying out obligations imposed on him by the Cabinet and sanctioned by the Attorney-General;
3. Whether when civil servants are implementing objectives imposed by the Government, they will be liable for prosecution in the event of change of Government, whether they should be taking the cross for any mistakes done by the Government they serve, whether Civil Servants will be prosecuted for implementing decisions taken by previous Government.

The Respondent's Case

The Respondent relied on the affidavit of **Emily Kamau** sworn on the 11th day of March, 2005 and on

the submissions dated **9th October, 2015** in reply to the submissions of the first Applicant dated **28th September, 2015** and filed on the **3rd of August, 2015** and that of the second (2nd) applicant dated **31st July, 2015**. and filed on **29th September, 2015**.

The Respondent foremost contention is that there is no ambiguity as to who the person referred to in **Section 26 (3) (a)** of the Constitution is. That it is clear as day light that the persons referred to are the Applicants (read accused persons).

That the Applicants failed to ensure that Anglo Leasing & Forensic Laboratories had the legal capacity to enter into contracts with the Government of Kenya. That they arbitrarily proceeded with procurement of the Project while there were no technical specifications for the project in place. That they violated procurement procedures.

It was strongly urged, on behalf of the Respondent, that since the prosecution's case has not commenced, not all the documents and evidence in support of the charges has been supplied to the defence (read accused). That what has been availed to the defence are only part of the exhibits to be tendered in evidence.

It was further strongly urged on behalf of the respondent that not all the materials which was forwarded to the Attorney-General, on the basis of which he made his opinion, has been availed to the court. That when and if availed the court will be in a position to assess how they were executing their mandate, e.g whether there were criminal activities involved in the course of the execution of their mandate.

It was equally strongly urged on behalf of the respondent that the Applicants arbitrarily undertook the procurement exercise since they did not comply with the tendering regulations and/or procedures as enjoined by the law.

It was also urged that the fact that the prosecution arose out of a transaction approved by the Cabinet and opinion given by the Attorney-General cannot be a bar against prosecution so long as it is demonstrated that the said prosecution is **not** malicious and has a legal basis.

That in any event matters of facts should form the basis of the accused defence should the accused be found to have a case to answer at their trial.

Last but not least that the questions raised by the Chief Magistrate for interpretation do not constitute substantial questions of law as was enunciated in the Indian case of **CHUNLAL .V. MEHTA -VS- CENTURY MINNING & MANUFACTURING CO. AIR 1962 SC 1314**.

Applicants reply

With regard to the submission that only part of the exhibits have been released so far and that that there are many more to be introduced as the case proceeds, the Applicants contend that it is now settled that in a criminal case the prosecution has a duty to release to the accused all the documents and/or evidence they intend to rely on. That they cannot hold any evidence at their whim and caprice. In this connection authority of **JUMA & OTHERS -VS- ATTORNEY GENERAL [2003] 2 EA 452 (HCK)** is in point. In that case it was held:-

“The provisions of the Constitution under consideration can have life and practical meaning only if accused persons are provided with copies of statements made to the police by persons who will or may be called to testify as witnesses for the prosecution as well as the copies of exhibits

which are to be offered in evidence for the prosecution.”

With regard to the submission that the court has not been shown the material which were forwarded to the Attorney-General, on the basis of which his opinion was sought, the Applicants contend that all that material which constitutes the evidence the prosecution will produce in support of its case were availed and form annexures to the application.

With regard to the submission that Applicants acted arbitrarily without regard to regulations and procedures, the Applicants contend that a joint Ministerial meeting had cleared the project for **implementation**. That was in line with **Regulations 3 (2)** of the **Exchequer Audit and Procurement [Regulations 2001]**. Hence the question of arbitrarily proceeding with implementation in the absence of the technical specification in place does not arise. That in any event the Applicants were not procurement officers. They were executing the contracts on the basis of cabinet approval in line with their mandate when the Attorney General had determined the legal capacity of the parties to enter into such contracts.

With regard to the submission that in the case of **JOSHUA CHELELGO KULEI - v - REPUBLIC & 6 OTHERS [2014] eKLR** it was held that the fact that the prosecution arose out of a transaction allegedly approved by the Attorney-General, cannot be a bar to prosecution if the prosecution is not **malicious** and has a legal basis, the Applicants contend that in deed their prosecution is **malicious selective** and hence **discriminatory** in that:-

- i. at page 37 of the Applicant's bundle of documents exhibited as “**ZK5**”, signed by the first Applicant, one of the signatories appearing on the face of the contracts is the then **Permanent Secretary** in the Ministry of Finance and Planning **Hon. Mwaghazi Mwachofi**. Yet it is **telling** that the said Permanent Secretary Treasury has not been charged alongside the accused in the criminal proceedings before the subordinate court;
- ii. **Francis Sang** [former Director of CID] has equally not been charged;
- iii. the **Attorney-General** too has entered a **Nolle Prosequi** in respect of the intended private prosecution brought by the Law Society of Kenya (LSK) against himself.

In this regard the Applicants relied on the case of **GEORGE JOSHUA OKUNGU & ANOTHER -VS- CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION COURT AT NAIROBI & ANOTHER**, where it was held, **inter-alia**:-

“70. Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the Petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the Petitioner and who have, with a view to being rendered incompetent as the Petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy, we hold, constitutes an unfair trial under Article 50 of the Constitution.

71. Here for example, the Petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorizations. To turn round and institute criminal prosecution against the Petitioners while making the very persons who

authorized the Petitioner's action into prosecution witness, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the Director of the Public Prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the Constitution and the office of the Director of the Public Prosecution Act. To the contrary the DPP would be breaching the Constitution which inter alia bars in Article 27 discriminatory "directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

With regard to the submissions that matters of facts should form the basis of the accused defence should accused be found to have a case to answer at their trial, the Applicants called in aid the celebrated case of **GITHUNGURI -VS- REPUBLIC [1986] KLR 1** at **page 18**, where their Lordships **eloquently** observed as follows:-

"..... what kind of mad man who has opportunity to apply for prohibition would opt for trial, the risk of conviction and imprisonment."

Moreover the Court of Appeal in **NATIONAL EXAMINATION COUNCIL -VS- REPUBLIC (EX-PARTE) GEORGE GITHINJI & ANOTHER CIVIL APPEAL NO. 266 OF 1996** it was held *inter-alia*:-

"..... if Githunguri had allowed the Chief Magistrate to try him, and a conviction had been recorded, an order of prohibition would be ineffectual against the conviction because such order would not quash the conviction. Prohibition looks to the future in order to prevent the making of flawed decisions."

With regard to the allegations that Applicants arbitrarily proceeded with the implementation of CID Forensic Sciences Laboratory **"without regard to the public procurement procedures"**, **the Applicants contend that it is instructive to note that the charge sheet does not say which public procurement procedures were infringed. That this in itself renders the charges defective.** However, assuming that the public procurement procedures then in force was the **Exchequer and Audit Public Procurement Regulations, 2001** [**"the regulations"**] [since repealed], then the evidence does not support the charge by reason of the fact that the Project was **"direct procurement"** authorized by the cabinet in the interest of National Security and National Defence. Thus it by-passed the tendering process.

With regard to the submissions that the questions raised for interpretation do not amount to substantial questions of law, the Applicants once again called in aid the celebrated case of **Githunguri -vs- Republic (supra)** where it was held *inter-alia* that when a request is made by the accused, through his counsel, that questions be referred to the High Court, and the Chief Magistrate is of the opinion that the interpretation of **Section 26** was properly invoked the High Court was properly seized of the matter.

That in any event there are **two pre-requisites** for reference to a Constitutional Court:-

(1) the question must relate to the interpretation of the Constitution;

(2) the subordinate court must be of the opinion that the question involves a substantial question of law.

It suffices to say that the two pre-requisites were met.

Last but not least, the affidavit of **Emilly Kamau** in opposition to the Notice of Motion application do not disclose that there are any other outstanding documents which the state intends to use in the course of the prosecution of the Applicants in the subordinate court [**CMCR.C NO. 338 OF 2008**]. Hence the court could only proceed on the premise that all exhibits have been availed.

Issues arising for determination

1. whether the words “**any person**” and “**that person**” used in **Section 26 (2) (a)** of the Constitution includes a person whose acts have been sanctioned, acquired and confirmed by the AG as legally binding and valid;
2. whether it is **Constitutionally** permissible for the Attorney-General to institute criminal proceedings against a person carrying out instructions of the Cabinet of Kenya in execution of Government Contracts [where the Attorney-General himself has given a seal of approval to the contract]. Whether he can turn around and prosecute a civil servant for carrying out obligations imposed on him by the Cabinet and sanctioned by the Attorney-General on behalf of the Government.
3. Whether when civil servants are implementing objectives imposed by the Government, they are liable for prosecution. Whether such civil servants should take the cross for any mistakes done by the Government they serve.
4. Whether this application is justiciable and/or tenable in law so that the orders sought should be granted.

Analysis of the facts vis-a-vis the law

I am grateful to all counsel for their assistance and in put in this application. I have carefully considered the issues raised by the application and the evidence **vis-avis** the law. I have equally taken into consideration all the authorities cited before me even though I have not taken the liberty to quote all of them in **extenso**. Having done so I take the following view of the issues raised by the application.

It is common ground that the first Applicant and the second Applicant were at all material time employees of the Government of Kenya. The first Applicant was the Permanent Secretary in the Office of the President. The second Applicant was the Finance Officer in the Office of the President. Both were public officers and were enjoined in their daily conduct to conform with certain laws and regulations when transacting business. The said laws and regulations included, but were not limited to:-

1. **The Constitution of Kenya;**
2. **The Government Contracts Act [Cap 25] Laws of Kenya;**
3. **The Treasury Act [Cap 3] Laws of Kenya;**
4. **The Accounting Officer Appointment Responsibility Act [Cap 5] Law of Kenya;**
5. **Borrowing of the Government Act [Cap 9] Laws of Kenya;**
6. **Extended Loans and Credit Act [Cap 422] Laws of Kenya**
7. **The Exchequer and Audit Act [Public Procurement Regulations 2001].**

The **first issue** which falls to be decided is whether such officer is “**any person**” or “**that person**” as contemplated by **Section 26 (3) (a)** of the Constitution of Kenya (since repealed). In that regard I fall back to the **Interpretation and General Provisions Act [Cap 2] Laws of Kenya**. I am fortified in this respect by the provisions of **Section 48** thereof which provides thus:-

“where any written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to

do or to enforce the doing of the act or thing.”

The said Act [Cap. 2] defines “***a person***” as including a company or association or body of persons corporate and incorporate. Accordingly, I find and hold that the word “***any person***” and “***that person***” in **Section 26 (3)** of the Constitution do not include “***a person***” whose acts or omission constituting the alleged offence were ***prior*** to and/or ***after***, the occurrence thereof scrutinized, approved and confirmed as legally valid and binding by the Attorney-General. In this regard I am fortified by the provisions of **Section 6** of the **Government Contracts Act [Cap 25]** Laws of Kenya and **Section 3 (1)** of the **Interpretation and General Provisions Act [Cap 2]**. So far as it relates to the **Second (2)** Applicant **Section 3 (1)** provides thus:-

“Accounting Officer ---” means an accounting officer appointed under the Government Financial Management Act, 2014.”

Hence the first and second Applicants were lawfully engaged at all material times and were acting as such.

The offence the Applicants are charged with is created by **Section 101 (1)** of the **Penal Code**. It provides as follows:-

“Any person who, being employed in the public service, does or directs to be done in abuse of authority of his office, any arbitrarily act prejudicial to the right of another is guilty of a felony.”

On the basis of the charge sheet and the evidence tendered herein and from the wordings of **Section 101 (1)** of the **Penal Code** it is impossible to determine acts that were done in abuse of office and acts that were done arbitrarily which are prejudicial to the rights of the Government of Kenya.

This is more so in the light of the fact that the Applicants were executing agreements approved by the **cabinet** and given seal of legality by the Hon. The Attorney-General. Seen in that light the acts of the Applicants cannot be said to have been arbitrary and/or in abuse of authority of their respective offices.

The **second** issue which falls to be decided is whether it is constitutionally permissible under **Section 26 (3) (a)** of the Constitution for the Attorney General, to institute criminal proceedings against a Public Officer in respect of the execution of Government agreements:-

- i. if the Attorney-General as the **Principal Legal Advisor** to the Government has both prior to and after execution thereof scrutinized and given an opinion thereon confirming its legal validity and enforceability.
- ii. which prior to the execution has been discussed and approved by the Cabinet, of which the Attorney-General is a member;
- iii. when the Attorney-General has entered a **Nolle Prosequi** in his own favour, and removed a third suspect (read **Francis Sang**) whom KACC had recommended his prosecution.

It is common ground that both Applicants were public officers [as defined in **Cap 2 Law of Kenya**] and **Section 123 of the Constitution** holding office under the Government of Kenya. As such they were, at all material times, acting lawfully in the execution of their mandate. In that regard the Applicants called in aid the authority of **GUANTAI -VS- THE CHIEF MAGISTRATE NAIROBI. CIVIL APPEAL NO. 276 OF 2003**. In that case, the Applicant was an employee of the Kenyatta National Hospital as its Chief Legal Officer. The said Hospital is established for the purposes specified in **regulation 5** of the **Kenyatta National Board Order 1987 – Legal Notice No. 109**. Under **regulation No. 2** of the above cited order,

there was established a state corporation known as the **Kenyatta National Hospital Board**. On or about 9th February, 2001 the Hospital advertised for pre-qualification of bidders and thereafter invited tenders for supply, deliver, installation and commission of Radiology Diagnostic Equipment at the Hospital.

The appeal board thereafter declared the procuring entity contract illegal and declared it to be nullified. By that time the successful bidder had already performed the contract and payment had already been made to him. The project was duly commissioned and completed as designed. On 5th February, 2005 **Joram Mwenda Guantai** as an officer employed in the public service, to wit, **Chief Legal Officer** was arraigned in court on various charges of abuse of office contrary to **Section 101 (1)** of the **Penal Code**.

On 27th March, 2003 the applicant moved the **Superior Court under Order 53 Rules 11 and 2** of the **Civil Procedures Rules** for an order of prohibition directed at the Chief Magistrate's Court or any court of similar jurisdiction from hearing criminal case No. ACC 9/2003 between **Dr. Hosea Waweru and Joram Mwenda Guantai**. After a full hearing the Judge of the **Superior Court** dismissed the Application. The applicants moved to the **Court of Appeal**. It was held *inter-alia*.

“In the result we hold a firm view that in the particular circumstance of this case the prosecution of the appellant and his co-accused, DR. HOSEA N. WAWERU, the interested party in the appeal, would be oppressive and vexatious and would amount to an abuse of the process of the Court and that the criminal charges against them have been wrongly brought. The learned trial Judge had inherent power and duty to intervene but he did not take the appropriate judicial action. In failing to do so he greatly erred and had failed to secure the 2nd appellant and the interested party a fair treatment before the subordinate court.”

A situation akin to the current case arose in the case of **REPUBLIC -VS- CHIEF MAGISTRATE'S COURT, MILIMANI COURT EX-PARTE TRIPLE A CAPITAL LIMITED & 2 OTEHERS [2014] eKLR** where it was held *inter-alia*:-

“All the documents regarding the transaction were indeed forwarded to the office of the Attorney-General by the 1st Interested Party.

I do not think that a person can escape criminal liability simply because he sought the opinion of an advocate before doing something that later turns out to be criminal. However, the opinion of the Attorney-General cannot be equated to that of any ordinary advocate. The Attorney-General's opinion is cemented in the Constitution. Public entities like KPC normally seek the opinion of the Attorney-General before entering certain transactions. The Attorney-General is deemed to give the best legal opinion in good faith. Those who act on the opinions of the Attorney General normally seek the opinion in good faith. Those who act on the opinions of the Attorney-General should not be punished for doing so. It is assumed that the Attorney-General has sufficient capacity to render such advice.....”

In the case of **BANK OF UGANDA -VS- BANCO ARABE ESPANOL, SUPREME COURT CIVIL APPEAL NO. 8 OF 1998**, the Supreme Court of Uganda held that the opinion of the Attorney-General should not be taken lightly. The Court eloquently rendered itself thus:-

“On whether or not the loan agreement was valid and enforceable, the parties to this tripartite agreement had been particular to include a clause in it which sought legal opinion as a condition precedent. The appellant is the principal – financial adviser to the Government of Uganda and the Attorney-General is the principal legal adviser to the same Government. In consequence,

nothing could be more authoritative and authentic than the opinion of the Attorney-General of Uganda, which he expressed and wrote on the loan agreement.....

At the time the loan agreement was signed, the Uganda Constitution designated the Attorney-General as the Principal Legal Advisor to the Government of Uganda with functions, inter-alia, to give legal advice and legal services to the Government on any subject and to draw and peruse agreements, contract treaties, conventions and documents by whatever name called, to which the Government is a party or in respect which the Government has an interest.

