IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 33 OF 2017

BETWEEN

DAVID MWANGI MUIRURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 23rd June, 2017

In

H.C.CR.A No. 36 of 2015)

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JUDGMENT OF THE COURT

1. The appeal before us relates to the decision of the High Court dated 23rd June, 2017 wherein the learned Judge (Chitembwe, J.) interfered with the trial court's finding that **David Mwangi Muiruri** (the appellant) had no case to answer in respect of the nine counts which were preferred against him.

2. It is trite that upon the prosecution closing its case the trial court exercises either of the two options prescribed under **Section *210 and 211 of the Criminal Procedure Code*** in respect of the subordinate court and Section ***306 (1) & (2)*** of the Criminal Procedure Code, in respect of the High court. The contents of the two are basically the same with Section 306 Ciminal Procedure Code providing as follows:

> ***"306***
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> ***1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.***
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> ***2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."***

3. In determining the suitable option, to put it in another way, whether the accused has a case to answer, the court must be satisfied that the prosecution has established a *prima facie* case against the accused. A *prima facie* case is defined in the ***Mozley and Whiteley's Law***

> ***Dictionary 11th Edition*** as:
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> ***"A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be***

called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

4. The concept was also discussed in the often cited case of ***Ramanlal Trambaklal Bhatt vs. R [1957] EA 332*** thus,

> ***"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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 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." (Emphasis added)***

5. Consequently, the appeal turns on the sole issue of whether the prosecution had made out a *prima facie* case to warrant the appellant being put on his defence on either all or any of the nine counts.

6. In the first count, the appellant was charged with the offence of making documents without authority contrary to ***Section 357(a)*** of the ***Penal Code***. The particulars thereunder were that on divers dates between 16th January, 2004 and 29th March, 2004 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with the intent to deceive, without lawful authority, made certain documents namely court proceedings in respect of Malindi Civil Suit No. 18A of 2004 purporting to show that the said proceedings were held before Joyce Manyasi, the then Chief Magistrate at Malindi Law Courts, purporting them to be genuine court proceedings.

7. On the second count, he was charged with the offence of forgery contrary to ***Section 349*** of the ***Penal Code***. The details were that on divers dates between 16th January, 2004 and 29th March, 2004 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with intent to defraud, forged certain documents namely court proceedings in respect of Malindi Civil Suit No. 18A of 2004 purporting them to have been genuine court proceedings conducted and signed by Joyce Manyasi, the then Chief Magistrate at Malindi Law Courts.

8. The third was the offence of making documents without authority contrary to ***Section 357(a)*** of the ***Penal Code***. The particulars read that on divers dates between 16th January, 2004 and 29th March, 2004 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with intent to deceive, without lawful authority, made a court decree in respect of Malindi Civil Suit No. 18A of 2004 purporting to show that the said decree was made by Joyce Manyasi, the then Chief Magistrate at Malindi Law Courts, purporting it to be genuine court decree.

9. As for the fourth count, he was charged with the offence of forgery contrary to ***Section 349*** of the ***Penal Code***. The particulars were that on divers dates between 16th January, 2004 and 29th March, 2004 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with intent to defraud, forged a certain document namely a court decree in respect of Malindi Civil Suit No. 18A of 2004 purporting it to have been a genuine court decree signed by Joyce Manyasi, the then Chief Magistrate at Malindi Law Courts.

10. The fifth was in respect of the offence of uttering a forged document contrary to ***Section 353*** of the ***Penal Code***. The details therein were that on 6th March, 2007, at the Ministry of Lands offices in Mombasa, within Mombasa County, the appellant jointly with others not before the court, with intent to defraud, knowingly and fraudulently uttered a false document namely court decree in respect of Malindi Civil Suit No. 18A of 2004 suit to the Land Registrar Mombasa purporting it to have been a genuine court decree signed by Joyce Manyasi, the then Chief Magistrate at Malindi Law Courts.

11. In count six he was charged with the offence of making documents without authority contrary to ***Section 357(a)*** of the ***Penal Code***. The particulars thereof were that on 22nd February, 2007 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with intent to deceive, without lawful authority made a court vesting order in respect of Malindi Civil Suit No. 5 of 2007 purporting to show that the said court vesting order was made by Daniel Ogembo, the then Principal Magistrate at Malindi Law Courts and purporting it to be a genuine vesting order.

12. On the seventh count he was charged with the offence of forgery contrary to ***Section 349*** of the ***Penal Code***. The facts were that on 22nd February, 2007 within Malindi Township in Kilifi County, the appellant jointly with others not before court, with intent to defraud, forged a court vesting order in respect of Malindi Civil Suit No. 5 of 2007 purporting to show that the said vesting order was made by Daniel Ogembo, the then Principal Magistrate at Malindi Law Courts.

