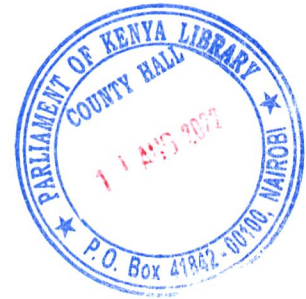


REPUBLIC OF KENYA



KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT-FOURTH SESSION

PUBLIC ACCOUNTS COMMITTEE (PAC) AND DEPARTMENTAL
COMMITTEE ON HEALTH

REPORT ON:

JOINT SITTINGS TO INVESTIGATE THE PROCUREMENT OF
MEDICAL GOODS AND EQUIPMENT FOR THE MINISTRY OF
MEDICAL SERVICES BY DOL INTERNATIONAL LTD AND
ASSOCIATED COMPANIES IN THE YEAR 2006

Clerk's chambers,
National Assembly,
NAIROBI

July, 2010

NA. 10B .PLC.2010/ (33)

Clerks Chambers
National Assembly
NAIROBI

08 July, 2010

PAPER LAID

Mr. Speaker Sir, the following Paper will be laid on the Table of the House, today
Thursday 8th July, 2010

**REPORT OF THE JOINT SITTINGS OF THE PUBLIC ACCOUNTS
COMMITTEE AND THE DEPARTMENTAL COMMITTEE ON HEALTH TO
INVESTIGATE THE PROCUREMENT OF MEDICAL GOODS AND
EQUIPMENT FOR THE MINISTRY OF MEDICAL SERVICES BY DOL
INTERNATIONAL LTD AND ASSOCIATED COMPANIES IN THE YEAR
2006**

(CHAIR, PUBLIC ACCOUNTS COMMITTEE)

Copies to:

The Speaker

Deputy Speaker

The Clerk

Hansard Editor

Hansard Reporters

The Press

Approved DSN A
R. S. G.
08/07/2010

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PREFACE

Hon Speaker Sir,

1. The Public Accounts Committee (PAC) and the Departmental Committee on Health are both creatures of the Parliamentary Standing Orders 187 and 198 respectively and derive their mandate from the said Standing Orders which provide:-

Standing Order 187 (1)

(There shall be a select Committee to be designated the Public Accounts Committee (PAC) for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and such other accounts laid before the House as the Committee may think fit

Standing Order 198 (3)

The functions of the Departmental Committees shall be:-

- (a) Investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- (b) To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
- (c) To study and review all legislation referred to it;*
- (d) To study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;*
- (e) To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House or a Minister; and*
- (f) To make reports and recommendations to the House as often as possible including recommendation on delegated legislation.*

2. The Committee comprise the following Members:-

Public Accounts Committee (PAC)

- (i) Hon. Bonny Khalwale, M.P. - Chairman
- (ii) Hon. Dr. Julius Kones, M.P.
- (iii) Hon. Martha Karua, M.P.

- (iv) Hon. Charles Onyancha, M.P.
- (v) Hon. Alex Mwiru, M.P.
- (vi) Hon. Daniel Muoki, M.P.
- (vii) Hon. Francis C. Ganya, M.P.
- (viii) Hon. David Ngugi, M.P.
- (ix) Hon. Edick Anyanga, M.P.
- (x) Hon. Boaz Kaino, M.P.
- (xi) Hon. Nuh Nassir Abdi, M.P.

Departmental Committee on Health

- (i) Hon. Robert Monda, M.P. - Chairman
- (ii) Hon. (Dr) David Eseli, M.P.
- (iii) Hon. (Dr) Bonny Khalwale, M.P.
- (iv) Hon. Nuh Nassir Abdi, M.P.
- (v) Hon. Joseph Magwanga, M.P.
- (vi) Hon. Thomas Mwadeghu, M.P.
- (vii) Hon. Sheikh Muhammed, M.P.
- (viii) Hon. Cyprian O. Omolo, M.P.
- (ix) Hon. Fredrick Outa, M.P.
- (x) Hon. Joseph Lekuton, M.P.
- (xi) Hon. Victor Kioko Munyaka, M.P.

3. The Committee held a total of three sittings where witnesses testified on the subject of inquiry. Those who testified included, the Permanent Secretary, Ministry of Medical Services, the Attorney General and the Managing Director, Dol International Ltd. The Director, Kenya Anti-Corruption Commission (KACC) failed to appear on the two occasions he was invited.
4. The Committee wishes to express its gratitude to the Clerk of the National Assembly and his staff for providing the Committee with technical support and the Office of the Speaker of the National Assembly for the overall guidance.

Hon. Speaker Sir,

5. It is our pleasant privilege and duty to lay this report on the Table of the House on behalf of the Committee pursuant to Standing Order 181 of the Parliamentary Standing Orders.

Signed.....

for
Hon. Bonny Khalwale, M.P.
Chairman, Public Accounts Committee (PAC)

Date.....6/7/2010

Signed.....

Hon. Robert Monda, M.P.
Chairman, Departmental Committee on Health

Date.....6/7/2010

INTRODUCTION

6. This matter had been discussed on the floor of the House through a Question by Private Notice by Ikolomani Member of Parliament, Hon. (Dr) Bonny Khalwale who is the Chairman of the Public Accounts Committee (PAC) and also a Member of the Departmental Committee on Health. The question was not however answered to the satisfaction of the Member prompting the Chair to ask the Member to revisit the matter through other means hence the joint sittings by the two Committees.
7. Of interest to the Public Accounts Committee in the matter was the alleged flawed procurement process which had contributed to pending bills totalling Kshs.2,094,188,014.00 relating to the 2007/2008 financial year as observed by the Controller & Auditor General under paragraph 530 to 532 of his report on the accounts of 2007/2008 financial year. The bills could not be cleared during the year and were carried over to the 2008/2009 financial year. Of interest to the Health Committee was the delayed supply of the items in question to intended users. The delay impacted negatively on service delivery by the Ministry of Health and had adverse effects on country's economic development.
8. While discharging its mandate, the Committee was guided by the existing procedures and modalities of operations of the National Assembly. The procedure and modalities were derived from the Constitution of Kenya, Acts of Parliament, Standing Orders and convections, practices and rulings of the chair.
9. The following Members are agreeable with the contents of this report and assent to it as authenticated below:-

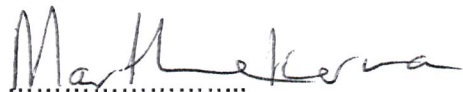
Public Accounts Committee (PAC)

(i) Hon. Bonny Khalwale, M.P.

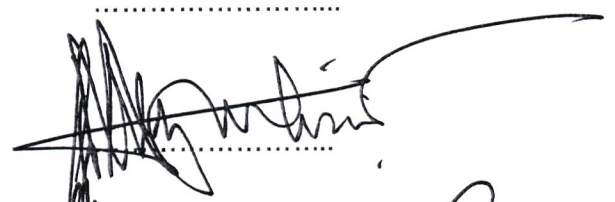
(ii) Hon. Dr. Julius Kones, M.P.

(iii) Hon. Martha Karua, M.P.

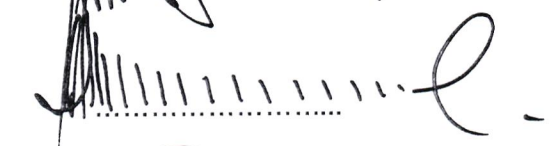
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(iv) Hon. Charles Onyancha, M.P.

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(v) Hon. Alex Mwiru, M.P.

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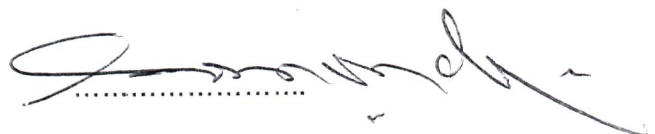
(vi) Hon. Daniel Muoki, M.P.

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(vii) Hon, Francis C. Ganya, M.P.

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(viii) Hon. David Ngugi, M.P.

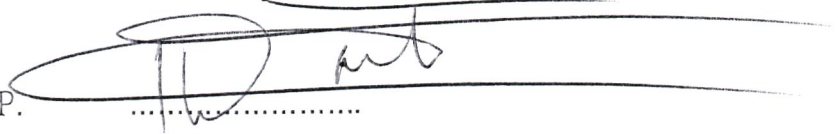
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(ix) Hon. Edick Anyanga, M.P.

(x) Hon. Boaz Kaino, M.P.

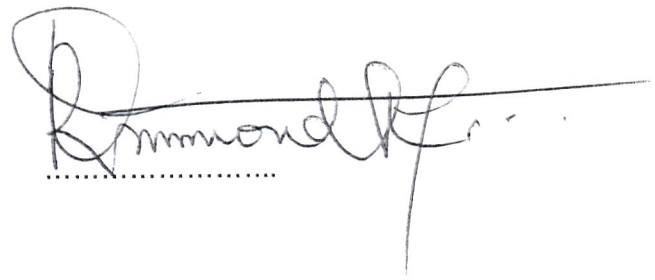
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(xi) Hon. Nuh Nassir Abdi, M.P.

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Departmental Committee on Health

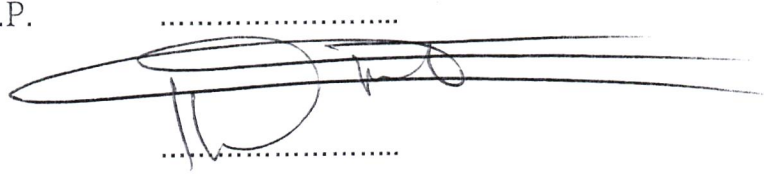
(i) Hon. Robert Monda, M.P.

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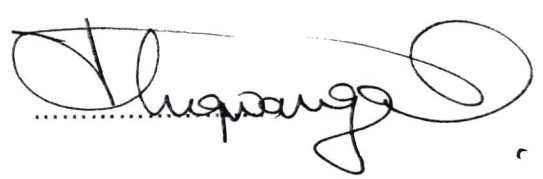
(ii) Hon. (Dr) David Eseli, M.P.

.....

(iii) Hon. (Dr) Bonny Khalwale, M.P.

.....


(iv) Hon. Nuh Nassir Abdi, M.P.

.....


(v) Hon. Joseph Magwanga, M.P.

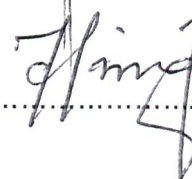
(vi) Hon. Thomas Mwacheghu, M.P.

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(vii) Hon. Sheikh Muhammed, M.P.

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(viii) Hon. Cyprian O. Omolo, M.P.

.....


(ix) Hon. Fredrick Outa, M.P.

.....

(x) Hon. Joseph Lekuton, M.P.

.....

(xi) Hon. Victor Kioko Munyaka, M.P.

.....

EVIDENCE RECEIVED

10. Those who gave evidence before the Committees included, the Permanent Secretary, Ministry of Medical Services Prof. James Ole Kiyiapi accompanied by Senior Ministry Officials, Ms. Muthoni Kimani representing the Attorney General of the Republic of Kenya and Dr. Shadrack Ithinji Mwititi, the Managing Director, Dol international Ltd accompanied by his Advocate. The Director Kenya Anti-Corruption Commission (KACC) failed to appear before the Committee on two occasions he was invited citing other prior engagements. The Committee heard evidence that:-
11. In the year 2005, the Ministry of Health floated several tenders for the supply of medical equipment. Several companies participated in the tenders which were subsequently awarded between January and June, 2006.
12. Dol International Ltd and its associated companies were awarded four tenders namely:-
 - (i) L.P.O. No. 0061880 for the supply of x-ray envelopes worth Kshs. 17,340,000.00 against a performance bond dated 12th January, 2006;
 - (ii) L.P.O. No. 0061967 for the supply of x-ray equipment worth Kshs.123,400,000.00 against a performance bond dated 31st March, 2006;
 - (iii) L.P.O. No. 0061843 for the supply of sutures worth Kshs. 40,300,000.00 against a performance bond dated 31st March, 2006;
 - (iv) L.P.O. No. 860536 for the supply of medical supplies worth Kshs.17,897,700.00 against performance bond dated 31st March, 2006.
13. On 20th February, 2006, M/s Unimed Supplies and Services Ltd lodged a complaint to the Public Procurement Complaints Review and Appeals Board against the award of L.P.O. No. 0061843 for the supply of sutures worth Kshs. 40,300,000.00 to Dol International Ltd. The complaint was dismissed. In its ruling, the Board observed that once a Local Purchase Order was issued, a binding contractual relationship was established and the parties to the same were bound by the contract.

14. In May, 2006, the Ministry of Health opened and irrevocable letter of credit for Kshs.123,400,000.00 in favour of Dol International Ltd to facilitate supplies in performance of its contractual obligations. Towards the end of May, 2006, the Ministry cancelled the letter of credit and declined to receive and make payment to Dol International Ltd and associated companies on L.P.O. No. 0061843 for the supply of sutures worth Kshs.40,300,000.00 and other contracted tenders. This was after the Kenya Anti-Corruption Commission (KACC) notified the Ministry of its intention to investigate the matter on account of irregularities and or corruption in the procurement process.
15. Among the alleged irregularities in the procurement process was that when the Ministry's Technical Evaluation Committee carried out its evaluation, it was satisfied that there were seven qualified samples of sutures that were submitted by bidders and all were to be submitted to the Ministerial Tender Committee (MTC) for consideration. However only the sample by Dol International Ltd was submitted to the Ministerial Tender Committee (MTC) for consideration.
16. In the meantime, Dol International Ltd and its associated companies had procured all contract items under L.P.O's No.0061843 and 0061967 and were in the process of delivering them to the Ministry. The items were in accordance with tender standards and specifications and were marked "*Ministry of Health GOK*" and "*not for sale*" and had been stored at the company's offices in Kenya and abroad. Items under tender No.SD/KEN/RUR-HEA-2/98/25/IS which were drugs and medical equipment had been received by the Ministry and had been distributed to various health facilities in the country. ***(Attached to the effect is letter dated 11th August, 2006 from, Ministry of Health to Kenya Anti-Corruption Commission (KACC) referenced annex 1)***
17. Following the Ministry's action to cancel the L.P.O's, Dol International Ltd and its associated companies had no choice but to proceed to court to safeguard their interest. Through Miscellaneous Civil Application No. 273 of 2006 in the High Court of Kenya at Nairobi, the companies among others obtained the following orders:-
 - (i) Leave to apply for an order of certiorari quashing the unilateral decision of the Permanent Secretary, Ministry of Health to cancel and or terminate Local Purchase Orders

