



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E007 OF 2021

ANN WANGECHI MUGO.....1ST APPELLANT
ALBERT KINYUA MBABU.....2ND APPELLANT
HENRY KATISO KAWINZI.....3RD APPELLANT
SMITH GIKUNDA GITURU.....4TH APPELLANT
RICHARD NYAIYO ONDIEKI.....5TH APPELLANT
MARTIN RAY MWENDA NJERU.....6TH APPELLANT
LEE MUGENDI NDURU.....7TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein were charged in Runyenjes Anti-Corruption case No. 1 of 2015 with the following counts: -

i) Count 1 – All Appellants

Conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, jointly conspired together with others before court to commit an offence of corruption, namely to misappropriate the sum of Kshs. 4,734,577 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board for the routine maintenance and repair of roads within the Municipality of Chuka.

ii) Count II – 3rd, 4th and 5th Appellants

Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, being employees of the Municipal Council of Chuka as the Town Clerk, Town Engineer, the Works Officer and the Treasurer respectively, jointly used their respective offices to improperly confer a benefit on Ann Wangechi Mugo of Anajay Cleaning and General Supplies by irregularly awarding Contract No. MCC/KRB/1/2009/10 for routine maintenance and repair of roads within the Municipality of Chuka amounting to Kshs. 1,020,000 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board.

iii) Count III – 3rd and 4th Appellants

Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, being employees of the Municipal Council of Chuka as the Town Clerk, Town Engineer, the Works Officer and the Treasurer

respectively, jointly used their respective offices to improperly confer a benefit on Martin Mwenda of Snow Ball Construction Company by irregularly awarding Contract No. MCC/KRB/2/2009/10 for routine maintenance and repair of roads within the Municipality of Chuka amounting to Kshs. 1,080,000 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board.

iv) Count IV – 3rd and 4th Appellants

Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, being employees of the Municipal Council of Chuka as the Town Clerk, Town Engineer, the Works Officer and the Treasurer respectively, jointly used their respective offices to improperly confer a benefit on Ann Wangechi Mugo of Interdevelopers Construction Company by irregularly awarding Contract No. MCC/KRB/3/2009/10 for routine maintenance and repair of roads within the Municipality of Chuka amounting to Kshs. 862,200 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board.

v) Count V – 3rd and 4th Appellants

Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, being employees of the Municipal Council of Chuka as the Town Clerk, Town Engineer, the Works Officer and the Treasurer respectively, jointly used their respective offices to improperly confer a benefit on Lee Mugendi Nduru of Seven Eleven Construction Company by irregularly awarding Contract No. MCC/KRB/4/2009/10 for routine maintenance and repair of roads within the Municipality of Chuka amounting to Kshs. 800,000 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board.

vi) Count VI – 3rd and 4th Appellants

Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Between 7th December, 2009 and 29th January, 2011, at the Municipal Council of Chuka within Tharaka Nithi County in the Republic of Kenya, being employees of the Municipal Council of Chuka as the Town Clerk, Town Engineer, the Works Officer and the Treasurer respectively, jointly used their respective offices to improperly confer a benefit on Albert Kinya Mbaabu of Chalk Dust General Suppliers by irregularly awarding Contract No. MCC/KRB/5/2009/10 for routine maintenance and repair of roads within the Municipality of Chuka amounting to Kshs. 323,064 that was disbursed for the financial Year 2009/2010 to the Council by the Kenya Roads Board.

2. They were tried, convicted and sentenced as follows;

Count 1 – each appellant was fined Kshs.100,000/= and in default to serve 12 months imprisonment for the first limb Section 48(1)(a). On 2nd limb, each of them was fined Kshs.1,184,000/= and in default 12 months imprisonment. However, the 2nd, 3rd and 4th appellants were discharged in counts II, III, IV, V and VI, unconditionally, under Section 35 of the Penal Code.

3. The appellants being dissatisfied with the said conviction and sentence moved this court vide different petitions of appeal which were all consolidated on 24th of June, 2021 with the lead file being Criminal Appeal No. E005 of 2021.

4. Further, on 5th day of August 2021, the order of appearance of the appellants was agreed as follows;

- 1) Ann Wangechi Mugo – 1st appellant
- 2) Albert Kinya Mbaabu – 2nd appellant
- 3) Engineer Henry Kitiso Kawinzi – 3rd appellant
- 4) Smith Gikundu Gituru - 4th appellant
- 5) Richard Nyaiyo Ondieki – 5th appellant
- 6) Martin Ray Mwenda – 6th appellant
- 7) Lee Mugendi Nduru – 7th appellant

5. Each of the appellants set out several grounds of appeal in their respective petitions of appeal. The court has perused the petitions aforesaid, and the following are the common grounds in all the petitions: -

- 1) That the learned magistrate erred in law and in fact in not finding and holding that the prosecution had not discharged the high burden of proof beyond all reasonable doubt that the appellants had conspired to commit an offence of corruption contrary to

Section 47A(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

- 2) The learned magistrate erred in law and in fact in holding that the appellants had conspired to misappropriate the sum of Kshs. 4,734,577/= when there was no such evidence on record.
- 3) The learned magistrate erred in law and in fact in not finding and holding that the charges against the appellants were not sustainable as there was no evidence of compliance with Section 35 of the Anti-Corruption and Economic Crimes Act, 2003.
- 4) The learned magistrate erred in law and in fact in not finding and holding that the evidence of PW1, PW2, PW3 and PW4 was accomplice evidence which required corroboration and there was no independent evidence connecting the appellants to the charge of conspiracy.
- 5) The learned magistrate erred in law and fact in shifting the burden to the appellants to prove their innocence.
- 6) The learned magistrate erred in law and fact in relying on inadmissible evidence and documents under Sections 33, 67, 68 and 106(B)(2)(4) of the Evidence Act.
- 7) The learned magistrate erred in law and in fact by failing to consider the forensic document examiner's evidence.
- 8) The learned magistrate erred in law and in fact in failing to comply with Section 169 of the Criminal Procedure Code.
- 9) The learned magistrate erred in law and in fact by imposing manifestly harsh and/or excessive sentence.

6. When the appeal came up for hearing, the court gave directions on filing of submissions which all the appellants, and the respondent complied with.

7. In his submissions, counsel for the 1st, 2nd and 6th appellants submitted that, the prosecution did not prove the case against them beyond any reasonable doubt. Further that, the trial court did not comply with Section 35 of the Anti-Corruption and Economic Crimes Act, 2003. It was also submitted that PW1, PW2, PW3 and PW4 were accomplices and that their evidence required corroboration by independent evidence connecting the 1st, 2nd and the 6th appellants with the crime of conspiracy.

8. On the failure by the trial court to hold that Section 35 of the Anti-Corruption and Economic Crimes Act was not complied with, and on the issue of evidence of accomplices, counsel relied on the cases of **Esther Waruiru Theuri & Another Vs Republic eKLR, Aka Indusa Vs Republic [2011] 2 EA 173** and that of **Waringa Vs Republic [1984] KLR 617** respectively.

9. It was the case of the 1st, 2nd and 6th appellants that the documents relied on by the prosecution were secondary evidence and though they objected to the production of the same, as they were photocopies, the trial court admitted them in evidence and used them to convict the appellants.

10. On behalf of the 3rd, 4th and 5th appellants it was submitted that the prosecution did not prove the case beyond reasonable doubt as they did not prove existence of an agreement between the appellants to misappropriate Kshs. 4,734,577/=. That the original tender opening minutes were not produced and that the lower court relied on exhibits which did not bear any official logo of Chuka Municipal Council and it was not clear where the documents came from.

11. It was further submitted that there was no audit report that was produced in court as required under Article 229(5)(6) of the Constitution which provides that;

“The Auditor-General may audit and report on the accounts of any entity that is funded from public funds. An audit report shall confirm whether or not public money has been applied lawfully and in an effective way”.

12. On the issue of non-compliance with Section 35(1) of ACEA, it was submitted that the section makes it mandatory that recommendations be made to the director of public prosecution on the results of investigations and as such, the learned magistrate failed to find that the said provision was not complied with. Reliance was made on the case of **Nicholas Muriuki Kangangi Vs Attorney General (Criminal Appeal No. 331 of 2010)**.

13. The said appellants further submitted that the trial court did not consider their defences, in that, the documents that were produced by the prosecution are not the ones that were in the tendering process and that some, if not all of them, saw those documents for the first time in court for example the alleged tender opening register and the tender evaluation report.

14. The 7th appellant on his part submitted that the trial court failed to comply with Section 169 of Criminal Procedure Code, which is mandatory, and thus the judgement falls short of a valid judgment; that the judgment does not consider the testimony of the prosecution witnesses against that of the defence witness. Reliance was made on the case of **James Nyanamba Vs Republic [1983] eKLR**.

15. Submitting on the elements of the offence of conspiracy to defraud, the 7th appellant contended that the prosecution failed to prove the existence of an agreement of all the conspirators and the common intention to defraud the public in that, there was no evidence led by the prosecution to demonstrate that the 7th appellant ever met the co-appellants. Further reliance was made on the case of **Gichanga Vs Republic [1993] KLR 143** and that of **Republic Vs Anne Atieno Abdul & Others [2017] eKLR**.

16. The 7th appellant further submitted that the trial court shifted the burden of proof to him while it is trite that the burden is on the prosecution. Reliance was made on the case of **Julius Wachira Vs Republic [2015] eKLR**. He urged the court to consider the evidence that was adduced against him by the document examiner (PW5), PW6, and the documentary evidence that was produced, and find that his conviction was unfounded and unsafe and allow the appeal.

17. The respondent in its submissions contended that the conviction was proper and that, the ingredients of the offences were proved beyond any reasonable doubt.

18. In regard to Section 35 of the Anti-Corruption and Economic Crimes Act, it was submitted that the issue was comprehensively dealt with by the trial court. Further that, under Article 157 of the Constitution, the DPP does not require any consent from any entity to conduct prosecution of any person. Reliance was made on **Criminal Application No. 11 of 2018 (Nyeri)**.

19. Counsel for the respondent submitted that all the elements of the offence of conspiracy were proven and that it led evidence indicating the specific involvement and overt act(s) carried out by each of the appellants herein while acting in concert with each other towards the overall perpetuation of a common purpose being that of misappropriation of funds. Reliance was made on the case of **Sammy Kipng'etich Kirui Vs Republic** on the instances when a charge of conspiracy would be justified. They also relied on Section 21 of the Penal Code for definition of a common purpose.

20. It was further submitted that the manner in which the subject procurement and award of tenders was conducted as demonstrated by the prosecution witnesses, was a clear breach of the provisions of the Public Procurement and Disposal Act. The respondent urged the court to dismiss the appeals.

21. The court has carefully considered the submissions filed herein by the respective parties and the grounds of appeal. It has also re-evaluated and re-analyzed the evidence that was adduced before the trial court.

22. All the appellants herein were charged with the offence of conspiracy to commit an offence of Corruption Contrary to Section 47A(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act (ACECA), 2003.

23. The 3rd, 4th and 5th appellants faced (5) additional counts of abuse of office contrary to Section 46 as read with Section 48 of the ACEA; the particulars whereof are set out in the introductory part of this judgment.

24. **Section 47A(3) of ACEC**, provides as follows;

Any person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

25. **Section 48** provides;

1) A person convicted of an offence under this part shall be liable to –

a) A fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b) An additional mandatory fine if as a result of conduct that constituted the offence the person received a quantifiable benefit or any other person suffered a quantifiable loss.

2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows –

a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in sub-section (1)(b).

b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

26. On the other hand, the offence of abuse of office is provided for in Section 46 and it provides;

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

27. The 3rd, 4th and 5th appellants herein were all employees of the defunct Municipal Council of Chuka who held various positions to wit; Council Engineer in charge of Technical aspects of the roads, Clerk of Works supervising the roads and the Treasurer respectively, while the rest of the appellants were said to have improperly benefited from irregularly awarded contracts for the routine maintenance and repair of roads within the said municipality. That funds were disbursed for the financial year 2009/2010 to the Council by Kenya Roads Board.

28. At the hearing, the prosecution called a total of seven witnesses. On the part of the appellants, each of them gave sworn statement save for the 1st and 5th who chose to exercise their right to remain silent. In addition, the 1st and 6th appellants called one witness each.

29. As earlier stated, all the appellants herein were charged with the offence of conspiracy to commit an offence of corruption while the 3rd, 4th and 5th appellants were charged with abuse of office. The Penal Code and ACEA do not define the word “conspiracy”. The **Black Law Dictionary 9th Edition** defines conspiracy as follows;

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

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

The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable. There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

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

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

32. To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see **Republic Vs Anne Atieno Abdul & Others [2017] eKLR**). Further **Halsbury’s Laws of England Vol. 25** observes that;

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

33. It requires that a common purpose between them or among the subject parties is proved. Common intention is set out in **Section 21 of the Penal Code** as follows;

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

34. On the other hand, the offence of abuse of office is defined in **Section 46 of ACEA** as follows;

A person who uses his office improperly to confer a benefit on himself or anyone else is guilty of an offence.

35. There are two ingredients of the charge of abuse of office namely;

i) the person must have used a public office to improperly confer something to herself/himself or to anyone else.

ii) The thing conferred must be in the nature of a benefit.

36. In regard to the appeal before the court, the summary of the evidence as adduced before the trial court was that; in the year 2009, the Municipal Council of Chuka (defunct) (herein referred to as Council) placed an advertisement for roads grading in Chuka town. The council identified the roads under its annual roads work plan, subject to approval by Kenya Roads Board and the Government of Kenya would fund the projects. The work plan was approved vide a letter dated 4th May, 2009, reference being Annual Roads Program Financial year 2010 Chuka Municipal Council.

37. Upon release of the funds, the council advertised on 2nd December, 2019, in the Daily Nation Newspaper following which, tenders in regard to those bids were received, opened, evaluated and awarded.

38. On the 28/12/2019, a meeting was held to open the tenders during which, each bid was opened, read out and recorded in the tender opening register. During that meeting, the 3rd and 4th appellants were among those present and minutes were taken by PW1 and all the six (6) members present signed the register.

39. The tenders for the following roads were opened and the applicants listed as follows;

Tender 1

Forest road Maryaini estates

<u>Applicants</u>	<u>Amount (Kshs.)</u>
(a) Anna J. Cleaning General suppliers	1,534,000/=
(b) Ndegwa Construction Company	1,020,070/=

Tender 2

Govi river Kahawa road

<u>Applicants</u>	<u>Amount (Kshs.)</u>
(a) Hemiki Construction Company	1,103,800/=
(b) Top Notch Construction Company	1,264,600/=
(c) Snow Ball Construction Company	1,080,000/=
(d) Inter Developers Construction Company	1,185,000/=

Tender 3

Off forest road Ministry of Water

<u>Applicants</u>	<u>Amount (Kshs.)</u>
(a) Hemiki Construction Company	866,400/=
(b) Top Notch Construction	980,700/=
(c) Jilek outlet Limited	877,700/=

Tender 4

Public Works CBK Millennium School Road

<u>Applicants</u>	<u>Amount (Kshs.)</u>
(a) Seven Eleven Construction Company	800,000/=
(b) Eastern Building & Civil Engineering Construction Limited	804,625/=

Tender 5

Posta Road

<u>Applicants</u>	<u>Amount (Kshs.)</u>
(a) Beckham's Civil Building	305,400/=
(b) Chalk Dust General Suppliers	323,064/=

40. According to PW1, he is the one who took the minutes during the tender opening committee meeting held on 28/12/2009 but the minutes that were shown to him during investigations were different from the ones that he took on the material day and he noted the following;

- (1) *The minutes were signed by Harambee Gikingo (an accused before the trial court but not an appellant in this appeal) yet he did not attend the meeting on the said date.*
- (2) *The first and third tenders had a 3rd applicant namely Inter Developers Construction Company who had been added.*
- (3) *The 4th tender had an extra applicant namely Chalk Dust General Suppliers who had been added.*
- (4) *The 5th tender had an extra applicant namely Seven Eleven Construction.*

41. He was categorical that he did not sign the minutes but he gave out a draft of the same to the secretary who typed and gave them to the Town Clerk (Harambee Gikingo).

42. It was PW1's further evidence that, on the 11/03/2010, he again took the minutes of the tender award committee meeting. They went through the minutes and the report and they awarded the tenders as follows;

Tender 1 – Anna J. Cleaning & General Suppliers

Tender 2 – Snow Ball Construction Company

Tender 3 - Inter Developers Construction Company

Tender 4 – Seven Eleven Construction Company

Tender 5 – Chalk Dust General Suppliers

43. It was his evidence that, in the minutes of the meeting that took place on 11/03/2010, some figures are altered in the tender register yet he is not the one who did the alterations. Further that the request for tender which should contain the name, tender number, amount and stamp for each tender were missing and that though they had been signed by all those present, the ones that were shown to him during the investigations were signed by three people only. He gave an example of the Bills of Quantities for all the tenders which were signed by the 3rd and 4th appellants and a Mr. Micheni only. He confirmed that he had worked with the 3rd and 4th appellants for 3 and 14 years respectively, and he knew their signatures.

44. PW2 in his evidence stated that he attended the tender opening committee meeting held on the 28/12/2009 and confirmed that PW1 was the one who took the minutes on the said date. He had attended on behalf of the Town Clerk one John Gikingo who is said to have signed the minutes of the meeting held on that day yet he was not in attendance.

