



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 57 OF 1994

MICHAEL WACHIRA KIMANI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

In brief the evidence of the lower court was that the complainant and two of his companions were coming from a beer hall, as they walked home the complainant stopped to answer a call of nature. He was attacked and hit on the eye. He fell screaming. His two colleagues came to his assistance and the assailant ran away.

They all identified this said assailant as having the appellant. One of them in fact lit a match and was able to recognise the appellant who then ran away.

All three admitted they were drinking at a beer hall prior to walking home.

The appellant denied the allegations but did admit that he was in the same bar and were drinking beer. It was he who first left the bar and the other three followed him. The appellant went home. He was called the following day to see an injured person. He went and noted the complainant was injured. It was he and another who actually took the complainant to hospital. There was no mention then who attacked him.

No mention of the accused being involved was made. They were all drunk.

It is definitely not disputed that the complainant was attacked and sustained serious injuries. The question that arises is whether the assailant was the appellant.

The police received information from the complainant that it was the appellant - all they did was to await the appellant but carried no further investigations as to MOTIVE. What was the motive for the complainant to be attacked by the appellant? It was without a doubt that the complainant and his colleagues were all very drunk. Admittedly the accused may well have been drunk.

Looking at their evidence the complainant stated the appellant came from behind asking whether he was known to the complainant. He was then hit for no reason on the left eye, then heard him long interrogated and ran away.

The second witnesses story was that he actually saw the appellant but the complainant and his colleagues whilst his colleagues saw the accused appellant and asked them if they knew him then hit the complainant with an unknown object. A match was lit and a deep cut on the left eye was noted. He too was then hit.

Throughout the trial there was no evidence led by the prosecution that the accused was the one in the dock. No identification parade had been concluded but despite this the questions asked by the accused appellant to the witness reconfirmed that the appellant made efforts to have a reconciliation understanding later.

The appellant was also well known to the witness.

M/S Kalum advocate came on record when the last prosecution witness was given evidence - namely the doctor. Unfortunately he did not recall the other three witnesses who had given evidence. This would have assisted the defence in making out their defence.

Though present during the appeal, the appellant did not mention a fact that arose in his Memorandum of appeal that the trial a fact that arose in his memorandum of appeal that the trial magistrate...through the prosecution not to have the witnesses answer his questions.

He also mentioned a.....between the complainant and himself that occurred earlier in evidence.

In his evidence the appellant denied taking the complainant to hospital but in his appeal he admit as much as does his witness D.W.2.

The trial magistrate believed the prosecution witness.

This court would not interfere with the conviction and sentence. The appeal is otherwise dismissed.

Dated and delivered at Nyeri this 15th day of November, 1995

M. ANG'AWA

JUDGE



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