**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**(CORAM: KWACH, OMOLO & BOSIRE, JJ.A.)**

**CRIMINAL APPEAL NO. 93 OF 2000**

**BETWEEN**

**PAUL MWANGI MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appeal before us arises in this manner. Between the 12th August 1999 and the 16th November, 1999, Paul Mwangi Maina, the appellant herein was tried by a Senior Resident Magistrate, (Mrs. Muketi) on a charge of malicious damage to property contrary to section 339(1) of the Penal Code . The particulars of the charge were that on the 31st August, 1998 at Piave Farm, Njoro, "jointly with others already before the court wilfully and unlawfully damaged the fencing wire and posts by pulling them down and burning to ashes valued at Shs.500,000/= the property of **PETER MUCHIRI MWANGI."**

Three witnesses told the trial magistrate that they saw the appellant, among other persons, destroy the fence. Those witnesses were Peter Muchiri Mwangi (**P.W.1**) his sister Josephine Mugambi (**P.W.2**.) and some other member of the family Phillis Wangare **(P.W.3.**) . The destruction of the fence was on the 31st August, 1998 and the appellant was said to be a neighbour of the complainant. The appellant was arrested at Nakuru Law Courts by Corporal David Chege (**P.W.4)** on the 30th June, 1999, some nine months after the offence was committed. Apparently the appellant had come to the courts to listen to the case of some other people who had been charged with the same offence. The offence took place within the jurisdiction of Njoro Police Station. Chief Inspector Steven Ocharo (**P.W.5**.) came to collect the appellant from Nakuru. In his evidence before the Magistrate, he did not explain why it had taken them nine months to arrest the appellant. The appellant also gave sworn evidence before the Magistrate and he denied involvement in the offence. He specifically told the magistrate that other people had been arrested at home the following day after the offence while he himself was only arrested when he came to Nakuru court.

The magistrate considered this evidence and then delivered herself as follows:-

> "All the prosecution eyewitnesses come from the same family. Though there is no law forbidding such evidence giv en the nature of the offence, it would have been desirable that there be an outsider who could have been termed as an independent witnesses.
>
> The time span within the time of the commission of the offence and the arrest of the accused was unduly unreasonab le. There are no limitation statutes in criminal matters but then the accused being a neighbour, he should have been arrested as soon as it is practicable.
>
> With the evidence on record the court is of opinion that it would be insufficient to enter a conviction.

The Court, therefore, finds the accused not guilty as charged and I acquit him under section 215 Criminal Procedure Code."

The Republic, the respondent before us, was aggrieved by the decision of the Magistrate. So on the 25th November, 1999, it filed a petition of appeal before the High Court of Kenya at Nakuru. There were six grounds in the petition and they were:-

"(i)The learned trial magist rate erred in law to acquit the Respondent under section 215 of the Criminal Procedure Code, when the defence case did not disproof (sic) the prosecution case.

(ii)That the learned trail magistrate erred in law in considering extraneous matters in acqui tting the Respondent.

(iii)That the learned trial Magistrate erred in law when he found that the prosecution witnesses were untrustworthy on the basis that all belonged to one family when there is no law forbidding admission of such evidence.

(iv)Tha t the learned trial magistrate erred in law whenhe found that the span within the time of the commission of the offence and the arrest of the accused was unduly unreasonable when in fact there is no limitation statutes in criminal cases.

(v)That the judgment of acquittal was based on wrong principles of law and is unsustainable"

This appeal by the Republic was obviously under **section 348A of the Criminal Procedure Code** . That section provides:-

***"When an accused person has been acquit ted 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 Attorney -General may appeal to the High Court from the acquittal or orde r on a matter of law. "***

The appeal can only be on a matter of law. What constitutes a matter of law, must, of course, depend on the circumstances of each case. In **SHABUDIN MERALI AND ANOTHER V. UGANDA [1963] EA 647**, the question of law involved was:-

***"..... whether the decision of the magistrate that no prima facie case had been made out was one at which a reasonable court properly directing itself, could arrive. "***

In **REPUBLIC V. KIDASA [1973] EA 368** Trevelyan and Hancox, JJ., as they then were, dealt with the point that:-

***" ..... In the instant case not only did the trial magistrate make no proper or sufficient finding on the facts, but he came to a conclusion on prefixes to which no reasonable court, properly directing itself cou ld, on the evidence, possibly have come. He clearly erred in law and thereby precluded himself from giving any or any adequate consideration of the rest of the evidence. In other words, having administered to himself of erroneous direction of law, he was prevented from coming to a proper conclusion on the facts. "***

In **R. V. PHILLETOUS MALLO [1958] EA 11**, the question of law was that:-

***"the judgment does not deal at all with the question whether accused received the money as alleged by the prosecution. I think that was a substantial error of law, and on that ground alone the appeal must be allowed ..... "***

In **PATEL V. REPUBLIC [1968] EA 97**, the question of law was, once again,

> ***".... whether the decision of the magistrate that no prima facie case has been made out was one at which a reasonable court, properly directing itself, could arrive. "***

And lastly in **REPUBLIC V. WACHIRA [1975] EA, 262** Trevelyan & Hancox, JJ. once again said:-

> ***"an appeal under section 348A of the Criminal Procedure Code , by the Attorney -General, only lies on a matter of law. However it has been settled for many years that the sufficiency or otherwise of the evidence at the close of the prosecution case, so as to require an accus ed to make his defence, is a matter of law..... "***

The learning to be gathered from these decisions is that a question of law, which would entitle the Attorney-General to appeal under section 348A of the Criminal Procedure Code , must be as varied as cases come. No one can and has ever attempted to set out an exhaustive list of what would constitute a question of law; it would be unwise and unhelpful to do so. We shall, in due course, return to some of these cases in another aspect of the matter.

In the case we are considering, Mr. Oriri Onyango, learned counsel for the Republic, told us that it was contrary to law for the trial magistrate to hold that the identification of the respondent by members of the same family was not sufficient. We would agree with Mr. Oriri Onyango and with the learned Judge that if the magistrate held that the law requires that identification of an accused person should not be only by members of a family, but should in addition, be supported by neighbours, for example. There is no such law. But with respect to the learned Judge and to Mr. Oriri Onyango, the trial magistrate did not lay down any such principle of law. We have already set out the relevant portion of her judgment and she specifically said therein that:-

> ***"Thoug h there is no law forbidding such evidence, given the nature of the offence, it would have been desirable that there be an outsider who could have been termed as an independent witness."***

Our understanding of what the magistrate is saying is that she had seen the three witnesses who gave evidence before her purporting to identify the appellant and she was not very satisfied with that evidence. She would have preferred some independent evidence to support that of ***P.W.1., P.W.2. and P.W.3***. It was really a question of credibility and we do not know of any law which would prevent a magistrate from being doubtful about the veracity of witnesses. We can find absolutely nothing illegal in what the magistrate did.

The extraneous matter which was complained of by the Respondent in their ground two of the petition of appeal was that the magistrate brought in the issue of the three witnesses being members of the same family. In view of what we have said, we do not need to say anything further on that point except perhaps to add that it was not an extraneous matter for the trial magistrate to take into account the fact that the three witnesses were related.

