IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, M'INOTI & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 100 OF 2019

BETWEEN

JOHN SIMIYU KHAEMBA..............................1ST APPELLANT

PAMELA MALUTI..2ND APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nairobi (Ong'undi J.) dated 16th August 2018 in

H.C.CR.A. No. 20 of 2018)

****

JUDGMENT OF THE COURT

John Simiyu Khaemba (the 1st appellant) and ***Pamela Maluti (the 2nd appellant),*** were charged with four others be-fore the ***Chief Magistrate's Court*** at ***Eldoret*** with ten counts of offences under the ***Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (the Act)***. At the material time the 1st appellant was the accountant whilst the 2nd appellant was the procurement officer of the ***Kenya Rural Roads Authority***, ***Uasin Gishu*** region. Among the appellants' co-accused were a former Member of Parliament for ***Eldoret South Constituency, Hon. Peris Chepchumba Simam*** and her husband, ***Enock Kimel Simam,*** both directors of a company known as ***Kachur Holdings Ltd***. The 1st appellant was charged in two of the ten counts whilst the 2nd appellant was charged in six.

In the first count, (count 1) the 1st appellant was charged jointly with the others, with conspiracy to commit an economic crime contrary to ***section 47A (3)*** as read with ***section 48(1)*** of the Act. The particulars were that between 6th January 2010 and 1st April 2010 in Eldoret Town within Uasin Gishu County, the 1st appellant and his co-accused conspired together to commit an economic crime, namely influencing the award of contract ***No. UG/2-27-09/10-003*** for routine maintenance and spot improvement of the ***Bayete-Chuiyat-Bargaeiywa Road*** in ***Eldoret South Constituency*** to ***Kachur Holdings Ltd***, a company that did not qualify for such award by dint of ***section 31(1) (d)*** as read with ***section 33(1) (b)*** of the ***Public Procurement and Disposal Act, No 3 of 2006,*** in that one of its directors was a public serv-ant.

In the second count (count 8) the 1st appellant was charged with abuse of office contrary to ***section 46*** as read with ***section 48(1)*** of the Act, the particulars being that on or about 13th April 2011, at the ***Kenya Rural Roads Authority*** office in Eldoret Town, being the Uasin Gishu Regional Accountant of the Kenya Rural Roads Authority, a public body, he used his office to im-properly confer a benefit on Kachur Holdings Ltd by approving the payment of ***Kshs 4,213,001*** in favour of the said company for the routine maintenance and spot improvement of the Bayete-Chuiyat-Bargaeiywa Road in Eldoret South Constituency.

On her part, the 2nd appellant was charged in the first count (count 1) jointly with the others, with conspiracy to commit an economic crime contrary to section 47A (3) as read with sec-tion 48(1) of the Act. The particulars of the offence were similar to those in the first count against the 1st appellant, which we have already set out above. In the next four counts (counts 2, 3, 4 and 5) the 2nd appellant was charged jointly with one ***Shachile Mikoya Laban*** with wilful failure to comply with the law relating to the tendering of contracts contrary to ***section 45(2) (b)*** as read with section 48(1) of the Act. The particulars of those offences were that on diverse dates between 6th January 2010 and 11th April 2010, at Kenya Rural Roads Authority in Eldoret town, be-ing persons whose functions concerned the use of public reve-nue, jointly and wilfully failed to comply with provisions of the Public Procurement and Disposal Act, 2005 and the Public Pro-curement and Disposal Regulations, 2006. The specific provi-sions of that statute and the regulations that the 2nd appellant and the said Shachile Mikoya Laban were alleged to have failed to comply with related to the minimum threshold for restricted tendering, tender opening procedures, and

evaluation of bids concerning Contract No. UG/2-27-09/10-003 that was awarded to Kachur Holdings Ltd for routine maintenance and spot improvement of the Bayete-Chuiyat-Bargaeiywa Road in Eldoret South Constituency.

