**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 106 of 2014**

**MONICA MUTHONI NJOROGE...……...….APPELLANT**

**VERSUS**

**REPUBLIC ……....……RESPONDENT**

**(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Criminal Case 468 of 2011 delivered by Hon. C.A.Ocharo, PM on 1st August, 2014)**

**JUDGMENT**

**BACKGROUND**

Monicah Muthoni njoroge, the Appellant herein was charged with committing the offence of causing grievous harm contrary to Section 234 of the Penal code. The particulars of the charge were that on 1st January, 2011 at Githurai 44 Estate, Nairobi within Nairobi Area, did grievous harm to Susan Wanja Njeri by knocking and twisting her left leg.

The Appellant was found guilty and sentenced to 5 years imprisonment. She was however dissatisfied with both the conviction and sentence and she preferred this appeal. She was dissatisfied that Section 200 of the Criminal Procedure Code was not complied with when a succeeding magistrate took over the conduct of the trial, that the prosecution case was re-opened after compliance with Section 210 of the criminal procedure code and that the learned magistrate erred in writing a second ruling on a case to answer which occasioned a fatal miscarriage of justice. She was also dissatisfied that the trial court shifted the burden of proof upon her, that the evidence of both the investigating and arresting officers could not be relied on, that the court failed to consider provocation as a mitigating circumstance and that the sentence imposed without the option of a fine was excessive and harsh in the circumstances.

**SUBMISSIONS.**

The Appellant was represented by learned counsel, Mr. Muraguri while learned State Counsel, Ms. Sigei represented the Respondent. Both parties filed written submissions and also highlighted them orally. Mr. Muraguri centered his submission on legal points. He submitted that the failure by the succeeding magistrate to comply with Section 200 of the Criminal Procedure Code occasioned a fatal defect to the trial. Furthermore, at this point, the prosecution had closed its case. The magistrate however re-opened the case and took additional evidence. He submitted that this defect was incurable even though the magistrate later held that it was an oversight and she disregarded the witness' evidence. This notwithstanding, counsel submitted that since the additional evidence of the investigating officer was taken unprocedurally

meant that the prosecution case was left bare. That is to say that the evidence of the only other two witnesses could not sufficient establish that the Appellant committed the offence. More so, without the evidence of the investigating officer, it was not established how the case was reported and the Appellant arrested. As such, the Appellant ought to have been acquitted. On sentence, counsel submitted that 5 years imprisonment was excessive and urged that in the event that the conviction is upheld, the court should reduce the same.

Ms. Sigei, for the Respondent opposed the appeal. She submitted that the prosecution was forced to close its case on 27th August, 2012 after the court rejected a prayer for adjournment. Section 211 of the Criminal Procedure Code was then complied with and the matter set for defence hearing. On the defence hearing date the trial magistrate was on transfer. Hon. Otieno took over the conduct of the trial. She complied with Section 200 of the Criminal Procedure Code. The Appellant chose to proceed from where the matter had reached. The next time the matter came up for hearing the prosecutor informed the court he had a witness available, the investigating officer. The court took his testimony. She submitted that this oversight was acknowledged by the trial magistrate in her judgment and she disregarded the evidence of the witness. She submitted that the court found that the elements of the offence had been proved and that the evidence of the investigating officer did not occasion injustice on the part of the Appellant. She submitted that since the offence carried a maximum life sentence, the 5 years imprisonment meted out by the lower court was proper and reasonable. She concluded by urging the court to dismiss the appeal.

I have gone through the entire record of proceedings. The trial was conducted by three magistrates. It began with Hon. D. Kinaro, RM, who took the evidence of both PW1 and 2. Thereafter, Hon. Otieno took over the conduct of the trial on 5th September, 2013 after compliance with Section 200 of Criminal Procedure Code. She noted that the trial was at defence hearing since Hon. Kinaro, after the close of the prosecution's case ruled that the Appellant would be put on her defence. Hon. Otieno set the defence hearing for 6th January, 2014. Unfortunately she did not go further than that as the trial was taken over by Hon. C.A. Ocharo on 6th January, 2014. The said trial magistrate did not comply with Section 200(3) of the Criminal Procedure Code which required her to explain to the Appellant that she had taken over the conduct of the trial and that the Appellant had a right to request for re-summoning of the witnesses who had so far testified. The record shows that she allowed the prosecutor to address the court. The prosecutor then informed the court that he had one remaining witness. Consequently, PW3 PC Margaret Kizembera, the investigating Officer testified.

There were obviously two illegalities occasioned by Hon. C. Ocharo. The first was her failure to comply with Section 200(3) of Criminal Procedure Code. Secondly, allowing the reopening the prosecution case when the same had been closed and a ruling made pursuant to Section 211 of the Criminal Procedure Code. Suffice it to say, the two illegalities rendered the trial a nullity. The defects can only then be cured by ordering a retrial. Principles which guide the court before ordering a retrial were set out in the case of **Mwangi vs Republic[1983] KLR 522** where the Court of Appeal said:

> **"That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence or potentially admissible evidence a conviction might result; Braganza vs Republic[1957] E.A 152(CA) 469, Pyarwa Bussam vs Republic(1960) E.A 854**

**Several factors have therefore to be considered. These include:**

1. **When the original trial was illegal or defective a retrial will be ordered.**

2. **A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**

3. **A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**

4. **A retrial should not be ordered where it is likely to cause an injustice to the accused person.**

**5. A retrial should be ordered where the interest of justice so demand.**

**6. Each case should be decided on its own merits.**

**7. Whether there is evidence to support the conviction."**

In the present case, taking into account that the evidence PW3, the investigating officer was disregarded, this court would only at a glance reevaluate the evidence of PW1 and 2. PW1 was the complainant. Her testimony was that the Appellant attacked her when she went to enquire why she had prevented her daughter from fetching water from the plot water point. She testified that it was about 11.00 a.m. and that good Samaritans took her to hospital. The assault also allegedly took place on the corridor in the plot where both PW1 and the Appellant lived. In the circumstances, I find the Appellant's evidence as one against no other. At the very least the police should have called one of the persons who took her to hospital to confirm under what circumstances the assault took place.

I also find the evidence of PW1 very scanty. She testified that she is the person who went into the Appellant's house as aforestated. She was not clear with whom she found the Appellant. It was on the same date and at the same time that her daughter had gone to draw water from the water point. Suffice it to say that most likely, her daughter was also in the house or around the plot. She also failed to categorically state that she was alone at the time of the assault, yet it is clear that some people offered to take her to hospital. The question that follows is who were these people? Why were they not called to testify? In my view then, I find that in the absence of such crucial evidence, it is only safe to conclude that had their evidence been adduced most probably it would have been adverse to the prosecution case. See the case of **Bukenya and others Vs Uganda [1972] E.A**., where it was held that:

> **"The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

It is factual that PW1 was injured as was further confirmed by PW2 Dr. Z. Kamau of Police Surgery who examined her on 18th January, 2011. Indeed, medical reports showed that PW1 suffered a fracture of the bone of the left ankle. But the test is whether it is the Appellant who inflicted the injury. As I have said, the sole evidence of PW1 does not sufficiently establish that it is the Appellant who inflicted the injuries. In that regard, it is my view that even if this court were to order a retrial, the same would not likely result in a conviction.

This is also a case where, if a retrial is ordered, the court should be satisfied that no prejudice would be occasioned to any of the parties to the trial. It is trite that the trial commenced on 1st February, 2011 and was concluded on 1st April, 2014 which was within a period of three years. The appeal was filed in the same year that the trial was concluded. Therefore, the search for justice has now taken six years. It would serve nobody's interest to revert to a retrial when there is no likelihood of a conviction. In contrast, a retrial would be prejudicial both to the complainant and the Appellant by hooding them back to the corridors of justice when no positive result is likely to be achieved. In that case, this court has no alternative but to set the Appellant free. Further, ordering a retrial would be to aid the prosecution to fill the gaps I have identified in their case. As often said and held, that is not the obligation of this court. This court is entailed to reevaluate the only evidence available on record which I have done in arriving at a finding of whether the case is good for a retrial.

In the result, the appeal succeeds. I quash the conviction and set aside the five years jail term. I order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED THIS 22nd DAY OF NOVEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Appellant present in person.

2. M/s Akuja for the Respondent.