REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 11 OF 2016

THE REPUBLIC.......................................APPELLANT

=VRS=

1. JOSEPH MOKAYA MIGIRO.....1ST RESPONDENT

2. JAPHET SIOCHA......................2ND RESPONDENT

[Being an appeal against the Ruling of Hon. N. Kahara – Resident Magistrate delivered on the 29th day of April 2015 in the Original Keroka Principal Magistrate's Court Civil Case No. 691 of 2013]

JUDGEMENT

The respondents were charged with three counts all relating to a transaction in respect of parcel of land LR No. East Kitutu/Mwamangera/1471 belonging to Donald Onsongo Mageka. The 1st respondent, who is a brother of Donald Onsongo Mageka, the complainant in the lower court, was accused of unlawfully making a sale agreement without the consent of the complainant with intent to defraud. He was also accused of forging the seller's signature thereat. The 2nd respondent was charged with forcible detainer and was accused of remaining on the complainant's land parcel LR NO. East Kitutu/Mwamangera/1471 without colour of right and in a manner likely to cause a breach of peace against the complainant who was by law entitled to possession of the same.

The respondents pleaded not guilty to the charge and the prosecution called four witnesses but at the close of the prosecution's case, the trial magistrate found that the prosecution had not established a prima facie case against the accused persons sufficient to warrant them to be put on their defence and acquitted them of all the charges under Section 210 of the Criminal Procedure Code.

Being aggrieved, the prosecution preferred this appeal. The same is premised on grounds that: -

> **"1. The learned trial Magistrate misdirected herself in holding that a stranger can purport to dispose of another person's property in absence of proven agency relationship.**
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> **2. The learned trial magistrate occasioned a miscarriage of justice by importing an erroneous assessment of the facts presented.**
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> **3. The learned trial magistrate blatantly ignored the expert evidence of an handwriting expert without assigning any reason thereof.**
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> **4. The learned trial magistrate erred by over-reaching her jurisdiction in attempting to consider the merit of the land transaction.**
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> **5. The learned trial magistrate blatantly erred in finding that Section 349 of the Penal Code, Chapter 63 of the Laws of Kenya as a penalty section and thus declaring the charge sheet defective.**
>
> **6. The learned trial magistrate erred in returning a finding that forged signature does not fall under the purview of the provisions of Section 349 of the Penal Code."**

By the appeal the prosecution prays that matter be remitted to Nyamira Principal Magistrate's court for rehearing.

The appeal proceeded by way of written submissions. It is important to note that the complainant filed his own submissions to which he has annexed several documents but which this court shall not consider as the same did not form part of the proceedings in the lower court and leave to adduce additional evidence was not adduced. In any event, even had they been produced in evidence in the lower court, the correct

procedure would have been to hand them to the Prosecution Counsel prosecuting the appeal to attach them to his submissions. An appeal cannot be prosecuted by the State and the complainant at the same time as the complainant is represented by Counsel appearing for the State. That said, I have considered the submissions by both sides carefully but as an appeal is in the nature of a retrial, I have also reconsidered and evaluated the evidence so as to reach my own conclusion. I have done so bearing in mind that unlike the trial magistrate I did not have the benefit of seeing or hearing the witnesses give evidence and so did not observe their demeanour.

The trial magistrate acquitted the respondents because she was not satisfied that they had a case to answer. In other words, she was not satisfied that the prosecution had established a prima facie case against the accused persons sufficiently to warrant them to be put on their defence.

In a criminal trial, a prima facie case is made out when at the conclusion of the prosecution's case, the evidence is sufficient to require the accused person to defend himself failing which the court can enter a conviction in **PP V. Dato Seri Anwar bin Ibrahim No. 3 of 1999 (2) [CLJ 215 at page 274 – 275]** cited with approval by Nyakundi J in **Republic Vs. Parsati Parteri [2017] eKLR Paut J** stated: -

> **"A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence must be such that it can be overthrown only by rebutting evidence, must be such that, if rebutted, it is sufficient to induct the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence."**

Closer home in **Ramanlal Trambaklal Bhaft Vs. Republic [1957] EA 332 at 334** the court stated: -

> **"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".**
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> **A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence….**
>
> **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 minds to the law and the evidence could convict if no explanation is offered by the defence." (emphasis mine).**

Applying the above test to the evidence adduced at the trial, it is my finding that the same did not meet the threshold to put the respondents on their defence. Whereas there is no doubt that the 1st respondent and the 2nd respondent executed the impugned sale agreement, it is doubtful that it was not sanctioned by the complainant. In examination in chief, the complainant (Pw1) vehemently denied that he authorized the 1st respondent to sell the subject land parcel to the 2nd respondent. However, in cross examination, the complainant admitted to have purchased the parcel of land through the 1st respondent in the same manner. He also admitted that he received money from the 1st respondent at around the same time that the land was sold to the 2nd respondent and stated that he also recovered money from the 1st respondent and in re-examination he admitted he was given money for the plot. It is instructive that although he claimed that the money he received from the 1st respondent was for a different plot, he did not disclose which that plot was and in the end of re-examination, his evidence was that he was given money for the plot.

It is my finding that the evidence of the complainant creates doubt in the mind of this court as to whether he was not a party to the transaction and whether he did not report this matter to get at the 1st respondent who he accused of dealing with his own parcel of land in a manner that did not please him (the complainant). This doubt was exacerbated by the investigating officer (Pw3) who emphatically told the court that had the complainant owned up to receiving money from the 1st respondent, he would not have charged the respondents. The question whether or not the 1st respondent could have dealt with the land without a power of attorney from the complainant is an issue for the Environment and Land Court where the complainant admitted there is a civil suit pending and where the threshold is lower than in this criminal case.

In this case, to have put the respondents on their defence would have been tantamount to asking them to prove their innocence and I do not think that any reasonable tribunal properly directing itself would have convicted the respondents had they elected to remain silent. Accordingly, I find the appeal not merited and the same is dismissed.

It is so ordered.

Signed, dated and delivered at Nyamira this 22nd day of November 2018.

E. N. MAINA

JUDGE