REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 127 of 2007

GEOFFREY NJUGUNA GACARA……..…….APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

[Being an Appeal from the judgment in Chief Magistrate's Court Criminal Case No. 1076 of 2007 by S.A. Okato SRM on 10.7.2007]

JUDGMENT

1. When the present Appeal came for hearing on 19.3.2009, the Appellant abandoned the appeal on conviction and sought that the sentence be reduced and leniency be exercised. No reasons were given why the sentence should be reduced.

2. The appeal is opposed for reasons that the circumstances were aggravated and the 20 years imposed was lenient compared to the maximum sentence of life in prison for the offence alleged committed by the Appellant.

3. I note that the Appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. It was alleged that on 13.3.2007, at Kyenthei Village in Machakos District he did and unlawfully so, caused grievous harm to Agnes Mutio Kituko. He was convicted and sentenced to serve 20 years in prison.

4. From the evidence on record, the Appellant attacked his mother, PW1, Agnes Mutio Kituko and PW2, his sister Anne Wairimu was present and confirmed the incident. PW1 suffered injuries to the head and the right hand. The Appellant admitted the offence and said that he was very drunk when he committed the offence.

5. Although the learned magistrate took note of the Appellant's drunkenness; he did not say why it was not a factor in determining either the culpability of the Appellant generally or the eventual sentence to be imposed on him. As I understand it the degree of intoxication is important in determining intent and as was said in Archbold, Criminal Pleading, Evidence and Practice 2003 at Page 1583;

"***In Republic vs McKnight, The Times, May 5, 2000, CA, it was held that the JSB specimen direction on voluntary intoxication in cases of specific intent, based on Republic vs Sheehan and Moore, need not be given where there is no factual basis for such direction; neither evidence that the defendant was drunk nor that he could not remember what he had been doing as a result of being drunk was sufficient; the essence of the defence was that the defendant did not have the necessary guilty intent because his mind was so affected by drink that he did not know what he was doing at the time when he***

did the act in question, and the degree of intoxication must have been such that it had prevented him from foreseeing or knowing what he would have foreseen or known had* he been sober." The Court relied, in large part, for its conclusions on Sooklal and another vs the State [1999] I W.L.R 2011, PC. As in that case, the Court seems to have erred in suggesting that drunkenness is a defence. It is not, and it is certainly not a special defence with some burden on the accused. Intent is for the prosecution to prove and in deciding whether it has been proved a court or jury is to do so by reference to "all the evidence drawing such inferences… as appear proper in the circumstances" [Criminal Justice Act 1967, s.8 (ante, & 17-36)]. Where intent is in issue and there is evidence of drunkenness, it is submitted that a Sheehan and Moore direction should routinely be given. Where intent is not in issue (e.g the defence to murder is self-defence or provocation), then the giving of a *Sheehan and Moore direction is inappropriate and liable to confuse."

6. In his sworn statement of defence the Appellant stated as follows:-

"***I am Geoffrey Njuguna Macharia from Masii Township. I am a driver. On 18.3.2007 I was arrested and escorted to Masii Police Station. I was charged with the instant offence. I know the complainant Agnes Mutio Kituko. She is my mother. I know her hand was cut on 13.3.2007. I do not know who cut her but my sister told me on 15.3.2007 that she had been cut. I went to see my mother in hospital and when I asked her who had cut her she said I was the one. My mother did not frame me up. I am the one who cut her. I was drunk when I cut her. I went into the house where I picked a panga to defend myself from my sister (PW2) who was beating me."***

7. From his defence, the accused person acted unlike a criminal with intent would have acted. It is clear that he had no clear intent and the prosecution had the burden of proving intent. The language used in Archbold (supra) is similar to the language used in section 13(4) of the Penal Code where it is provided as follows:-

"***Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."***

8. A clear reading of the evidence on record and principally that of PW1 and PW2 would have led one to conclude that the Appellant had no intention of causing grievous harm to his mother. His problem was with his sister, PW2 and not his mother and that is why when he sobered up he went to see her in hospital and had to be told that in fact it was he that caused her to be in her hospital bed.

9. If that be the case, then it is clear that no investigation was made of the Appellant's level of drunkenness although all witnesses said that he was drunk. In fact at the conclusion of this Appeal, I recall PW1, the accused's mother raising her hand and insisting on being heard and she pleaded that leniency be exercised because her son was drunk. Her intervention of course has no bearing to the appeal but clearly at the trial and from a reading of the record, there was good reason to interrogate the evidence of intoxication.

10. Having so said, an appellate court can only interfere with sentence if the same is manifestly harsh or some wrong principle was invoked when passing sentence –see Griffin vs Republic [1981] KLR 121. In this case, noting the circumstances and the evidence against the Appellant as well as his defence evidence, I think that I am properly entitled to interfere with the sentence and will reduce it to the sentence already served. Since conviction is not challenged the Appeal on sentence is allowed and the Appellant may now be released unless he is otherwise lawfully held.

11. Orders accordingly.

Dated and delivered at **Machakos** this **19th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Wang’ondu for Republic

Appellant present

Isaac Lenaola

Judge