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High Court of Kenya

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Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR

Civil Appeal No 13 & 10 of 2015

Teddy J. O. Musiga*

Facts

Kenya's Court of Appeal delivered the decision in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 others*¹ on the 19th of June, 2020. This decision was an appeal arising from the High Court and it revolved around a dispute regarding the construction of the standard gauge railway in Kenya.²

The High Court decision was delivered on the 21st of November, 2014 and the background facts were as follows: The Ministry of Transport realizing the necessity of constructing a railway line entered into a Memorandum of Understanding on August 12, 2009 with China Roads and Bridges Corporation (4th Respondent) in which the latter was to undertake a feasibility study on the construction of an electric railway system spanning Mombasa-Nairobi. That feasibility study was to be undertaken by the 4th respondent at its own cost and if it turned out to be feasible, then they would also help with financing the project. Having thus presented the positive feasibility report, the Cabinet decided that the project would be undertaken under government to government terms with the Chinese government offering part of the loan through Exim bank, a Chinese government owned bank. Accordingly, the 2nd and 4th Respondents negotiated and signed two commercial contracts; one for the Standard Gauge Railway (SGR) line and the second one for the supply and installation of facilities, locomotives and rolling stock with the total contract sum for civil works and purchase and installation of locomotives and rolling stock amounting to the sum of 327 billion Kenyan Shillings (About 3 billion USD).

Therefore, the Petitioners case was that the government erred in awarding the contract to the same parties who did the feasibility study without compliance to the established procurement

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¹ *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR <<http://kenyalaw.org/caselaw/cases/view/196972/>>

² *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others* [2014] eKLR <<http://kenyalaw.org/caselaw/cases/view/103808/>>

system, the SGR project would lead to environmental degradation and also that the 4th Respondent were not fit to be awarded the tender since they had already been blacklisted by the World Bank.

The High Court's decision rejected the appellants' invitation to the court to stop the construction of the Standard Gauge Railway alleging that its procurement and construction violated the Constitution of Kenya and other laws.³ Additionally, the High Court also found that the documents tendered by the petitioners had been obtained illegally as a result of which the court ordered that they be expunged from the Court records.⁴ Further, the High Court found that there were neither breaches of statute nor of the Constitution in the procurement process and that Parliament had duly conducted its oversight role and given financial approval for the project. Lastly, the High Court also found that the project was exempt from competitive bidding as it was a government to government project under section 6 of the Public Procurement and Disposal Act (repealed).⁵

Aggrieved by that decision of the High Court, the petitioners/appellants lodged two separate appeals, Civil Appeals 10 and 13 of 2015 which were consolidated by an order of the Court of Appeal on November 8, 2016.⁶ The appeal was opposed by the respondents on the grounds that it was an academic exercise since the Railway line from Mombasa to Naivasha was complete and already operational and the trial court had correctly ruled on the issues raised at trial.

Holdings of the Court

The Court of Appeal rendered their decision in this case being guided by three main questions which are:

- i. Whether the appeal was moot or academic as it sought to stop the construction of a railway line that had already been constructed on grounds that the procurement process undertaken for its construction was flawed.

³ See the final orders of the High Court at paragraphs 126 and 127 of the judgment <<http://kenyalaw.org/caselaw/cases/view/103808/>>

⁴ *Ibid*

⁵ *Ibid*

⁶ *Supra* foot note no. 1 for the full citation of the case.

- ii. Whether illegally obtained evidence was admissible in court and whether relying on that evidence would be detrimental to the administration of justice.
- iii. When would a procurement process not require competitive bidding as a procurement process that fell within the terms of section 6(1) of the Public Procurement & Disposal Act (repealed) and entailed a loan or grant under an international agreement?

In response to the first question the Court of Appeal held that the reliefs sought by the petitioners to stop the construction of the SGR had been overtaken by events and were unavailable considering that the railway line from Mombasa to Naivasha was complete and operational. The contract had already been executed by dint of construction and operationalization of the SGR line from Mombasa to Naivasha. Therefore, orders of injunctions to restrain the implementation of the impugned contract or to quash the award of the contract were no longer within reach.

In response to the second question regarding whether illegally obtained evidence was admissible in court and whether relying on that evidence would be detrimental to the administration of justice, the court held that sections 79⁷ and 80⁸ of the Evidence Act provided for the rules for adducing illegally obtained evidence. Section 80 of the Evidence Act guaranteed the authenticity and integrity of documents relied upon in the court. Where the documents in question did not meet the criteria of admissibility set in section 35 of the Evidence

⁷ Section 79 of the Evidence Act provides that,
“The following documents are public documents—
(a) documents forming the acts or records of the acts—
 (i) of the sovereign authority; or
 (ii) of official bodies and tribunals; or
 (iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
(b) public records kept in Kenya of private documents.
All documents other than public documents are private.”

