**IN THE COURT OF APPEAL**
**AT NYERI**

**(CORAM: OMOLO, ONYANGO OTIENO & VISRAM, JJ.A)**

**CRIMINAL APPEAL NO. 481 OF 2010**

**BETWEEN**

**JOSHUA NTONJA MAILANYI ……………………………. APPELLANT**

**AND**
**REPUBLIC ……………………………………………….. RESPONDENT**

***(Appeal from an appeal of the High Court of Kenya at Meru (Kasango, J) dated 15th December, 2009***

**In**

**H.C.CR.A. No. 66 of 2006)**
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## JUDGMENT OF THE COURT

On the 26th June, 2003, the appellant, **Joshua Ntonja Mailanyi**, appeared before a First Class District Magistrate (D.J. Nyaga, Esq.) at Tigania, charged with the offence of defilement of a girl contrary to ***section 145 (1)*** of the Penal Code. The particulars of that offence were that on the 21st day of June, 2003 at K[...] Location of Meru North District of the Eastern Province, the appellant had unlawful carnal knowledge of D K, a girl under the age of fourteen (14) years. The appellant pleaded not guilty to that charge and the Magistrate ordered that the case be heard on 28th July, 2003; in the meantime the appellant was to be released on cash bail of K.shs.10,000/- or on a bond of K.shs.50,000/- with one surety in similar amount. On 10th July, 2003, the appellant again appeared before the same Magistrate and as at that date the appellant had an advocate, one Mr. Kimathi, to conduct his defence. The trial of the appellant eventually started before A. K. Kaniaru, Senior Resident Magistrate, on the 19th August, 2004. Mr. Kimathi was present and conducted the appellant's defence. Dr. James Kahura (PW1), D K herself (PW2), and J M (PW3), the father of the complainant, testified before Mr. Kaniaru and were cross-examined by Mr. Kimathi. The hearing was then adjourned to the 26th November, 2004.

By 26th November, 2004 Mr. Kaniaru had apparently been transferred and the appellant's case was taken over by Mr. G. Oyugi, Resident Magistrate. Mr. Kimathi was still present for the appellant and as the prosecutor told the Magistrate that he did not have the police file with him, hearing was adjourned to the 11th February, 2005. On the latter day, Mr. Oyugi heard evidence from Stanley Mnyanga (PW4), T N (PW5), the mother of the complainant and Police Constable, Geoffrey Sigei (PW6). The prosecution then closed its case and Mr. Oyugi ruled that the appellant had a prima facie case to answer and put the appellant on his defence. Mr. Kimathi asked for an adjournment and the Magistrate adjourned the hearing to the 1st day of March, 2005. On this day, Mr. Kimathi informed the Magistrate that the appellant would

testify in his defence on oath and that there was no witness to be called on behalf of the appellant. The appellant testified and was cross-examined; Mr. Kimathi then told the Magistrate that he (Mr. Kimathi) would put in written submissions and that he needed two months to enable him do so. The Magistrate adjourned the hearing to the 14th March, 2005 for mention. Mr. Kimathi was not present in court on the 14th March and the Magistrate appointed the 6th April, 2005 as the date for his judgment. The Magistrate did deliver his judgment on the appointed day and by that judgment the Magistrate acquitted the appellant on the charge of defilement.

What followed the acquittal of the appellant was an appeal to the High Court by the Hon. the Attorney-General, apparently under the provisions of ***section 348A*** of the Criminal Procedure Code. That section provides:-

***"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 a formal charge, or an order dismissing a 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 appeal by the Attorney-General under that section is not an open-ended one; the appeal can be only on a matter of law. The problem with the section must be what constitutes a matter of law.

The Attorney-General's appeal to the High Court was based on three grounds, namely:-

***"1. THAT the Learned Honourable Magistrate erred in law by find (sic) that the ingredients of the offence of defilement had not been proved beyond a reasonable doubt thus his acquittal of the Respondent amounted to a miscarriage of justice.***

***2. THAT the Learned Honourable Magistrate erred in law by disregarding the medical evidence adduced before him as proof of penetration and proceeded to discount the same without the benefit of hearing other expert evidence to arrive at his decision.***

***3. THAT the Learned Honourable Magistrate erred in Law by dismissing the prosecution's case and holding that the Respondent could not be connected with the offence contrary to very clear evidence as to his identification by the prosecution witnesses."***

Mary Kasango, J. heard the appeal and by her judgment dated and delivered on 15th December, 2009, the learned Judge reversed the finding of the trial Magistrate acquitting the appellant; found the appellant guilty as charged, convicted him and sentenced him to seven (7) years imprisonment.

The appellant, in turn, now appeals to the Court on three grounds, namely:-

**"1. THAT the Learned Judge erred in Law in entertaining an appeal emanating from a flawed trial. The trial court disregarded the provisions of section 200 of the Criminal Procedure Code.**

**2. THAT the Learned Judge erred in law in allowing an appeal by the Republic based on facts.**

**3. THAT the Learned Judge erred in Law in misconstruing the provisions of section 348A of the Criminal Procedure Code (Cap 75 Laws of Kenya) in relation to the appeal by Republic which amounted to a miscarriage of justice."**

The appeal before us is obviously a second appeal and that being so, the Court can only deal with matters of law – see ***section 361 (1)*** of the Criminal Procedure Code.

The first question of law raised is in ground one of the memorandum of appeal. The complaint in that ground is that the trial Magistrate who acquitted the appellant had failed to comply with the provisions of ***section 200*** of the Criminal Procedure Code when he took over the trial of the appellant from the Senior Resident Magistrate, Mr. Kaniaru.

***Section 200 (3)*** sets out what a magistrate who takes over a trial previously conducted by another magistrate ought to do. The section provides:-

***"Where a succeeding magistrate commences the hearing of proceedings and part of evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused of that right."***

The record of Magistrate Oyugi is silent as to whether he (Mr. Oyugi) did inform the appellant of his right to have any or all the three witnesses who had previously testified before Mr. Kaniaru to be re-summoned and re-heard. This was clearly a serious defect in the record of the trial but at the same time, this Court must bear in mind that Mr. Kimathi, the appellant's counsel was present in court when Mr. Oyugi took over the trial from Mr. Kaniaru. Mr. Kimathi did not himself ask the Magistrate to re-summon and rehear the three previous witnesses and it is clear the Magistrate was continuing with the trial from where Mr. Kaniaru had left it. The witnesses who testified before Mr. Oyugi were numbered as PW4, PW5, PW6 etc. and it is clear that everybody involved in the trial knew that three other witnesses had testified. Mr. Kimathi did not raise that issue at any stage before the Magistrate and even in the appeal before the High Court, the issue was never raised. ***Section 382*** of the Criminal Procedure Code provides:-

***"Subject to the provisions hereinbefore contained, no finding, sentence or order shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:-***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

We have already pointed out that throughout his trial in the Magistrate's court the appellant was always represented by counsel, Mr. Kimathi. When the Magistrate ruled that the appellant had a case to answer, he (Magistrate) does not appear to have explained to the appellant the provisions of ***section 211*** of the Code. It was Mr. Kimathi who told the Magistrate that the appellant would give sworn evidence and would not call any witnesses. Limiting ourselves to circumstances of this appeal, we are satisfied that though the record of the Magistrate is silent with regard to the requirements of ***section 200 (3)*** of the Code, the appellant and his counsel must have been aware that they had a right to demand that the three witnesses who had testified before Mr. Kaniaru could be re-summoned and reheard. The failure by the Magistrate in this connection is covered by ***section 382*** and the proviso thereto. The failure occasioned to the appellant no injustice and we reject ground one of the appellant's grounds of appeal.

Grounds 2 and 3 relate to the scope of ***section 348A*** under which the Attorney-General appealed to the High Court .

As we have pointed out the right of appeal granted to the Attorney-General by that section is not an open-ended one; such an appeal can only be on a point or points of view. The question which we posed earlier is what would constitute a point of law. Dealing with that issue this Court 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 <u>Republic v. Kidaga [1973] EA 368</u>; <u>Republic v. Wachira [1975] EA 262</u> from the High Court and <u>Patel v. Republic [1968] EA 97</u> 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. ------------"-** See Paul Kobia M'Ibaya vs. Republic, Criminal Appeal No. 267 of 2003 (unreported).

In grounds two and three in his memorandum of appeal, the appellant complains that the learned Judge allowed the Attorney- General's appeal on issues of facts and not law and that in doing so the Judge misconstrued the provisions of ***section 348A*** CPC. It is true the trial Magistrate had in effect found and held that the prosecution had not proved by its evidence that the appellant had defiled the complainant. That, on its face, can be treated as a finding based on facts rather than one based on law. But as the Court pointed out in **Paul Kobia M'Ibaya** Case (supra) from which we have quoted extensively, conclusions based on evidence presented can also turn into a question of law if such conclusions are of such a nature that no reasonable court properly directing itself to the evidence could ever make them. In the case of **Patel v. Republic [1968] EA 97**, for example, Patel was charged with the traffic offence of driving a car in a manner dangerous to the public contrary to ***section 47 (1)*** of the Traffic Act. The evidence at the trial showed that Patel had been driving in a cautious and orderly manner on a wet road but that, suddenly, the car skidded to the right and collided with a car which was driven in the apposite direction on its correct side of the road. The trial Magistrate accepted that evidence and at the close of the prosecution case ruled that Patel had no case to answer, and acquitted him. The Attorney-General appealed to the High Court and that court allowed the appeal and directed that Patel be put on his defence. Patel then appealed to the Court of Appeal for East Africa and in dismissing the appeal the Court held:-

***"------------------- we would say that on the evidence as it stands at present at the close of the prosecution the facts proved by the prosecution are such that in the absence of any other explanation should leave no doubt in the mind of the Magistrate that the appellant was guilty. In other words, the appellant should have been called upon to make his defence. He may indeed make a perfectly good defence. It may well be that he will give a perfectly reasonable explanation for the car swerving across the road in front of an on-coming vehicle, an explanation which shows not merely is he not to blame, but that, for all practical purposes, he had lost the control of the car for circumstances beyond his control. But that is a matter for him to lead evidence, to displace the position as existed at the termination of the case for the prosecution. ----------"***

In this **Patel's case** one cannot say that there was an apparent or patent mistake of law with the Magistrate's judgment. What the Court was saying was that at the termination of the prosecution case, the Magistrate was bound to place the appellant on his defence taking into account the nature of the evidence before him. In other words, in the face of the prosecution evidence no reasonable tribunal could have come to the conclusion that Patel had no case to answer; he had to explain why his car skidded across the road and hit an on coming car which was on its correct side of the road. The decision of the Magistrate to acquit Patel in the face of the available evidence was perverse and that was recognized as a point of law which entitled the Attorney-General to appeal.

Turning now to the appeal before us, we understand Kasango, J to be saying that the decision of the Magistrate acquitting the appellant was perverse, taking into account the entire evidence on record. D K swore that the appellant had separated her from her two younger brothers and took her about one kilometer away. Hear what D told the magistrate:-

***"Then when we were going, the accused deliberately pretended to have fallen into another ditch there and told me he had fallen. He then held my hand at that very time. He knocked me down. He removed my pants. I screamed but he covered my mouth. He removed his penis and inserted it in my vagina while I was still screaming. My father heard my screams."***

For his part the father, J M (PW3) swore:-

***"-----. When going home I heard screams. I could not see clearly ahead as there was a bush ahead of me. That time it was around 6.00 p.m. I continued going. Then ahead I saw the accused. He was in a ditch. He was lying (sic). He was going up and down like somebody doing press-ups. That was about 10 metres from where he was. I went right up to where the accused was. By that time the screams had ended. I found the accused lying on top of my child K. He had covered her mouth . He was playing sex with her. I told the accused '***our friendship is now ending, you can do that to me. That is now police case***.' The accused got so shocked that even when I told him to come out of the ditch, he was unable to do so. I had thought of beating the accused but I decided not to do so. Instead I went to where the accused was. He had removed his trouser upto the knees. I helped him to put it on. I hit him twice on the back with the flat side of the panga. That time the complainant was still on the ground. She was lying there on her back. Her lower part of the body was bare. The clothes had been pulled or pushed to the upper part of the body. I told the accused not to attempt to run away or else I would cut him. I then told him we go to the police. --------------"***

Constable Sigei (PW6) confirmed hereceived the complainant and her parents and that the appellant was taken there under arrest. The complaint against the appellant was that he had defiled D.

To this evidence the appellant in his sworn statement was apparently saying that J arrested him because he (appellant) had been found chewing "*miraa*" belonging to J and that J could have manufactured the story of defilement because the appellant had left J with a car battery and a radio and that J was unwilling to give those items back to the appellant. J admitted he had the appellant's radio but denied that he was unwilling to give the radio back.

For our purposes, the important thing is that the Magistrate did not say anywhere in his judgment that he did not believe J and his daughter D. The reasons given by the Magistrate for acquitting the appellant were, first, that no witness testified that D had bled, that the clothes she wore were not produced in court and secondly that though D was found to be suffering from some venereal disease, the appellant was not. Dr. James Kahura (PW1) produced the P3 in respect of D; her gentalia had a fresh cut injury and Dr. Kahura said by the time the appellant was being examined, he could have undergone medial treatment and the venereal decease found with D could have been fully treated.

In the face of the overwhelming prosecution evidence, we agree with the learned Judge that the acquittal of the appellant by the Magistrate was in truth perverse. We are ourselves fully satisfied the learned Judge was perfectly right in reversing the acquittal and replacing it with a conviction. The sentence the Judge imposed was reasonable and lawful. The appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 7th day of July, 2011.

**R.S.C. OMOLO**
**…………………………..**
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**
**………………………………..**
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**
**………………………………**
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**