REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 120 OF 2017.

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT.

AND

GEOFFREY MUKONZA MWANGANGI.....RESPONDENT.

(An appeal from the ruling in the Chief Magistrate's Court at Milimani Cr. Case No. 476 of 2014 delivered by Hon. T. N. Sinkiyian, RM on 4th September, 2017).

JUDGMENT.

Background.

1. Geoffrey Mukonza Mwangangi, hereafter the Respondent was charged in the Count I with the offence of obtaining credit contrary to Section 316(a) of the Penal Code. The particulars of the offence were that on diverse dates between April 2011 and October 2011 in Nairobi within Nairobi County, in incurring a debt to Raphael Kiilu Ndivo obtained credit to the amount of Kshs. 480,000/- from the said Raphael Kiilu Ndivo by falsely pretending that he would pay him, a fact he knew to be false. In c

2. Count II he was accused of issuing a bad cheque contrary to Section 316 A 1(a) 4 of the Penal Code. The particulars of the offence were that on 1st March, 2012 along Harambee Avenue, Nairobi within Nairobi County, with intent to defraud issued a cheque No. 000156 of Kshs. 480,000/- to Taurus Supplies knowing that Account No. 0291478040 had insufficient funds.

3. The Respondent pleaded not guilty. After the close of the prosecution case the learned trial magistrate acquitted him under Section 210 of the Criminal Procedure Code after making a finding that the prosecution had not proved their case beyond a reasonable doubt. The Appellant was dissatisfied with that decision and has lodged the present appeal against the acquittal. The grounds of appeal were set out in the Petition of Appeal filed 18th September, 2017. I duplicate them a under;

> ***i. The learned magistrate erred in law and misdirected herself in finding that the key elements of the offence of obtaining money by false pretences had not been proved.***
>
> ***ii. The learned magistrate erred in law in failing to place the Respondent/accused to his defence when the prosecution had proved a strong case against him.***
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> ***iii. The learned trial magistrate erred in law in denying the prosecution the right to cross-examine the Respondent/accused.***
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> ***iv. The learned trial magistrate erred in law in speculating on the defence the accused/Respondent would have offered if he was placed on his defence.***
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> ***v. The learned trial magistrate erred in law in finding that the prosecution failed to discharge its burden of proof.***
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> ***vi. The learned trail magistrate erred in law in dismissing all the charges for lack of evidence when there was sufficient evidence to place the accused on his defence.***
>
> ***vii. The learned trial magistrate erred in law in failing to place the accused on his defence.***

Submissions

4. The main contestation in this appeal is that the trial court erred in reaching a verdict that the Respondent should not tender a defence. Learned counsel for the Respondent, Mr. Momanyi argued that the court did not address its mind to what constituted a *prima facie* case warranting an accused to be put on his defence. Instead, the court addressed itself as if the Respondent had already tendered a defence which precipitated a finding that the case was not proved beyond a reasonable doubt. He argued that had the Respondent been put on his defence, the Appellant would have cross examined him on his testimony so as to test the veracity of the same and thereby demonstrate that the same had not dislodged the prosecution case. This, according to Mr. Momanyi amounted to a miscarriage of justice as the prosecution had presented a strong case against the Appellant warranting him to be put on his defence. He cited the cases of **Looi Kow Chai *v.* Republic[2003] 2 MLJ 65, Balachandaria *v.* Public Prosecution[2005] 2 MLJ 301**, **R.T. Bhatt *v.* Republic[1957] EA 322 and Republic *v.* Benson Ochieng Oyungi[2016] eKLR** to buttress the submission.

5. The Respondent's submissions were filed on 12th July, 2018 by learned counsel Mr. Nzaku. He submitted that the crux of the appeal was for this court to determine whether there was sufficient evidence tendered by the Appellant to warrant the trial court to place the Respondent on his defence. His view was that the entire prosecution evidence summed up did not implicate the Respondent to the commission of the offences. He added that the prosecution evidence lacked probative value and that the learned magistrate therefore properly directed her mind in acquitting the Respondent.