- (LPO's) No. 0061843, 0061880, 0061967 and Tender award No. SD/KEN/RUR-HEA-2/98/25/IS;
- (ii) Leave to apply for an Order of Mandamus compelling the Permanent Secretary, Ministry of Health to accept the medical equipment and drugs supplied under LPO's No. No. 0061843, 0061880, 0061967 and Tender award No. SD/KEN/RUR-HEA-2/98/25/IS;
 - (iii) Leave to apply for orders prohibiting the Kenya Anti-Corruption Commission (KACC) from interfering with the Applicants' items of trade or its offices and the items of trade confiscated on 29th March, 2006 be returned to the Applicants save for copies of documents required for their investigations;
 - (iv) Order of Prohibition directed to the Kenya Anti-Corruption Commission (KACC) and the Attorney General prohibiting them from filing criminal charges against Dr, Shadrack Ithinji Mwititi, the Managing Director, Dol International Ltd with respect to the L.P.O.'s. ***(A copy of the court order is attached hereto referenced Annex 2).***
18. Arising from the Court ruling, the Office of the Attorney General's professional assessment on the subject matter was that the Ministry takes appropriate action to avoid potential litigation for breach of contract without prejudicing investigations. The Attorney General also observed that the doctrine of *quantum merruit* or value for money applied to this matter since the Ministry was satisfied with both quality and prices of the supplies. He however pointed out the Ministry's compliance with the contractual obligations depended on the outcome of its consultations with the Kenya Anti-Corruption Commission (KACC).
19. In its letters Ref No. KACC/INV.6/14 Vol IV (82) dated 9th March, 2007 and KACC/INV.6/14 Vol IV (87) dated 2nd April, 2007 ***(all attached as annex 3 and 4)*** addressed to the Managing Director, Dol International Ltd, Kenya Anti-Corruption Commission (KACC) made it clear that the decision on whether or not to accept the goods lay with the Ministry of Health as a matter of contractual obligation. The Commission's responsibility was to advise the Ministry to exercise caution in the matter in the light of ongoing criminal investigations. The Permanent Secretary, Prof. James Ole Kiyiapi told the Committee that the Ministry would be guided by the outcome of the anti-corruption case on the next course of action.

20. In January, 2009, the Kenya Anti-Corruption Commission commenced Anti-Corruption Case No. 15 of 2009 at the Makadara Criminal Courts whereby the Managing Director of Dol International Ltd and associated companies Dr. Shadrack Mwiti Ithinji and others namely, Andrew Oira Nyambeche, Samuel Mwangi Ndirangu, Zachary Bolo Awino, and Julius Thairu Muraguri were charged with different offences under the Anti-Corruption and Economic Crimes Act and the Penal Code relating to tendering and procurement of LPO's No. 0061843, 0061880, 0061967 and Tender award No. SD/KEN/RUR-HEA-2/98/25/IS.
21. On 22nd June, 2010, the Anti-Corruption Case No. 15 of 2009 at the Makadara Law Courts was finally determined and all the accused persons were acquitted under Section 210 of the Criminal Procedure Code. *(Copy of the court ruling attached as annex 5).*

OBSERVATIONS

22. Arising from the evidence, the Committee made the following observations and conclusions:-
 - (i) Sutures which Dol International Ltd procured under L.P.O. No. 0061843 at a cost Kshs.40,300,000.00 in the year 2006 had a life span and would be expiring by December, 2010. The civil case on the matter was commenced in the year 2006 and it is not known when it would be concluded;
 - (ii) The Committee appreciates the role of the Kenya Anti-Corruption Commission (KACC) in the war against corruption but was concerned with the time taken by the Commission to investigate this matter and institute criminal proceedings against suspects. The Committee observed that the delay impacted negatively on service delivery in the health sector which was not in the interest of the public.

RECOMMENDATIONS

23. The Committee recommends that:-
 - (i) The Ministry of Medical Services should take quick action aimed at safeguarding public funds from possible loss considering that some of the goods like the sutures will expire by December, 2010;

- (ii) The Permanent Secretary, Ministry of Medical Services should put in place sufficient measures to ensure that procurement of goods and services at the Ministry is transparent and accountable so as to avoid suspicion leading to unnecessary investigations and court cases thus delaying the whole process.

- (iii) The Kenya Anti-Corruption Commission (KACC) should in future ensure that investigations and prosecutions on such matters are fast-tracked to avoid inordinate delays which impact negatively on service delivery thereby hurting the country's economic development.

MINUTES OF THE FOURTH JOINT SITTING OF THE PUBLIC ACCOUNTS COMMITTEE (PAC) AND THE DEPARTMENTAL COMMITTEE ON HEALTH HELD ON TUESDAY, 6TH JULY, 2010 AT 04.00 P.M. IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS

PRESENT:-

| | |
|-------------------------------|----------------|
| Hon. (Dr) Robert Monda, MP | (Co-Chair) |
| Hon. Dr. Julius Kones, MP | (Ag. Co-Chair) |
| Hon. (Dr) Nuh Nassir Abdi, MP | |
| Hon. Martha Karua, MP | |
| Hon. Alex M. Mwiru, MP | |
| Hon. Daniel Muoki, MP | |
| Hon. Francis C. Ganya, MP | |
| Hon. Edick O. Anyanga, MP | |
| Hon. Joseph Magwanga, MP | |
| Hon. Sheikh Muhammed Dor, MP | |
| Hon. Cyprian Omolo, MP | |

ABSENT WITH APOLOGIES:-

Hon. Dr. Bonny Khalwale, M.P.

ABSENT:-

Hon. Fredrick Outa, MP
Hon. (Dr) David Eseli, Simiyu MP
Hon. Thomas Mwadeghu, MP
Hon. Joseph Lekuton, MP
Hon. David Ngugi, MP
Hon. Charles Onyancha, MP
Hon. Boaz Kaino, MP
Hon. Victor Munyaka, MP

IN ATTENDANCE:-

NATIONAL ASSEMBLY

| | | |
|----------------------|---|------------------------------|
| Ms. Anita Thurairira | - | Principal Clerk Assistant II |
| Mr. George Gazemba | - | Clerk Assistant II |
| Mr. Salad M. Guyo | - | Clerk Assistant III |

MIN No. 7/2010:- CONSIDERATION OF REPORT ON THE PROCUREMENT OF MEDICAL GOODS AND EQUIPMENT FOR THE MINISTRY OF HEALTH BY DOL INTERNATIONAL LTD

Standing Order 185(3) provides that:-

“A Joint Committee shall not adopt its report, unless by a resolution supported by not less than a majority of the total number of the Members of the Joint Committee”

The Committee observed that in view of the fact that two of its Members namely; Hon Bonny Khalwale and Hon. (Dr) Nuh Nassir Abdi were members of both the Public Accounts Committee and the Departmental Committee on Health, the total membership of the Joint Committee therefore was twenty and eleven members constituted a majority to consider and adopt a report of the Joint Committee as required by Standing Order 185(3).

