



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO.82 OF 2018**

**REPUBLIC .....APPELLANT**

**VERSUS**

**RIZIKI MATANO CHONGA**

**RENNICK MKALA NYAMU .....RESPONDENTS**

*(Appeal from the Ruling in Anti-Corruption Case No.1 of 2015 of the Chief Magistrate's Court at Malindi Law Court- Hon.Dr. Julie Oseko, CM dated 27th July, 2017)*

**CORAM: Hon. Justice R. Nyakundi**

**Mwangi for the Appellant**

**Nyachiro Robert Arati for the 1<sup>st</sup> Respondent**

**George Kariuki & Associates Advocates for the 2<sup>nd</sup> Respondent**

**J U D G M E N T**

The respondents were charged with the offence of corruptly soliciting for a benefit Contrary to Section 39 (3) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars being that, the 1<sup>st</sup> Accused on the 12<sup>th</sup> day of March, 2015 at Bofa Beach Resort in Kilifi Town within Kilifi County, being a person employed by a public body, to wit, Kilifi County Government, as Head of Supply Chain Management Department corruptly solicited for a benefit of Kshs.400,000/- as an inducement from **Stephen Sanga** so as to influence the Head of Budget **Mrs. Florence Birya** to increase the Budget allocation for the construction of St. Thomas Road from Kshs. 3 Million to Kshs. 4.5 Million, a matter relating to the affairs of the said Public Body.

Count II- Corruptly agreeing to receive a benefit Contrary to Section 39(3) (a) as Read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars being that, the 1<sup>st</sup> Accused person on the 13<sup>th</sup> day of March, 2015 at Malindi Town within Kilifi County, being a person employed by a Public body, to wit, Kilifi County Government, as Head of Supply Chain Management Department agreed to receive a benefit of Kshs.400,000/- as an inducement from **Stephen Sanga** so as to influence the Head of budget **Mrs. Florence Birya** to increase the Budget allocation for the construction of St. Thomas Road from 3 Million to Kshs. 4.5 Million, a matter relating to the affairs of the said Public Body.

Count III- Corruptly receiving a benefit Contrary to Section 39 (3) as read with Section 48 (1) of the Anti -Corruption and Economic Crimes Act. No. 3 of 2003.

The particulars being that the 1<sup>st</sup> Accused person on the 13<sup>th</sup> day of March, 2015 at National Treasury ground, in Kilifi Town within Kilifi County, corruptly received a benefit of Kshs. 100,000/- from **Nirelep Goviandehal Solanki** as an inducement so as to facilitate the processing of payments in respect of goods supplied by Aisha Suppliers Limited to Kilifi County Government, a matter relating to the affairs of the said Public Body.

Count 1V- Corruptly offered a benefit Contrary to Section 39 (3) as read with Section 48 (1) of the Anti- Corruption and Economic Crimes Act. No. 3 of 2003.

The Particulars being that **Nirelep Govindehai Solanki** on the 13<sup>th</sup> day of March, 2015 at National Treasury ground, in Kilifi Town within Kilifi County, corruptly offered a benefit of Kshs.100,000/- as an inducement to **Matano Riziki Choga** so as to facilitate the processing of payments in respect to goods supplied by Aisha Suppliers Limited to Kilifi County Government, a matter relating to the affairs of the said Public Body.

Count V- Corruptly receiving a benefit Contrary to Section 39 (3) (a) as read with Section 39 (3) (a) as read with Section 48 (1) of the Anti – Corruption and Economic Crimes Act No. 3 of 2003.

The particulars being that 2<sup>nd</sup> Accused person on the 13<sup>th</sup> day of March, 2015 at Diamond Club, along Mombasa Malindi Highway in Kilifi Town within Kilifi County being an agent of **Matano Riziki Choga**, a person employed by a public body, to wit, Kilifi County Government as Head of Supply Chain Management Department corruptly agreed to receive a benefit of Kshs.200,000/- as an inducement from **Stephen Sanga** so as to influence the Head of Budget **Mrs. Florence Birya** to increase the Budget allocation for the construction of St. Thomas Road from Kshs.3 Million to Kshs.4.5 Million, a matter relating to the affairs of the said Public Body.

The Appellant being aggrieved with the ruling and subsequent acquittal of the court, has appealed against the judgment and acquittal of the Respondents on the following grounds:

- 1. THAT the trial of the Respondent in Anti- Corruption Case No. 1 of 2015 be declared a nullity.*
- 2. THAT the trial of the Respondent was premised on a report of the CEO (EACC) in the absence of a properly constituted commission.*
- 3. THAT the DPP relied on the EACC a report that was prepared and forwarded in the absence of commissioners.*
- 4. THAT the EACC was not properly constituted and had no power to investigate and recommend to the DPP pursuant to Article 79, 249 and 250 of the Constitution and Section 4 of the EACC Act.*

#### **Background.**

The 1<sup>st</sup> Respondent is the Head of Supply Chain Management of the Kilifi County Government, he was charged with three offences under the Anti- Corruption and Economic Crimes Act. The 2<sup>nd</sup> Respondent on the other hand was charged with corruptly receiving a benefit contrary to Section 39 (3) as read with Section 48 (1) of the Anti – Corruption and Economic Crimes Act No. 3 of 2003 the allegation being that he received the money as an agent of the 1<sup>st</sup> Respondent.

The above charges were filed on 18<sup>th</sup> March, 2015 and initially charged alongside one **Mr. Nirleep Govindihai Solanki** who was charged with the offence of corruptly offered a benefit contrary to Section 39(3) as read with Section 48 (1) of the Anti- Corruption and Economic Crimes Act No. 3 of 2003. This charge was however withdrawn on 7<sup>th</sup> September, 2015 under Section 87 (a) of the Criminal Procedure Code by the prosecution citing lack of sufficient evidence.

At the heart of this matter is the fact that after the accused persons were charged the hearing of this matter did not commence as scheduled for the following reasons;

- 1. Petition No. 3/ 2015 was filed in the High Court of Kenya at Malindi with the effect that these proceedings got stayed pending hearing and determination.*
- 2. The Director of Public Prosecution had not given a go ahead to continue to prosecute.*

For the above reasons, the matter was pending for two (2) years and the accused persons finally took plea on 23<sup>rd</sup> March, 2017 and this was after the High Court lifted the stay order for these proceedings and the office of Public Prosecution finally gave final consent to prosecute the accused persons. The hearing of this case commenced on 3<sup>rd</sup> May, 2017 and a total of nine (9) witnesses testified on the part of the prosecution. On 7<sup>th</sup> July, 2017, the prosecution closed its case.

The crux of the matter was that the complainant one **Sanga Barawah**, a businessman in Kilifi County and also a general contractor with offices both in Kilifi and Malindi working under the style and business name **Mediscop Agencies** was contracted by the County Government of Kilifi to undertake a routine maintenance of St. Thomas Road in Kilifi. During the hearing, he alleged that he was awarded the tender by one **Owen Baya** who was never called as a witness and at that time, the said **Mr. Baya** was the County Secretary for the Kilifi county Government. The proper procurement procedures were not followed but he proceeded and completed the works and he alleges that he spent Kshs.4.5 Million. He also informed the court that he did not have any experience or knowledge of road construction neither was he licensed to undertake a road construction project. That he commenced the process of ratification of the activities that he had unprocedurally undertaken in order for him to be paid the Kshs.4.5 Million that he had spent. That upon demanding payment, he was referred to the Head of Procurement the 1<sup>st</sup> Accused person who explained to him that he could not be paid more than 3 Million as there were no funds. That the 1<sup>st</sup> accused person advised him to accept the amount he was being offered as opposed to nothing.

He further stated that he followed up on the payment for more than two months without any success and decided to report the matter to the

Ethics and Anti- Corruption Commission on the 11<sup>th</sup> day of March, 2015. That from this meeting a ‘sting operation’ was set up in an attempt to arrest the 1<sup>st</sup> accused person, at some point during the operation, it was suspended and (PW7) and (PW8) took back the recording gadget with the money exchanged saying that the same would be increased to Kshs.400,000/- which he alleged was not counted.

His testimony was that it was (PW7) and (PW8) who told him to call the 1<sup>st</sup> accused person to tell him that he had money which he told the 1<sup>st</sup> accused to give to the 2<sup>nd</sup> accused to keep for him and he would collect the following day. These events lead to the arrest of 2<sup>nd</sup> accused person. The lower court noted even though (PW1) stated that the recordings made were in respect of himself, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons, he did not participate in the transcribing and he did not sign the transcript and it was also noted that that the voice recording played in court was not clear.

Taking a closer look at the record, the prosecution having withdrawn the case against one **Mr. Nirelep Solanki** under Section 87 (a) of the Criminal Procedure Code, the court noted that the charges against the accused in Count III was not withdrawn. Similarly, the evidence of (PW2), (PW3) and (PW7) seem to point this accused person and the complainant did not testify against the accused to point him to the offence of soliciting the Kshs.100,000/- . There is also no evidence that the accused solicited or received the Kshs.100,000/- from on **Mr. Solanki** or knew or sent **Mr. Solanki** to put the money in his car. Further no evidence was tendered by the prosecution to show the court that the 1<sup>st</sup> accused person solicited money from **Mr. Solanki** and the said **Mr. Solanki** was also not called as a witness.

The record also clearly shows that the prosecution case was marred with a lot of contradictions for example, (PW7), (PW8) and the entire team stated that the money was Kshs. 400,000/- but the amount that was in court was Kshs.380,000/- and the amount that was finally produced as Exhibit was Kshs.180,000/-. The inconsistencies between the evidence of the prosecution witnesses leaves so many questions in the mind of the court and if at all they were placed on their defence, one would wonder what version they would be expected to address. The court noted that the contradictions, omissions and inconsistencies in the evidences lacked corroboration and became inconsistent with the particulars of the charge which may render the charges to be a fatality.

#### **Appellant’s Submissions.**

The Appellant filed her Submissions on the 19<sup>th</sup> day of December, 2019 and has persuaded allow the appeal based on the grounds stated above. The Appellant is of the view that the investigations in this matter were commenced when the EACC was not fully constituted and therefore the trial should be nullified by this Honourable court.

The Appellant relied on the Authority of **John Mwangi Maina & 2 Others vs Republic Criminal Appeal No. 78 of 2016** where the High Court in Nyeri dealt with a similar matter, the Appellants in this matter were tried and found guilty and the **Hon. Matheka** noted that;

‘The matter was similar to the SISTU case in that the EACC was not properly constituted at all material time, as at 6<sup>th</sup> February, 2015 when investigations began’.

A similar position was held in High Court **Criminal Appeal No. 14 of 2016 Gabriel Mburu Irungu Vs Rep.** The Appellant also directed the court’s attention to **Civil Appeal No. 102 of 2016** where the court made the following finding;

*‘Two important facts are not in dispute. Firstly, the chairperson of the EACC, Mumo Matemu and the commissioners JANE ONSONGO and IRENE KEINO resigned on 12<sup>th</sup> May, 2015, 31<sup>st</sup> March, 2015 and 30<sup>th</sup> April, 2015 respectively. Secondly, the investigations touching on the appellant that culminated in the charges against him were concluded after the commissioners of EACC had resigned’*

*‘...the power to undertake investigations and make recommendations is one of the core functions of the EACC and is undertaken by the commissioners with the help of the secretary and other staff of the EACC as the commissioners may direct from time to time. If the commissioners are not in office, it would therefore follow that the business of EACC as contemplated under Paragraph 5 of the second schedule to the EACC Act as read with Section 11 (1) (d) of the EACC Act cannot be undertaken.’*

Based on the above, the Appellant urged the court to find that the investigations were commenced when the EACC was not fully constituted and therefore the trial should be nullified.

#### **1<sup>st</sup> RESPONDENT’S SUBMISSIONS.**

The 1<sup>st</sup> Respondent filed her written submissions on the 30<sup>th</sup> day of October 2020 and according her Advocate **Mr. Nyachiro**, the grounds relied upon by the Appellant were not justified and that the Appellant has not demonstrated how the learned trial magistrate erred in both law and fact in arriving at her decision to acquit the Respondents under Sections 210 of the Criminal Procedure Code and that the only issue is how the EACC and the DPP failed in their mandate to investigate and prosecute the Respondents.

**Mr. Nyachiro** submitted that the first ground of appeal relied upon by the Appellant was a misplaced group of Appeal which does not meet the threshold required under the law. That conventionally, the grounds of appeal usually touch on the errors of fact and the law by the trial magistrate that the Appellant wishes to be re-interrogated by the appellant court.

**Mr. Nyachiro** also directed the court to the second ground relied upon by the Appellant that the trial of the Respondent was premised on a report of the C.E.O of the EACC in the absence of a properly constituted commission. He submitted that the mandate to investigate corruption cases is vested with the EACC and that the Respondent was charged in court by the officers from EACC who arrested him and

charged him after seeking the directions and concurrence from the Director of Public Prosecution. He further submitted that the issue of constituting of the EACC was a preliminary issue which ought to have been ventilated before arraigning the respondents in court or at the earliest stages of the trial which right they waived and consequently they cannot blame the court or the trial magistrate whose role as independent arbiter is to hear both parties and make a determination.

Similarly, he also added that the Appellant has not filled or attempted to file the purported report of the CEO. That the report is neither in the copy of appeal and even the Appellant's submissions. That the court is therefore at a loss to make a determination based on a report that perhaps never was.

On the issue of the DPP relying on the EACC Report that was prepared in the absence of commissioners. His submission is that the appeal is an afterthought and there is nothing forthcoming that signifies that the Director of Public Prosecution had some intervening reasons not to apply his mind articulately in exercising his constitution mandate. That the DPP is not bound by the finding /investigations of EACC, they have the liberty to order proper and fresh investigations if need. That before taking up any matter the DPP has to establish that all loopholes including the proper constitution of the commission are sealed. The failure and negligence in exercise of that mandate is fatal and amounts to waiver.

Lastly **Mr. Nyachiro**, on the issue of whether the EACC was not properly constituted and had no powers to investigate and recommend to the DPP, he submitted that the nearest the appellant has reached in demonstrating that the commission may have not been properly constituted was through case law which have been haphazardly thrown in the appellant's submissions. He went ahead to state that the date of the charge is when the plea is actually taken and hence though the facts are scanty during which period the commissions was improperly constituted, the authority highlights what transpired in 2015 hence the dates and circumstances are different.

## **2<sup>nd</sup> Respondent Submissions**

The 2<sup>nd</sup> Respondent filed submissions on the 13<sup>th</sup> day of November, 2020 and directed the attention of the court to the following four issues;

- 1. The alleged Appeal herein is not valid, not known in law and not supported by the provisions of Section 348 A (1) and (2) of the Criminal Procedure Code. They submitted that the Appellant alleges to have been offended by the ruling of the learned Magistrate but has failed to point out which part of the ruling and the proceedings the Appellant is aggrieved by. That the above mention section of the Criminal Procedure Code limits the High Court to hear an Appeal from the lower court on acquittal or on an order; limited to matters of facts and law.***
- 2. That the evidence on record and the ruling by the learned Chief Magistrate court does not give merit to the Petitioner's prayers.***
- 3. The 2<sup>nd</sup> Respondent through his advocate Mr. Kariuki questioned whether the Appellant can separate its actions and or omissions from the actions or omissions of the EACC and any officer working under their instructions.***
- 4. Mr. Kariuki finally submitted that the Appellant was acting in bad faith and abusing the process of the court. That the Appellant is acting in bad faith aimed at defeating justice and if the Appeal is allowed, the same would amount to double jeopardy.***

## **Analysis and Determination**

I have considered the petition of Appeal by the Appellant dated 19<sup>th</sup> December, 2018 which is the subject of this Judgment, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I am duly guided that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

The provisions under Section 306 of the Criminal Procedure guide and do postulate on the standard of proof on the doctrine of a prima facie case and a motion of no case to answer. The section sets the tone in the following language if at the close of the prosecution case, it appears to the court that there is no evidence that the accused or any one of them committed the offence. It shall in the particular case make a finding of not guilty and discharge the accused of any wrong doing.

