IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL 267 of 2003

PAUL KOBIA M'IBAYA ……..…….. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Meru (Kasanga Mulwa, J) dated 30th January, 2003

in

H.C. Criminal Appeal No. 9 of 2000)

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JUDGMENT OF THE COURT

The appellant, *Paul Kobia M'Ibaya*, was tried by the District Magistrate Tigania, Meru for the offence of careless driving contrary to *section 49(1)* of the Traffic Act. The particulars of the offence stated thus:

"On 11th day of August 1999 at about 7.45 a.m. along Mikinduri Miathene Road being the driver of motor vehicle registration No. KPZ 781 L/Rover drove the said vehicle without due care and attention."

The appellant was acquitted of the offence after trial. Thereafter, the Attorney General appealed to the High Court, Meru, in Criminal Appeal No. 9 of 2000 against the acquittal. The appeal by the Attorney General was based on three grounds 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 analysed the prosecution's evidence, instead he analysed 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 doubtiful (sic) when the same was strong, coroborated (sic) in all material particulars and credible."

The superior court allowed the appeal, set aside the acquittal of the appellant, and substituted the acquittal with a conviction and sentenced the appellant to a fine of Shs.4,000/= or 2 months imprisonment in default. This appeal is against that decision of the superior court.

The prosecution called five witnesses at the trial before the District Magistrate to prove the charge of careless driving. The synopsis of the prosecution case is as follows:

On 11th August 1999 at about 7.45 a.m., Godfrey Mburunga Ithaiba (complainant) was driving his matatu registration number KUH 514 on his correct side of the road from Mikinduri towards Meru Town along Mikinduri/Miathene Road. When he reached a corner at a river, motor vehicle registration number KPR 781 Land-Rover driven by the appellant emerged from the opposite direction. According to the complainant, the appellant was driving on the wrong side of the road. The complainant applied emergency breaks and the appellant tried to pull to the correct side of the road but it was too late and the appellant's vehicle hit the front right wing of the complainant's vehicle causing extensive damage to it. The appellant's vehicle stopped a short distance from the point of impart.

The appellant and his two witnesses blamed the complainant for the accident. According to the appellant, the complainant was driving very fast because there was another matatu behind him and when negotiating the corner, the complainant drove offside and collided with the appellant's motor vehicle which was on its correct side of the road.

The trial Magistrate evaluated the evidence and concluded:

"**From the evidence before me, I find that it was the matatu driver (PW 1) who was at a speed and not the accused.**

The accused had just been signaled to stop by DW 2 and he slowed down to stop. He could not have pulled to the right to stop. It is the matatu, I believe, that came speeding fleeing from the other one that lost its track and hit the slowing Land-Rover.

The sketch plan of the scene is strongly opposed by the defence and this raises doubts in my mind if in fact it was correctly drawn.

On the whole I have serious doubts in my mind that it was the accused who was at a speed and who pulled to his right to cause the accident.

I am therefore unable to find that he was careless in his driving. I find him not guilty and acquit him accordingly."

The decision of the trial Magistrate was, as we have stated above, altered by the superior court and a conviction for careless driving entered. The petition of appeal contains five grounds four of which challenge the findings of the superior court including ground 4 which states:

"**4. THAT the Honourable Judge erred in law in misdirecting himself during evaluation of evidence by evaluating the evidence in isolation without material corroboration and in particular by finding that the learned Trial Magistrate had no basis for disregarding the sketch plan when there was sufficient evidence to support the magistrate's findings."**

However, the appellant mainly relies on the supplementary ground of appeal to the effect that the learned Judge erred in law by failing to appreciate that the trial in the subordinate court was conducted by unqualified person and was therefore a nullity. The record of appeal shows that the entire prosecution in the subordinate court was conducted by Sergeant Gituma. The supplementary ground of appeal is incontestable in view of the decision of this Court in ***Elirema & Another vs. Republic*** ***[2003] KLR 537*** to the effect that a police officer below the rank of an Assistant Inspector does not qualify for appointment as a public prosecutor and that a prosecution conducted by an unqualified prosecutor is a nullity. Indeed, Mr. Orinda, learned Principal State Counsel, conceded the appeal on this ground.

That notwithstanding, the question whether the appeal by the Attorney General to the superior court in the circumstances of this case was competent has admittedly troubled us. By ***section 348 A*** of the Criminal Procedure Code (CPC), the Attorney General may appeal to the High Court against acquittal on a trial

held by a subordinate court "on a matter of law".

We recognise that what constitutes a question of law or point 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 court 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 348 A*** 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 recognised 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.

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 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. On this aspect, the predecessor of this Court in ***Mathani v Republic** [1965] EA 777* said at page ***781 para E - F***:

"***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."***

Moreover, in ***M'Riungu v Republic** (1982-88) I KAR 360*, this Court aptly advised at page 360 last para:

"**Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion which would be the same as holding the decision is bad in law."**

This Court has jurisdiction to entertain an appeal against the reversal by the High Court of the decision of the subordinate court for it is a question of law whether there existed sufficient reasons for such reversal (see ***Fazelabbas Sulemanji and another v R**. (1955) 22 EACA 395* – cited with approval in ***Sharudin Merali v Uganda** [1963] EA 647* at page ***648 para G***.

The remaining question is whether the appeal to the High Court was based on a point of law. We have already quoted the findings of the subordinate court. It is evident that the appellant's Land-Rover and the complainant's matatu collided on the morning of 11th August 1999 along Mikinduri/Miathene Road at a sharp corner near a narrow bridge. Each driver claimed that the other had crossed to his correct side of the road and caused the accident. Each called witnesses to show that the other driver was to blame for the accident. The point of impact as described by the police officer was disputed. The trial Magistrate, faced with the two contradicting versions of the accident, evaluated the evidence and made a finding that the appellant was not guilty of the offence charged and gave reasons for the decision. The grounds of appeal merely questioned

the correctness of the findings of the subordinate court. The superior court allowed the appeal on two grounds – firstly, that the defence evidence was not sufficient and credible enough to put doubt on the prosecution case, and, secondly, that there was no basis for the trial Magistrate to disregard the sketch plan. The superior court ultimately found that the prosecution had proved its case against the appellant.

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. Thus, the only reason that the High Court reversed the decision of the subordinate court was because it had a different view of the evidence from that of the subordinate court and substituted its decision for that of the subordinate court. The subordinate court gave reasons for its judgment. The Attorney General did not establish, nor did the superior court find, that no reasonable tribunal properly directing itself could have reached the same decision as the subordinate court. We have no doubt that the appeal by the Attorney General to the superior court was incompetent and this is an additional ground for allowing the appeal.

In the final analysis, the appeal is allowed, the decision of the superior court is set aside and the appeal by the Attorney General to the superior court is dismissed. We order that the order of acquittal made by the subordinate court be and is hereby restored. The fine of Shs. 4,000/= if paid shall be refunded to the appellant.

Dated and delivered at Nyeri this 26th day of October, 2007.

R.S.C OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR