REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 1 OF 2016

(From original conviction and sentence in criminal case number 1903 of 2015 of the Principal Magistrate's Court at Kapenguria)

PETER SHIRAU AMAKOBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

This appeal by one Peter Shirao arises out of his conviction and sentence to 3 years in prison, in case number 1903 of 2015. The appellant was charged together with another called Yusuf Abdul with an offence of **grievous harm, contrary to section 234 of the Penal Code.**

The particulars of the said offence are that on the 3rd day of November, 2015 at G. K Prison, Kapenguria within West Pokot County, the accused persons jointly and unlawfully did grievous harm to Solomon Pkemoi. Upon full hearing of the case, Yusuf Abdul was acquitted of the offence.

The brief facts of the case are that the complainant and the two accused persons were by the time of the commission of the alleged offence serving sentences at Kapenguria Prison. They were all in ward 4. In the morning of 3rd November, 2015, at around 8.00am the appellant looked for his 70Kshs of which he had hidden the previous night within his beddings and did not find it. He thought second accused had stolen it. He grabbed him in an effort to conduct a body search. He was holding him by the neck. The 2nd accused resisted. The appellant strangled him. In self defence the second accused pushed the appellant away. The appellant sprawled and accidentally fell on the complainant and fractured his right leg.

I have considered the raised grounds of appeal by the appellant and my finding is that they were not informed by the facts of this case. They must have been picked as they were in another appeal. That notwithstanding, I have re-evaluated the evidence and weighed it against the applicable law.

The first issue of which I need to consider is of ***mens rea***, whether the appellant intended to harm the complainant.

The facts of the case are vivid that the appellant's intention was to harm the second accused person whom he blamed of stealing his 70Kshs. In law the doctrine of transferred malice or intent, holds that when the intent to harm one individual inadvertently causes a second person to be hurt instead, the perpetrator is still held responsible. For such an act or omission to attract criminal liability, the suspect must have intended to do wrong or have acted in a reckless and negligent manner, knowing that his actions would

cause or likely cause the result complained of.

In ***Republic versus Hancock and Shankard (1985) 3WLR 1014***, it was held that:-

> ***"Probability of an injury arising from an act done is important because if the likelihood that the injury will result is high, the probability of that result may be seen as overwhelming evidence of the existence of the intent to injure***."

In the case of ***Republic versus Nedrick 1986 HL***, it was rightly held that a person would be guilty if his actions are virtually certain to result to death or serious harm regardless of intent. Actually a person is held in law to have intended natural and probable consequences of his own conduct.

I need consider the issue of '**causation**' given that the appellant action did not directly cause the injury to the complainant. **Causation** provides means of connecting conduct with a resulting effect. This is a consideration of whether the defendant's conduct or omission cause the harm or damage. In doing so, '**but for'** test should be invoked. The question here is, '**but for'** the actions of the defendant would the result have occurred? If yes, the result would have occurred in any event, the defendant is not liable. If the answer is no, the defendant is liable as it can be said that his action was a factual cause of the result.

The appellant in this case attacked the second accused who pushed him in self defence prompting him to fall on the complainant, causing him grievous harm. If the appellant had not attacked the second accused, the second accused would not have pushed him and the complainant would not have been injured. Factual causation is therefore well established in this case. In line with this I must question whether the action of 2nd accused of pushing the appellant is a '***novus actus interniens'***. This is a new intervening act which breaks the chain of causation. The law is that the act of a third party will generally break the chain of causation unless the action was foreseeable. This was so held in the case of ***Republic versus Pagett (1983) 76 Cr. App 279***. When the appellant attacked the second accused in a prison cell where there were other inmates, it was foreseeable that such action could harm not only the second accused but any other inmate present. The chain of causation was therefore not broken.

Harm must result from a culpable act. The appellant attack on the second accused was unlawful as he ought to have reported him to the authorities in prison.

Having considered the foregoing issues, I do find that the appellant was rightly convicted for the offence of grievous harm and sentenced. His appeal lacks merit and is accordingly dismissed.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 24th day of January, 2017.

S. M. GITHINJI

JUDGE