On the other hand in Subsection (2) if at the close of the prosecution case in support of the charge, it appears to the court that a case has been made out against the accused person, sufficiently to require him to be placed on his defence, then, the court would call upon such accused to state his defence on any of the elective model provided in the provisions what therefore is a prima facie has been clearly stated in the case of **R. T. Bhatt v R {1957} E.A.** to include whether, the evidence availed by the prosecution has established the elements of the offence sufficient.

I reckon that the Criminal Procedure Code provides no definition as to what is the meaning of a prima facie case. However, the doctrine has received attention from legal scholarly works and various jurisprudential decisions by the Superior Courts to achieve a clear understanding of the concept and its application.

The definition of what has to commonly known as a prima facie case concept in the discussion on a motion of no case to answer under Section 306 (1) of the Code has been defined. In **Osborne's Concise Law Dictionary** as follows:

***“A case in which there is some evidence in support of the charge or allegations made in it, and which will unless it is displaced. In a case which is being heard in court, the party starting, that it upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer and the case will have to be dismissed.”***

The instant case being a criminal trial, the prosecution is vested with the burden of proof to establish the elements of the offence and the accused person as a perpetrator beyond reasonable doubt. Thus the persuasive authority from a comparative Common Law jurisdiction in **Haw Tua Tau {1981} 2 MLJ 49**: Set out the criteria to be satisfied as follows:

***“The prosecution makes out case against the accused by adducing evidence of primary facts, it is to such evidence that the word if un rebutted refer, what they mean is that for purpose of reaching the decision called for by Section 188 (1) similar to Section 306 (1) of the Kenyan Criminal Procedure Code.”***

In respect of the measure of a prima facie case within the permissible limits of Criminal Law the standard of proof required is not that envisaged in the dictum by **Lord Denning in Miller v Minister of Pensions [1947] 2 ALL ER 37** in which he held as follows:

***“That degree is well settled it need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt, does not mean proof beyond a shadow of doubt.....”***

In this case the burden on a prima facie case to be shown by the prosecution according to **Lord Denning** is consistent with the proposition that the degree need not reach certainty but it must carry a high degree of probability but not beyond reasonable doubt, that there exists evidence which can sustain a conviction.

Similarly in **Regina v Coker and others {1952} 20 NLR 62**, the court held that:

***“a submission that there is no case to answer meant that there was no evidence on which the court could convict even if the court believed the evidence given.”***

In what I consider one of the land mark cases by the English Court of Appeal in **R v Galbraith [1981] IWL R** it addressed the concept of prima facie case in this way, where **Lord Lane C. J.** said:

***a) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty, the Judge will of course stop the case.***

***b) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.***

The analysis done by **Lord Devlin** in Trial by Jury, the **Hamlyn Lectures (1956) republished in 1988** does illustrate the distinct roles of the Judge and jury when asked to decide whether a prima facie case has been established against the accused persons within meaning of a prima facie case and a motion of no case to answer he held as follows:

***“There is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their Judgment based on their experience. But they base their Judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturers of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw. That is a job for an expert. It is the business of Judges as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury, in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is. The trained mind is the better instrument for detecting flaws in reasoning, but if it can be made sure that the jury handles only solid arguments and not sham, the pooled experience of twelve men is the better instrument for arriving at just verdict. Thus logic and common sense put together.”***

What in essence is being propounded in the above principles is the aspect that in a prima facie case before the burden shifts to the accused persons to show that the crime occurred, the prosecution ought to have rested its case on the required standard of proof. It is only at that time within permissible defences in Law i.e. insanity, self-defence or without fault of his own an accused person can be called upon to state his defence.

These principles from the persuasive case Law have been carefully adopted and applied in our jurisdiction on many occasions as can be seen in the case of **R. T. Bhatt v R [1957] EA** to achieve the objective in a question on what constitutes a prima facie case. Thus whether a trial Judge thinks of existence of a prima facie case this one test is a matter of discretion which must meet the set criteria chosen reasonably and demonstrably justified. The law in Kenya is now trite on this subject and the test of a prima facie case is stated to exist where evidence can prove essential elements of the offence and a reasonable tribunal properly constituted addressing its mind to the facts and the Law may convict if no evidence is offered in rebuttal.

Having said this the court must act on the presumption:

***(a). That all such evidence of primary fact is true, unless, it is inherently incredible that no reasonable person would accept it as***

being true and

**(b). That there would be nothing to displace those inferences as to further facts or to the state mind of the accused which would be reasonably be drawn from the primary facts in the absence of any further explanation.**

**At the conclusion of the prosecution case, what had to be decided remains a question of Law only, as decider of Law, the Judgment consider whether there is some evidence not inherently incredible which if he were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential element lacking, then, and then only, is he justified in finding that no case against the accused, had been made out which if un rebutted would warrant his conviction.”**

There in the fullness of the wisdom of the framers of our statute, the sole purpose of advancing a motion of no to answer under such circumstances is to have the trial court dismiss the charge and acquit the accused person as in the present case. It is quite apparent that in our jurisdiction any of the two legal positions are permissible but done in strict compliance that the object under the right to a fair trial in Article 50 which provides constitutional guarantee of due process comes into force even in retrospect whether the prosecution has made out a prima facie case against the accused person. This would equally apply to the submissions on a no case to answer motion by the defence. The grave issues of the constitution which might turn on at this stage of the trial perhaps requires the single most important question as to whether the right to a fair trial under Article 50 remains guaranteed be determined by the court.

It seems therefore at the end of the day if I place the accused persons in their defence that there exist a prima facie case the sufficiency of evidence shall be tested within the threshold issue of circumstantial evidence. Similarly, the myriad of other contradictions and inconsistencies in the evidence as I have analysed will not do any good to this case. From what the nine witnesses told the court starting with (PW1) to PW9 there is no iota of evidence which came out from each one of them how money allegedly came into possession of the accused persons.

It is quite apparent that in our jurisdiction any of the two legal positions are permissible but done in strict compliance that the object under the right to a fair trial in Article 50 which provides constitutional guarantee of due process comes into force even in retrospect whether the prosecution has made out a prima facie case against the accused person. This would equally apply to the submissions on a no case to answer motion by the defence. The grave issues of the constitution which might turn on at this stage of the trial perhaps requires the single most important question as to whether the right to a fair trial under Article 50 remains guaranteed be determined by the court.

This court has also taken into consideration and is persuaded with the Respondent’s submissions that indeed the Respondents were arraigned in court in 2015, a trial that lasted 5 years and the effort of the Appellant at this point is only trying to test the court after failing to establish a prima facie case.

The discretion to determine whether the prosecution has satisfied the legal and evidential burden of a prima facie case to call upon the accused to be placed on his or her defence, requires the court to address its mind to two issues one, whether the deserving considerations on the right to a fair trial entrenched in Article 50 are present in the facts of the case under review. Secondly, whether the prosecution positioned such evidence which affords support of the facts in issue or non-existence of the facts in issue to demonstrate with particular degree of confidence of a prima facie case.

The facts of this case are no different from the principles in the comparative jurisprudence of **R v Johnson (1993), 12 O. R. (3d) 340 (C.A.), at pp. 347 – 48:**

***“No adverse inference can be drawn if there is no case to answer. A weak prosecution’s case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words of Irving J. A. in R v Jenkins (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R. 61 (C.A.), “Circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned.” That point, it seems to me, can only be the point where the prosecution’s evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for a reasonable doubt could be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt: it fails to provide any basis to conclude otherwise. When linked in that fashion to the strength of the Crown’s case, the failure to testify is no different than the failure to call other defence evidence.... If the Crown’s case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent; R v Boss (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123 (C.A.), at p. 42 (sic) C. R. But the failure to testify cannot be used as simply one of the circumstances from which the guilt of the accused can be inferred. R v Armstrong (1989), 52 C. C. C. (2d) 190 .... As Doherty J, pointed out in R v Manchev, an unreported judgment of the Ontario High Court, August 23, 1990, the accused’s failure to testify is not an independent piece of evidence to be placed on the evidentiary scale. It is rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence adduced. (Emphasis added by Sopinka J.)***

