



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ndege (Criminal Appeal 60 of 2019)
[2022] KEHC 11930 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 60 OF 2019
JM MATIVO, J
AUGUST 19, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

NAAMAN MUGUNA NDEGE RESPONDENT

*(Appeal against the Ruling delivered by Hon. Mr. E. M. Kagoni, PM in Mombasa
CM's Criminal Case Number 885 of 2018, R v Naaman Muguna Ndege on 6.5.2019)*

JUDGMENT

1. The facts presented in this appeal are deceptively straightforward, yet concealing the complexity and obscurity of the underlying real legal issues which requires resolution. At the heart of the appeal is the ambit and scope of sections 210 and 215 of the *Criminal Procedure Code*¹(CPC) and their interplay or absence of it. Unfortunately, both parties never saw the remarkable difference between these two provisions, and as I will point out shortly, the respondent's approach and submissions directly addressed a decision made under section 215 of the *Criminal Procedure Code* as opposed to a finding of no case to answer under section 210 of the *Criminal Procedure Code*.
2. The unavoidable fundamental legal question is the meaning of a *prima facie* case as contemplated under section 210 which provides that "if at the close of the evidence in support of the charge, and after hearing such summing up, submissions or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."
3. Granted, the state seeks to overturn the ruling in Mombasa Chief Magistrate's Criminal Case Number 885 of 2018, *R v Naaman Muguna Ndege* delivered on May 6, 2019 at the close of the prosecution case

¹ Cap 75, Laws of Kenya.



in which the trial magistrate acquitted the respondent under section 210 of the CPC. The respondent faced the offence of stealing contrary to section 268(1) of the *Penal Code*² as read with section 275 of the *Penal Code*. The accusations were that on diverse dates between July 21, 2017 and February 6, 2018 at the Imperial Bank Ltd, Likoni Branch in Mombasa sub-county within Mombasa County, he stole one Ramtons coffee maker S/No 03131/10114CE (2), One HP Officer jet colour printer model premium hp 6700 S/No CN44BDS3TO and one 40-inch colour television set make Samsung S/No LC5M3DGZ600179M all valued at Kes 143,000/= the property of Imperial Bank Ltd, Likoni Branch which was under the receivership of Kenya Deposits Insurance Corporation.

4. The respondent faced an alternative count of handling stolen property contrary to section 322(1) (2) of the *Penal Code*. It was alleged that on the May 21, 2018 and May 22, 2018 at Kiembeni Estate house number 8462, Bamburi sub-county within Mombasa County, otherwise than in the course of stealing, he dishonestly retained one Ramtons coffee maker S/No 03131/10114CE, one HP office jet colour printer model premium hp 6700 S/No CN 44BDS3TO, one 40-inch colour television set make Sumsung S/No LC5M3DGZ600179M knowing or having reasons to believe them to be stolen goods.
5. In order to properly contextualize and analyse the issues at hand, an evaluation of the prosecution evidence, albeit briefly, is necessary. The prosecution called 11 witnesses. PW1, Joash Ongweny, a security guard employed by Wells Fargo testified that on July 21, 2017 at about 2pm he saw the respondent who was a manager at the Imperial Bank Likoni branch leave with a coffee maker. He recorded it in the occurrence book. He also testified that on February 6, 2018 at about 1pm, a one Benson, a bank cleaner was leaving the bank with TV set. He asked him to explain where he was taking it, but before he could answer, the respondent said he had instructed him to take it to his motor vehicle, so he allowed him to leave with the TV but he recorded the incident in the OB No 5/6/1/018 at 1.20pm. On cross-examination he stated that the respondent did not sign the OB. He also said he was present when the printer was taken.
6. PW2 Benson Ahamata Angaliki a cleaner testified that in July 2017 the respondent came to the kitchen and took a coffee maker and left with it. He also said in September he saw the respondent leave the banking hall with a box, but he did not see its contents. He testified that on February 6, 2018, the appellatant asked him to unmount the TV set and take it to his car.
7. PW3, Andrew Mwandolo, a teller/cashier at the bank testified that in February 2018 he saw the appellatant carrying a Samsung TV which had been mounted on the wall for a long time. PW4 Mohamed Mohamed Abubakar, a bank's employee, in charge of the inventory and system administration in the coast region said that on May 16, 2016, he noticed that the TV has been removed from the wall and a week later he did an audit and found that the TV and the printer were missing. He later learnt that the printer was recovered from the appellatant's home.
8. PW5, Mr Peter Lengarie said that the respondent said he took the TV for repair, but later, he accompanied CI Cheruiot and others to his house where the TV, Printer and coffee maker were recovered. PW6, PC James Mungai attached to CBK Mombasa he recorded the OB, he went to the respondent's house and recovered the items and prepared an inventory.
9. PW7, Fredrick Mumba who was in charge of the bank testified that on May 16, 2018 he sent PW4 to pick a printer but he found it missing, that he personally went to the branch and confirmed that the printer and the TV were missing and a guard informed him that the items had been taken away and OB extracts showed the days the items were moved out. He reported to the police. He said the respondent denied knowledge of the missing items, but upon being showed evidence that they had been moved, he said the TV had been taken for repairs and the coffee maker and printer were in his house.