In the last count (count 7), the 2nd appellant was charged alone with abuse of office contrary to section 46 as read with sec-tion 48(1) of the Act, the particulars being that on 31st March 2010 at the Kenya Rural Roads Authority office in Eldoret town, being the Uasin Gishu regional procurement officer of the Kenya Rural Roads Authority, a public body, she used her office to im-properly confer a benefit on Kachur Holdings Ltd by issuing the said company with a letter of award of contract for routine maintenance and spot improvement of the Bayete-Chuiyat-Bar-gaeiywa Road in Eldoret South Constituency before the bids were adjudicated and awarded by the ***Eldoret South Constituency Roads Committee***.

To prove its case against the appellants and their co-ac-cused, the prosecution called 14 witnesses, the totality of whose evidence was that the contract for the routine maintenance and spot improvement of the Bayete-Chuiyat-Bargaeiywa road was to be funded from the ***10% Road Maintenance Levy Fund*** whilst the other roads in the Constituency were to be funded from the ***22% Road Maintenance Levy Fund*** and that the two appellants were members of the Eldoret South Constituency Roads Commit-tee that awarded the contract to Kachur Holdings Ltd.

It was the prosecution's further evidence that the bid by Ka-chur Holdings Ltd was purportedly evaluated by persons who were not members of the technical committee and therefore not qualified; that the award of the tender was made one day before the Constituency Roads Committee met to approve award of the same; that the committee that purported to award the contract to Kachur Holdings Ltd was supposed to consider only bids un-der the 22% Road Maintenance Levy Fund and not the 10% Fund; that the road was purportedly repaired without supervision or inspection by the Ministry of Roads; that Kachur Holdings Ltd was paid ***Kshs 1,975,926*** on 14th April 2011 and ***Kshs 2,549, 149.22*** on 26th June 2011 without supporting measure-ments sheets and certificates signed by the Constituency Roads Officer confirming the work done and further without certificates signed by the Senior Roads Overseer of the Ministry of Roads; and that the directors of Kachur Holdings Ltd were the former Member of Parliament for the Constituency and her husband.

In their defence, the 1st and 2nd appellants denied the of-fences and defended the award of the contract to Kachur Hold-ings Ltd as within the law. By a judgment dated 7th October 2016, the trial court convicted the 1st appellant of conspiracy to commit an offence of economic crime and sentenced him to a fine of ***Kshs 500,000*** or in default two years imprisonment. The court also convicted him of abuse of office for which it sentenced him to a fine of ***Kshs 300,000*** or in default 1 year imprisonment.

The second appellant was convicted of conspiracy to commit an offence of economic crime and sentenced to a fine of ***Kshs 500,000*** or in default 2 years imprisonment; three counts of wilful failure to comply with the law relating to the tendering of con-tracts and sentenced, for each count, to a fine of ***Kshs 300,000*** or in default 1 year imprisonment; and lastly abuse of office for which she was sentenced to a fine of ***Kshs 300,000*** or in default 1 year imprisonment.

The appellants and their co-accused were aggrieved and pre-ferred a first appeal to the High Court. By the judgment dated 16th August 2018, the subject of this appeal, ***Ong'undi, J.*** al-lowed the appeal as regards the appellants' convictions for con-spiracy to commit an economic crime, and wilful failure to comply with the law relating to the tendering of contracts. The convic-tions were quashed and the sentences set aside. As regards the appellants' appeal against conviction for abuse of office, the court found the appeal to be without merit, dismissed it and sustained the convictions and sentences. The appellants were further ag-grieved and lodged this second appeal.

The 1st appellant impugned the judgment of the first appellate court on the grounds that it erred by ignoring the trial court's failure to comply with ***section 200 (3)*** of the ***Criminal Proce-dure Code***; by failing to properly evaluate evidence that was fa-vourable to them; by upholding their conviction for the offence of abuse of office without sufficient evidence; and by failing to hold that the charges against them were duplicitous and defective.

Mr Manyonge, learned Counsel for the 1st appellant, con-tended, as regards the first ground of appeal, that when the ini-tial trial magistrate who had heard the bulk of the evidence was transferred, the succeeding magistrate did not comply with sec-tion 200 (3) of the Criminal Procedure Code in that she failed to inform the appellants of their right to demand recall of witnesses who had already testified. Counsel relied on the judgments of the High Court in ***Office of DPP v. Peter Onyango Odongo & 2 Others [2015] eKLR*** and ***Mercy Mugure v. Republic [2018] eKLR*** and the judgment of this Court in ***Abdi Adan Mohamed v. Republic [2017] eKLR*** and submitted that it was mandatory for the court to explain to the accused person of his right to request recall of witnesses and failure to do so rendered the proceedings a nullity.

Next, the 1st appellant submitted that the two courts below failed to evaluate the evidence on record and that had they done so, they would have noticed it was in his favour. It was contended that ***Laban Mikoyan Sachile*** and ***Mule Robert Maingi (PW8),*** who were the 1st appellant's seniors, approved the payment and directed the 1st appellant to pay the pending bills and that there-fore he did not make that decision personally. It was also con-tended that the two courts below erred by failing to appreciate that it was not mandatory to produce the measurement sheets before payment of pending bills. The 1st appellant argued that from the evidence on record, the measurement sheets were mere auxiliary tools. He relied on the judgment of this Court in ***Joram Mwenda Guantai v. The Chief Magistrate, Nairobi [2007] eKLR*** and submitted that breach of procedures and regulations did not constitute a criminal offence. In addition, this appellant contended that the first appellate court misapprehended the evi-dence and erroneously concluded that the bills incurred in the 2009/2010 financial year could not be paid in the 2010/2011 financial year, which was not the case. He also faulted the first appellate court for holding that they had switched the vote from the 22% fund to the 10% fund without any evidence.

On the third ground of appeal concerning the charge of abuse of office, the 1st appellant submitted that the evidence adduced was inadequate to sustain conviction because no public money was lost and no benefit was conferred on the contractor in question. He contended that the High Court quashed the man-datory fines imposed by the trial court because there was no proof of any benefit that was conferred on the contractors, but erred in upholding the conviction for abuse of office in the ab-sence of proof of any loss. The 1st appellant added that the quashing of the conviction for conspiracy to commit an economic crime absolved him from any wrong doing because, inherent in the charge of fraud, is an element of conspiracy, which the pros-ecution did not prove. He wondered why ***Loyce Achieng Ochuka (PW4),*** the assistant accountant who prepared the payment vouchers, and ***PW8***, the road engineer who instructed processing of payment, were not charged. The 1st appellant further con-tended that the two were accomplices and that their evidence was not reliable and could not form the basis of a

conviction.

Turning to the ground on duplicity of the charges, the 1st appellant submitted that he was charged with two different of-fences, that of conspiracy and that of abuse of office, both arising from the same facts. In his view, the charge of abuse of office should have been framed as an alternative charge. He cited ***Rebecca Mwikali Nabutola & 2 Others v. Republic [2016] eKLR*** in support of the submission.

On her part, the 2nd appellant faulted the High Court for treating all procurement procedural infractions as criminal of-fences; for failing to hold that the charge of abuse of office against the 2nd appellant was improperly particularised to her prejudice; by relying on accomplice evidence without due warning; by failing to properly evaluate the evidence; and by failing to hold that the trial court did not comply with section 200 of the Criminal Pro-cedure Code.

Arguing the 2nd appellant's appeal, ***Mr Ouma,*** learned counsel, submitted that the particulars of the charge of abuse of office against the 2nd appellant stated that she abused her office by issuing Kachur Holdings Ltd with a letter of award of contract before bids were adjudicated and awarded by the Eldoret South Constituency Roads Committee. However, counsel submitted, the High Court based its judgment on alleged violations of procurement procedures by the 2nd appellant which were not in the particulars and were not the subject of the charge. In counsel's view, the High Court took into account matters that were irrele-vant to the charge and its judgment was therefore based on a theory that was not advanced by the prosecution. He added that the learned judge erred by elevating procedural infractions into criminal offences because section 46 of the Act, which is a gen-eral section unlike section 45 of the Act, does not define the phrases "abuse of office" or "improperly conferring a benefit". It was contended therefore that mere failure to comply with pro-curement procedures does not constitute abuse of office because conduct which is otherwise not criminal may be criminalised. In support of the submission counsel relied on ***Joram Mwenda Guantai v. The Chief Magistrate, Nairobi (supra); Jacquel-ine Okuta & Another v. Attorney General & 2 Others [2017] eKLR; Aids Law Project v. Attorney Genal & 3 Others [2015] eKLR*** and ***Geoffrey Andare v. Attorney General & Another [2016] eKLR,*** where the courts deprecated criminal charges based on overly broad provisions, lacking in precision. He invited us to read section 46 of the Act restrictively so as to require wilful or careless conduct.

On the second ground of appeal, the 2nd appellant submit-ted that the charge of abuse of office against her was inaccurately particularised thus occasioning her prejudice. It was contended that from the evidence the 2nd appellant did not commit any of-fence because the Eldoret South Constituency Roads Committee did not have power to award the tender in question and did not in fact award it. Because of faulty particulars, it was contended, the prosecution focused on the wrong organ and minutes, which was prejudicial to the 2nd appellant.

Next, the 2nd appellant submitted that PW8 was an accom-plice because he co-authorised the second payment to Kachur Holdings Ltd, and that the two courts below erred by failing to warn themselves of the danger of relying on his accomplice evidence, which is evidence of the weakest kind. The appellant relied on the judgment in ***Kinyua v. Republic [2002] 1KLR 257*** in support of the necessity of a warning before relying on accomplice evidence. On the authority of the decisions in ***Ndungu Kimanyi v. Republic [1979] eKLR, Charles Ndung'u Githuka v. Republic [2014] eKLR*** and ***Geoffrey Kipng'eno v. Republic [2012] eKLR***, it was contended that PW8 was not a credible witness.

Regarding failure to properly or adequately evaluate the ev-idence, the 2nd appellant submitted that contrary to the prose-cution case and the holding by the High Court that the tenders were opened prematurely on 21st January 2010, the evidence showed that they were opened on 25th January 2010 as adver-tised. Accordingly it was submitted, there was no basis for hold-ing that the 2nd appellant abused her office by prematurely no-tifying Kachur Holdings Ltd of award of the contract.

Lastly as regards section 200 of the Criminal Procedure Code, the 2nd appellant submitted that it was the advocates for the accused person, rather than the accused persons themselves, who indicated to the court that the trial should proceed from where the initial magistrate had reached. In addition to the au-thorities cited by the 1st appellant, the 2nd appellant relied on the decision of this Court in ***Ndegwa v. Republic [1985] eKLR*** and that of the High Court in ***Anthony Musee v. Republic [2012] eKLR*** and submitted that the provision in question is couched in mandatory terms and failure to comply with the section is fatal to the conviction. Although the court has discretion to order are trial, the 2nd appellant submitted that a retrial was not merited in the circumstances of this appeal, among others because six years have elapsed since the trial started; the appellants were acquitted of most of the counts which the respondent did not ap-peal against; there was no guarantee that the witnesses were still available; and the appellants' co-accused did not prefer appeals from the judgment of the High Court.

Mr Omirera, Senior Assistant Director of Public Prosecutions opposed the appeal, submitting that the same had no merit. Starting with the alleged violation of section 200 of the

Criminal Procedure Code, counsel submitted that recall of witnesses was not mandatory and that the court has to consider a number of factors, among them how far the trial had reached and the possibility of obtaining the witnesses. Relying on the judg-ment of this Court in ***Joseph Kamau Gichuki v. Republic [2013] eKLR,*** counsel submitted that section 200 of the Criminal Procedure Code is to be invoked sparingly and in exceptional circumstances to meet the ends of justice.

It was counsel's further submission that the succeeding magistrate explained to the appellant's, who were represented by counsel, their right to demand recall of witnesses and that they elected to continue the trial from where the previous magistrate had reached. In the circumstances, counsel contended, the ap-pellants could not be heard to claim that there was non compli-ance with section 200 of the Criminal Procedure Code.

On evaluation of evidence by the first appellate court, coun-sel urged that the court properly evaluated the evidence and came to its own independent conclusions as it was duty bound to do. Counsel added that the two courts below arrived at concurrent findings of facts that the appellants had abused their of-fices and that the appellants had not established any basis for interfering with those findings. On whether the two courts below had elevated mere procedural irregularities into criminal of-

fences, counsel submitted that the failure by the appellants to adhere to prescribed regulations were the facts which constituted the offence of abuse of office with which they were charged and that the failure to adhere to procedures was properly taken into account. He added that from the evidence of PW3, the purported road repairs were undertaken without verification or confirma-tion by Ministry officials. Counsel

denied that the charges are bad for duplicity and urged us to dismiss the appeal.

It cannot be gainsaid that in a second appeal like this one, our jurisdiction is limited to considerations of issues of law only.

Issues of fact have been settled conclusively by the two courts below and we can only interfere with those findings if it is demon-strated to our satisfaction that the findings are based on no evi-dence, or on a perversion of the evidence, or taking the evidence in totality, no reasonable tribunal properly addressing itself could have arrived at those findings. The Court's approach was suc-cinctly stated as follows in ***M'Riungu v. Republic*** ***[1983] KLR 455***

> "*where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".*

Most of the grounds of appeal are similar and we shall therefore consider them together, save where there are issues that are distinct to each appellant.

Starting with compliance with section 200 (3) of the Crimi-nal Procedure Code which is common to both appellants, the record shows that the trial of the appellants and co-accused commenced on 16th September 2013 before ***Hon. Mokua, Senior Principal Magistrate,*** who heard the entire prosecution evi-dence and the entire defence evidence, save for ***DW10***, in respect of whom he took the evidence-in-chief. Thereafter, he was trans-

ferred and succeeded by ***Hon. Cherere, Chief Magistrate*** (as she then was). The succeeding magistrate heard the cross-exam-ination and re-examination of DW10 as well as the evidence of four witnesses called by the prosecution under ***section 212*** of the Criminal Procedure Code, to rebut aspects of the defence evidence.

The record shows that on 23rd October 2015, the appellants and their co-accused, through their advocates, requested the succeeding magistrate to proceed from where the previous mag-istrate had left. The prosecution took the same view. The record shows on that day ***Mr Aseso***, learned counsel, appeared for the 1st appellant, whilst ***Mr Koros*** appeared for the 2nd appellant. The trial magistrate directed the proceedings to be typed and the case be listed for mention on 27th November 2015.

On 27th November 2015, the prosecution confirmed that the proceedings were typed. The pertinent part of the record reads as follows:

> "*Section 200(3) of the Criminal Procedure Code explained to accused persons and they reply…"*

Mr Aseso for the 1st appellant, who also held brief for the 2nd appellant's advocate, is recorded as requesting the court to pro-ceed from where the previous magistrate had reached. The court agreed with the parties and directed that the trial would continue from where the former magistrate had left.

The provisions of section 200(3) of the Criminal Procedure Code have been the subject of consideration in a number of judg-ments by this Court. See for example ***Ndegwa v. Republic [1985] KLR 535), Abdi Adan Mohammed v. Republic [2017] eKLR, Nyabuto & Another v. Republic [2009] KLR 409*** and ***Joshua Ntonja Mailanyi v. Republic [2011] eKLR,*** which set out the principles to guide the invocation of the provision. In ***James Gichuki Njoroge v. Republic [2013] eKLR,*** this Court stated as

follows:

> "*This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."*

The appellants' trial had commenced two years before the succeeding Magistrate took over and the entire prosecution evi-dence had been taken save for four witnesses whose evidence was merely to rebut aspects of the defence evidence. Similarly, the entire evidence of the defence had been heard, save cross-exam-ination of only one witness. Commencing the trial *de novo* was clearly not in the best interest of the administration of justice as the appellants themselves readily accepted.

