IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 55 OF 2000

FRANCIS KATETE

VS

THE REPUBLIC

From the Second Grade Magistrate's Court at Chiradzulu

Criminal Case No. 279 of 2000

CORAM: CHIPETA, J.

Appellant, present and Unrepresented

Manyungwa, of Counsel for the Respondent

Nthole, Official Interpreter

JUDGMENT

The Appellant, Francis Katete, was the third accused in a trial on a charge of grievous harm contrary to Section 238 of the Penal Code in the court of the Second Grade Magistrate sitting at Chiradzulu. After full trial he was convicted as charged to 15 months imprisonment with hard labour that same day. He now appeals to this court against both conviction and sentence.

The Appellant has filed five grounds of appeal in this matter. On strict consideration these grounds can be compressed into two only, to wit, that the decision of the lower court to convict the Appellant was against the weight of the evidence and that the sentence imposed on the Appellant was unduly harsh.

In arguing the appeal as regards the conviction, the Appellant said there has a fight amongst his relatives and he intervened in it in order to stop the fight. In that intervention his claim is that he did not occasion the grievous injury he now stands convicted of inflicting on the complainant. The complainant, he claims, was previously injured in one arm when a can felled her. On the occasion of this fight between relatives, he says she fell down and injured herself afresh in the same arm. Both sides of the fend sustain injuries and that even he as a peacemaker so sustained injuries but that only he and two co-accused were brought to trial and were treated as not having themselves suffered injuries in that fight.

As regards sentence, the Appellant's complaint was that he felt the lower court neglected to fully take into account the fact that he was a first offender. He also felt that the lower court failed to pay sufficient regard to the manner in which the offence herein was committed.

On the part of the State Mr Manyungwa, Assistant Chief State Advocate, was worried about the conviction of the Appellant in this case. In his assessment the evidence in the record was ridded with conflicts and he much doubted whether the lower court could at the end of it all rightly claim that it was satisfied beyond reasonable doubt that the Appellant herein injured the Complainant. From the evidence, he said, what emerges clearly is that a fight broke out between two camps of relatives and in the concussion the evidence defects, it is not so certain which group provoked the other and whether the injury of the complainant which was apparently initially inflicted by a cow was indeed in that dry renewed by the Appellant. The State thus Felt that it would be unsafe to sustain the conviction.

On sentence the State equally agreed with the Appellant that the sentence meted out on him was manifestly excessive. Mr Manyungwa observed that to begin with the first accused having been discharged after the withdrawal of the charge against him, he found it strange that of the removing two accused persons while one was given a suspended sentence on the offence of unlawful wounding, the Appellant although also a first offender, was given an immediate custodial penalty, albeit the fact that he was convicted as charged. The State felt that either the court should have sent both convicts to jail or suspended their sentences even if the convicts were upheld.

I have gone through the record of the lower Court with great care. It is clear from this record that on the material day there was indeed a fierce fight between the group comprising of the Complainant Irene Petro and her daughter PW11 Loveness Matupa and their clan and the group comprising the Appellant, who is Loveness's cousin and his clan. It is also clear that although each side is trying to shift the blame to the other for starting the fight, there were immediate outstanding misunderstandings between the two groups which were recipe enough to ignite the fight. It is further clear that although each side in evidence tried to minimize the role they played in the fight, the fight was a merciless one and was conducted with a great sprint of vengeance between the group. It is clear to me that both groups were armed and both groups fought vigorously. An observation I would like to make here, however, is that in cases of assault falling short of decanoming death, it is a well understood principle of Criminal law that provocation is not a defence. If anything it only becomes relevant for consideration when it comes to sentencing. What I am trying to say is that it would be wrong here to try and assess the guilty or innocence of the Appellant herein from the angle of the question who provoked the situation or the fight.

It was in evidence before the lower Court that with aid of an axe the Appellant chopped at the complainant in the head area. This came from the evidence of the complainant herself

and that of PW11 her daughter. It also came out in evidence of PW1 that the Appellant broke her arm. Apart from depicting their injuries the Medical Report that was tendered in evidence referred to cuts on the head and injuries on the wrist of the right arm and on the shoulder bone and even indicated administration of plaster of paris by way of treatment of the complainant. In cross examination these two witnesses stuck to their stories that the Appellant played a significant role in inflicting serious injuries on the Complainant. Even the Caution Statement and reply to charge attributed to the Appellant by PW111 which statements the Appellant made no effort at any point to retract, indicate that the Appellant confessed participating in the fight herein and injuring the complainant. As has been held time and again an appellant should not rush to .... In the circumstances I find it difficult to say no blame should attach to the Appellant in this case just because the opponent group and even the Complainant herself was as active also in the fight. To do so would be to found a decision on a wrong premise.

What was in issue before the court in the matter at hand was the question of the injury of the complainant. Much as evidence may have extended to the injury of various other people including the Appellant, as those other injuries were not the subject of the charge before the court, they were not to be allowed to deflect the court from the assignment before it. Now if two witnesses came before the court to testify on what role the Appellant played in injuring the complainant and the injuries were to some extent supported by a medical report and further if the statements of the Appellant to the police stood unrestricted and use confirming the Appellant’s role in the assault one may ask therefore what reasonable doubts were there which the lower court should have exercised in favour of the Appellant. I take the view that leaving aside such sympathy as I may have that the Appellant too must have been mercilessly beaten up by the other group, his conviction was squarely proved to the requisite standard, it being that for this type of offence he cannot pray in aid provocation as a defence. The appeal against conviction thus fails and I dismiss it accordingly.

Turning to sentence I am mindful of the youthful age of the Appellant of 28 years only and of the fact that he has not previous record. As I have indicated earlier I equally sympathize with the fact that the complainant’s camp was equally aggressive and armed in this fight and so no doubt the Appellant himself also underwent physical pain and injury in the process of this fight. Although I have earlier discounted this aggression of the other camp when it was begin depicted as a possible defence, as I also pointed out earlier, it is quite a legitimate mitigation point when it comes to sentence. I do not however lose sight of the fact that the record shows the complainant as quite an elderly woman. It is a grace matter for an able-bodied youngman of 28 years, as the Appellant did, attack such a woman in the manner he did even if she was a quarrelsome and pugnacious one. Ordinarily a sentence of 15 months imprisonment with hard labour for the offence the Appellant was convicted of would not come to me with any sense of shock. Sentence for grievous harm can go as high as 14 years imprisonment. Bearing in mind however the mitigating factors I have earlier referred to, especially the fact that the Appellant too was as much a victim in the fight as an aggressor I think a shorter penalty

will still suffice to teach him a lesson. I thus set aside the sentence of 15 months imprisonment with hard labour imposed by the lower court and in lieu thereof. I sentence the Appellant to 12 months imprisonment with hard labour only with effect from the date he was convicted.

Pronounced in open Court this 2nd day of January, 2001, at Blantyre.

A.C. Chipeta

JUDGE