REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 97 OF 2013

PAUL MUTURI KAROBIA……..……..……..……APPELLANT

-VERSUS-

REPUBLIC…….……..……..RESPONDENT

(Being an appeal against sentence in Kigumo Senior Resident Magistrate's Court Criminal Case No. 1155 of 2008 (Hon. Mutuku, M.W) on 9th November, 2010)

JUDGMENT

The appellant was charged with the offence of grievous harm contrary section 234 of the Penal Code. The particulars of the offence were that on the 26th day of September, 2008 at Kiwangenye village in Murang'a South district within central province, the appellant unlawfully did grievous harm to Mary Njeri Kuria.

When the charges were initially read to the accused person, he replied, "it is true". However, the record does not indicate that the court entered any plea. Charges were later read to the appellant again and on this occasion he responded, "it is not true". It was then a plea of not guilty was entered.

After taking evidence from the prosecution and the appellant, the learned magistrate found the appellant guilty but insane. She therefore ordered that the accused person be detained at the pleasure of the president.

The evidence which informed the learned magistrate's decision comprised the testimony of six prosecution witnesses and the sworn statement of the appellant himself.

According to the complainant, on 26th September, 2008 at around 11 am she was at Kiawangenye tea buying centre when the appellant without any provocation whatsoever attacked and injured her with a panga. The injuries were so severe that she fell down and lost consciousness; she only regained her consciousness at Githumu hospital where she was taken for treatment. The complainant knew the appellant because they both hailed from the same village and grow up together. She said that the appellant had attacked her before and had even been warned by their area assistant chief.

The evidence of the prosecution witnesses who witnessed this incident was consistent that there was no conversation whatsoever between the appellant and the complainant before he started attacking her. They told the court that the appellant leisurely walked to his house where he locked himself after the attack.

It is only after one of his friends called the appellant out that he opened the door and came out still holding the same panga he had attacked the complainant with. He was subdued and taken to the police where he was rearrested and charged.

The extent of injuries which the appellant sustained were described by the medical officer who examined her as harm and the weapon used was said to be sharp. This witness confirmed that the complainant sustained deep cut on her head, mandible, neck, right arm and the occipital region. The degree of injury was grievous harm.

When the appellant was put on his defence, he did not deny having injured the complainant but his defence was that he had a mental disease and was not aware of what he was doing; he told the court that he had been undergoing treatment for this disease at Thika district hospital and that this incident happened probably because he had not taken the prescribed medication on that day. He produced medical treatment notes to support his position.

Looking at the appellant's appeal, his main contention appears to be that because he was suffering from insanity when he committed this offence, he ought not to have been convicted and sentenced because, he could not appreciate the nature and the consequences of his actions.He urged the court to find that he is now stable mentally and can fit into the society.

The record shows that when the appellant was put on his defence, his counsel applied to have him examined by a psychiatrist at Thika district hospital; the court granted this application and directed that the appellant be taken to the Thika hospital for the examination. No report, however, was ever produced as evidence in court to show that the appellant was examined as directed by the court or that he was insane or suffered a psychiatrist problem. In her judgment, the learned magistrate said that the appellant was examined by Dr Kitili Wambua who opined that the appellant was on treatment for a psychiatrist disorder and was under medication. This appears to have been misdirection because the record does not bear Dr Kitili Wambua's testimony or his opinion.

Section 151 of the Criminal Procedure Code states;

Every witness in a criminal cause or matter shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

Dr Kitili Wambua is not recorded as a witness in the proceedings and even if he was his evidence could only have been properly received on oath. By relying on non-existent evidence, the learned magistrate disregarded the provisions of section 151 of the Criminal Procedure Code.

The learned magistrate also relied on the medical treatment notes by the appellant to conclude that he suffered from a mental disorder. Those notes, in my view, could only be produced by their maker who in this case is assumed to be the medical expert who examined and treated the appellant; it is the opinion of such an expert that the court could possibly have acted upon. The learned magistrate erred in law in admitting in evidence the treatments notes from the appellant who could not be cross-examined on their veracity or authenticity.

In the absence of any evidence that the appellant was insane at the time he committed the offence it cannot be said with any certainty that the appellant was guilty but insane. He was simply guilty; accordingly, the appellant ought to have been convicted of the offence of grievous harm as defined under section 234 of the Penal Code. That section states:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

For the forgoing reasons, I would allow the appellant's appeal only to the extent that I would quash the conviction of guilty but insane and substitute it with a conviction of guilty. I would set aside the

sentence of being held in prison at the pleasure of the president with a sentence of 20 years imprisonment commencing the 26th August, 2008 when the appellant was arrested and put into custody.

Dated, signed and delivered in open court this 17th day of February, 2014

Ngaah Jairus

JUDGE