REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 90 of 2008

JOSEPH GACHAGO GATHONDU ……..... APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

(Appeal from the original Judgment and Conviction of the Senior Resident Magistrate's court at Karatina in Criminal Case No. 679 of 2007 dated 30th October 2007 by P. C. Tororey – Ag. PM)

J U D G M E N T

This matter comes before me to consider the appropriate of an imprisonment term which was handed down to Joseph Gachago Gathondu hereinafter referred to as "*the appellant"* by **P. C. Tororey**, the then Acting Principal Magistrate in the Senior Resident Magistrate's Court at Karatina.

On 20th August 2007, the appellant was arraigned before the said court on a charge of assault causing actual Bodily harm contrary to section 251 of the Penal Code. The appellant pleaded guilty and a guilty plea was accordingly entered. The facts were then led by the prosecution and the appellant confirmed the same to be true. Thereafter the learned magistrate called for a probation report. When the probation report was ready, the prosecution suddenly realised that they had goofed in giving the facts when the P3 form had not been filled. Nor had it been tendered in evidence. The prosecution stated that the complainant had following the assault been admitted in hospital. He had however been discharged and the P3 form filled. The complainant had lost 2 fingers. He prayed to court to allow him to withdraw the earlier charge so that he could charge the appellant with the fresh charge of grievous harm.

The learned magistrate then reserved her ruling on the issue. On 22nd October 2007, the learned magistrate delivered her ruling which was to the effect that the plea for the appellant was taken on 20th August 2007. He pleaded guilty to the charge. Section 214(1) of the criminal procedure code talks of amendment of the charge before the close of the prosecution case. In the case before her, the appellant having pleaded guilty and the prosecution having given facts and the court having convicted the appellant, it was deemed that the prosecution had closed its case. She accordingly rejected the application. The position taken by the learned magistrate was correct in my view and cannot be impugned.

Having so rejected the application, the learned magistrate however surprisingly proceeded to consider the probation officers report and rejected the same in favour of a custodial sentence. She noted that the complainant sustained severe injuries and the home report was not in support of rehabilitation within the community. She then sentenced the appellant to 5 years imprisonment.

The appellant was aggrieved by the sentence imposed and hence preferred this appeal. In his petition of appeal, the appellant laments that:-

"1. That I had pleaded guilty to the charge.

2. That the imposed sentence is oppressive and excessive in regard to the evidence of good character which is admissible in the Kenya laws.

3. That the learned trial magistrate misdirected herself in imposing such a stiff sentence as per the charge and find (sic) it satisfactorily, if and whether it was meant for rehabilitation purpose, it necessitated a lesser severe sentence.

4. That the imposed sentence is wholly unjustified that resulted to a miscarriage of justice.

5. That the imposed sentence and considered sentence is invalid and harsh in that I never understood the substance of the charge and subsequent there to the reasons in respect to section 207 of the criminal procedure code."

The foregoing are really no grounds of appeal but mere pleas in mitigation.

When the appeal came up for hearing, the appellant maintained that the sentence imposed was manifestly harsh and excessive. On his part, **Mr. Makura**, learned Senior State Counsel submitted that though the sentence imposed was the maximum permissible under the statute, it was nonetheless legal. Indeed it was his view that the appellant narrowly missed being convicted on the grievous harm charge whose maximum sentence is life imprisonment.

To my mind much as the appellant abandoned his appeal on conviction, I do not think that his conviction can stand. The record shows that the P3 form in respect of the complainant was never tendered in evidence. Accordingly there was no prove that the complainant was injured. There was no evidence that the complainant suffered actual bodily harm upon which the court would have proceeded to convict the appellant. In the absence of any evidence touching on the nature and extent of the injuries sustained by the complainant as a result of the alleged assault, no conviction can result. It is on the basis of the foregoing that I will now allow this appeal, quash the conviction and set aside the sentence imposed. The appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE