



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 312 of 2008

DAVID NGURU KINYUAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 22nd May, 2008

in

H.C.CR.A. NO. 132 OF 2005)

JUDGMENT OF THE COURT

On 21st April, 2005, a Senior Resident Magistrate at Nanyuki convicted **David Nguru Kinyua**, the appellant herein, on one count of robbery with violence contrary to **section 296 (2)** of the Penal Code. The Magistrate then proceeded to sentence the appellant to death. The particulars of the charge on which he was so convicted and sentenced were that on 24th September, 2004, at Nyaringino Nanyuki area in Laikipia District of the Rift Valley Province, with another not before the court the appellant robbed **Peter Marunga Kinyua** of cash Shs.2,230/= and one jacket valued at Shs.300/= and that at or immediately before or immediately after the time of the robbery the appellant used actual violence to the said **Peter Marunga Kinyua**. The appellant appealed against his conviction and sentence to the superior court; that court, (Kasango & Makhandia, JJ.) by its judgment dated and delivered at Nyeri on 22nd May, 2008, dismissed the appeal against the conviction and confirmed the sentence of death. The appellant now comes to this Court by way of a second appeal, and that being the position, only matters of law can be considered by the Court - see **section 361 (1)** of the Criminal Procedure Code.

There was only one eye-witness to the robbery, namely **Peter Mwangi Kinyua** (Peter - PW1) who is also described in the charge-sheet as **Peter Marunga Kinyua**. Peter swore he was alone in his house at 9 p.m. on 24th September, 2004; he was sitting on a chair and the room was lit by a hurricane lamp. In his evidence in court Peter stated the appellant alone entered his house and since the appellant was a person well known to him, Peter immediately recognized him. The appellant had a rungu and he hit Peter on the head with the rungu. The appellant then demanded to be given money as Peter had sold cabbages. When Peter told the appellant that he had no money, the appellant produced a knife from his pocket and cut Peter with it on one of his fingers. The appellant then took Peter's jacket which had Shs.2,230/=. Peter screamed and neighbours came but by then the appellant had disappeared. None of the neighbours who responded to Peter's cries for help came to testify in court. Peter went and reported the matter to **Pc. Julius Mbui** (P.W.3), at Ngarengiro Police Post; the report was made there on 25th September, 2004 at 9

a.m. According to **Pc. Julius**, Peter reported that he had been attacked by two persons, but only managed to recognize the appellant. The appellant was arrested on 27th September, 2004 and on 28th September, 2004 Peter was issued with a P3 form in which Pc. Julius recorded that:

“The complainant alleged to have been robbed and being assaulted by some people well known to him, please examine him.”

Peter had reported the incident on 25th September, 2004; it is not clear from the evidence what happened after he made the report i.e whether Peter went to seek medical assistance for the injuries which he said had been inflicted on his head with the use of a rungu and on his hand by the use of a knife.

A clinical officer at Nanyuki Hospital, one **Stephen Gitahi** (P.W.4) gave evidence regarding the medical condition of the appellant. His evidence, as recorded by the Magistrate is as follows: -

“..... I recall on 24/2/05. I examined one Peter Maringa Kinyua who alleged to have been assaulted by people well known to him. He had changed his clothes. He complained of a cut on the third finger. On examination, the said Peter Maringa (complainant) had a cut wound on the third finger of the right hand. The age of injuries was five days. A sharp object caused the injuries. He was treated. I assessed the degree of injury as harm. I completed and signed the P3 Form and I wish to produce it as an exhibit P3 Form P. Exhibit No.2.”

In cross examination the witness said:-

“I examined the complainant. The complainant gave me the history. He had a cut wound on the third right finger. The complainant was treated. The cut could be occasioned by a sharp object but I cannot tell exactly what the weapon was. I completed the P3 Form. The complainant had a treatment note. The complainant never told me what cut him.”

It is clear from the evidence of the clinical officer that he was not the first person to attend to Peter when the latter first visited the hospital. Peter said he reported to the police on 25th September, 2004 and after that he went to the hospital. The clinical officer spoke of treatment notes which he apparently used to complete the P3 Form on 24th February, 2005 but he did not say who had made those notes and did not offer to produce the notes. But the clinical officer was saying that when he examined the appellant the injury on his hand was five days old. That could not possibly be correct. The treatment notes, if they had been produced, would have shown the date on which Peter was first examined at the hospital and that would have confirmed the age of the injury on the finger as at the time when Peter was first examined. On 24th February, 2005 when the clinical officer was examining him, the injury would have been some five months old. Peter also alleged the appellant had hit him on the head with a rungu. No such injury is mentioned in the P3 Form. We stress these points because the appellant's case in the Magistrate's court was that Peter was framing him up on the charge. The trial Magistrate and the learned Judges on first appeal did not specifically address these issues. Who was the first medical person to see Peter and when did that take place? Why were the medical notes not produced? Why was there no mention of the alleged injury on the head caused by the rungu? We are not in a position to conclude that if the two courts below had addressed these points, they would still have come to the conclusion that the prosecution had proved its charge against the appellant beyond a doubt that was reasonable. We must now give the appellant the benefit of doubt on those issues.

Accordingly, we allow this appeal, quash the conviction recorded against the appellant, set aside the sentence that he is currently serving and order that he be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nyeri this 6th day of November, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR