Maina & 4 others v Republic (Criminal Appeal 4 & 132 (Consolidated) of 2020) [2021] KECA 126 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 126 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 4 & 132 (CONSOLIDATED) OF 2020

MSA MAKHANDIA, PO KIAGE & J MOHAMMED, JJA

NOVEMBER 5, 2021

BETWEEN

IAN GAKOI MAINA ..... 1ST APPELLANT

ODONGO PHILIPS KABITA ..... 2ND APPELLANT

SUKWINDER SINGH CHATTE ..... 3RD APPELLANT

EPAINITO APONDO OKOYO ..... 4TH APPELLANT

CROSSLEY HOLDINGS LTD ..... 5TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

((An appeal from the Judgment of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 9th October, 2019 in ACEC Appeal No. 21 of 2019))

JUDGMENT

1 By these consolidated appeals, the appellants challenge the decision of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) (as she then was) which reversed their acquittal by the Kisumu Chief Magistrate's Court on various charges related to the alleged fraudulent transfer of the land known as IR No. 21038 (L.R. 7545/3) to the 5th appellant, Crossley Holdings Limited. It had been the prosecution's case that the said land, measuring 9394 acres, belonged to Miwani Sugar Company Limited (1989) (in receivership) and had been transferred by a fraudulent scheme commenced by the filing of a dummy suit, being HCCC No. 225 of 1999, by Nagendra Sexene against Miwani Sugar Mills Limited, leading to judgment in execution of which transfer and vesting orders were either fraudulently issued or forged, as were minutes of the relevant land control Board.

2 A total of nine accused persons were arraigned before the trial court. They all faced a joint charge of conspiracy to defraud contrary to Section 317 of the Penal Code and several alternative or separate

charges relating to the said transaction. It is not necessary for our decision that we should go into any detail about the said charges, less still quote them verbatim.

3 Hon. Ng'arng'ar, Chief Magistrate, who took over the hearing of the case in May 2017 recorded the testimony of thirty witnesses called by the prosecution before it closed its case. He noted in his ruling, after hearing submissions by the defence and the prosecution on no-case to-answer, that one John Gitau Kimani, who was the 2nd accused, died before the prosecution closed its case, as did several other witnesses who had been listed to, but had not testified. He then proceeded to find that the prosecution had failed to establish a *prima facie* case in respect of the 1st count on conspiracy to defraud, and the alternative to that count that had charged the appellants with fraudulent disposal of public property. He also acquitted the 6th and 9th accused in respect of the 2nd count of fraudulent acquisition of public property, and the 7th accused of forgery as charged in count

4. He, however, found that the prosecution had made out a prima facie case in respect of the 3rd, 5th and 6th counts for the accused persons it concerned, namely Moses Nyabura Oswewe and Abdulkadir Athman Salim ElKindy, who were the 4th and 8th accused persons, respectively. Ian Gakoi Maina, Odongo Philip Kabita, Sukwinder Singh Chatte, Epainto Aponu Okoyo and Crossley Holdings Ltd, the 1st, 3rd, 6th, 7th and 9th accused, respectively, were accordingly acquitted and set at liberty. They are the appellants herein.

5 The Republic was aggrieved by that ruling acquitting the appellants as having no case to answer and filed a petition of appeal at the High Court. It listed some nine aspects in which it charged the trial magistrate erred in law and in fact.

6 That appeal was heard by Mumbi Ngugi, J. who, as we stated at the beginning of this judgment, allowed it and reversed the Hon. Chief Magistrate's ruling and directed that the appellants should have been placed on their defence, alongside their co-accused who were. The learned Judge rejected the prayer that the appellant's said defences be heard by a magistrate other than Hon. Ng'ar'ng'ar 'on the basis that as the 4th and 8th accused persons' defences were to be heard by the said chief magistrate, it was impractical for those of the appellants to be separated and, moreover, as the prosecution case built through 30 witnesses, was already complete before Hon. Ng'arng'ar.

7 It was the appellants' turn to be aggrieved. They filed notices of appeal and thereafter memoranda of appeal in which they faulted the learned judge as having erred in; failing to undertake a re-evaluation, re-analysis and re-assessment of the evidence; shifting the burden of proof; deciding without perusing the exhibits and proceeding on surmises; ignoring the letter from the Registrar of Companies on the directorship of the 6th appellant; ignoring the prosecution witnesses' concession that there was no evidence linking the 3rd appellant to the 5th appellant; misapprehending what constitutes a *prima facie* case; failing to appreciate the ingredients of the offence of conspiracy; failing to appreciate the contents, tenor and substance of the documentary evidence relating to the subject land; failing to appreciate the distinction between a private and public company; and failing to appreciate the prosecution's failure to establish what role if any the appellants played in the offences charged.

8 In readiness for the hearing of the appeal, learned counsel for the parties' filed written submissions which they relied on without highlighting. For the 1st appellant, **M/s. Gichaba & Co**. gave a summary of the evidence led by the prosecution at the trial as well as the procedural history of this matter leading to the present appeal. On the merits of the appeal, counsel elected to deal with all the grounds globally and first faulted the learned judge for failing to discharge the first appellate court's fundamental duty of re-evaluation of the entire evidence. Referring to the learned judge's treatment of the evidence of **PW2,**

PW5, **PW15** and **PW30**, counsel submitted that the learned Judge erroneously found, contrary to the evidence, that the said witnesses' testimony was to the effect that;

> i. The subject land was public property
>
> ii. It initially belonged to Miwani Sugar Company
>
> iii. Miwani Sugar Company (1998) Ltd (in receivership) was established to take over its assets
>
> iv. The Ministry of Finance issued and had been redeeming bonds for the said assets.

9 It was contended that the findings were contrary to what the witnesses stated in chief and in cross-examination, which the learned judge "completely ignored" in arriving at her decision, which led to her placing the appellant on his defence.

10 Counsel referred to specific parts of the testimonies of PW2 (David Otieno), PW5 (Kipngetich Arap Korir Bett); PW15 (Stephen Kiplan Bundotich) PW 30 (Stanley Wangundi Miriti, the investigating officer) who categorically stated that;

> i. The property was registered in the name of Miwani Sugar Mills Limited.
>
> ii. Miwani Sugar Mills Limited was a private limited company
>
> iii. Miwani Sugar Company (1989) Limited (in Receivership) was never registered as the owner of the land
>
> iv. The land was transferred from Miwani Sugar Mills Limited to Crossley Holdings Limited.

11 It was urged that in the absence of a single document identified or produced in proof of PW15's assertion that "the Government through the Ministry of Finance offered to purchase the debt and assets of Miwani Sugar Mills Ltd," it remained "pure hearsay" and the learned judge should not have placed reliance on it as she did, especially considering the witness in cross-examination stated:

> "the property in question had never been registered in the name of Miwani Sugar (1989) Ltd."

12 Attacking the evidence of the investigating officer that emerged in cross examination as evincing shoddy investigations, counsel asserted that "there was not *an iota* of evidence adduced by all the 30 witnesses to support the particulars of count one and the alternative charge that the subject property LR 7545/3 was public property," and concluded that the learned judge had no basis for holding that it was. All this goes to show, it was submitted, that the learned judge merely rehashed but did not re-evaluate, analyse and make proper conclusions on the entire evidence as she was duty bound, a duty expressed in many cases including, *Okeno Vs. Republic [1972] EA 32*; *Kiilu & Anor vs. Republic [2005] 1KLR 174*, *Irene Nduku Vs. Republic [2014] eKLR*.

13 Counsel next criticized the learned judge for failing to find that a *prima facie* case had not been made out to warrant putting the 1st appellant on his defence. Citing Sections 210 of the *Criminal Procedure Code* ; Sections 107 and 108 of the *Evidence Act* and the cases of *R.T. Bhatt vs. Republic [1957] EA 332* and *Republic vs. Wachira [1975] EA 262*, it was urged that without proof that the subject land was public property; that it was registered in the name of Miwani Sugar Company [1989]; and was fraudulently transferred from it; the main charge stood unproven and there was no justification for placing the 1st appellant on his defence.