The Committee subsequently considered and adopted its report on the procurement of medical goods and equipment by for the Ministry of Medical Services by Dol International Ltd. It was agreed that the report be tabled in the House by any of the Co-chairs on 7th July, 2010.

MIN No. 7/2010:- ADJOURNMENT

There being no other business to transact, the Co-Chairs adjourned the sitting thirty seven minutes past five in the evening.

Signed :- Hon. (Dr) Dr. Julius Kones, M.P.
For: Dr. Bonny Khalwale, M.P; Co-Chair

Signed :- Hon. (Dr) Robert Monda, M.P.
Co-Chair

Date:- 6th July, 2010

MINUTES OF THE THIRD JOINT SITTING OF THE PUBLIC ACCOUNTS COMMITTEE (PAC) AND THE DEPARTMENTAL COMMITTEE ON HEALTH HELD ON FRIDAY, 2ND JULY, 2010 AT 10.00 A.M. IN THE COMMISSION ROOM ON FIRST FLOOR, COUNTY HALL, PARLIAMENT BUILDINGS

PRESENT:-

| | |
|----------------------------------|------------|
| Hon. (Dr) Boni Khalwale, MP | (Co-Chair) |
| Hon. (Dr) Robert Monda, MP | (Co-Chair) |
| Hon. (Dr) Nuh Nassir Abdi, MP | |
| Hon. Fredrick Outa, MP | |
| Hon. Joseph Magwanga, MP | |
| Hon. (Dr) David Eseli, Simiyu MP | |
| Hon. Daniel Muoki, MP | |
| Hon. Alex M. Mwiru, MP | |
| Hon. Edick O. Anyanga, MP | |

ABSENT:-

Hon. Dr. Julius Kones, MP
Hon. Thomas Mwachugu, MP
Hon. Joseph Lekuton, MP
Hon. Cyprian Omolo, MP
Hon. Francis C. Ganya, MP
Hon. David Ngugi, MP
Hon. Charles Onyancha, MP
Hon. Martha Karua, MP
Hon. Boaz Kaino, MP
Hon. Victor Munyaka, MP
Hon. Sheikh Muhammed Dor, MP

IN ATTENDANCE:-

- NATIONAL ASSEMBLY

| | | |
|--------------------|---|---------------------|
| Mr. George Gazemba | - | Clerk Assistant II |
| Mr. Samuel Njoroge | - | Clerk Assistant II |
| Mr. Salad M. Guyo | - | Clerk Assistant III |

MIN No. 5/2010:- PROCUREMENT OF MEDICAL GOODS AND EQUIPMENT FOR THE MINISTRY OF HEALTH BY DOL INTERNATIONAL LTD

The Committee resolved to finalize its report on this matter and table it in the House for further action before the House adjourns for recess on the second week of July, 2010. The resolution was necessitated by the proceedings of the anti-corruption case at Makadara Law Courts, Nairobi where Dol International Ltd Managing Director, Dr. Shadrack Ithinji Mwiti and others who had been indicted for various corruption offences in connection with the procurement were acquitted of all the offences.

The Committee agreed to meet on Tuesday, the 6th July, 2010 at ten in the morning to discuss the draft report on the matter with a view to adopting it and tabling it in the House.

MINUTES OF THE SECOND JOINT SITTING OF THE PUBLIC ACCOUNTS COMMITTEE (PAC) AND THE DEPARTMENTAL COMMITTEE ON HEALTH HELD ON MONDAY, 23RD NOVEMBER 2009 AT 02.30 P.M. IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDING

PRESENT:-

| | |
|----------------------------|------------|
| Hon. Dr. Boni Khalwale, MP | (Co-Chair) |
| Hon. Dr. Robert Monda, MP | (Co-Chair) |
| Hon. Edick O. Anyanga, MP | |
| Hon. Alex M. Mwiru, MP | |
| Hon. Charles Onyancha, MP | |
| Hon. Martha Karua, MP | |
| Hon. Boaz Kaino, MP | |
| Hon. Joseph Magwanga, MP | |
| Hon. Victor Munyaka, MP | |
| Hon. Fredrick Outa, MP | |
| Hon. Dr. Julius Kones, MP | |

ABSENT WITH APOLOGY:-

Hon. Dr. Nuh Nassir Abdi, MP
Hon. Sheikh Muhammed Dor, MP

ABSENT:-

Hon. Daniel Muoki, MP
Hon. Thomas Mwadeghu, MP
Hon. Joseph Lekuton, MP
Hon. Cyprian Omolo, MP
Hon. Francis C. Ganya, MP
Hon. David Ngugi, MP
Hon. Dr. David Eseli, MP

IN ATTENDANCE:-

- NATIONAL ASSEMBLY

| | | |
|----------------------|---|---------------------------|
| Ms. Anita Thurairira | - | Principal Clerk Assistant |
| Mr. George Gazemba | - | Clerk Assistant II |
| Ms. Wanjiru Ndindiri | - | Parliamentary Intern |
| Ms. Sylvia Ocharo | - | Parliamentary Intern |

TREASURY:-

Tom Khakame - Senior Assistant Deputy Accountant General

KENYA NATIONAL AUDIT OFFICE (KENAO):-

| | | |
|-----------------------|---|--------------------------|
| Alex Rugera | - | Director of Audit |
| Denis T. Kariuki | - | Deputy Director of Audit |
| Mr. Joash O. Manasseh | - | Principal Auditor |

Mr. Joash O. Manasseh - Principal Auditor

MIN No. 3/2009:- PROCUREMENT OF MEDICAL GOODS AND EQUIPMENT FOR THE MINISTRY OF HEALTH BY DOL INTERNATIONAL LTD

Prof. James Ole Kiyiapi, Permanent Secretary, Ministry of Medical Services representing the Ministry, **Ms Muthoni Kimani**, Deputy Solicitor General representing the Attorney General and **Dr. Shadrack Mwiti**, Managing Director, Dol International Ltd appeared before the Committee and gave evidence. Prof James Ole Kiyiapi was accompanied by:-

- (i) Dr. John Munyu - CEO, Kenya Medical Service Supplies Agency;
- (ii) Dr. Martin Awori - Senior Deputy Director
- (iii) I.O. Omogi - Chief Procurement Officer
- (iv) D. Nyambok - Legal Officer
- (v) A.M. Kiilu - Senior Assistant Chief Health Administrative Officer

Dr. Shadrack Mwiti was accompanied by his Advocate, Mr. Jotham O. Arwa from Rachier and Amolo Advocates.

In their evidence, the Committee heard that:-

- (i) The Ministry could not trace any documents relating to this procurement in their records. All information the Ministry had was received from the Kenya Anti-Corruption Commission (KACC) which had taken certain documents for the purposes of investigating the matter;
- (ii) There was no actual contract signed between the Ministry and Dol International Ltd, but Local Purchase Orders (LPO's) were still issued for the supply of goods;
- (iii) In his professional assessment of the matter, the Attorney General advised the Ministry to honour its contractual obligation with Dol International Ltd to save the public from possible public loss as the issuance of LPO's constituted a contract;
- (iv) The Permanent Secretary, Ministry of Health made it clear that the Ministry would not pay for the sutures and would decide on the next course of action on the matter after the pending court cases were finalized.