The primary issue on this appeal, is whether the session Magistrate erred by not allowing the respondents to state their defence. In this respect I echo the words in **R v P. (M.B.) (1994) 1 S.C.R. 555, at p. 579:**

***“At trial, accused persons continue to be protected by a right to silence. Specifically, they cannot be compelled to testify, and they have a right not to have their testimony used against them in future proceedings. These protections against testimonial compulsion of the accused have been constitutionalized in Section 11 (c) (right of the accused not to be compelled to testify) and Section 13 (right of witness not to have his or her testimony from one proceeding used to incriminate him or her in a subsequent proceeding) of the Charter. As this Court observed in Dubois, supra at p. 357, when combined with Section 11 (d) (presumption of innocence). Subsection 11 © and 13 of the Charter protect the basis tenet of justice that the Crown must establish a “case to meet” before there can be any expectation that the accused should respond. All of these protections, which emanate from the***

*broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a prima facie case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so may, serve as the basis for drawing adverse inferences: Dubois, supra, at pp. 357-58: D. M. Paciocco, Charter Principles and Proof in Criminal Cases (1987), at p. 495. In other words, once there is a “case to meet” which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes – in a broad sense – compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction (emphasis in original).*

The above charter provisions are in pari materia with our Article 50 of the Constitution on the right to a fair hearing. The right of a fair and just legal system and as stated in the principle above require that if the prosecution has decided to prosecute a case, the same must be done to ensure that a conviction is reached.

The session Judge or Magistrate sitting on a fact finder, evaluates the credibility of witnesses in criminal cases to make a definitive finding on existence or non-existence of facts in issue. Cases are never tried as an academic exercise but in an effort to find those culpable and pass punishment according to the Law.

An analysis of this case and the context of the initial case, at the close of prosecution case bearing in mind the above demonstrated principles, the prosecutor has not discharged the burden of proof of a prima facie case against the accused persons. The accused persons equally play no role as to where and how the prosecution acquires their evidence and material to prosecute a case.

Before I pen off, it is important to note that criminal charges come into the judicial system by virtue of having been instituted by the Director of Public Prosecution, the Ethics and Anti-Corruption Commission does not have locus standi in instituting criminal proceedings. The power to institute and undertake criminal proceedings as well as to take over and continue any such criminal proceedings is bestowed on the Director of Public Prosecutions (D.P.P.). This is under **Article 157** of the Constitution. That decision to prosecute unfortunately is subject to judicial review by this Court. This case presents a picture of an unfair system of justice for the real experience by the respondents perceives a conflict, between the justice actors in the administration of justice. While this Court has recognized the importance of anti-corruption commission in our view no action should have been taken by the DPP to charge the respondents in absence of the legality and legitimacy of the investigative agency.

The prejudice to the respondents’ interests either actual or inferred from the length of the delay were these proceeding to be re-opened afresh may not be remediable in damages. The framework set out in this appeal gives rise to both doctrinal and practical problem contributing to a culture of delay and complacency towards fair administration of justice. Here for example the state argues that the trial Judge erred in characterizing the evidence and assessing it in both quantity and quality as lacking candor of a prima facie case. Such a finding in a criminal trial is sometimes unavoidable. In order to achieve fairness of the trial and to live up to the constitutional obligations. The intervener or appellant in this case knows too well that the quality of justice does not always increase proportionally with the length, complexity or multiple trials before different Courts. Unnecessary attempts to bring the culprits to book and in efficiency in the level of investigations have the opposite effect, weighing down the entire system. At the heart of this appeal is the framework of the burden and standard of proof of beyond reasonable doubt.

Accordingly, this court finds that a prima facie case as known in Law is far from being established by the prosecution. That placing the accused person on their defence would be an action in futility.

In the upshot of this, is that I disallow the appeal with no orders as to costs.

**DATED, DELIVERED AND SIGNED ATMALINDI THIS 18TH DAY OF OCTOBER 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**1. MR. MWANGI FOR THE APPELLANT.**

**2. MR. KARIUKI FOR THE RESPONDENT**