



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEALS NOS 177 & 178 OF 1991(CONSOLIDATED)

DAVID W NGERETHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Criminal Case No 884 of 1989 of Principal Magistrate's Court at Nyeri (Njuguna Kimani R M))

JUDGMENT

These two appeals have been consolidated for convenient disposal. The two appellants, then police constables at Nyeri, were after trial convicted of demanding money with menaces contrary to section 302 of the Penal Code in that on 26/1/1989 in Majengo Village in Nyeri District demanded money with menaces namely Shs 100/- from one Nicholas Kibui so that he might not be arrested and charged with possession of *chang'aa*.

The complainant testified that he was accosted by PC Mwaruko and the two appellants who told him starkly on the face that he traded in *chang'aa*, an allegation which he readily denied. They told him that a jerry can they had with them was his, a fact he denied. They then grabbed him by the trousers and by the hands and handcuffed him. He vehemently protested but in vain.

PC Mwaruko told him that unless he gave them Shs 100/- they would take him to the police station and charge him. He told them that he had no money but they advised him to go home, look for it and meet them later at the Green Bar. On his way home he met PW4, Wambugu, to whom he narrated his ordeal. This witness led him to Mr Muchunku the Senior Assistant Commissioner for Police who received and acted on the complaint. His quick move led to the arrest of the three police officers.

Both the appellants gave sworn evidence and denied the charge laid against them.

The prosecution's case was based mainly on the evidence of the complainant. It was cogent and consistent. It received corroboration from the testimony of Mr Muchunku who instructed the setting up of the trap. The Shs 100/- note provided by him was recovered from the trouser pocket of the appellant, Nduva.

Further, more corroboration on the evidence of the complainant can be found in the evidence of PW2 and PW3.

In my view, the charge against the two appellants was proved beyond any reasonable doubt.

On a charge under section 302 of the Penal Code the prosecution must prove that:-

1. A demand for a valuable thing was made;
2. The demand was made with intent to steal;
3. The demand was made with menaces or force; and
4. The demand was addressed or made to a person.

As far as the first requirement is concerned, there is no question but that money is a valuable thing. There was ample evidence that Shs 100/- was demanded and given by the appellants.

There was intent to steal once there was intent to take without the consent of the complainant, the person to whom the demand was made. See *Okech v R* [1968] EA. By demanding Shs 100/- the only intention by the appellants was to steal the money.

The appellants handled the complainant and handcuffed him. This was with force and some violence so as to make him accede unwillingly to the demand.

Consequently, upon evaluation of the entire evidence on record I am satisfied that the appellants were correctly convicted and the convictions are upheld. I reject the grounds of appeal.

PC Mwaruko was an active accessory to the felony and led the newly employed appellants in the commission of the crime. It is regrettable that he was illegally shielded from prosecution. Chief Inspector Mutingu told the trial court:-

“The complainant mentioned that PC Mwaruko had demanded the money ---- There were instructions that only the two accused should be charged.”

This was open bias by the police against the appellants.

However, that did lessen the gravity of the offence.

The force cannot be cleaned of bad elements if there are still some rotten and protected potatoes in the sack.

I observe that the appellants will not be retained in the force after their convictions and that they are young men with a wide and long future ahead of them. They may reform and rehabilitate. I reduce the sentence for each appellant to nine (9) months' imprisonment.

Order: Convictions upheld.

Sentences reduced to nine months' imprisonment.

Dated and delivered at Nyeri this 22nd day of January 1992.

P. K TUNOI

JUDGE