The Director, Kenya Anti-Corruption Commission (KACC) failed to appear despite being duly invited. There was no word from his office.

MIN No. 4/2009:- ADJOURNMENT

There being no other business to transact, the Co-Chairs adjourned the sitting seven minutes past five in the evening.

Signed :- Hon. (Dr) Dr. Julius Kones, M.P.
For: **Dr. Bonny Khalwale, M.P; Co-Chair**

Signed :- Hon. (Dr) Robert Monda, M.P.
Co-Chair

Date:- 6th July, 2010

MINUTES OF THE FIRST JOINT SITTING OF THE PUBLIC ACCOUNTS COMMITTEE (PAC) AND THE DEPARTMENTAL COMMITTEE ON HEALTH HELD ON THURSDAY, 12TH NOVEMBER, 2009 AT 09.00 A.M. IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDING

PRESENT:-

| | |
|------------------------------|------------|
| Hon. Dr. Boni Khalwale, MP | (Co-Chair) |
| Hon. Dr. Robert Monda, MP | (Co-Chair) |
| Hon. Edick O. Anyanga, MP | |
| Hon. Francis C. Ganya, MP | |
| Hon. David Ngugi, MP | |
| Hon. Dr. Nuh Nassir Abdi, MP | |
| Hon. Alex M. Mwiru, MP | |
| Hon. Charles Onyancha, MP | |
| Hon. Dr. David Eseli, MP | |
| Hon. Joseph Magwanga, MP | |

ABSENT:-

Hon. Dr. Julius Kones, MP
Hon. Daniel Muoki, MP
Hon. Martha Karua, MP
Hon. Boaz Kaino, MP
Hon. Thomas Mwadeghu, MP
Hon. Victor Munyaka, MP
Hon. Fredrick Outa, MP
Hon. Joseph Lekuton, MP
Hon. Cyprian Omolo, MP
Hon. Sheikh Muhammed Dor, MP

IN ATTENDANCE:-

- NATIONAL ASSEMBLY

| | | |
|----------------------|---|----------------------|
| Mr. George Gazemba | - | Clerk Assistant II |
| Ms. Wanjiru Ndindiri | - | Parliamentary Intern |
| Ms. Sylvia Ocharo | - | Parliamentary Intern |

MIN No. 1/2009 :- PROCUREMENT OF MEDICAL GOODS AND EQUIPMENT FOR THE MINISTRY OF HEALTH BY DOL INTERNATIONAL LTD

The Co-Chairs gave an overview of the subject matter to Members present. The matter had been discussed on the floor of the House by way of Question by Private Notice by Ikolomani Member of Parliament, Hon. Bonny Khalwale who is the Chairman of the Public Accounts Committee and also a Member of the Health Committee. The matter was not conclusively determined by the House thereby opening a window for other means of revisiting it, hence the joint sitting.

The gist of the matter was that Dol International Ltd and its associated companies had been issued with Local Purchase Orders (LPO's) with the Ministry of Health for the procurement

of certain medical items key among them sutures. The company procured the goods and was ready to deliver them to the Ministry but the Ministry declined to accept delivery and make payment on grounds that the procurement of the items was a subject of investigation by the Kenya Anti-Corruption Commission (KACC). In the year 2006, Dol international Ltd instituted a civil suit against the Ministry to safeguard its interest. In 2009 the Managing Director, Dol International Ltd and others were charged in an Anti-Corruption Court in connection with the matter, courtesy of the KACC.

The two court cases were pending. The sutures worth 40 million Kenya Shillings had a lifespan and were likely to expire before the conclusion of the two court cases and should the cases end up in favour Dol international Ltd, the Ministry would end up paying for expired sutures thereby occasioning the Public financial loss. In his professional assessment, the Attorney General had advised the Ministry to honour its contractual obligation with the Dol International Ltd to save the public from possible financial loss.

The Committee resolved to hold sittings to explore avenues for an amicable resolution of this matter in order to save the public from possible financial loss that could be occasioned by a court order requiring the Ministry to pay for the expired items.

MIN No. 2/2009:- ADJOURNMENT

There being no other business to transact, the sitting was adjourned at thirteen minutes past eleven in the morning.

Signed :- Hon. (Dr) Dr. Julius Kones, M.P.
For: Dr. Bonny Khalwale, M.P; Co-Chair

Signed :- Hon. (Dr) Robert Monda, M.P.
Co-Chair

Date:- 6th July, 2010



MINISTRY OF HEALTH

Telegrams: "MINHEALTH",
Nairobi
Telephone: Nairobi 717077
When replying please quote

OFFICE OF THE
PERMANENT SECRETARY
AFYA HOUSE
CATHEDRAL ROAD
P.O. Box 30016
NAIROBI

POL/ADM/8/A/12 VOL.III/(144)

11th August, 2006

Ref. No. _____

The Director,
Kenya Anti-Corruption Commission,
P. O. Box 61130-00200,
NAIROBI

PROCUREMENT IRREGULARITIES AT THE MINISTRY OF HEALTH: DOL INTERNATIONAL LTD AND ASSOCIATED COMPANIES

We refer to the above matter which was a subject of investigation by your institution. This matter was taken to the High Court by M/S. DOL International whereby a "Stay Order" was issued. The same issue has been a subject of communication between this Ministry and the office of the Attorney General. We have also communicated to you on the same.

As indicated, the supplier was awarded tenders to supply pharmaceutical products and equipment to the Ministry. Pursuant to the award, the Ministry issued Local Purchase Orders (L.P.Os) Nos.0061843, 0061880, 0061967 and Tender Award No.SD/KEN/RU-HEA/2/25/1S for the supply of the items stipulated in the LPOs.

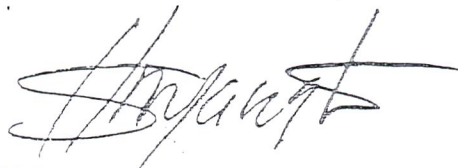
With regard to LPOs Nos.006843 and 0061967, the supplier has procured the goods and was awaiting to deliver to the Kenya Medical Supplies Agency (KEMSA) when he was stopped after your letter Ref. No.KACC/INV.6/14 VOL.II(86) of 27th April, 2006. The supply of drugs and medical equipment under Tender No.SD/KEN/RUR-HEA-2/98/25/1S had been concluded by delivery of the drugs and equipment which had been distributed to various health facilities in the country where they have been utilized.

By the time the investigations into allegations of corruption started, the supplier had performed his contractual obligations and was ready to finalize the delivery of the remaining supplies in time as stipulated in the contract. This is one of the main grounds he is relying upon in the matter (application) before the High Court.

To facilitate the supplies in recognition of its contractual obligations, the Ministry had opened a Letter of Credit. This had to be cancelled when the allegations were made.

It should be noted that, the Procurement Appeals Board has ruled that once a Local Purchase Order is issued, a binding contractual relationship is established and the parties to the same are bound by the contract. In this respect, since the Ministry had issued the said LPO's, the Tender Award and received some of the supplies (drugs and equipment) and utilized the same, it finds itself in a position where it is not able to defend itself. Further to the above, the goods supplied were within the stipulated standards.

