



**Republic v Ruitha & 5 others (Anti-Corruption and Economic Crimes Appeal 8 of 2016)
[2021] KEHC 9834 (KLR) (Anti-Corruption and Economic Crimes) (30 April 2021) (Judgment)**

Neutral citation: [2021] KEHC 9834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 8 OF 2016**

JN ONYIEGO, J

APRIL 30, 2021

BETWEEN

REPUBLIC APPELLANT

AND

JAMES WAGEMA RUITHA 1ST RESPONDENT

ELIZABETH WAMBUI MBUGUA 2ND RESPONDENT

MANASEH MUNIALO WANDABWA 3RD RESPONDENT

BERNARD OGOLLA JACOB 4TH RESPONDENT

WILLIAM KIMUTAI KEITANY 5TH RESPONDENT

JOHN WASHINGTON OTIENO OGUTU 6TH RESPONDENT

(An appeal against the acquittal by (Hon. Felix Kombo (PM) in the Chief Magistrate Court at Nairobi ACC Case No. 14 of 2013 delivered on 21st October 2016)

JUDGMENT

1. The appellant herein, the office of the director of public prosecutions filed a petition of appeal dated November 1, 2016 challenging the ruling of the hon Felix Kombo (PM) delivered on the October 21, 2016, thereby acquitting the respondents under section 210 of the [Criminal Procedure Code](#). The petition of appeal raises the following grounds: -
 1. The learned trial magistrate erred in law and fact in acquitting the respondents under section 210 of the [Criminal Procedure Code](#) while the prosecution had established a *prima facie* case against the respondents



2. The learned trial magistrate erred in law and misdirected himself by failing to make a distinction between the standard of proof required under section 210 of the *Criminal Procedure Code* (*Prima Facie* case) and under section 215 of the *Criminal Procedure Code* (beyond reasonable doubt).
 3. The learned trial magistrate erred in law by failing to properly analyze and scrutinize the evidence on record thus arriving at a wrong decision.
 4. The learned trial magistrate erred in law and fact in holding that National Housing Corporation Board was aware of the interest shown while the evidence on record proves otherwise
 5. The learned trial magistrate erred in law and fact in holding that there was no specific procedure governing the processes of allocation of houses by housing allocation committee while the evidence on record indicate that there were specific procedures provided by staff housing policy.
 6. The learned trial magistrate erred in law and fact in holding that the respondents did not fail to disclose their personal interest while the evidence on record demonstrates that their interest was unknown by the board of management, National Housing Corporation.
2. The respondents were arraigned before the Chief Magistrate’s Court Milimani on the October 17, 2013 facing various charges under the *Anti-Corruption and Economic Crimes Act* No 3 of 2003. The charge sheet was subsequently amended and charges read to them on the 28th of April 2014, to which all the accused persons(respondents) pleaded not guilty to their respective counts.
 3. In summary, the respondents were employees of the National Housing Corporation, a body corporate mandated to ensure that kenyans have access to affordable housing. They held senior positions in the corporation as follows; The 1st respondent, as the managing director; 2nd respondent, corporation secretary; 3rd Respondent, finance manager; 4th respondent, the technical manager; 5th respondent, senior legal manager and, the 6th respondent, chief estates officer. Besides, they were members of the corporation’s housing allocation committee (hereafter “the HAC”) appointed by the 1st respondent in his capacity as the managing director.
 4. The mandate of the HAC was to allocate houses to the successful applicants. The respondents were accused by virtue of sitting in the housing allocation committee (HAC) wherein they allegedly without disclosing their interests, allocated to themselves and or their relatives NHC houses contrary to the policies in place on provision of affordable housing in Kenya.
 5. For purposes of clarity and specificity, the six respondents were charged as accused 1-6 respectively as follows:
 - i. 1st respondent (1st accused) -faced three counts (counts 1,2 and 14) of abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003 for improper conferment of a benefit for housing schemes A- 703 Madaraka Infill Sector ‘A’, B3-24 Langata phase I and C2-19 Kileleshwa national housing corporation to himself, his spouse Irene Wanjiru and himself respectively without pre-requisite approval of the corporation housing approval committee.
 - ii. 2nd respondent (2nd accused)-faced three counts (counts 3,4 and5) of failure to disclose her private interest to one’s principal (National Housing Corporation) contrary to Section 42(1) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act* for failing to disclose her



private interest in housing schemes D69-687 Langata phase IV, A-654 Madaraka Infill Sector 'A' and C-25 Kileleshwa allocated to her husband, herself and herself respectively while sitting in the housing allocation committee of the corporation in her capacity as the Corporation secretary

