



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 228 of 2001

JOSEPH KIMANI MUGITA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being Appeal against Convict And Sentence of P. Mwangulu, District Magistrate I, In the District Magistrate's Criminal Case No. 31 of 2001, Kigumo)

JUDGMENT

The Appellant was charged with Robbery contrary to *Section 296(1)* of the Penal Code it being alleged that he robbed Sh.5000/- from David Gichia Kabiu using violence on 9th December 2000 at Githumu Village.

P.W.1 John Kimani who said was a clinical officer at Kigumo Health Centre was not the one who had treated the Complainant on 9th December 2000 and it is not made clear in the evidence why the person who treated the Complainant on 9th December could not fill the P.3.

According to P.W.1 therefore he relied on a note from “Githumu” which contained the injuries the Complainant had sustained. It is not clear from P.W.1, what “Githumu” was. Was it Githumu Hospital or Githumu Police Station? P.W.1 saw more injuries in the said note than the injuries the Complainant and the trial magistrate talked about. But despite all that, the degree of injury, according to P.W.1, was “harm”. In fact the Complainant had been treated and discharged same night. P.W.1 having told the court he saw the Complainant on 14th February 2001 went on to talk about the date 29th January 2000 at 9.00 p.m. when the Complainant was receiving treatment at Githumu Hospital. On the whole, I find his evidence unreliable.

P.W.3 Police Constable Peter Waweru received report of the alleged robbery from the Complainant on 9th December 2000 about 9.00 p.m. at Githumu Police Station. According to this witness, the scene of crime was lit from a bulb from a hotel. That is not elaborated – which hotel it was, how far from the scene and how bright the light was and whether the scene was actually lit at the time the crime was committed.

The Complainant did not talk of any light until he was asked by the court at the close of his evidence and he simply replied:

“There was electric light.”

The Appellant told the court there had been power black out. P.W.3 had not been at the scene at the time of the alleged attack and did not know such an attack was taking place.

P.W.4 Njuguna Ng'ang'a, a friend of the Complainant who told the court that acting on information that the Complainant had been seriously beaten, he went where the Complainant was. He claimed he found the Complainant with many people and he talked as if a number of those people, including him, took the Complainant to hospital via Githumu Police Station. But from the defence of the Appellant, it would appear as if P.W.4 was the only person who was escorting the Complainant to hospital via the Police Station. The Appellant talked of having found the Complainant with an old man.

The evidence of P.W.4 is significant on the point that all that time he was with the Complainant, taking the Complainant to the Police Station, to the hospital and thereafter home, P.W.4 "did not hear anything having been stolen from" the Complainant. P.W.4 went on to say during cross-examination:

"The Complainant said he had been beaten by Kimani Gachago.-----I did not know that you were the one who had assaulted the Complainant."

The name of the Appellant is Joseph Kimani Mugita and nowhere in the proceedings is it shown that he is the same person known as Kimani Gachago.

However, from the evidence of the Complainant and P.W.4 as well as the Appellant's defence, there is no doubt that the Appellant found the Complainant and P.W.4 on their way to hospital via the Police Station and offered some advice which was not acceptable to the Complainant and P.W.4. The Appellant left them alone.

Those were the only prosecution witnesses. As to the connection of the Appellant to the offence therefore, the court has the evidence of a single witness – the Complainant who was P.W.2. The two were people who knew each other and although the Complainant does not say it, what the Appellant told the court suggests that the two are people who have had some dealings. The Appellant talked of the Complainant's cow having eaten the Appellant's nappier grass which had been bought by an old man who as a result demanded from the Appellant refund of the money the old man had paid for the nappier grass. The evening of 9th December 2000 the Complainant and the Appellant met at a bar at their local Githumu Trading Centre. Both took some beer and the Complainant left earlier at about 8.00p.m. before the Appellant left at about 9.00 p.m. They seem to have been friendly.

The Complainant told the court that as he passed a corridor, he found a person standing beside the corridor. He claims to have identified him as "Kimani Mugita" the Appellant. But that name or any other for the attacker may have come to be mentioned after report of the incident to the Police as during the trial there was no keenness in bringing out important details in the evidence adduced. How far apart were the two men and why does there appear to have been no talking between the two who knew each other so well if the Complainant recognized the Appellant? It was at night yet the Complainant could not talk of any light until the trial magistrate asked him specifically about light. The response. Four short words with no elaboration. But the issue of light was a very crucial one in the trial since the offence is alleged to have been committed at night and four short words only on that important issue are not enough.

If what the Appellant said is truth, and he appears to be truthful, there was power black out at least for some time. Could the attack not to have taken place at that time? The Complainant who was silent about light until the court questioned him, similarly was silent about his activities with the Appellant including the fact that they had been taking beer in one bar at the Trading Centre. He could not therefore say whether they had left the bar together or one left before the other. Was the corridor at the Trading Centre?

The Appellant told the court he left the bar after the Complainant had left but he found the Complainant with an old man, probably P.W.4, on the way and that was after the Complainant had been injured. Evidence does not say it, but apparently the Appellant was following the two and was therefore coming from the direction where the scene of the injuries on the Complainant was. On learning of the

condition of the Complainant and what had happened, he offered some advice and assistance, but the offer was not accepted, not necessarily because the Appellant had been recognized as the Complainant's attacker but simply because the Complainant and P.W.4 thought their idea was better than the idea of the Appellant who as a result left the two alone. The Appellant had suggested that the Complainant be taken to hospital before going to the Police Station and had offered assistance in payment of hospital fees.

Somehow thereafter some wise counsel seems to have come up lining the Appellant as a suspect and it has not been explained why he was not arrested at the time he was advising that the Complainant be taken to hospital first. According to the Complainant's evidence, there were other people apart from P.W.4. Those people ought to have apprehended the Appellant there and then if what the Complainant is saying is truth. Otherwise the fact that the Appellant could be with them at that stage suggests his innocence. Added to that is the fact that the Appellant, a local man, was not arrested until 22nd. There is no convincing evidence that he had disappeared.

From what I have said above therefore, the conviction of the Appellant was not sustainable as the evidence was inadequate – and raised doubts. Accordingly, the Appellant's appeal is hereby allowed. His conviction quashed and the sentence imposed upon him set aside. The Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 28th day f February 2005.

J. M. KHAMONI

JUDGE