The Ministry is still in dire need of the remaining supplies in order to effectively deliver health services to the needy Kenyans. We therefore would like to finalize this issue by honouring this contract with the supplier and finalizing the matter pending in the High Court. However to do this we would like your approval or a recommendation on the status of investigation and steps that have been undertaken so far to conclude the matter.



DR. HEZRON O. NYANGITO
PERMANENT SECRETARY

lww/NKW

cc.

The Hon. Attorney General,
Attorney General's Chambers
NAIROBI. (Attn. Muthoni Kimani, MBS.
Deputy Solicitor-General).

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 273 OF 2006

THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS
OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

THE MATTER OF: THE EXCHEQUER AND AUDIT (PUBLIC
PROCUREMENT), REGULATIONS 2001 AND THE
CONSTITUTION OF THE REPUBLIC OF KENYA.

BY

INTERNATIONAL (K) LIMITED 1ST APPLICANT
KENPAK COLOUR PRINTERS LIMITED 2ND APPLICANT
SHADRACK ITHINJI MWITI 3RD APPLICANT

VERSUS

PERMANENT SECRETARY,
MINISTRY OF HEALTH 1ST RESPONDENT
KENYA ANTI-CORRUPTION
COMMISSION 2ND RESPONDENT
SOLICITOR GENERAL 3RD RESPONDENT

IN CHAMBERS ON THE 26TH DAY OF MAY 2006
BEFORE THE HONOURABLE MR. JUSTICE NYAMU

ORDER

READING the application presented to this court on the 26th day of May
by Counsel for the Applicants under Order 53 Rule 1(1) and (2) of the Civil
Procedure Rules, the Law Reform Act Cap 26 and all other enabling powers and
provisions of the law, AND UPON READING the Statement dated 25th May 2006
and the Verifying Affidavit of SHADRACK ITHINJI MWITI sworn on 25th May
together with the annextures thereto, AND UPON HEARING Counsel for
the Applicants EX PARTE.

IT IS HEREBY ORDERED

THAT the Applicants DOL INTERNATIONAL (K) LIMITED, KENPAK
COLOUR PRINTERS LIMITED and DR. SHADRACK ITHINJI MWITI
be and are herein granted leave to apply for an Order of Certiorari to
remove to the High Court and quash the unilateral decision of the
Permanent Secretary Ministry of Health from canceling and/or
termination Local Purchase Orders (LPO's) numbers 0061843,
0061880, 0061967 and Tender Award No. SD/KEN/RUR-HEA-
2/98/25/IS.

2. THAT the Applicants be and are hereby granted leave to apply for an Order of Mandamus directed to the Permanent Secretary Ministry of Health compelling him to accept the Medical equipment and drugs supplied by the 1st and 2nd Applicants under LPO's numbers 0061843, 0061880, 0061967 and Tender Award No. SD/KEN/RUR-HEA-2/98/25/IS
3. THAT the Applicants be and are hereby granted leave to apply for an Order of Mandamus directed to the Permanent Secretary Ministry of Health compelling him to pay the 1st and 2nd Applicants for the medical equipment and drugs supplied under LPO's numbers 0061843, 0061880, 0061967 and Tender Award No. SD/KEN/RUR-HEA-2/98/25/IS.
4. THAT the Applicants be and are hereby granted leave to apply for an order of Prohibition directed to the Director Kenya Anti Corruption Commission prohibiting him by himself, his servants, agents or appointees or in any other manner howsoever from interfering with the Applicants goods of trade or its offices and the goods items of trade confiscated on 29/3/2006 be returned to the Applicants save for copies required for their investigations.
5. THAT the 3rd Applicant be and is hereby granted leave to apply for an Order of Prohibition directed to the 2nd and 3rd Respondents and or any other person prohibiting the filing and prosecution of Criminal charges against DR. SHADRACK ITHINJI MWITI in respect of the supply of medical equipment and drugs to the 1st Respondent.
6. THAT the grant of leave do operate as a stay in respect of Order 1 and 4 above only.
7. THAT all Orders are granted on condition that the Application is filed within 21 days and served within 3 days failing which the Orders shall automatically lapse.
8. THAT the costs shall abide the outcome of the main application.
9. THAT there shall be liberty to apply

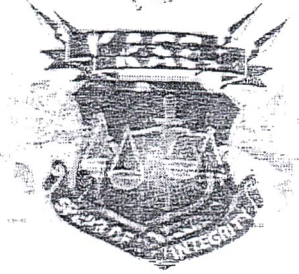
IN under my hand and seal of this Honourable Court this 26th day of 2006.

ED at Nairobi this 26th day of May 2006.

DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI

KENYA ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE
(Vailey Rd./Millmani Rd.
Junction)
P.O. Box 61130
00200 - NAIROBI, Kenya



Tel.: 254 (020) 2717318/310722
Fax: 254 (020) 2719757
Email: kacc@integrity.go.ke
Website: www.kacc.go.ke

When replying please quote:

KACC/INV. 6/14 Vol. IV (82)

9th March 2007

Dr. Shadrack I Mwiti
Managing Director
Dol International (K) Limited
P. O. Box 10961 - 00100
Nairobi

Dear Sir,

**REF: GOODS AWAITING DELIVERY/DELAYED PAYMENT DUE TO ALLEGED
INVESTIGATIONS**

Refer to your letter Dol/07/02/23/009 dated 23rd February 2007 on the above captioned subject.

Be advised that the decision whether or not to accept your deliveries does not lie with the Director of KACC but is a matter of contractual obligation with your client. KACC however acknowledges that it is conducting investigations into alleged criminal conduct by both parties with regard to the procurement of the said goods and the results and recommendations will only be disclosed to the appropriate authorities for appropriate action once the investigations are complete.

Yours faithfully,

Dr. J. P. Mutonyi, MBS
For: Director/Chief Executive

JPM/hmm

KENYA ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE
(Valley Rd. /Milimani Rd.
Junction)
P.O. Box 61130
00200 - NAIROBI, Kenya



Tel.: 254 (020) 2717318/310722
Fax: 254 (020) 2719787
Email: kacc@integrity.go.ke
Website: www.kacc.go.ke

When replying please quote:

KACC/INV. 6/14 Vol. IV (87)

2nd April 2007

Dr. Shadrack I Mwiti
Managing Director
Dol International (K) Limited
P. O. Box 10961 – 00100
Nairobi

Dear Sir,

REF: GOODS AWAITING DELIVERY/DELAYED PAYMENT DUE TO ALLEGED INVESTIGATIONS

Reference is made to your letter Dol/07/02/23/016 dated 19th March 2007

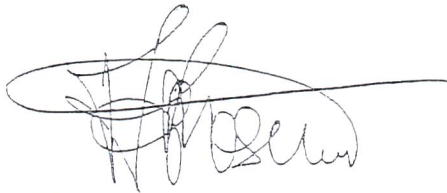
This is to remind you of a fact we mentioned in our earlier letter ref. KACC/INV. 6/14 Vol. IV (82) dated 9th March 2007, that the Commission is investigating allegations of criminal conduct by both parties to the contract.

