REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO 15 OF 1993

ISAACK MUCHIRI WANJOHI ……..…… APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(From Original Conviction and Sentence in Criminal Case

No 312 of 1992 by Njuguna Kimani - RM)

JUDGMENT

The appellant and two others were jointly charge with grievous harm contrary to section 234 of the Penal Code in that on the 14.4.1990 at Othaya township jointly with others not before court did grievous harm to the complainant Lawrence Muchori Gicheru.

The case for the prosecution was, in outline, as follows. The complainant, the appellant, his co-accused and other patrons were at Heshima Bar taking beer at the back room. Between 10 pm and 11 pm all of them had consumed many bottles of beer and were obviously very drunk and noisy. There were two notable quarrels attracting the attention of the barmaid and the manager. The first one went without incident and the parties settled down for more beer but the second one resulted in a scuffle and a fight leading to the complainant's eye being pierced by an umbrella. According to him he was assaulted by four persons one of them being the appellant who was armed with an umbrella.

In his judgment the learned trial magistrate convicted the appellant on the offence charged and his co-accused on assault while invoking the provisions of section 179 of the Criminal Code. He sentenced the appellant to three years' imprisonment plus three strokes of the cane. The co-accused were each fined Shs 5,000/ and in default six months' imprisonment. Part of the fines was payable to the complainant.

The appellant in his petition of appeal merely reiterates that he did not cause the injuries suffered by the complainant, and; that as the complainant was so drunk and intoxicated during the bar brawl he could not identify his assailant. At the hearing of the appeal, however, the question that arose to be considered was whether the major offence of grievous harm can be maintained for one accused and reduced to assault for his co-accused, the victim being one and the same; or; more precisely, can three accused persons be jointly convicted of the offences of grievous harm and assault at the same time, over a common victim and in one injury.

That the trial court had power to substitute conviction for the lesser offence is not in issue. This could be done under section 179 of the Criminal Procedure Code with reads as follows:-

> "179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
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> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".

It is apparent that this section can only be applied where the minor offence is arrived at by a process of substraction from the major charge, and where the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

The application of this section was considered at length in the case of *Hassan Mpanda v Republic* [1963] EA 294.

Thus, if the learned trial magistrate found that the facts of the major charge constituted a minor offence he ought to have reduced the graver charge for all the accused and not for some because if the charge is substracted it follows that it is eliminated and obliterated altogether.

The violence alleged in the charge was the same as that alleged and proved against all the accused persons and was not capable of separation. All of them could either be found guilty of the graver charge or the minor offence and not some to be indicted separately and selectively. It follows, therefore, that the conviction against the appellant is not sustainable in law.

There was ample proof that the complainant had consumed a large quantity of beer and was hopelessly drunk at the time of the attack upon himself. He was not sure of the number of the persons who assaulted him and neither could he recall the weapons used to injure him. The upshot of his testimony shows that he provoked the attack. The evidence of the barmaid and the manager absolved the appellant from the attack.

For these reasons this Court considers that there was a misdirection on the part of the trial court in convicting the appellant on the charge arraigned against him.

The appellant's conviction is unsafe and is quashed. The sentence is set aside. He is entitled to his liberty forthwith unless otherwise lawfully held under other lawful warrant.

Dated and Delivered at Nyeri this 17th day of March, 1993

P.K. TUNOI

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JUDGE