



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 129 OF 2012**

*(An appeal from the Judgment of Hon. Mr. P. O. OOKO, SRM delivered on 2<sup>nd</sup> April 2012 in the Chief Magistrate's Court at Kakamega in Criminal Case No. 1689 of 2011)*

**REPUBLIC ..... APPELLANT**

**VERSUS**

**MOSES AMWATA ..... ACCUSED/RESPONDENT**

**JUDGMENT**

This is an appeal by the State against the decision of the learned magistrate P. O. OOKO, SRM delivered on 2nd of April, 2012 by J.S. Wesonga, RM with a finding that the accused be acquitted, because the prosecution had failed to establish a prima facie case against him to warrant him being put on his defence.

The State is allowed to file such an appeal on points of law.

The petition of appeal dated 24/4/2012 lists seven grounds of appeal. Mr. Oroni, learned Prosecuting Counsel argued the appeal on behalf of the State. He emphasized that the accused should have been put on his defence.

Mr. Ondieki for the accused (now respondent) opposed the appeal. With regard to count I, counsel argued that notice under the Business Premises Tribunal Act not served, and therefore no prima facie case had been established. With regard to count II on malicious damage to property, counsel argued that the accused had not participated in the destruction of the property. Therefore in counsel's view the learned magistrate was correct in finding that no prima facie case had been established.

I have perused the proceedings. In particular, I have perused the evidence of PW1, Phaustine Oketch, PW2 Lydia Sakwa and PW3 Everline Ochieng. It is evident to me that there was a dispute regarding the business premises between the landlord and tenant. There was also damage to property of the tenant/complainant. The evidence on record, in my view established a prima facie case against the accused. The accused having been implicated in the events that precipitated the charges herein, especially on the evidence of PW1 and PW2, should have been put on defence. That is the only way that substantive justice can be seen to be done under our present Constitution. Putting the accused on his defence will give the trial court an opportunity to evaluate both sides of the allegations and substantively decide on proof of criminality or otherwise. I cannot say more on this, as I do not want to influence the decision of the trial court.

As a consequence, I find merits in the appeal. I set aside the ruling of the learned magistrate acquitting the accused/respondent. I quash the acquittal. I order that the accused be put on his defence.

***Dated and delivered this 22nd day of November, 2013***

**George Dulu**

**JUDGE**