



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI, J

ACEC APPEAL NO.5 OF 2020

ANTHONY JUMA OPONDO.....1ST APPELLANT

PAUL MARTIN SAO2ND APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(Being an appeal from the conviction and sentence in Milimani Chief Magistrate’s Anti Corruption Court Case No. 10 of 2019 (Hon. E. Juma, (CM) dated 27th January 2020)

JUDGMENT

1. The appellants were charged in Nairobi Chief Magistrate’s Anti- Corruption Court Case No 10 of 2019 with offences under the Bribery Act and the Anti-corruption and Economic Crimes Act (ACECA).
2. At count I, the appellants were charged with the offence of receiving a bribe contrary to section 6(1) (a) of the Bribery Act as read with section 18(1) and (2) thereof. The particulars of the offence were that on the 27th day of April 2017 at Uganda House in Nairobi City County within the Republic of Kenya, being persons employed by the Ethics and Anti- Corruption Commission (EACC) as Legal Officer II and Operation Assistant II respectively, they requested for a financial advantage amounting to Kshs 15 million from the complainant, Dennis Mumbo of Mwananchi Credit Limited through his lawyer, Albert Kuloba, with intent that, in consequence, they would compromise a purported tax evasion investigation involving the said Mwananchi Credit Ltd.
3. At count II, the appellants were charged with the offence of conspiracy to commit a corruption offence contrary to section 47A (3) as read with section 48(1) of ACECA. The particulars of the offence were that on the same date and place and in their respective capacities as in count I, they conspired to commit a corruption offence namely bribery by requesting for a bribe from the said complainant through one Albert Kuloba to compromise a purported investigation on tax evasion against the said Mwananchi Credit Ltd.
4. The appellants were separately charged at count III and IV with the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA. The particulars of the offence were that on the same date and time as in count I and II, they used their respective offices with intent to improperly confer on themselves a benefit of Kshs 15 million from the complainant through one Albert Kuloba so as to compromise a purported investigation on tax evasion against the said Mwananchi Credit Ltd, a matter related to the affairs of the said public body.
5. They pleaded not guilty to the offences and after a full trial, they were acquitted of the charges in count I and II. However, they were convicted on the charge of abuse of office as charged in count III and IV respectively. They were each sentenced to a fine of Kshs 1 million and in default to a term of imprisonment for 10 years.
6. Dissatisfied with both the conviction and sentence, the appellants have preferred the present appeal in which they raise the following grounds of appeal.

1. That the Learned Trial Magistrate erred in law and in fact in convicting the appellants in count 3 and 4 for the offence of abuse of office when there was no sufficient evidence to prove the charges.

2. That the Learned Trial Magistrate erred in law and in fact in convicting the appellants when the crucial ingredients of the offence of “abuse of office” were never established and the prosecution did not discharge their duty to prove the case beyond the standard

required.

3. That the Learned Trial Magistrate erred in law and in fact in convicting the appellants in count 3 and 4 when the weight of the evidence did not support the conviction at all.

4. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the evidence on record did not satisfy the ingredients of abuse of office charge.

5. That the Learned Trial magistrate erred and misdirected herself and relied on facts not adduced in evidence and thus arrived at a wrong decision.

6. That the Learned Trial Magistrate misdirected herself in relying on “internal procedural breach” as opposed to the specific breach of the law as stipulated under section 46 of the ACECA hence arrived at a wrong decision thereof.

7. That the Learned Trial Magistrate, despite holding that the appellants never used their offices to confer any benefit on themselves, erred in law and in fact in failing to appreciate that conferment of benefit is the main ingredient of a charge of abuse of office as stipulated in law.

8. That the Learned Trial Magistrate erred in fact and in law by sentencing the Applicants herein to suffer the maximum punishment yet they were first time offenders (and) never breached section 46 of the ACECA to warrant such harsh punishment.

9. That the Learned Magistrate erred in fact and in law by failing to recognize that the charge sheet was fatally defective as a consequence of duplicity of the charges.

7. The appellants asked the court to quash their conviction on count III and IV, set aside the sentence and direct that the fine paid by the 1st appellant be refunded to him.

8. As this is a first appeal, I am under a duty to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses which the trial court had the advantage of doing- see **Okeno v Republic (1972) EA 32**.

9. The prosecution case was presented through 16 witnesses. Dennis Mumbo (PW1) was a Director of Mwananchi Credit Limited, a private company engaged in the business of money lending. On 20th April 2017, he received a call from his lawyer, Albert Kuloba (PW10) who informed him that he had received a call from his police friend, Peter Orwa (PW5), informing him that his company was being investigated for tax evasion.

10. Later that afternoon, PW1 received a call from Kuloba informing him that he had received a call from Mr. Sao of EACC (the 2nd appellant) who had introduced himself as the main investigator. Mr. Sao had requested to meet Kuloba on 27th April 2017. Mr. Kuloba met with Sao and one Juma (the 1st appellant) at the EACC offices. Mr. Sao and his colleague produced a file which they claimed contained the results of their investigation and informed him that the file was ready for prosecution. PW1's lawyer asked to see the file or a charge sheet but was told that more details could be discussed outside EACC.

11. On the same day, the appellants called PW1's lawyer, PW10, and they agreed to meet at a restaurant in Uganda House. At the restaurant, the appellants informed PW10 that PW1's company had tax arrears of up to Kshs 280 million. According to PW1, Mr Sao asked the lawyer for Kshs 1.5 million to drop the charge.

12. PW1 had asked a police officer he knew, one Munga Nyale who was with the Anti-Terrorism Police Unit (ATPU), to investigate if there was such a case. Munga Nyale gave PW1 the number of one Pascal Mweu (PW7) at the EACC whom he spoke to and the said Mweu advised him to go to the EACC. He also received a call on 28th April 2017 from an EACC officer, Jane Gikunje, who asked him to go to EACC to record a statement. In cross examination, he stated that he had never met the appellants. He had been told about the investigation by his lawyer, Kuloba. His lawyer had met the 2nd appellant at Uganda House. He had gone to EACC on 2nd May 2017 and found that there was no demand or investigation against his company. There was no demand from KRA and EACC was not investigating his company.

13. Victor Omondi Otero (PW2) worked with EACC. His duty was to usher visitors to the office and register vehicles and visitors. He would take the name and identity card number of the visitors to EACC. He had been called by Rogers Akaki (PW16) on 17th May 2017 to record a statement about two visitors who had gone to see the 2nd appellant. He could recall the visitors as their names were in the visitors' book. He produced the original register in court which showed that Mr. Orwa (PW5) had visited EACC on 27th April 2017 and was issued with card no. 2007 and a Mr. Simiyu with card no. 2001.

14. Jacob Lula Matayo PW3, an office assistant at EACC, had been asked by the 2nd appellant to open the door to the office of the Deputy Director in charge of investigations, Mr. Waihenya (PW15). The 2nd appellant had asked him to open the office for the 1st appellant as he wanted to record a statement from a client. He had done so, and had later closed the office.

15. Lucas Chepkemioi Cheprugar (PW4) a Senior Manager in charge of Corporate Compliance at KRA had been asked by Rogers Akaki from EACC about compliance information on Mwananchi Credit Ltd, PW1's company. He provided the information which showed that the company had complied with its obligations and there were no tax evasion charges against it. It was not under investigation either by KRA or EACC which work closely together.

