REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 26 OF 2019

ALEX MULI MULEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from ***Mwingi Senior Principal Magistrate's Court*** *Criminal Case Number* ***106 of 2017*** *which was delivered on* ***27th of March, 2017*** *by Hon. K. Sambu-SPM*

J U D G E M E N T

1. **Alex Muli Mulei**, the Appellant herein, was charged in *Mwingi Senior Principal Magistrate's Court Criminal Case Number 106 of 2017* with the offence of **Robbery Contrary to Section 295** as read with **Section 296(1) of the Penal Code**. The particulars of the offence are that on 23rd March, 2017 at Kabati shopping Centre, Mbuvu location, in Mwingi-East Sub-county, within Kitui County, he robbed one Paul Kamau Matuve a bicycle make Pamoja, cell phone samsung galaxy make, 1 Oxford Dictionary 9th edition, 1 Kamusi Karne ya 21, 1 holy bible with Apocrypha, 1 blue school shirt, 2 pairs of trousers, 1 pair of slippers, 1 pair of shoes, 1 black school bag, 1 T-shirt and Kshs. 1,070 in cash all valued at Kshs. 19,620 and immediately before or immediately after such robbery, used actual violence to the said Paul Kamau Matuve.

2. The Appellant denied committing the offence, but upon trial, he was found guilty and convicted. He was sentenced to serve seven (7) years' imprisonment. He felt aggrieved and preferred this appeal against both conviction and sentence, raising the following eight grounds namely: -

(i) The trial court grossly erred in both law and fact when passing the verdict to convict and failing to note that the prosecution side did not prove its case to the required standards of proof.

(ii) The learned trial Magistrate erred in both law and fact in convicting him on overly contradictory, uncorroborated and unreliable evidence in breach of the provisions of Section 163 (1) (2), hence insufficient and inconclusive to sustain the conviction occasioning a serious miscarriage of justice. The learned trial magistrate erred in both law and facts in shifting the burden of proof to the Appellant's defence contrary to the rules of natural justice contrary to Section 169 of the Criminal Procedure Code.

(iii) The learned Magistrate erred in both facts in shifting the burden of proof to the Appellant's defence contrary to the rules of natural justice contrary to Section 169 of the Criminal Procedure Code.

(iv) The Learned Trial Magistrate erred in both law and facts when passing the verdict to convict when ignoring the fact that the identification of the assailant it was not clear as it was very late in the night.

(v) The learned trial Magistrate, erred in both law and facts when passing judgement as assailant, it was not clear who the assailant was, as it was very late in the night.

(vi) The learned trial Magistrate erred in points of law and fact when failing to observe that he was made the victim of circumstance since nothing on record was to connect him with the commission of the alleged offence.

(vii) The learned trial Magistrate gravely erred in both law and fact when passing the verdict to convict without finding that some of the key witness in this case were never summoned to adduce their testimonies which could have changed the whole trial.

(viii) The sentence meted out was manifestly excessive.

3. The Appellant at hearing of this appeal however, dropped his appeal on conviction and stated that he was only appealing on sentence as he was satisfied about the conviction.

4. The Respondent through Mr. Okemwa, learned Counsel from the Office of the Director of Public Prosecution opposed this appeal stating that the 7 years handed over to the Appellant, was too lenient considering the fact that he had previous criminal record.

He further urged this court to consider the fact that the Appellant terrorized his victims the whole night and injured one of them.

5. This court has considered this appeal and the response made. The Appellant was charged and convicted with offence of robbery contrary to ***Section 295*** as read with ***Section 296 (1) of the Penal Code*** provides as follows: -

> ***''Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property, in order to obtain or retain the thing, stolen or to overcome resistance to its being stolen or retained, is guilty of a felony termed robbery.***
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> ***Any person who commits the felony of robbery is liable to imprisonment for fourteen years.''***

6. There is no doubt therefore, that the offence committed by the Appellant is treated seriously by law and the same is reflected by the sanction prescribed above.

7. This court has gone through the proceedings from the Lower Court and it is clear that, the Appellant indeed terrorized his victims for long periods of time on the night of 22nd March, 2017, past mid-night to the wee hours of 23rd March, 2017. In the process, he caused injuries to the complainant who was a form two student at Muthuka Secondary School. The injuries are summarized in Prosecution Exhibit 1. The Appellant stole his school books including a bible and school uniforms. Given the nature of the offence, this court agrees with the Respondent that the sentence meted out to the Appellant was a bit lenient. The reasons why I find the sentence a bit too lenient are basically two, namely: -

> *(i) The law as cited above, prescribes a maximum jail term of 14 years: of course the trial court was seized with the discretion to mete out any other appropriate sentence. This court however, under Section 354 (3) (ii) has powers to alter the sentence by either, reducing it or increasing it on an appeal depending on the circumstances obtaining and if there is evidence that the Appellant deserved a more deterrent sentence. In this matter, the circumstances indicate that a more deterrent sentence was justified.*
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> *(ii) A social inquiry report dated 6th September, 2018, reveals that, the Appellant was a habitual offender with several criminal cases and the local administration regarded him a threat to security in the area, as he was known to be a habitual criminal with tendencies of violence. He had also committed similar offences in Garissa.*

8. It is true that, a probation report is not binding to a trial court, but looking at the reasons the trial took in meting out a sentence of seven (7) years, it is evident that the trial court took into consideration the fact that the Appellant was not remorseful (which I also observed at the hearing of this Appeal), the victims impact assessment, and the gravity of the offence. All this factors in my considered view, called for a much stiffer and more deterrent sentence than the seven (7) years given. The trial court fell into error when it failed to factor in the adverse mitigating factors.

In the premises, this court finds that this appeal lacks merit. The sentence meted out against the Appellant was too lenient for a foretasted reason. This court hereby, sets aside the sentence of seven (7) years and its place under the provisions of ***Section 354 (3) (II)***, the sentence is increased to ten (10) years. Under the provisions of ***Section 333(2),*** the period of 2 years he spent in custody from 2017 to 2019, which is approximately two (2) years shall be subtracted from the 10 years. He shall therefore, serve eight (8) years from 24th June, 2019, when he was sentenced and it is expected that the extra year added to him, will be utilized by the Appellant to reform and transform so that he can change from his criminal ways and become a better and useful member of the society, once he completes his term.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF MAY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE