



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 140 OF 2016**

**REPUBLIC.....APPELLANT**

**VERSUS**

**DAVID MWONGELA.....RESPONDENT**

**(An appeal from a ruling in the Chief Magistrate's Court at Milimani Cr. Case No.258 of 2016 delivered by E. Agade, RM on 5<sup>th</sup> August 2016).**

**JUDGMENT**

**Background.**

This appeal was filed the Republic which was dissatisfied with the trial court's finding acquitting the Respondent under Section 210 of the Criminal Procedure Code. After the close of the prosecution case, the learned magistrate ruled that a prima facie case had not been established to warrant the court to put the Respondent on his defence. He accordingly acquitted him under Section 210.

In the trial the Respondent, David Mwangela was charged with twelve counts. In counts 1, IV, VII and X, he was charged with making of a false document contrary to Section 347(a) as read with Section 349 of the Penal Code.

The particulars of count 1 were that on or about 6<sup>th</sup> February, 2012 at an unknown place within the Republic of Kenya, jointly with others not before the court, and with intent to defraud and without lawful authority made a false document namely a Custom Transit Bond referenced G.C.S.B No. 01703 2012 for Blackbox (K) Limited purporting it to be a genuine and valid document issued by the Commissioner Customs service department, Kenya Revenue Authority, a fact he knew to be false.

The particulars of Count IV were that on or about 9<sup>th</sup> February, 2012 at an unknown place within the Republic of Kenya, jointly with others not before the court, with intent to defraud and without lawful authority, made a false document namely a Custom Transit Bond referenced GCSB No. 04198 2012 for Blackbox (K) Limited purporting it to be a genuine and valid document issued by the Commissioner Customs Service Department Kenya Revenue Authority, a fact he knew to be false.

The particulars of Count VII were that on or about 27<sup>th</sup> April, 2012 at an unknown place within the Republic of Kenya, jointly with others not before the court, with intent to defraud, and without lawful authority made a false document namely a Custom Transit Bond referenced G.C.S.B No. 04200 2012 for Blushed Freighters Company Limited purporting it to be a genuine and valid document by the

Commissioner Customs Service Department Kenya Revenue Authority, a fact he knew was false.

The particulars of Count X were that on or about 7<sup>th</sup> May, 2012 at an unknown place within the Republic of Kenya, jointly with others not before the court and with the intent to defraud, without lawful authority made a false document namely a Customs Transit Bond referenced G.C.S.B No. 04662 2012 for Kipteebes Freighters Ltd purporting it to be a genuine and valid document issued by the Commissioner Customs Service Department Kenya Revenue Authority, a fact he knew to be false.

In counts III, VI, IX and XII he was charged with obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on or about 6<sup>th</sup> February 2012 in Nairobi within Nairobi county, jointly with others not before the court, with intent to defraud, obtained Kshs. 525,000/= from one Francis Kyengo Kiminza, a director of Blackbox (K) Limited by falsely pretending that it was a security for a Custom Transit Bond, a fact that they knew to be false.

The particulars of Count VI were that on or about 9<sup>th</sup> February, 2012 in Nairobi within Nairobi county, jointly with others not before the court, with intent to defraud, obtained Kshs. 525,000/= from one Francis Kyengo Kiminza, a director of Blackbox (K) Limited by falsely pretending that it was a security for a Customs Transit Bond, a fact he knew to be false.

The particulars of Count IX were that on or about 27<sup>th</sup> April 2012 in Nairobi within Nairobi county, the respondent, jointly with others not before the court, with intent to defraud , obtained Kshs. 350,000/- from one Mohamed Ibrahim Ali, a director of Blueshed freighters company limited by pretending that it was a security for Customs Transit Bond, a fact they knew to be false.

The particulars of Count XII were that on or about 7<sup>th</sup> May 2012 in Nairobi within Nairobi County, jointly with others not before the court, with intent to defraud, obtained Kshs. 401,000/= from one David Kipkosgei, a director of Kipteebes Freighters Limited by pretending that it was a security, a Custom Transit Bond, a fact they knew to be false.

In Counts II, V VIII and XI the Respondent was charged with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code. The particulars of Count II were that on or about 6<sup>th</sup> February, 2012 within the Republic of Kenya, jointly with others not before the court conspired to make a false document namely a Custom Transit Bond referenced G.C.S.B. No. 01703 2012 for Blackbox (K) Limited purporting it to be a genuine and valid document issued by the Commissioner Customs Services Department, Kenya Revenue Authority.

The particulars of Count V were that on or about 9<sup>th</sup> February, 2012 at an unknown place within the Republic of Kenya, conspired to make a false document namely a Custom Transit Bond referenced G.C.S.B No. 04198 2012 for Blackbox (K) Limited purporting it to be a genuine and valid document issued by the Commissioner, Custom Service Department, Kenya Revenue Authority.

The particulars of Count XIII were that on or about 27<sup>th</sup> April, 2012 at an unknown place within the Republic of Kenya, conspired to make a false document namely a Customs Transit Bond referenced G.C.S.B No. 4200 2012 for Blueshed Freighters Company Limited purporting it to be a genuine and valid document issued by the Commissioner, Customs Service Department, Kenya Revenue Authority.

The particulars of Count XI were that on or about 7<sup>th</sup> May, 2012 at an unknown place within Republic of Kenya, jointly with others not before the court, conspired to make a false document namely a Custom Transit Bond referenced G.C.S.B No. 04662 2012 for Kipteebes Freighters Ltd Purporting it to be a genuine and valid document issued by the Commissioner, Customs Service Department, Kenya Revenue Authority.

The grounds of appeal are set out in a Petition of Appeal dated 1<sup>st</sup> November, 2016. They are; that the trial magistrate erred when he found that the prosecution had not established a prima facie case, that the

trial magistrate erred when he failed to evaluate the prosecution's evidence before arriving at the decision that insufficient evidence was tendered, that the trial magistrate erred when she refused to allow the prosecution to procure witnesses and instead chose to adopt their evidence under Section 33(b) of the Evidence Act, that the trial magistrate erred when she found that the transit bonds were false but then went ahead and acquitted the Respondent, the trial magistrate erred when she found that there was no conspiracy established by the evidence adduced and finally that the trial magistrate erred when she found that the prosecution failed to prove how an omission to register the bonds was a criminal offence.

Learned State Counsel, Miss Sigei and learned counsel, Mr. Odhiambo represented the Appellant and Respondent respectively. They both filed written submissions in which they evaluated the evidence adduced in the trial. The Appellant argued that it was clear from the evidence on record that a prima facie case had been established and that the trial magistrate erred when she arrived at a contrary decision.

Mr. Odhiambo on the other hand argued a case that the trial magistrate's finding that a prima facie had not been established was proper. He put a strong case that the appeal has no merit and should be dismissed.

### **Determination.**

This court has considered the Petition of Appeal and the respective submissions and found that the only issue arising for determination is whether the evidence adduced by the prosecution set out a prima facie case requiring the appellant to answer in a defence. What constitutes a prima facie case was defined by the then East African Court of Appeal in the reknown case of **Ramanlal T. Bhatt v. Reginam**[1957] EA 332 that:

**“A mere scintilla 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.”**

This court is nevertheless mandated to reevaluate the evidence afresh and consider whether a prima facie case was established. The prosecution's case was that the respondent and his accomplices (separately charged) formed a conspiracy whose sole purpose was the production of forged Custom Transit Bonds which they used to obtain money from unsuspecting persons. The bonds in question were referenced G.C.S.B 01703 2012, G.C.S.B 04198 2012, G.C.S.B 04200 2012 and GCSB 04662 2012. The prosecution advanced a case that the appellant witnessed the bonds in question knowing them to be forgeries.

This court has considered the evidence adduced and it is clear that he did indeed witness the documents in question as was evidenced by PW7 who examined the documents in question. However, he did not record the documents in question in the register as a mandatory requirement. He also failed or neglected to notice the fact that the bonds in question were not signed by the proper authorities and that the signatures therein did not conform to the specimen signatures that were on file from Occidental Insurance Company. Evidence was also adduced by PW1, PW2 and PW3 that the custom transit bonds were not drawn by Occidental Insurance. The appellant's role in witnessing the documents and the legal authority that this impacted on the documents made him a maker of the documents in question. He was therefore liable for any falsehood on the face of the documents.

Further, according to the prosecution the bonds in question were then passed as real to Blackbox (K) Limited(01703 2012 and 04198 2012), Blueshed Freighters Company Limited(04200 20120 and Kipteebes Freighters Limited(04662 2012). A director to Blueshed Freighters gave evidence about how the custom transit bond in question was passed to him as being a legitimate bond and how he relied upon it until Kenya Revenue Authority informed him of its falsehood. The trial court also adopted the

statements of the directors of the other companies which this court has not accessed as they were not part of the record of appeal. That said it was clear that the prosecution were submitting that other members of the conspiracy obtained the money.

There was also evidence, as adduced by PW9 of mobile financial transactions between the members of the conspiracy. Records belonging to one Alex Mutende of telephone number 0711516128 were produced in court which showed that the Respondent through his mobile phone number 0722793673, received money from this number on 11<sup>th</sup> May, 2012 (two transactions totaling Kshs. 70,200/=), on 16<sup>th</sup> May, 2012 (one transaction totaling Kshs. 60,000/=) and finally on 8<sup>th</sup> June, 2012 (two transactions totaling Kshs. 55,000/=). It is clear that the said Alex Mutende was the link that united the conspiracy as his telephone records clearly indicated that he was sending or receiving money from members of the conspiracy including the Respondent. This, the Appellant contends, is clear evidence that establishes a prima facie case. This court holds a similar view as that of the appellant.

It is important that I note that other alleged conspirators of the Respondent were separately charged in other cases as it was practically impossible to charge them under one charge sheet due to the multiplicity of counts.

It is clear that a prima facie case was established in counts 1, 2, 4, 5, 7, 8, 10 and 11. With regards to the offence of obtaining by false pretences this court agrees with the learned trial magistrate that the prosecution did not adduce evidence sufficiently making out a case requiring the appellant to answer. The court must next decide what action it must take to salvage the situation.

In arriving at a decision this court finds guidance in **Ramanlal R. Bhatt(supra)** which was an appeal from the decision dismissing the appeal by the High Court of Tanzania after the Appellant was convicted by the District Court of Bukoba. The appeal was before Law, Ag. J who made an order after finding that a prima facie case had been established remitting the matter to the trial court to conduct a defence which led to a conviction of the Appellant. The appellant appealed to the High and the appeal was dismissed. He preferred a second appeal in the Court of Appeal which found that the ruling by Law, Ag. J. left the trial magistrate in a difficult position that he had to convict anyhow, as the judge had held that a prima facie case had been established. The Court of Appeal held that the best course would have been to order for a retrial.

This case presents a similar scenario as in the case of **Bhatt(supra)**. The learned trial magistrate in detail already expressed his view why he thought that the appellant should not be put on his defence. He already took a particular opinion on the matter. Therefore, to have the matter remitted back to him for the hearing of the defence case would just but be a mechanical process; a formality, so strictly to speak. This would not serve the interests of justice but would likely amount to a mockery of it. In view thereof, I order that a retrial be conducted before another magistrate with competent jurisdiction. The prosecution through the investigating officer shall summon the appellant to go to the relevant police station for purposes of preparing him to take plea afresh not later than 22<sup>nd</sup> June, 2017. Pending his appearance in court, the Appellant shall execute a personal bond of Ks. 100,000/-. It is so ordered.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of June, 2017.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of ;**

**1. Miss Sigei for the appellant.**

**2. Mr. Odhiambo for the respondent.**