45. PW3 was also in attendance and according to him, the minutes were taken by PW1. PW2 and PW3 confirmed that the tenders were opened.

46. PW4 was in charge of payments and posting of ledgers at Chuka Municipal Council. He confirmed that the council advertised for road maintenance and five tenders were advertised for. He attended both tender opening and tender awarding committee meetings. According to him, the tenders were awarded and the payments were done as per the certificate of payments. That some of the companies that were paid included Inter Developer Construction Company, Snow Ball Construction company, Chalk Dust General Supplies, Top Notch and Ndegwa Construction Company.

47. On his part, PW6 who was the investigating officer testified that the minutes of the tender committee meeting were signed by the Town Clerk yet he was not a member of that committee. That the companies listed and the amounts quoted in the register compared to the minutes, the two had glaring differences. It was also his evidence that some companies that had not bid were added. Further that, some companies that were awarded the tenders had not met the minimum requirements. After investigations, he concluded that all the companies that had bid were one and the same entity. According to him, the then officials conspired and awarded the tenders to the same Company.

48. On their part, the appellants denied any involvement in the offences of conspiracy to commit an offence of corruption and/or abuse of office.

49. Having set out the summary of evidence as hereinabove, I now proceed to consider the grounds of appeal as set out in this judgment. On grounds 1 and 2, it was the prosecution's case, *inter alia*, that the procurement procedure was not followed and that the tenders were awarded to entities that did not qualify. It was also their evidence that payments were made yet the work was not done.

50. According to PW1, he is the one who took down the minutes of both the tender opening and tender awarding committees. He kept the original records of both but gave the secretary to type when they were asked for, by the Town Clerk. After the same had been typed, he certified them as a true copy of the original but it was his evidence that he did not read the same to confirm the contents as he believed that what he wrote is what was typed. When he was later shown the minutes, he confirmed that they had been tampered with and there were alterations which he did not make. That there were glaring differences in the register and the minutes between the companies that were listed and the amounts quoted for example in the first tender, the minute indicated 3 companies to have tendered but according to the register, only 2 companies had bid; Tender 4, only 2 companies had bid but in the minutes, Chalk Dust General Supplies had been added, Tender 3 minutes indicate 4 companies had bid but the register showed an extra company namely Inter Developers Construction had been added and lastly in Tender 5, 3 companies had bid but another company namely Seven Eleven had been added.

51. On awarding of the tenders, it was PW1's evidence that Inter Developers Construction Company was awarded the third tender though it had not bid but its name was added later in the minutes but it is not in the register.

52. PW2 and PW3 who attended the meeting of the 29/12/2009 confirmed that the minutes were taken by PW1 and that the Town Clerk was not in that meeting. In fact, PW3 stated that he had attended the meeting on behalf of the Town Clerk. Though in his defence, the 3rd appellant told the court that the register that was produced in court is not the one that was used for the two committee meetings, he admitted that there were irregularities in awarding the tenders and the committee was not keen during the evaluation process in that, the documents that were provided to the tender evaluation committee were questionable and there was no evaluation criteria. He also admitted that though the evaluation committee awarded marks, none of the companies met the minimum requirements.

53. It was the evidence of PW6 that Anna J Construction Company was awarded the first tender yet it did not have a certificate from public works or a tax compliance certificate and the PIN certificate that it presented was for Lee Mugendi (7th appellant).

54. Further that the figures in its bid documents were altered and yet it was given all the marks. That though Snowball Company was awarded the 2nd tender, its bid documents were not availed to the council and it was not registered with the registrar of companies and the money was paid to Ann Wangechi (the 1st appellant herein).-

55. It was his further evidence that the third tender, though awarded to Inter Developers Construction Company, it was not in the tender opening register but according to the evaluation report, it was the most responsive. According to the documents that were obtained from the registrar of companies, it was not a registered company and it did not meet the minimum requirements. Further, the documents that were produced in court shows that the 1st appellant is the one who was paid.

56. That the 4th tender was given to Seven Eleven and the documents that were presented are for the 7th appellant and according to the evidence available, the company did not qualify for the tender going by the documents that it submitted.

57. The court notes that after Snow Ball was awarded the tender, the record shows that it sub- contracted the road works to Anna J Cleaning and Suppliers and the reason given was due to financial constraints. There is nothing on record to show that the sub-contract was approved by Chuka Municipal Council and no reason was given why they did not invite new bids for that particular tender.

