REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 172 OF 2018

LYDIA WANGECI GICHUHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the ruling in the Chief Magistrate's Court at Makadara

Cr. Case No. 688 of 2088 delivered by Hon. A. R. Kithinji on 3rd August, 2018).

JUDGMENT

1. The Appellant **Lydia Wangeci Gichuhi** is undergoing a criminal trial in which she is facing a charge of stealing by agent contrary to **Section 283** of the **Penal Code**. She was arraigned in court on 6th February, 2012 and she pleaded not guilty. The prosecution called three witnesses in support of its case against her. Upon the close of the prosecution's case, the trial magistrate ruled that she had a case to answer and placed her on her defence while reserving the reasons for the same until the final judgment. The Appellant was aggrieved by the said decision and has now preferred an appeal against it to this court.

2. She has raised six grounds of appeal in a Petition of Appeal filed on 27th September, 2018. I duplicate them as under:

> ***i. That the learned trial magistrate erred in law and fact by finding that the prosecution had adduced evidence to warrant her being put on her defence.***
>
> ***ii. That the learned trial magistrate erred in law and fact by not considering her submissions.***
>
> ***iii. That the learned trial magistrate erred in law and fact by not properly directing her mind to the degree of proof and the law relating to the burden of proof in criminal cases.***
>
> ***iv. That the learned trial magistrate erred in law and fact by finding that she has a case to answer yet there were no exhibits in the matter.***
>
> ***v. That the learned trial magistrate erred in law and fact by finding that she has a case to answer despite the fact that the investigating officer and arresting officer did not testify.***
>
> ***vi. That the learned trial magistrate erred in law and fact by finding that she has a case to answer.***

Submissions

3. In her submissions, Ms. Omwakwe, learned counsel for the Appellant faulted the prosecution for closing its case without calling both the arresting and the investigating officers to testify. She also took issue with the fact that some documents were marked for identification but were never produced as exhibits. She further argued that the trial magistrate failed to consider the submissions tendered by the Appellant upon the close of the prosecution's case. She submitted that the prosecution did not establish a prima facie case against the Appellant to warrant her being placed on her defence. She therefore urged this court to set aside the trial court's ruling of 3rd August, 2018 and acquit the Appellant under **Section 210** of the **Criminal Procedure Code**.

4. Learned State Counsel, Ms. Nyauncho for the Respondent opposed the appeal. She submitted that under **Section 347** of the **Criminal Procedure Code**, an appeal can only lie from a final order of the trial court. She argued that the appeal was premature and an abuse of the

court process and should not therefore be entertained by this court. In her view, the evidence on record established a prima facie case against the Appellant. It was her submission that the Appellant was not prejudiced by the order placing her on her defence since she still had an opportunity to appeal after tendering her defence in case she was convicted.

5. In rejoinder, Ms. Omwakwe submitted that the Appellant would be prejudiced if she proceeded to give a defence that is not corroborated by material evidence since the documents identified by the three prosecution witnesses were not formally adduced in evidence.

Analysis and determination

6. Upon carefully re-evaluating the evidence on record and analyzing the parties' respective submissions, I find that the only issue for determination is whether the appeal was properly before the court.

7. Section 211(1) of the **Criminal Procedure Code** provides for the procedure to be followed by a trial court upon the close of the prosecution case. It reads:-

> ***"(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)."***

8. It is clear that the decision to place an accused person on defence wholly depends on what the trial court makes of the evidence tendered before it in support of the charge that an accused person is facing. All that is required of the trial court is to determine whether the prosecution has established a *prima facie* case against the accused person to enable the court place him/her on his/her defence. What a *prima facie* case constitutes was defined in the renowned case of **Ramanlal Trambaklal Bhatt v Republic (1957) EA 332** as follows:

> ***"……..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."***

9. In the case of **Republic v Jagjivan M. Patel & Others,** the court held as follows:

> ***"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."***

10. Notably, a trial court is not obliged to give reasons for rejecting submissions of no case to answer and/or ruling that a *prima facie* case has been made out to warrant the accused person to make a defence. This is in view of the fact that a detailed assessment could lead *the accused to adopt a specific strategy of defence which may amount to filling in the gaps in the prosecution case. (See* ***Republic v Kamiro Chege*** **[2006] eKLR**).

11. More importantly, a finding made under **Section 211** of the **Criminal Procedure Code** is not a final order from which an appeal can arise since the trial is still on going. Under **Section 347 (1) (a)** of the **Criminal Procedure Code,** an appeal to the High Court can only be made from final orders by a convicted person. The said provision states thus:

> ***"(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"***

12. In my mind, the court only ought to form an opinion in its mind that on the face of the evidence adduced, the accused ought to respond to the evidence adduced by the prosecution in the form of a defence. The court then proceeds to rule that the accused has a case to answer after which the accused tenders his defence. No doubt at this point, the case is yet to be concluded, reasons wherefore, the decision is not appealable pursuant to Section 347 of the Criminal Procedure Code.

13. In the foregoing, it is proper to conclude that the grounds advanced in this appeal would constitute part of the defence submission that the Appellant shall offer. It may be that the court will find weaknesses in the prosecution case on account of those reasons and proceed to acquit her. At this point, it is not for this court to usurp the duty of the trial court by undertaking to evaluate the strength or otherwise of the prosecution evidence adduced.

14. The rationale to the above explanation is simple. At the point of being placed on his defence, the accused is not yet convicted. He still has an opportunity to reiterate the submissions made on a no case to answer and more so, ventilate in evidence a defence with a view to rebutting the prosecution case. That is why a right of appeal does not lie against a ruling on a case to answer. The accused must await a final order of conviction, if at all, to appeal to this court pursuant to **Section 347** of the **Criminal Procedure Code**.

15. Needless to say is that the submission by the Respondent that the appeal was premature was not in vain. The Appellant should await the final verdict of the trial court after she tenders her defence. If she is convicted, she can then file an appeal to this court. I accordingly find the appeal unmeritorious and I dismiss it. The trial court file should be forthwith remitted to the trial magistrate for mention on 31st July, 2019 for purposes of issuing a date for defence hearing. It is so ordered.

Dated and delivered at Nairobi this 23rd July, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Omwakwe for the Appellant.

2. Mr. Momanyi for the Respondent.