



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 60 OF 1981

BETWEEN

1. LEORNARD KAHARA RAGUI

2. LABAN KARANJA DANIEL

3. DAVID DUBE KARANJA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

JUDGMENT

These three appellants are appealing against the summary rejection of their appeals by the High Court under Section 352(2) of the Criminal Procedure Code against their convictions in the Senior Resident Magistrate's court, Kiambu, for doing grievous harm to one Ngua, contrary to Section 234 of the Penal Code.

On the night of April 15, 1979, Ngua gave a lift to two girls from the General Post Office to Uthiro village where they lived. They showed him their house as well as the house of one Dube where there had been a robbery the previous evening. Ngua told them he knew Dube as a friend.

Ngua said in his evidence that when he put his lights full on to turn his car in Dube's compound he saw some people coming towards him; when they reached him the second and third appellants pulled him out of the car. The second appellant asked him who he was and began to beat him, and told the third appellant to go and fetch his simi. The third appellant disappeared. One of the girls shouted that Ngua had brought them from Nairobi and he was a friend of Dube. The second appellant took Ngua into Dube's house. Dube was not available. Mrs Dube denied knowing Ngua.

The second appellant brought Ngua out of Dube's house. Ngua said he saw the third appellant and another person outside. They started to beat him. Ngua said:-

“I ran towards a building and then somebody appeared with a panga ... He cut my arm breaking it ... I was being attacked by about four people.”

Thereafter Ngua's evidence-in-chief continued for a considerable length until his very last and solitary statement:

“It was the first accused (pointed out) who came with a panga and cut me.”

Without there being any prior or further mention of the 1st appellant in his cross-examination he said again:

“Second accused was with third accused ... when second and third accused approached me I was still in my car. Third accused got hold of me and pulled me out of the vehicle ... second accused beat me up. Third accused went for a simi.”

Ngua was the only prosecution witness who spoke as we have quoted him. All three applicants gave evidence on oath. They all denied having cut Ngua. They said there were many people there. The second appellant also said he hit Ngua who hit him first when he tried to escape after he was brought out of Dube’s house by him. The third appellant who is a son of the second, appellant added that he was arrested together with one Mugane because Ngua told the police that Mugane had cut him and the third appellant had beaten him. Mugane was later released by the police. Mugane confirmed this in his evidence.

The learned magistrate appreciated that the evidence in support of the charge was that of Ngua only. It was, however, incorrect to think as the learned magistrate did, that there could be no independent evidence because it was a case of one man against the members of one family in particular when many people were said to have been present at the scene. Neither of the two girls was a witness although it was known where, they lived. The absence of independent evidence would not necessarily make a conviction unsustainable but it ought to make the court feel doubly wary.

An analysis of the evidence in the case leads us to the following unavoidable findings. Ngua did not claim that the first appellant was present among the people who were coming towards his car when he switched on his lights. The third appellant disappeared presumably to fetch the second appellant’s simi on the order of his father. When Ngua was brought out of Dube’s house he only saw the third appellant and another man outside. Who was the other man with the third appellant? He remained a mystery.

Ngua did not claim that the third appellant brought a simi which he handed to the second appellant or the first appellant or to anyone else at all or even that the third appellant used a simi himself. When Ngua was brought out of Dube’s house the first appellant was not there, and the second and third appellants who were there were not armed with a simi. Ngua originally did not name the first appellant as the one who cut him, he, said somebody who appeared with a panga cut him. Also originally his complaint to the police was that he was cut by Mugane, not the first appellant. But in Court Ngua accused the first appellant of having cut him.

The learned magistrate said there was mob justice, and it was important to look at the facts to determine whether it was a reasonable assumption that Ngua was mistaken for a thief. Of course, grievous harm can at no time be justified or excused on that pretext.

It was also night time. While the grievous harm caused to the complainant was in no way justified, it cannot be safely ruled out that anyone of the many persons who were involved in the melee may have cut Ngua who himself said he was attacked by about four people.

State Counsel submitted that under Section 361 of the Criminal Procedure Code a second appeal lies on a matter of law. It is a matter of law whether the first appeal was properly rejected summarily.

We allow these appeals, quash the convictions and set aside the sentences of all three appellants. They must be set at liberty.

Order accordingly.

As **Miller** and **Potter JJA** agree it is so ordered.

Dated and Delivered at Nairobi this 16th day of September 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the
original.

DEPUTY REGISTRAR