REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 297 OF 1984

AMOS MBURU GATHAGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Resident Magistrate's Court at Thika, RN Kamiro Esq)

JUDGMENT

This is the appeal of Amos Mburu Gathagu, against his conviction before the Thika Magistrate's Court on February 14, 1984, and against the sentence imposed by that court.

The appellant was there charged with the offence of doing grievous harm contrary to section 234 of the Penal Code. He pleaded not guilty, was convicted, and was sentenced to five years' imprisonment and five strokes of the cane.

The victim of this crime, PW 1, Stanley Mburu Gathagu, gave evidence that the appellant was his step brother, and that, at about 7.00 pm on the evening of March 6, 1983, they had met in Mutuya Bar in Githuma market center. Also present were another stepbrother, PW 3 Samuel Mwangi Gathungu and PW 4 John Njooka Gathungu. All four had various drinks in Mutuya Bar and later in Wamiamo Bar. According to PW 3,

"We continued drinking. We visited other two bars before we went home."

In cross-examining PW 1, the appellant suggested that one or more of the party had been so drunk that they had lost the way. PW 1 denied this. He also denied that he had quarrel led with customers or with police officers there. He denied leaving some partly consumed beers. It is indisputable that a quantity of White Cap and Tusker Lager had been drunk by these four people, but it is difficult to say how much. It does not appear that the drink was taken suddenly, or just before leaving for home. It seems that their drinking was done over a relatively long period of time ie the four hours between 7.00 pm and 11.00 pm.

After 11.00 pm, the four men went to the house of PW 3 Mwangi, where they had a meal, then to the house of PW 4, Njooka, where they had another meal, and finally to the house of PW 1, where they had yet another meal. This last meal was not free of contention. According to PW 3, Mwangi, PW 1 had wanted his wife to kill a hen but his wife had protested. PW 1 was cross examined about this by the appellant. He denied that he had had a quarrel with his wife about killing a chicken.

At all events, when it came to midnight the party dispersed. PW) escorted the appellant out of the compound, and pointed out the path he should take. It was suggested by the appellant, in cross-examining PW 1, that this had been necessary because they were all drunk but PW 1 denied this, and said that escorting the appellant outside the compound was a matter of hospitality routine.

It was at that point that PW 1 sustained injury to his eye. He said that the appellant, who had a spotlight, violently hit him on his right eye. The medical evidence given by PW 2 Dr Ranganathan, was that PW 1 had a deep cut on the right eye about 3 1/2 inches long. The Magistrate noted that, when PW 3 Mwangi had gone back to see what had happened, he found PW 1 and the appellant together. This also is what PW 4 Njooka found and it was when the appellant saw PW 4 Njooka, return, that the appellant ran away. Neither of these witnesses says that PW 1's wife was present, though PW 1 says that it was his wife and his mother and PW 3 Mwangi, and PW 4 who took him to hospital.

In these circumstances the learned magistrate rejected the theory that PW 1 had been injured by his wife and dismissed it as concocted evidence. He accepted the evidence of PW 1 supported as it was by the evidence of PW 3, Mwangi and PW 4, Njooka.

In the first of his grounds of appeal, the appellant relies on the fact that PW 1 did not produce the weapon, i.e. the spotlight with which he was injured. In the view of this court, PW 1's failure to produce the spotlight is understandable. PW 1 was seriously injured, and both PW 1 and PW 4 say that the appellant ran away.

In the second of his grounds of appeal the appellant argues that if there had been fighting between PW 1 and himself, neighbours would have noticed it. However, it was not the prosecution's case that there had been fighting between PW 1 and the appellant, but rather that the appellant had suddenly and violently struck him without any provocation. It would therefore not be expected that neighbours would intervene.

In the third of his grounds of appeal, the appellant contends that, at the police station, the complainant's wife claimed to be an eye-witness to the incident and yet, at the trial, she was not called as a witness. It is nowhere suggested that the complainant's wife, either at the police station or anywhere else, accepted responsibility for her husband's injuries and it can therefore be assumed that had she been called as a witness by the prosecution she would have supported and strengthened the prosecution case against the appellant.

I can understand that, her being the complainant's wife would have prevented her from being put forward as an independent witness. If the court did not believe the complainant, it was hardly likely to believe the complainant's wife, and I can understand why the prosecution should decide that she was not required as a witness. Whatever may have been the reason for not calling the complainant's wife, her absence from the trial will not have prejudiced the appellant's case or been to his disadvantage.

In his fourth ground of appeal, the appellant contends that his absence from home for seven months, after the offence, was treated as proof of guilt whereas there was a perfectly innocent explanation for it. It is quite usual for the appellant to be away from home, even for periods as long as a year, because he works far from home. This point was considered by the learned magistrate as being further circumstantial evidence which supported the direct evidence of the complainant. He said, in his judgment, that immediately after the incident he, the appellant, went into hiding and that it was only after 9 months, that he was found and arrested. To this court, delay of 9 months in arresting the appellant is equivocal in its significance, and this court accepts that there may be an innocent explanation for the appellant's absence during that period. There is, however, significance in the appellant immediately

going into hiding after the incident, and the magistrate was entitled, in the view of this court, to take full account of that behaviour on the appellant's part. As behaviour, it was entirely consistent with the appellant's behaviour at the time of the incident itself. PW 4 John Njooka Gathungu had said, in evidence, "Accused on seeing me, ran away". This court does not consider that the learned magistrate misdirected himself as to the significance of the appellant's behaviour, looking at that behaviour as a whole, and finds no reason here for regarding the learned magistrate's decision as unsafe.

In his fifth, and final ground of appeal against conviction, the appellant complains that he was ill-treated when he was in a police station, was beaten there and maimed in his left leg. Through being beaten, he was forced, the appellant says, to sign a written statement. There is no indication in the Notes of Evidence that the prosecution relied on any such written statement, nor is there any indication in the judgment of the learned magistrate, that any such statement was before the court. It cannot, consequently, have influenced the learned magistrate in coming to his decision, and there is no force in this ground of appeal.

Having considered the evidence in the case, the reasoned judgment of the learned magistrate and the appellant's grounds of appeal, this court considers that the learned magistrate was right in the decision he made and should be upheld. Accordingly the appeal against conviction is dismissed.

The appellant also appeals against the sentence of five years' imprisonment with five strokes of the cane, which was imposed in the court below. The learned magistrate, rightly in the view of this court, described the appellant's behaviour as

"outrageous, in that, unexpectedly and for no reason, he hit the complainant thereby removing the eye".

The magistrate went on to stigmatise the appellant as "a dangerous element in a society". On the other hand, the prosecution had accepted that the appellant was a first offender, and it follows that he could not be a danger to society in the sense of being a habitual criminal. He had caused grave injury to the complainant, and that, as the learned magistrate said, called for a custodial sentence, but this court considers a custodial sentence of five years to be excessive, having regard to the appellant's hitherto good character. With a first offender, the experience of imprisonment itself, rather than the duration of that imprisonment, is a salutary lesson which is not likely to be forgotten. The appeal against sentence will therefore be allowed in part and for the sentence of five years' imprisonment imposed in the court below, there will be substituted a sentence of two years' imprisonment. The sentence to five strokes of the cane will be upheld.

Dated and Delivered at Nairobi this 9th day of October 1984.

J.W.A. BUTLER-SLOSS

JUDGE