The other issue taken up by the Attorney-General before the High Court was the time it took the police to arrest the appellant. We agree that there is no statutory period within which a suspect must be arrested. But the magistrate said as much. What she did do was to consider the fact that the appellant was said to be a neighbour of the complainant and he knew him well. The unchallenged evidence before the magistrate was that the appellant was arrested some nine months after the alleged offence. Chief Inspector Ocharo ***(P.W.5)*** did not tell the magistrate that the police had been looking for the appellant but they were unable to trace him because he had gone into hiding. In the absence of such evidence was it unlawful or even unreasonable for the magistrate to ask why it had taken the police such a long time to arrest the appellant if he had been identified by the three witnesses and his name given to the police? ***P.W.4*** who arrested the appellant did not say how he came to know the police at Njoro were looking for the appellant. The appellant himself said in his sworn evidence that it was the complainant ***(P.W.1)*** who pointed him out to ***P.W.4***, and asked ***P.W.4***. to arrest him. ***P.W.5*** did not even tell the magistrate when the name of the appellant was first given to them. In these circumstances, we are totally unable to see anything wrong in the magistrate taking into account the fact that had the appellant been identified by ***P.W.1, P.W.2 and***

***P.W.3*** as they alleged, they would have immediately given his name to the police who would have in turn arrested him immediately and charged him together with the other persons. This was, in our view a perfectly relevant and legitimate matter for the magistrate to take into account in coming to the decision on whether to convict or acquit.

With the greatest possible respect to the learned Judge, he was wholly unjustified in interfering with the decision of the trial magistrate.

Having interfered with the decision of the magistrate, the learned Judge himself proceeded not only to set aside the acquittal by the magistrate but to convict and sentence the appellant to two years imprisonment. Mr. Oriri Onyango told us that the Judge was entitled to do so under section 354(b)(1) of the Criminal Procedure Code which provides:-

> ***"354(3) The court may then, if it consider s that there is no sufficient ground for interfering, dismiss the appeal or may -***
>
> ***(a) (i) .....***
>
> ***(ii) .....***
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> ***(iii).....***
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> ***(b).....***
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> ***(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 th ink fit."***

Mr. Oriri Onyango told us that what Rimita J did was to reverse the magistrate's order of acquittal and that having done so the next logical thing for the Judge to do was to record a conviction and proceed to sentence as the learned Judge did do. We understood from Mr. Oriri Onyango that he thought there were no authorities on the issue and that we should set out what ought to be done by the High Court under such circumstances.

Of course on first principles the provisions of section 354(3)( c) which we have already set out do not state that once a judge reverses the acquittal he shall proceed to convict and sentence. It would have been very easy for Parliament to have said so. But the matter was not devoid of authority as Mr. Onyango Oriri thought. The truth is that neither the learned Judge nor Mr. Onyango Oriri cared to look at their law-books. Had they done so, they would have seen the cases of **SHABUDIN MERALI AND ANOTHER v UGANDA [1963] EA 647** and **REPUBLIC v KIDASA [1973] EA 368** both of which we have cited. In the first case Sir Udo Udoma, the then Chief Justice of Uganda, 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. The case of REPUBLIC v KIDASA , ante, was exactly on the point. There, 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 said:-

> ***"..... we set aside the acquittal and or der the discharge (except in respect to count 8 ..... ) and order the magistrate, without the taking of any further evidence to redetermine the matter ....."***

The Court in KIDASA's case in truth set aside the acquittal and in effect directed the magistrate to record a conviction. The reason for that course of action is not difficult to find. The accused person having been thus convicted by the magistrate would be able to appeal again to the High Court,at least against sentence. The course taken by Rimita, J. apart from the fact that it is not authorised by the plain wording of the section, also deprived the appellant of his right of appeal to the High Court.

We have said enough, we think, to show that Rimita, J. was not justified in allowing the appeal by the Republic and in proceeding to convict the appellant and sentence him. We do not think we should say anything on the fact that the learned Judge does not appear to have given the appellant a chance to argue against the appeal in the High Court. We quash the conviction recorded against the appellant by the High Court, set aside the sentence consequent upon the conviction and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.

**Dated and delivered at Nakuru this 23rd day of February, 2001.**

**R.O. KWACH**

**.....**

**JUDGE OF APPEAL**

**R.S.C. OMOLO**

**.....**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

**.....**

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR