

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 389 of 2002

LUCAS MBURU NDUNGU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the judgment of P. Mwangulu, District Magistrate I, In Criminal Case No. 1030 of 2001 of the Resident Magistrate's Court at Kagumo)

JUDGMENT

The Appellant was charged with the offence of Robbery contrary to *Section 296(1)* of the Penal Code, it being alleged that on the night of 16th to 17th September 2001 at Heho Trading Centre the Appellant robbed Elias Mungai Ndungu of Ksh.5000 and a hat valued at Ksh.500/=.

That is a serious offence requiring clear and strong evidence proving the prosecution's case beyond reasonable doubt.

Only the complainant Elias Mungai Ndungu, P.W.1, and Margaret Mwikali, P.W.2, gave evidence relating to the alleged robbery. From P.W.1 he first told the court that he was the first person to go out and at the end he said he was the last person to go out. He would speak as if there were no other people in the unnamed bar and sometimes as if there were other people in the bar. If they were there and the Appellant ordered everyone of them to go out, that was a big and annoying event the said customers having been disturbed before they finished the beers they had paid for and in those circumstances P.W.1 could not have had P.W.2 only supporting his evidence in court. P.W.2 was a bar maid who obviously did not see the Complainant's hat being taken and must not have been the waiter the Complainant claims to have informed that he (complainant) had been beaten and robbed.

From the evidence of P.W.2, nobody else except the Complainant, was disturbed in the bar and P.W.2 seems to have been seeing the events not exactly the same way the Complainant was seeing them. Yet P.W.2 claimed she was in the bar serving. She appears to be a witness who only went to court to say what she had been told to say.

In any case, in relation to the robbery of the hat, the court had the evidence of the Complainant only. In relation to the robbery of Ksh.5000/=, the court also had the evidence of the Complainant only. P.W.2 saw neither.

P.W.3 John Njaramba Gitau's evidence had nothing to do with the alleged robbery. In any case he told the court he arrested the Appellant at about 7.00 a.m. on 17th September 2001. The alleged robbery is said to have taken place at about 8.00 p.m. on 16th September 2001. The A. P. from Muthithi Chief's camp to whom P.W.3 handed the Appellant did not give evidence. Instead P.W.4 to whom the A.P. handed the Appellant is the one who gave evidence talking as if the Appellant had been arrested by P.W.3 for robbery yet that was not the case.

That was the only evidence by the prosecution and that evidence, even without the alibi defence advanced by the Appellant, cannot sustain a conviction, the reliability of the Complainant not having been manifested in his evidence on record. Otherwise what was there was evidence of a single witness on the

crucial issue of robbery. A single witness, the Complainant, whose reliability is in doubt.

The Appellant should not have been convicted. Accordingly, I do hereby allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. I order the Appellant be released forthwith unless lawfully detained in some other cause.

Dated at Nyeri this 28th day of February 2005.

J. M. KHAMONI

JUDGE