



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.98 OF 2018**

**BETWEEN**

**REPUBLIC.....APPELLANT**

**AND**

**ADAN NOOR ADAN.....RESPONDENT**

*(An Appeal from the original acquittal under Section 210 of the Criminal Procedure Code*

*in Cr. Case No. 1335 of 2017 at the Chief Magistrate's Court at Milimani*

*delivered by the Hon. Kenneth Cheruiyot on 16<sup>th</sup> May 2018).*

**JUDGMENT**

1. Appellant, being the prosecutor, appealed against the acquittal of the Respondent under **Section 210 Criminal Procedure Code**. The Appellant raised the following grounds of appeal, that the learned trial magistrate erred in law and fact by failing:

- a. To consider that the prosecution had established a prima facie case against the respondent;*
- b. To properly consider the weight of the charges as against the evidence adduced;*
- c. To consider that the prosecution had discharged its burden of proof by establishing its case beyond reasonable doubt.*

2. The Respondent was charged in the trial court with eleven (11) counts. There were eight (8) counts of making a document without authority contrary to **Section 357(a) of the penal code**, a count of uttering a false document contrary to **Section 353 of the Penal Code**, a count of forgery contrary to **Section 349 of the Penal Code** and a count of personation contrary to **Section 382 of the Penal Code**. The particulars of the charges are as follows:

a. **Count I-VIII** Making a document without authority contrary to **Section 357(a) of the Penal Code**.

i. **Count I:** On the 26<sup>th</sup> day of September 2013 at an unknown place within the Republic of Kenya with intent to deceive or defraud, without lawful authority or excuse made, Minutes of the board of directors meeting of Quick Handling Aviation Services Limited in which (1) Ebla Abdi Osman (2) Abdullahi Yusuf Robleh (3) Mustafa Haji Ahmed Dahir and (4) Zeina Abdi Osman were appointed as the Directors and each were allotted some shares, purportedly signed by Ferdinand G. Muchomba, a certified public secretary purporting them to be genuine minutes of the board of directors meeting of Quick Handling Aviation Services Limited purportedly signed by Ferdinand G. Muchomba certified public secretary.

ii. **Count II:** On the 26<sup>th</sup> day of September, 2013 at an unknown place within the Republic of Kenya, with intent to deceive or defraud, without lawful authority or excuse made extraordinary general meeting minutes for Quick Handling Aviation Services Limited in which (1) Ebla Abdi Osman (2) Abdullahi Yussuf Robleh (3) Mustafa Haji Ahmed Dahir and (4) Zeina Abdi Osman were appointed as the new directors of the company and each were allotted some shares purportedly signed by Ferdinand G. Muchomba a certified public secretary, purporting it to be a genuine extraordinary general meeting of Quick Handling Aviation Services Limited.

iii. **Count III:** On the 26<sup>th</sup> day of September 2013 at an unknown place within the Republic of Kenya, with intent to deceive

or defraud without lawful authority or excuse made Return of Allotments of Quick Handling Aviation Services Limited in which the return relates to one allotment of 600 ordinary shares, signed by Ferdinand G. Muchomba, a certified public secretary purporting it to be genuine Return of Allotments of Quick Handling Aviation Services Limited.

iv. **Count IV:** On the 26<sup>th</sup> day of September, 2013 at an unknown place within the Republic of Kenya, with intent to deceive or defraud without lawful authority or excuse made Form of Annual Return for Quick Handling Aviation Services Limited signed by Ferdinand G. Muchomba, a certified public secretary purporting it to be genuine Form of Annual Return for Quick Handling Aviation Services Limited.

v. **Count V:** On the 2<sup>nd</sup> of September 2014, at an unknown place within the Republic of Kenya, with intent to deceive or defraud without lawful authority or excuse made special notice for extraordinary General Meeting of Quick Handling Aviation Services Limited in which a notice was given seeking to remove (1) Abdikadir Ali Duale (2) Mohamud Abdi Hussein and (3) Stephen Kibet from the office of Directors of the Company purportedly signed by Ferdinand G. Muchomba, certified public secretary. Purporting it to be a genuine special notice for an extraordinary meeting of Quick Handling Aviation Services Limited.

vi. **Count VI:** On the 10<sup>th</sup> of January, 2014, at an unknown place within the Republic of Kenya, with intent to deceive or defraud without lawful authority or excuse made minutes of the Extra Ordinary General Meeting of Quick Handling Aviation Services Limited in which a motion seeking to remove (1) Abdikadir Ali Duale (2) Mohamud Abdi Hussein and (3) Stephen Kibet as the Directors of the Company were discussed and seconded by Mustafa Haji Ahmed Dahir and members took a vote for their removal purportedly signed by Ferdinand G. Muchomba, certified public secretary, purporting it to be genuine minutes of the extraordinary meeting of Quick Handling Aviation Services Limited purportedly signed by Ferdinand G. Muchomba Certified Public Secretary.

vii. **Count VII:** On unknown date and place within the Republic of Kenya, with intent to deceive or defraud, without lawful authority or excuse made, notification of change of Directors and Secretaries Form, purportedly signed by Ferdinand G. Muchomba Certified Public Secretary, purporting it to be a genuine Notification of Change of directors and Secretaries Form, purportedly signed by Ferdinand G. Muchomba, Certified Public Secretary.

viii. **Count VIII:** On the 10<sup>th</sup> day of January, 2014 at an unknown place within the Republic of Kenya, with intent to deceive or defraud, without lawful authority or excuse made, Form of Annual Return for Quick Handling Aviation Services Limited, signed by Ferdinand G. Muchomba, Certified Public Secretary.

b. **Count IX:** Uttering a false document contrary to **Section 353 of the Penal Code**. The Particulars are that on diverse dates between 26<sup>th</sup> September 2013 and 12<sup>th</sup> March, 2014 at Registrar of Companies in Nairobi within Nairobi County, knowingly and fraudulently uttered a certain forged document namely (1) minutes of the board of directors meeting of Quick Handling Aviation Services Limited dated 26<sup>th</sup> September, 2013 (2) Special/ordinary Resolution dated 26<sup>th</sup> September 2013 (3) Return of Allotments dated 26<sup>th</sup> September 2013 (4) Form of Annual Return of Quick Handling Aviation Services Limited dated 26<sup>th</sup> September 2013.

c. **Count X:** Forgery contrary to **Section 349 of the Penal Code**. The particulars were that at an unknown date and time within the Republic of Kenya, with intent to defraud forged the Signatures and Stamp impression of Ferdinand G. Muchomba a certified public secretary.

d. **Count XI:** Personation contrary to **Section 382 of the Penal Code**. The particulars were that at an unknown date and time within the Republic of Kenya, with intent to defraud falsely represented himself to be Ferdinand G Muchomba, a certified public secretary.

### **Summary of evidence.**

3. **PW1, Abdikadir Ali Duale**, a businessman in the transport industry in his testimony stated that he, along with Stephen Kibet, Aden Noor Aden (the Respondent herein) and Mohamud Abdi Hussein were shareholders and directors at Quick Handling Aviation Services Limited. They received a contract to offer handling services at Wajir Airport. They entrusted the Respondent to handle the task due to their busy schedules. After a while it became apparent that the Respondent was not able to attend meetings and therefore the other directors met without him. They involved community elders and further filed an application to seek orders restraining the Respondent from dealing with the company.

4. **PW1** denied attending the meeting that approved the appointment of the new directors dated 26/9/2013. He further admitted seeing form CR12.

5. **PW2, Mohamud Abdi Hussein**, a businessman, testified that he formed Quick Handling Aviation Services Limited together with **PW1**, Stephen Kibet, **PW4**, and the Respondent being directors. They left the Respondent to run it since they were busy. The Respondent then failed to attend meetings. It was then that CR12 documents revealed that other directors had joined the company. It was his testimony that the Respondent forged a company resolution that gave rise to the change of directorship.

6. **PW3, CIP Iranda Masiko**, a forensic document examiner testified that he compared the sample signature of the Respondent against the documents in question and found that he had indeed signed the documents. Further, that the stamp impressions made on the documents in question are different from the actual stamp of **PW5**. **However, the evidence of PW5, Ferdinand Githethuki Muchomba** a registered Company Secretary, was that he could not confirm who signed the CR12 documents or other documents presented to his office for purposes of registering the new directors.

7. **PW4, Stephen Kibet**, a businessman was a co-directors of Quick Handling Aviation Services Limited. After futile attempts at getting the Respondent to attend meetings, they resolved to approach community elders. They failed to resolve the dispute and therefore filed a miscellaneous civil application in court. They then discovered that there were directors who had joined the company without their consent. They found that the minutes for the meeting that gave rise to the resolution to include new directors included his name yet he did not attend the meeting.

8. **PW5, Ferdinand Githethuki Muchomba**, a registered certified public secretary testified that he did not sign nor stamp the documents. He however admits that the details on the stamp are his. Further, that the signature looked like his. He explained that these details are available to whomever he processes documents for.

9. **PW6, Peterson Wachira** was a clerical officer working in the office of the Registrar of Companies. In principle, his testimony was that he had never seen the Respondent submit or present any of the impugned documents to the Registrar of Companies

### **Analysis and determination**

10. The appeal was canvassed by way of written submissions. Those of the Appellant were filed on 17<sup>th</sup> October, 2019 by prosecution counsel, Ms. Sigei whilst those of the Respondent were filed by his counsel, Wesonga, Mutembei & Kigen Advocates on 5<sup>th</sup> November, 2019. I have considered the respective submissions and the cases cited and I take the following view of the appeal.

11. The main contestation in this appeal is the submission by the Appellant that the prosecution established a *prima facie* case that warranted the placing of the Respondent on his defence, and that therefore, it was an error to acquit him under Section 210 of the Criminal Procedure Code. Counsel for the Respondent on his part submitted that the prosecution's case did not establish a *prima facie* case as envisaged in the case of **R. T. Bhatt v Republic [1957] EA 332**.

12. The main issue for determination is therefore, whether a *prima facie* case was established at the close of the prosecution case to warrant the placing of the Respondent on his defence.

