



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 4 OF 2018

SUHEIL SIDIQUE HAROON.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(An appeal against the ruling and order of Hon. J. Nang'ea, CM delivered on November, 29th 2017 in Criminal Case NO. 26 of 2014 at

Mombasa Chief Magistrate Court)

JUDGMENT.

1. The Appellant, SUHEIL SIDIQUE HAROON is charged with three (3) counts of obtaining goods by false pretenses contrary to Section 313 of the Penal Code in counts I, VI and VIII and seven (7) counts of issuing a bad cheque contrary to Section 316A (1) as read with Sub-section 4 of the Penal Code.

The Appellant was arraigned in court on 1st December, 2014 whereby the charges were read to him and he pleaded NOT GUILTY to all of them.

2. The trial commenced on 30th June, 2017 whereby the prosecution called evidence of four (4) witnesses with the last one testifying on 12th October, 2017. Ann on 29th November, 2017, the trial magistrate ruled that he had found that a prima facie case had been made out in respect of all the charges and placed the appellant on his defence while reserving reasons for this.

3. The appellant is aggrieved by this ruling of the trial magistrate and has preferred the appeal against the said ruling and order of the court on the following grounds:

(a) THAT the learned trial subordinate court erred in law and in fact by failing to find that the evidence adduced against the Appellant did not satisfy the ingredients required to enable it place the appellant on his defence as no prima facie case had been made out against him.

(b) THAT the learned trial magistrate failed to appreciate that the complainants were using the Criminal Justice System to collect civil debts and that the evidence so tendered on record clearly illustrated that the case was clearly of debt collection and therefore civil in nature.

(c) THAT the learned trial magistrate erred in law and in fact in failing to hold that the evidence adduced was shaky, contradictory and not supported by the evidence on record.

(d) THAT the learned trial magistrate overlooked the fact that the document examiner report failed to capture the signature of the Appellant as no specimen signature was ever taken from him thereby occasioning a false graft.

(e) THAT the leaned trial magistrate erred in law and in fact in failing to note that the evidence contained in the invoices, delivery notes and the cheque did not tally in terms of date, the amount, the goods supplied and the place of supply.

The appeal proceeded for hearing on 20th September, 2018 and both counsels made oral submissions.

4. The Appellant's counsel submitted by highlighting the five grounds of appeal and wanted the court to look at the exhibits on record. He submitted that the appellant had transacted business with PW1, PW2 and PW10 and had only been unable to pay due to bad business in

South Sudan. He therefore could not have been said to have obtained money by false pretenses. He referred court to the alleged bad cheques being Exhibits P13, P14 and P15 (invoices) which he said were post-dated cheques.

5. He also pointed out that the dates of the invoices came earlier than the date of the cheques. Also, the appellant signatures were never taken and presented to the Document Examiner for analysis. He then submitted that this is a case where criminal proceedings were being used to settle civil debts when the prosecution's witness agreed in their evidence that they were dealing with the appellant on credit basis.

6. Mr. Wangila, Counsel for the Director of Public Prosecutions in response, submitted that on the issue of the charges of obtaining by false pretenses in counts 1, 6 and 8 against the appellant, the state conceded that indeed there was a contractual relationship between the appellant and complainants that had spread over a period of time, with one of the terms being business on credit and hence the element of pretence as envisaged under Section 313 of the Penal Code does not accrue.

7. He however submitted that the court adjudicates over the issue of the appellant having issued bad cheques as charged vide Counts II, III, IV, V, VI VII and IX. He argued that even though the signatures on the alleged cheques produced as Exhibits P13, 14 and 15 were not analyzed scientifically, the appellant's name appeared on the face of it as the account holder.

8. As a first appeal, this court is required to conduct a fresh evaluation of all the evidence that was adduced before the trial court and come up with an independent conclusion on whether to uphold or set aside the decision of the trial magistrate. In so doing, there ought to be regard to the fact that, unlike the trial court, this court had no advantage of seeing or hearing the witnesses (**See Okeno –versus – Republic (1973 E.A 32)**).

9. I have considered the grounds in the memorandum of appeal, arguments by the appellants and prosecution's counsel, the proceedings before the trial court and the law. I find that the prosecution adduced evidence of four witnesses and upon closing its case, the trial magistrate found the appellant had a case to answer and placed him on defence as per the provisions of Section 211 of the Criminal Procedure Code. This aggrieved the appellant that he filed the appeal.

10. The procedure in trials before the subordinate court is provided for under Part VI of the Criminal Procedure Code.

At Section 211 of the Criminal Procedure, the law provides that:-

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

11. From this provision, it is clear that the decision to place an accused person on defence depends on what a particular court makes of the evidence that will have been tendered before it on first examination. This position may be proved to be true or disproved depending on the explanation an accused person may give on defence. Therefore, the process of trial at this stage is still on going and cannot be stopped.

12. Also, reading through the said provision, there is no requirement that the trial court gives reason for arriving at the finding that the evidence adduced has raised a prima facie case to warrant an accused person to be placed on defence. Infact, as a matter of practice, courts find it safe not to give reasons for their finding of a prima facie case so as not to preempt the defence by an accused person.

13. The next issue for determination is whether there is a right of appeal where an accused person has been placed on defence.

Appeals from the subordinate courts are governed under part XI of the Criminal Procedure Code. Section 347(1) which deals with appeals to High Court provides as follows:-

“Save as is in this part provided,

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) an appeal to the High Court may be on a matter of fact as well as a matter of law.”

14. Much as the finding of a prima facie case and placing an accused person on defence is a matter of law, under Section 211 of the Criminal Procedure Code, it is not subject of the provisions of Section 347(1) (a) of the Criminal Procedure Code. The Section clearly indicates that an appeal to the High Court must be by “a person convicted”.

15. At the stage of being placed on defence, one is not a convict yet and therefore has no right of appeal. In the circumstances, the appeal herein is incompetent and hence dismissed forthwith.

16. The appellant having been placed on his defence, I direct that the matter be placed before the trial court for disposal on the Chief Magistrate, Mombasa Law Courts for allocation before a court of competent jurisdiction for the same to proceed accordingly, with immediate effect.

Judgment Delivered, Signed and Dated this 22nd day of January, 2019.

D. CHEPKWONY

JUDGE.

IN THE PRESENCE OF:

Mr. Wangila, counsel for the state

Mr. Munyalla holding brief for Mr. Muganda for the appellant

Court Assistant; Beja