REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 60 OF 2008

(From original conviction and in Criminal Case No. 2848 of 2003 sentence of the Senior Principal Magistrate's Court at Malindi)

JOSEPH PETER MATATA ……..…….APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

Joseph Peter Matata (the appellant) was convicted for the offence of grievous harm contrary to section 234 Penal Code and sentenced to five years imprisonment. He had been charged with going armed in public contrary to section 88 of the Penal Code, convicted and discharged under section 35(1) Penal Code. The prosecution case was based on particulars that on the 11th day of December 2003 at about 7.30am at Garsen Township in Tana River District, appellant attempted unlawfully to cause the death of Agnes Soka Matta, by stabbing her several times on her body with a Somali sword. The initial charge had been attempted murder contrary to section 220 Penal Code which trial magistrate substituted with offence under 234 Penal Code at the end of the trial.

The complainant is the estranged wife o the appellant and she told the trial court that on 11-12-03 at about 7.00am she alighted from vehicle when appellant approached her while armed with a sword saying he wanted to talk to her. She didn't say a word and began running away. Appellant stabbed her from the back using the sword which he had – four times on the right and two times on the left side. She felled own and he pierced her stomach using the same sword. A lady made noise and someone hit appellant with a stone, so he ran away.

PW1 was taken to hospital and admitted for a month – she underwent surgery for the stomach, as her intestines had been cut twice – she was also stitched on the injured points. She identified the sword in court. She gave past incidences when appellant visited violence on her including burning her clothes and strangling her – attempts to resolve these issues by elders failed because appellant did not attend the meeting called for. On cross-examination she said their marriage has been frought with violence and disagreements and suspicions dating back to 1989.

PW1 further explained on cross-examination that when appellant approached her she took her bag and just begun moving way – she said:

"***I did not even gesture to him, because I did not want us to pick a quarrel with him. I was already annoyed with him. There was no exchange of words between him and me…He had attempted to kill me previously. At one time, he tried to remove my gullet or throat with his fingers….I know he wanted to kill me after what he did to me. He stabbed me 8 times and this was more than mere assault. There was no way I could stop and talk to him, since in the past, he had even beaten me and undressed me in public. I did not provoke him…"***

PW1 denied suggestions by defence counsel Mr. Mouko that all these issues stemmed from extra-marital affairs. Ayub Malibe (PW2) a police reserve cum businessman was at his shop on 11-12-03 at about 7.30am at Garsen Centre when he saw PW1 alight from a matatu. He noticed the appellant also alighting from the same matatu, he was carrying a knife and walking like he wanted to talk to PW1. PW2 saw appellant stabbing PW1 using the knife, she fell down and he kept stabbing her while she was on the ground. A man then went and hit appellant so as to stop him and appellant began to run away but was apprehended by a mob. The knife was recovered and produced in court (actually it's the same object which PW1 referred to as a sword). PW2 knew both complainant and the appellant as he was married from their home – he had known them for about 6 years. He stated:

"***I saw blood and wounds on the complainant's back and stomach. I did not know why he stabbed her…."***

On cross-examination PW2 stated that complainant looked like she did not want to talk to the appellant and since he already knew that the couple had marital problems, what he saw merely confirmed it. This flow of events is confirmed by PW3 Dalko Gurka who was in the company of PW2.

On cross-examination he stated that he could not hear what the couple said but PW1 was yelling, he saw appellant utter something but could not hear as they were at a distance – however he noticed that PW1 was refusing to talk to appellant because she struggled to walk on, even as the appellant held her.

He however clarified that PW1 did not abuse appellant but rather only yelled saying "*Niokoe, niokoe"*

David Benjamin Jillo (PW4) was at home when he heard noises of someone being chased and rushed to go and see, only to find appellant being beaten by a mob who were saying "*ua, ua, ua"* and upon inquiry he was told appellant had killed someone next to the road. He requested that the appellant be taken to the police station and while escorting him, he asked appellant what had happened and "*he told me he wanted the woman to die."*

Pc Charles Muriuki (PW5) who received appellant at the Garsen Police Station was informed that appellant had cut a lady very badly and a knife said to have been used in the attack was handed over to him. He noted that appellant was also hurt and bleeding from the nose – his face was also injured. The victim had been rushed to hospital already. When Pc Muriuki went to see her in hospital, he found her unconscious with wounds on the stomach, right side of chest and left side of stomach.

Dr. Phillip Masaulo (PW6) examined the complainant and stated that her clothes were soaked in blood at the initial time and she was sick looking and pale, showing loss of blood. She had three stab wounds on the right side of her chest and a penetration wound on the left side of the abdomen – which necessitated surgery. She also had a wound on the upper left arm and on the right forearm. When the abdomen was open, she was found to have a laceration of the small intestine and there were two punctured holes that were repaired during surgery. There were also lacerations on the semi colon and large intestines. The doctor assessed the degree of injury as grievous harm and filled and signed the produced P3 form.

In his sworn defence appellant accused complainant of "sleeping with men" and that she even got a child named Fidelis Kirwa with another man during the subsistence of their marriage – he named the man as Jillo Kaman. Thereafter she had a relationship with one Chisaka and one Gulacha Komora (with whom she had a child named Majory Hagobu. He confirmed that he and complainant no longer lived together. On the material date he was going to Wema where complainant was staying with the children as he wanted to talk to her to let him have the children for holidays and that's when he saw her inside the

matatu, which he boarded. He explained that he did not talk to her inside the matatu because she was seated in the front cabin and he was at the back. W hen they alighted, he greeted her but she declined to talk, - he asked her to give him ten minutes to talk to her – she said she had no time for him. She then left him and crossed the road to where Gulacha was in a government vehicle GK 522B, accompanied by other people. He then explained:

"***That is when I lost control out of anger. I became angry because I still loved her. I started to stab her with a knife. I had the knife myself. It is a knife I carry for defence as there are bandits and clashes between Pokomos and Ormas. It was a knife like a walking stick. There are many people who walk around with such knives in Tana River. As I was stabbing her, she called me by the name "Baba Peter", I left and I wanted to look for people to go and help me report at the police station…."***

He denied telling PW4 that he wanted PW1 dead and says the knife did not get bent as a result of stabbing PW1 but rather someone else bent it so as to imply that he wanted to kill her. He denied that he intended to kill PW1 and explained that he acted out of anger.

On cross-examination appellant stated:

"***When I saw her going to Guracha, I took it as a provocation and an insult, as it was not once."***

Appellant stated that he didn't know he would meet PW1 on the way that day and that he only got back to his sense when complainant asked him.

"***Baba Peter, leo umeamua kuniua?"***

His defence witness Daniel B. Baya confirmed witnessing the incident and that he saw a government vehicle belonging to Ministry of Education – it had two occupants.

In his judgment, the learned trial magistrate observed that there was no dispute that appellant stabbed and wounded the complainant – the appellant admitted as much. He also noted that there was no evidence on record to prove that appellant had an intention of killing complainant. The learned trial magistrate then stated:

"***As regards knowledge on the part of the accused that what he was doing was immensely dangerous, that it must in all probability cause her death or such bodily injury as was likely to cause death. Here I would say that accused person was angered when the complainant refused to give him audience. He lost control and acted in the heat of passion. It is my considered opinion that he did not comprehend that his action of stabbing the complainant repeatedly would cause her serious bodily injury as was likely to cause death. For this reason, the charge of attempted murder contrary to section 220(a) of the Penal Code cannot stand. However, there is overwhelming evidence that accused intended to cause grievous harm to the complainant "-***

The learned trial magistrate thus substituted the charge with one of grievous harm contrary to section 234 Penal Code and convicted him on that.

The findings of the trial magistrate were challenged on grounds that:

(a) The learned trial magistrate erred in law and in fact in finding the appellant guilty, without sufficient ingredients of the said charge being proved.