14 Counsel next argued that as there was no proof on the record that Section 35 of the *Anti-Corruption and Economic Crimes Act* was complied with, the alternative to count one could not stand. That provision requires in mandatory terms that at the conclusion of an investigation under *Anti-Corruption and Economic Crimes Act* , the Anti-Corruption Commission must make a report to the Director of Public Prosecutions who must sanction any proposed prosecution under the Act. *Patrick Omukinda Omung'ala Vs. Republic (Criminal Appeal No. 195 of 2012)* and *Nicholas Muriuki Kangangi Vs. Attorney-general [2011] eKLR* were cited in aid.

15 The learned judge was also faulted for sustaining charges against the 1st appellant when he "was only charged for having acted for Nagendra in Kisumu HCCC No. 225 of 1993 as an advocate" which were in fact commenced by a different advocate. It was contended that as the 1st appellant was performing his duty under the Constitution and the *Advocates Act*, charging him was an "in (sic) the rule of law and administration of justice." Reliance was placed on this Court's decision in *Bellevue Development Co. Ltd Vs. Francis Gikonyo & Others [2018] eKLR* and that of the High Court in *Philomena Mbete Mwilu vs. DPP [2019] eKLR* which strongly affirmed judicial independence and immunity.

16 Counsel rested by asserting that the learned judge's direction to the same magistrate who had acquitted the appellants for want of evidence was equivalent to an order to convict coming from a superior to a subordinate court, which struck at the appellants' right to fair trial.

17 So stating, counsel urged us to reverse the learned judge and uphold the 1st appellant's acquittal.

18 For the rest of the appellants, learned counsel Mr. Richard Onsongo in his submissions took a similar stance. After giving the summary of the evidence at the trial, he argued the fifteen grounds of appeal under a few broad themes.

19 Addressing the burden of proof, counsel asserted that under the Constitution accused persons are presumed innocent until proven otherwise, and cited the case of *Republic Vs. Lifeus [1997] 3 SCR 320* in which the Canadian Supreme Court explained that the guilt of an accused person must be proved beyond reasonable doubt and that such doubt is not imaginary or frivolous, but based on reason and common sense, "logically derived from the evidence or absence of evidence." He also cited Sections 107 and 108 of the *Evidence Act* for the position that the burden and incidence of proof rests with the prosecution and the same does not shift throughout the trial which was famously referred to as the 'golden thread' that is always seen "throughout in the web of English criminal law" in *Woolmington vs. DPP [1935] AC 462.*

20 Regarding what constitutes a *prima facie* case, Mr. Onsongo referred to *Mozley and Whiteleys' Law Dictionary* which renders it as when a litigating party has evidence in his favour "sufficiently strong for his opponent to be called to answer it," and cited the guidelines given by the Federal Court of Malaysia in *PP vs. Mohammed Radzibin Abdubashar [2005] 6 MLJ 399* on what a trial court should do at the close of the prosecution case. He then asserted that a trial court is enjoined by law to determine whether at the close of its case the prosecution has discharged the burden of proof. He referred to Lord Parde CJ's observation in *Sanjil Chattai Vs. The State [1985] 39 WLR 925* that;

> "A submission that there is no case to answer may properly be made and upheld:
>
> (a) a. where there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.
>
> (b) when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."

21 Also cited for the same proposition were the Nigeria Supreme Court decision of *Daboh & Anor vs. State [1977] SSC 122* and *Director of Public Prosecution vs. Peter Kibatala (Criminal Appeal No. 4 of 2015)*.

22 Next adverting to the duty of a first appellate court to reassess, reevaluate, reanalyze and interrogate the evidence so as to reach its own independent conclusion thereon, counsel contended that the learned judge failed in that duty because she "only looked at the evidence brought by the prosecution that was not in favour of the accused person to the exclusion of the evidence in favour of the accused person; exonerating evidence or any contradictory evidence brought by the prosecution." And he cited *Peter Kifue Kiilu & Anor. Vs. Republic (Supra)*; *Okeno vs. R (Supra)* and *Gabriel Njoroge Vs. Republic [1985 – 88] 1 KLR 1134*.

23 Mr. Onsongo proceeded to argue that the learned judge failed to undertake that duty as was expected of her and instead misapprehended that duty and took a wrong turn when, instead of conducting a reevaluation of the evidence, she stated that she was "called upon to answer 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 in their defence." It was his view that the learned judge could not consider the question she formulated without looking at the entire case reading the evidence on record, reassessing, reevaluating and reanalyzing the same. Counsel very specifically faulted the learned judge for failing to;

> a. look into and reproduce the testimony of the prosecution witnesses during their cross-examination
>
> b. look at and appreciate the evidence of PW 30 Stanley Wangundi Miriti, the investigating officer.

24 It was thus counsel view that: -

> Having failed to refer to, mention and or demonstrate that she had looked into, appreciated and taken into account the cross-examination by the defence of the prosecution witnesses, the first appellate court failed to find whether '... <u>if 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.</u>" *R vs. Wachira [1975] EA 262*.
>
> (Counsel's emphasis)

25 He criticized the learned judge for considering the prosecution case in isolation and taking a very narrow and constricted view of the evidence on record. Moreover, she made conclusions not borne by any supporting documents, having taken assertions and oral testimony as proof of facts. He even listed several instances where such assertions were abandoned or contradicted by their makers during cross-examination before posing; "with all the foregoing answers and evidence during cross-examination, how did the learned judge come to the conclusion that the land in question was public land?"

26 Mr. Onsongo faulted the learned judge for essentially putting forward a theory that was not borne out by the evidence and arriving at a conclusion not based on the weight of actual evidence. This was made worse, in his view, by the learned judge's failure to analyse the evidence touching on each of the specific charges or counts so as to appreciate the weight of the evidence tendered by the prosecution against each of the appellants, and the omnibus finding that they all had a case to answer was untenable.

27 Learned counsel next contended that by holding that there was evidence "sufficient to require that the [appellants] offer some explanation in their defence," the learned judge essentially required them to

enter upon compulsory self-incrimination. This was in violation of their "right to remain silent and not to testify during the proceedings and to refuse to give self-incriminating evidence" as guaranteed under Article 50 of the Constitution.

28 He concluded by reiterating that there was no evidence to warrant placing the appellants on their defence, which amounted to asking them to fill in the crevices and gaps in the prosecution case which amounted to shifting the burden and incident of proof to them. He urged us to reverse the learned judge and restore the trial court's finding of no case to answer.

29 On the part of the Republic, submissions were filed by Mr. F.S. Ashimosi,the learned Senior Assistant Director of Public Prosecutions. He first listed the charges that were preferred against the appellants, gave a summary of the case, did a brief analysis of the evidence and gave a precis of the procedural history of the matter. On the merits of the appeal, he agreed that the High Court was as a matter of law enjoined as a first appellate court, to analyse and reevaluate the evidence adduced to draw its own conclusion, while bearing in mind that it neither saw nor heard any of the witnesses, consistent with the authorities, foremost of which was *Okeno Vs. Republic (supra)*. He added, however, that there is no set format for re-evaluation as it depends on the circumstances of each case as well as the style of the first appellate court, for which assertion he cited *Sembuya vs. Alports Services Uganda Limited [1999] LLR 109 (SCV*); a decision of the Ugandan Supreme Court. He dismissed any criticism of the learned judge as devoid of merit.

30 On *prima facie* case, he cited various authorities including *Ramanlal Trambaklal Bhatt Vs. Republic* (supra) and *Republic vs. Wachira* (supra) which counsel for the appellants also relied on. He repeated and affirmed the basis upon which the learned judge found that a *prima facie* case had been made out and prayed that the appeals be dismissed. On whether Hon. Ng'arng'ar who had ruled under Section 210 of the Criminal Procedure Code (CPC) that the appellants did not have a case to answer, could be compelled to put them on their defence, the learned SADPP invited us to take judicial notice that the said Chief Magistrate had been transferred out of Kisumu station, and so the complaint should fail.

31 We have carefully considered the submissions and given this appeal anxious consideration. We have also studiously engaged with the many authorities that were cited by the parties before us. Even though it was not adverted to directly, there is no doubt that a particular difficulty presented by this appeal is the conceptual and practical incongruity inherent in an appeal against acquittal. We think that when an accused person has been acquitted by a competent court exercising its usual jurisdiction, and which appears to have exercised its mind reasonably and not perversely on the analysis of the evidence before it, the idea of "reasonable doubt" takes a real and significant meaning that logically spawns unease about appeals from a resultant acquittal. It is no wonder then that appeals against acquittal were previously closely circumscribed by law. The right was previously created by Section 348A of the CPC but in telling terms;

> "348A. when an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."

32 That right was amplified by section 354(3) which states the powers of the High Court in dealing with an appeal from an acquittal by the subordinate court to be these;

> "354(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High court may think fit."

33 That the right of appeal to the High Court against acquittal by the subordinate was limited to matters of law only first introduced to the law in 1967 through *CPC Amendment Act No. 13 of 1967* was thus express from these provisions and was reemphasized by this Court. See for instance, *Paul Mwangi Maina Vs. Republic (Nakuru Cr. App. No. 93 of 2010)*. And it is worth noting that an acquittal by the High Court in exercise of its original jurisdiction was not appealable to this Court.

34 Those limitations to the right of appeal against acquittal were removed, almost by stealth, by the *Security Laws (Amendment) Act, 2014,* which affected certain fundamental changes to the law by way of omnibus amendments. Some of those amendments were successfully challenged at the High Court in *The Coalition For Reforms And Democracy & 2 Others Vs. The Republic & Others (High Court Petition No. 628 of 2014)* but Section 19 of the Amendment Act, which effected those critical changes to prosecutorial appeal against acquittal, was not subject of any challenge.

35 That notwithstanding, the unease and controversy over such appeals as currently formulated has not abated. Its implications on fair trial rights of an accused person as well as the potential for double jeopardy were discussed at length, complete with comparative jurisprudence, by this Court sitting in Mombasa (Makhandia, Ouko & M'Inoti JJ.A) in *Republic Vs. Danson Mgunya [2016] eKLR*. Even though the Court fell short of declaring unconstitutional the extant prosecutorial appeal against acquittal, its unease over its current formulation in Section 348A following the aforementioned amendment is quite palpable. The section now grants the Director of Public Prosecutions a wide and basically unfettered right of appeal against acquittal thus;

"384A(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) if the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately."

36 We think, with respect, that the provision leaves this area of law in quite an unsatisfactory state and is potentially subject to abuse. We do not think that it is right or proper, less still just or fair, for any and all acquittals to be the subject of prosecutorial appeal, which should be exercised only in exceptional cases where the justice of the matter requires the reversal of a glaringly unjustified and improper acquittal. We think it is enough for us to reiterate the concern voiced in *Republic vs. Danson Mgunya* (supra) regarding the manner and effect of the amendments that opened wide the door to prosecutorial appeals, and which must be relooked as a matter of urgency;

"Before we leave this issue, there are two important points that we feel constrained to make regarding the right of the State to appeal to this Court against acquittal by the High Court

in the exercise of its original jurisdiction. It seems to us totally undesirable that fundamental changes in the law, such as the ones involved in this appeal, should be effected through miscellaneous statute law amendments, which is what, for all intents and purposes, the Security Law (Amendment) Act, 2014, is. As we understand it, the device of miscellaneous statute law amendments is intended to effect minor rather than fundamental and far-reaching amendments to legislation. Ordinary it will seek to correct any errors, anomalies or inconsistencies in legislation. It is completely ill suited to settle controversial or highly contested issues of the day which may require deep reflection and careful consideration.

As a direct consequence of the questionable choice of the device of miscellaneous statute law amendments to effect changes to the Criminal Procedure Code regarding the right to appeal to this Court from acquittals by the High Court in the exercise of its original jurisdiction. we now have two sets of completely incongruous provisions on the issue. On the one hand there is Section 348A as amended by the 2014 Act, which allows such appeals on matter of fact and law, and on the other there is section 379(5) and (6) of the Criminal Procedure Code, which, having not been repealed continues to provide for the procedure of declaratory judgment which does not reverse an acquittal. In these circumstances, courts are forced to resort to the device of implied repeal, which in an issue like before us ought not be the case, (See *Ellen Street Estates Ltd v. Minister for Health (1934) 1 ALL ER 385*.

The second point is that although we have concluded that legislation conferring a right of appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction is neither in violation of the principle against doubt jeopardy nor otherwise unconstitutional, nevertheless it is to be expected that the Director of Public Prosecutions will not use the amendment to prefer all and sundry appeals against acquittals by the High Court. In our view, this is a right that must be exercised in exceptional circumstances, the kind that loudly cry out for appellate justice. As the survey above had demonstrated, in many Commonwealth jurisdictions, even where a right of appeal against acquittal by the superior courts is allowed, it is very circumscribed, for example by the requirement that it is only by leave; or it is limited to issues of law only; or a successful appeal does not affect the acquittal and has only prospective effect; among others. The Director of Public Prosecutions must therefore consider putting in place clear policy on the exercise of this right of appeal to distinguish it from the automatic appeal to the High Court in acquittals by the subordinate courts."

37 Turning now to the merits of this appeal, we begin by noting that all the parties before us acknowledge that the duty of the High Court as the first appellate court was to subject the entire evidence to a fresh and exhaustive re-evaluation, analysis and reassessment to the end that it should draw its own independent inferences and conclusions of fact and law from the evidence. This is a solemn duty that a first appellate court must scrupulously and carefully discharge and which an appellant is entitled to expect and demand. A failure to do so demonstrably on the record, notwithstanding that there is no set format or template for conducting the exercise, is a matter of law that entitles, indeed, compels, a second appellate court to reverse the first.

38 We think that given the disadvantage an appellate court has of not having seen and heard witnesses as they testified, it is imperative that it proceed with that caution in mind and be thus slow to interfere with findings of fact that may have proceeded from the trial court's assessment of the credibility of witnesses as they testified. The need for circumspection before overturning these factual findings is the greater in our opinion, if the effect is to turn an acquittal into a conviction or, as happened in this case,

into a finding that a *prima facie* case has been made out calling for the placing of the accused person on his defence.

39 The main complaint by the appellants herein is that the learned judge did not discharge or properly discharge that bounden duty of a first appellate court. In particular, it is contended that the learned judge took the prosecution evidence in isolation. She did so by looking only at what the witnesses said in direct examination and taking it as established truth. The appellants claim, and we think from our perusal of the record that there is substance in the claim, that the learned judge did not consider the evidence given by the prosecution witnesses when subjected to cross-examination. Had she done so, she would have been able to appreciate the gaps, contradictions and deficiencies in the prosecution case.

40 We have already adverted to some of those deficiencies earlier in our judgment but some of those that stand out are the following;

> PW2 (David Otieno), PW5 (Kipngetich Arap Korir Bett) and PW30 (Stanley Wangundi Miriti) all stated that the property was always registered in the name of Miwani Sugar Mills Limited.
>
> PW2, PW5, PW15 and PW30 all confirmed that the subject land was never transferred to nor registered in the name of Miwani Sugar Company (1989) Limited (in Receivership).
>
> PW2, PW27 and PW30 all stated that Miwani Sugar Mills Ltd for which the property was transferred to Crossley Holdings Ltd, was a private company.

41 It is instructive that those witnesses included PW2 who was an advocate for the High Court of Kenya who acted for Miwani Sugar Company (1989) Limited (in Receivership); PW27 who was the Company Secretary of the Kenya Sugar Board; and PW30 who was the investigating officer in the case. These are the persons who were best placed to know the legal status of the two companies as well as the ownership and legal effect of the registration of the land in question.

42 Considering that the fulcrum of the prosecution case was the conspiracy charge alleging that Miwani Sugar Company (1989) Ltd (in Receivership) was defrauded of its property comprising ofL.R. No. 75 45/3, the emergency of clear fact that the said company did not in fact own the land, and had never owned it, must mean that the entire charge collapses. Added to the fact that the land in question was registered in the name of Miwani Sugar Mills Ltd, an acknowledged private company, any charge that the subject land was public property must also fall, and this was clear to see from the evidence.

43 We have read the ruling of the trial court on case to answer and have noted that Hon. Ng'arng'ar gave some eleven reasons why he thought the prosecution had not established a *prima facie* case against the appellants that he eventually acquitted. We think his reasoning deserves to be quoted *in extenso*;

> I wish to state from the onset that applying this test to the 1st, 2nd and 4th counts the prosecution has failed to establish a prima facie case. The reasons for my findings are:
>
> (i) For the 1st count to succeed it must be proven by the prosecution that there was the element of an agreement, a meeting of minds of the accused persons and the intention to defraud.
>
> These basic elements have not been established.
>
> In the entire case no evidence was led to establish the linkages between all the accused persons.
>
> It was not proved that the accused persons demonstrated any intention to jointly execute the conspiracy.

(ii) The particulars of Count No. 1 and Count No. 2 indicate that the value of the parcel of land – known as LR 7545/3 was Kshs. 2.32 billion.

No evidence to support this was led at all.

It was incumbent upon the Prosecution to produce a valuation report which would have established the value and size of the property in question.

(iii) The prosecution failed to lead evidence on the issue of ownership of land parcel No. LR 7545/3 which is the subject of the charges herein

(iv) It was the duty of the Prosecution to proof the role of each of the accused persons and their capacities in their respective offices in the Commission of the offence. This line of evidence is lacking for all the accused so as to establish a nexus leading to conspiracy.

(v) The Prosecution failed to tender evidence to demonstrate that Miwani Sugar Company (1989) Ltd [in receivership] was a public company.

This would have been easily proved by production as exhibiting the Articles of Association or Incorporation Certificates more of these were never produced as exhibited.

(vi) From the evidence led by the prosecution, the assertion was that the land in issue was never registered in the name of Miwani Sugar Mill (1989) Ltd [in receivership] as per evidence of PW 15 - Stephen Bundotich.

This was also the evidence of the Company Secretary PW27 Rosemary Akoth Mikon who stated that in her tenure she did not see any inventory of assets of Miwani Sugar (1989) Ltd

Likewise PW5 – Kipngetich Arap Korir Bett was categorical that the property in issue was not registered in the name of Miwani Sugar (1989) Ltd.

(vii) This evidence goes contrary to the particulars of both the 1st, 2nd and 4th counts herein.

(viii) In respect to the 2nd count the 6th accused's status was not established.

The Investigating Officer PW30 – Stanley Wangendi Miruti admitted in cross-examination that the 6th accused was not a Director of Crossly Holdings Ltd.

He went further to state that he did not know why the 6th accused was charged.

(ix) The prosecution failed to lead evidence on the role played by the directors of Crossley Holdings Limited. They indeed were not joined to the proceedings herein.

No nexus was created between the 6th accused and the 9th accused Crossley Holdings Ltd.

(x) In respect to the 4th count that deals with forgery, the evidence of a document examiner would be key to establish whether or not the documents – (Letter or consent to transfer was forged or not.

The Investigating Officer told court that he did not subject the document to the government Document Examiner to confirm the prints. This was a fatal omission.

(xi) The collapse of 1st, 2nd and 4th counts can squarely be attributed to the shoddy investigation in this case.

The Investigating Officers failed to cover very obvious and crucial aspects or issues to proof the charges.

The reasons adduced herein for the 1st and 2nd charges go to make useless and hence unstainable the alternative charge to the 1st count, that is fraudulent disposal of public property contrary to Section 45(1)(b) as read with Section 48 of the Anti-Corruption and Economic Act No. 3 of 2003.

A look at the evidence of the Investigating Officer which was to line up the entire prosecution case ended up being the evidence that weakened the prosecution case on the 1st, 2nd and 4th counts alongside the alternative charge to the 1st count.

Following from my findings above, the evidence on record is not capable of sustaining safe conviction even if the accused persons objected not to offer any defence or explanation."

44 With respect, and given what we ourselves have observed, we think the Hon. Magistrate had a sound basis for reasoning and concluding as he did, given the state of the record.

45 It must be recalled that in order to justify a ruling that an accused person has a case to answer, the prosecution evidence must be such as would entitle a reasonable tribunal, properly directing itself on it, without more, to convict. If the evidence is either devoid of relevant elements that would go to establish the offence charged, or has been so discredited in cross-examination as to be of low credibility or probative value, the court has a duty to uphold a submission of no case to answer, and acquit the accused. It has to be so, for to hold otherwise would be to say that a case that is incapable of reasonably sustaining a conviction should still be answered by the defence. What would be the use of such answer unless the intention be that the accused would thereby somehow provide, contrary to the principle of non-self-incrimination, facts that would pad and patch up the holes and defects of the prosecution case to the point where the court might then be entitled to convict?

46 Such an approach would be wholly untenable and inimical to the golden thread that postulates that the burden of proving a criminal charge beyond reasonable doubt resides with the prosecution throughout the trial and never shifts. This principle is so fundamental that it must be jealously guarded as it implicates the liberty of all citizens as well as their human dignity. Murphy, J. expressed the principle thus in *Pyneboard Pty Ltd vs. Trade Practices Commission [1983] 152 CLR 328 at 346*, cited to us by Mr. Onsongo, and with which we fully concur;

> "The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigations. It protects the innocent as well as the guilty form the indignity and invasion of privacy which occurs in a compulsory self-incrimination; it is society's acceptance of the inviolability of human personality."

47 So critical in the principle that it has been referred to, with justification we think, as an "overreaching principle" in *R vs. White[1999] 2 SCR 417*. We also agree with the reasoning of the court in *Republic vs. P (M.B) [1994] ISC R 555 at 579* when applying the principle to the question of *prima facie* case thus;

> "Perhaps the single most important organizing principle in criminal law is that right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the court establishes that there is a case to meet, an accused is not compellable in general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her. The broad protection afforded accused reasons is perhaps best discharged in terms of the over-arching principle against self-incrimination. It is up the state, with its greater resources, to investigate and prove its own case and the individual should not be conscripted into helping the state fulfil this task. ..."

48 Upon a full consideration of this appeal, we think, with respect, that the state of the evidence adduced rendered it inevitable that a submission of no case to answer, once mounted, was bound to succeed. The prosecution case was in the kind of state Lord Parker C.J. had in mind when he issued *Practice Direction (Submission of No Case)* reported in [1962] 1 WLR 227; [1962] 1 All E.R 448 DC as follows;

> "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."

49 We have no doubt in our mind that the evidence on record before the trial magistrate left great doubt as to the proof of the offence charged. There was not laid before the court evidence which, unless controverted, would be sufficient to establish the elements of the offences. Having failed to lay such evidence and establish or discharge the burden of presenting such *prima facie* evidence to the hilt, the Hon. Magistrate was entitled, indeed enjoined by law, to dismiss the charges and acquit the appellants as he did. (See *DPP vs. Kibatala* , (supra).

50 That being our view of the matter, we come to the conclusion, and with respect to the learned judge, that the High Court fell into error in upsetting the ruling on no case to answer.

51 In the result, the appeal succeeds and is allowed. The judgment and order of the High Court is set aside and substituted by an order restoring the ruling and order of the trial court that the appellants had no case to answer and stand acquitted.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR