REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC APPEAL NO 21 OF 2019

REPUBLIC...APPELLANT

VS

IAN GAKOI MAINA...1ST RESPONDENT

ONDONGO PHILIPS KABITA..2ND RESPONDENT

SUKHWINDER SINGH CHATTE......................................3RD RESPONDENT

EPAINTO APONDO OKOYO...4TH RESPONDENT

CROSSLEY HOLDINGS LTD...5TH RESPONDENT

(Being an appeal from the ruling in Kisumu Chief Magistrate's Court Criminal Case No. 429 of 2010 (Hon. J.K. Ng'arng'ar (CM) dated 20th May 2019)

JUDGMENT

1. In his ruling delivered on 20th May 2019, Hon. J.K . Ng'arng'ar acquitted all the respondents in this appeal under section 210 of the Criminal Procedure Code of all charges against them in Criminal Case No. 429 of 2010. The respondents had been charged alongside 3 others with various offences.

2. Under count one, all the accused were charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars were that between 21st May 2007 and 30th January 2008 they conspired together with intent to defraud Miwani Sugar Company (1989) Ltd (In Receivership) of its property comprised in all that parcel of land known as L. R. No. 7545/3 measuring approximately 9,394 acres valued at Kshs 2.32 billion situated in Miwani by fraudulently causing the said property to be transferred to M/s Crossley Holdings Limited.

3. In the alternative to count one, Ian Gakoi Maina, John Gitau Kimani, (who was deceased at the time of the trial) Odongo Phillips Kabita, Moses Nyabura Osewe, Kefa Lumumba Atunga and Abdikadir Athman Salim Elkindy were charged with the offence of fraudulent disposal of public property contrary to section 45(1)(b) as read with section 48 of the Anti-corruption and Economic Crimes Act No. 3 of 2003. The particulars of the offence were that between 21st May 2007 and 30th January 2008 jointly fraudulently disposed of the property in count one by fraudulently causing the said property to be transferred to Crossley Holdings Limited.

4. Count two charged Sukhwinder Singh Chatte and Crossley Holdings Limited with fraudulent acquisition of a public property contrary to section 45(1)(a) as read with section 48 of the Anti-corruption and Economic Crimes Act. The particulars of the offence were that between 21st May 2007 and 30th January 2008, they fraudulently acquired public property, to wit L. R. No. 7545/3 measuring approximately 9,394 acres valued at Kshs 2.32 billion situated in Miwani and belonging to Miwani Sugar Company (1989) Ltd (In Receivership).

5. Count four charged Epainto Apondo Okoyo with the offence of forgery contrary to section 349 of the Penal Code. The particulars of the offence were that between 21st May 2007 and 30th January 2008, he forged a letter of consent to transfer dated 24.12.2007 purporting it to be issued by the Nyando District Land Control Board consenting to the transfer of all that property known as L. R. No. 7545/3 measuring approximately 9,394 acres valued at Kshs 2.32 billion situated in Miwani and belonging to Miwani Sugar Company (1989) Ltd (In Receivership) to M/s Crossley Holdings Ltd. Counts three, five and six related to charges against the respondents' co-accused in which they were found to have cases to answer and placed on their defence.

6. The Office of the Director of Public Prosecutions (DPP) was dissatisfied with the decision of the trial court. It has consequently filed the present appeal and sought orders of stay of the proceedings before the trial court, which orders were granted following the hearing of the substantive appeal and reservation of this judgment on 25th July 2019.

7. In the Petition of Appeal dated 31st May 2019 and lodged under sections 347, 348 and 350 of the Criminal Procedure Code, the DPP raises nine grounds of appeal. He argues in the first ground that the trial court erred in acquitting all the nine accused persons of count one, conspiracy to defraud contrary to section 317 of the Penal Code despite the fact that there was sufficient evidence to establish a *prima facie* case. The second ground challenged the acquittal of the six accused persons in the alternative to count one on fraudulent disposal of public property contrary to section 45(1)(b) as read with section 48 of ACECA, while there was sufficient evidence to establish a *prima facie* case. In the third ground, the DPP challenges the acquittal of the two accused persons in count two, Sukhwinder Singh Chatte and Crossley Holdings Ltd, on the charge of fraudulent acquisition of public property, while ground four relates to the acquittal of Epainto Aponu Okoyo, the 7th accused (4th respondent) on the charge of forgery. The DPP argues at ground five that the court erred in finding that the prosecution had failed to prove ownership of the property when it had adduced sufficient evidence to establish ownership.

8. The DPP alleges that the trial court erred in law and fact in holding that the 4th and 8th accused persons had a case to answer on charges of abuse of office in issuing a clearance certificate to transfer the property to and executing a notification of sale without court orders and issuing irregular and fraudulent court orders that were used to transfer the property, yet contradicted himself by finding that there was no proof of conspiracy against the 6th and 9th accused persons to whom the property was transferred; that there was no proof of conspiracy against the 1st accused person who applied for the said transfers; and none against the 2nd, 3rd, 5th and 7th accused persons who aided the process by forgery of documents that were used to effect the transfer. The DPP argues that the trial court should have inferred conspiracy from the chain of the transaction.

9. The appellant's seventh ground impugns the finding of the trial court that the prosecution had not proved that the property in contention was owned by Miwani Sugar Company (1989) Limited (In receivership) and was not registered in the name of the said company despite the evidence of the investigating officer that a certificate of ownership from Miwani Sugar Mills Ltd to Miwani Sugar Company (1989) Ltd had been registered as entry number 22 in the title. The appellant further argues that the court erred in not upholding the elaborate process of acquisition of the property by Miwani Sugar Company (1989) Ltd (In Receivership) through a legal and equitable process.

10. Ground eight impugns the finding by the trial court that the value of the subject property was not established. The appellant argues that the trial court erred by holding that the prosecution had failed to prove the value of the property when the evidence that was tendered to establish the value of the property, which included valuation for stamp duty by the 3rd accused produced as Pexh 2, was unchallenged.

11. Finally, the appellant challenges the holding of the trial court that the investigations of the matter were shoddy and that the evidence of the investigating officer was against the prosecution case yet the investigating officer had clearly summed up the prosecution case and his evidence was of high probative value.

12. The appellant asks this court to set aside the orders of the trial court in respect to all the accused persons and the charges against them, find that they have a case to answer, and place them on their defence to be heard by a different magistrate other than Hon. Julius Ng'arng'ar CM.

13. In his submissions at the hearing, Learned Prosecution Counsel, Mr. Ashimosi, relied on and adopted the Petition of Appeal whose contents I have set out in summary above. He submitted that the Learned Magistrate erred in finding that the respondents had no case to answer in count one, the alternative to count one, count two and count four. He referred the court to the proceedings and submitted that the 30 prosecution witnesses had adduced sufficient evidence to place all the accused persons on their defence in all the counts. He also relied on the submissions made by the appellant before the trial court.

14. According to Mr. Ashimosi, all the counts in the charge sheet are inter related, and they relate to the same property and the same conspiracy to defraud. In his view, the trial court should either have found that all the accused persons had a case to answer or none had a case to answer. He noted that the alleged fraud had been initiated by a fraudulent court order initiated by a magistrate in his capacity as a Deputy Registrar. It was his submission that it was interesting that the trial court found that the Magistrate, the 8th accused, had a case to answer, but found that the 9th accused, the company to which the subject property was transferred, the company's director, the 6th accused, and the 1st accused, the Advocate who initiated the suit which has been found to be a forgery, as well as the valuer who played the role of undervaluing the property, have no case to answer.

