REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 2 OF 2017

WESLEY KIPTUI RUTTO

FRED KIPROTICH RUTTO ……...….APPLICANTS

VERSUS

REPUBLIC…….……..….RESPONDENT

RULING

INTRODUCTION

1. The applicants are accused persons in Kabarnet Principal Magistrate's Court Criminal Case No. 858 of 2013 where they face two counts, respectively, of malicious damage to property contrary to section 339(1) of the Penal Code and stealing contrary to section 275 of the Penal Code. Upon the close of the prosecution case, the defence made submissions on a ***no case to answer*** under section 210 of the Criminal Procedure Code**,** which the trial Court in a one-line ruling rejected as follows:

> "**RULING:**
>
> ***As per the evidence tendered a case has been adduced against the accused requiring them to give their defence."***

THE APPLICATION

2. Aggrieved by the order rejecting their submission of no case to answer, the applicants by a Notice of Motion dated 27th January 2017 seeking the following orders on revision:

> *1.* ***THAT*** *this application be certified urgent and heard ex-parte in the first instance.*
>
> *2.* ***THAT*** *the court file in Principal Magistrate Court at* ***Kabarnet, Criminal Case No. 858 of 2013 (Kabarnet Law Courts)*** *be called to the High Court of Kenya at Kabarnet for examination and revision.*
>
> *3.* ***THAT*** *the Honorable court be pleased to examine and revise the order issued by the Honourable trial Magistrate S.O. TEMU (PM) in Principal Magistrate court at* ***Kabarnet Criminal case No, 858 of 2013*** *putting the accused persons on their defence and substitute it with an order of* ***no case to answer*** *and accordingly acquit the accused persons of all the charges.*

*4. **THAT** pending the hearing and determination of the instant Revision application there be a stay of the proceeding in the Principal Magistrate's Court Criminal Case **No. 858 of 2013 (Kabarnet Law Courts) Republic –vs- Wesley Kiptui Ruttoh and Fred Kiprotich Rutto.***

3. The grounds of the application were set out as follows:

*1. "**THAT** the applicants have been put on their defence following the Ruling of **Hon**. **S.O. Temu Principal Magistrate** in a one line ruling.*

*2. **THAT** in the said one line ruling the Honourable Magistrate did not give reasons or grounds in support of his finding of a case to answer on the part of the applicants, the 1st and 2nd accused persons.*

*3. **THAT** the Honourable trial Magistrate did not analyze or consider the written submissions and oral arguments put in support of no case to answer motion despite the same having being placed before him.*

*4. **THAT** that alone occasioned a grave misdirection or the part of the trial magistrate, was perverse and had occasioned an injustice to the accused person/applicants.*

*5. **THAT** the applicants are inviting the High Court to call for and examine the Criminal **Case No. 858 of 2013** and satisfy itself of the legality and propriety of the order issued by the trial magistrate quite in terms of envisaged in **section 362 of the Criminal Procedure Code (Cap.75) Laws Of Kenya and Article 165(6) and (7) of the Constitution** which grants the Honorable court the jurisdiction to intervene in such a matter or matters.*

***6. THAT** the applicants are invoking the jurisdiction of the High Court to reverse the order issued by the trial magistrate and substitute it with an order finding both accused persons have no case to answer and accordingly acquit them.*

7. Indeed under the provisions of Section 364 (1) (b) of the Criminal Procedure Code the High Court in exercising the powers of revision can alter or revise an order by the Subordinate Court. In the case the reversal can take the form of analysis of the submissions and evidence on record. All needs to be done to ensure the fair administration of justice."

4. The application was supported by the affidavit of the 1st Applicant setting out, in material parts, the relevant facts of proceedings at the trial as follows:

*"**SUPPORTING AFFIDAVIT OF WESLEY KIPTUI RUTTOH DATED 27TH JANUARY, 2017***

*2. THAT I and the 2nd applicant have been put on the defence following the ruling of Hon. **S Temu Principal Magistrate in a one line ruling. Annexed herewith and marked "WKR1" find a copy of the said ruling**.*

3. THAT in the said one line ruling the Honourable Magistrate did not give reasons or grounds in support of his finding of a case to answer on the part of the applicants, the 1st and 2nd accused persons.

