



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 29 OF 2019

ZAIDI MUTWALIBI MUYONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 170C of 2018

of the Chief Magistrate's Court at Busia by Hon. T.Madowo–Resident Magistrate)

JUDGMENT

1. Zaidi Mutwalibi Muyonga, the appellant herein, was convicted for the offence of stealing from the person contrary to section 279 (a) of the Penal Code.
2. The particulars of the offence were that on 13th February 2018 at Malaba township, in Teso North sub County of Busia County, stole cash Kshs. 650,000/= the property of David Kiplenting Chepkwony from the person of the said David Kiplenting Chepkwony.
3. The appellant was sentenced to 10 years' imprisonment. He has appealed against the sentence which he has described as excessive and harsh.
4. The state was noncommittal and was represented by Mr. Mayaba, learned counsel.
5. Briefly the facts of this case were as follows:

The complainant herein had a sick child. The appellant posed as a traditional medicine man. He took the complainant and his wife to the room of their sick child and asked for a blanket. He instructed the couple to face the wall and covered them with a blanket. He chanted and some smoke ensued from a pot. He declared their son to be healed. He was paid Kshs.80, 000/= after declining an offer of Kshs.40, 000/=. He instructed them to meet him at Webuye the following day.

6. When they met at Webuye, the appellant had a huge box with some money which he claimed was Kshs.300, 000/= which had been stolen from him in Eldoret. He demanded to be paid Kshs.800, 000/= so as to release the bad spirit. This was in 2016. The complainant asked the appellant to give him time to look for money. In February 2018 he went and withdrew Kshs.650, 000/= and took it to the appellant.

7. The appellant instructed him to bathe with the water from Malaba. He (appellant) then took him to a lodging in Malaba and at the door he heard spirits talking from within. The appellant covered him with bed sheets and went away with all the money. Later he reported to the police.

8. These facts do not disclose the offence of stealing from the person. Stealing from the person is defined in **Black's Law Dictionary, 10th Edition** as:

Larceny in which the goods are taken directly from the person, but without violence or intimidation, the victim usually, being unaware of the taking. Pickpocketing is a typical example.

In the instant case this is not what happened. The complainant was simply tricked. The offence ought to have been that of cheating contrary to section 315 of the Penal Code. It provides:

Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any

money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.

9. Under section 279 (a) of the Penal Code, the penalty is provided as follows:

If the thing is stolen from the person of another; the offender is liable to imprisonment for fourteen years.

10. In his grounds of appeal, the appellant stated:

That the above stated offence indeed took place.

11. An appellate court would only interfere with the sentence of trial court where some sufficient circumstances exist. These circumstances were spelled out in the case of in the case of **Nelson vs. Republic [1970] E.A. 599** as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.

12. The appellant having admitted in his grounds of appeal that he committed the offence, I will not interfere with the conviction save for the charge and the section under which he ought to have been charged. I therefore substitute the offence with a charge of cheating contrary to section 315 of the Penal Code.

13. The penalty under section 315 of the Penal Code is 3 (three) years. I accordingly substitute the sentence of 10 years with that of three (3) years imprisonment to run from when he was sentenced by the trial court. His appeal succeeds to that extent.

DELIVERED AND SIGNED AT BUSIA THIS 25TH DAY OF JUNE, 2020

KIARIE WAWERU KIARIE

JUDGE