15. Mr. Ashimosi noted that after the order was issued to transfer the land, it required land rent and clearance certificates. He further observed that the trial Magistrate found a case to answer against the 4th accused who issued a fraudulent land clearance certificate without collecting revenue. The trial court had, according to the appellant, found all the public officers who used their offices to facilitate the fraud had a case to answer, but the people to whom the land was transferred had no case to answer.

16. The appellant submitted that the evidence on record had established a conspiracy, and the trial magistrate was in error in his interpretation of a case to answer. According to the appellant, the trial magistrate had, in his ruling and analysis, showed that he confused a case to answer with the burden of proof. Mr. Ashimosi's submission was that there was sufficient evidence to require the respondents to explain in their defence, and he asked the court to find that the respondents had a case to answer, set aside the orders of the trial court and direct that the mater be heard before any other court other than Hon Julius Ng'arng'ar, the Chief Magistrate in Kisumu.

17. In submissions in reply, Mr. Onsongo for the respondents argued that the cardinal rule is that the prosecution bears the burden of proving a *prima facie* case or beyond a reasonable doubt unless the offences is a strict liability offence. He referred the court to the defence submissions contained in the supplementary record of appeal which he argued had extensive submissions on the parameters of a case to answer. His submission was that the prosecutions called 30 witnesses who had no evidence of substantive weight. In his view, the trial court had the advantage of listening to and seeing the witnesses and marking their demeanour, which this court does not have.

18. According to Mr. Onsongo, the crux of the case before the trial court was a property known as LR no 7545/3. The issue was whether that property had ever been public property, and whether either Miwani Sugar Mills or Miwani Sugar Company (1989) Limited (In Receivership) owned the property so as to make it public property. He submitted that Miwani Sugar Mills Ltd was confirmed by the prosecution witnesses to have been the owner of the land, and that it was a private company. That on the other hand, it was confirmed by prosecution witnesses that Miwani Sugar Company (1989) Ltd (In Receivership) has never been the owner of the property. The prosecution was alleging that the accused had transferred the property from a person who has never owned it to a third party, which in Mr. Onsongo's view is how the prosecution case failed.

19. He urged the court, if it agreed with the submissions on behalf of the respondents, to acquit even those accused persons who were placed on their defence as the prosecution case died on the runway, even had the accused persons elected to keep silent.

20. In brief submissions in reply, Mr. Ashimosi noted that the respondents were contending that there was no proof of ownership by Miwani Sugar Company (1989) Ltd (In Receivership). He referred to the Petition of Appeal in which, at ground 7, he had raised the issue of ownership and referred to the evidence of PW30 who he submitted had led evidence with respect to ownership.

21. Ordinarily, as the first appellate court, I am called upon to re-evaluate the evidence and reach my own conclusion, bearing in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno v R. (1972) EA 32.** However, in this case, I am called upon to consider the question whether the trial court properly came to the conclusion that the prosecution had not established a prima *facie case* to warrant placing the accused on their defence.

22. Should I agree with the findings of the trial court, then, barring an appeal by the prosecution, that would be the end of the matter. However, should I find that the trial court was in error, then a detailed analysis of the evidence and conclusions with respect thereto on the part of this court may be prejudicial to the accused. It may be akin to the situation considered in **Republic v Kamiro Chege [2006] eKLR** in which Ojwang, J (as he then was) in applying the decision in **Anthony Njue Njeru v. Republic Crim. App. No. 77 of 2006, [2006] eKLR** observed as follows:

> ***"Whenever the Court rules that there is a case to answer and puts the accused to his defence, <u>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."</u>***

23. In its decision in **Anthony Njue Njeru v. Republic** (supra) the Court of Appeal had observed that:

> ***"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 person."***

24. As an appellate court considering whether or not the trial court made the errors that the Prosecution alleges it did, I must bear in mind that should my view of the evidence be divergent from and lead me to a conclusion different from that arrived at by the trial court, then an in-depth analysis is not desirable as it may also be deemed to be influencing or directing the trial court on the path to take. I therefore need to walk a rather delicate line in considering the evidence before the trial court and the ruling of the court in reaching the conclusions on the ruling appealed from.