⁸ Section 80 of the Evidence Act provides that,
(1) “Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.”

Act, allowing the documents in question to remain on record would be detrimental to the administration of justice. Regardless of whether the respondents had made a complaint to law enforcement agencies regarding theft of documents, the appellants could not rely on information obtained in unclear circumstances and while a citizen was entitled to information held by the State, there was no need or room to use irregular methods in obtaining information. Regarding the issue as to whether relying on illegally adduced evidence would be detrimental to the administration of justice, the Court held that it would be detrimental to the administration of justice and against the principle underlying article 50(4) of the Constitution to, in effect, countenance illicit actions by admission of irregularly obtained documents.⁹ However well-intentioned conscientious citizens or whistle-blowers were in checking public officers, there could be no justification, for not following proper procedures in the procurement of evidence.¹⁰ Therefore, the Court of Appeal found no basis for interfering with the decision of the High Court to expunge the documents in question.

In response to the third question as to the circumstances in which a procurement process would not be subjected to the requirements of competitive bidding, the Court of Appeal held that; under article 227 of the Constitution of Kenya, 2010 when a state organ or any other public entity contracted for goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. Article 227 of the Constitution was to be interpreted in a manner that promoted its purposes, values and principles as article 259 of the Constitution demanded and also holistically. Article 227(1) of the Constitution ought to be read together with 227(2) which stated that an Act of Parliament would prescribe a framework within which policies relating to procurement and asset disposal would be implemented. The legislation that gave effect to that provision was the Public Procurement and Asset Disposal Act. Under that legislation's transitional provisions, procurement proceedings commenced before the commencement date of the Act had to be continued in accordance with the law applicable before the commencement date of the Act. Therefore, the statute applicable to the proceedings was the repealed Public Procurement and Disposal Act.

⁹ Article 50 (4) provides that “evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

¹⁰ As at the time of writing this commentary, Kenya is yet to enact a legislation to deal with whistle-blowers. Similarly, the East African Legislative Assembly is also at advanced stages of developing a whistle-blower protection law.

Although the Public Procurement and Asset Disposal Act recognized alternative methods of procurement, the default procurement method was open tendering. Section 29(1) of the Public Procurement and Disposal Act (repealed) provided that for each procurement exercise, the procuring entity had to use open tendering. Other procurement procedures recognized under the repealed Act that were subject to prescribed safeguards included restricted tendering, direct procurement, request for proposals, request for quotations, and procedure for low value procurements, among others. As regarding restricted tendering or direct tendering, the safeguards under section 29 (3) of the repealed Act included obtaining the written approval of the procuring entity's tendering committee and recording in writing the reasons for using the alternative procurement procedure.

Sections 6 and 7 of the Public Procurement and Disposal Act (repealed),¹¹ contained provisions with respect to conflict between requirements under the Act with any obligations of the country arising from treaties or agreements. Parliament recognized that there could be instances when conditions imposed in instances of negotiated grants or loans or by donor funds could conflict with the provisions of the Public Procurement and Disposal Act (repealed). In that case, such conditions would prevail thereby removing such procurement from the purview of the Public Procurement and Disposal Act (repealed).

The Court of Appeal also held that the engagement of China Road and Bridge Corporation (CRBC) was not an obligation arising from a negotiated grant or loan agreement for purposes

¹¹ Section 6 of the Public Procurement and Disposal Act dealt with Conflicts with international agreements and it provided that,

- “(1) Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.
- (2) Where the Republic of Kenya is required under the terms of any treaty or convention to which she is party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part or wholly, jointly or separately, procurement through such contributions shall be—
- (a) in discrete activities where possible; and
 - (b) subject to the applicable provisions of this Act.
- (3) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) apply shall be subject to the provisions of this Act.
- (4) Where a procurement to which subsection (1) applies favours an external beneficiary—
- (a) the procurement through contributions made by Kenya, shall be undertaken in Kenya through contractors registered in Kenya; and
 - (b) all relevant insurances shall be placed with companies registered in Kenya and goods shall be transported in carriages registered in Kenya.

of section 6 of the Public Procurement and Disposal Act (repealed). That was because as indicated, the contract with China Road and Bridge Corporation (CRBC) as the contractor was procured long before the financing agreement was entered into. Under the circumstances section 6(1) of the Public Procurement and Disposal Act (repealed), did not exempt the procurement from the provisions of the statute. Kenya Railways Corporation, as the procuring entity, was therefore under an obligation to comply with the requirements of the Public Procurement and Disposal Act (repealed) in the procurement of the SGR project.

Orders of the Court of Appeal

Ultimately, the Court of Appeal dismissed the appeal and gave orders to the effect of upholding the decision of the High Court ordering to be expunged from the record documents that had been presented by the appellants as evidence in support of their petition. They also ordered that part of the judgment of the High Court that the procurement of the SGR was exempt from the provisions of the Public Procurement and Disposal Act, 2005 by reason of Section 6(1) thereof was set aside. And they substituted it with an order declaring that Kenya Railways Corporation, as the procuring entity, failed to comply with, and violated provisions of article 227(1) of the Constitution and sections 6(1) and 29, of the Public Procurement and Disposal Act, 2005 in the procurement of the SGR project. The appeals succeeded to that extent only.

Significance

The significance of this decision revolves around three fields of law: Public Procurement Law, Evidence Law and Civil Procedure Law. The case also touches on other cross cutting themes such as the doctrine of mootness under legal theory; whistle-blower protection mechanisms and public interest litigation among others.

To begin with public interest litigation; this case was filed by two citizens as a public interest litigation case.¹² The case therefore encourages the filing of public interest litigation matters. The case was filed within the backdrop of the Constitution of Kenya 2010, which encourages a more relaxed approach to the issue of *locus standi* in public interest cases.¹³ The Constitution

¹² The Petitioners in the case were Mr. Okiya Omtatah and Mr. Wycliffe Gisebe.

¹³ There are many case law precedents that also support the proposition that there ought to be a more relaxed approach to *locus standi* in public interest matters. And some of those cases include the following; *Priscilla Nyokabi Kanyua v Attorney General and the IIEC* <http://kenyalaw.org/caselaw/cases/view/67992/>; *Albert Ruturi, JK Wanywela & Kenya Bankers' Association v The Minister of Finance & Attorney General and Central Bank of Kenya* (2002) 1 KLR 61; *El-Busaidy v Commissioner of Lands & 2 Others* (2006) 1KLR etc

contains two articles which are of relevance to public interest litigation. The first of these is article 22 which deals with enforcement of the Bill of Rights.¹⁴ The second of those articles is article 258.¹⁵

Notwithstanding the final determination of this case, one of the legacies of this case as a public interest matter is that it will make it significantly easier for other people and organisations to plan and develop comprehensive public interest strategies when they can be confident that their right to take the case in the first instance cannot be successfully challenged by either the defendant or the judiciary. In this particular case, the court in its final orders directed each of the parties to bear their own costs since the matter was a case was a matter of public interest.¹⁶ Secondly, one of the greatest significance of this case is that it will encourage whistleblowing whenever incidences of corruption occur. The case sought to expose the irregularities in the procurement process regarding the construction of the Standard Gauge Railway despite the fact that Kenya does not have a whistleblowing protection mechanism in place. Notwithstanding the final decision of this case, it may encourage future whistle-blowers to file legal suits.

The case may also facilitate the expedition to enact and develop whistleblowing protection laws. Such laws may achieve the end result of encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, it could also help authorities monitor compliance and detect violations of anti-corruption laws. Such laws may also have the effect of providing effective protection for whistleblowers and supports an open organizational culture where employees are not only aware of how to report

¹⁴ Article 22 of the Constitution of Kenya, 2010 provides that,
“1) 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 or infringed or is threatened.
2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
(a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members

¹⁵ Article 258 of the Constitution of Kenya, 2010 provides that,
“1) Every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention
2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
(a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members

¹⁶ See final orders of the court (Paragraph 111 of the judgment).

but also have confidence in the reporting procedures. Such laws may also help businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.¹⁷

Thirdly, the other significance of the case is that it delved into the doctrine of mootness in legal theory. Particularly, the court grappled with the issue as to whether the appeal was moot or academic since it sought to stop the construction of a railway line that had already been constructed on grounds that the procurement process undertaken for its construction was flawed. The Court of Appeal expounded on the instances in which a case can be termed as moot. And they held that a moot case is a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights, and as a verb, it means to render a question as of no practical significance.¹⁸ A matter is moot if further legal proceedings relating to it has no effect, or events places it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.¹⁹

¹⁷ For a full discussion on the need for enactment of whistle-blower protection laws in East Africa see, Teddy J. O. Musiga, Hannington Amol & David Sigano, “Baseline Study on the East African Community Whistle-blowers Protection Bill, 2018”. (2019) Report prepared under the aegis of the East Africa Law Society’s Advancing Regional Integration through Support to EAC Institutions

¹⁸ See paragraph 64 of the judgment.

¹⁹ See paragraph 67 of the judgment.