58. Payment vouchers were produced to show that payments were made. In addition, the bank statement for Chuka Municipal Council were also produced. According to the bank statements from Co-operative Bank, a total of Kshs.5,218,166/= was paid to various entities and to 4th and 6th appellants on different dates as follows;

a) Inter Developers Construction Company -	2,111,090/=
b) Chalk Dust General Suppliers -	183,338/=
c) Anna J Cleaning General Suppliers -	2,057,210/=
d) Seven Eleven Construction Company -	719,822/=
e) Martin Mwenda -	25,862/=
f) Smith Gikunda -	121,470/=

59. Though the 2nd and 6th appellants denied having tendered for the services, the bank statements shows that they received some payment from Municipal Council of Chuka during the period in issue. When they were put on their defence they did not give a reasonable explanation as to how the money ended up in their accounts and what it was for. For avoidable of doubt, the 2nd appellant is the proprietor of Chalk Dust General Suppliers. On the part of the 7th appellant, in his defence, he admitted to be the owner of Seven Eleven Construction Company but denied having purchased the tender and did not know who was paid the money. Though there was no evidence that his signature is the one in the bid documents for Seven Eleven Company, his company was paid 2 Cheques by Chuka Municipal Council for Kshs. 624,562/= and Kshs. 95,260/= and one of the signatories to that account is the 1st appellant herein. He cannot deny any knowledge of the tender yet money was paid into an account for a company in which he has a legal interest in and he never questioned the source of the money.

60. The investigating officer in his evidence stated that he visited the roads and the work was never done. According to him, some are just foot paths and cannot be classified as roads. There were no Bills of Quantities and what was there only stated “grading”. The 3rd appellant was the works officer and his role was to inspect the works and prepare work measurement sheets. In his evidence he stated that he prepared for all the road works and forwarded the same to accounts for payment. It is worth noting that when he was put on his defence he did not produce the work measurements sheets that he stated he prepared. Even without shifting the legal burden, the investigating officer having testified that the roads were never done, the 3rd appellant had the evidential burden under Section 111 to prove that he inspected the works and prepared the works measurements sheets as that was his work.

61. Though he denied having signed for Inter Developer and Snow Ball, as the works officer, and being charged with the duty of signing for payments, he ought to have explained how the payments were made to those two companies and by whom, if he was not the one who made them.

62. On the offence of abuse of office, the Act does not define the term ‘office’ but it defines ‘public officer’ in section 2 to mean

“an officer, employee or member of a public body, including one that is unpaid, part-time or temporary”

63. The same section defines “public body” to mean;

(a) the Government, including Cabinet, or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local Authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local Government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body

by virtue of any of the preceding paragraphs of this definition.”

64. From the foregoing, it can be deduced that the “person” referred to in Section 46 means a Public Officer and Office in the same section means a “public Office”. On the other hand, the Act defines “benefit” to mean;

“any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage”

(65) The offence of abuse of office, which under section 3 of the Act constitutes corruption, if therefore committed by a public officer who uses a public office to improperly confer on himself or on another person a gift, loan, fee, advantage etc which he or that other person was not otherwise entitled to. In my view, the above provision sufficiently covers improper use of public office which includes violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit to the public officer himself or to other people like in this case where the 3rd, 4th and 5th appellants ignored the Procurement procedures and regulations in order to improperly confer a benefit on the 1st, 2nd, 6th and 7th appellants by irregularly awarding the respective tenders to entities associated with the said appellants when they had either not qualified or they had not met the minimum requirements.

65. In view of the foregoing, and the evidence on record, I find that the appellants herein formed a common intention to prosecute an unlawful purpose in conjunction with each other and in prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.

66. On the 3rd ground of appeal, Section 35 of ACEC provides as follows;

1) Following an investigation, the commission shall report to the Director of Public Prosecutions on the results of the investigation.

2) The commission’s report shall include any recommendation the commission may have that a person be prosecuted for corruption or economic crime.

67. The appellants have argued that non-compliance with that section is fatal and reliance was made on the case of **Esther Waruiru Theuri & Another V R [2011] eKLR** and **Indusa Vs R [2011] 2 EA 73**.

68. On her part, counsel for the respondent is of the view that under the constitution, the DPP does not require any consent from any entity to conduct prosecutions of the appellants herein or any other case under the Kenyan law for that matter.

69. The court has considered that ground of appeal and the submissions by the parties. I have also perused the authorities relied on by both the appellants and the respondent.