16. Peter Orwa (PW5), a DCI officer attached to Kenya Broadcasting Corporation had been informed by Albert Kuloba (PW10) that his client was having problems with EACC. On 20th April 2017, Kuloba, who was a friend, requested him to accompany him to EACC on 27th April 2017. They went together to EACC and Kuloba requested to see a Mr. Opondo. They were met by the 2nd appellant who took them to Mr. Opondo. Mr. Opondo showed them some documents. He identified the appellants as the officers he had met with Kuloba at EACC. He did not listen to the conversation between Kuloba and the appellants.
17. PW6, Stephen Oduor Manyalla, was attached to DCI, Serious Crimes Unit, but had previously been at EACC. On 28th April 2017, he had seen his friend Mumbo (PW1), at Savannah Restaurant. Mumbo had informed him that officers from EACC had been calling him about an investigation into tax evasion. The EACC officers had requested his lawyer to facilitate payment of a bribe of Kshs 1.5 million for them to drop the investigation.
18. PW6 had called the 2nd appellant who was his colleague at EACC and had asked him if he was handling such a case. The 2nd appellant confirmed that they were handling such a case, that the investigation was on course, and that PW6 should not interfere. The 2nd appellant later joined PW6 at Savannah Hotel and confirmed that there was such a case against PW1 which he was investigating.
19. Pascal Mweu (PW7) the Acting Deputy Director, Investigations, was heading the Forensic Investigations Division at the time of the incident. The appellants, who worked at the EACC, were not in his division. On 28th April 2017, he was called by Munga Nyale, an ATPU officer, and informed that he had concerns about unethical conduct by EACC officers who were demanding a bribe from a person know to him. Nyale asked him if EACC was investigating a case of tax evasion. He gave PW7 the name of the 2nd appellant as the investigator. On inquiring from Livingstone Waihenya (PW15) Waihenya confirmed that the 2nd appellant was attached to the division but Waihenya was not aware of any investigations relating to tax evasion. Later Waihenya called him and told him that the 1st appellant was investigating the matter.
20. Mr Wagwe (Wagwe Waudo), who was in charge of civil litigation at EACC, informed him that no matter had been forwarded to the 1st appellant to investigate allegations of tax evasion. According to PW7, the 1st appellant was working at the Legal Department which does not conduct investigations. PW7 therefore told Mr. Munga Nyale to tell PW1 to report to EACC on 2nd May 2017 to lodge a formal complaint. PW1 went to the EACC, was referred to Abdi Mohammed who, after listening to him, directed him to register the complaint at the EACC Report and Data Centre.
21. According to PW7, Rogers Akaki (PW16) was instructed to investigate the complaint by PW1. His testimony was that only approved officers investigate matters, and investigations are assigned by the Director, Investigations. In this case, the matter had not been assigned to any officer. The matter was being conducted by the appellants outside the framework set by the EACC, under which matters are discussed at the committee level and then assigned by the Director. PW7 confirmed in cross-examination that an investigator can receive a complaint from anyone but not to act upon. Both the appellants had letters from the Chief Executive Officer of EACC approving them as investigators.
22. PW7 also confirmed that the 1st appellant had lodged a complaint at the EACC Data Centre on 2nd May 2017 that Mwananchi Credit Ltd. makes a profit of Kshs 800 million. The complaint was lodged on the same day that PW1 had lodged his complaint. In re-examination he stated that the appellants were investigators but could not carry out investigations before the case was assigned to them. Further, EACC did not commence investigations on an intelligence report, but that such report must go through the Intelligence Department for analysis before they are investigated.
23. The evidence of PW8, Edwin Wagwe Waudo, formerly an Assistant Director, Civil Litigation at the EACC, was that the 1st appellant was a member of his team. He had not assigned him any duties to carry out investigations. His department was not involved in investigations unless an investigator needed a legal opinion. In his time, no investigating officer had requested for legal assistance in the investigation and he did not assign the 1st appellant any matter for investigations.
24. PW9, Joseph Wachira, an investigator with EACC, had on 26th April 2017 been requested by Waihenya (PW15) to go with the 2nd appellant to City Hall on official duty. On 27th April 2017, the 2nd appellant and PW9 agreed to go to City Hall at 10.30 a.m. On the way out, the 2nd appellant said he wanted to see a Legal Officer and asked PW9 to see if the vehicle to take them to City hall was ready. The 2nd appellant then came to the reception and informed PW9 that he would be assisted in the assignment by the 1st appellant and he asked P9 to go back to his office, which he did. He stated in cross examination that he and the 2nd appellant had been given an assignment by Mr. Waihenya in which he was to assist the 2nd appellant. He reported to a Mr. Musyi that the 2nd appellant had gone for the assignment with someone else. In re-examination, he stated that he could not go for the assignment as the 1st and 2nd appellants were using a private vehicle.
25. Albert Simiyu Kuloba (PW10) was the lawyer for Mwananchi Credit Ltd. in which PW1 was the Managing Director. He had been called by his friend Orwa (PW5) on 20th April 2017 and informed that he had received information that Mwananchi Credit Ltd was being investigated for tax evasion. He had informed PW1 who asked him to find out what the issue being investigated by EACC was. On 27th April 2017, PW10 went to EACC where he met the appellants who told him that his client was being investigated for tax evasion as he had arrears of Kshs 280 million. They told him that to regularize, his client had to pay Kshs 15 million 'for starters'. PW10 informed his client the position.
26. In cross-examination, PW10 stated that it was PW5 who told him about the investigations, not vice versa. He had been with PW5 but he went to the EACC office alone. He had been told that his client was in arrears of Kshs 280 million but need to pay Ksh 15 million to KRA to regularize, which he thought was the amount needed to settle the alleged arrears. His assumption was that the Kshs 15 million was to be paid to KRA. He had met the appellants near Uganda House on 27th April 2017 and they told him how his client could regularize the position.
27. PW10 further stated that PW1 could have misunderstood the position and the Kshs 15 million was not a bribe sought from him. He had

met the appellants at EACC and later they came back to him, which is when they met at Uganda House. He denied that the appellants had solicited a bribe from his client through him. They had not said that it was a bribe but had called it a payment for regularizing. His evidence on re-examination was that the appellants told him the Kshs 15 million could regularize.

28. Simon Kiptoo (PW11), a data analyst from Safaricom, produced a report on data information from the mobile numbers of PW5, PW10 and the appellants. He had not analysed the data as he had not been requested to do so.

29. PW12, Juma Mbiti Wanyenje, an investigator with EACC and a Deputy to Rogers Akaki who was in charge of operations, had authorized the 2nd appellant and Joseph Wachira (PW9) to go on an assignment to City Hall. He later found out that the 2nd appellant had asked Wachira not to go as he would be going with someone from the Legal Department. The 2nd appellant later informed PW12 that he did not go with PW9 due to a transport hitch, and a Legal Officer who was going in the same direction had given him a lift. He did not tell PW12 the name of the Legal Officer.

30. PW13, Elizabeth Mumasi Ngerese, was a report analyst at EACC. She had received a report from the 1st appellant that Mwananchi Credit Ltd was evading tax yet it had an annual income of Kshs 800 million. The report was dated 2nd May 2017. Half an hour later, she received a complaint from PW1 that some EACC officers were requesting a bribe of Kshs 15 million and that the officers were the appellants. She denied in cross examination that she was being used to frame the appellants.

31. Tom Amolo, (PW14), an Assistant Director at EACC, had received the report from PW1 before the complaint from the 1st appellant. He had taken both reports to Rogers Akaki (PW16) who headed operations. He stated that the 1st appellant, an EACC officer, did not follow the process for filing complaints which was through a memo through his supervisor which would then go to the Data Centre.

32. Livingstone Waihenya (PW15) the Deputy Director in charge of investigations had, on 26th April 2017, requested the 2nd appellant and PW9 to go to City Hall to follow up on some documents that were needed in court in May. He had then left for Nakuru. When he returned to Nairobi, he was informed by PW9 that the 2nd appellant had been given a lift to City Hall by the 1st appellant. He had later received a call from PW7 regarding an investigation of a tax evasion complaint against Mwananchi Credit Ltd. When he asked the 2nd appellant, he said that he was not aware of the KRA Mwananchi Credit Ltd tax evasion investigation. Later, however the 2nd appellant texted to say that the 1st appellant had received documents from an informer touching on Mwananchi Credit Ltd tax evasion.

33. In cross examination, PW15 explained the manner of handling complaints, which is that all complaints must all be registered at the Data Centre, a preliminary investigation conducted to *inter alia*, ascertain whether it was within the EACC mandate, then the complaint is forwarded to the senior officers to direct on the way forward.

34. The final prosecution witness, Rogers Akaki (PW16) Assistant Director, Operations had received a public report from the Report and Data Centre that two EACC officers had solicited a bribe of Kshs 15 million to terminate an investigation they were carrying out against Mwananchi Credit Ltd on tax evasion. He also received the report made by the 1st appellant on the alleged tax evasion complaint. He recorded the statement of PW1 which was to the effect that the appellants had summoned him through his lawyer, PW10, alleging that they had finalized an investigation on tax evasion. PW16 substantially summarized the evidence as it emerged from the other prosecution witnesses. He confirmed that PW5 and PW10 had visited EACC on 27th April 2017 and met the appellants. They had met in PW15's office with an informer from KRA. The informer was not registered at the EACC offices.

35. PW16 had examined the call data of the appellants. The 2nd appellant had called PW5 on 19th April 2017, and PW5 had called PW10 on 20th April 2017. He had also noted several conversations between the 1st appellant and PW5, as well as between the 2nd appellant and PW 5 on 27th April 2017.

36. The appellants had met PW10 outside Uganda House at about midday on 27th April 2017. According to PW16, though the 1st appellant had a letter of appointment as an investigator, his role was to file civil suits for recovery of assets. Tax evasion was a criminal offence outside the job description of the 1st appellant.

37. PW16 confirmed that the 2nd appellant was an investigator. However, investigations were distributed by a standing committee. The appellants had commenced investigations without going through the Data Report Centre or their supervisors. PW16 stated that the 1st appellant lodged a complaint as an afterthought after PW1 had lodged his, and the documents attached to the complaint by the 1st appellant were not from KRA.

38. When placed on their defence, both appellants gave sworn evidence. The 1st appellant stated that he was appointed an investigator by EACC. He thus had the powers of a police officer to investigate matters assigned to him. He had received a dossier from an informer that Mwananchi Credit Ltd was evading tax. He had gone to consult both PW15 and PW16 but they were not available. He met the 2nd appellant and upon sharing the information, the 2nd appellant said they needed to do preliminary investigations before reporting the matter. After the preliminary investigations, he eventually decided to lodge the complaint with EACC Data and Report Centre, which he did. He had never met PW1 but confirmed meeting PW10 on 27th April 2017. He denied going to Uganda House or calling PW1 or his lawyer. He had called the 2nd appellant and PW5 to help him trace a lost phone. He had been victimized for touching the wrong case. In cross-examination, he confirmed that he did not inform his supervisor, PW8, or any of his bosses about the tax evasion case as he did not find them in the office from 26th April 2017 to 27th April 2017. He confirmed he met PW5 and PW10, with his informer, at the EACC offices. He had reported the issue to EACC Report and Data Centre on 2nd May 2017.

39. The 2nd appellant also gave sworn evidence. He was a police officer serving at Moyale at the time of the trial. Previously, he had been at

the EACC where he had been seconded from 1st April 2016. He was appointed an investigator on 15th June 2016. On 26th April 2017, he had seen the 1st appellant who told him he was looking for PW15 and PW16 but had not found them. The 1st appellant told him he had documents relating to tax evasion by Mwananchi Credit Ltd. The 2nd appellant had advised him to report the matter at the Report and Data Centre, and also to do preliminary investigations. The 1st appellant told him he had done so, and that he was going to meet PW5 and PW10. The 2nd appellant had taken PW5 and PW10 to the 1st appellant then left. He had not demanded Kshs 15 million from PW1. All he did was show PW5 and PW10 the 1st appellant's office.

40. In cross examination, he stated that his duties were to investigate corruption cases and to plan and execute trap and sting operations. He was, however, not mandated to carry out investigations. One had to be assigned a case before commencing investigations. He was not an investigator in this case and was only involved when the 1st appellant told him he could not find PW15 and PW16. He had seen PW10 but had not told him to regularize by paying Kshs 15 million.

Analysis and Determination

41. I have considered the evidence before the trial court which I have set out above. I have also considered the submissions of the parties. In their submissions, the appellants did not directly address the grounds of appeal set out in their Petition Of Appeal. Instead, they raise three main issues arising from their grounds of appeal, which I will consider and address respectively.

Whether the appellants summoned PW10

42. The appellants ask the court to determine the question whether they summoned PW10, Albert Simiyu Kuloba, as the trial court found. They submit that contrary to the findings by the trial court, the evidence did not show that the appellants summoned the complainant's lawyer to EACC.

43. They note that PW10 did not, anywhere in his evidence, state that he was summoned to EACC either by way of a phone call or any other means. He had visited EACC on 27th April 2017 and gone to the office of the appellants whom he had been told were handling the matter. He had also confirmed in his testimony that there was no phone conversation between him and any of the appellants. According to the appellants, it was PW10 who had called EACC and spoken to the 1st appellant and the 1st appellant informed him that he was the one who was carrying out the investigations. PW10 had then asked if he could go and see him about the investigations. They therefore submit that the trial court erred in finding that PW10 was summoned to EACC, and they urge the court to so find.

44. In response to this argument, the State submits that the appellants were found guilty of the offence of abuse of office by conducting secretive out of the system investigations. It notes that the evidence of PW8, the Assistant Director, Civil Litigation and Asset Recovery at EACC, was that he did not allocate the 1st appellant duties to investigate as this was not within his mandate or the mandate of the Department. It further notes that PW7, the Acting Deputy Director of Investigations, had confirmed that the appellants were never allocated the matter to investigate. That all complaints which require investigation must be tabled before a committee in which he sits, and no investigations can be conducted outside the directive of that committee. While the appellants were investigators, they could not investigate a matter which had not been assigned to them, and investigations do not commence on an intelligent report as the report has to go through the intelligence department for analysis.

45. The State further submits that the evidence of PW10 was that when he got information that Mwananchi Credit Ltd was being investigated for tax evasion, he went to EACC offices where he met the appellants. That they told him the charges they were investigating against his client, and suggested that they meet outside EACC. PW10 had met the appellants outside Uganda House where they told him that he could give them Kshs.15 million to regularize the tax arrears. According to the State, it is therefore immaterial whether or not it was proved that the appellants summoned PW10 to their office. There is evidence that the appellants met PW10 in their office and later outside Uganda House where they asked for the Kshs. 15 million in order to terminate the alleged tax evasion investigations that were ongoing. It is the State's case therefore that the evidence on record proved that the offence the appellants were convicted of was committed.

46. Having considered the first question posed by the appellants for determination and the respective submissions of the parties with respect thereto, I find that I am in agreement with the State that the question is not material to the issue before the trial court. The evidence shows that PW10, in the company of PW5, went to the EACC offices on 27th April 2017. They were let into the premises by PW2. PW3, the office assistant, opened PW15's office on the instructions of the 2nd appellant. PW10 met the appellants in the said office, and according to PW10, they subsequently met at Uganda House, where the appellants allegedly informed PW10 that they could terminate the tax evasion investigations against the complainant and his company. Whether it was PW10 who called the appellants, or the appellants who called PW10 and summoned him to EACC would not make a difference if, at or subsequent to their meeting, the appellants demanded a bribe in order to terminate the investigations against the complainant.

47. It is noteworthy, however, that the analysis of call data done by PW16 shows that the 2nd appellant had called PW5 on 19th April 2017. PW5 had then called PW10 on 20th April 2017, and there were also several phone conversations between the 1st appellant and PW5. The records further indicate that the 2nd appellant also communicated with PW5 on 27th April 2017. From the evidence of PW10, it was PW5 who informed him about the investigations being carried out against his client. Whether directly or indirectly, the evidence indicates that it was the appellants who set in motion the communications that brought PW10 to the EACC on 27th April 2017. As I observed, however, whether the appellants summoned PW10 or he called the 1st appellant is not material in this case.

Whether the charge sheet was defective

48. The second question that the appellants ask the court to address is whether the charge sheet was defective, and in their view, it was. They note that in the particulars of the charges in count III and IV, it is indicated that the appellants used their respective offices "with intent" to

confer to themselves a benefit of Kshs 15 million from the complainant through Albert Kuloba in order to compromise a purported investigation on tax evasion against the complainant. They submit that the inclusion of the phrase “with intent” renders the charge defective as section 46 of ACECA is unequivocal and cannot be read in another way. They submit further that the section criminalises a positive act, not an intention, and the prosecution did not prove even the existence of the intention. It is their submission that the positive act that is an offence is the conferment of a benefit, not the intention to confer a benefit. The appellants refer to the decision of Ong’udi J in **Charles Kizito Wanjala Masinde v Republic[2018] eKLR**.

49. In response, the States cites the provisions of section 134 of the Criminal Procedure Code (CPC) to submit that the charge sheet was not defective as it complied with the provisions of the said section. It further submits that the appellants understood the charges they were facing and actively participated in the trial. They also cross-examined witnesses and presented their defence, and they never raised the issue of the defect in the charge sheet during trial. It is therefore its case that no prejudice or injustice was occasioned to the appellants by the framing of the particulars of the charge sheet, nor was their right to a fair trial under Article 50(2)(b) of the Constitution violated.

50. The State further submits that even though the Kshs 15 million benefit had not been conferred upon the appellants, the court should find that this does not render the charge defective, and the conviction should therefore not be rendered a nullity by this court.

51. I have considered the respective submissions of the parties on this issue. Section 46 of ACECA provides that:

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

52. The appellants have relied on the decision of Ong’udi J in **Charles Kizito Wanjala Masinde v Republic** (supra) in which the court stated:

“32 For an offence to be established under section 46 ACECA it must be shown that:-

(i) The person accused was a state officer occupying a public office within the meaning of Article 260 at the time of commission of the offence.

(ii) The person accused must have used his/her office to confer a benefit and that the nature of the benefit must be disclosed.”

53. Section 134 of the CPC cited by the State that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

54. The State has also relied on the decision of the Court of Appeal in **Criminal Appeal No. 27 of 2018 Benard Ombuna v Republic** in which it was held that:

“The test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with charges preferred against him and as a result, he was not able to put up an appropriate defence.

55. The State urges the court to find that if there was a defect in the particulars of the offence, then the defect is curable under section 382 of the Criminal Procedure Code and uphold the conviction. Section 382 provides that:

Finding or sentence when reversible by reason of error or omission in charge or other proceedings

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

56. The State also asks the court, if it finds that the offence of abuse of office was not proved because the benefit of Kshs 15 million was not conferred on the appellants, to invoke its powers under section 180 of the CPC and find the appellants guilty of an offence under section 47A(1) of ACECA. Section 180 of the CPC provides that:

180. Persons charged with any offence may be convicted of attempt.

When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.

57. It seems to me that in this case, the charge sheet against the appellants was not defective. It set out clearly a statement of the specific

offence or offences with which the appellants were charged, as well as the particulars of the offence with which they were charged. The problem, as I see it, however, is that the particulars of the offence with which the appellants were charged are not offences under the provisions of section 46 of ACECA. As submitted by the appellants, the provision criminalises the “*conferment of a benefit*”, not the ‘intent’ to confer a benefit. This would explain why the penalty for the offence includes a fine of double the benefit that an accused person obtained, or the loss suffered by the public entity in question.

58. From the evidence presented before the court, the appellants are alleged to have had the intention of obtaining a bribe, ostensibly to drop investigations that they were purportedly carrying out against the complainant. The intention of ACECA in section 46 appears to have been to criminalise the act of obtaining a benefit, not the intent to obtain one. Section 47A of ACECA contain the provisions that render the attempt or intent to use one’s office to confer a benefit an offence. It provides as follows:

Attempts, conspiracies, etc.

(1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence.

(2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence.

59. The question is whether the evidence before the court shows, beyond reasonable doubt, that the appellants attempted to obtain a benefit of Kshs 15 million from the complainant. The person who was at the centre of the matter was the lawyer, Albert Kuloba, PW10. He it was who had been contacted by PW5, after the latter had been contacted by the appellants, on the basis that the appellants were investigating a tax evasion case against the complainant’s company. PW10 had informed his client, PW1, about the alleged investigations and the demand for a bribe, and PW1 had ultimately filed a report with the EACC.

60. From the evidence, the appellants met PW10 and PW5 at the EACC offices on 27th April 2017. This emerged from the evidence of PW2, PW3, and PW9. They alleged that they were investigating the allegations of tax evasion, even though none of them had been assigned the case, which did not exist, and in the case of the 1st appellant, he had never been assigned any investigations as he was engaged in civil litigation for civil recoveries, as the evidence of PW8 established.

61. Further, there was a clear internal mechanism for reporting of complains, for intelligence and preliminary investigation, and for assignment of investigators. The appellants appear to have invented a complaint against PW1’s company, assigned it to themselves, started investigating it and, according to the information that PW10 gave to his client, PW1, demanded Kshs 15 million as a bribe. It was only after the complainant had reported the matter at the EACC that the 1st appellant rushed to report the ‘complaint’ on tax evasion at the EACC Report and Data Centre.

62. The evidence that PW10, Albert Kuloba, gave before the court, however, as the trial court found, was totally different from what he had told his client and it totally undercut the prosecution case. He essentially retracted what he had informed his client, testifying instead that the appellants had told him that the money was going to be paid to KRA to ‘regularise’ the tax arrears due from the complainant. It is thus not possible to say, from the evidence before the court, that the prosecution established, *beyond reasonable doubt*, that the appellants attempted to confer on themselves a benefit of Kshs 15 million. In the circumstances, even though the evidence, shorn of the retraction by PW10, strongly suggests the attempt to confer a benefit of Kshs 15 million to themselves, the benefit of the doubt must go to the appellants. I will accordingly not exercise powers under section 180 of the CPC to find the appellants guilty of the attempt to confer a benefit on themselves as the State submits I should do.

Whether the appellants were convicted of an offence unknown to the law

63. With regard to this issue, the appellants submit that the trial court had noted that while no money was paid to the appellants, their conduct brought disrepute to their office. They are aggrieved that the court made this finding despite there being no evidence that the EACC office was brought into disrepute. In any event, according to the appellants, bringing the office into disrepute does not amount to a corruption offence under section 46 of the ACECA.

64. The State’s response is that the appellants were found guilty of the offence of abuse of office. That they used their office in furtherance of personal interest. They submit that the trial court, while noting that the appellants did not receive any money, took note of the fact that the appellants brought disrepute to the office during sentencing. The State submit that the trial court did not sentence them for bringing disrepute to the office, but that it considered bringing disrepute to the office as an aggravating circumstance during sentencing. It, however, found the appellants guilty of the offence of abuse of office which is an offence known in law.

65. It is useful to consider the findings and conclusions of the trial court in order to address this issue. In its judgment, the trial court stated:

“Both accused in abuse of authority given to them by their employer EACC unprocedurally commenced parallel investigation without authority, notification or knowledge of their superiors, they held an investigative meeting with PW10 and PW5 days before the 1st accused lodged complaint, this was clearly and presumably to further personal interest.

The two accused are entrusted with powers by EACC to work within the laid down reporting lines and procedures, there was no valid explanation given by the defence why they did not inform or alert their superior of such investigations they were undertaking. The reason for keeping the investigations a secret was not explained by the defence.

Both accused may have demanded Kshs 15m as a bribe but since the key witness PW10 who had set PW1 on motion retracted evidence that the payment was to KRA, PW10 absolved both accused on count 1 and 2.

There is no doubt and this Honourable Court is certain that both accused were in furtherance of personal interest and made it apparent by conducting secretive out of the system investigation and made effort to exclude PW9 from their company on the 27/4/14, they committed act which amounted to abuse of office..”

66. The trial court then proceeded to make its findings in which it acquitted the appellants of the offences charged in count I and II and to convict them on count III and IV.

67. From the portion of the trial court’s judgment set out above, it is evident that the trial court focused on the unprocedural investigations by the appellants in reaching the conclusion that the appellants were in abuse of office.

68. The appellants, from their conduct as emerges from the evidence, may have been intent on abusing their office to improperly, indeed corruptly, confer a benefit to themselves, an offence under section 46 of ACECA. They may also have attempted to obtain such benefit, an offence under section 47A of ACECA. Their plan, however, came a cropper when PW1 reported the matter at the EACC, and the 1st appellant was forced to hastily report the alleged complaint against the complainant’s company at the EACC Data and Report Centre. The evidence of PW10, however, meant that the only thing that can be said was established with certainty is that the appellants operated in contravention of the internal processes of EACC. They flouted all the internal processes regarding investigations, doubtless with intent to confer a benefit to themselves, and such conduct most certainly brought some degree of disrepute to EACC- what is one to make of the integrity of the anti-corruption fight if those charged with waging it engage in corruption themselves?

69. However, the appellants are correct when they submit that bringing the EACC to disrepute and flouting internal processes does not amount to the offence of abuse of office as contemplated under ACECA.

70. In the result, I find that this appeal has merit. The conviction of the appellants is hereby quashed and the sentences set aside. The fine of Kshs 1 million paid by the 1st appellant shall be refunded to him. The 2nd appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated Signed and Delivered at Nairobi this 7th day of October 2020.

MUMBI NGUGI

JUDGE