Appeal by the state: Jurisdiction and the
Role of an Appellate Court
Principles Applicable

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 65 OF 2006

LESIIT, J.

REPUBLIC……..……
APPELLANT
VERSUS
PAUL KOBIA M'IBAYA…….....…….
……..RESPONDENT

(From Original Resident Magistrate in Criminal Case No. 295 of 2005 at Tigania; G. Oyugi – R.M.)

JUDGEMENT

This is an appeal by the state. The Respondent in this case was acquitted by the lower court of the charge of assault causing or actual bodily harm contrary to Section 251 of the Penal Code. After hearing the entire prosecution and defence case, the lower court acquitted the respondent herein of the charge.

The state filed this appeal on 3rd May, 2006. It has raised three grounds of appeal namely:

" 1. The trial magistrate erred in law in that he failed to find that the prosecution had properly discharged its burden of proof as required by the law and thereby acquitted the respondent

2. The trial magistrate erred in law in that he never anlayzed the prosecution's evidence, instead he analyzed defence evidence and solely relied on it so as to reach an acquittal.

3. The trial magistrate erred in law in finding that the prosecution's evidence was doubtful (sic) in all material particulars and credible."

In the submissions of Mr. Kimathi, learned state counsel, he urged that the finding of an acquittal by the trial court was wrong in view of the evidence tendered. Counsel urged that no reasonable tribunal addressing itself to the evidence and issues would have come to the same conclusion as the court did. Counsel urged that the evidence adduced by the prosecution was sufficient to found a conviction.

Mr. Mwanzia represented the Respondent in this appeal. Counsel urged one point only, that there was no discernible question of law which arises from the appeal. Counsel urged that the appeal was

incompetent and for that preposition relied on the case of **Paul Kobia M'Ibaya v- Republic CA 267 of 2006.**

"**In contrast, in cases where the primary facts warrant a determination by the subordinate court one way or the other or where a magistrate has drawn an interence 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 our view, the appeal to the High court was not based on any discernible question of law. Furthermore, the superior court did not reverse the decision of the subordinate court on any legal grounds but merely because it had a different appreciation of the evidence from that of the subordinate court."

I have considered the appeal and have evaluated and analyzed afresh the evidence adduced before the lower court.

In **OKENO VS REPUBLIC 1972 EA 32** the role of a first Appellate court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

This is an appeal by the state. The jurisdiction of an appellate court in such appeals was discussed in Paul Kobia M'Ibaya, Supra, the case cited by the Respondent and I need not repeat.

The facts of the prosecution case were varied. The complainant PW1 claimed that the respondent had attacked her with bare hands and a metal and had injured her on the mouth, head, right hand and knee joint; and that she left her bleeding. Two witnesses PW2 and 4 said that they had gone to visit the complainant. One of them stated that they found the Respondent coming out of the complainant's house holding an object. The other one said they found the Respondent hitting the Complainant. Both said that the complainant was bleeding from the nose, mouth and right hand.

PW5, the police officer who received the complainant's report stated that he saw her on the day of the alleged assault and that he saw no injury on her.

The defence was quite simple. The Respondent denied assaulting the appellant. She called the caretaker of the plot where she and the complainant lived. The caretaker's evidence was that he was called by the husband of the Respondent and informed that there was a problem. He proceeded to the plot where he found maize scattered everywhere. When he enquired what the problem was, the complainant told him that she did not want maize dried in the verandah near her house. No complaint was received by him of an alleged assault.

The learned trial magistrate considered the evidence before him and found various contradictions in the prosecution case and resolved that the contradictions put to question the credibility of those witnesses. The contradictions were highlighted in his evidence. These contradictions related to the issues of the assault. The two eye witnesses did not agree in their evidence whether they met with the respondent as she left the complainant's house after assaulting her or whether they found her in the act.

The other contradictions he highlighted is that PW5 the investigating officer saw the complainant on

the same day of the assault and received her report yet he saw no evidence of injuries or bleeding. The learned trial magistrate doubted the evidence of PW3 that the complainant had any injuries. PW3 filled the P3 form in respect of the complainant on the basis of treatment notes by another doctor. The notes were not before the court. The learned trial magistrate found that there was a misunderstanding between the complainant and the respondent but that it involved maize and not an assault.

The appeal by the Attorney General is based on the conclusion reached by the learned trial magistrate on the basis of the evidence presented before the court. It is my view that the findings of the learned trial magistrate were proper whether in law or fact.

I am satisfied that a reasonable tribunal could have reached that same conclusion faced with the same facts and the law.

This was an appeal by the state. It is therefore made on the premise that the findings of fact by the lower court were correct since an appeal by the state can only be on questions of law. I find no merit in this appeal since the conclusion reached by the learned trial magistrate was the correct one in law.

Having come to the conclusion I have of this appeal, I find it has no merit and accordingly dismiss it.

Dated, Signed and Delivered this 13th day of April, 2011.

LESIIT, J.
JUDGE.