



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO.10 OF 2015

GALGALLO BORU DULACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.171 of 2014 of the Principal Magistrate's Court at Marsabit by Boaz M. Ombewa – Ag. Principal Magistrate)

JUDGMENT

The appellant, **GALGALLO BORU DULACHA**, was Charged with an offence of robbery with violence contrary to section 296 (2) of the penal code.

The particulars of the offence were that on 9th March 2014 at **SHAURI YAKO** estate in Marsabit Central District within Marsabit County, while armed with a knife robbed **TOTO SALA GASO** of cash Kshs. 29,000 and at or immediately before the time of such robbery threatened to stab the said **TOTO SALA GASO**.

The appellant was convicted of the offence and sentenced to suffer death as provided for by the law.

He now appeals against both conviction and sentence.

Mr. Halake Rambo, the learned counsel appeared for the appellant. He filed seven supplementary grounds of appeal for the appellant. They can be summarized as follows:

- 1.That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution failed to call some material witnesses.
- 2.That the learned magistrate erred in law and in fact by denying the appellant's witness to testify.
3. That the learned magistrate erred in law and in fact by relying on the prosecution evidence that was full of inconsistencies and contradictions. 4.That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence to warrant the conviction.

The state opposed the appeal through **Mr. Motende**, the learned counsel.

Briefly the facts of the prosecution case were as follows:

On the material day at about 2 am the complainant and the appellant were inside a lorry. The appellant

demanded the complainant to give him the money he had. He drew a knife and threatened to stab him. He complied. He then alighted and raised an alarm.

In his defence the appellant contended that he was framed up.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

Though the appellant contended that the prosecution failed to call two material witnesses, the evidence on record does not mention a watchman anywhere. The only person who is mentioned is the brother of the appellant. This, I agree was a very material witness. No explanation was tendered as to why he was not called. This would amount to selective calling of witnesses. The failure to call him was prejudicial to the appellant.

When the appellant contends that he was denied a chance to call his witness, he is not being truthful. The record is very clear that he indicated that he did not have any witness to call. This ground of appeal is therefore dismissed.

TOTO SALA GASO (PW1), the complainant, in his evidence said that before the incident he was in a lorry with the appellant and both were chewing miraa (khat). However, the evidence of **P.C STANLEY KESIER (PW3)** is that he reported that while they were both chewing miraa, the appellant excused himself and left. When he returned, he robbed him. This question was put to the complainant during cross examination but he denied that that was what he had reported. **P.C Kesier (PW3)** could not have made up this fact. The complainant painted a picture of himself as a witness who could not be relied upon to tell the truth. The court of appeal in the case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283, MADAN, MILLER and POTTER JA** held:

"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 is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

Considering that the complainant testified that he had previously differed with the appellant, it was unsafe to rely on his evidence without the variance in his evidence in court and what he is purported to have reported to the police being resolved.

Having evaluated the entire evidence on record, I find that there was no sufficient evidence on record to base a conviction on. The conviction was therefore unsafe. Consequently, the conviction is quashed and the sentence set aside.

The appellant is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 17th day of August, 2016

KIARIE WAWERU KIARIE

JUDGE