REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 398 OF 1999

SIMON GAKUMU MUTAHI…….APPELLANT

Versus

REPUBLIC…….RESPONDENT

(Being an appeal from the judgment of N. Kimani, Senior Resident Magistrate, dated 12th February 1999, in the Chief Magistrate's Court at Nyeri, Criminal Case No. 1971 of 1998)

JUDGMENT

The Appellant was charged with robbery with violence contrary to Section 296(2) of the Penal Code, particulars alleging that on the 14th day of November 1998 at Kihuyo Village, Nyeri District the Appellant, jointly with another not before court, and being armed with dangerous weapons, namely an iron bar, a rungu and a Somali Sword, robbed John Maina Wanjohi of cash Ksh.5,200/= and at or immediately after the time of such robbery wounded John Maina Wanjohi.

The Prosecution's case was that the Complainant, John Maina Wanjohi, while in the company of P.W.2, Charles Gitau Nguyo, who was carrying a carton full of shop goods, were on 14th November 1998 at about 6.00 p.m. walking to the Complainant's home when they were stopped by two other men who robbed from the Complainant, P.W.1, Ksh.5,200/= and escaped. After that P.W.2, an employee of the Complainant's mother, took the Complainant to the Complainant's home. That evidence suggests that although the Complainant was injured on the forehead, he was not so seriously injured as to be unable to walk from the scene of the offence to his home. But from that stage, the evidence changes to be that concerning a person who was seriously injured; so that while at home, the Complainant just found himself at Nyeri Nursing Home admitted and he recorded his statement at the hospital.

The Complainant himself said that. Neither the Complainant nor P.W.2 said that the Complainant became unconscious. But P.W.4, Police Constable David Kubabi claimed during cross-examination that the Complainant was unconscious. P.W.4 seems to have said that without remembering he had said in his evidence in chief that the Complainant was the one who went to him at the C.I.D. office Nyeri,only a short while after the alleged robbery, and reported to him that he (the Complainant) had been assaulted by the Appellant. Having changed to say that the Complainant was unconscious, P.W.4 did not tell the court the person who reported the matter to him. The evidence of the Complainant and that of P.W.2 is silent on the identity of the person who reported this case to the Police. Throughout the Prosecution's case therefore, there is no identity of the person who made that report.

But whoever he may have been or if he was the Complainant, the report was that of an assault and not a robbery. After the Appellant had been arrested, he was charged with robbery and prosecuted for robbery

which the learned trial magistrate did not find to have been there. He convicted the Appellant of assault and the following were some of the short-comings:

Firstly, from the evidence of P.W.1, the Complainant, and the evidence of P.W.2, the two Prosecution witnesses claimed to have been at the alleged robbery, the evidence is not consistent how the alleged robbers came to be at the scene. Part of that evidence is that the robbers came from the bush while the other part of that evidence is that the robbers were walking from the front along the pathway on which P.W.1 and P.W.2 were when they met with P.W.1 and P.W.2.

Secondly, the robbers are said to have been armed with dangerous weapons namely an iron bar, a rungu and a Somali Sword. That is what particulars of the charge allege. It means there was only one item of each one of the named weapons. There were two alleged assailants. From the evidence of P.W.1, he saw all the three types of the mentioned weapons. But while he claimed that the Appellant was armed with each item of the three weapons, the same P.W.1 who was the Complainant, did not say whether or not the second robber was armed with any of those weapons.

But the Complainant was together with P.W.2 who told the court that the Appellant was armed with an iron bar and a rungu only. He said that the second robber was armed with another rungu. It means that there were two rungus contrary to the single rungu found in particulars of the charge and also contrary to the apparently single rungu found in the evidence of the Complainant. It further means that there was no Somali Sword as put in particulars of the charge and in the evidence of the Complainant. It also means that if there is evidence to say that the second robber was in any way armed with a dangerous weapon, then the particulars in the charge cannot be correct.

Thirdly, inconsistencies in the evidence of P.W.4 who was the arresting and investigating officer. On 14th September 1998 at about 8.40 p.m. he recorded a report of an assault at the time:

“Complainant was brought to the station seriously injured. He said he had been attacked by accused person and another not in court and robbed of 5,200/=”. Later at the end of his cross-examination “The Complainant was unconscious by then.”

At the end P.W.4 decided that the Appellant be charged with robbery with violence and therefore, fourthly, got the misleading evidence of P.W.3 to try and strengthen that charge. As a result, PW.3 spoke of things he had not done as if he had done them as follows:

“I am Dr. John Pius Okullo from Nyeri P.G.H. On 11.12.98 I examined one John Maina Wanjohi upon request of D.C.I.O. Nyeri who was allegedly assaulted on 14.11.98. His clothes were soiled and blood stained. He was unconscious when he was brought to the hospital.

There was----------on the left side of the head and two stab wounds on the forehead. There was a dip cut on the upper lip. There were fractures on the right part of the head upon X-ray and a fracture at the back of the head.

Age of these injuries was within half hour. Both sharp and blunt objects have been used to occasion these injuries. He was admitted for 13 days, and treated accordingly. Degree of injury was Grievous Harm.”

Not only was that evidence misleading; it was also inconsistent. This witness saw the Complainant on 11th December 1998 only and that was only for the purpose of filling a P3 for the Complainant. He was not entitled to talk the way he talked in the court conducting himself as if he himself, for example, had seen grievous harm upon the Complainant. Moreover, the Complainant and P.W.2 never talked of the several injuries P.W.3 came to talk about. According to the evidence from the Occurrence Book as produced by D.W.3, Chief Inspector Ernest Oponyo the then O.C.S. Nyeri Police Station, entry OB63 was an assault report. No evidence was adduced before the trial magistrate to show that there was another entry, relevant in this matter, showing grievous harm or robbery. A robbery alleged to have been, purportedly, aimed at the unseen money the Complainant had confidentially hidden in a wallet in a coat pocket without the same robbers apparently seeing anything of value in the carton of shop goods P.W.2 is

said to have been conspicuously carrying. No robber touched him and his goods, let alone scratching him.

The Appellant in his sworn defence denied the offence pointing out that there was no truth in the prosecution's case because what happened was an encounter between the Complainant and the Appellant, the two of them without the presence of any other person. The encounter occurred because of a grudge the Complainant had against the Appellant arising from their local differences which had resulted into two criminal cases one against the Complainant's mother jointly with a brother of the Complainant and the Second Criminal Case against the Complainant. In each criminal case, the Appellant was the Complainant. The Appellant called three witnesses, one of them producing the relevant court case files being Nyeri S.P.M Criminal Case No. 883/98 and criminal case No. 1038/98. The Appellant told the court that in each criminal case he had been the Complainant in his capacity as Vice Chairman of Kihuyo Catholic Church and secretary to Kihuyo Water Project. While the first case was dismissed because witnesses were not present in court, the accused in the second case was found guilty, convicted and fined Sh.5000/=.

The Appellant said that as a result of the two criminal cases, his relationship with the Complainant became bad. The fine was imposed in September 1998 and it was only in November 1998 that this case arose. The Appellant said that the Complainant waylaid him near home on that 14th November 1998 at about 6.40 p.m. as the Appellant was going to his home near Mutahi's farm. The Appellant said of the Complainant:

"He told I have been hiding and I could see them that time. He told me the 5000/= fine he paid I had to refund him. I told him I did not pocket that 5000/=. He was alone by then. I was also alone. He hit me on the forehead with as stick and also on the hand. I managed to get hold of that stick. We struggled and we both fell down. He released the stick to me and he ran away I also ran away towards Kihuyo as he ran towards his home. I went to Major Seminary Patrol Base and reported that Complainant had assaulted me on the hand and fore head, I was issued with a note to attend treatment. This is the treatment card from Nyeri P.G.H.".

The Appellant said his wife was arrested by Police on that 14th November 1998 evening and released at 7.00 p.m. on 15th November 1998 at Nyeri Police Station following the incident and that he himself was arrested on 17th November 1998 and subsequently charged with the offence in this matter. The treatment note he had got from Major Seminary Patrol Base was taken by the Police at Nyeri Police Station and he could not obtain a P3 form. He produced his treatment card.

The Appellant added that the Complainant had a stick and that it was the one produced in court as a Prosecution exhibit. He explained that having wrestled the stick from the Complainant, the Appellant had gone with it to his home and kept it there and gave it to the Police who went with him to his home. P.W.4 said he recovered a walking stick and an iron rod. He was not made to explain why he took possession of an iron rod from the house of the Appellant.

The foregoing is the position in this case the Appellant having also told the court that when the Complainant's mother and Complainant's brother who were jointly charged in criminal case No. 883/98 for destroying a Community Water tank valued at over Ksh.700,000/= and when that case was dismissed as aforesaid, they said together with the Complainant that they could destroy the Appellant like that tank. He added:

"Later Complainant and his brother threatened to kill me."

Perhaps that briefly explains the background to this case.

We hold the view that the story as given by the Appellant in his defence is consistent and credible unlike the inconsistent, sometimes contradictory, exaggerated, misleading and therefore difficult to believe story given by the prosecution. The learned trial Magistrate having disbelieved the Prosecution's case alleging robbery with violence, there was no evidence to sustain a conviction of assault – and in our view the Appellant ought not to have been convicted.

Accordingly, we do hereby allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. We order the fine, if paid, to be refunded to the Appellant.

Dated this 6th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE