REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 91 OF 2014

(FORMERLY KISII HCCR NO. 204B OF 2012)

BETWEEN

REPUBLIC ……..……...……...…..... APPELLANT

AND

ROSE ODHIAMBO OMBEWA …..……..... 1ST RESPONDENT

JENIPHER AKINYI OTIENO …….…… 2ND RESPONDENT

(Being an appeal from the original judgment and acquittal in Criminal Case No. 1676 of 2010 at Principal Magistrate's Court at Homa Bay, Hon. N. N. Njagi, PM dated on 14th August 2012)

JUDGMENT

1. **ROSE ODHIAMBO OMBEWA** and **JENIPHER AKINYI OTIENO** faced a charge of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** in the subordinate court. It was alleged that on 9th July 2010 at [Particulars Withheld] Secondary School within Homa Bay District, they jointly unlawfully assaulted JTA thereby occasioning her actual bodily harm.

2. The prosecution called 6 witnesses and after the close of its case, the learned magistrate found that the respondents had no case to answer and proceeded to acquit them under **section 210** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

3. In summary the prosecution case was that the complainant PW 1, a student at [Particulars Withheld] Secondary School testified that she had been assaulted by the respondents at the school on 9th July 2010 between 4.30pm and 9.00pm. She stated that she had been beaten on her back, waist, chest and arms. She left school the following day and went home where she found her mother's house help PW 2. PW 2 testified that PW 1 came home on 10th July 2010 and narrated to her what happened. She saw injuries in the wrists, back and waist. When PW 1 went home, her mother was not at home as she had gone Busia for a funeral.

4. PW 3, PW 1's mother came home on 10th July 2010 at about 10.00pm whereupon she was told by PW 2 that PW 1 had been assaulted and was asleep. PW 1 informed her that she had been assaulted at school and she observed the injuries sustained. PW 3 decided to take her to New Nyanza Provincial General Hospital on Monday, 12th July 2011. She first went to report the

incident at Central Police Station Kisumu but was later referred to Rangwe Police Station. She was issued with a P3 form which was filled by Dr Rakama.

5. PW 4, a police officer at CID Homa Bay, who was the investigating officer, gave an account of how he investigated the matter. Dr Rakama, PW 5, was the medical officer who prepared the P3 form. She stated that she could not recall seeing the patient physically. PW 6, Dr Kemunto, a medical doctor produced the discharge summary and treatment notes.

6. The State now appeals against the acquittal on the following grounds set forth in the petition of appeal dated 20th August 2012;

a. *The Hon. Trial Magistrate erred in law in failing to find that the prosecution had discharged its burden of proof as required in law.*
b. *The Hon. Trial Magistrate erred in law in placing more weight on the defence case and totally failed to evaluate and place any weight on the prosecution's overwhelming evidence.*
c. *The Hon. Trial Magistrate erred in Law in that, in acquitting the Respondents, he relied on extraneous matters that were not canvassed either in the prosecution's case or the defence case.*

7. Mr Oluoch, learned counsel for the State, urged the court to review the evidence and find that the prosecution had proved its case. He submitted that the testimony of the complainant, PW 1, was clear that an assault took place and that the injuries were proved and that her evidence did not require any corroboration. He pointed to the fact that PW 2 and PW 4 who saw the complainant after assault confirmed the injuries. Counsel further submitted that it was a misdirection on the part of the learned magistrate to insist that all the witnesses be called and that the reasons why some of the witnesses did not come was explained by the investigating officer. He noted that it was improper for the court to bemoan the lack of witnesses when it had the power under **section 144** of the ***Criminal Procedure Code*** to summon witnesses. Counsel maintained that on the whole the learned magistrate emphasised minor contradictions to the detriment of the prosecution case.

8. Mr Nyauke, counsel for the respondents, submitted that the verdict of the trial court was justified and that the prosecution case was full of gaps. He submitted that the prosecution was based on malice as the complainant did not present herself to the police and that the evidence was procured by other people. He urged the court to dismiss the appeal.

9. Before I consider the grounds of appeal, it is important to recall that this appeal is by the State against an acquittal which is limited to matters of law. The applicable provision, **section 348A** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, states as follows;

> ***Right of appeal against acquittal, order of refusal or order of dismissal***
>
> *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.* [Emphasis mine]

10. Whether or not there is sufficient evidence on a case to answer constitutes a matter of law was dealt with by the Court of Appeal in ***Paul Kobia M'Ibaya v Republic***, **Criminal Appeal No. 267 of 2003 [2007]eKLR where it stated as follows;**

> ***We recognize that what constitutes a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of the determination by the subordinate court and will vary infinitely from case to case. In some cases, the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are ex facie, erroneous in law or embark on an erroneous statutory interpretation. Those cases where the error of law is patent or is***

apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court has treated the evidence adduced at the trial. The cases of Republic v. Kidaga [1973] EA 368; Republic v. Wachira [1975] EA 262 from the High Court and Patel v. Republic [1968] EA 97 from the predecessor of this Court are good illustrations of this category of cases. In all the three cases, the respective subordinate courts acquitted the accused without putting him on his defence on the ground that there was no case to answer. In all the three cases, the Attorney-General appealed to the High Court under section 348A of the CPC against the acquittal. The appeals were invariably allowed on the ground that the respective Magistrates reached a conclusion on the evidence which no court properly directing itself could have reached. That ground was recognized to be an error of law. So a question of law warranting an appeal to the High Court by the Attorney-General arises if the subordinate court reaches a decision which, on evidence, no reasonable court properly directing itself on the evidence and the law could arrive at.

11. Conversely where the primary facts warrant a determination by the subordinate court one way or the other or where a magistrate has drawn an inference of fact from primary facts which could be reasonably drawn from the primary facts, no question of law arises and an appeal from such determination would be incompetent. In ***Mathani v Republic*** **[1965] EA 777, 781** the Court of Appeal expressed the view that;

> *As regards the question whether it was open to the Resident Magistrate and the Chief Justice to draw the inference ……. this is an inference of fact and an appeal could not lie to this court unless it was not reasonably possible to draw such an inference from the primary facts proved. If it was reasonably possible to do so then, even if a different inference could also be drawn from the primary facts proved, no appeal lies to this Court as the drawing of the inference of fact in preference to other inferences which could equally be drawn is not a question of law.*

12. These authorities demonstrate that it is a question of law whether the learned magistrate properly directing himself on the facts and law could come to such a decision. The issue for determination in this appeal is whether a reasonable tribunal taking into account the law and evidence could come to the conclusion reached by the subordinate court in this case.

13. The learned magistrate found the testimony of PW 1 was not corroborated by any other person who was in the school compound on the material date. He also found that another teacher, Carol Odera, was not called to give evidence and no reason was given as why she was not called. He dismissed the evidence of PW 2 on the ground that she did not see the assault even though she saw the injuries inflicted on PW 1. The learned trial magistrate also took issue with why it took long to report the incident to the police and questioned why PW 1 did not report the matter to the police. He also took issue with the paucity of the medical evidence and the contradictions in the testimony of the medical practitioners who testified.

14. While the issues raised were legitimate, the learned magistrate inquiry detracted from the substantial issue at hand that is whether the respondents assaulted the appellant. The testimony of PW 1 was not required in law to be corroborated. The question is whether the learned magistrate believed the complainant or not and he did not express a view on the matter nor consider whether she was telling the truth. Likewise, **section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** does not require all or any number of witnesses to be called although the learned magistrate is entitled to draw an adverse inference. 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; "*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 the injury."

15. Counsel for the respondents submitted that charges were malicious in that the complainant did not make a report to the police. In my view, this issue is adequately explained by the fact that the complainant was a child. In ***Kamau John Kinyanjui v Republic*** **NAI CRApp No. 295 of 2005 [2010]eKLR**, the Court of Appeal settled the issue that in criminal cases, the complainant envisaged under the various provisions of the ***Criminal Procedure Code*** is always the Republic.

16. In light of the findings I have made, I find and hold that the decision of the learned magistrate was perverse and could not be supported by the evidence and the applicable law. I therefore set aside the order of acquittal entered against the respondents.

17. Apart from setting aside the acquittal, the powers of this court under **section 354(3)(c)** of the ***Criminal Procedure Code*** are wide. It provides:-

> ***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.***

18. In the case of ***Republic v Tony Mutai*** **ELD HCCRA No. 20 of 2006 [2007]eKLR**, Ibrahim J., set aside the acquittal and ordered the matter to proceed by directing the magistrate to reconsider the submissions under **section 210** of the ***Criminal Procedure Code***. In ***Patel v Republic (Supra)***, the Court of Appeal set aside the acquittal and directed that Patel be put on his defence. **In *Shabudin Merali & Another v Uganda* [1963] EA 647**, the appellate judge had set aside the order of acquittal by a magistrate and proceeded to order a retrial before a different magistrate. On appeal to the then Court of Appeal for East Africa, the order for retrial was set aside and was substituted with an order that the case be remitted to the magistrate to continue the hearing that there was a case to answer. In ***Republic v Kidasa*** **[1973] EA 368** the magistrate had acquitted Kidasa under **section 215** of the ***Criminal Procedure Code*** after the full trial. After reversing the acquittal, and acting under the then equivalent of **section 354(3)(c)**, the judges set aside the acquittal and ordered the magistrate, without taking evidence to re-determine the matter.

19. What the cases cited show is that the court had wide latitude under **section 354(c)** of the ***Criminal Procedure Code*** to make orders that meet the justice of the case. In the circumstances of this case, I think a retrial would not be justified given the length of time that has taken since the acquittal. Furthermore, I have already expressed the view that there was sufficient evidence to put the respondents on the defence. I therefore adopt the position taken in ***Patel v Republic (Supra)*** and direct that the respondents be put on their defence and that the matter proceed before any other magistrate.

20. As a matter of information I wish to draw attention to the fact that during the pendency of these proceedings, **section 348A** of the ***Criminal Procedure Code*** was amended by the ***Security Laws (Amendment) Act, 2014***. The section now allows the Director of Public Prosecutions to appeal against an acquittal on the basis of fact and law. It provides as follows;

> *348A. (l) 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 Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

21. In conclusion, I now make the following orders;

a. The appeal is allowed and the order of acquittal made on 14th August 2012 be and is hereby set aside and substituted with an order placing the respondents on their defence.
b. The respondents shall appear before the Chief Magistrate's Court, Homa Bay for purposes of taking their defence upon compliance with **section 211** of the ***Criminal Procedure Code*** before any magistrate.

DATED and **DELIVERED** at **HOMA BAY** this **17th day of February 2015.**

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellants.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.