70. I distinguish them with the court of appeal decision in the case of **Susan Mbogo Ng’ang’a v The Attorney General (sued for and on behalf of the Chief Magistrate’s Court, Nyeri Law Courts & 2 others (Civil Appeal No. 66 of 2016)**. In this case, the Court of Appeal while dealing with a similar issue observed that while under Section 12 of the repealed Prevention of Corruption Act, prosecution for an offence under that Act could not be instituted “except by or with the written consent of the attorney General” that Act also provided that where a person has been arrested without such consent no further or other proceedings was to be taken until that consent was obtained. No such or equivalent provision was made in the ACECA. We are therefore in agreement with the trial court when it contrasted the provision of Section 12 of the repealed Prevention of Corruption Act with the provisions of Sections 35 of ACECA thus;

“The legislature was fairly categorical here that a prosecution under the prevention of Corruption Act Cap. 65 must be pleaded by a written consent from the Attorney General. Its intention was quite clear from the onset leaving no doubt that any prosecution without the written consent from the Attorney General would have been fatal. There is no such express provision in the Anti-Corruption Act (sic).”

There is therefore no merit in the complaint by the appellant that the learned judge should have quashed the prosecution on the basis of alleged non-compliance with Section 35 of ACECA.

71. Further, and in my considered view, under Article 157(10) of the Constitution which establishes the office of the Director of Public Prosecutions, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the directions or control of any person or authority.

72. It is my view that Section 35 of ACECA cannot override Article 157(10) of the Constitution. That ground of appeal therefore has no merit.

73. On the 4th ground of appeal, the 1st, 2nd and 6th appellants submitted that PW1, PW2, PW3 and PW4 all served in the tender opening and the tender evaluation committees and in particular PW1 was the custodian of the minutes. As such, their evidence was therefore accomplice evidence requiring corroboration, which was independent, connecting the appellants herein with the offence of conspiracy. They relied on the case of **Waringa Vs Republic [1984] KLR 617** in which the court held *inter alia* that;

i) “When considering the evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness.

ii) The corroboration which should be invoked for considering the evidence of an accomplice is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

iii) The corroboration must be independent evidence which affects the accused by connecting him or tending to connect him with the crime.”

74. Section 141 of the Evidence Act is on the accomplices and it provides;

“An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

75. In this connection, I would draw attention to the following passage from the judgment of Lord Ellenborough in **R vs Jones (1809) 170 ER 1105 1106** (also quoted with approval in **R V Baskerville (1916) 2KB 658**).

“Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness and the consequence is inevitable that if credit is given to his evidence, it requires no confirmation from another witness.”

76. I have read through the judgment of the trial court and it sets out in graphic details how each of the appellants was involved in the process that led to the commission of the offences they are charged with. Much of it is documentary evidence. Each of the appellants and especially 3rd, 4th and 5th had separate and distinct roles in that process. The evidence adduced before the trial court against each of them points to their guilt.

77. Similarly, the documents that were produced and which connects the other appellants to the offence of conspiracy to commit the offence of corruption are self-explanatory. Payment vouchers were signed and payments made for services that were never rendered to the Municipal Council of Chuka as testified by PW6. Section 141 quoted above is very clear that a conviction shall not be illegal merely because it proceeds upon uncorroborated evidence of an accomplice, but which was not the case herein. The documents that were produced corroborates the evidence of PW1, PW2, PW3 and PW4 and so the learned magistrate was right in convicting the appellants.

78. On ground number 5, the 7th appellant contended that the learned magistrate erred in shifting the burden of proof to him. Reliance was had on the case of **Julius Wachira Vs Republic [2015] eKLR** that;

“The gaps we have identified in the evidence are minor. They cast doubt on the prosecution’s case. The burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the appellant”.

79. Whereas the court concurs with this legal position, the evidence on record against the 7th appellant shows that he admitted to be the owner of Seven Eleven Construction Company though he denied having purchased the tender and he did not know who was paid the money. His PIN certificate was used by the 1st appellant in her bid document for Ann J Cleaning Supplies and by Chalk Dust Supplies which was solely owned by the 2nd appellant.

80. Further, the evidence shows that his company Seven Eleven was evaluated for tender 5 though it had not bid for that tender. How did that happen? It is also clear from the record of the proceedings that he tendered for tender number 4 and he was awarded the contract. The bid documents that were used for that particular tender that is; the PIN certificate and the certificate of registration were his own and not that of his company and his company Seven Eleven was eventually paid.

81. From the foregoing, it is not therefore true that the court shifted the burden of proof to him as alleged. The prosecution adduced sufficient evidence against him.

82. On the 6th ground of appeal, the appellants complain that the learned magistrate relied on inadmissible evidence and documents. They submitted that they objected to production of Exb. 19 which is a photocopy of a letter from the ministry of Public Works (Kenya Roads Board) and despite that objection, the trial court admitted it in evidence and used it in convicting the appellants. Further that, the letters from Public Works, Auditor General and Registrar of Companies were not produced by the makers, contrary to Section 33 of the Evidence Act; and therefore not admissible. They relied on the case of **Peter Waihiga Kabiru & 3 others vs R [2019] eKLR**.

83. The court has perused the record of proceedings in regard to the above issue. On the 9th May, 2017, counsel for the 1st, 2nd and 6th appellants objected to the production of the letter dated the 4th May 2009 on the ground that the same is a photocopy; and that though it is certified, it does not state who certified it and therefore, it was secondary evidence.

84. The learned magistrate heard the objection and in her ruling, she considered the objection and held that the said letter is deemed to be a public document under Section 79(1) of the Evidence Act and therefore admissible.

85. In her response to the objection, the prosecutor stated that the letter was certified by Municipal Council of Chuka to which some of the appellants were employees. The same was certified by PW1 who was the administrative officer of the council. An inventory dated 5/10/2012 for all the documents collected from the council was signed by PW1, Charles Mutembei, Gakuo and the 4th appellant.

86. Section 64 of the Evidence Act provides that the contents of documents may be proved either by primary or by secondary evidence.

87. Section 65 which is on primary evidence provides;

1) Primary evidence means the document itself produced for the inspection of the court on the other hand secondary evidence is defined under Section 66 of the Evidence Act to include;

a) Certified copies given under the provisions hereinafter contained;

b) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

c) Copies made from or compared with the original;

88. Section 76 provides that documents must be proved by primary evidence except in cases mentioned in Section 68 of the Act.

89. The court notes that the copies of documents complained of are public documents.

90. Under Section 80 of the Evidence Act, certified copies of public documents may be produced as proof of the contents of the documents or parts of the documents of which they purport to be copies. The learned magistrate in her ruling on the objection, analyzed the law and justified her decision to overrule the objection. I have no reason to fault her decision in that regard.

91. On the 7th ground of appeal, the learned magistrate is faulted for failing to comply with Section 169 of the Criminal Procedure Code. The 7th appellant submitted that Section 169(1) is couched in a mandatory manner and for that reason the judgment of the learned magistrate falls short of the very critical requirement of a valid judgment.

92. In this regard, I wish to rely on the case of **Hawaga Joseph Ansanga Ondiasa Vs R (Criminal Appeal No. 84 of 2001)** which was quoted by the Court of Appeal in **Criminal Appeal No. 42 of 2010 Samuel Mwambuki & Another Vs R** in which the Court held as follows;

“It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However even if we were to hold that he did not prepare his judgment strictly in accordance with Section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated. See also the case of Samwiri Senyange Vs R 91953) 20 EACA;

“Where there has not been strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code, that will not necessarily invalidate a conviction and the court will entertain an appeal on its merits in such a case if it can be done with justice to the parties.”

93. This court wholly associates itself with the above decisions.

94. On the 8th ground of appeal regarding the sentence and whether the same is manifestly harsh and/or excessive, it is trite law that sentencing is within the discretion of the court.

95. The court notes that before sentencing, the appellants were offered an opportunity to mitigate and it is clear the trial court indeed noted to have considered the said mitigation before sentencing. The trial court did consider the mitigation and other factors before meting out the said sentence and so, it cannot therefore be faulted since it had the opportunity to exercise its discretion. The sentence meted out was lawful and legitimate per the provisions of the law. (See **Christopher Ochieng v R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011, B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**). **The appellants did not prove that the sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.**

96. **In my view, the trial court rightfully considered all material facts before it and further appreciated the objectives of sentencing and so reached a determination that is well founded in the law.** As such, it is my view that in the circumstances of the case, the sentence cannot be said to be excessive and/or harsh. The appellants did not satisfy and/or prove any of the grounds as were pronounced in **Bernard Kimani Gacheru v Republic [2002] eKLR.**

97. In the above premises, I find that the appeals have no merits and I hereby dismiss the same.

98. *It is so ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....for the Respondent