In my view, the opinion of the Attorney-General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents. Unless there are other agreed conditions, third parties' are entitled to believe and act on that opinion without further enquiries or verifications, it is also my view that it is improper and untenable for the Government, the Bank of Uganda or any other public institution or body in which the Government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest, to question the correctness or validity of the opinion in so far as it affects the rights and interests of third parties.....

While it is true that the Attorney-General plays a dual role as Government principal legal adviser on both political and legal matters. Nevertheless, in the latter role, the Attorney-General is a law officer for the sole purpose of advancing the ends of Justice. In this role, the Attorney-General has access to all types of advice from fellow ministers who may have negotiated and authorized the signing of contracts. He has a host of qualified and experienced advisers on legal matters of the kind that were involved in this loan agreement.”

Of the Attorney-General of England whose functions are legacies adopted in the Ugandan Constitution and law, it was said in the **House of Commons Debates, Vol.179, Cols 1213-1214 of December. 18, 1924**, which is reported in John L. J. Edwards **“The Attorney-General, Politics and the Public Interest, 1984”**, that:

“It is the duty of the Attorney-General, in the discharge of his responsibilities – entrusted in him, to inform himself of all relevant circumstances which might properly affect the decision.”

In **METROPOLITAN BANK LTD -VS- POLEY [1885] 10 APP. CASE 210** at 220, 221 Lord Blackburn in deciding whether criminal charges preferred were oppressive and or abuse of the process of the court said (at 220, 2121) thus:-

“.....From early times the court had inherently in its power the right to see that its process was not abused by proceeding without reasonable grounds, so as to be vexatious and harassing – the court had the right to protect itself against such abuse.”

The passage was cited with approval in **STANLEY MUNGA GITHUNGURI -VS- REPUBLIC [1985] KLR 91** at page 103 thus”

“the High Court has an inherent power and duty to secure equal treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

On the evidence presented before me, by the two Applicants, I find and hold that in the peculiar circumstances of this case, the prosecution of the Applicants, who were merely carrying out instructions of the Cabinet of Kenya in execution of Government Contracts [*where Hon. Attorney-General himself had given a seal of approval to the contract*] amounts to an abuse of the powers of the Attorney-General and oppressive and vexatious.

This is more so in the light of the fact that investigations, leading to the charging of the accused, was done by KACC who recommended that the applicants and Francis Sang [*the then Director of CID*] be charged. Consequently, upon KACC's advise, the Hon. The Attorney-General in "*his wisdom*" issued a **Press Statement** in which he exonerated Francis Sang but left the two applicants to the dogs, so to speak. When the Law Society of Kenya (LSK) identified the *mischief* of the Attorney-General, and instituted a private prosecution against him (A.G), he removed himself by entering a "**Nolle Prosequi.**" Last but not least one of the signatories to the contract was **Hon Mwaghazi Mwachofi** Permanent Secretary Ministry of Finance (Treasury). It is *telling* that he was not charged alongside the two Applicants. That is a glaring evidence of selective prosecution.

Granted the Attorney-General has the power to enter a **Nolle Prosequi** but he must do so fairly, unoppressively and in a manner which does not amount to an abuse of the process of the court. In the peculiar circumstances of the case the exercise of his powers amounted to an abuse of the process of the court, I find and hold.

It is now settled law that under the Constitution, the exercise of such powers of the Attorney-General with respect to the entering of a **Nolle Prosequi** can be questioned by a court of law. In deed this was urged successfully in the case of **STANLEY MUNGA GIGHUNGURI -VS- REPUBLIC CR. APPL. NO. 271 OF 1985 [Supra]**.

In the instant case, I hold the view that the exercise by the Attorney-General of his powers under **Section 26 (3) (a)** of the Constitution is detrimental to public policy and is an abuse of the court process. That being my view of the matter, I have jurisdiction under **Section 123 (8)** and **65 (2)** of the Constitution to declare it so, which I hereby do.