- iii. The 3rd respondent (3rd accused)- had two counts (counts 6 and 7) of failure to disclose a private interest to one's principal (National Housing Corporation) contrary to section 42(1) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) for failing to disclose his private interest in houses A: 667 at Madaraka housing scheme and B1-06 at Kileleshwa housing scheme respectively which were respectively allocated to him by the housing committee whose proceedings he participated as a member.
 - iv. The 4th respondent (4th accused)- was charged with two counts. The first count(count8) was in respect of failure to disclose a private interest to one's principal (National Housing Corporation) contrary to section 42(1) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) for housing schemes C-634 Madaraka infill sector A and houses one, two and three at Migori national housing corporation which he was allocated by the housing committee whose proceedings he participated as a member. In respect of the second count (count10), it concerns abuse of office C/S 46 as read with section 48 of the [Anti-Corruption and economic crimes Act](#) No 3 of 2003 in that he used his office to improperly confer a benefit to himself to wit house No one, two and three Migori housing corporation scheme without the pre-requisite approval of the housing allocating committee.
 - v. The 5th respondent (5th accused) - had two counts (counts 9 and 10) of failure to disclose a private interest to one's principal (National Housing Corporation) contrary to section 42(1) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) by participating in proceedings of the corporation's house allocating committee meetings which allocated him housing schemes C-674 Madaraka Infill sector 'A' and NHC Eldama Ravine Plot No 4 respectively.
 - vi. The 6th respondent (6th accused) - had three counts (counts12,13 and 15) on abuse of office contrary to section 46 as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) for improper conferment of benefit for housing schemes one, two and three Migori national housing corporation, house no four and five Migori National Housing Corporation and C2-19 Kileleshwa National Housing Corporation scheme respectively without the pre-requisite approval of the allocation committee.
6. As members of the HAC, their key mandate was to allot houses to successful parties after compliance with the set pre-requisite standards.
 7. The case was partly heard before hon DN Mulekyo (Ag Chief Magistrate) who was then transferred before concluding the proceedings. Consequently, upon complying with section 200 of the CPC, hon F Kombo Principal Magistrate as he then was took over the case from where it had reached. The hearing proceeded and on 22/3/2016 the prosecution closed its case. Parties herein through their respective counsel submitted on whether the respondents had a case to answer. After extensively examining and evaluating the prosecution evidence and materials tendered, the hon Magistrate delivered his ruling on October 21, 2017 finding that the six respondents had no case to answer and consequently acquitted them under section 210 of the [Criminal Procedure Code](#). Aggrieved by the said acquittal, the DPP filed the instant appeal which unfortunately remained dormant for almost three years until the court intervened by threatening to dismiss it for want of prosecution.



8. Parties having agreed to canvass the appeal through written submissions, the court made directions as such. The appellant filed his submissions on the December 18, 2019. The 1st, 4th and 5th respondents filed theirs on 3/3/2020, the 2nd and 3rd respondents followed suit on 4/3/2020 and, the 6th respondent filed his submissions on 14/5/2020.

The Appellant's Submissions

9. Through his submissions filed on December 18, 2019, the appellant has raised three issues for determination as follows; whether the prosecution established a *prima facie* case against the respondents; whether the 1st to 6th respondent used their offices to improperly confer a benefit on themselves or anyone else and, whether there was an agent who had direct or indirect private interest in a decision that his principal was to make.
10. M/s Sigei appearing for the appellant basically adopted her submissions. Learned counsel urged the court to find that prosecution had met the standard of what constitutes a *prima facie* case as stated in the case of *RT Bhatt v Republic* [1957] EA 332- 334 & 335, *May v O'Sullivan* [1955] 92 CLR 654 where the court held that the onus of establishing a *prima facie* case lies with the prosecution and that a *prima facie* case need not be one which must necessarily lead to a conviction at the close of the case.
11. Learned counsel restated the evidence tendered before the trial court thus contending that there was sufficient proof that the respondents by virtue of being members of the corporation's HAC did abuse their positions thereby conferring benefits unto themselves, their spouses or relatives the corporation's houses without disclosing their interests to the said committee. M/s Sigei asserted that PW1-PW15 were consistent in their evidence that there was utter conflict of interest which the respondents never disclosed when houses allocated to them or their close relatives were the subject of discussion or allocation by the HAC.
12. The appellant submitted that the trial court did not consider all the issues and evidence to reach to the conclusion it did thereby acquitting the 1st – 6th respondents. The appellant further stated that the prosecution had established a *prima facie* case which the trial court failed to appreciate.

The 1st, 4th and 5th Respondent's Submissions

13. The 1st, 4th and 5th respondents represented by Mr Oonge filed their submissions on March 3, 2020. Learned counsel accused the appellant of delay in prosecuting the appeal. He stated that the appeal is dated 1/11/2016 and was filed on 2/11/2016 but the appellants seemed not to have been interested until when the court ordered that the respondents be served. The 5th respondent stated that he was served with the appeal on January 6, 2019 over two and half years later since the decision to be appealed against was sought.
14. According to learned counsel, the delay has not been explained contrary to the constitutional underpinning under article 50 (2) (e) which recognizes the right of an accused person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. In support of this submission, counsel relied on the holding in the case of *Robert Dean Dickey v State of Florida* 398 US 30 to explain that deliberate delay harms an accused person and constitutes abuse of the criminal Process.
15. On whether the learned trial magistrate erred in acquitting the respondents, it was submitted that the trial court correctly applied the law in acquitting the accused persons under section 210 of the Criminal Procedure Code. It was further stated that the trial court properly identified and analyzed all the evidence and the issues as framed in the charge sheet in compliance with the celebrated case of



Ramanlal Trambaklal Bhatt v Republic 1957 EA 332. Counsel contended that the appellant did not specifically identify the error on what was not analyzed by the trial court.