6. With respect to the applicable law, Mr. Nzaku cited Section 306 of the Criminal Procedure Code. He also referred to the case of **Republic *v.* Alex Mwanzia Mutangili[2017] eKLR** which set guidelines for the procedure a trial court should follow after the close of the prosecution case**.** He submitted that the learned trial magistrate did not violate the law in acquitting the Respondent for want of sufficient evidence. He therefore implored the Court to dismiss the appeal and uphold the ruling of the learned magistrate delivered on 4th September, 2017.

Determination.

The Relevant Law.

7. The main issue for determination is whether the learned trial properly evaluated the evidence of the prosecution before acquitting the Respondent under Section 210 of the Criminal Procedure Code. To be precise, the issue is whether at the close of the prosecution case, a *prima facie* case had been established to warrant the placing of the Respondent on his defence. It then calls upon this court to define what constitutes a prima facie case. In the well celebrated case of **Ramanlal Trambaklal Bhatt *v.* Republic[1957] EA 322**, the then East African Court of Appeal defined prima facie case 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 scintilia of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, …, 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."***

8. See also Lord Parker C.J., in **Practice Note[1962] 1 All ER 448**, that:

> ***"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.***
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> ***…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 can convict on the evidence so far laid before it, there is a case to answer."***

9. The definition clearly distinguishes a *prima facie* case from proof beyond a reasonable doubt. The latter is applicable only after an accused has been called to tender a defence. At that point, the trial court is enjoined to critically evaluate the entire evidence to the standard beyond a reasonable doubt. For purposes of this judgment, I shall nor delve into defining what proof beyond a reasonable doubt entails save to state that the learned trial magistrate misdirected herself in her ruling in finding that she was called upon to determine whether the prosecution had proved their case beyond a reasonable doubt. The prosecution had just closed their case and all that was required of her is to determine, under Section 210 of the Criminal Procedure Code, that no *prima facie* case was established to warrant the Respondent to be put on his defence. That is to say that based on the evidence on record a reasonable court directing its mind to it, would not convict the

Respondent. It is therefore, the onus of this court to reevaluate the evidence on record and arrive at the correct finding, whether a *prima facie* case was established to warrant the placing of the Respondent on his defence.

10. This cannot be undertaken before the court addresses itself to the relevant applicable law. Counsel for the Respondent cited Section 306 of the Criminal Procedure Code. The provision, unfortunately, applies to trials before the High Court which fall under Part IX of the Code. The applicable provision is Section 210 which falls under Part VI of the Code which relates to trials before a subordinate court. It reads;

> ***"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, 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 case and shall forthwith acquit him."***

11. I add that the acquittal in the present was under the correct provision of the law. The only error the learned trial magistrate made was to address herself to the improper burden of proof that the prosecution was required to discharge at that point. She set out the issue for determination at paragraph 24 of the ruling, as whether the prosecution had proved the charges **beyond a reasonable doubt** (emphasis own). She simply was required to consider whether a *prima facie* case had been established pursuant to the test set out in the **Bhatt case (**Supra**)**.

12. One of the grounds set out by the Appellant was that the learned magistrate erred in denying the Appellant the right to cross examine the Respondent. It was asserted that the court ought to have placed the Respondent on his defence so they (prosecution) could interrogate and possibly rebut his evidence. That the failure to give the Appellant an opportunity to interrogate the Respondent's account of events resulted in the court failing to appreciate and take into account all the evidence adduced by the prosecution.

13. This ground clearly contravenes Section 211(1) of the Criminal Procedure Code which lays out three different ways through which an accused can opt to conduct his defence. The prosecution reserves the right to cross examine an accused only if he tenders a sworn defence. Another instance is when even if the accused adduces an unsworn defence, if he calls witnesses, the witnesses may be cross examined by the prosecution.

14. Under the provision, an accused has the right to remain silent after which the court proceeds and writes a judgment. It is common sense that in such an instance, no evidence is available for testing by way of cross examination. The Appellant's submissions that the prosecution was denied a right to cross examine the Respondent when he was not placed on defence therefore flies in the face of a total misunderstanding of the law in the followings ways; First, it is the pure reserve of the trial court to determine whether or not a prima facie case has been established to warrant an accused to offer a defence.

15. Second, it proffers an assumption that the prosecution could direct an accused the nature of defence he should offer so that they access a platform of cross examining him.

16. Third, it is in contravention of constitutional safeguards set out in Article 50 (1)(i) and (l) which grant an accused the right to remain silence and not to give self-incriminating evidence.

17. Further, the submission that the failure to put the Appellant on his defence resulted in the court not appreciating the Appellant's evidence is a clear misdirection as it implies a shifting of the burden of proof upon the accused person to proof his innocence which is untenable.

Whether a prima facie case was made out by the evidence adduced.

18. The Respondent was charged with the offence of obtaining credit contrary to Section 316(a) of the Penal Code. The particulars of that offence are set out above but key among them was that the amount of credit was obtained through false pretences. The sum was Kshs. 480,000/- which was inordinately at odds with the prosecution's evidence which detailed the debt amounting to Kshs. 2.5 million over the period in question. The evidence did also disclose that Kshs. 1,000,000/- was paid back on 29th May, 2012.

19. While *prima facie*, it is discernible that a debt was owing from the Respondent to the complainant it was not apparent why the charge only related to the sum of Kshs. 480,000/- . If the prosecution case was informed by the cheque that formed the basis of count II, the charge would still not hold as it is clear that every time the Respondent borrowed money from the complainant he proffered him with a postdated cheque as security. Further, the circumstances under which the cheque in question was conferred to the complainant were not clear as there was no signed acknowledgement as was the case with the other soft loans he advanced to the Respondent.

20. No doubt the Respondent deposited the cheque that forms the basis of Count II, an indicator of the false pretences element. But as the cheque was post-dated the complainant ought to have deposited it on due date. He however deposited it when he was aware that there were no funds in the account. Thus, the inability to differentiate the sum of Kshs. 480,000/- from the rest of the debt for purposes of proving false pretences meant that there was a failure to prove the specific false pretence. If the prosecution would have charged the whole debt as being obtained through false pretences they would have also suffered the same fate as it is clear that the Respondent paid the complainant Kshs. 1 million in the intervening period which rebutted the prosecution's evidence that he did not intend to pay. The court thus, finds that the prosecution did not make out a case with regards to the offence constituting Count I.

21. Count II related to the offence of issuing a bad cheque contrary to Section 316A of the Penal Code. The Respondent issued a cheque number 000156 drawn on account number 0240291479040 at Equity Bank to the complainant for an amount of Kshs. 480,000/-. The cheque was dated 1st March, 2012 and was deposited on 6th July, 2012 whereupon it was declined.

22. The prosecution's case was that the cheque was drawn in late October, 2011 although dated 1st March, 2012. On 1st March, 2013 there were insufficient funds in the account to meet the payee's demands. This was also the case when the cheque was finally deposited on 6th

July, 2012. PW1 testified that he did not deposit the cheque on the stipulated date as they had an agreement with the Respondent that he would not bank it immediately.

23. It is clear though from the bank statements that had the cheque been deposited on certain dates after 1st March, 2012 it would have been honored as there were funds in the account. Be that as it may, by the Respondent issuing the complainant with the cheque payable on the due date, he had undertaken to honor the payment of Kshs. 480,000/-. Unfortunately, it was dishonored, rendering it a bad cheque. I would find, in the circumstances that the prosecution made out a *prima facie* against the Respondent in respect of Count II warranting him to be put on his defence.

24. As to who should hear the Respondent's defence, it follows that a different magistrate other than the trial magistrate should take over the conduct of the matter, as in any case, the trial magistrate has already made up her mind as to the culpability o+f the Respondent. See **Bhatt Case** (supra).

25. In the result, this appeal partially succeeds. I dismiss it with respect to count I by upholding the Respondent's acquittal thereof under Section 210 of the Criminal Procedure Code. However, with respect to Count II, the appeal succeeds. I set aside the Respondent's acquittal under Section 210. I substitute it with an order that the prosecution established a *prima facie* case against the Respondent to warrant him to tender a defence.

26. The file shall be mentioned before court No.1 on 12th October, 2018 for allocation before a magistrate other than Hon. ***T. N. Sinkiyian, RM*** for defence hearing after compliance with Section 211 of the Criminal Procedure Code. The original trial court file shall forthwith be remitted back to the court by the Hon. Deputy Registrar of this court. It is so ordered.

DATED and **DELIVERED** this **9th** day of **October, 2018**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Momanyi for Appellant*

2. *Mr. Omollo h/b for Nzaku for the Respondent*