25. The core of the charges against the respondents and their co-accused was the alleged fraudulent transfer of L. R. No 7545/3 (I. R. No 21038 comprising 9,394 acres belonging to Miwani Sugar Company (1989) Limited (In Receivership) valued at Kshs 2.32 billion. The transfer was effected pursuant to orders issued in **Kisumu HCCC No 225 of 1993 – Nagendra Saxena vs Miwani Sugar Mills Ltd**. The prosecution case was that the accused conspired to have the said parcel of land, which was a public property, transferred to the 9th accused.

26. The following emerges as the evidence placed before the trial court by the prosecution in support of the charges against the nine accused persons.

27. First, the transfer of the subject property was effected pursuant to orders issued in HCCC No. 225 of 1993. This case, however, from the evidence, may have been fictitious, court fees in respect thereof not paid, and summons to enter appearance not issued by the court. Maureen Achieng Onyango (PW1) produced the court file on HCCC No 225 of 1993 (exhibit 1). It emerged from the evidence of PW9 (John Lumumba) an executive officer working at the Kisumu High Court Civil Registry in 2005, that upon perusal of the court file on the matter in 2005, he had found that court fees were never collected. He had seen evidence of assessment of court fees but no evidence of payment. He also did not get the register for 1993. PW17, Paul Ombege Matundura, confirmed that no fees were paid on HCCC No 225 of 1993, and that the 1993 register was not available.

28. With respect to the summons to enter appearance in the matter, Justice Olga Sewe (PW16), who was a Deputy Registrar in Kisumu in 1993, confirmed that she did not sign summons to enter appearance in HCCC No 225 of 1993 dated 28.6.93, which were purportedly signed by her. She further confirmed that the summons had no mail registry stamp or Deputy Registrar Stamp which would be found on such a document. Further, while it was purported to have been signed by her in 1993, it bore a Ref: JKF-10/2000, showing it was printed in 2000.

29. PW2, David Otieno (Otieno), an Advocate with the firm of Ragot & Co Advocates, was acting for Miwani Sugar Mills Ltd and Miwani Sugar Company (1989) Ltd (In Receivership) He had received an email communication from the Receiver Managers of Miwani Sugar Company (1989) Limited (In Receivership) together with a notification of sale of the land by Jogi Auctioneers. The proprietor of Jogi Auctioneers was John Gitau Kimani, who had been charged as the 2nd accused but was deceased at the time of the trial. The notification of sale was issued pursuant to instructions issued by the court in HCCC No. 225 of 1993 signed on 24.10.2007 directing the sale of L.R. No 7545/3 to recover a sum of Kshs 28,542,182.00.

30. Upon perusal of the court file, Otieno noted that on 28.6.1993, one Naftali J.B. Awali (now deceased) had filed the suit against Miwani Sugar Mills Ltd seeking judgment for US$ 400,000 being what was referred to as consultancy fees. The summons were given to one Samson Wanjohi in July 1993 and June 1994 but he was unsuccessful in effecting service.

31. Fourteen (14) years, later on 29.5.2007, Gakoi Maina Advocate, the 1st accused, applied for the extension of the original summons. The summons were extended by the then Deputy Registrar of the High Court in Kisumu, Hon Abdul El Kindy (the 8th accused) who granted a 14-day extension. One Harun Odhiambo Okello, a process server, alleged that he attempted service on 30th and 31st May 2007, unsuccessfully. He swore an affidavit to the effect that he served by post and courier on 4.6. 2007.

32. Mr. Otieno further established from the court file that through his Advocate, Gakoi Maina, the 1st accused (and 1st respondent in this appeal), the plaintiff in HCCC No. 225 of 1993 applied for and obtained judgment on 20. 6. 2007 in default of defence. The default judgment was signed by El Kindy. Thereafter, Gakoi Maina filed a bill of costs for taxation which was fixed for taxation on 28.6. 2007. The bill was placed before El Kindy on 29.6. 2007 in the presence of a Mr Agedo holding brief for Mr Maina and was taxed at Kshs 542,180.