Secondly and more importantly, the record before us indi-cates that the effect of section 200(3) of the Criminal Procedure Code was explained to the appellants, and twice, through their advocates, they requested to proceed with the trial from where the previous magistrate had reached. To now turn round and claim that they were not aware of their right and that they needed to make the request for recall of witnesses personally rather than through their advocates, is to say the least, disingenuous. We do not see any basis for holding that the appellants were not aware of their rights under section 200 (3) of the Criminal Procedure Code or that they were denied an opportunity to recall any of the witnesses they wished to recall. From the record, which we must go by, it was their wish that the succeeding magistrate should

proceed from where the former magistrate had reached. We do not see any merit at all, in this ground of appeal.

The next ground of appeal that is common to both appel-lants is that their conduct which the prosecution complained of and which formed the basis of the charges of abuse of office for which they were convicted, was mere breach of procurement regulations that did not constitute criminal offences. It is apt to reproduce the charges against both appellants as relates to the charge of abuse of office. The 1st appellant was charged as follows in ***count 8***:

> "*Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No.3 of 2003.*
>
> *Particulars of offence:*
>
> *John Simiyu Khaemba: On or about 13th April 2011 at the Kenya Rural Roads Authority office in Eldoret Town within Uasin Gishu County in the Republic of Kenya, being the Uasin Gishu Regional Accountant of Kenya Rural Roads Au-thority, a public body, used his office to improperly confer a benefit to Kachur Holdings Ltd by approving the payment of Kshs 4,213,001 in favour of the said Kachur Holdings Ltd for Routine Maintenance and Spot Improvement of Bayete-Chuiyat-Bargaeiywa Road in Eldoret South Constit-uency."*

On her part, the 2nd appellant was charged as follows in ***count 7:***

> "*Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.*
>
> *Particulars of Offence:*
>
> *Maluti Pamela Maluti: On 31st March 2010, at the Kenya Rural Roads Authority office in Eldoret Town within Uasin Gishu County in the Republic of Kenya, being the Uasin Gishu Regional Procurement Officer of the Kenya Rural Roads Authority, used her office to improperly confer a ben-efit on Kachur Holdings Ltd by issuing the said Kachur Holdings with a letter of award of contract for Routine Maintenance and Spot Improvement of Bayete-Chuiyat-Bar-gaeiywa Road in Eldoret South Constituency before bids were adjudicated and made by the Eldoret Constituency Roads Committee."*

Section 46, which creates the offence of abuse of office under which both appellants were charged, reads as follows:

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

The Act does not define the term ***"office"*** but it defines ***"public officer"*** in ***section 3*** to mean:

> "*an officer, employee or member of a public body, including one that is unpaid, part-time or temporary."*

The same section defines ***"public body"*** to mean:

> *(a) the Government, including Cabinet, or any department, service or undertaking of the Government;*
>
> *(b) the National Assembly or the Parliamentary Service;*
>
> *(c) a local authority;*
>
> *(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or*
>
> *(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition."*

From the foregoing, it can be deduced that the "person" referred to in ***section 46*** means a public officer and "office" in the same section means a ***"public office"***. On the other hand, the Act de-fines ***"benefit"*** to mean :

> "*any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage."*

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 of-ficer himself or on another person. Accordingly we are not per-suaded that the provision in question is a loose provision or cre-ates an offence of strict liability as the appellant's suggested.