In the circumstance of this case, if the criminal case against the Applicants were to proceed then the charge sheet should be amended to include the **Hon. Amos Wako** [The Attorney-General] and **Francis Sang** [read former Director of CID] and the **Hon Mwaghazi Mwachofi** [Permanent Secretary Ministry of Finance]. They would be charged jointly or severally with regard to the the acts and/or omissions complained of. In that way the prosecution would not be seen as *selective* or *discriminatory*. It would amount to fair treatment for all the parties before the subordinate court.

The **third question** that falls to be decided is whether civil servants in implementing the objectives imposed by the Government are liable for prosecution in the event of change of Government, whether they should be taking the cross for any mistakes done by the Government they serve, whether civil servants should be prosecuted for implementing decisions taken by previous Government.

The **Interpretation and General Provisions Act [Cap 2]** Laws of Kenya defines "**the Government**" as the Government of Kenya. The Government of Kenya has the meaning assigned to it in the Constitution. Under **Section 123** of the Constitution of Kenya a "**Public Officer**" means **a person** holding or acting in an office in the public service. Under [**Cap 2**] a "**Public Officer**" means **a person** in the service of, or holding office under, the Government of Kenya, whether that office is permanent, or paid or unpaid. "**Public Office**" means the office or employment the holding or discharging of which by **a person** would constitute **that person** a public officer.

Given the definition of a **public office** and a **public officer** as hereinabove, it is clear to me that the two Applicants were public officers gainfully employed by the Government of Kenya in public office at all material times.

It is also common ground that they implementing a government project. It is equally common ground that the Government of Kenya is a body corporate whose existence is in perpetuity.

Against that backdrop, and in view of **Section 76** of the **Interpretation and General Provisions Act [Cap 2]**, which states that acts of public officers binds the Government, it is clear to me that when a public officer faithfully executes his mandate under the Constitution and/or any Act of Parliament or written law his/her actions bind the Government.

In the same vein it is clear to me that by dint of **Section 6** of the **Government Contracts Act [Cap 25]** no public officer shall be personally liable upon any contract which he makes in his official capacity.

Flowing from the foregoing, I find and hold that the application is **justiciable**. It is thus tenable in law.

Determination

(A) In answer to question 1, the Applicant's case is that the words "**any person**" and "**that person**" in **Section 26 (3) (a)** of the Constitution do not include a person who acts and/or omissions constituting the alleged offence were prior to or after their occurrence scrutinized, approved and confirmed as legally valid and binding by the Attorney-General.

Accordingly, I answer question 1 (a) in the NEGATIVE.

(B) Given the definition of a public officer and a public office as in 1 (a) hereinabove, I find and hold that the two Applicants were at all material times public officers in gainful employment of the Government of Kenya.

That given the evidence on record, they were implementing a Government Project with the approval of the cabinet in accordance with their mandate derived from various regulations, legislations and the Constitution.

Against that backdrop of evidence, and in view of the provisions of **Section 76** of the Interpretation and **General Provisions Act [Cap 2]** laws of Kenya and **Section 6** of the **Government Contracts Act [Cap 25]** Laws of Kenya, I find and hold that a public officer **cannot** be charged or take cross for any mistakes done by the Government they serve. That they cannot be prosecuted for implementing decisions taken by the previous Government especially when done in good faith like in the instant case.

Accordingly, I answer question 1 (b) in the NEGATIVE.

(C) The answer to questions 1 (a) and 1 (b) above are in the **NEGATIVE** hence the criminal charges against the Applicants in **MILIMANI CMCR.C. NO. 338 OF 2005** are:-

- i. unconstitutional and illegal;
- ii. an abuse of power and the process of the court by the Attorney-General;
- iii. vexatious and oppressive;
- iv. contrary to due process, and/or;
- v. contrary to public policy.

D. The High Court, in the circumstances of this case, under its powers **under Section 65 (2)** and **123 (8)** of the Constitution, do hereby **PROHIBIT** and **PERMANENTLY STAY** the prosecution of the Applicants [**ZAKAYO KIPKEMOI ARAP CHERUIYOT** and **JOHN AGILI ALAO** on the same or similar charges.

For the above reasons the reference is allowed. Orders accordingly.

A certified copy of this order shall be placed in the file of Milimani CM CR.C No. 338 of 2005.

A similar copy to be served upon the Chief Magistrate Nairobi for compliance in terms of **Section 67 (2)** of the Constitution of Kenya then in force.

Dated and **delivered** at **Nairobi** this 24th **day** of November **2015**.

N. R. O. OMBIJA

JUDGE



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