*4. THAT the Honourable trial magistrate did not analyze or consider the written submissions and oral arguments put in support of no case to answer motion despite the same having being placed before him. **Annexed herewith and marked "WLR 2" find a copy of the written and filed submissions on the no case to answer application.***

5. THAT that alone occasioned a grave misdirection on the part of the trial magistrate, was perverse and had occasioned an injustice to me and my co-applicant.

*6. **THAT** I and the 2nd applicant are inviting the High Court to call for and examine the **Criminal Case No. 858 of 2013** and satisfy itself of the legality and proprietary of the order issued by the trial magistrate quite in terms of envisaged in section 362 of the Criminal Procedure Code (Cap. 75) Laws of Kenya and Article 165 (6) and (7) of the Constitution which grants the Honourable court the jurisdiction to intervene in such a matter or matters.*

*7. **THAT** I and the 2nd applicant are invoking the jurisdiction of the High Court to reverse the order issued by the trial magistrate and substitute it with an order finding both accused persons have no case to answer and accordingly acquit them.*

*8 **THAT** I am advised by my advocate which advice I verily believe it to be true that indeed under the provisions of **Section 364 (1) (b) of the Criminal Procedure Code** the High Court in exercising the powers of revision can alter or revise an order by the Subordinate Court. In the case the reversal can take the form of analysis of the submissions and evidence on record. All needs to be done to ensure the fair administration of Justice."*

RESPONCE

5. The Director of Public Prosecution (DPP) did not file any pleading or affidavit and was content to make oral submissions in opposition to the application at the hearing.

SUBMISSIONS

6. Counsel for the parties – Mr. Arusei for the Accused/applicants and Ms. Macharia for the DPP – made oral submissions before the court on the 7th February 2017 and ruling was reserved.

7. It was submitted for the applicants, principally, that the court had jurisdiction to revise an order on a submission of no case to answer without requiring the accused to await an appeal from judgment –

"[Under] section 362 and 364 the Court has jurisdiction. The defence submitted on no case to answer orally and in writing (annexture 1). The court made a ruling placing the accused on their defence.

There is no analysis on the submissions of the defence on no case to answer. The court did not consider. The ruling does not state whether it considered the submissions, and the court did not give reasons. The court should have given a clear ruling on the finding on no case to answer. The ruling has occasioned injustice."

8. For the DPP, it was contended that section 211 of the Criminal Procedure Code does not require a magistrate to give any explanation why the court puts the accused on his defence in a ruling on a no case to answer -

"It is not a requirement to give reason for the decision [to place an accused on his defence]. The defence does not dispute the jurisdiction of the Magistrate. There was no prejudice in putting accused on his defence as he is given an opportunity for the accused to defend himself. The application is premature and there is no miscarriage of justice. The accused can go on appeal after judgment."

ISSUE FOR DETERMINATION

9. The issues arising for determination in the application are

a. Whether the High Court has power to revise an order on a submission of no case to answer in a criminal trial; and

b. Whether, if the court has such power, the Court will revise the order of the trial court rejecting

the accused persons' submission of no case to answer on the facts of the case.

10. The Court accepts the position on judicial precedent set out in ***Rift Valley Sports Club v. Patrick James Ocholla,*** H.C. Civ. Appeal No. 179 of 2003, [2005] eKLR (Musinga, J. as he then was) as follows:-

> *"The learned trial magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant n injunction in a ruling which was devoid of any legal reasoning.* ***A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be.*** *The doctrine of stare decisis is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision* ***without citing any reasons for doing so."***

11. However, the issue of non-observance of precedent does not arise in this matter, and the giving of reasons in a ruling on finding of ***a case to answer*** in ***criminal cases*** is governed by authority as demonstrated below.

DETERMINATION

The power of revision

12. Sections 362 and 364 of the Criminal Procedure Code provide as follows:

> *"**362. Power of High Court to call for records***
>
> *The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.*
>
> ***363. ….***
>
> ***364. Powers of High Court on revision***
>
> *(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*
>
> *(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*
>
> ***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***
>
> *(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*
>
> *Provided that this subsection shall not apply to an order made where a subordinate court has*

failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

[Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.]"