² Cap 63, Laws of Kenya.



10. PW8 Hussein Amani Mabruk, a security supervisor employed by the Central Bank of Kenya testified that the branch manager called him to his office where the respondent denied taking the items but later, he changed and told them that he had taken the TV for repairs and that the printer and coffee maker were not imperial bank property. He led them to his house where first he gave them a TV, a printer and a coffee maker, but later they learnt that the TV did not belong to the bank, so they went back to the house and the appellant handed over to them a TV set.
11. PW9 Sgt Joseph Nduati Muragu attached to CBK Headquarters, Nairobi interrogated the appellant who said he had taken the items for repairs. He produced the exhibits in court. PW10 Veronica Kamau's evidence resembled that of PW8. Lastly, PW11 CI Wilson Cheruyoit, the OCS CBK Police Station was the initial investigating officer. He led the team that accompanied the respondent to his house where the items were recovered.
12. In the impugned ruling, the learned magistrate held:- (i) that the prosecution was required to establish both the *mens rea* and *actus reus* to prove the completion of the offence; (ii) that the prosecution was required to tender evidence to show that the accused intended to keep the items permanently; (iii) that the element of *mens rea* was missing; and, (iv) that by the time the prosecution closed its case, it had not tendered evidence to establish that the offence of theft had been committed by the accused, so, he dismissed the charges and acquitted the respondent under section 210 of the [Criminal Procedure Code](#).³
13. Aggrieved by the ruling, the state seeks to overturn it citing the following grounds:-
 - a. That the trial magistrate erred in acquitting the appellant against the weight of the evidence;
 - b. That the learned magistrate erred when he failed to find that the evidence on record did not support the charge.
 - c. That the learned magistrate misdirected himself in law in interpretation of the ingredients of the offence of stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#).
 - d. That the learned magistrate failed to consider the fact that once evidence was tendered in court, it was his duty to impartially interrogate the same and use it to arrive at a just decision.
 - e. That the learned magistrate misdirected himself on what constitutes prima facie evidence.
14. Essentially, the appellant's counsel's submissions were three-fold:- (i) that the learned magistrate gave his views as to what constitutes theft; (ii) that the learned magistrate erred in finding that the bank rules lacked a time frame within which taking an asset would amount to theft, and (iii) that the respondent was improperly acquitted.
15. The respondent filed two sets of submissions dated April 25, 2022 and September 28, 2021. In his submissions dated March 12, 2019, the respondent cited [James Rioba Makara v Republic](#)⁴ which defined the offence of stealing and dedicated his submissions to addressing the question whether the offence of stealing was committed. He argued that it is incumbent for the complainant ie the Central

³ Cap 75, Laws of Kenya.

⁴ [2015] e KLR.



Bank of Kenya to establish ownership. He argued that the complainant lost nothing and that the Central Bank of Kenya was not the complainant in the case, so the case cannot stand. He argued that the alternative charge was not proved and cited *Tembere v Republic*.⁵

16. Additionally, the respondent's counsel submitted that the evidence adduced did not in any way establish theft but it tilted in favour of an acquittal. He submitted that the trial magistrate considered the evidence of all the witnesses and the magistrate was clear that what was required was to determine whether the court could proceed and convict the accused were he to elect to remain silent. He cited *Mwangi v Wambugu*⁶ in support of the proposition that a court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or where the judge acted on wrong principles in arriving at his findings.
17. I propose to start this determination by recalling that before the trial magistrate was a determination of a simple question, which is whether the prosecution established a *prima facie* case to warrant putting the respondent on his defence. Undisputedly, there is a clear distinction between a *prima facie* case under section 210 of the CPC and an acquittal under section 215 of the CPC. *Prima facie* means "at first glance," or "at first appearance." It is generally used to describe a situation on initial observation. In the legal system, *prima facie* is commonly used to refer to either a piece of evidence which is presumed to be true when first viewed, or a legal claim in which enough evidence is presented to support the validity of the claim.
18. *Prima facie* implies that evidence exists which, unless disproven, is sufficient to prove a certain fact or circumstance. Evidence that may be accepted as *prima facie* is any evidence which, if accepted at face value, supports the case, or a necessary element of the case. A *prima facie* case is that amount of evidence which would be sufficient to counter-balance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove other facts inconsistent with it, and the establishment of a *prima facie* case does not take away the presumption of innocence which may in the opinion of the court be such as to rebut and control it.⁷
19. Admittedly, there is no statutory definition of what is a *prima facie* case. *Oxford Companion of Law*⁸ gives the definition as: -

“A case which is sufficient to call an answer while *prima facie* is evidence which is sufficient to establish a case in the absence of any evidence to the contrary but is not conclusive”.
20. *Mozley and Whiteley's Law Dictionary*,⁹ defines *prima facie* case as:-

“A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case then is one which

⁵ [1990] KLR.

⁶ [1984] 1 KLR.

⁷ Words & Phrases Permanent Edition 33, p. 545.

⁸ Page 907

⁹ 11th Ed



is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

21. As was held in *Ramanlal T Bhatt v R*¹⁰ :-

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It may not be easy to define what is meant by a "*prima facie* case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."(Emphasis added)

22. By now it is manifestly clear that a *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence. It must be such that, if un rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

23. When a trial court rules that the prosecution has established a *prima facie* case against an accused person, the accused person assumes a definite burden. It becomes incumbent upon accused to adduce evidence to meet and nullify, if not overthrow, the *prima facie* case against him.¹¹ This is due to the shift in the burden of evidence, and not of the burden of proof. When a *prima facie* case is established by the prosecution in a criminal case, the burden of proof does not shift to the defense. It remains throughout the trial with the party upon whom it is imposed—the prosecution. It is the burden of evidence which shifts from party to party depending upon the exigencies of the case in the course of the trial.¹²

24. It can now be safely stated that a *prima facie* case is an early screen for a court to determine whether the prosecution can go forward to try the accused fully for the crime. As such, the standard of proof that the prosecution must satisfy at the *prima facie* case stage is lower than that for proof that the defendant is guilty. In order to establish a *prima facie* case, a prosecutor needs only to offer credible evidence in support of each element of a crime. By contrast, a prosecutor must prove defendant's guilt as to each element beyond a reasonable doubt to win a conviction. So, even if a prosecutor can present enough evidence to establish a *prima facie* case as to all elements of a crime, the prosecution must nevertheless still prove defendant's guilt beyond a reasonable doubt. This is a constitutional requirement.

¹⁰ {1957} EA 332 at 334 and 335.

¹¹ Moran Rules of Court, Vol. III, pp. 542-543; People vs. Upao Moro 101 Phil. 1226.

¹² Florenz D. Regalado, Remedial Law Compendium, 1970 ED; p. 795



25. When, at the close of the case for the prosecution, a submission is made that there is “no case to answer,” the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a “case to answer” has no effect whatever on the onus of proof, which rests upon the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact.¹³
26. As the New South Wales Supreme Court held that “[t]here is no necessary inconsistency between a court deciding that the defendant has a case to answer, and then proceeding to hold, in the absence of any further evidence, that the case for the prosecution does not warrant a conviction.”¹⁴ The following steps laid down by the High court of Malaysia offer useful guidance in the issues at hand: -¹⁵
- a. at the close of the prosecution’s case, the court should subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution’s witnesses. Take into account all reasonable inferences that may be drawn from that evidence, then draw the inference that is most favourable to the accused;
 - b. the presiding judge or magistrate should ask himself/herself the question “If I now call upon the accused to make his defense and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is ‘Yes.’ then a *prima facie* case has been made out and the defence should be called. If the answer, is ‘No’ then, a *prima facie* case has not been made out and the accused should be acquitted;
 - c. If after the defence is called, the accused elects to remain silent, then convict;
 - d. If after defence is called, the accused elects to give evidence, then if you accept the explanation given by the accused, then you must acquit.¹⁶
27. If the court accepts the explanation given by or on behalf of the accused, it must of course acquit. But this does not entitle a court to convict if the court does not believe the explanation, for the accused is still entitled to an acquittal if it raises in the mind of the court a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
28. Turning to the present case, I have carefully evaluated the impugned ruling, the evidence tendered before the trial court and the steps laid down in the above cited decision. I have also considered decided cases on the subject. My reading of the impugned ruling, the authorities and decided cases leaves me with no doubt that the trial magistrate misconstrued the issue before him which was whether the prosecution had established a *prima facie* case. He confused the ambit and scope of a ruling under

¹³ The High Court of New South Wales in *May v O’Sullivan* {1955} HCA 38; (1955) 92 CLR 654

¹⁴ *Director of Public Prosecutions (NSW) v Elskaf* [2012] NSWSC 21.

¹⁵ See *Phiri Mailesi v Public Prosecutor*, Court of Appeal of Malaysia, Criminal Appeal No: p-05-311-11/2011.

¹⁶ *Mat v Public Prosecutor* [1963] MLJ 263.



section 210 of the CPC with a decision contemplated under section 215 of the CPC. From the reasoning adopted by the learned magistrate, it is clear that the learned magistrate proceeded to consider the merits of the evidence on the innocence or guilty of the respondent instead of satisfying himself as to the narrow question before him which was whether the prosecution had tabled sufficient evidence to warrant putting the respondent on his defence. This becomes clear if we consider the following excerpt from the ruling: -

“The question which quickly bogs the courts mind is whether a person whose intention was to steal would go a head and record in the occurrence book that which he intended to steal. I do not think so. The element of *mens rea* is missing here meaning the offence the accused person has been charged with is not complete. The accused person had the authority as was confirmed by PW4 to move items. PW7 also confirmed that the accused person had the authority to authorize repairs of less than Kshs. 10,000/= without seeking authority from his bosses. What the court was not told and may be that would have imputed ill motive on the part of the accused person was how long items taken from the bank would remain out before being returned. No definite time frame was indicated and even if such time were to be indicated, its violation or breach would not constitute an offence of theft.

For this reason alone, I agree with the defence that at the time the prosecution closed its case it had not rendered evidence to establish that the offence of theft was committed by the accused person.”

29. From the above excerpt, it is manifestly clear that the learned magistrate reasoning was not addressing the narrow question as to whether the prosecution has established a *prima facie* case against the respondent to justify placing him on his defence. On the contrary, the learned magistrate went a step further to evaluate whether the elements of the offence had been proved and determined the respondent's innocence which should not be done at this stage. By so doing, the learned magistrate misconstrued the issue before him and fell into error. He dangerously descended into the arena of the dispute and determined the respondent's innocence long before calling upon the respondent to answer the charges. Simply put the, the learned magistrate dangerously determined the ingredients of the offence as opposed to addressing his mind to what constitutes a *prima facie* case.
30. The learned magistrate having fallen into grave error as herein above explained, and having misconstrued the law and tests for determining what constitutes a *prima facie* case, and by determining the innocence of respondent at this stage, the learned magistrate fell into grave error which cannot be allowed to stand. By so doing, he occasioned grave miscarriage of justice. Accordingly, I allow this appeal, set aside the ruling delivered on May 6, 2019 and substitute it with a ruling that the prosecution had established a *prima facie* case against the respondent and that the respondent be placed on his defence. I further order that the criminal trial against the respondent proceeds in the lower court to hearing and final determination.

Right of appeal 14 days

SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF AUGUST 2022

JOHN M. MATIVO

JUDGE

SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF AUGUST 2022

J. N. ONYIEGO

JUDGE

