



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 42 OF 2019**

**REPUBLIC.....APPELLANT**

**VERSUS**

**PATRICK WAFULA KABURU.....RESPONDENT**

*(From the ruling in Criminal case No. 1665 of 2010 of the Chief Magistrate's Court at Bungoma by Hon. P.N Areri– Senior Resident Magistrate)*

**JUDGMENT**

1. **Patrick Wafula Kaburu**, the respondent herein, was charged with two counts. In count one the charge was of cheating contrary to section 315 of the Penal Code while in count two he was charged with the offence of forgery contrary to section 349 of the Penal Code.

2. The particulars of the offence in count one were that on diverse dates between 29<sup>th</sup> August 2008 and 2<sup>nd</sup> October 2008 within Nairobi City by means of fraudulent tricks he obtained Kshs.286, 021 from Martin Nyongesa King'asia.

3. In count two, the particulars were that on 8<sup>th</sup> December 2008 at Kimilili Township in Bungoma North District, the accused forged a land sale agreement dated 8<sup>th</sup> September 2008 for Kshs. 458, 979 to read Kshs. 1,140,000/= dated 3<sup>rd</sup> September 2008 purporting to be owed by Martin Nyongesa King'asia for the purchase of land parcel number Kimilili/Kimilili/85.

4. After the trial, he was acquitted by the learned trial magistrate under section 210 of the Criminal Procedure code. The Republic was dissatisfied and filed this appeal.

5. The appellant was represented by Mr. Gacharia, learned counsel. The appellant raised eight grounds of appeal that can be summarized as follows:

a) That the learned trial magistrate erred in law in holding that a *prima facie* case was not established against the respondent.

b) That the learned trial magistrate misapprehended what a *prima facie* case is.

c) That the learned trial magistrate erred in law by failing to appreciate the ingredients of the offence.

6. The respondent opposed the appeal. He contended that the acquittal was proper in law.

7. **Black's Law Dictionary, 10th Edition** defines *prima facie case* as follows:

***Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.***

The Court of appeal in the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, defined *prima facie case* as follows:

**It is 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.**

8. This test as prescribed by the court of Appeal is what the learned trial magistrate ought to have applied. He ought to have subjected the entire evidence on record to the provisions of Article 50 (2) (i) of the Constitution of Kenya which provides:

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(i) to remain silent, and not to testify during the proceedings;**

I have perused the evidence on record and I find that the learned trial magistrate did not seem to appreciate what a *prima facie* case is. Had he done so, he would not have acquitted the respondent under section 210 of the Criminal Procedure Code. The prosecution had established a prima facie case.

9. I therefore set aside the ruling of 26<sup>th</sup> June 2012 and order that the case be remitted to the lower court for hearing of the defence case and the conclusion thereof. Mention before the Bungoma Chief Magistrate's Court on 17<sup>th</sup> March 2020. The respondent to present himself without fail.

**DELIVERED and SIGNED at BUSIA this 3<sup>rd</sup> day of March, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**