33. It merged from the evidence of Otieno that his perusal of the court file indicated that Gakoi Maina moved to extract a decree in the matter, which was signed on 2.7.2007 by El Kindy. The matter was thereafter placed before Mwera J for attachment of the property, L. R. No. 7545/3. Mwera J did not grant the application, and it was ultimately dismissed by Mugo J. However, the plaintiff, according to Otieno, went ahead with the execution against the property.

34. Otieno later learnt that the subject land had been transferred to Crossley Holdings Ltd (the 9th accused (5th respondent) pursuant to a notification of sale signed on 24.10.2007 by El Kindy. The property had been advertised by Jogi Auctioneers in the Kenya Times newspaper of 6.12.2007 and was apparently sold on 24.12.2007 for Kshs 752,000,000 to Crossley Holdings Ltd, the highest bidder, as indicated in a letter from the auctioneer to the court dated 24.12.2007.

35. Otieno's perusal of the court file further indicated that on the same day as the sale, that is 24.12.2007, Gakoi Maina sought an order vesting the property in the purchaser, which vesting order was granted by El Kindy. According to Otieno, an application to set aside the sale and transfer on the basis that they were irregular and fraudulent, was made on behalf of Miwani Sugar Mills Ltd and Miwani Sugar Company (1989) Ltd (In Receivership) and was allowed by Mwera J on 13.6.2008, and the property reverted to Miwani Sugar Mills Ltd.

36. PW11, Mitchell Menezes, an Advocate, had held brief for Gakoi Maina in Kisumu HCCC No 225 of 1993 in an application relating to L. R. No 7545/3. He had appeared before Mwera J and Mugo J, the latter of whom granted orders prohibiting transfer or charging of the land. He had again held brief for Mr. Maina on 4.2. 2008 when the matter came up before Mwera J on the hearing of an application which, from the evidence of Otieno (PW5) had been allowed by Mwera J on 13.6.2008 and the property had reverted to Miwani Sugar Company (1989) Ltd (In Receivership).

37. With respect to the status of Miwani Sugar Company (1989) Ltd (In Receivership), it emerged from Otieno's evidence that the company was incorporated by the government to buy out the assets and operations of Miwani Sugar Mills Ltd, including the subject property. This evidence was supported by that of Stephen K. Bundotich (PW15) who had acted for the receiver manager of Miwani Sugar Company (1989) Ltd (In Receivership).

38. What emerged from the evidence of Bundotich was that the government had sought to purchase the debt and assets of Miwani Sugar Mills Ltd and had established Miwani Sugar Company (1989) Ltd (In Receivership). A sale agreement had been executed by the Ministry of Finance, and the Ministry had issued annual bonds redeemable annually so it was not able to register a transfer of the property to Miwani Sugar Company (1989) Limited (In Receivership) until the bonds were fully redeemed.

39. Kipngetich Arap Korir Bett (PW5) had been appointed Receiver/Manager of Miwani Sugar Company (1989) Ltd (In Receivership) with Martin Owidi (deceased) by the Kenya Sugar Board, the debenture holder, in 2005. Miwani Sugar Mills Ltd had been placed under receivership by Bank of Baroda in 1988, and in 1989 the government established Miwani Sugar Company (1989) Ltd to take over the assets of Miwani Sugar Mills Limited.

40. It emerged from Bett's evidence that in 2001, the Receiver Manager had received a bid of Kshs 2.32 billion to revive the Miwani Sugar Company (1989) Ltd (In Receivership). The bidder was Crossley Holdings Ltd, the 9th accused (5th respondent). The receiver managers had subsequently learnt of the notification of sale of 45 days from Jogi Auctioneers to sell property No L. R. 7545/3. The notification was from Gakoi Maina Advocate and had been obtained in HCCC No 225 of 1993.

41. With respect to the transfer of the subject property, Faith Mbaire Ng'ethe (PW4) had assessed the stamp duty on the transfer of the subject property, which had been valued at Kshs 752,000,000 by Odongo Kabita (the 2nd accused) who had been the District Land Valuer, Kisumu/Nyando/Bondo. She assessed the stamp duty at Kshs 15,040,010.

42. George Gachihi (PW7) had registered the court order in Kisumu HCCC No 225 of 1993 against the property. The documents presented for registration were the court order, the consent from the Nyando Land Control Board dated 24.12.2007, a valuation by the Kisumu Nyando District Land Valuer for Kshs 752,000,000 and payment of stamp duty of Kshs 15,040,000. The transfer was to be effected in favour of Crossley Holdings Ltd. Gachihi had effected the transfer.

43. PW12 Mwanisa Chinjali testified with respect to an original consent to transfer dated 24.12.2007 which sought to transfer a property to Crossley Holdings Ltd from Miwani Sugar Mills Ltd. She had not completed the entry as the consent did not have a plot number. Joshua Mulu Mutua (PW13), a valuer who worked with Phillips Odongo Kabita (the 2nd accused, 2nd respondent) had visited and valued the property L. R. No. 7545/3 and given a report to his superior, Kabita to conclude. He noted that in the valuation for requisition for stamp duty, Mr Kabita had stated that the recommended purchase price of Kshs 752,000,000 be accepted for purposes of stamp duty assessment.

44. John Ng'ang'a Mbugua (PW21) confirmed that he chaired a meeting of the Land Control Board, Nyando, as a District Officer, on 4.12.2007. He denied that the document that purportedly gave consent to transfer L. R. No 7545/3 which was dated 24. 12. 2007 was issued by the Nyando Land Control Board. Further, the Board that he chaired had never deliberated on an application for sale by public auction of L. R. No 7545/3 North East Kisumu by one Gakoi Maina Advocate. He also confirmed that they never used to do special land control board meetings.

45. PW22's evidence also related to Nyando Land Control Board of which he was a member. His evidence was that the Board did not deliberate on the application to transfer a property from Miwani Sugar Mills to Crossley Holdings Ltd as they did not see such an application. The consent on the basis of which the property was transferred was in relation to another property, Kisumu/Wawidhi A (2) 1029 and other parties, as emerged from the evidence of PW24, Susan Wangui Waweru, a District Commissioner in Nyando in 2008/2006 and chair of the Land Control Board before her transfer and replacement by PW21.

46. This was confirmed by the evidence of PW6, Jackson Odego Odenyo, who had obtained consent to transfer L R. Kisumu/Wawidhi/1029 from Joseph Otieno Ragot to Muhoroni Agro Chemical and Food Company in 2005. The consent had the same serial numbers S/N 103500 as the one used to transfer the subject property. The consent purportedly issued for transfer to Crossley Ltd was dated 24. 12.2007, while the consent to transfer L R. Kisumu/Wawidhi/1029 was dated 8.12.2005.

47. Simon Kamande Kariuki was in the Ministry of Lands in 2008 in charge of revenue collection. His testimony with respect to the stamp duty on L.R. 7545/3 was that it was paid by banker's cheques, one issued by Southern Credit Banking Corporation, being cheque No 016/08, another by Guild Bank 804/86, and one by Fidelity Bank 128788, totaling Kshs 15,040,110. PW25 Rina Kiroya, who used to work for Southern Credit Banking Corporation Ltd as the Bank Manager, produced a cheque drawn by Kibos Sugar Ltd dated 28.1.2008 for Kshs 7,040,000. It was drawn in favour of Southern Credit Banking Corporation Ltd, who issued a cheque drawn in favour of the Commissioner of Domestic Taxes for the same amount. The directors of Kibos Sugar Limited included Sukhwinder Singh Chatte (the 6th accused, 3rd respondent).

48. In his decision, the trial magistrate cited the decision in **Ramlel Trambaklal Bhate (sic) vs Republic (1957) EA 334** and **Republic vs Kyalo Musili Musyimi (20160 eKLR** on the duty of the prosecution and what amounts to a *prima facie* case.

49. He found that the prosecution had not established a *prima facie* case in counts 1, 2 and 4 against the accused. With respect to court 1, no element of an agreement or meeting of minds of the accused persons and the intention to defraud had been established. No evidence had been led to establish the linkages between all the accused persons, nor was it proved that the accused persons demonstrated any intention to jointly execute the conspiracy. It was his finding also that no evidence such as a valuation report was led to prove, with regard to count 1 and 2, that the value of the land, L.R. No.7545/3 was Kshs 2.32 billion.

50. Further, the issue of ownership of the land was not proved. The prosecution had also failed to prove the role of each of the accused in the conspiracy, or to show that Miwani Sugar Company (1989) Ltd (In Receivership) was a public company. Further, that the land in contention was never registered in the name of Miwani Sugar Company (1989) Ltd (In Receivership).

51. With respect to the 6th accused, the court concluded that his status was not established as he was not a director of Crossley Holdings Ltd, and no nexus was created between the 6th and 9th accused. The court also found that count 4 on forgery was not proved as the document – the letter of consent to transfer was not subjected to a document examiner.

52. For the same reason, the court found that in light of his findings on count 1 and 2, the alternative charge to the 1st count, fraudulent disposal of public property contrary to section 45(1)(b), was useless and unsustainable. The court's conclusion was that the prosecution had not established a *prima facie* case to warrant placing the respondents on their defence.

53. The trial court cited the words of the court in **Ramanlal Trambaklal Bhatt v R [1957] E.A. 332** when it stated that ***"A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence."***

54. In a criminal trial, the burden placed on the prosecution is to establish a *prima facie* case that would justify placing an accused person on his defence. A *prima facie* case is defined in **Black's Law Dictionary, 10th Edition** as:

> ***"Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it make (sic) later be proved to be untrue.***
>
> ***At first sight; on first appearance but subject to further evidence or information…***

55. **Black's Law Dictionary** further defines a prima facie case as follows:

> ***"Prima facie case 1. 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."***

56. It is useful to set out in full the words of the court in **Ramanlal Trambaklal Bhatt v R** (supra), which were 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. <u>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."</u>

(Emphasis added)

57. In **R vs Jagjiwan M. Patel and Others (1) T.L.R. (R) 85** in which the court stated:

> ***"…..all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his 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 border line 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."***

58. I also bear in mind the words of the court in **R. v. Wachira (1975) EA 262** in which the court held as follows:

"[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 is <u>no evidence of a material ingredient of the offence</u> or if the <u>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</u>….Apart from these two situations, a tribunal should not in general be called upon to reach a decision as 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. "

59. Having considered the prosecution evidence set out above, as well as the caution that this court should not make definitive findings thereon, I find that the prosecution had established a *prima facie* case against the respondents in this matter, sufficient to require that they offer some explanation in their defence. I say so for several reasons.

60. First, there is evidence that the subject property, L.R. No. 7545/3 was transferred to the 5th respondent. The transfer was pursuant to a sale carried out on the basis of a notification for sale and a vesting order issued by the 8th accused in the matter, who was placed on his defence. The notification for sale was issued in a matter, HCCC No. 225 of 1993, summons in respect of which were shown to have been fraudulent- Sewe J-the person alleged to have signed them having testified that she had not, and discreditted them in other ways as appears in evidence.

