REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 44 OF 2015

REPUBLIC ……...….APPELLANT

-VERSUS—

NOEL WANJIKU NJUGUNA …RESPONDENT

(*BEING AN APPEAL from the original conviction and acquittal in Criminal Case No. 822 of 2012 at Chief Magistrate's Court at Nanyuki Hon.* ***V.K. KIPTOON SENIOR RESIDENT MAGISTRATE)***

JUDGMENT

1. This appeal is presented by the Office of the Director of Public Prosecution (ODPP). The Respondent **NOEL WANJIKU NJUGUNA** was charged before the Nanyuki Chief Magistrate's court with two counts. On the first count respondent was charged with the **offence of grievous harm Contrary to Section 234 of the Penal Code Cap 63.** On the second count she was charged with the **offence of assault causing actual bodily harm Contrary to Section 251 of Cap 63.** After trial the trial court acquitted the respondent on both counts under **Section 215 of the Criminal Procedure Code Cap 75**. The state being aggrieved of that acquittal has filed this present appeal.

2. Office Director of Public Prosecution (O D P P) by its appeal has brought the following grounds.

> ***(a) That the Learned Magistrate misdirected himself in law in acquitting the accused/respondent despite overwhelming evidence against her;***
>
> ***(b) The Learned Magistrate misdirected himself in law in making a decision that was clearly against the weight of the evidence;***
>
> ***(c)The Learned trial Magistrate misdirected himself in misapprehending and misapplying the law applicable in criminal trials, leading to a miscarriage of justice.***

3. The Learned Principal Prosecuting Counsel Mr. Tanui argued all the three grounds together. After summarizing the Prosecution's evidence Mr. Tanui submitted that the trial court was wrong to acquit the respondent and sought that this court would allow the appeal.

4. The appeal was vigorously opposed by the respondent's Learned Counsel Mr. Bwonwonga.

5. The background of the prosecution's case was that the respondent was a tenant of Margaret Wanja the complainant (**P W 1**). On 22nd June, 2012 at about 4p.m. while P W 1 was in her house the respondent went there and informed **P W 1** that she desired to move out of her rented accommodation. The

respondent requested P W 1 to refund her the rent deposit she had paid her. P W 1 informed the respondent that the deposit would be refunded to her at the end of the month. P W 1 then went to collect the gate keys from one of tenants. P W 1 stated that it was then that the respondent together with her sister held her from the back, threw her down and kicked and beat her. The respondent then took hold of the keys P W 1 was holding and the keys cut P W 1 on her index finger on her right hand. The respondent took away those keys.

6. The respondent who is a teacher by profession in her defence stated that on 22nd June, 2012 she was in the process of moving from her rented accommodation. Contrary to what P W 1 stated respondent said that it was p W 1 who snatched the keys of the main gate from her but because she held onto the keys P W 1 got hurt by the wire in the bunch of keys. The respondent denied that she assaulted P W 1.

7. Mr. Tanui in his submissions argued all the three grounds of appeal together. He summarized the evidence adduced before the trial court then referred to the trial courts judgment and stated that the issue raised by the trial court Magistrate was misdirection. The trial court made reference to P W 1's previous medical surgery which the trial court stated that the prosecution did not sufficiently adduce evidence on the type of injury she sustained and that nor was it clarified by the clinical officer **(P W 3).** Mr. Tanui submitted that the trial court erred sine the injuries suffered by P W 1 were clarified by the Clinical Officer. For that reason Mr. Tanui argued that the trial court's acquittal of the respond in error.

8. Mr. Bwonwonga began by drawing the courts attention to the charge sheet. He submitted, quite rightly so, that the charge sheet reflected the date of assault and grievous harm as 22nd July, 2012 whereas the prosecutions evidence indicated the offence occurred on 22ndJune 2012. Counsel argued that the doubt created by the conflicting dates should be in favour of the respondent.

9. Mr. Bwonwonga further submitted that the prosecution's evidence did not support the charges respondent faced. He submitted that P W 1 was cut by her own keys and that, that cut could not be attributed to the respondent.

10. Further he submitted that P W 1 testified that she was thrown down by the respondent and that such action according to the Learned Counsel did not amount to an assault by the respondent. That accordingly the trial court was correct in acquitting the respondent.

11. Mr. Bwonwonga submitted that the prosecution framed the respondent with the charges of assault and yet P W 1 was not injured by the respondent but that it was the previous surgical operation that was evident on her body.

12. Mr. Bwonwonga also criticized the P3 form produced by the Clinical Officer stating that it failed to indicate the degree of injury of P W 1 and it failed to indicate a date. Mr. Bwonwonga concluded therefore that P W 1 was not assaulted and the trial court was entitled to acquit the respondent since there was no material to convict the respondent.

COURT ANALYSIS AND DETERMINATION

13. This appeal is brought under the **Provisions of Section 348 A of the Criminal Procedure Act Cap 75.** That Section before its amendment only permitted the Prosecution to appeal to the High court from an acquittal an order of a Magistrate court on a matter of law. That Section was amendment and now permits appeal against acquittal by the Magistrate court or the High court on a matter of fact and law. That section now allows greater latitude in consideration of an appeal against acquittal.

The Section provides:

Section 348A

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 Prosecution's may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on matter of fact and law.

