

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.605 OF 1998
(FROM ORIGINAL CONVICTION AND SENTENCE IN CASE NO.1125
OF 1997 OF THE SENIOR RESIDENT MAGISTRATE’S COURT AT
THIKA)

GEORGE KINYANJUI NGANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

George Kinyanjui Nganga (the appellant) has appealed against his conviction on 12th March, 1998 by the Senior Resident Magistrate, Thika, for the offence of Common assault contrary to Section 250 of the Penal Code, which he was not charged with but which the trial magistrate, pursuant to the provisions of Section 179(2) of the Criminal Procedure Code, thought had been proved by the prosecution. The appellant had been charged with Grievous Harm Contrary to Section 234 of the Penal Code in that on the 17th December, 1996 at Igegania Village, Thika, he unlawfully did grievous harm to Cecilia Nduta Kabaya (PW 1).

It is provided in Section 179(2) of the Criminal Procedure Code that, when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it. As Mr. Mwaniki, advocate acting for the appellant, submitted, the prosecution is still required to prove on the required standard of beyond reasonable doubt, facts which reduce the offence charged to minor offence.

The onus lay on the prosecution to prove on the required standard an essential ingredient of the offence of common assault contrary to Section 250 of the Penal Code, namely: that the complainant was assaulted unlawfully. It is Mr. Mwaniki’s submission that this was not proved at all.

I have reviewed the complainant’s evidence and I note the following: the complainant arrived at Igegania Shopping Centre from Nairobi on 17th December, 1996 at 5 p.m. She met with Mrs. Mugwe who was arranging for a wedding and the two ladies entered into a bar to drink beer as they talked. The complainant drunk tusker beer upto 9.30 p.m. and then left for her home, one kilometre away. She said she had a torch and there was moonlight. Meaning she could see her way through.

Upon arrival at her gate she said she was shot with a gun on her left arm, which was fractured by the appellant whom she recognised as her nephew. She bled profusely and screamed. She said that the appellant started running away but she ran after him until he entered into a waiting car and was driving away.

The complainant then testified that she went for assistance at a neighbour’s home. Mr. Kamau, owner of that home received her, the wound was dressed and the fractured arm was tied with a lessu but she declined to be taken to Hospital. Her testimony was that she did not tell Mr. Kamau the names of the person who had shot her. Mr. Kamau was also not called to give evidence.

Next morning the complainant said she sent for the Assistant Chief, to whom she made this report of attack. She however, did not also give him the names of the person who had shot her. The said Assistant Chief was also not called to give evidence in the trial court.

The complainant was taken to Gatundu Hospital, from where she was referred to Kenyatta National Hospital. Her husband facilitated her admission into Kenyatta National Hospital where the fractured arm

was XRayed and put in plaster. Again, the complainant did not tell her husband the names of her attacker and he also was not called to testify.

After her discharge from Hospital the complainant recorded a police statement but did not again name her attacker. She recorded a further statement three months later. It was then that she named the appellant as the person who had shot her. When asked why she failed to name the appellant all through, she said that she knew the father of the appellant's co-accused as a dangerous criminal whom she feared. The trial magistrate accepted her explanation.

IP Ngotho (PW 2) of the CID Thika received a report of this shooting the next day (18th December 1996). He visited the scene but did not find any empty cartridges.

No medical evidence was also adduced by the Prosecution. Taking in to account all the aforesaid matters, I am in total agreement with Mr. Mwaniki that the conviction of the appellant was unsafe and I hereby quash it. I set aside the sentence (fine of Shs.6000). I order that this money (Shs.6000) if paid by the appellant be refunded to him forthwith. It is so ordered.

Dated and delivered this 5th July, 2001.

A.G.A. ETYANG'

JUDGE