61. The 1st respondent (1st accused), Gakoi Maina, had applied for the extension of the summons, had obtained the judgment in default; had applied for the notification for sale, and following the sale, had applied for a vesting order to the purchaser, the 5th respondent. He had also purportedly applied for the consent to transfer. Menezes, (PW11) had held Gakoi Maina's brief in applications relating to the property in which orders had been sought to set aside the sale of the property.

62. The property had been transferred on the basis of a consent that was also shown to be fraudulent-it bore the same serial number as a consent issued on a different date in respect of a different property, and issued a few years earlier, as emerged from the evidence of PW6, PW21, PW22 and PW24. The evidence indicated that the consent had purportedly been applied for by Gakoi Maina on 24. 12. 2007, the date of the sale of the subject property.

63. The property was valued at Kshs 752,000,000 by Kabita the 3rd accused (2nd respondent), the amount it was allegedly paid for at the sale, and which was reflected in the transfers assessed for stamp duty purposes at Kshs 15,040,110 by Ng'ethe (PW4). The stamp duty was paid partly by a cheque of Kshs 7,040,000 drawn by Southern Credit Banking Corporation Limited on the instructions of Kibos Sugar Limited, one of whose Directors was Sukhwinder Singh Chatte (the 6th accused, 3rd respondent) as emerged from the evidence of Rina Kiroya (PW25) a former manager of Southern Credit Banking Corporation Ltd.

64. There is evidence from Otieno (PW2), Bett (PW5) Bundotich (PW15), as well as Miriti (PW30) that the subject property was public property. It initially belonged to Miwani Sugar Mills Limited; a decision had been made to establish a company (Miwani Sugar Company (1989) Limited (In Receivership) to take over its assets, and that the Ministry of Finance had issued and been redeeming bonds for the said assets. That the value of the property was not proved to be Kshs 2.32 billion as the trial court found was not, I believe, a material consideration.

65. Taking the above matters into consideration and bearing in mind what amounts to a *prima facie* case as set out above, I find that the prosecution had established a *prima facie* case to require placing all the accused persons on their defence, not just the 4th and 8th accused. The evidence against all the accused was, in my view, sufficient to require them to offer an explanation in their defence.

66. As the authorities cited above illustrate, at the close of the prosecution case and in considering whether or not to place an accused person on his or her defence, the court is not required, as observed in **Jagjivan M. Patel v R** (supra) 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."***

The court should place the accused persons on their defence unless, in the words of the court in **Wachira v R** (supra**) *"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".*** I take the view that the evidence in this case which I have set out above does not fall into the two categories considered in **Wachira v R.**

67. Accordingly, I hereby allow this appeal and set aside the decision of the Chief Magistrate dated 20th May 2019. I find and hold that all the accused in the case before the Chief Magistrate, including the 5 respondents before this court, should have been placed on their defence, and I so direct.

68. The prosecution had prayed that this court should direct that the defence case should be placed for hearing before any other Magistrate other than the trial magistrate, Hon. Julius Ng'arng'ar. I have considered this prayer and I find that it is a prayer that I am not able to grant, for two reasons.

69. First, the trial court heard the prosecution case against all the nine accused persons together but placed two of the accused persons on their defence. They did not participate in this appeal and may have justifiable objections to having their defences taken before a magistrate other than the one who heard the prosecution case. At the same time, this court cannot separate the defences of the 4th and 8th accused persons and direct that they be heard separately.

70. The second reason is related to the first. The prosecution case, in which a total of 30 witnesses testified, is complete. It would be difficult and may well be prejudicial to all the accused persons to have a person who had not heard the witnesses take it over at the defence stage. Nor would it be prudent in the circumstances, given the length of time that has elapsed since the events forming the subject matter of this matter occurred and the challenges that may arise with respect to availability of witnesses, to order that it be heard afresh before another magistrate.

71. I accordingly direct that the respondents in this case are placed on their defence, the defence case to be presented before Hon. Ng'arng'ar.

Dated and Signed at Nairobi this 7th day of October 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 9th day of October 2019

J. N. ONYIEGO

JUDGE