

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

crim app 636 of 82

CHRISTOPHER MUTHOKA MUSOVIA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CORAM: PORTER, AG J

Ndeto Mututo for Appellant absent,

J Momanyi Bwonwonga (Senior State Counsel) for Respondent

JUDGEMENT

The appellant was convicted by the District Magistrate II at Kitui for He was convicted of the crime and sentenced to a fine of shs 1,500 in default to serve 6 months imprisonment. Then the learned District Magistrate refused an application for time to pay. I understand from the appellants advocate that he was committed for a short time and later paid the fine.

This case arose after an argument between the assistant chief of Siomunyo sub-location in Nyatta Location, and the appellant who was stated to be a private process server. It happened in a bar Kavisuni market when the assistant chief was drinking in a rear room and the appellant was sitting on veranda of the same bar with two of his wives and some other people. There is no dispute that there was a struggle between them and as a result of that struggle the complainant finished up with a cut on his right upper eye 1 1/2 cm by 1/2 cm caused according to the evidence of the doctor by "metal (sic) or a fist. The appellant finished up with a big lacerated would on the left temporal region, bruises on her arm. Both the parties the complainant and the appellant reported to the police.

The complainant seems to have done it the day after. The police seem to have not made up their mind to charge anyone until August 1982 some 6 months after the event. The advocate for appellant has made a great deal of the fact that police have not proceeded with the report of the appellant. I cannot see much in his argument. As I understand if this is a cross complaint of assault.

And the police appear as a result of what seems to be the extremely long investigation particularly in such a minor case as this to have decided to proceed with the complaint of the complainant. Where I think the advocate of the appellant has made a point is that it is quite clear from the evidence of P W 4 particularly in cross examination that he was somewhat surprised that it was the appellant who was prosecuted.

The issue in this case really has little to do with the actual fight. What the complainant said was as he was coming from the back room to go to the toilet the appellant stood up and came towards him and asked him why he had arrested his wife with traditional liquor and hit him twice in the face, where they fell down, and started to struggle.

What the appellant said was that the complainant came from the back room drunk and indecently assaulted the appellant's wife by touching her on the right breast, after having made a nuisance of himself with her on 3 previous occasions on that day in the bar. According to P W 2, the appellant's wife, the complainant told her that she was a prostitute and then the appellant stood up and started to interfere and the fight started. There is no doubt that if the appellant's evidence is accepted it would amount to a reasonable defence for assault on the basis of defence of his wife and that was the real issue in this case.

The prosecution called a witness supporting the complainant who told a rather different story to the complainant in saying that they had a conversation and a few minutes after the conversation he saw the appellant hit the complainant. It seems that witness has missed out something of what happened before the fight started. The appellant called his wife who confirmed his story.

There are a number of odd things in this case. It was the case of the complainant that he had arrested the wife of the appellant with traditional liquor. It was clearly made an issue by the defence and could have been solved as had been suggested by the advocate for the appellant in the most simple way. No one seems to have troubled to obtain the file or a certified copy of the conviction of the wife of the appellant in order to support the story of the complainant. Then again looking at the evidence as a whole I can see no way in which the account of the complainant. Then again looking at the evidence as a whole I can see no way in which the account of the complainant gives any good reason for the presence of the bruise on the arm of the appellant's wife while the appellant's story says how that happened.

State counsel does not support this conviction on the basis but the evidence provided by the prosecution and the defence was unreliable on both sides for reasons he has set out in his submission. He has also pointed out that neither side was really called all the evidence which he could have done and that in the circumstances this was a case for reconciliation case under the section 176 of Criminal Procedure Code.

Having considered all the evidence myself I notice that State Counsel the advocate for the appellant and myself all have reasons to be dissatisfied with this judgment. It seems to me that there was a reasonable doubt in this case and that the prosecution's evidence was unsatisfactory. The learned district Magistrate should have given the benefit of doubt to the appellant. In the circumstances this appeal will be allowed, the conviction quashed and sentence set aside. If the fine is paid as I have been informed it may be repaid to the appellant.

D C PORTER

AG JUDGE

24/2/83