For the 1st appellant, the particulars of the charge were clear that he used his public office as the Uasin Gishu regional accountant of the Kenya Rural Roads Authority, to improperly confer a benefit to Kachur Holdings Ltd by approving payment to it of ***Kshs 4, 213,001***. To prove that the approval of payment was improper, the prosecution adduced evidence to show that the 1st appellant authorised payments to Kachur Holdings,which among other things, did not qualify because its tender was not the lowest as required by ***section 66(4)*** of the ***Public Procurement and Disposal Act***; had among its directors, Hon Peris Chepchumba Simam, the Member of Parliament for Eldoret South Constituency contrary to ***section 33*** of the same Act which bars a procuring entity from entering into a procurement contract with a public servant; and Kachur Holding's alleged maintenance and improving of the road in question was neither supervised as required, nor confirmed through supporting docu-ments such as the measurements sheets and an inspection re-port. After considering the payment of Kshs 4,213,001 made to Kachur Holdings Ltd on the strength of the 1st appellant's ap-proval, and in light of the above and other irregularities, the two courts below were satisfied that the 1st appellant had improperly conferred a benefit upon Kachur Holdings, to which it was other-wise not entitled to.

We are satisfied that the two courts below did not proceed on the assumption that breach of procurement regulations *perse* constitutes criminal offences. Rather, they found on the evidence before them that in the circumstances of this case, the breach of the regulations constituted improper conferment of a benefit to Kachur Holdings Ltd. It is not enough to claim, as the appellants do, that no public money was lost; a benefit was improperly conferred which otherwise should not have been. We do not see any basis to differ with the concurrent findings of the two courts below in that regard.

We may add that the decision of this Court in ***Joram Mwenda Guantai v. The Chief Magistrate, Nairobi*** *(supra)* which the appellants have cited cannot avail them in the circumstances of this appeal. In that case the Court found the prosecution of the appellant to be an abuse of the process because he was not a member of the Board that had awarded the contract that was alleged to be in violation of the ***Exchequer and Audit (Public Procurement) Regulations,*** which the Court also found to be poorly drafted. The Court did not set any fast and hard rule that breach of regulations cannot constitute evidence of abuse of office. This is how the Court expressed itself:

> *"Again, we do not agree with the assertion by Mr. Oriri-Onyango, for the Attorney General, that every breach of the regulations amounts to an abuse of office punishable under the Penal Code. Each case depends on its own particular facts and circumstances."*

As regards the 2nd appellant, the contention by the prosecution was that she used her office to improperly confer a benefit on Kachur Holdings by issuing it with a letter of award of contract before adjudication of the bids. The 2nd appellant contends that the two courts below erred by taking into account other violations of the regulations, which she considers to have been irrelevant considerations. She also made heavy weather of the evidence of when the bids were opened, insisting that the date stamp showing 21st January 2010 was erroneous.

The record shows that the first appellate court carefully considered this issue and rejected the appellant's contention. This is how that court addressed the issue:

> *"182. The evidence of PW8 Mule Robert Maingi from the doc-uments (PEXB 44-55) is that the bids were opened on 21st January 2010. The opening of bids should not have pre-ceded the site visit which was mandatory. (PEXB 34) which was the certificate of contractors visit to the site was un-dated but it was received on 21st January 2010 a day be-fore the official mandatory site visit. The said certificate showed that the visit had taken place on 22nd January 2010 even before the said date.*
>
> *183. The explanation by the defence was that the stamping of the documents with a date stamp of 21st January 2010 was erroneous. That the clerk who did that forgot to adjust it before stamping and he had died. These are documents which were supposed to have been handled by a commit-tee. If indeed there was such an error, the same committee could have noted that as it went through the rest of the pro-cesses and corrected the errors as a committee. This was never done."*

Similarly the first appellate court addressed the question whether the contract was awarded on 25th March as claimed by the appellants. It found that the documents that the appellants were relying on in support of that contention were confirmed not to have originated from the Kenya Rural Roads Authority (KERRA) offices. The Court concluded:

> *"All the defence exhibits (DEXB 36, 37, 46 and 47 were not genuine documents as they were proved not to have originated from KERRA."*

The two courts below were satisfied on the evidence on record that the 2nd appellant issued Kachur with the letter of award of contract before adjudication of the bids. The other irregulari-ties noted by those courts were not irrelevant as claimed by the appellants; in our view, they went to demonstrate that the con-ferment of benefit to Kachur Holdings Ltd was not accidental or innocent. It was tainted through and through with impropriety.

In light of the foregoing, we are satisfied that the first appel-late court properly and adequately evaluated and analysed the evidence as it was duty bound to do and came to its own inde-pendent conclusion. This applies also to the question of the 22% and 10% funds, as well as the payment, in the succeeding finan-cial year, of bills incurred in the 2009/2010 financial year. With respect, the appellants are now inviting us to re-evaluate the ev-idence once again, in the hopes that we shall come to a different conclusion from the first appellate court, which, as we have stated, is not the function of this Court in a second appeal. Hav-ing carefully considered the record, we do not perceive any per-verse conclusions by the first appellate court that are palpably incongruent or inconsistent with the evidence on record.

On the 1st appellant's contention that the charge of abuse of office was duplex and bad, we do not think so. In count 1 which was quashed by the first appellate court, the 1st appellant was charged with five others with conspiracy to commit an economic crime contrary to ***section 47A(3)*** as read with ***section 48 (1)*** of the Anti-Corruption and Economic Crimes Act. The particulars of that offence referred to conspiracy to influence the award of the contract to Kachur Holdings Ltd, which did not qualify. The charge of abuse of office against the 1st appellant was laid under ***section 46*** as read with ***section 48(1)*** of the same Act, the particulars, as we have already stated, being approval of payment to Kachur Holdings Ltd, and thus conferring a benefit to it. These were two distinct offences which were charged in two distinct counts. As the

High Court properly noted in ***Peter Mbuvi Wanza v. Republic [2016] eKLR,*** the rule against duplex charges pro-hibits the prosecution from charging an accused person with commission of two or more offences in a single charge. The pur-pose is to ensure that the accused person knows with clarity the offence he is alleged to have committed to enable him prepare adequately to answer it, and to focus the trial court itself in terms of evidence, relevance and efficiency. (See also ***Julius Maina Ndirangu v. Republic [2001] eKLR*** and ***David Njuguna Wairimu v. Republic [2010] eKLR).*** We do not see any merit in this ground of appeal either.

Lastly as regards accomplice evidence and the decision of the Director of Public Prosecution (DPP) to use some of the ap-pellants' colleagues (PW4 and PW8) as witnesses rather than to charge all of them, we are satisfied that decision in and of itself cannot be evidence of wrong doing or trumped up charges. The Constitution has vested in the DPP the responsibility of conducting prosecutions and ***Article 157(10)*** of the Constitution has in-sulated his office from undue interference in the discharge of that mandate. While it is trite that the courts must step in to stop any abuse of power conferred by the Constitution, including on the DPP, directing him on who to charge or who to use as a witness would in our view, constitute unjustified interference with his constitutional mandate. As this Court stated in ***Diamond Has-san Lalji & Another v. Attorney General & 4 Others [2018]eKLR*** while reiterating that courts have power to control exercise of prosecutorial powers by the DPP where abuse is apparent, courts will not interfere with the DPP's prosecutorial decisions that are made *intra vires.*

Section 141 of the ***Evidence Act*** provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it is based on the uncorroborated evidence of an accomplice. ***Michael Murithi Kinyua v. Republic [2002]eKLR***, this Court stated as follows regrading accomplice evidence:

> *"Under section 141 of the Evidence Act, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so."*

In this appeal, the conviction of the appellants was not based solely on the evidence of their colleagues whom they contend were accomplices. There was other independent evidence of the appellant's conduct which the two courts below found to consti-tute the offence of abuse of office.

Having carefully considered the record of appeal, the grounds of appeal, the appellants' submissions and the authori-ties they cited, we are satisfied that there is no merit in this ap-peal. Accordingly, the same is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at NAIROBI this 7th day of August, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

……………………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR