



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 231 OF 2007

REGINA GATURI KAVETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No.1838 of 2006 – W. M. Kagendo [R.M.]

JUDGMENT

The appellant, Regina Gaturi Kavete was charged with the offence of **Assault causing actual bodily harm contrary to Section 251** of the **Penal Code**. The particulars of the offence were that on the 28<sup>th</sup> July 2006 at Lake View Estate in Nakuru Township, the appellant unlawfully assaulted Elizabeth Waithera thereby occasioning her actual bodily harm. The appellant pleaded not guilty to the charge. After full trial, the appellant was convicted as charged and sentenced to serve eight months imprisonment without an option of a fine. The appellant was aggrieved by her conviction and sentence and duly appealed to this court.

Although in her petition of appeal the appellant raised grounds challenging her conviction by the trial magistrate, at the hearing of the appeal, Mr. Mugambi, counsel for the appellant abandoned the appeal on conviction and instead urged this court to consider varying the custodial sentence that was imposed on the appellant. He submitted that the trial magistrate had failed to consider the entire circumstances of the case, including the fact that the prosecution had earlier intended to withdraw the case before they changed their mind and proceeded with the same. He further submitted that before the appellant was sentenced to the custodial sentence, the trial magistrate had ordered a probation report to be prepared which probation report was favourable to the appellant. He argued that the trial magistrate however ignored the probation report and proceeded to sentence the appellant to serve a custodial sentence. Mr. Mugambi explained that it was not clear under what circumstances the trial magistrate rejected the probation officer's report. He maintained that under the circumstances of this case, the appropriate sentence that the appellant should have been sentenced to serve was a non custodial sentence or an option of a fine. He urged the court to substitute the sentence under **Section 26** of the **Penal Code** or alternatively invoke its jurisdiction under **Section 354** of the **Criminal Procedure Code** and sentence the appellant to an appropriate non-custodial sentence. Mr. Mugambi for the State left the issue of sentence to the court.

The appellant in this appeal is not appealing against conviction. She is appealing against sentence. The appellant is asking this court to scrutinise the sentence by the trial magistrate and determine if she had exercised her discretion lawfully when she sentenced the appellant to serve a custodial sentence. The Court of Appeal in **Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported)** held at page 2 as follows;

*“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See **Diego vs Republic [1985] KLR 621**).”*

In the present appeal, Mr. Mugambi for the appellant submitted that the trial magistrate did not take into

account all the relevant factors before she arrived at the decision sentencing the appellant to serve a custodial sentence. According to the evidence which was adduced by the prosecution, the appellant attacked the complainant who was her neighbour over a disagreement on who between them was entitled to draw water first from the communal tap. The appellant stabbed the complainant severally with a knife. According to PW3 Dr. Philip Wainaina Kamau, the complainant sustained several cut injuries. The complainant had a penetrating wound 4cm wide by 2cm deep on her head. She also had a wound 2cm x 4cm which had not been stitched. She had a cut on the head 5cm long. The complainant was stitched and treated after sustaining the said injuries.

It was clear to this court that the injuries that the complainant sustained as a result of the attack by the appellant were serious. There was no justification for the appellant to attack the complainant. There was no justification for the appellant to use a knife to injure the complainant over a minor dispute. This court has no reason to disagree with the finding by the trial magistrate before she sentenced the appellant when she noted that the attack on the complainant was particularly vicious. However, this court is of the opinion that once the trial magistrate made an order that a probation report be prepared, it was incumbent on the trial magistrate to consider the said report before sentencing the appellant to serve a custodial sentence. I have read the said probation report. The same was favourable. The trial magistrate ought to have given reasons for rejecting the said probation report before exercising the option of sentencing the appellant to serve a custodial sentence.

For the said reason, I hold that the trial magistrate wrongly exercised her discretion when she sentenced the appellant to serve a custodial sentence. I will therefore set aside the said sentence and substitute it with an appropriate sentence of this court. I will therefore sentence the appellant to pay a fine of Ksh.10,000/= or in default thereof she will serve six months imprisonment. I will further make an order that the facts of this case have disclosed that the offence committed by the appellant caused her to owe civil liability to the complainant. Under **Section 175 (2) (b)** of the **Criminal Procedure Code**, I order the appellant to pay the complainant compensation of Ksh.40,000/=. This amount shall be paid before the appellant shall be released from custody. In default thereof, she shall serve six months imprisonment. The amount paid in compensation shall be without prejudice to any civil suit that shall be filed by the complainant to recover further damages that she has sustained as a result of the injuries that were inflicted on her by the appellant.

It is so ordered.

**DATED at NAKURU this 5<sup>th</sup> December 2007**

**L. KIMARU**

**JUDGE**