16. Mr Oonge further submitted that the appellant has failed to show this court in its submissions on what they meant in raising grounds no 2 and 5 in which it was claimed that the trial magistrate failed to make a distinction between standard of proof required under section 210 of the *Criminal Procedure Code* (*prima facie*) and under section 215 of the *Criminal Procedure Code* (beyond reasonable doubt). Touching on ground 5 of the appeal that the trial magistrate erred in law and fact in holding that there was no specific procedure governing the process of allocation of houses by HAC, Mr Oonge submitted that there was no evidence on record indicating that there was a specific procedure provided by staff housing policy hence there was no error.
17. Regarding grounds 4 and 6 where the appellant faulted the trial magistrate for finding that NHC board was aware of the interest of the 1st -6th respondents, counsel submitted that the evidence on record proved otherwise that the respondents had submitted their respective application forms for house allocation which the HAC was fully aware of hence non disclosures of interest does not arise. It was further submitted that ground 4 was incomprehensible and one cannot be able to decipher what the appellant is complaining about with respect to interest.

The 2nd and 3rd Respondent's Submissions

18. The 2nd and 3rd respondents filed their submissions on March 4, 2020 through the firm of Macharia Mwangi stating that the appellant has not made any case to sustain the appeal before court. That the appeal is a generic one which does not show any specific errors of law and fact.
19. According to Mr Mwangi, ground 4, 5 and 6 of the appeal cannot stand as PW2, pw4 and pw6 confirmed in their respective testimonies that letters of allotment were the end product of the allocation of houses and that the 2nd and 3rd applicants had disclosed their interest by submitting their application forms;
20. Learned counsel maintained that; the trial court's ruling went to a great length to analyze the evidence adduced and the legal issues that arose; the appellant has not raised any grounds to show that the trial court erred; no factual issues have been highlighted and, perusal of the appellant's submissions show no new basis to disturb the ruling.
21. Counsel urged this court to be persuaded by the decision of the Ugandan High Court Case High Court Criminal Session Case No 0003 of 2014; *Uganda v Patricia Ojangole* where the court held that it was not necessary for the accused in that case to have disclosed interest on a matter that was within the common knowledge of the board.
22. The court was further referred to the holding in the case of *John Kimemia Gitau v Unilever Tea Kenya Limited* [2013] eKLR and *Philomena Mbete Mwilu v DPP & 3 Others* [2018] Eklr where both courts held that where all persons are involved in decision making and they are interested parties, the issue of disclosure does not arise e.g in instances where Tender process is open to all staff like it was in the case of *John Kimemia* (supra).
23. Finally, counsel urged this court to dismiss the appeal as filed by the appellants and reaffirm the decision of the learned magistrate.

The 6th Respondent's submissions

24. The 6th respondent then a chief estates officer at NHC and member of HAC filed his submissions on May 14, 2020 through the firm of Kiptness and Odhiambo Advocates who raised two issues



- for determination as follows; whether the prosecution made out a *prima facie* case against the 6th respondent and, whether the evidence on record disclosed the offence of abuse of office contrary to section 46 as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#).
25. On whether the appellant established a *prima facie* case, learned counsel submitted that its now well settled law that a court has to be satisfied that a *prima facie* case has been made out before it can put the accused on their defence and when a *prima facie* case is not made out the court must of necessity acquit. Reliance was placed on the cases of *R T Bhatt v Republic* [1957] EA 332- 334 & 335, [May v O'Sullivan](#) [1955] 92 CLR 654 and [Republic v Prazad](#) [1979] 2A CRIM R 45
 26. It was submitted that the appellant did not demonstrate how the 6th respondent abused his office nor conferred benefit unto himself as he did not have power to allocate houses. That the decision of the trial court is well analyzed capturing all relevant issues and therefore this court should uphold the impugned decision.
 27. Mr Odhiambo contended that the 6th respondent did not do any wrong and two board reports BAC and EMU made no recommendations to charge him and the 4th respondent. He further argued that HAC was not a creation of any legal statute or board and therefore did not have a specific criteria or procedure to guide it in its supposed mandate of allocating houses.
 28. It is Mr Odhiambo's view that the evidence adduced by the appellant showed that it was a policy for NHC that 20% of the housing allocations was reserved to staff and the remaining 80% reserved for the public. Counsel asserted that the trial court correctly found that members of the public, staff and their relatives could be allocated houses, provided they met the requirements.
 29. In conclusion, Mr Odhiambo stated that putting the 6th respondent on his defence will amount to filling yawning gaps in the prosecution's case something that courts frown upon. He urged this court to find that the trial court was right in acquitting the 6th respondent under section 210 of the [Criminal Procedure Code](#) and dismiss the appeal herein.

Evidence Before The Trial Court

30. This matter has been brought to this court in exercise of its appellate jurisdiction. This court is duty bound to re-examine, re-evaluate and re-assess and make its own independent conclusion and or determination without losing sight of the fact that the trial court had the benefit of assessing witnesses' demeanour. See *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala Vs R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.
31. The National Housing Corporation is a statutory legal entity which has been established under [cap 117](#) Laws of Kenya with the key mandate of developing housing units for sale either directly or through tenant purchase scheme.



32. As outlined herein above, the six respondents were charged commonly with either the offence of abuse of office or failure to disclose interest to principal by participating in National Housing Corporation HAC meetings to which they were members and subsequently allocated to themselves, their spouses, close relatives or friends the corporation houses without disclosing their interests or that of their relatives or friends.
33. From the record, the said house allocation exercise took place on various dates between 2006 and 2010. The houses fell in different categories or development schemes which were spread across the country as follows;
1. House No A703 Madaraka infill allocated to the 1st respondent (See count 1)
 2. House B3-24 Sector A Langata phase 1 allocated to Wanjiru Wagemu wife to 1st respondent (see count 2)
 3. House No D69-687 Langata phase IV allocated to Ndua Mbugua husband to the 2nd respondent (see count 3)
 4. A-654 Madaraka infill allocated to the 2nd respondent (see count 4)
 5. C 25 Sector A-Kileleshwa allocated to the 2nd respondent (see count 5)
 6. A667 Madaraka house allocated to the 3rd respondent (see count 6)
 7. B1-06 Scheme Kileleshwa allocated to the 3rd respondent (see count 7)
 8. C-674 housing scheme Madaraka infill allocated to the 4th respondent (see count 8)
 9. C-674 Section A Madaraka allocated to 5th respondent (see count 9)
 - 10 Plot K Eldama Ravine allocated to the 5th respondent (see count 10)
 - (11) House Nos 1,2,3 Migori allocated to the 6th respondent (see counts 11 and 12)
 - (12) House Nos 4,5 Migori allocated to Kepha Awino nephew to the 4th respondent (see count 13)
 - (13) C219 Kaleleshwa allocated to the 1st respondent (see count 14&15)
34. It was the prosecution's case that sometime around June to July 2010, an audit was conducted in relation to the sale of the houses constructed in Western and Nyanza which took place in March, 2009. Pw1 Simon Waiyaki Mwangi who was part of the Audit team stated that arising from the said audit, two reports were submitted with recommendations thus revealing serious anomalies bordering on fraud and abuse of office in house allocation (See P Ex.41)
35. The said audit report was subsequently presented to the 1st respondent in his capacity as the managing director and therefore the CEO of the corporation who also escalated it to the NHC board whose membership then included Willson Kipsigei Maina (Pw3), and Grace Nandako Wanyonyi (Pw10) Reginald Okumu (Pw12) Said Athaman (Pw14) and Ps housing representative Tirop Kosgey (13). Out of the five NHC board committees, there was the board audit committee (BAC) whose membership included Pw1 as the chair, Pw3 and Pw4 as members.
36. Having gone through the report, the NHC board directed the BAC to conduct an audit inquiry on Migori scheme and present its findings on house allocation in that scheme for consideration.
37. According to its inquiry, the BAC found out that in Migori scheme, five houses had been allocated to the 4th respondent (Ogolla) and his nephew Kepha Awino with the 4th respondent acquiring house



- No. 1,2 and 3 and Kepha Awino houses No 4 and 5 . According to BAC the houses were not regularly allocated as they were not allocated by HAC. The BAC recommended that the allocation be nullified save for retention of one house for Migori applicants.
38. Having presented its report at the 174 full NHC board meeting (P EX7), the board resolved to nullify allocation of 5 houses to Ogolla (4th respondent) and his nephew. The houses were to be reprocessed and renovated for reselling. They also terminated his employment contract although he later appealed and was retired.
 39. While considering Ogolla's appeal for retirement instead of termination of contract, the board observed that there were flaws and loophole in the house allocation process and therefore directed the audit committee to undertake in depth analysis of house allocation in the corporation and submit a report to the board.
 40. When the audit report (PEX.12) was presented at the 179 NHC board's meeting on March 12, 2012 it emerged that there were serious loopholes in house allocation process. It was further revealed that even board members among them the chairman one Bosire Ogero was a beneficiary of house allocation courtesy of those loopholes.
 41. It was in the said board meeting that a resolution to escalate the issue to KNAO, EMU, PS in charge housing, DPP, EACC was arrived at and that the chairman's appointment be revoked. Further, employment contracts of the 2nd, 3rd and 5th respondents to be terminated as well as that of Pw4. Thereafter, the board's report and that of EMU which were more less the same were forwarded to EACC who swung to action with Pw15 Salat Abdi taking over the investigations through which the respondents were charged.
 42. In his testimony, Pw1 confirmed the findings of the report to that effect. Also, Pw2, Lilian Mwikali an economist, valuer and property manager working as the estate manager of the corporation confirmed that the respondents were appointed to sit as members of the HAC by the 1st respondent in his capacity as the managing director and also its chair.
 43. She stated that, the corporation had staff housing policy which was adopted the year 2005 and the house improvement policy adopted 2010 to improve houses allocated to staff.
 44. The witness confirmed receiving house allocation letters to the respondents. That she released allocation letter to the 1st respondent on May 16, 2020 for house No A 703 Madaraka sector A housing scheme. On August 17, 2011 she again released allocation letter to the 1st respondent for house No 703 subject to payment of the full purchase price. The same happened for house No C-219 Kileleshwa housing on May 12, 2011.
 45. She further confirmed releasing various houses' allocation letters to the 2nd, 3rd, and 4th respondents on various dates pursuant to submission of their application forms.
 46. Pw2 also stated that, she received application forms from Kepha Awino for house Iv and V. That she prepared letters for house allocation for the 4th respondent upon introduction from her boss Mr Agutu. That the 5th respondent was also allocated C 174 Madaraka on September 12, 2011.
 47. It was her testimony that it was the policy of NHC that 20% of the houses for sale were reserved for staff and 80% for the members of the public and that they were treated equally by the NHC. At page 59 of the proceedings, she stated that the 4 respondents did not receive any preferential treatment.
 48. Pw3 a member of the board basically corroborated the finding of the board earlier on stated.



49. Pw4 Susan Chepkorir a registry clerk merely stated her role in the registry which included processing house allocation application forms and documentation exercise.
50. Pw5 Erastus Mbaabu Ritangu an accountant with the corporation was in charge of managing rural housing loan applications, open accounts and process records and tax returns. He confirmed that the respondents were allocated the subject houses and that they made payments like anybody else upon presenting their letter of offer. He also corroborated Pw2's testimony that staff were allocated their share of houses to purchase at 20%
51. Pw6 Alexander Eliakim Masika and Pw7 Bernard Lenius Awour both accountants working with NHC corroborated the evidence of Pw5. At page 88 on cross examination by Mr Ngatia, Pw6 stated that there was no requirement for anybody to disclose any interest in the property to be purchased as staff were entitled to 20% houses reserved for them and that there was no preferential treatment. Pw7 stated that he was the one who issued clearance certificates for the houses allocated to the respondents. He further confirmed that they all made the initial deposit of 10%.
52. Pw8 Anthony Thiong'o Human resource officer basically provided employment records for the respondents while Pw9 Ambrose Kimuta a clerical officer was charged with the responsibility for opening files for houses and constructions.
53. Pw10 Grace Nandako Wanyonyi a board member (Director) confirmed that the board did receive an audit report regarding loopholes in the HAC process and that NHC had various policies interalia; staff housing policy, loans policy, housing development policy, estate policy among others. She also confirmed that staff had their own share of the houses due for sale. According to her, there were multiple allocations of houses to individuals while some applicants missed out contrary to rules of equity embraced by the corporation.
54. Pw11 Jemimah Cheptoo a farmer from Eldama Ravine told the court that sometime in 1988, she was allocated a house No 4 Eldama Ravine but it was later repossessed irregularly despite having repaid substantial amount of money.
55. Pw12 Reginald Okumu board director and chair BAC confirmed that the audit report did reveal irregularities in house allocation and that they recommended termination of contract of some staff. He stated that the HAC members had allocated houses to themselves and relatives without declaring their interest.
56. At page 138 of the proceedings, he confirmed that there was no clear policy on house allocation. He further stated that there were gaps with no proper policy on how to make deposits for houses.
57. At page 145, on cross examination by Mr Mwangi, he stated that the corporation had no standard house allocation procedure. He further stated that one was supposed to use his own judgment in case of allocation. He further added that accused bought their houses and that they were not favoured.
58. At page 150, he stated that no staff policy had been breached. At page 151 he said there was no policy barring relatives from being allocated houses.
59. Pw13 one Mr Tirop Kosgey a board member testified that the HAC members did not declare their interest when allocating houses in which they had interest. He also confirmed that the board had recommended sacking of the accused for benefitting from house allocation without declaring their interest.
60. Pw 14 Athman Said a member of the board corroborated the evidence of Pw12 and Pw13.



61. Pw15 basically recorded the complaint, investigated the same and recommended the charges purely on account of abuse of office and failure to declare their private interest to their principal

Analysis and Determination

62. I have carefully considered the grounds of appeal herein against the lower court proceedings and the impugned ruling thereof. I have also considered written submissions by parties' respective counsel. Although the appellant raised six grounds of appeal, the same were during the hearing collapsed into three main grounds as follows; Whether the appellants established a *prima facie* case against the respondents; Whether the respondents used their office to improperly confer benefit on themselves or anyone else; Whether there was an agent and principal relationship between NHC and the six respondents
63. Despite the appellant's submission on the three grounds separately, there is clearly one main ground of appeal bordering on whether the prosecution had established a *prima facie* case based on the evidence presented before court to warrant the respondents being put on their defence. It is the appellant's case that the prosecution had proved a *prima facie* case against the respondents who ought not to have been acquitted but placed on their defence on the charges leveled against them. Under section 210 of the *Criminal Procedure Code*, upon close of the evidence in support of a charge and upon a court considering submissions of the prosecution and the defence, if it appears to the court that a case has not sufficiently been made to require an accused person put on his defence, the court is duty bound to dismiss the charge and forthwith acquit the accused
64. There is no precise definition or parameters set out specifically to pick out on what a *prima facie* case is. It all depends on the individual trial court's independent judgment depending on the evidence presented before it bearing in mind the attainment of substantive justice. Where a case on the face of it or manifestly does not disclose reasonable evidence with a possibility of a conviction should the accused be put on his defence, a court will not waste its time to seek an accused person tender his defence for that will amount to assisting the prosecution fill in possible gaps left hanging during prosecution evidence.
65. A *prima facie* case is defined in the *Black's Law Dictionary* 9th Edition at pg 1310 as:
- “ 1. The establishment of a legally required rebuttable presumption.
 2. A party's production of enough evidence to allow the fact- trier to infer the fact at issue and rule in the party's favour.
66. There is however sufficient case law with guidelines on what entails a *prima facie* case. In the case of *Ramanlal T Bhatt v Republic* [supra] relied on by all the parties herein, the court established the applicable standards in a *prima facie* case by stating as follows: -
- “ ...
 - (i) The onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.
 - (ii) The question whether there is a case to answer cannot depend only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.



- (iii) The judge hearing the case stated misdirected himself on the law when considering the question whether a *prima facie* case is made out, and, as it could not be said that the magistrate at the resumed trial would necessarily have reached the conclusion he did, had he not been influenced by this misdirection, it was not safe to allow the conviction on the first count to stand. Appeal allowed on first count...”

67. It is clear therefore that a *prima facie* case does not require proof of the charges beyond reasonable doubt. The court’s duty is to determine whether a reasonable court could possibly convict an accused based on the evidence laid by the prosecution if no explanation was tendered by the respondent. See [R vs Charles Kimani Mbugua](#) 2017 eKLR, Nyakundi J stated: -

“...the most important constitutional principle to bear in mind is the right of an accused person not to be forced into assisting his or her prosecution. It therefore means that before a court makes a finding on *prima facie*, the prosecution is under a legal duty to establish that there is a case to compel the accused to answer. My understanding of a *prima facie* case is not one where this court has to decide the accused innocence or guilt, but to review the evidence and consider whether the prosecution has put up a case and materials to the extent to fairly call the accused to defend himself...”

68. Therefore, to find an accused person liable to tender his or her defence in a criminal trial is not a mechanical process but an exercise governed by sound legal principles which must be satisfied first by the prosecution. The requirement to establish a *prima facie* case is intended at sieving serious and sound criminal case litigation worth going to the next stage against prosecution based on other ulterior motives or generally undeserving preferment of charges without due regard to the applicable law and sufficient evidence to sustain a case at least to the level of a *prima facie* case.

69. The gist of the charges herein was that the respondents herein by virtue of being senior employees of NHC and sitting in the Corporation’s housing allocation committee (HAC) allotted to themselves and or their relatives houses without disclosing their interest or relatives’ interests in the houses subject of sale. There is no dispute that at the material time the respondents were employees of the NHC holding senior positions.

70. It is also an admitted fact that, during the material time, the respondents were either themselves or their relatives allocated NHC houses as listed against them in their respective counts in the charge sheet which were built by the corporation for purposes of sale. Further, it is an admitted fact that during the material time, the 1st respondent then the corporation’s managing director was a member and chair of the HAC together with the 2nd to the 6th respondent whom he personally appointed to be members.

71. The question is, did they confer any benefit/s to themselves? Were they under duty to disclose their private interest in the houses to the HAC to which they were members? For the trial court to make a finding on a case to answer, it had to look at the evidence produced by the appellants vis a vis the charges that were presented under section 42 (1) and 46 of the [Anti-Corruption and Economic Crimes Act](#) No 3 of 2003.



72. Before I endeavor to examine on whether the conduct of the respondents amounted to abuse of office, it is important to reproduce the relevant section alleged to have been breached. section 46 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003 which provides for abuse of office states as follows: -
- A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.
73. The appellants were under obligation to establish that; the Respondents were employees of the NHC; Used their office or position to confer a benefit; the benefit was conferred to self or someone else; the benefit conferred was improper and therefore a abuse of office.
74. As already stated; the respondents were employees of the NHC; they held positions and or offices in the corporation; they were either beneficiaries or their relatives benefited from the allocation of the houses in question.
75. According to the evidence tendered before court, there were various policies in place governing NHC housing scheme. Among such policies were; Staff housing policy and house improvement policy. It was common ground that, under the staff housing policy 20% of the houses were reserved for the staff. This fact was confirmed by PW2, PW3 PW6 and pw12 who stated that 20 % of allocation of the houses were available under the staff policy and there was nothing barring the staff members from applying for houses. PW3 during cross exam by Mr Ngatia stated that members of staff had a right to apply like any other person and that there was nothing wrong in a relative applying for a house. He stated that he was further aware that there was nothing barring a wife, sister, cousin etc of a male employee from applying for a house.
76. PW5 during cross examination by Mr Oonge testified that he owns more than one house developed and bought from NHC. He stated that the forms to be completed by staff and members of the public are the same ones normally addressed to the Managing Director NHC. According to him, he was not aware of any policy that prohibited a member of the staff from owning more than one house in a Scheme.
77. On cross-examination by Mr Ngatia, pw6 also stated that houses that were meant for staff did not end up going to staff. He stated that various persons benefited from the housing schemes including board members, members of staff and the public. He also stated that he was not aware of any policy that barred a member of HAC from applying for a house or applying for more than one unit.
78. There is no doubt from the evidence on record that the appellant did not submit evidence to show that the respondents were estopped from applying and owning more than one house in a scheme. The witnesses before the trial court stated that they were not aware of anything stopping the Respondents as the members HAC or their relatives from applying for houses and that they could be entitled to more than one unit.
79. The respondents were constantly accused of allotting themselves houses while the evidence shows as members of staff of NHC they were entitled to purchase the houses like any other person at the approved prices which they did.
80. Save for the Migori scheme and Eldama Ravine which was said not to be under the staff housing scheme, the rest of the houses which forms the subject of the proceedings herein were. It is worth noting that the HAC was an adhoc committee created by the MD the 1st respondent herein using delegated authority by the board. It was definitely not operating secretly. It was not an individual person's affair.



81. According to the evidence of pw2, all the respondents did apply for the houses allocated to them. They followed due process that is; submitting their application forms; paying 10% deposit, receiving offer letter and finally accepting and paying the full amount like any other ordinary person. Nobody is alleging non-payment by the respondents. Equally, nobody is claiming that the corporation suffered loss as a result of the impugned transactions.
82. Pw2 confirmed receiving application forms from all the respondents. Pw5 also admitted issuing allocation letters to the respondents. On his part pw7 confirmed issuing clearance letters to the respondents implying that they complied with all the requirements for house allocation. Who was supposed to allocate houses for the corporation if all committee members were to step aside?
83. As correctly stated by the investigating officer and indeed by the members of the Audit committee, the House committee had no clearly spelt out rules and regulatory procedures governing its operations. It is no wonder pw12 stated that;
- “we did not find any allocation procedure. There was no documented allocation procedure before the ISO procedures. One would say the accused used their best judgment until then”
84. What act of impropriety did they commit by doing what was the norm or ordinary thing to do then in the circumstances? Where an organization has internal procedures governing certain acts which by virtue of long usage or practice have acquired the force of law as a custom, one cannot claim that that practice is illegal as long as the organization does not suffer any prejudice in the circumstances. There was no intention or *mens rea* established on the part of the accused that they intended to commit an offence. This is a critical and key ingredient which must be proved in a criminal case. See the case of *Singh Mandia v Republic 1966 EA 315* where it was held that in criminal law, in criminal charges, intention or relevant motive must be proved.
85. On the other hand, there was legitimate expectation that, as staff members, they were entitled to a certain percentage of the houses floated for sale as long as they fulfilled necessary conditions like anybody else. They genuinely believed they were discharging properly their official duties which was routine. Was there intent to improperly confer a benefit upon themselves or their relatives? Did any member of staff complain of having been denied an opportunity to buy a house as a result of the respondents' purchasing one or more than one house? From the evidence there is none.
86. As regards Migori housing scheme which was not under the staff housing scheme which Ogolla allegedly benefitted from, the same were advertised and no successful applicant came up. Without further re-advertisement as required of the HAC, he submitted an application which was properly processed by the HAC. However, the board nullified the allocation and retired him. For purposes of section 46 of [ACECA](#), he did not confer benefit upon himself as no benefit passed as envisaged under section 46. In any event, he did apply for the houses but never benefitted. As regards Eldama Ravine house, the beneficiary (pw11) failed to pay in full even after being accorded an opportunity. The house was properly seized and disposed of.
87. I do not agree with the claim that the trial court did not consider the evidence by the prosecution. I am in agreement with the trial court's conclusion and finding that;
- “my conclusion from this evidence is as follows; to the extent that members of the HAC were also employees of NHC, they were perfectly entitled to apply for, and be allocated a house by the HAC, under their 20% reserved staff quota.



Secondly, their relatives were not barred from similarly applying to the same HAC, under the 80% public quota, as members of the public”

88. Having re-evaluated the evidence on record, I am satisfied that the trial court properly analyzed the evidence against the applicable law and counsel’s submissions and arrived at a proper conclusion that the prosecution had failed to establish a *prima facie* case on charges of abuse of office c/s 46 of [ACECA](#) against the respondents hence the trial court properly directed its mind by acquitting them under section 210 of the Criminal Procedure Code.

Whether there was an agent and principal relationship between NHC and the 1st -6th Respondents

89. The appellant states that there was an agent and principal relationship between NHC and the respondents and that the respondents had a duty to disclose a private interest to NHC. The appellants stated that the same was not done contrary to section 42(1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003 which provides:-

Conflict of Interest

1. If an agent has direct or indirect private interest in a decision that his principal is to make the agent is guilty of an offence if-
 - a. the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest; and
 - b. the agent votes or participates in the proceedings of his principal in relation to the decision.
 2. A private body may authorize its agent to vote or participate in the proceedings of the private body and the voting or participation of an agent as so authorized is not a contravention of subsection (1).
 3. An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.
 4. Subsection (3) does not apply with respect to an employment contract of the agent, or a related or similar contract or agreement or to any prescribed contract, agreement or investment.
90. Who is an agent and who is a principal? Section 38 of [ACECA](#) defines an agent and principal as
- (1) in this part-
- “agent is a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;
- “principal” a person, whether in the public or private sector, who employs an agent or on whom or on whose behalf an agent acts”
91. It was incumbent upon the prosecution to prove that indeed the respondents were agents to the NHC as their principal and that they acted on behalf of their principal in decision making but failed to disclose their private interest. In the instant case, the respondents are accused of participating in the HAC meetings in which meetings houses were allocated to them and or their relatives.



92. Were there requirements for disclosure of one's private interest? M/s Sigei for the appellant argued that the respondents were duty bound to disclose. On the other hand, counsel for the respondents argued that, one can not disclose to the principal that that the principal is already aware of. Almost all prosecution witnesses stated that as staff members, they were entitled to 20% staff quarter and that this was documented in the staff housing policy. Further, the applications were submitted to the employer through the HAC. To that extent, the employer was all along aware of the agent's private interest and even made provision in advance. The employer cum principal cannot purport to plead innocence. One cannot therefore be required to disclose to the principal what the principal has promised to dispense or pass to the agent.
93. The only problem one can discern from the whole scenerio is that there were no clear systems or procedure setting out rules within which the staff were supposed to play their role. This was admitted by the NHC Audit committee, investigating officer and the board thus necessitating ISO compliant procedures which came to force 2011 much later after the house allocations subject of this case had already been undertaken.
94. PW1 was part of the team that did an audit report which was presented to the board audit committee and the findings were that there were irregular allocations of houses by the 1st -6th respondents as HAC members.
95. PW12 stated that the HAC was not a creation of the board of NHC. A further a look at the board audit report at page 34 states that the HAC was not accountable to the Board. It is contradictory for the appellant to state that the 1st -6th respondents owed NHC a duty to declare an interest in the houses and yet they did not answer to the NHC board.
96. Nonetheless, the evidence before court shows that all the houses that were deemed to have been acquired irregularly in Migori were reclaimed and the 2nd -6th respondents were fired with the 4th respondent appealing and opting for a retirement.
97. It should also be noted that several witnesses PW2, PW3 and PW6 established that 20 % of allocation of the houses were available for staff to purchase and further PW5 and PW6 stated that there was nothing precluding the staff members from participating in the 80% share that was left for the public.
98. This court agrees with the trial court's analysis on conflict of interest using the Ugandan High Court (Anti Corruption Division) Case *Uganda v Patricia Ojangole* Criminal Session Case No 0003 of 2014 (Gidudu. J) in which the court stated: -

“..The above provision makes disclosure meaningful and not a mere formality as the prosecution seems to suggest. To disclose is to reveal what was previously not known to the other party. The duty should arise where the other party has no knowledge of what is concealed. The crime is committed when the other party acts innocently only to discover later that an interest has been concealed and a party has gained from that concealment ...

The prosecution adduced evidence of PW1, PW2 and PW5 to the effect that the board had already made known to all staff that they should apply for substantive appointments if they qualify. Now the prosecution has asked me to fault the accused for failing to disclose to people like PW2 and PW5, who were the authors of the information. With respect, if this was the intention of the law, it is ridiculous. Disclosure is an English word which does not mean mere formality (Sic) but conveying information unknown to the recipient...”

...It would be clumsy for the law to merely criminalize a person for holding a position of influence. The person can only be guilty if evidence is adduced to prove that the person used



that position to influence the outcome of a decision. As I observed earlier on, the existence of a conflict of interest does not by itself amount to a crime. That would be absurd because not every situation of conflict is created by the person charged. It only becomes an offence if a person tries or indeed succeeds in influencing the outcome of a decision for personal benefit...”

99. It is true that the NHC board was aware that members of staff including the respondents were entitled to allocation of a house under the 20% quarter provided for in the estate development policy and various witnesses told the court that nothing stopped the respondents as members of the staff from applying for the 80%. It then goes without saying that one need not disclose that which the principal has already declared and determined or pre-set aside as belonging to the employee in this case the agent and by extension the respondents. If the respondents were to step aside, it means there could be no house allocation committee in place.
100. It was also clear through prosecution evidence that the NHC had in existence a lot of loopholes which if keenly looked at, created conflict of interest for the 1st -6th respondents who were interested in houses but had to still apply through the same process as fellow members of staff and public. PW1 in his testimony stated that none of the polices present at NHC prevented 1st -6th respondents from applying and paying for the houses.
101. It is thus important to note that the respondents are not creators of the conflict of interest and as stated in *Uganda v Patricia Ojangole* (supra) it will be absurd for this court to punish the respondents. The onus was purely on the Appellant to prove to the trial court and this court the private interest they were referring to that the NHC as the principal was unaware of that required its agents the 1st -6th respondents to reveal or disclose.
102. Having analyzed the evidence in respect of all the counts that the respondents were charged with and further having considered counsel’s submissions, it is my finding that the prosecution did not present a *prima facie* case against the respondents before the trial court to warrant this court set aside the decision of the hon Magistrate in acquitting the respondents under section 210 of the *Criminal Procedure Code* for lack of case to answer. It will be futile and a miscarriage of justice to put the respondents on their defence based on the available evidence.
103. Having held as above, the end result is that the appeal lacks merit and the same is dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH APRIL, 2021.

.....
J. N. ONYIEGO

JUDGE