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

14. The respondent was charged on the first count with causing grievous harm to P W 1. Grievous harm is defined in Section 4 of Cap 63 as

> "*grievous harm" means any harm which amounts to maim or dangerous harm, or serious or permanent injures health, or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injuries to any external or internal organ membrane of sense."*

15. The above definition in my view sufficiently responds to the submissions of Mr. Bwonwonga where he argued that the charge against respondent failed because prosecution failed to prove that P W 1 had suffered permanent injury. The above definition shows that where the harm amount to dangerous harm it falls within the category of grievous harm. In the case before the trial court P W 1 stated that her assault had resulted in internal injures which impacted a previous medical surgery she had undergone and this was corroborated by the Clinical Officer who examined her after the assault. The Clinical Officer also testified that the cut on P W 1's index finger required stitching. These injuries the Clinical Officer categorized as grievous harm. Even though the Clinical officer stated that P W 1's Injures were not permanent, in my view that does not mean that the injuries were not grievous they were, in my view, as per the definition of grievous harm, that is dangerous harm. On this point I rely on the case decided by Justice D S Majanja namely.

> **Republic vs. Rose Odhiambo Ombewa & another [2015] eKLR as follows:**
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> "Lastly and as regards the medical evidence, I would only quote the decision of the Court of Appeal in John Oketch Abongo v Republic KSM CA. Criminal Appeal No. 4 of 2000 [2000] eKLR where it stated as follows:
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> ***"Whether or not grievous harm or any other harm is disclosed must be a matter for the Court to find from the evidence led and guided by the definition in the Penal Code. A Court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the Courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of injury".***

16. The Court is therefore at liberty to form its own opinion on the extent of the injuries. It follows that even if the clinical officer did not state the degree of injury the court could form its own opinion.

17. Learned counsel Mr. Bwonwonga highlighted errors in the date reflected in the charge sheet, which reflected the date of 22nd July 2012 instead of 22nd June, 2012, as the date of the assault. He also submitted that the P3 form did not indicate the date of assault. The court's simple response to that submissive is that the error in the charge sheet, in respect to the date of the offence, can be cured under Section 382 of Cap 75. That Section provides:

> ***382. subject to the provisions herein before contained, no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complainant, summons, warrant, charge proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

18. Pertinent to the provisions of the above Section is the holdings in the case KIMEU V REPUBLIC [2002] 1 K A R 757 where the court held:

> "*The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernable prejudice is caused to the accused"*
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> It follows that the date reflected in the charge sheet is curable under Section 382 Cap 75 because it is a minor discrepancy. It is important to note that P W 1 and the respondent in giving their evidence indicated that the incident occurred on 22nd June 2012. In respect to the P3 contrary to the submissions of Mr. Bwonwonga, it is stated that the assault occurred on 22nd June, 2012 which date was in tandem with the witnesses evidence

19. Mr. Bwonwonga, in the court's view, erred to submit that because the doctor who previously performed Surgery on P W 1 was not called to testify the respondent could not be convicted on a charge of assault. Whether or not P W 1 was previously operated by a doctor did not distract the clear evidence of P W 1 or of the Clinical Officer that on 22nd June 2012 she was cut on her index finger and was injured on her back where she had previously been operated. That submission therefore is rejected.

20. It is however the last issue raised by Mr. Bwonwonga that will determine this appeal. Mr. Bwonwonga faulted the prosecution for failing to call two people who were present when the respondent assaulted P W 1. The two people were Kihoro and Muturi whom P W 1 said were present when the incident occurred.

21. The relevant Section to consider is Section 143 of the Evidence Act, Cap 80. The section provides:

> "No *particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

22. In the case BUKENYA & OTHERS – VRS – REPUBLIC 1972 EA 549 it was held :

> *"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case."*
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> Justice R P V Wendoh when faced with a case of assault where only the complainant and the Clinical officer were called to testify, just as in this case, in the case **HALKANO MATA BAGAJA V REPUBLIC [2015]eKLR** stated:
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> "*It was clear that P W 1 was not alone at the scene but there were other people like Halake who allegedly intervened. No reason was given why none of the people that were present at the scene were called as witnesses. This is necessitated by the fact that P W 1 and the appellant were not on good terms. The prosecution would have endeavored to call any other independent witnesses to allay any fears of there being an attempt to frame or fix the other. The prosecution should have called Halake or any other independent witness, but not necessarily all who were present at the occurrence*".

23. P W 1 in her examination in chief stated that as the respondent was kicking her "fundi's" came to the scene. It would follow from P W 1'S said testimony that the said "fundi's" were there when the respondent kicked her and pulled the keys from her hand causing injury to her index finger.

24. On being cross examined by counsel for the respondent P W 1 said that Kihoro and Muturi were present at the scene. It is not clear whether Kihoro and Muturi were the "fundi's", but whichever way the 'fundi's" and anyone else at the scene should have been called to corroborate the evidence of P W 1. They were not called and that left the evidence of P W 1, who said she was assaulted, and the evidence of

the respondent as the only evidence to be considered by the trial court. The fact the "fundi's" and Kihoro and Muturi were not called entitled the trial court, and this court, to draw an inference that the evidence of those witnesses, if called would have been adverse to the prosecution. With the fact being that the respondent had either been given notice to vacate, or had herself given notice to vacate P W 1's premises (the prosecution's evidence is not clear on this) gives credence to the respondent's submissions that the respondent was framed of the charges before the trial court.

25. In my view the failure of prosecution to call those witnesses who were present when the incident occurred raises a doubt which doubt must be resolved in favour of the respondent. **On that ground the appellant's appeal is hereby dismissed and the acquittal by the trial court is upheld.**

Dated and Delivered at Nanyuki this 26th October 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant Njue

Mr. Tanui for the state

Mr. Bwonwonga for the Respondent

Court

Judgment delivered in open court

MARY KASANGO

JUDGE