



**Chitavi v Republic (Criminal Appeal 11 of 2014)  
[2023] KECA 1564 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1564 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 11 OF 2014  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**ANTONY MKALA CHITAVI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 1st November, 2013 in High Court Criminal Appeal No. 279 of 2011)*

**JUDGMENT**

1. Antony Mkala Chitavi, the appellant, was charged with the offence of abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act*. The particulars of the offence were that on February 26, 2008 at the Mombasa Water and Sewerage Company Limited office in the City of Mombasa, within Coast Province in the Republic of Kenya, being a person employed in the public service as the Managing Director of Mombasa Water and Sewerage Company Limited (the Company) used the said office to improperly confer a benefit on Africa Merchant Assurance Company Limited (AMACO) by awarding it the tender for the provision of general insurance services for the calendar year 2008 at a tender price of Kshs.2,246,556 notwithstanding that AMACO was not the successful bidder for the tender. The appellant faced an alternative charge of willful failure to comply with the law applicable to the tendering of contracts contrary to section 45 (2)(b) as read with section 48 of *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.
2. He was tried before the Chief Magistrate's Court at Mombasa.  
  
In a judgement delivered on the 12th of December 2011, the appellant was found guilty and convicted on the main as well as the alternative count. On the main count, he was fined Kshs.800,000.00 or three years imprisonment in default. On the alternative charge, he was fined Kshs.800,000.00, or in default, imprisonment for a term of three years. The sentences were to run consecutively.



3. On appeal, the High Court at Mombasa (M Muya, J.) in a judgment delivered on November 1, 2013 upheld the conviction and sentence on the main count. The conviction and sentence on the alternative count was set aside.
4. In this his second appeal, the appellant has challenged the judgment of the High Court primarily on the ground that the offence was not proved. We heard the appeal on May 18, 2023. In his written and oral submissions, learned counsel for the appellant Mr. Magolo submitted that the High Court misdirected itself in failing to set aside the conviction on the main count; that the appellant as the Chief Executive had to act to save the Company from risks that would have occurred if its property remained without insurance cover; that in the circumstances, the appellant was justified in giving a direct award to AMACO; that for an offence under section 46 of the act to hold, there has to be evidence of a benefit; that in this case no evidence was presented of a benefit having accrued to either the appellant or to AMACO; that what the evidence showed was that there was part payment to AMACO for services rendered to the Company. It was submitted that the trial court and the High Court failed to appreciate that what the appellant did is lawful, as single sourcing is permissible and not an abuse of office. It was submitted that in the circumstances, the offence was not proved.
5. For good measure, counsel for the appellant in his oral submissions further urged that section 200(1) (b) of the *Criminal Procedure Code* was breached by the trial court; that proceedings before the trial court commenced before Hon. Mrs. Mutoka who heard the evidence of all witnesses, but the judgment was written by Hon. Mutende without first complying with those provisions of the law.
6. Learned counsel Mr. Mwangi Kamanu holding brief for Mr. Nyoro for the respondent submitted that the conviction is well founded; that the prosecution established that the appellant awarded the tender directly to AMACO against the express advice of the tender committee which had advised that the tender should be awarded to a different entity; that there was overwhelming evidence that AMACO was disqualified and could not have been awarded the tender; that single sourcing was unjustified and could not be done against the advice of the tender committee; and that it was established that the appellant breached the law.
7. This being a second appeal, our mandate is confined to matters of law. In accordance with section 361 of the *Criminal Procedure Code* and as pronounced by the Court in *Karani vs. Republic* [2010] 1 KLR 73, we cannot interfere with the decision of the High court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.
8. With that in mind, the main issue in this appeal is whether the learned Judge of the High Court erred in upholding the conviction for the offence of abuse of office contrary to section 46 of the *Act* which provides that a person who uses his office to improperly confer a benefit on himself or anyone is guilty of an offence. A benefit is defined in section 2 to mean “any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.”
9. The ingredients of the offence of abuse of office which must be established under that section are that the accused must have used a public office to confer a benefit either to themselves or another. It must also be demonstrated that the benefit was obtained by improper use of the office. In *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party)*;



*International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR, the High Court expressed that:

“271. There are two ingredients of the charge of abuse of office. One, the person must have used a public office to improperly confer something to herself or himself. Second is that the thing conferred must be in the nature of a benefit. In the present case, if it is established, as alleged by the proposed witnesses, that it was unusual for borrowers to be granted interest free facilities, then an interest free loan to the Petitioner could amount to a benefit to her. The benefit would have accrued notwithstanding that the loan was fully repaid.

272. That however, is not the end of the matter for the prosecution because the evidence available must also disclose that she obtained the benefit by improperly using her office as a Judge of the Court of Appeal.” [Emphasis added]

10. In that regard, both courts below found as a fact that the Company for which the appellant was working as Managing Director, is a public company; that against the advice of the tender committee which had recommended the award of the tender to a different bidder, the appellant single handedly awarded the tender to AMACO; and that there was evidence of payment to AMACO on which, in effect, a benefit was conferred.
11. The circumstances in which this Court may interfere with the concurrent finds of the two courts below are limited. See *AMG v Republic* [2013] eKLR. In the present case, the procurement officer of the company, Beatrice Nyamwamba (PW1) and a member of the tender opening committee explained at length that the company advertised tenders in three newspapers for provision of general insurance services for the year 2008; that although 10 bidders bought the tender documents, three bids, including that of AMACO were received; that after opening the bids, the matter moved on to the tender evaluation committee which recommended award to Eagle Africa Insurance. That despite the exercise having been repeated, the tender committee recommended the award to that company. The appellant, as the Managing Director was briefed, despite which he went ahead to give the award to AMACO.
12. John Kamande Gitau (PW2), who was a member of, and secretary of the evaluation committee chaired by Nicholas Muli Muthembwa (PW8) stated that AMACO was disqualified as its bid did not meet mandatory requirements and that despite having recommended for the award to be made to Eagle Africa Insurance, he learnt later that it had been awarded to AMACO although it had not complied with the requirements.
13. Timothy Mugo Ngendo (PW5) chaired the tender committee which considered the report by the evaluation committee relating to provision of general insurance. Robert Nyiro (PW7) was also a member of that committee. Three companies had tendered to provide those services for the year 2008. The evaluation committee had recommended Eagle Africa Insurance. His committee deliberated and adopted the evaluation report by the evaluation committee recommending Eagle Africa Insurance. The decision of the tender committee was communicated to the appellant, the Managing Director and “he said it was okay if the process was finalized.” PW5 later learnt the award was made to AMACO by the Managing Director “contrary to the award by the tender committee.” He stated that although the quotation by AMACO was cheaper, “it was not as per the regulations.”
14. John Karisa (PW3) an accounts assistant explained that he prepared payment voucher for amount of Kshs.1,170,136.50 being half of the amount invoiced by AMACO for insurance premiums while



- Everlyne Adoyo Owour (PW4), an expenditure cashier in the company, prepared the cheque which was dispatched to AMACO.
15. David Makhamu (PW10) the Coast Regional Manager of AMACO confirmed in his testimony that the appellant gave AMACO the letter of offer awarding the contract; that AMACO invoiced the company and received payment of Kshs.1,170,136.50.
  16. Mr. John Oduor Juma (PW9) was at the material time the interim Director General of Public Procurement Authority. At the request of KACC, he reviewed the tender process undertaken by the company in connection with its procurement of insurance services for 2008. He analyzed the tender documents and processes and concluded that the appellant who had the responsibility to ensure that the Public Procurement and Disposal Act is complied with “breached” it “when he awarded the tender to AMACO at Kshs. 2,246,556 yet the firm had found nonresponsive by the tender committee”.
  17. Investigations were carried out by PW12, Gideon Kimathi Rukaria, an investigator at KACC. His investigations revealed that AMACO was not qualified to be awarded as it had been disqualified at the evaluation stage of the process and that the appellant as Managing Director awarded the contract to AMACO in contravention of the law. Consequently, the appellant was charged with the offence.
  18. In his defence the appellant stated that he appointed members of the tender and evaluation committees from amongst employees of the company, and that he was not a member in any of those committees; that the tender committee chose Eagle which was offering the service at Kshs. 2.8 million relative to AMACO which was offering the same at Kshs. 2.2 million but was not awarded; that the tender committee had unprocedurally awarded the tender to Eagle; that as the Managing Director, he did not accept the offer by Eagle Africa Insurance and settled on AMACO because it was qualified and his decision was saving the company Kshs.600,000.00.
  19. It was the appellant’s testimony that he had to ensure that the Company, which did not have insurance cover at the time, got cover; that it was urgent for insurance cover to be renewed; that he “followed the procurement process in an emergency” and that he never benefitted from the award to AMACO; and that he decided to use the alternative available as the tender committee and the evaluation committee were not making a decision.
  20. Based on the evidence, we are satisfied that the concurrent findings by the trial court and the High Court that the prosecution established that the appellant, a public officer, abused his office by awarding the tender for provision of insurance services to AMACO notwithstanding that it was not the successful bidder for the tender is well founded.
  21. In John Simiyu Khaemba v Republic [2020] eKLR, this Court stated that:

“The offence of abuse of office, which under section 3 of the Act constitutes corruption, is therefore committed by a public officer who uses a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc which he or that other person was not otherwise entitled to. (See also Philomena Mbete Mwilu v DPP & Others [2018] eKLR, for the ingredients of the offence of abuse of office).

In our view, the above provision sufficiently covers the mens rea (improper use of public office) and the actus reus (conferment of a benefit to self or another person) of the offence of abuse of office and is therefore not overly broad or general as claimed by the appellants. Improper use of public office would include con-scious violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit on the public officer himself or on another person.”



- 22. We find, in this case that there was overwhelming and credible evidence to support the concurrent findings of the courts below. We have no basis on which we can interfere with the decision of the High Court affirming the conviction.
- 23. The complaint regarding the non-compliance with Section 200(1)(b) of the *Criminal Procedure Code*, was not raised before the High Court. Neither is it a ground in the appellant’s memorandum of appeal. Rule 74 of the *Court of Appeal Rules, 2022* provides that the appellant shall not, without leave of the court, argue any ground of appeal that was not specified in the memorandum of appeal or in any supplementary memorandum of appeal. It is also noteworthy that it was not addressed in the appellant’s written submissions. It was raised for the first time during the hearing of the appeal. It is with respect an afterthought.
- 24. The appeal fails and is accordingly dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2023**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

