

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 411 OF 2006

PAUL NYAMAI KANYITHYAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.1438 of 2003 of the Chief Magistrate's Court at Nairobi by T. Ngugi - Senior Resident Magistrate)

JUDGEMENT

The appellant with two others were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. That on the 2nd day of November, 2001 at around 11.15 p.m. at the junction of Kusi Lane and Suswa Lane off 4th Parklands Avenue in Nairobi within Nairobi area jointly unlawfully assaulted Benson Karinge Mwangi thereby occasioning him actual bodily harm. According to the charge sheet the appellant was arrested and released on police bond on 10th June 2003. The record also shows the appellant was taken to court and charge read over to him on 12th June 2003. From the record there is no indication that the appellant absconded from jurisdiction of the court or that he was being sought by police for the offence that took place on 2nd day of November 2001. The evidence on record shows that at the time the offence took place the appellant was a police officer working at Runda Police station. It is also clear that at the material time the appellant and the complainant were residing at Deep Sea area within Parklands. It is also clear that the appellant and the complainant who both owned rental houses within Deep Sea slum area had several cases involving the management and the operation of the slum area. The complainant's wife was the chairlady of a group known as Muungano which was advocating for the slum to be built by the Catholic Church but which the appellant and his group resisted. It is clear that the complainant made several complaints to the OCS Parklands against the appellant alleging that as a police officer, he owned property and operating business. Nevertheless it is clear that the complainant was attacked on the material night as he was heading to his home from a night out at a bar within the area. He was confronted within Kusi and Suswa Lanes by five people. He says with the help of street light was able to identify the appellant with two others who were charged. According to the complainant the attackers were people known to him as residents of Deep Sea area within Parklands. After receiving severe injuries on the mouth, forehead and the back of the head, the appellant was able to free himself and ran to his house. On reaching his house he met with PW2 Jane Wairimu who was washing clothes outside the house. PW2 then opened the door for him and found that the complainant had blood all over. When she asked him what had happened to him the complainant said he was beaten by Muiruri. At the same time the wife to the complainant also came out and found that her husband had injuries all over. The said lady gave evidence as PW3 and she confirmed that they had been having a running battle with the appellant and others and that James Muiruri was one of the people who had wanted to kill her. On asking her husband who had beaten him he said he was beaten by Muiruri.

PW4 Justus Mahega who took the complainant to hospital did not mention the names of the appellant and said that the appellant never told him the persons who assaulted him.

PW6 PC David Kaduve stated that on the material time he was attached to Gigiri Police Station formerly of Parklands and that on 3rd November 2001 he received a report of assault from the complainant who was in company of his wife. He was informed that assault occurred on 2nd November, 2001 at 11.30

p.m. He recorded the complaint in the occurrence book and since the complainant was injured he advised him to go and be attended by the doctor. According to PW6 the complainant did not mention the name of the appellant as one of the attackers.

After the close of the prosecution case the appellant gave sworn testimony and denied having committed the offence that was alleged against him. He stated that on the material day he went to his business premises at about 8.30 p.m. and stayed there together with his wife until 10.00 p.m. The business was closed and he went straight to his house at about 10.30 p.m. He confirmed that he never came out from his house until the following morning. This was corroborated by DW6 who was the guard to the appellant's house. He stated that on 2nd November 2001 at about 10.30 p.m. he opened the gate for the appellant together with his wife who entered and never came out until the next day.

The question that arises now is whether there is adequate evidence on record to enable this court to say that the appellant was one of the persons who attacked the complainant on the material night. PW1 stated that on the material night he was accosted by five people near an electric pole and that some of the people who attacked him were known to him. He then mentioned the appellant as the one who was hitting him with a metal bar. He did not mention the name of the appellant to any of the persons he met after the attack. And none of the prosecution witnesses gave evidence that implicated the appellant in the offence that was committed on 2nd November 2001. PW2 and PW3 were the first persons who met with the complainant and in their evidence the complainant never mentioned the name of the appellant. What comes out from the evidence is that all the accused persons before the lower court together with the complainant had been involved in long standing differences over houses they built in a slum area called Deep Sea. The appellant was arrested and taken to court almost two years after the incident and no explanation has been given by the prosecution as to why the investigations took such a long period of time.

In his defence the appellant raised an alibi to say that he was not at the scene at the time the alleged offence took place. He brought DW6 as his witness and the said witness stated that he opened the gate for the appellant and his wife at about 10.30 p.m. and they never came out of the house the whole night. PW6 also confirmed that if the appellant was to go out during the night he would go through the only gate that he was guarding and that it was possible for him to detect the appellant leaving the house. The trial court in its judgement goes over the evidence and dismisses the alibi of the appellant as untenable. The trial court however, does not give any reasons why it dismissed alibi defence given by the appellant. I think it was the duty of the trial court to give reasons why the alibi defence by the appellant was untenable. It was not open for the trial court to merely dismiss the defence given by the appellant without giving sufficient reasons for the same. Equally it was the duty of the prosecution to challenge the evidence of the appellant and DW6 in respect of the alibi defence given. That was not done and in my opinion there were doubts in the evidence of the prosecution which was to be resolved in favour of the appellant.

I think the evidence given by the prosecution is disjointed and shallow to result in the conviction of the appellant. First and foremost if the complainant was assaulted by persons known to him the first thing for him to do was to name the assailants on the first instance and to the relevant authorities. It is clear that at the time the first report was made by the complainant and his wife the names of the appellant was not mentioned to the officer who received the report. The basis for that failure is that the complainant was not sure that the appellant was among the persons who attacked him on the material night. The evidence of PW6 who received the first report is clear and categorical that the complainant did not name the appellant as one of his attackers. That was an issue which was central to the conviction of the appellant and which destroys the case of the prosecution. In my view there are considerable doubts as to whether the appellant was involved in the assault that was committed against the complainant. In my humble view the basis of the appellant's arrest and connection to the assault is because of the earlier dispute he had with the complainant. I think that suspicion however strong cannot be a basis to found a conviction for an offence which was not proved beyond reasonable doubt against the appellant. In short the appeal by the appellant has considerable merits and it is for that reason that I am inclined to allow the appeal, quash the conviction and set aside the sentence imposed by the trial court.

Dated, signed and delivered at Nairobi this 2nd day of February 2009.

M. WARSAME

JUDGE