REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 266 OF 2010

REPUBLIC.....APPELLANT

VERSUS

TABITHA WAITHERA MURIGI.....RESPONDENT

(Being an appeal against the judgment and acquital of the Respondent by Hon. D.M. Machage SRM Eldama Ravine, in Eldama Ravine Criminal case No.285 of 2010 dated 1st September 2010)

JUDGMENT

The respondent herein, Tabitha Waithera Murigi, was charged that on the 12th day of March, 2010 at Makutano Village in Koibatek District within Rift Valley Province she unlawfully assaulted Jane Wanjiru occasioning her **actual bodily harm** contrary to **Section 251** of the **Penal Code.**

The trial court after considering the evidence before it found it insufficient to prove the offence and consequently acquitted the respondent under **Section 215** of the **Penal Code.**

Aggrieved by the respondent\'s acquittal the State has preferred this appeal on five (5) grounds which can be reduced down to two, as follows:-

1. that the learned trial magistrate erred in law in acquitting the respondent against the weight of the evidence;

2. that the learned trial magistrate erred in law by requiring the corroboration of the complainant\'s evidence when such corroboration is not, as a matter of law, required;

In arguing the appeal, learned counsel for the appellant submitted that the acquittal was against the weight of the evidence, that the offence occurred during the day and that the complainant was able to positively identify the assaillant who was known to her; that the evidence of the complainant was supported by that of the clinical officer; and that the evidence of the complainant was sufficient to prove the charge.

Learned counsel for the respondent in opposing the appeal submitted that there was contradiction in the evidence of prosecution witnesses; that owing to that contradiction P.W.2\'s son who is alleged to have been present ought to have been called to clarify the issues in controversy; and that the crime was poorly investigated.

By dint of the provisions of **Section 348A** of the **Penal Code** an appeal to the High Court by the State against an acquittal of an accused person by a subordinate court may only be on a matter of law. The section provides:-

"348A. When an accused person has being acquitted by a subordinate court, or where an order refusing to admit a complaint or formal charge, has been made by a subordinate court, the Attorney- General may appeal to the High Court from the acquittal or order on a matter of law."

The Court of Appeal in **Paul Kobia M'ibaya** V. **Republic** Criminal appeal No. 267 of 2003 explained that:

"What constitutes a point of law or point of law for purposes of appeal to the superior court depends on the nature of determination by the sub-ordinate court and varies from case to case. An error of law may arise for instance where the sub-ordinate court made findings which are *ex-facie* erronous in law or embarks on erroneous statutory interpretation. The error of law could also arise from the manner the sub-ordinate court treated the evidence at trial. If the trial court for instance, reached a conclusion on the evidence which no court properly directing itself could have reached that would amount to an error of law."

Quoting with approval the decision **Mathani** V. **Republic** (1965) E.A 777 the court further observed:-

"In cases where the primary facts warrant a determination by the sub-ordinate 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 facts, no question of law arises and an appeal from such determination would be incompetent."

In this appeal the appellant contends that the acquittal was against the weight of the evidence. There were four (4) prosecution witnesses. But it is only the complainant who maintained that she had been assaulted by the respondent using a panga. Although she testified that P.W.ll, Julia Nyambura, was present and witnessed the attack, Julia in her evidence denied doing so. The learned trial magistrate observed:-

"The complainant testified and said that when she was assaulted by use of a panga at P.W.11\'s premises, by the appellant the same happened in full view of Julia Nyambura in her premises. But Julia the presecution witness testified and denied ever seeing the accused assault the complainant. She said that she only ran to the road and saw the two go different ways after a scuffle."

With this evidence which disowns critical account, the trial magistrate found the charges not proved beyond reasonable doubt.

The trial court found the evidence of the prosecution witness contradictory. That finding alone entitled it to make the conclusion it reached. Any other court properly directing itself would have reached a similar conclusion.

In respect of ground two of the appeal, the appellant contends that the learned trial magistrate erred in law by requiring the corroboration of the complainant\'s evidence when such corroboration is not, as a matter of law, required.

The learned trial magistrate upon finding the evidence of prosecution witnesses contradictory concluded:-

"That leaves me with the evidence of the complainant verses the evidence of the accused...it therefore stands that the complainant single evidence against the accused was not corroborated as its required by law. The benefit of doubt then goes to the accused"

With respect to the learned trial magistrate, no corroboration was required. That was a misdirection. Be that as it may, the trial magistrate was right in his final decision.

For the foregoing reasons, this appeal has no merits and is dismissed.

Dated, Signed and Delivered at Nakuru this 21st day of September, 2012.

W. OUKO
JUDGE