

- 1) That he was not given an opportunity to respond to the submission that there was no prima facie case to answer.
- 2) That the decision of the Court was wrong because there was an arguable case.
- 3) Any other ground shown during the appeal process.

FACTS

5. An employment contract was made by the Appellant and the First Respondent Sayed Abba Ahmed on the 10th December 2019 wherein the Appellant employed Sayed as licenced herbalist for a term of 5 years from 1st February 2020 to 1st February 2025 with salary at \$3,200 per month. At the time of the contract, Sayed was in Switzerland and the Appellant in Tonga. The Appellant will be responsible for payment of return ticket of Sayed and also accommodation when he arrives in Tonga.
6. Sayed asked the Appellant to pay for his partner's (Van Yune) ticket also and the Appellant agreed on the basis that it will be repaid by Sayed. Also en route with a stopover in Auckland, the expense for the hotel was by the Appellant. When the Respondents arrived in Tonga they were placed in accommodation at a guest house for 2 months with a total rental of \$3,200 which was paid by the Appellant.
7. The Appellant says that he has not been paid the total expenses in the previous paragraph totaling \$7989.02 which Sayed had promised to pay by the last week of May 2020.

DISCUSSION

8. The Appellant has made his claim under section 166 of the Criminal Offences Act which requires a higher standard of proof than would have been a civil claim for breach of promise. Not only that, but the penalty for breach of section 166 is not more than 3 years imprisonment and there is no financial liability.
9. At the hearing, the Respondents pleaded not guilty to the charges under section 166.
10. The first and only witness called by counsel for the Appellant was the Appellant, who gave evidence as described in the facts above. He was shown and confirmed the agreement of 10 December 2019 with Sayed. There was no cross examination by counsel for the Respondent.
11. Counsel then closed the case for the Appellant.

12. The defence Counsel opened by putting to the Court that the evidence does not support a prima facie case under section 166.
13. The transcript from the Magistrates Court say that Counsel for the Respondent then read his submissions in law. Unfortunately I find no record of these submissions. The only record I can find is in the judgment of the Magistrates which refer to the submissions of the defence counsel.
14. In his summing up the Magistrate refer to matters which have not been brought up in evidences. This includes that the Respondent have not denied the debt they owe to the Appellant. Also from the submissions of counsel for the Respondents he says that the ticket of Van Yune was returned to the company that issued it - eDreams and that they are ready to pay their debt to the plaintiff. For these reasons the Respondents did not obtain the money on credit through false pretences or fraud. Therefore this element of the offences under section 166 of the Criminal Offences Act has not been proved leading to the submission of no prima facie case to answer.
15. The Magistrate agreed and dismissed the claim on the ground that there was no prima facie case to answer.
16. On 14 December 2020 the case was called for mention but the Respondent did not have his counsel and there was no Arabic interpreter. The case was deferred to the 14 January 2021 where both parties appeared with their counsel.
17. At the request of both counsel I agreed that the way forward for this case are –
 - i. That the Appellant file his submission in response to the no prima case issue by 21 January 2021.
 - ii. That the Respondents file their reply by 28 January 2021
 - iii. That the case be set for hearing on 4 February 2021.
18. I am grateful to both counsel for filing their submissions in the time stipulated.
19. Pausing here, I would like to say that this is what the Magistrate should have done before accepting the no prima facie case submitted by the Respondent, then decide whether to

accept or deny the submission. I take it from the submissions filed that, based on authorities, both counsel agree that where a motion of no prima facie case is made, the prosecution party (Appellant) will be given an opportunity to respond before a decision is made. Tonga Magistrates Bench Book, part J pg132 and Fatai v Police TOSC 15; AM12/2013. I take into account the reply from Counsel for the Respondents that an opportunity was given by the Magistrate when he said – “Oku toe ‘iai ha me’a ‘oku tokanga kiai ha taha?” (Is there anything that anyone wants to say). I fail to see this in the transcript of the Magistrate’s hearing or in the written judgment by Magistrate Ma’u and counsel for the Appellant denies this also as indeed his main ground for the appeal is that he was not given an opportunity to respond before the ruling was made.

CONCLUSION

20. Taking into account that this is an appeal against a decision of a Magistrate that there is no prima facie case to answer, Requesting that the Magistrate’s decision be quashed.

AND having considered the submission in response by the Appellant and Reply by the Respondent

And taking into account the above Discussion

21. I conclude and make the following Orders

- 1) That the Magistrate’s decision is quashed.
- 2) That this case is referred back to the Chief Magistrate to hear or appoint another Magistrate to do so as a matter of urgency.
- 3) That the submissions in response by the Appellant on the no prima facie issue and reply by the Respondent be forwarded with the reference back to the Chief Magistrate.
- 4) That there is no order as to costs.
- 5) The restraining order on the passports of the Respondents shall remain in effect.

NUKU’ALOFA: 4 February 2021




Tupou J
ACTING JUDGE