13. In applying subsection 5 of section 364 above in ***Republic v. Everlyne Wamuyu Ngumo*** [2016] eKLR, Bwonwonga, J. revised an order for the release of a motor vehicle which the Director of Public Prosecutions (DPP) claimed was an exhibit in the case holding that the DPP had no right of appeal from such an order and it was, therefore, revisable in accordance with section 362 of the Criminal Procedure Code.

14. I respectfully agree with Odunga, J in ***Director of Public Prosecutions v. Samuel Kimuchu & Anor.*** [2012] eKLR that the revisionary power exists in interlocutory and final orders, when he held that-

"From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or ***in any other order***. *Accordingly, I join* ***Ochieng, J.*** in ***Livingstone Maina Ngare's Case (supra)*** in holding that the *High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required* ***standards of correctness, legality and propriety."***

15. I have considered the philosophy in the Malaysian case of ***Public Prosecutor v. Muhari bin Mohd Jani and Another*** [1996] 4 LRC 728, 734-5 cited in ***DPP v. Samuel Kimuchu***, supra, that –

*"**The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…. If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…. This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".***

16. I find that the revisionary jurisdiction exists in cases of ***all orders, interlocutory or final,*** of the subordinate court, save that an order of acquittal may not be revised to an order of conviction. Moreover, the Court may exercise its jurisdiction to revise an order ***suo moto***, despite existence and or exercise of right of appeal by the party who brings the matter requiring revision to the attention of the court by application for revision or otherwise. This was the holding of H.M. Supreme Court of Kenya (Rudd, Ag. CJ., Connell and Pelly Murphy, JJ.) in ***R. v. Ajit Singh s/o Vir Singh*** [1957] EA 822, 824 when it considered the construction of then section 363 (5) of the Criminal Procedure Code (in the same terms as today's section 364 (5) of the CPC), as follows:

" Subsection 5 of s. 363 is in the following terms:

"(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The construction of this sub-section is not free from difficulty. The opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did in fact lie.

We are of the opinion that sub-s. 5 is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s. 361 and s. 363 (1). To hold that sub-s. 5 has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect – for instance in the case of a conviction where no offence known to the law has been proved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal. *In our view* ***Chhagan Raja v. Gordhan Gopal*** *(1936) 17 KLR 69 merely decided that, on the facts of that particular case, the court should not make an order in revision.* ***It emphasises that the exercise of jurisdiction in revision is discretionary.***

In this case the decision was brought to the notice of the court by the Crown, and the court, in exercise of its discretion, decided to call for and examine the record under the powers conferred by s.361."

This decision supports the submission by the applicants that the High Court's jurisdiction for revision is not ousted by possibility of an appeal.As emphasised in the ***Ajit Singh*** and the ***Muhari bin Mohd Jani*** decisions, the Court has a wide discretion to revise orders of the trial court and the discretion is to be exercised on a case by case basis having regard to the different circumstances of each case.

17. In addition, Article 165 (6) and (7) of the Constitution of Kenya 2010 entrenches the supervisory jurisdiction of the Court in the following terms:

"165 (6) The High Court has ***supervisory jurisdiction*** *over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and ***may make any order or give any direction it considers appropriate to ensure the fair administration of justice.****"*

18. Clearly, the court has jurisdiction under the Constitution and statute to revise the order before the court. The only question is whether the court will, in discretion, exercise that jurisdiction. That discretion is to be exercised judicially in the light of the settled principles of the court with regard to the nature of order sought to be revised, and whether the decision is "***a finding, sentence or order which is manifestly incorrect***" or it has resulted in an miscarriage of justice, or, in the words of the applicants, it has caused an injustice to the accused. In the particular case before this court, and in deciding whether to

exercise discretion to revise the order in question, it appears to me that the question to be answered is whether the revision of the order rejecting a submission of no case to answer would micro-manage the trial of the case before the Magistrate's Court, whether the trial court's decision of rejecting the submission of no case to answer was "***a finding, sentence or order which is manifestly incorrect***", or one that would result in an injustice or miscarriage of justice, which this court in its supervisory jurisdiction cannot allow to stand. In this regard, as discussed below, there is a matter of applicable judicial policy on the procedure in cases of findings on a submission of no case to answer.

Acquittal under section 210 of the Criminal Procedure Code

19. The *locus classicus* in East Africa on the issue of acquittal for a finding of a no case to answer is ***Murimi v. R.*** (1967) EA 542, 545, a case primarily involving the right of the court to call a witness if his evidence appeared to be essential to the just decision of the case, where the Court of Appeal for East Africa (Sir Charles Newbold, P., Duffus and Spry, JJ.A.) held as follows:

> *"There are numerous decisions of the High Court of Tanzania and of this court to the effect that it is the duty of the trial court under the latter part of the provisions of s. 151 to call a witness if his evidence appears to the court to be essential to the just decision of the case; and this is so even if the evidence results in strengthening the prosecution's case. (See Boniface v. R. [1957] EA 566, Manyaki v. R. [1958] EA 495 and R. v. Kulukana Otim [1963] EA 253).*
>
> *The provisions of s. 151 must, however, be read and considered together with the other provisions of the Code and in particular in so far as this case is concerned with ss. 205 and 206. The relevant portion of s. 205 states as follows:*
>
> *"205. If at the close of the evidence in support of the charge, 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 charge and acquit the person."*
>
> *Section 206 provides that if it appears to the court that a case is made out the court then calls upon the accused for his defence in accordance with this section.*
>
> ***The provisions of s. 205 are mandatory and if at the close of the prosecution's case a prima facie case has not been made out the accused person is entitled to be acquitted. We do not consider that s. 151 was designed , nor should it be used, to empower the trial court immediately after the prosecution has closed its case to call witness in order to establish the case against the accused, except, possibly, when the evidence is of a purely formal nature.*** *The onus is on the prosecution to prove its case and the Criminal Procedure Code provides that an accused shall be acquitted if at the end of the prosecution's case this has not been done. We would here refer to several decisions of this court on the question as to whether an appeal court should sustain a conviction when a* ***prima facie*** *case had not been made out at the close of the case for the prosecution but where the defence had been called for and had then called evidence establishing the guilt of the accused. In particular we refer to the decision of this court in Karioki v. R. (1934) 1 E.A.C.A. 160, R. v. Kinanda bin Mwaisuma (1939) 6 E.A.C.A. 105 and D.M. Patel v. R. (1951) 18 E.A.C.A. 188.*
>
> *We also considered the various English cases on which these decision were based, and also a later case of R. v. Abbott [1955] 2 ALL E.R. 899.*
>
> ***The previous decisions of this court do not in any way detract from the fact that the law requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused person is wrongly called on for his defence then this is an error of law. On appeal, however, an appeal court has to examine the case as a whole and to consider all the evidence produced at the trial court, and in accordance with the provision of s.346 of the Code, will not reverse a conviction on account of any error by the trial court unless such an error has in fact occasioned failure of justice.***

In this case the trial magistrate was wrong in law in not acquitting the appellant when at the close of the case for the prosecution no prima facie case had been made out. The position was in no way altered as a result of the evidence given by the appellant; there was still no sufficient evidence upon which he could be convicted."

Reasons for an order rejecting submission of no case to answer

20. In Kenya, the two judge bench of Trevelyan and Todd, JJ. in ***Kibera Karimi v. R*** 1979) KLR 36, the court held as regards giving of reasons for a finding that the accused had a case to answer that –

"When the prosecution case was close, the defence submitted that there was no case for the appellant to answer, which submission was rejected in a detailed ruling, a practice which should not, at all events generally, *be followed as Roskill, LJ. Pointed out in* ***R v. Falconer-Atlee*** *(1974) 58 Cr. App Rep 348, 356, in relation to a jury case:*

"If he was going to leave the case to the jury, he should have left it saying no more than that there was evidence to go to the jury…."

Roskill LJ thought that in the circumstances of the case the trial judge had been unwise, as he put it, because in giving his reasons he expressed a view, albeit only tentative view on the facts."

21. Sitting with Chesoni, J. (as he then was) Trevelyan, J in ***Festo Wandera Mukando v. R.*** [1976-80] 1 KLR 1626, 1631 to the same effect said:

"[W]e were once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the Court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. ***Where a submission of "no case" is rejected, the Court should no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then it is an end to the case or the count or counts concerned."***

22. Similarly, ***Archbold's Criminal Pleading, Evidence and Practice*** (2006 ed.) sets out the position in England and Wales, at p. 468 as follows:

""D. MAGISTRATES' COURTS

4-296 In their summary jurisdiction magistrates are judges both of facts and law. It is therefore submitted that even where at the close of the prosecution case or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason.

4-297 It is submitted that in committal proceedings the question to be determined by the magistrates, in the event of a submission of no case being made, is the same question which a judge has to ask himself in like circumstances during a trial on indictment. ***Magistrates are not obliged to give reasons for rejecting a submission of no case. Harrison v. Department of Social Security [1997] COD 220DC."***

23. There is, in my respectful view, no conflict between the holding in ***Murimi*** that failure by the trial court to acquit an accused at the interlocutory stage where no case is established on the evidence presented by the prosecution is an error of law and ***Karimi*** that the trial Court should not give reason for its decision to reject a submission of no case to answer. The two principles co-exist in their application to different circumstances; it is only a question as to what stage to correct the error of law in the circumstances of each case. The position of the matter may be resolved as follows:

a. There is power to revise all orders except order for acquittal;

b. The court, however, gives full reasons in the case of an acquittal, except where perhaps one accused is acquitted while the co-accused are put on their defence, in which case the reasons for the acquittal of the one may await final judgment of the case so as not to prejudice the trial of the co-accused;

c. There is no appeal from a decision on submission of no case to answer;

d. In finding that the accused has a case to answer it is not advisable to give detailed reason therefor; and

e. The court should not give reasons for the rejection of a plea of no case to answer so as not to prejudice the fair trial of the case.

24. Section 347 of the Criminal Procedure Code contemplates an appeal only form final orders of conviction by the trial court as follows:

*"**347. Appeal to High Court***

(1) 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) Repealed by Act No. 5 of 2003, s. 93.

*(2) **An appeal to the High Court may be on a matter of fact as well as on a matter of law."***

25. There is also no inconsistency that the DPP is under section 348A entitled to appeal an acquittal on a finding of no case to answer as a matter of fact and law (see ***R. v. Wachira,*** (1975) EA 262) as an order of acquittal is a final Order. An accused who fails in his submission of no case to answer, or who is aggrieved by a finding of a ***prima facie*** case should await a final order of conviction to appeal the decision under section 347 of the Criminal Procedure Code. However, as pointed out below, the accused may renew his submission of a no case to answer at the end of the full trial.

CONCLUSION

26. There is power to revise (or review, as some caselaw has used the civil law terminology) all orders save an order for acquittal. See section 364 (4) of the Criminal Procedure Code and ***Bichange v. R*** [2005] 2KLR 4 where the Court of Appeal (Omolo, O'Kubasu & Waki, JJA) held that –

"The meaning of section 364(4) of the Criminal Procedure Code is that where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction."

27. In the Court of Appeal decision in ***Anthony Njue Njeru v. Republic*** Crim. App. No. 77 of 2006, [2006] eKLR (Bosire, O'Kubasu and Onyango Otieno, JJ.) it was held:

"Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt's case…, we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused."

28. ***See also REPUBLIC v KAMIRO CHEGE*** [2006] eKLR, where Ojwang, J., as he then was, in

applying ***Antony Njue Njeru*** said:

> ***""Whenever the Court rules that there is a case-to-answer and puts the accused to his defence, a detailing of its assessment of evidence could lead the accused to adopt a specific strategy of defence; and this could amount to a filling-in of gaps in the prosecution case."***

The decision in ***Anthony Njue Njeru*** is binding upon this Court, and its wisdom is antedated in ***Murimi*** for East Africa, ***Kabera Karimi*** and ***Festo Wandera Mukando*** in Kenya and in England and Wales by ***Harrison v. Department of Social Security*** [1997] COD 220DC.

29. The submissions filed by the applicants before the trial court challenge the evidence presented by the prosecution as having been insufficient and based upon hearsay and suspicion and, therefore, not meeting the threshold of ***prima facie*** case as set out in Court of Appeal for Eastern Africa decision in ***Ramanlal T. Bhatt v. R*** (1957) EA 332, 335 (CA) that–

> *"A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson J., said, 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 is offered by the defence."***

30. Without prejudice to the finding of the trial court upon hearing of the defence case, it cannot be said cannot be said from the submissions filed as Annexture 1 of the supporting affidavit of the 1st applicant in this application that the court had no basis for placing the accused on their defence. The issues of lack of *locus standi* of the complainant, insufficiency of evidence of alleged eye-witness, and non-recovery of alleged stolen items are not, with respect, unanswerable as to support a finding of manifest error or injustice. It is for the appellate court at the hearing of an appeal to minutely examine the evidence to determine whether the charge, on the accepted evidence before it shorn of alleged hearsay, has been proved to the required standard of beyond reasonable doubt, and thereby determine whether an error of law in the finding of the trial court at the submission of no case to answer is disclosed. For this reason, this court is unable to discuss in detail the submissions filed on the plea of no case to answer so as not to prejudice the findings of the trial court.

31. In the absence of ***manifest injustice or error of law*** in the ruling, this court cannot fault the trial court for acting in accordance with settled precedent on the undesirability of rendering decisions in case of rejection of submission of a plea of no case to answer. This Court does not find, at this stage of the proceedings, that in placing the accused on their defence the trial court committed a miscarriage of justice.

32. In ***R. v. Wachira,*** (1975) EA 262, Trevelyan, J. paired with Hancox, J. (as he then was) and held that –

> *"[I]t has been settled for many years that the sufficiency or otherwise of the evidence at close of prosecution case, so as to require an accused to make his defence thereto, is a matter of law.A court is only entitled to acquit at that stage if there* ***no evidence of a material ingredient of the offence*** *or if the* ***prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict****…Apart from these two situations, a tribunal should not in general be called upon to reach a decision s to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before 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 might convict on the evidence so far laid before it,*

there is a case to answer. "

See also ***R. v. Kidasa*** [1973] EA 368.

33. It is instructive that a plea of no case to answer may be renewed at the end of the trial as observed in ***Archbold*** 2006 ed. at paragraph 4-292 as follows:

> *"4-292 Submissions of no case are made at the close of the case for the prosecution (save for the exceptional case created by the Domestic Violence, Crime and Victims Act 2004 s. 6(4), post 4-298, 19-118f).* ***Attempts have occasionally been made to renew such a submission during the course of the defence. The Court of appeal has said that whilst a submission ought normally to be made at the close of the prosecution case, it may be made at the end of defence case R. v. Anderson, The Independent (C.S) July 13, 1998. Similarly , in R. v Ramsey [2000] 6 Archbold News 3, CA, it was said that where, in a borderline case, the judge properly rules that there is a case to answer; he may be under a duty to re-visit the issue at the end of the evidence, taking account of the evidence called on behalf of the defence. In R. v Brown (Davina) [2002] 1 Cr. App. R. 5, CA, reference having been made to these authorities and to other unreported decisions, it was confirmed that if, at any time after the conclusion of the prosecution case, the judge is satisfied that no jury, if properly directed, could convict, he has the power to withdraw the case from the jury, but that this is a power to be sparingly exercised.*** *It is submitted that it would not be a proper exercise of this power for the trial judge to purport to assess the credibility of any evidence adduced on behalf of a defendant, thereby usurping the function of the jury."*

34. As in ***R v. Wachira,*** supra, it is anticipated in cases of submission of no case to answer that the final decision thereon must await the full consideration of the facts of the case when all evidence is in unless the court takes the view that even if the evidence presented is accepted it would not support a *prima facie* case. If the Court so finds, the accused is acquitted. If not the matter awaits the consideration of the whole evidence presented in the trial, and the accused is at liberty to renew his submission of no case.

35. With respect, the trial magistrate in this case considered the evidence and on finding that the accused had a case to answer, in accordance with the advice of judicial authority binding upon him that it was undesirable so to do, refrained from giving reasons therefor, so as not to prejudice the fair hearing of the trial by suggesting by implication that the court had already accepted the case for the prosecution.

36. For the reasons set out above, the applicants' invitation to this court to call for the trial court record and to revise the decision thereof to place the accused on their defence is declined.

ORDERS

37. Accordingly, the accused persons' application by Notice of Motion dated 27th January 2017 for revision of the trial court's order on submission of no case to answer is dismissed.

38. There shall be no order as to costs.

DATED AND DELIVERED THIS 31ST DAY OF MARCH 2017.

EDWARD M. MURIITHI

APPEARANCES

M/S. Arusei & Co., Advocates for the Applicants.

Ms. Macharia, Principal Prosecution Counsel for the Respondent.