13. A *prima facie* case was defined by the then East African Court of Appeal in the case of **Ramanlal Trambaklal Bhatt v Republic (1957) EA 332** as follows:

*“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 is true, ..., that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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.”*

14. See also Lord Parker C.J., in **Practice Note[1962] 1 All ER 448**, that:

*“A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.*

*...If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal can convict on the evidence so far laid before it, there is a case to answer.”*

15. From the foregoing authorities, it is clear that a *prima facie* case does not require proof beyond a reasonable doubt. The court's duty is to determine whether a reasonable court may convict the Respondent based on the evidence laid by the prosecution if no explanation was tendered by the Respondent.

16. The Respondent was charged with eleven counts: eight (8) counts of making a document without authority, a count of uttering a false document, a count of forgery and a count of personation.

17. The prosecution was required in counts I-VIII to prove that the Respondent made or caused the various documents to be made without authority and that the intention was to deceive or defraud. In count IX, the Appellant needed to prove that the Respondent uttered or caused the document to be uttered fraudulently and knowingly. In count X, the Appellant ought to have demonstrated that the document was false, that it was intended to deceive or defraud. In count XI, that the Respondent with intent to deceive or defraud represented himself to be some other person.

18. The Appellant faulted the trial court for not considering that they had established a *prima facie* case. It is my duty to derive, from the totality of evidence, the basis of this assertion. In the ruling of the learned trial magistrate, as regards counts I, II, III, IV, V, VI, VII and VIII, he found that there was no sufficient evidence that the Respondent made the documents in issue or forged them altogether. He observed that

the PW3, the forensic document examiner testified that he could not establish whether it was the Respondent who put the signatures of Ferdinard G. Muchomba in them. He only could confirm that the said Muchomba did not sign them. That in any case PW3 was not presented with the known signatures of Muchomba; only the questioned signatures and specimen stamp impressions. That he was of the opinion that different people signed the documents and different stamps made the stamp impressions.

19. The learned trial magistrate at paragraph 50 of his ruling further said;

***“There is no proof either that the accused person presented the documents named in count X to the Registrar of Companies or that he presented himself as Ferdinard G. Muchomba to the Registrar of Companies as claimed in Count XI. In fact, the charge sheet does not even name the person to whom the accused presented himself to as Ferdinard G. Muchomba.”***

20. I cannot agree more. Just as was submitted by counsel for the Respondent, the case was itself a non-starter. PW1 adduced no evidence that linked the Respondent to the charges. His evidence was that he did not know if the Respondent presented the minutes that changed the CR12 to the Registrar of companies. Equally, PW2 had no evidence to show that the Respondent forged the documents.

21. The only persons who could have vindicated the two key witnesses were PW3, the forensic document examiner and PW5 the Company Secretary. But again, their evidence did not salvage an already bad situation. PW3 testified that he was not given the known signatures of PW5 which were allegedly forged. He was neither given specimens of his signature and stamp. He only had a specimen impression. In his evidence, was unable to confirm that it was the Respondent who put PW5's signature on the documents.

22. PW5 on his part exonerated the Respondent. His evidence was that he does not at all recall the Respondent presenting any of the impugned documents to him or that he purported to be him. This, thus, delinked the Respondent from all the offences. Further, PW6, a clerk at the Registrar of Companies office also said that he had never met the Respondent and that he neither presented the questioned documents to him.

23. I add that the evidence in **Count XI**, the charge of personation, was wanting. The Appellant did not submit any evidence of the Respondent representing himself as another. I presume that this charge was preferred on account of the signatures and stamp impressions supposedly belonging to **PW5** which he disowned. I find it unsatisfactory that **PW5** would admit that the details of the stamp and the signature on the document bore the uncanny resemblance to his yet he denied processing such a document. Therefore, his testimony that he could not confirm the culpability of the Respondent meant that the trial court did the noble thing of acquitting him.

24. The prosecution no doubt failed to show that the Respondent, with intent to defraud made the documents listed in counts I to VIII, that he forged them or uttered them to PW5. They also failed to demonstrate he personated PW5. It is a case, clearly, the prosecution did not establish a *prima facie* case to warrant the Respondent be put on his defence. In fact, had the court ruled that a *prima facie* case was established and on defence the Respondent opted to keep quiet, the court would still have acquitted him. There was no wrong in the finding of law or fact by the learned trial magistrate in acquitting the Respondent.

25. As was held in the case of **Bhatt v Republic (supra)**, ***“a mere scintilla of evidence can never be enough.”***, what the prosecution adduced was so discredited and insufficient that a reasonable court, properly directing itself could not convict, let alone put the Respondent on his defence.

26. Therefore, from the totality of evidence the prosecution had not demonstrated a case for which the Respondent was required to answer to. The Appellant was unable to demonstrate the involvement of the Respondent in the charges preferred. The Appellant was unable to prove that the Respondent intended to defraud or deceive anyone.

27. In the result, I find the appeal without merit and I dismiss it accordingly.

**DATED and DELIVERED** this 20<sup>th</sup> day of **December, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Miss Nyauncho for the Appellant.

2. Miss Kyalo h/b for Mr. Wesonga for the Respondent.