(b) The learned trial magistrate erred in convicting the appellant without due regard to the appellant's defence of provocation, and lack of intention to commit the offence

(c) The learned trial magistrate erred in admitting the complainant's evidence without considering that she was bitter with the appellant and therefore capable of fabricating the evidence so as to have the appellant convicted.

(d) The trial magistrate failed to consider the appellant's mitigation and prevailing circumstances and consequently meted out a harsh sentence against the appellant.

At the hearing of the appeal, Mr. Mouko submitted on behalf of the appellant that the charge of grievous harm wasn't proved even as he pointed out that defence was not denying that the complainant sustained injuries which were inflicted by the appellant. It was Mr. Mouko's contention that there was no evidence on record as to what made the trial magistrate conclude that appellant caused grievous bodily harm. He challenged the finding of the doctor saying he was not the first one to attend to the complainant and there is no explanation as to why he reached the conclusion that the injury was grievous harm or maim. He argues that grievous harm is any harm which amounts to maim or endanger life or seriously or permanently injure health or extends to permanent disfigurement and that in this instance there was no evidence of permanent injuries or disfigurement and appellant ought to have been convicted for common assault or assault contrary to section 251 Penal Code. He further argued that the mens rea was lacking in the present case and that appellant simply acted on impulse and that the trial magistrate did not consider the appellant's evidence – choosing to believe complainant entirely.

Mr. Mouko also argued that although the offence for which appellant was convicted carries a life sentence, the sentence meted was excessive and it should in any event be substituted with sentence under section 250 or 251 and appellant be given a non custodial sentence.

The appeal was opposed on conviction and sentence and Mr. Ogoti counsel for the State submitted that the trial magistrate gave reason as to why he substituted the charge from attempted murder to grievous harm. Further that the P3 form produced is very clear as to the different degrees of injuries and their classification and PW6 reached such conclusion after examining PW1 and also referring to her treatment notes – finding that the injuries were so serious as to necessitate surgery and there should be no reason to substitute the charge with lesser one yet again.

Mr. Ogoti argued that the injuries were life threatening and the 5 year sentence meted out was justified and the history of frustration and anger over the years should not be used as an excuse for appellant's actions.

I have re-evaluated and analysed the evidence and the findings of the trial magistrate, it is very clear to me, that the learned trial magistrate considered very keenly both complainant's and appellant's evidence and that is why he found no evidence of an intention to kill and thus reduced the charge from an attempt to murder to one for grievous harm. In doing so he was appropriately guided by the findings of the witness who had the scientific and technical knowledge of the human body, and how to grade it when it has been subjected to injury. This witness gave a detailed description of the injuries and the repair process there to and his observation once the injuries started to heal. Mr. Mouko submissions on the question of the doctor not being the one who treated the witness is a non starter as (a) the doctor relied on clinical notes, which he referred to during the hearing and which Mr. Mouko (the one endowed with legal know how) was present when such reference was being made and he never raised any objection.

(b) It is common knowledge and practice that a P3 form can only be filled when the patient has healed enough to enable the medical person assess and determine the degree and extent of injury. Quite obviously just by reading contents of P3 form, the doctor (PW6) was finalized by the definition at the bolt which states grievous harm means any harm which inter alia endangers life or seriously …..injures health…..or serious injury to any …..internal organ"

Surely I need not say more – the learned trial magistrate properly accepted the evidence of PW6who was duly guided by his professional sense in classifying his findings as set out in the standard format in the P3 form.

Indeed the learned trial magistrate considered that appellant was angered at being snubbed in public by his wife – that is why he gave the five year sentence, for an offence which carries life, and for an action which was not just a single or double, but eight times stabbing …I think that sentence was really justified and I find no reason whatsoever to interfere with it.

Consequently my findings are that the conviction was safe and I uphold it. The sentence was legal and justified, nor was it harsh in the circumstances- I confirm the same.

The appeal is dismissed.

Delivered and dated this **2nd** day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Mouko present for appellant

Mr. Ogoti for State

Court clerk – Sango Swahili/English