The documents you have referred to in your letter were therefore recovered in furtherance to the investigation and can only be returned to Ministry of Health after determination of the same.

Please note it is not within this Commissions remit to authorize or clear any payments or receipt of goods for you by the Ministry of Health. It is our responsibility though to advice the Ministry to exercise caution in its dealings pending the conclusion of the criminal investigation.

In this regard, the Commission will not write to the Ministry of Health to withdraw our advice contained in the communication you have referred to.

Yours faithfully,



M. K. Bosire
For: Director/Chief Executive

CC: Permanent Secretary
Ministry of Health
Afya House
Nairobi

JPM/hmm

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
IN THE ANTI-CORRUPTION COURT AT NAIROBI
ANTI-CORRUPTION CASE NO.15 OF 2009

REPUBLIC PROSECUTOR
versus

ANDREW OIRA NYAMBECHÉ.....1ST ACCUSED
SAMUEL MWANGI NDIRANGU 2ND ACCUSED
ZACHARY BOLO AWINO 3RD ACCUSED
DR. SHADRACK MWITI ITHINJI4TH ACCUSED
DOL INTERNATIONAL 'K' LTD 5TH ACCUSED
JULIUS THAIRU MURAGURI 6TH ACCUSED

RULING

The six accused persons herein namely Andrew Oira Nyambeche, Samuel Mwangi Ndirangu, Zachary Bolo Awino, Dr. Shadrack Mwitithinji, Dol International alias Dol International 'K' Ltd and Julius Thairu Muraguri (herein referred to as accused 1, accused 2, accused 3, accused 4, accused 5, and accused 6 respectively) have been charged in different courts with different offences as follows:-

In Count I, accused 1, accused 2 and accused 3 have jointly been charged with the offence of deceiving principal contrary to Section 41(2) as read

with Section 48 of the Anti-Corruption and Economic Crimes Act No.3 of 2003 (hereinafter referred to as ACECA).

Accused 1, accused 2 and accused 3 have also been jointly charged in count 2 with the offence of abuse of office contrary to section 46 as read with Section 48(1) of ACECA and in the alternative with the offence of breach of trust by a person employed in the public service contrary to section 127(1) as read with Section 127(1) (a) of the Penal Code.

In Counts 3 and 4, accused 3, accused 4, accused 5, and accused 6 have jointly been charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. It is worth noting that accused 6 faces charges in count 6 only. He is not among the accused persons in count 5.

The particulars supporting the charges in each count are as stated in the charge sheet substituted on 29.4.2009. At this point it is appropriate to note that in all counts except for count 4, the particulars given in support of the offences in the other counts are similar and they all relate to the presentation or usage of an alleged summary technical evaluation report on item 44 for procurement of Vycril synthetic suture absorbable which was allegedly false and which accused persons allegedly knew to be false in material particulars in that it indicated that only one instead of seven samples had been assessed and approved as acceptable by the Ministry of Health as a result of which the Tender Committee of the Ministry of Health awarded tender number MOH/02/2005-2006 on item 44 to M/S DOL International Ltd at a price of Kshs.40,300,000/=.

In Count 4, the particulars thereof allege that on unknown dates between 20.9.2005 and 10.1.2006 in Nairobi, accused 3, accused 4, accused 5 and accused 6 conspired to defraud the Ministry of Health by fraudulently tempering with the tender documents submitted by Nairobi X-ray supplies Ltd thereby ensuring there was no competition against tender submitted by DOL International 'K' Ltd as a result of which tender No.MOH/06/2005-06 for supply of medical equipments X-ray general unit item number DH 114 was awarded to DOL International 'K' Ltd alias DOL International Ltd at a price of Kshs.123,400,000/=.

Each of the accused persons denied the charges in each count and in support thereof the prosecution called a total of twelve (12) witnesses. At the close of the prosecution case having carefully evaluated and considered all the evidence adduced herein by the prosecution in totality alongside the written submissions filed by counsels representing the accused persons, this court has come to the firm conclusion that the prosecution has failed to establish a *prima facie* case against each of the accused persons on the basis of which this court can put them on their defence. This court's finding has been informed by the following reasons:-

Looking at the evidence on record, it is clear that the prosecution's case is that accused 1, accused 2, accused 3 being senior procurement officer, procurement officer 2 and senior principal procurement officer in the Ministry of Health deceived their principal, abused their office by improperly conferring a benefit of tender number MOH/02/2005 -2006 for supply of non pharmaceutical items or item 44 by using a false summary report which they knew to be false on the basis of which tender for item 44 was

awarded to DOL International Ltd at a price of Kshs.40,300,000/= and because they knowingly used a false report to cause the tender to be awarded to M/S DOL International 'K' Ltd they breached the trust of their employer as alleged in the alternative charge to count 2 since they were persons employed in the public service.

In Count 3 and count 4 the prosecution's case is that accused 1, accused 2, accused 3, accused 4, and accused 5 conspired to defraud the Ministry of Health by making and using a false summary technical evaluation report on item 44 for tender No. MOH/02/2005-2006 as a result of which the tender was awarded to DOL International 'K' Ltd (accused 5) and by tempering with the tender document submitted by Nairobi X-ray services thus ensuring that tender submitted by accused 5 had no competition thereby causing tender No. MOH/06/2005-2006 for supply of X-ray equipments to be awarded to accused 5.

That being the prosecution case, the question for the court to determine at this stage is whether or not the prosecution has adduced sufficient evidence to prove the allegations made against each of the accused persons in each count.

I propose to first deal with the charges in Count 1, Count 2 and its alternative charge. Looking at the evidence adduced by the prosecution in support of the charges in the three aforesaid counts, I find that no documentary evidence has been tendered by the prosecution to establish as a fact that accused 1, accused 2, and accused 3 were at the material time procurement officers employed by the Ministry of Health. A few of the

Witnesses who testified herein alluded to this fact and this fact does not appear to be contested by the defence but be that as it may, it was the duty of the prosecution to prove this fact to the required standard since this was an essential ingredient to offences charged in counts 1, count 2 and its alternative charge. The claim that accused 1-3 were procurement officer at the time in question ought to have been proved by credible evidence to that effect by the time the prosecution closed its case. In all criminal cases, it is the duty of the prosecution to prove each and every allegation in the charge sheet beyond reasonable doubt. That burden never shifts to the accused person at any stage of the proceedings.

Secondly and most importantly it is my finding that the prosecution completely failed to adduce evidence to demonstrate that the alleged false summary of the technical evaluation report on item 44 which forms the basis of Count 1 and Count 2, and alternative Count and even counts 3 actually existed. The said false summary of technical evaluation report was never exhibited in court for the court to confirm it actually existed and to verify its contents i.e. check whether it indicated that only one sample instead of seven were assessed and approved as acceptable by the technical evaluation committee or whether it tallied with the technical evaluation report exhibited as exhibit 4 which was to the effect that ten samples were evaluated and 7 of them found acceptable. The only summary of technical evaluation report that was exhibited in court was the one done by members of the technical evaluation committee which was attached to exhibit 4.

In fact from PW8's and PW10's evidence, it is apparent that such a summary report as alleged in Counts 1, 2, alternative charge and count 3 never existed. PW8 and PW10 were members of the Ministerial Tender Committee that awarded the two tenders subject of this case to accused 5 and in their evidence they gave different accounts of why the Committee awarded the tender to accused 5 none of which was that they were guided by a summary report by the Secretariat showing that only one sample from DOL International 'K' Ltd was evaluated and found acceptable not 7 as alleged. PW8 on his part recalled that the committee was guided by a summary of a technical report prepared by the secretariat which indicated that ten (10) bids had been evaluated out of which the bid by accused 5 was found to be the most responsive.

PW10 on his part claimed that he never saw any summary of a report but he was sure that in awarding the tender for item 44 the committee was guided by the technical evaluation report -- exhibit 4. PW8 and PW10 did not say in their evidence that they were guided in awarding the tender for item 44 by a summary of a technical report prepared by the secretariat showing that only one sample by accused 5 was evaluated and approved as acceptable by the technical evaluation committee not seven as indicated in exhibit 4. PW 8 and PW10 were the only members of the Ministerial Tender Committee called to testify on how accused 5 was awarded the said tender and it is clear from their testimonies that their evidence does not support the charges in Count 1- Count 3.

In the absence of proof that such a false document existed, this court finds that the prosecution has failed to establish the charges in Count 1, Count 2 and its alternative charge against the accused persons.

In Count 2 it has been alleged that the accused persons abused their office by using the said false report and causing a benefit of the award of the tender for item No.44 to be improperly awarded to accused 5.

In my considered view the evidence on record far from supporting this allegation proved the complete opposite. Looking at the evidence of the prosecution witnesses starting from PW1 to PW10, there is no room for doubt that all the necessary procedures in the tendering process were carried out and strictly followed in the award of the said tender. The evidence quite clearly establishes that the said tender was properly and lawfully awarded to DOI International Ltd by the MOH's Ministerial Tender Committee as per its mandate. There is no evidence that accused 1-3 participated in the tendering process other than being members of the procurement department. Having failed to prove the existence of the false document that the accused persons allegedly used to have the tender awarded to accused 5, the prosecution has failed to prove in what way accused persons could have abused their office in having the tender awarded to accused 5 as alleged.

Similarly in the alternative charge, in the absence of proof that such a false document existed on the basis of which the said tender was awarded, it is my finding that the prosecution has failed to prove that the accused

persons acted in any way that would amount to a breach of trust by persons employed in the public service.

In view of the foregoing this court is persuaded to find that no case has been established against all the accused persons in count 1, count 2 and its alternative charge.

Consequently the accused persons (Accused 1, Accused 2 and accused 3) have no case to answer in those counts and they are accordingly acquitted under Section 210 of the Criminal Procedure Code.

Turning now to count 3 and count 4, I notice that all the accused persons have been charged jointly with the exception of accused 6 in count 5 and accused 1 and accused 2 in count 6 with the offence of conspiracy to defraud contrary to section 317 of the Penal Code.

Section 317 of the Penal Code is in the following words:-

"Any person who conspires with another by deceit or any fraudulent means to affect the market price of any thing publicly sold, or to defraud the public or any person whether a particular person or not or to extort any property from any person is guilty of a misdemeanor and is liable to imprisonment for three years."

A reading of this section clearly shows that for a person to be guilty of the offence of conspiracy to defraud, he must have acted in concert with another person to deceitfully or by fraudulent means affect the market price

of anything publicly sold or to defraud the public or any person of property or money.

In this case as regards count 3, there is no evidence that the alleged false summary report which was the tool allegedly used to defraud the MOH by causing the award of the tender in question to accused 5 ever existed. There is no evidence to suggest that accused 4 either on his own behalf or as a director of accused 5 a juristic person ever met accused 1,2, and 3 and organized for the making of a false summary report on the technical evaluation of samples to ensure accused 5 was awarded the tender. There is no evidence that the Ministry of Health was ever defrauded of any money or other property.

In Count 4, it is this court's finding that the prosecution failed to tender any evidence to support PW4's claim that the tender bid submitted by his employer Nairobi X-ray suppliers Ltd was tempered with by removing the manufacturer's brochure for general x-ray machine item DH114 from the tender document. In fact there is no evidence adduced by the prosecution to prove that the said brochure was infact included in the bid document submitted by Nairobi X-ray suppliers Ltd in response to the advertised tender. PW 4 admitted in his evidence that he was not certain that the brochure was part of the documents included in the bid submitted by the company in the first place. There is evidence that the content of the tender bids were not indexed and no inventory was taken of the documents contained in the bids when they were opened by the tender opening committee.

PW5 who was a member of the Technical Evaluation Committee charged with the responsibility of evaluating the brochures for medical equipments recalled in his evidence that he had seen the bid submitted by Nairobi X-ray services (exhibit 6) and he did not notice any mutilation on the tender bid. The investigating officer (PW12) who impressed me as a diligent, honest and forthright officer stated in his evidence that in the course of his investigations, he did not come across any evidence to show that the bid by Nairobi X-ray supplies Ltd was mutilated and if so by whom or at what stage. In fact he candidly pointed out that in his investigations he did not come across any evidence of conspiracy to defraud in respect of any of the accused persons or any evidence to suggest that a crime had been committed in the process of awarding the tenders in question. He recalled that in his report he recommended that administrative action be taken against accused 6 and the tender award to accused 5 be cancelled allegedly because it was unfairly awarded not because he established any criminal culpability in respect of any of the accused persons. He appeared surprised that the Hon. Attorney General in his wisdom found it appropriate to prosecute the accused persons for the offence charged in this case for which he had not established any evidence in his investigations. This explains why no evidence of conspiracy to defraud was presented in court. Given the foregoing observations and findings, it is this court's conclusion that no evidence has been adduced linking the accused persons to the offences charged in Count 3 and Count 4 on the basis of which they can be called upon to defend themselves.

It is thus my finding that each accused person has no case to answer in count 3 and count 4. Consequently each of the accused person is

accordingly acquitted under Section 210 of the Criminal Procedure Code and it set free unless otherwise lawfully held.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

22.6.2010

Before C.W. Githua (Mrs.) CM

Accused 1 – 6 present

Bosire Court Clerk

Mr. Anambo for 1st accused and holding brief for Mr. Mungla for 3rd accused, Mr. Okere holding brief for Mr. Ngari for 2nd accused; Mr. Kariuki for 6th accused and holding brief for Mr. Arwa for 4th accused 5th accused all present.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

C/Inspector Mutie present and states I hold brief for Mr. Mureithi for the Republic.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

Court: Ruling read, signed and delivered in open court.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

Court – Order sureties for 4th and 6th accused discharged. Securities deposited in court to be released back to them. For the other accused persons Cash Bail to be released to the depositors.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

C/Prosecutor – I apply to be supplied with certified copy of the Ruling.

Mr. Anambo – speaking on behalf of the other counsels we also apply to be supplied with certified copy of the Ruling.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

Court Order- Certified copy of the Ruling to be supplied to the prosecution and to the defence counsels upon payment of requisite fees.

C.W. GITHUA (MRS.)

CHIEF MAGISTRATE

22.6.2010

