**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 108 OF 2015**

**GORDON BALUSSI AMBAKA.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the judgment and sentence of Hon. J.N. Mwaniki Principal Magistrate on 27th April 2015 in the Chief Magistrates Court at Nakuru in CR. Case No.3467 of 2010)**

**JUDGMENT**

1. The Appellant **Gordon Balusi Ambaka was charged with two counts convicted on the first count and sentenced to a fine of Kshs.50,000/= in default to serve eighteen (18) months imprisonment on the 27/4/2015 in Nakuru Cr. Case No.3467 of 2010.** The first count was that on the 25/6/2010 at Nakuru town in Nakuru District of the Rift Valley Province, jointly with others not before the court demanded Kshs.15,000/= from Peter Ngigi Kamu with intent to steal.

The 2nd count was stated that on the 25/6/2010 at Nakuru town in Nakuru District of the Rift Valley Province, jointly with others not before the court demanded case of shs. 5000/= from Zakayo Njoroge Njenga wih intent to steal. The second count was withdrawn on the 18/8/2014 and subsequently acquitted of the said count.

2. Being aggrieved by the conviction the appellant lodged this appeal upon several grounds as stated in the petition of Appeal filed on the 4/5/2015 and a supplementary petition filed on the 12/10/2015 by his advocate, Orege instructed by Ms. Rochi, Orege & Co. Advocates, which may be summarized into three, thus:

*1) Discrepancies in the prosecution's evidence.*

*2) Failure to call a crucial witness*

*3) Lack of proper identification.*

Ms. Vera Odera, Learned State Counsel represented the state.

3. Mr Orege Advocate urged the Appeal upon his written submissions.

The offence of demanding money by menaces in defined under **Section 302 of the Penal Code,** thus

*Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of a felony and is liable to imprisonment for ten years.*

4. The duty of the first appellate court is to scrutinize, re exam and re evaluate the evidence adduced before the trial court and derive to its own findings and conclusion, as stated in the Case Okeno Vs. Republic (1972) EA 32. The court is further obligated to weigh the conflicting evidence and decide whether the trial magistrates findings should be supported, making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify – **Kiilu & another Vs. Republic (2005) 1 KLR 174.**

The prosecution's case was urged by two witnesses, PW1 and PW2.

5. The appellant stated his defence on oath. He admitted having been a prisons officer, Force No. 34264/2006/077754. He denied having committed the offence.

I have considered the prosecution and appellant's evidence, as well as the trial court's judgment.

**Analysis and determination.**

6. On a charge under **Section 302 of the Penal Code,** the prosecution must prove that

*a) A demand for a valuable thing was made.*

*b) The demand was made with intent to steal*

*c) The demand was made with menaces or force.*

*d) The demand was addressed or made to a person.*

In the absence of proof of the above ingredients, the charge cannot be stand **– Eraus Moses Saeta Vs. Republic (1992) e KLR.**

**Discrepancies in the prosecution's case.**

7. I agree with the appellants submissions that both **PW1** and PW2 evidence is muddled with numerous and material contradictions.

**PW1** stated that police arrested him at his shop. He did not state the number of the police officers, stating that he did not talk to them, but gave them Shs.15,000/= and went back to work on the following day. He did not say the said police demanded any money with force. He did not know them. On the next day, he spoke of "the person" who arrested him as the appellant, yet he did not know him, that he went to his shop and took away his system which he never testified to, by an unidentified CD. The alleged system was not identified or even produced in court as an exhibit.
Evidence of a demand of money was not testified to by the complainant. Indeed his evidence was that he gave them Shs.15,000/=.

8. **PW2** spoke of the complainant (PW1) having given to the police Shs.12,000/=, and balance was to be paid the next day. He testified to three people who went to arrest PW1 and upon negotiating, gave to them Shs.15,000/=, yet in his evidence in chief, PW1 testified not to have spoken to the police.

Further PW2 did not state who arrested the appellant nor who recovered the alleged handcuffs. That officer was not called to testify, for the court to ascertain whether indeed the handcuffs were recovered the appellant.

9. On failure to call a crucial witness, the appellant urged that was fatal to the prosecution's case.

The arresting officer who apparently is stated to be one who recovered the handcuffs from the appellant was not called, and no reason for that was given. The appellant denied that the handcuffs produced in court where not the one's he had when he was arrested. His evidence was that being a prisons officer which was not doubted, he was allowed to carry with him handcuffs.

10. PW1 did not mention any handcuffs in his evidence or at all. This evidence was adduced by **PW2** who was not the arresting officer. I have already made a finding that PW2's evidence was hearsay and cannot be relied upon to sustain a conviction. If indeed the handcuffs were recovered from the appellant, it would make no sense that PW2 testified that he never charged the appellant with the offence of being in possession of Government Stores, nor recorded any statement from prison authorities.

11. **Identification of a suspect** is crucial in a criminal conviction. PW1 testified that he did not know the people he gave money to at his shop. The next day, he testified that the person arrested was the one who had demanded money, and who arrested him.

12. Failure by the police officers to conduct an identification parade for PW1 to positively or otherwise identify the offender is fatal to the prosecution's case. Just because someone was arrested does not point out to that person being the one who was alleged to have demanded money from the complainant, PW1. Having testified to "people" not one person, whom he did not know before, it would not be possible that he would positively identify the appellant as the person who arrested him and to whom he gave the alleged Shs.15,000/=.

13. It is trite that that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution case and acquit the accused person – **Bukenya Vs. Uganda (1972) EA 549, cited in Said Awadhi Mubarak Vs. Republic (2014) e KLR.**

14. On the matter of identification, the court of Appeal in **Stephen Matu Kariuki & 2 others Vs. Republic (1996) eKLR** held that

*"dock identifications worthless, that the court should not rely on the dock identification unless it has been preceded by a properly conducted identification parade A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade"*

15. Further, in the case **Gabriel Njoroge Vs. Republic (1987)1 KAR 1134, cited in Amolo Vs. Republic (1991) 2 KAR,** the Court of Appeal rendered that

*"Following Gabriel Njoroge Vs. R (1987) 1 KAR 1134,Visual Identification must be treated with the greatest care and ordinarily a dock identification lone should not be accepted unless the witness has in advance:-*

**a) Given a description of the assailants.**

**b) Identified the suspect on a properly conducted parade.**

16. It is upon the above that the prosecution readily conceded to the appeal, but rather too late, after the appellants submissions were argued.

17. Nevertheless, upon interrogation, re examination and re evaluation of the entire evidence before the trial court, I come to a finding that the trial magistrate erred both in law and in fact in convicting the appellant on insufficient, incredible and purely suspicious evidence. Where neither the charge the elements were strictly proved, to the required standard, beyond reasonable doubt against the appellant.

18. Consequently, the appellants appeal succeeds. The conviction is set aside and the sentence quashed. Unless otherwise lawfully held the appellant is set at liberty.

**Delivered, Signed and Dated at Nakuru this 30th Day of July, 2020.**

**……**

**J.N. MULWA**

**JUDGE.**