



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J) _
CRIMINAL APPEAL NO. E004 OF 2020
BETWEEN
PHILIP LEMARIO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 516 of 2018 in the Chief Magistrate's Court at Isiolo by *Hon. E.Ngigi (PM)* on 25.09.2019)

JUDGMENT

Background

1. **PHILIP LEMARIO** (*Appellant*) was charged with one count of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code committed on 28.04.2018 against one **Evelyn Kendi**.

The prosecution's case

2. The prosecution called four (4) witnesses in support of the charges. Complainant testified that Appellant found her at her place of work in a bar and grabbed cash from therein which was confirmed to be Kshs. 4,500/- when stock was and he also punched and slapped her. Upon examination on 02.05.2018 by Daudi Dabaso, a clinical officer, complainant had pain on both shoulders. Francis Gitonga the bar owner was attracted to the bar by complainant's screams. He rushed to the bar to see Appellant running away and upon being informed he had stolen cash took stock and found Kshs. 4,500/- missing. Upon receiving complainant's report, PC Sharack Mwangera Musyoka immediately arrested the Appellant and recovered 100/- from him. He confirmed that complainant report that Kshs. 2,000/- but in her statement stated that the sum was Kshs. 4,500/-.

Defence case

3. In his unsworn defence, the Appellant denied the offence. He said he had gone to get his money from PW1 but she refused and framed him with this offence. He stated that complainant's evidence was untruthful having reported she lost Kshs. 2,000/- and then changing the sum to Kshs. 4,500/-.

4. The trial court after considering the evidence found the prosecution case proved, convicted and sentenced the Appellant to 20 years' imprisonment.

The Appeal

5. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellant argues that **the prosecution case was not proved beyond reasonable doubt**.

Analysis and Determination

6. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to

thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

7. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant, the State having not filed any.

8. The initial report to the police was that complainant was robbed Kshs. 2,000/-. How that changed to Kshs. 4,500/- that the Appellant was charged with robbing was not explained nor did the court resolve that very important piece of evidence. The initial report to the police has been held to be key for it is in report that the reportee is expected to give details of the offence and descriptions of the attackers to enable their apprehension, and where the reportee claims to know them, to name them.

9. The evidence by the complainant properly evaluated falls in the category of what the Court of Appeal described in **Ndungu Kimanyi vs. Republic [1979] KLR 282** as follows;

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

10. The variance between the first report and the evidence by the complainant should have raised judicial antenna in the mind of the trial magistrate that complainant and her employer were either being economical with the truth or untruthful and the evidence ought to have been treated with a lot of caution bearing in mind that Appellant was charged with a capital offence.

11. From the contradictions in the complainant’s evidence, I do not consider the burden of proof as having been discharged beyond reasonable doubt as postulated in **Miller v Minister of Pensions [1947] ALL ER 373**, **“That degree is well settled. It needs not to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave the only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”** to secure a verdict of guilty and a conviction against the appellant.

12. To that extent, the appeal succeeds. The conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 25TH DAY OF NOVEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For the State - Ms. Mwaniki