



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 105 of 2003

(Appeal arising from the Original conviction and sentence in Criminal Case No.399 of 2003 of the Senior Resident Magistrate's Court at Vihiga (F. M. Kinyanjui, Esq. SRM))

PHILIP CHAMWANDA
APPELLANT

V E R S U S

REPUBLIC **RESPONDENT**

J U D G E M E N T

The Appellant, Philip Chamwanda, was arraigned on 1.4.2003 before the Senior Resident Magistrate, F. M. Kinyanjui Esq., at Vihiga in Criminal Case No.399 of 2003. The charge against him was Burglary contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal Code. The particulars of the offence were that-

“on the 28th day of March 2003 at Lyaduywa village Lyaduywa Sub/location in Vihiga District, within the Western Province, Philip Chamwada broke and entered into (sic) a dwelling house of Ephraem Asuza Chavula with intent to commit a felony and did steal from therein (sic) one bicycle make Neelan S/No. not known (sic) one lantern lamp, three blankets, two bed sheets, and two mattresses all valued at Shs.7750/= the property of the said Ephraem Asuza Chavula.”

There was an alternative charge of handling which is not relevant.

After the charge was read to him, the Appellant said it was true. The charge was read and explained in Kiswahili. The facts were then read to the Appellant. He is recorded by the trial court as having said –

“The facts are true. I admit the facts and the charge. I stole the items after breaking into the house at 7.30 p.m.”

This was quite a mouthful. The court then proceeded to enter a plea of guilty and to convict the Appellant accordingly.

The prosecution informed the court that the Appellant was a first offender. In mitigation, the Appellant sought leniency. He was sentenced to 4 years imprisonment and 3 strokes of the cane and a further 2 years and 2 strokes of the cane in the second limb of the offence, both sentences to run concurrently.

The Appellant filed appeal on 08.04.2003 against the conviction and sentence. He put forward 4

grounds. In the first ground, he submitted that he pleaded guilty because the police had tortured him and forced him to plead guilty. In the second ground, he blamed the trial Magistrate for failing to detect that the plea was not voluntary. Ground 3 was unintelligible. In the fourth ground, the Appellant criticized the trial court on the ground that it failed to consider his mitigation. The Appellant also alluded to an alleged grudge between him and the complainant.

When the appeal came up for hearing on 10.11.2004, the appellant appeared in person. He reiterated that he had been forced to plead guilty but conceded that he did not tell the trial court that police had threatened to kill him if he did not plead guilty.

Mrs. Kithaka, Principal State Counsel, supported the conviction and pointed out that the Appellant never raised the issue of torture in the trial court nor did he show any evidence that he was forced to admit the offence.

Section 348 of the Criminal Procedure Act, Chapter 75 of the laws of Kenya, does not allow the filing of an appeal in case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. This section presupposes that the plea of guilty on which the conviction is founded is unequivocal. Where an appellant alleges that he was forced to admit the offence through torture, threats, intimidation, coercion, or violence or other unlawful means, the burden of proving that the plea of guilty was extracted by such means rests on him.

In such instance, the plea though seemingly unequivocal can be challenged through adduction of evidence. Courts of law act on the basis of evidence. This is why an accused person who is otherwise guilty of an offence may sometimes eschew conviction and hence sentence if the evidence against him falls short of the standard required by law, namely proof beyond any reasonable doubt.

In the instant case, the record shows that the appellant admitted not only the offence, but also the facts relating to its commission. At no time did he raise any complaint in the trial court regarding the alleged threats. In his petition of appeal, there was no attempt to adduce evidence to support the allegations made.

Without evidence, the Appellant's allegations remain empty and devoid of any substance. In short as the Appellant offered no evidence to support the allegations he made and as the plea on its face was unequivocal, there is no basis on which this court can interfere with the conviction and sentence.

The appeal has no merit. It is dismissed.

Dated at Kakamega this 4th day of February, 2005

G. B. M. KARIUKI

JUDGE