REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 1 of 2006

(From original conviction and sentence in criminal case no 191 of 2004 of R.M.'s court Hola Mr. T.L.OLE TANCHU)

YUSUF JILO GODHANA……..APPELLANT

VERSUS

REPUBLIC……..... ……..RESPONDENT

JUDGMENT

The appellant was sentenced to serve seven years imprisonment after a full trial for the offence of grievous harm contrary to Section 234 of the Penal Code. Being aggrieved by the conviction and sentence he has preferred this appeal arguing, among other things, that the trial court lacked jurisdiction to try the case;

that no plea was taken after the substitution of the charge and finally that the sentence was manifestly excessive.

The appellant was initially represented by Mr.Chalalu Kofa, who for several months failed to come to court to argue the appeal, forcing the appellant to argue it himself, doing so eloquently. He abandoned grounds 1 and 2 dealing with the trial magistrate lacking jurisdiction and the conviction being unlawful. That leaves grounds 3,4 and 5 which were consolidated and argued together. The gist of these grounds is that the sentence was harsh and excessive. That the court proceeded with the hearing immediately the old charge was substituted with a new charge. This, accordingly to the appellant was prejudicial to his fair trial as he had come prepared to cross-examine the witnesses on the previous charge. In other words, the court after accepting the substituted charge ought to have adjourned to give the appellant time to prepare his defence to the substituted charge. It was further submitted by the appellant that Pw1 ought to have been sworn afresh after he was stood down for twenty minutes.

Finally it was argued that the prosecution witnesses were contradictory. Learned counsel for the respondent supported both the conviction and sentenced and gave his reasons which take I have taken into account. Being the first appellate court, I am bound to re-evaluate the evidence that was adduced at the trial in order to arrive at an independent conclusion, bearing in mind always that this court does not have the advantage of the trial court where witnesses were heard and seen.

The facts of this appeal are that the appellant who had been cohabiting with PW2, Asha Athumani Hamisi (Asha) went to the complainant's house where Asha was said to be employed, and on entering the complainant's bedroom found Asha fanning the former. This infuriated the appellant who picked a charcoal iron box and hit the complainant with it.

The complainant sustained serious injuries which was assessed by medical report as grievous harm. The appellant in his sworn testimony maintained that Asha was his lawful wife and that he went to the complainant's house on the fateful evening where Asha was alleged to have been working. On entering the complainant's bedroom he found Asha fanning the complainant in bed. Asha panicked, picked the iron box in question, threw it at the appellant and missed him.

She then grabbed a panga which she aimed at the appellant, who on his part pushed her causing her to fall. The appellant threw the iron box at Asha but missed her, instead hitting the complainant. A fight then ensued between him and the complainant.

In the process the appellant using a panga cut the complainant who, according to him was stronger. The appellant submitted that he acted in self defence and was provoked by the complainant's association with Asha. The court found that there was no dispute that the appellant caused the injuries on the complainant which were assessed as grievous harm. He dismissed the defence advanced by the appellant as contradictory and inconsistent. He further doubted the credibility of the defence that the complainant engaged in a fight after being hit by the iron box.

I, with respect, agree with these findings of fact. Even if Asha was the appellant's wife, and even if he found her with the complainant in a compromising position in the latter's bedroom, I find that the appellant used more force than was necessary in the circumstances. Asha and the complainant were not armed. It is doubtful that Asha, who according to the appellant's testimony was surprised by his sudden entry into the room could have been in a position to pick and throw the iron box at the appellant. The truth of the matter is that the appellant was stung by what he saw, namely the complainant in bed without a shirt and Asha fanning him. A defence of self-defence is not available to the appellant. Nobody attacked him to warrant his attacking back.

On provocation I am persuaded that the appellant was Asha's husband hence the trial magistrate misdirected himself by insisting that the appellant had to prove the marriage beyond the evidence he called. That was tentamount to shifting the burden of proof to the appellant. In terms of Section 208 (1) and (2) the Penal Code I find that the complainant gave the appellant provocation for an assault.

There is evidence that prior to the occasion in question, Asha had spent two nights away from her home and this led the appellant to be suspiscious. All these put together and finding her in the complainant's bedroom was sufficient to anger a reasonable man. But as I have already found the appellant was not justified in the use of excessive force. Regarding the ground that the trial was prejudicial to him for the new substituted charge to have proceeded to hearing without giving him time to prepare, I can say only two things. One the new charge was substantially the same as the previous one. The initial charge was a simple assault while the substituted charge was grievious harm. Two; the appellant did not ask for time to prepare. The charge was read to him and pleaded not guilty. If he seriously needed time he ought to have applied for adjournment.

Finally the appellant also challenged the decision of the trial court to proceed with the evidence of Pw1 after he was stood down without administering the oath.

It is mandatory under Section 151 of the Criminal Procedure Code to administer oath to witnesses

testifying in criminal causes. I am satisfied that in the instant appeal Pw1 was examined upon oath. He was stood down, according to the record for 20 minutes. There was no need, in my view, to swear him again. The practise, however, is that where a witness is stood down he must be reminded of the oath he had taken earlier before he proceeds to testify. The omission to do so, given that the break was only for 20 minutes, is not fatal.

For all these reasons I find that, in view of the fact that the appellant was provoked, the sentence was excessive and harsh.

To, that extent the appeal is allowed, sentence of 7 years set aside and substituted with a sentence of two years from the date of the earlier sentence, namely 28th September, 2005.

Dated and delivered at Malindi this 6th day of November, 2006.

W.Ouko

Judge

6.11.06

Coram

W. Ouko, J

Mr.Ogoti for state

Appellant

CC: Gladys

Judgment delivered.

W.OUKO

JUDGE