REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 992 OF 2002

JOSEPH SEREM KEITANY ……...…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT OF COURT

The appellant, Joseph Serem Keitany, was charged with the offences Attempted Murder, contrary to section 220 of the Penal Code and wounding contrary to section 237 of the Penal Code. He was acquitted of the first count but convicted of the second. He was sentenced to 3 years imprisonment. He appeals against both the conviction and the sentence. The brief facts of the prosecution case are that the appellant, both complainants in the lower court, that is PW1 and PW2, and two witnesses, PW3 and PW4, on 4.1.2001, had several drinks at a bar in Highrise estate in Nairobi where they sat for some hours. About 11.30 p.m. they prepared to leave in a G.K. car registration number 2997 which was being driven by PW2, Sgt. Mecha.

Before leaving, an argument developed among them due to the fact that some bills had not been settled possibly by the appellant and PW3, Cpl. Paul Korir and the argument was brought to an end at that time by satisfying the bar maid who had demanded payment that the bill would be settled the next day. As the five people travelled in the above mentioned motor vehicle, PW1, Evans Orenge made a comment directed to the appellant, to the effect that it was shameful or improper or irresponsible for the appellant to have taken beer and refused to pay for it. This infuriated the appellant who slapped PW1.

The latter hit back with a fist. Soon thereafter, the car stopped to let a third party alight. That is when the appellant alighted and drew his pistol and aimed it at Evans Orenge, PW1. The gun is said to have been cocked and he, the appellant is said to have then removed the safety catch ready to shoot. On seeing what the appellant was about to do and fearing the dire consequences of his act, PW2 Nelson Mecha, the complainant in the second count (hereafter called the complainant), felt obliged to intervene and avert an ugly situation. At this stage PW1 and PW3 and PW4, decided to escape, fearing that the appellant might turn amok and spread them with bullets. It is to the record from, the complainant, PW2, on his part, however, stated that the others did not run away until he was shot by the appellant and infact PW3, Paul Korir, claimed in his evidence that he was present when the gun went off before he ran away like the other two.

Be that as it may, the express effect of the evidence is that the complainant, as earlier stated decided to intervene and avert the situation. He held the muzzle of the gun which the appellant held through the open front door as he sat on the wheel and the two started to struggle over it. That is when it went off and seriously injured the complainant, with a bullet going through one pelvis to the other and thereby damaging the bladder. The appellant, soon after this incident, disappeared from the scene leaving the complainant struggling to drive himself to hospital. The latter finally got himself to Memorial Hospital

where he was admitted and stayed for over 64 days during which he under-went the necessary medical operations.

In the mean time the appellant went back to his station and found that the incident had been reported to the senior officers who later arrested him and charged him with the offences aforementioned. He on request surrendered his gun, which was later sent to the firearm expert. The latter's report was given in evidence. Apart from a part of the prosecution evidence, particularly that of the complainant, which was to the effect that the appellant deliberately decided to shoot and shot the complainant, the rest of the evidence is to the effect that the appellant's gun went off as he struggled over it with the complainant, PW2.

The appellant's story in his own defence was the same as that of others except that part of the complainant's story that I have pointed out hereinabove. His stand is that the gun went off as he struggled over it with the complainant, PW2. He admits that the complainant wanted to take away the gun from him as he stooped through the motor vehicle's front passenger door and that at one stage the struggle was over the complainant's thigh and that it was at that stage that the gun went off. He denied that the gun was cocked or that he had intended to shoot either Paul Orenge, PW1 or Nelson Mecha, PW2 to kill or maim.

He however admitted that no bullet could be discharged from his gun unless the gun was cocked or unless it was cocked and the safety catch removed. He believed the gun must have been cocked and the safety catch opened or loosened during the struggle between him and the complainant. He also admitted he was not supposed to cock or remove the safety catch unless he was entitled to shoot at the time and he agreed therefore that the shooting that took place and injured the complainant was unlawful. He concluded that the other witnesses present at the scene ran away only after he himself had left and not before.

The honourable trial magistrate considered all above evidence and other evidence adduced in this case. He carefully also considered the appellant's statement in his defence. There was a statement the appellant had given under inquiry but the statement was not much different from the statement the appellant gave in court. The trial magistrate found that there was no dispute that the appellant, in the material night, was carrying his official gun lawfully loaded with 12 rounds of ammunition. He found no dispute over the fact that one bullet was discharged from the appellant's gun either deliberately or during a struggle between the appellant and the complainant, PW2.

He also noted that the appellant admitted that the shooting, however caused, was unlawful. The honourable trial magistrate as a matter of fact, further found that the appellant was requested to sit on the front seat of the car and he agreed and did so, to avoid further fighting with PW1 and it would appear also that he did so voluntarily without being pushed out of the car by PW1. The trial magistrate also found as a fact that the appellant's gun did not fall from its upholster on him being allegedly pushed out of the car. The magistrate instead accepted the evidence that the appellant deliberately drew the pistol from its holster and pointed it at PW1, Evans Orenge, threatening to shoot him although he concluded also that it was not certain whether or not the appellant intended to or was eventually going to shoot the said Evans Orenge.

The trial magistrate however noted and accepted that the appellant had drawn his pistol, cocked it, removed the safety catch with a real possibility to shoot in view of the fact that it was at that point in time that the 2nd complainant, PW2 Sgt. Mecha decided to intervene to prevent the appellant shooting. Be it as it may, the trial magistrate came to the conclusion, as I understand it that the said complainant, Sgt. Mecha, PW2, tried to disarm the appellant at this stage but the gun went off in the process and injured PW2. He accordingly concluded that culpability lay with the appellant and not the complainant aforesaid. I have carefully considered these facts and how the honourable trial magistrate came to these conclusions. I am fully satisfied that he came to the right conclusions in those matters of fact.

There is no doubt, and this court comes to the same conclusion, that the appellant took offence of the comments made by PW1, Evans Orenge to the effect that, the appellant had behaved dishonourably when he ordered and took some drinks without intending to or paying for the same. He started a quarrel with PW1 as they sat at the back of the car together and he punched the said PW1 who also similarly retaliated.

The appellant was transferred to the front seat from where he continued his abrasive conduct. When the car stopped to drop one of the passengers by which time the appellant could not control himself anymore, he jumped out and unupholstered his gun, cocked it and removed the safety catch ready to shoot Evans Orenge.

The complainant Sgt. Mecha apprehended that a shooting probably with fatal consequences might result from the appellant's conduct. He decided to intervene first by catching the gun and diverting its muzzle to face the floor of the car with a view that if the appellant proceed to shoot Evans Orenge or any other person may not be hurt. His clear intention was disarming the appellant. But the latter who clearly was still angry either deliberately or due to drinking, tenaciously held on to the gun as the complainant tried to take away the gun. In the process the gun went off and seriously injured the complainant.

Having accepted the above facts as did the trial magistrate, I also agree with the conclusion that the complainant had a lawful duty to disarm the appellant and that his effort to do so as shown in the facts above was proper and lawful. I further agree that the proper and lawful conduct from the appellant even at this stage should have been to let go the gun to the complainant who the trial magistrate found, was sober, reasonable and in control of the affairs at that moment, inclusive of driving the car in which the witnesses and the appellant travelled.

I now turn to the honourable trial magistrate's conclusions on the applicable law. He stated as follows on page 5 of her judgment: - "Whichever way one looks at it therefore, it was the accused person who caused the injury on the complainant. He does not have any defence. There was no excuse or lawful reason for him to shoot at PW2 or to cause him (sic) to try and disarm him (sic) in the process of which he (sic) was wounded. For this reasons, I am satisfied that the 2 nd count has been proved against the accused person beyond any shadow of doubt …."

In my view the trial magistrate's application of the relevant provisions of the law and his conclusions related on the facts he had earlier accepted is confused. He is not clear here how the appellant had caused the injury. It is in the record that the facts the honourable magistrate had accepted were that the appellant's gun went off during the process when the complainant was trying to disarm the appellant and while the two were struggling over the gun. Here however the honourble magistrate states that the appellant had no lawful reason to shoot at the complainant or to make the complainant try to disarm the appellant during which the complainant was wounded.

Clearly, the trial magistrate appears even at that final stage to have not resolved the issue as to whether the appellant had directly or deliberately shot at the complainant or whether the gun merely went off when the two were struggling over the gun. In my view and with respect to the trial magistrate, it was vital for him to resolve the issue one-way or the other although clearly, either conclusion would not have totally excused the appellant. As earlier stated however, the conclusion this court accepted is that the gun went off when the complainant and the appellant were struggling over it as the complainant tried to disarm the appellant.

I now turn to the issue as to whether or not the honourable trial magistrate should have convicted under section 237 of the Penal Code contrary to which the accused was charged in respect to the 2nd court. The section states as follows: - " Any person who – (a) unlawfully wounds another; or (b) ……. Is guilty of a misdemeanour and is liable to imprisonment for five years, with or without corporal punishment." This provision is placed in part XXII of the Penal code whose heading is 'OFFENCES ENDANGERING LIFE OR HEALTH ' which includes sections 229 to 242." Most of the offences created under the said provisions require the offender to have formed an express intention to commit the created offences. The offences start with the words "Any person who, with intent to …" or who "maliciously ." However not so section 237 above quoted which simply provides the offence envisaged without demanding that the offender needs have the intent or malice to commit the offence. Similar is section 234 of Penal Code which simply requires as stated above the 'actus reus' without stating the nature of intention or 'mens rea' required to create the offence.

Under section 234 any person who unlawfully does grievous harm to another is guilty to a felony and is

liable to imprisonment for life with or without corporal punishment. At the same time any person who with intent to maim, disfigure or disable any person or to do some grievous harm to another and succeeds to unlawfully wound or does grievous to another ends up also being guilty of a felony and would be liable to imprisonment for life with or without corporal punishment under section 231. I must confess that I find no difference between the offence of grievous harm created under section 231(a) and section 234 of the Penal Code and yet one clearly requires proof of intention or malice to commit the offence while the other does not.

My view would be that the offence under section 234 which requires no malice or intent to commit it should have provided for a lesser punishment. Be that as it may, we are mainly concerned with the offence created under section 237 which neither requires malice or intent to commit it. The section provides it to be a misdemeanour, which attracts a maximum punishment of 5 years imprisonment. What amount of culpability did the trial court need to convict the appellant then under the said section. In the case of Mohamed Nathoo Bakrania v. Republic (1951) 18 E.A.C.A., 248, the then Court of Appeal of Eastern Africa found that Prima Facie the word "unlawfully" used in section 237 aforementioned includes
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"all unlawful acts whether done intentionally or by criminal recklessness or negligence" While interpreting section 233 (1) of our then Penal Code which is equivalent to our present section 237 (a) aforequoted and under discussion, held that – "The omission of the word 'maliciously' from sections 227, 230 and 233(1) {equivalent to our sections 231, 234 and 237 (1)} does not affect the principle th at in any criminal charge involving negligence the prosecution must prove something more than negligence of a character sufficient to establish civil negligence."

The way I do understand it then is that the reason why section 231 (1) {the then section 227 (1)} attracted life imprisonment while the then section 230 {now section 234} and the then section 233 (1) {now section 237} attracted 7 years and 3 years, respectively, was because in the latter two sections the grievous harm or wounding, is caused otherwise than in circumstances contemplated by the then section 227 (present section 231) of the Penal Code. The circumstances include the fact that in the latter sections, culpability is much less in that they are intended to have been caused not with malice but by negligence or recklessness. The legislature, however, has since altered the nature of sentence under section 234 (formerly, section 230) of the Penal Code. Now section 234 attracts a life sentence when it formerly attracted 7 years, without requiring "malice" or "intent to do grievous harm." Whether this is not as a result of poor drafting is debatable.

In the case before me, the appellant deliberately drew his gun, cocked it, removed the safety catch and pointed it at PW1, Evans Orenge . He had earlier slapped Orenge, which had resulted to a scuffle. In my opinion, and I so do find, his act amounted to negligent and/or reckless conduct. He must have or ought to have known that if Evans Orenge was close enough, the latter would try to divert the direction of the gun from his person or the person of others. The fact that it was the complainant who ended taking the steps that Orenge or others would have taken makes no difference. I further find that the appellant's culpability in this conduct amounted to criminal negligence or criminal recklessness, which finally resulted to serious injury being cause to the complainant.

The upshot of all the above canvassing is that the honorable magistrate, although not clear in his final reasoning, was entitled to convict of the second count of unlawful wounding contrary to section 237(a) of the Penal Code. This court accordingly dismisses the appellant's appeal as to conviction. As to sentence, the maximum sentence provided is 5 years imprisonment. He got 3 years instead. I see no lawful ground of interfering with the sentence.

The end result therefore is that the appeal must and is hereby dismissed in its entirety as the conviction and sentence are confirmed. It is so Ordered.

Dated and delivered at Nairobi this 6th day of May, 2003.

D. A. ONYANCHA

JUDGE