13. On the eighth count he was charged with the offence of uttering a forged document contrary to ***Section 353*** of the ***Penal Code***. The details therein were that on 6th March, 2007 at the Ministry of Lands offices in Mombasa, within Mombasa County, the appellant jointly with others not before court, with intent to defraud, knowingly and fraudulently uttered a false document namely, a court vesting order in respect of Malindi Civil Suit No. 5 of 2007 to the Lands Registrar Mombasa purporting it to have been a genuine court vesting order signed by Daniel Ogembo, the then Principal Magistrate at Malindi Law Courts.

14. On the ninth and final count, he was charged with procuring execution of a document by false pretences contrary to ***Section 355*** of the ***Penal Code*** as read with ***Section 349*** of the ***Penal Code***. The particulars were that on 6th March, 2007 at the Ministry of Lands Offices in Mombasa, within Mombasa County, the appellant jointly with others not before court, by means of false and fraudulent representation as to the nature, contents or operations of certain documents namely court proceedings, court decree and vesting orders in respect of Malindi Civil Suit No. 18A of 2004 and 5 of 2007, procured the Land Registrar Mombasa to execute in the Lands register plot no. 622 Malindi in favour of G. Hotman Cottova, a company in which the appellant is the proprietor from Kark Heinz Borner, Mirko Blaetterman and Helmut Koster.

15. The gist of the prosecution's evidence was that Shabir Hatim Ali (PW3) was appointed as a caretaker over Plot Number 622 situated at Kibokoni in Malindi (suit property) by the then owners Kark Heinz Borner, Mirko Blaetterman and Helmut Koster. Sometime in 2007, he received a telephone call from a person who identified himself as the appellant. The appellant informed him that he had taken over the suit property through a court order. According to Shabir, the appellant came over and showed him a decree dated 29th March, 2004 emanating from **CMCC No. 18A of 2004 – Hotman Cotova vs. Kark Heinz Borner, Mirko Blaetterman and Helmut Koste**r (the 2004 suit). The decree declared G. Hotman Cotova, a company associated with the appellant, as the new legal owner of the suit property. He was also shown a vesting order dated 22nd February, 2007 issued in **Misc. Civil Suit No. 5 of 2007** (the 2007 suit) between the same parties directing the Registrar of Titles to issue a provisional certificate to the said company. On the strength of those documents he handed over the suit property to the appellant.

16. However, Shabir was still not so sure about the orders and sought the assistance of the then Member of the County Assembly of Lamu, Ali Bakari Mohammed (PW8) to verify the same. After making the necessary inquiries at the Law Courts he found out that the orders in question were not genuine. He also saw a copy of that decree in the suit property's skeleton file at the Lands office. This prompted Shabir to report the matter to the then Kenya Anti-Corruption Commission which referred the matter to the Criminal Investigation Department (CID) at Malindi to take over the investigations.

17. In April, 2009 Joyce Manyasi (PW1) who was indicated in the decree in issue as having presided over the 2004 suit, learnt about it from Mr. Joseph Munyithia, an advocate then practising in the firm of Musinga & Co. Advocates. She examined copies of proceedings, judgment and the decree all relating to the 2004 suit which were in the advocate's possession. She was adamant that she had never presided over such a matter when she was the Chief Magistrate at Malindi. She enumerated a number of reasons why she considered those documents as fictitious. These reasons included:-

a) The signatures thereon were neither appended by her nor belonged to her.

b) The proceedings as recorded were irregular and contrary to the style she had adopted of taking evidence and writing judgments over the years.

c) The serialization of the suit as 18A was peculiar and was not the usual manner of serialization applied at the law courts at the material time.

d) The certification of those proceedings was irregular. In that, instead of a certificate being inserted at the very end of the typed proceedings as was the norm, a signature purporting to be hers was affixed at the end of each statement.

8. In fact Peter Mbiu Macharia (PW7), who was attached to Joyce as a court clerk at the material time and also reflected as such in the proceedings, could also not recollect handling the 2004 suit. He pointed out anomalies in the said proceedings which were somewhat similar to what was highlighted by Joyce. Equally, Daniel Ogembo Ogolla (PW3) who was at the material time a Senior Resident Magistrate at Malindi law courts, denied certifying the proceedings relating to the 2004 suit and issuing the vesting orders in the 2007 suit as indicated thereon.

19. Thereafter, the proceedings, decree and vesting orders were subjected to forensic examination to establish whether the signatures thereon belonged to Joyce and Daniel. To that effect three reports prepared by Antipas Nyanjwa, a forensic documents examiner, were produced by his counterpart Daniel Gutus (PW9). According to the first report dated 7th March, 2011, the signatures appearing on the proceedings and decree of the 2004 suit allegedly belonging to Joyce were examined and compared with her known and specimen signatures. The conclusion drawn was that there was no agreement between the signatures. In the second report dated 20th April, 2011 Daniel's known and specimen signatures were compared in a similar manner with the signature purported to have been affixed by him certifying the 2014 proceedings. The conclusion was that there was no match. The third and final report dated 5th August, 2011 was in regard to the signature purportedly affixed by Daniel in the vesting order. The conclusion therein was no different from the first two reports.

20. In addition, Towash Zephania Maro (PW5), then in charge of the Chief Magistrate's civil registry, testified that he was only able to find an undated entry in relation to the 2007 suit in the register of that year but was not as successful with the 2004 suit. However, he indicated that the register for the year 2004 was incomplete since some of the pages therein seemed to have been plucked out. Further, he was unable to trace the physical files relating to the suits in question.

21. On his part, Dick James Safari (PW6) the then Registrar of Titles at the Mombasa lands registry, gave the chronological history relating to the registration entries of the suit property up to 3rd May, 1995 when Kark Heinz Borner, Mirko Blaetterman and Helmut Koster were registered as proprietors. He testified that according to the suit property's register which was produced, the suit property was transferred to G. Hotman Cotova on 6th March, 2007 pursuant to the decree in the 2004 suit. A subsequent entry with regard to the vesting order was made on 6th March, 2007. It was on that basis that G. Hotman Cotova was issued with a provisional title over the suit property.

22. It is after weighing the foregoing evidence that the trial magistrate, Honourable Y.A Shikanda found that the prosecution had not established a *prima facie* case. In doing so, he held firstly, that from the forensic reports the signatures purportedly affixed by Joyce in the proceedings in issue were not examined with her known and specimen signatures. Thus, there was no expert evidence to show that the signatures therein were not hers. Moreover, no examination of the appellant's handwriting or signature was done to establish that he was the one who forged Joyce's signature.

Therefore, there was no evidence linking him to the documents in issue. In as much as the forensic examiner's report established that the signature purporting to be affixed by Daniel in the documents in issue were not his, equally there was no evidence connecting the appellant as the author of the same.

23. Secondly, the source of the documents in issue was not known. From the evidence on record there appeared to be three sets, that is, the one allegedly in the possession of Joseph Munyithia advocate, the ones shown to Shabir and the ones produced in court. Thirdly, the fact that

the physical files relating to the suits were misplaced did not amount to them being non-existent. Only official communication from the law courts could confirm that the suits in issue did not exit. Lastly, that the documents produced and examined were photocopies and their susceptibility to manipulation could not be ruled out. In the end they were incapable of establishing an offence against the appellant.

24. As a result of that finding the respondent lodged an appeal at the High Court which appeal was allowed as we have intimated herein above. It is that decision that is the subject of the appeal before us. The appellant complains that the learned Judge erred in law by:-

> ***i. Delving into issues of fact and turning himself into a trial court contrary to Section 348A of the Criminal Procedure Code.***
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> ***ii. Failing to consider the distinct charges separately and make specific findings thereon rendering the decision as a whole unclear as to which charges the appellant was required to defend himself.***
>
> ***iii. Shifting the burden of proof to the appellant contrary to law.***
>
> ***iv. Drawing conclusions not based upon any evidence on record***.

25. Mr. Kariuki, learned counsel for the appellant, submitted that the learned Judge was required to restrict himself only on matters of law and not facts. We understood counsel to say that the learned Judge was not supposed to go through the evidence tendered at the trial court and come up with conclusions on issues of facts as presented therein. He took issue with the fact that the learned Judge did not mention the case law authorities referred to on behalf of the appellant in his judgement.

26. According to Mr. Kariuki, placing the appellant onto his defence as the learned Judge did merely to give his side of the story amounted to shifting the burden of proof errenously to the appellant. He contended that the learned Judge failed to take into account that the documents relied on were photocopies and that there was no evidence that the appellant had participated in the alleged offences. He urged us to allow the appeal on those grounds.

27. Mr. Monda, Senior Assistant Director of Public Prosecution supported the learned Judge's findings which he submitted were anchored on the law. Referring to ***Section 348A*** of the ***Criminal Procedure Code*** he submitted that the learned Judge was enjoined to consider issues of both law and fact. In his opinion the learned Judge did not shift the burden of proof to the appellant. The truth of the matter was that the evidence adduced demonstrated that he had special knowledge of the facts regarding the two suits. As such, by dint of ***Section 111*** of the ***Evidence Act*** he was under a legal duty to offer a plausible explanation. As far as he was concerned, the totality of the prosecution's case met the threshold established in ***Ramanlal Trambaklal Bhatt vs. R (supra).*** Therefore, the learned Judge could not be faulted for placing the appellant on his defence. Mr. Monda urged us to allow the matter to proceed to its full conclusion before the Chief Magistrate's Court wherein the hearing had commenced by the time this appeal was argued.

28. We have considered the record, submissions by counsel and the law. The starting point would be to address ourselves on the jurisdiction of the High Court in such an appeal. Section ***348A(1)*** of the ***Criminal Procedure Code*** as amended by the ***Security Laws (Amendment) Act, 2014*** stipulates -

> ***"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 <u>may</u> <u>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</u>."*** *(Emphasis added)*

Accordingly, the learned Judge had the unfettered latitude to delve into matters of both law and fact.

29. It is common ground that a first appellate court, such as in this case the learned Judge, is required to re-evaluate the evidence on record and come up with his own conclusions. However, there is no prescribed manner or format that such a re-evaluation should take. This Court in ***Joseph Kinyanjui Wainaina vs. R [2014] eKLR*** aptly put it-

> ***"Nevertheless, there is no set format to which a re-evaluation by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. That was the view expressed by the Uganda Supreme Court in the case of Uganda Breweries ltd v Uganda Railways Corporation [2002] 2 EA 634, which we find persuasive. The court in that case further stated:***
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> > ***"A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not meant that the court should write a judgment similar to that of the trial court" – See Semoya vs. Airports Services Uganda Ltd [1999] LLR 109.***
> >
> > ***And in Odingo & Another v Bunge No. 10/89, the court stated:***
> >
> > ***"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."***

30. Having perused the impugned judgment we are satisfied that the learned Judge did not shirk from his duty as a first appellate court. It is evident to us that he subjected the evidence to a fresh evaluation. The fact that he did not deal with each count individually as suggested by the appellant did not derogate our observation.

31. Turning to the substance of the appeal, we, like the learned Judge, do find that the learned trial magistrate erred in finding that the appellant had no case to answer. We say so, because first, we respectfully disagree with the finding that the source of the proceedings in question was unclear. Shabir testified that it was the appellant who showed him the decree and vesting order. Corporal George Ogolla (PW11), the investigating officer was also clear that he received the documents in issue from Shabir as well as from the appellant. Furthermore, Joyce Manyasi confirmed that the documents she had seen at the advocate's office were the same ones which were produced as exhibits before the trial court. We are at a loss as to why the trial magistrate was of the idea that they were three different versions. It is given that there may have been other copies of the said proceedings but what was clear from the prosecution's witnesses was that the copies produced were the same as the proceedings they had come across.

32. With regard to the forensic examination of Ms Manyasi's signature with those on the proceedings and decree in issue, our perusal of the record reveals that the forensic report dated 7th March, 2011 was in that regard. It is clear that the signatures purported to belong to her in the proceedings were compared with her known and specimen signatures. In our view, the forensic reports corroborated both Ms Manyasi's and Daniel's evidence that they had not participated in the suits in question let alone issuing any orders thereto. This clearly established a *prima facie* case that the documents were not genuine. To us, the fact that the physical files could not be traced by the court lends credence to the prosecution's case. More importantly, we note from the forensic reports, that the forensic expert indicated that albeit the documents being photocopies he did not find any forensic evidence of digital manipulation.

33. It is also clear that the prosecution witnesses connected the appellant to those documents. For instance Shabir testified that it was the appellant who brought the same to his attention before he took possession of the suit property. The same was confirmed by Alex Kitsao Sulubu (PW4) who worked as a gardener in the suit property. He was clear that the appellant took possession and even brought in his own employees. We believe that the foregoing evidence was sufficient to establish the appellant's connection with the documents in issue.

34. All in all, we find that the foregoing established a *prima facie* case against the appellant. It is not for us to analyse and filter the above evidence with a view to determining the specific counts on which the appellant ought to be placed onto his defence or not in this second appeal, lest we be accused of influencing the decision of the trial court. We say so because we are mindful of the fact that this matter might still end up in this Court for determination of an appeal emanating from the final determination of the trial court, and such findings would end up embarrassing the Court seized of the appeal.

35. From our own analysis however, the decision of the learned Judge cannot be faulted. The appellant should be heard in his defence and a judgment made one way or another. We think we have said enough to demonstrate that there is no reason for us to interfere with the learned Judge's decision. We agree that he has a case to answer in respect of all the counts as charged. Consequently, the appeal lacks merit and is hereby dismissed.

Dated and delivered at Malindi this 28th day of February, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR