



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 342 of 2004

(From Original Conviction(s) and Sentence(s) in Criminal case No. 44 of 2003 of the Principal Magistrate's court at Kikuyu (M. W. Murage -PM)

STANLEY MITARO MUNGAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Even though **STANLEY MITARO MUNGAI** stated that he intended to appeal only against the 14 years imprisonment sentence imposed against him for the offence of **GREVIOUS HARM** contrary to **Section 234** of the **Penal Code**. He nevertheless challenged the conviction in his submissions in support of this appeal.

The Complainant's evidence was that he and PW2 one **IRUNGU** were walking home at midnight on 16th June 2002 when they met 8 people. They said that one had a panga. He was identified as the Appellant. The Appellant immediately set on the Complainant fracturing his finger. Both the Complainant and PW2 escaped. They reported to Police the next day. The Appellant was arrested on 11th November 2003 which was 1 year and 5 months after the offence. The Complainant was examined by a Doctor 1 year, 5 months and 17 days after the incident. In his defence, all the Appellant stated was that he knew nothing about the offence.

In his filed petition and grounds of appeal, the Appellant challenged the conviction on the evidence of recognition which he claimed was not authentic and in any event not supported by a first report. He also challenged the evidence of lighting at the scene of alleged offence which he stated was not descriptive enough as to give the intensity, nature of light and distance from the Appellant and finally challenged the rejection of his defence without due consideration.

Miss Gateru learned State Counsel appeared for the State and opposed the appeal. Learned Counsel submitted that the Complainant recognized the Appellant as he knew him for 8 years, because the area where the incident occurred was well lit. I have carefully analyzed and evaluated the evidence adduced before the trial court. Nowhere did the Complainant who was PW1, talk about any form of lighting at the scene of incident. The Complainant was clear that it was midnight and therefore dark being at night. He did not mention any light in his evidence. PW2 on the other hand in regard to lighting conditions at the scene of incident merely states; "**That place was light (sic).**" With due respect to the learned trial magistrate, she ought to have inquired further just what PW2 meant by "**That place was light**" and ought to have taken a proper description of the lighting conditions. As it were, from both the Complainant and PW2, there was no evidence of the presence and or intensity of the light which both claim enabled them

to identify the Appellant.

There are more disturbing issues in this case. Why was the Appellant arrested 1 year 5 months after the alleged offence? There was no explanation given except PW3 in passing who said that the Appellant had been hiding. That cannot be true because PW2 met with the Appellant the very next day. Since PW2 had recognized him according to his evidence, the question is; why did he not arrest him or cause his arrest? PW3 did not say when the report of this offence was made to the Police a matter which was quite important to this case. There were more disturbing issues, the examination by the doctor long after the Appellant's arrest. That delay ought to have been explained as well. The absence of any evidence from the Police of the nature and date of the Complaint made to them by the Complainant leaves serious questions beckoning for answers. The delay is inordinate, it ought to have been explained. What was the cause of the delay? Could it be that the Appellant was not identified cum recognized on the date of the alleged offence but was connected later due to other circumstances? All these are possibilities and are material facts, which render the credibility of prosecution witnesses questionable. See **NDUNGU KIMANI VS. REPUBLIC** where it was held as follows: -

“...The witnesses upon whose evidence is proposed to rely upon should not create an impression in the mind of the Court that he is not a straight forward person or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence...”

Even without considering other issues raised by the Appellant, on account of lack of evidence as to the lighting conditions at the scene of crime, the lack of evidence in form of explanations for the inordinate delay in having the Appellant arrested and in having the Complainant examined by the doctor, I am convinced that the prosecution did not prove its case to the required standard.

Consequently, the conviction entered herein was wholly unsafe. I allow the appeal quash the conviction and set aside the sentence. The Appellant should be set free unless otherwise lawfully held.

Dated at Nairobi this 29th day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant present

Miss Gateru for the State

Wambui – Court clerk

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LESIIT, J.

JUDGE