REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 150 OF 2018

YUSUF CHPKOR CHEBIAGAN .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. M. Mukabi, RM, delivered on 8/1/2016 in the PM's court at Sirisia, in Criminal Case No. 889 of 2013, R. V. Yusuf Chepkor Chebiagan)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of five years' imprisonment in respect of the offence of incitement contrary to section 96 of the Penal Code (Cap 63) Laws of Kenya.

2. In this court the appellant has raised five grounds in his petition of appeal.

3. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.

4. In ground 2 the appellant has faulted the trial court by failing to appreciate that the whole prosecution was built on unfavourable circumstances.

5. In this regard, the evidence of Kennedy Towett (PW 1) was that on 10/12/2013 at about 7.00 a.m. he was with the chief of Sasuri Location (PW 2 – Jackson Chepkrum Konong), when they saw the appellant coming from Uganda. They crossed the border and headed to Chebyuk village. He was carrying chang'aa. Appellant and the seven people they were with were carrying chang'aa in sacks.

6. Furthermore, PW 1 rang Cpl. Amalla of Chesikaki police station. Luckily a police officer appeared on the scene and they followed the foot prints to Chepsingor area. Upon seeing them the appellant fled to the hills. He then began threatening/heckling "*angalia wezi wametuvamia*." At that time PW 1 and his group followed them and confiscated 20 litres of chang'aa in sacks. The public then willed around and he carried on with his false alarm.

7. Again on 28/12/2018 the public recovered another 30 litres of chang'aa in plastic bags. When PW 1 returned home, the appellant and his accomplices went armed to his home. The appellant attempted to hit him, but missed him. PW 1 called the chief. The public went to his rescue and arrested the appellant It was his evidence that the appellant is a person he knew well.

8. The evidence of PW 1 is supported by that of No. 344996 Cpl Francis Njure of Chesikaki police station (PW3). PW 3 along with PW 1 chased the appellant, who fled after seeing them. He saw the appellant carrying chang'aa in plastic bags. The appellant poured the chang'aa as he fled to the hills. This was on 10/12/2013.

9. The evidence of PW 1 is also supported by that of No. 60296 Cpl Damianus Onyango (PW 5), who was the investigating officer. It was the evidence of PW 5 that they laid an ambush on 10/12/2013 and managed to arrest the appellant as he fled with his accomplices. It was the appellant who started to scream while inciting the public to rescue him by alleging that he had been ambushed by thieves.

10. Upon being placed on his defence, the appellant testified on oath. He testified that on 11/12/2013 at 2 pm he received a phone call from a member of the community policing. The caller told him there were people who were arrested the previous day with illegal liquor. That liquor was being taken to his home, which he denied.

11. Furthermore, on 28/12/2013 he fell sick and as a result he took a boda boda to take him to Tuikut market. While enroute he met PW 1, who told him he was involved in the business of illegal alcohol, which he denied. A quarrel ensued and he attempted to arrest him. PW 1 then hit him with a stick on the head. As a result, he fell down and became unconscious.

12. He thereafter found himself in Cheptais sub-district hospital. Eventually he was arrested and charged with this offence.

13. While under cross examination, the appellant testified that he knew PW 1 very well; but he did not know that he was a member of community policing until the trial of this case started. He denied recalling what happened on 10/12/2013.

14. Finally, the appellant testified that he saw chief Jackson Konong (PW 3) before he lost consciousness.

15. I have re-assessed the entire evidence as a first appeal court. As a result, I find that the appellant was arrested by PW1 in broad day light and taken to Chesikaki police station, where he was charged with this offence. I therefore find that the appellant was positively identified by PW 1 and PW 3. As at that time, he was in possession of chang'aa. It is clear therefore that the circumstances of his arrest were favourable. I therefore dismiss ground 2, for lacking in merit.

16. In grounds 3 and 6, the appellant has faulted the trial court for convicting him on speculation and fabricated evidence. I find that the prosecution evidence was cogent and credible. I further find that the defence evidence was incredible. The appellant testified that he knew PW 1 very well and yet denied knowing that he was a member of the community policing. This piece of evidence is proof of the incredible defence, amongst his pieces of evidence. I therefore find that grounds 3 and 6 lack merit and I hereby dismiss them.

17. In grounds 4 and 5, the appellant has faulted the trial court for convicting him on the weakness of his alibi defence. In this regard, the trial court believed the prosecution evidence that he was at the scene of crime and rejected his alibi defence. That court, considered the alibi defence and found it to be incredible. It then proceeded to reject it.

18. I have re-evaluated the entire evidence including the alibi defence. I find that his alibi defence was rightly rejected. I therefore dismiss grounds 4 and 5 for lacking in merit.

19. In ground 7 the appellant has faulted the trial court for imposing a manifestly harsh sentence. In his submissions, the appellant faulted the trial court for failing to take into account the period he had been in custody.

20. In this regard, the record of the proceedings shows that the appellant was arrested on 28/1/2012 and taken to court for plea on 30/12/2016. He was convicted and sentenced on 8/1/2016, which translates to a custody period of over four years.

21. In sentencing the appellant the court only took into account that he was not a first offender and proceeded to impose the maximum sentence of five (5) years imprisonment. The court did not take into account that he had been in custody for over four years. The court also did not take into account that the previous conviction was for escaping from lawful custody, which was not relevant to a conviction of incitement.

22. I find that the trial court erred in law in ignoring the period the appellant had been in custody. Additionally, I find that it also erred in law for failing to take into account the custody period as mandatorily required of it by the provisions of section 333(2) of the Criminal Procedure Code (Cap 75) laws of Kenya. I am therefore entitled to interfere with the sentencing discretion of the trial court, which I hereby do, with the result that the sentence imposed is hereby reduced to the one already served.

23. The appellant is hereby ordered set free unless otherwise held on other lawful warrants.

Judgement signed and dated at Narok this 9th day of March 2020.

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Bungoma this 1st day of April, 2020.

S. N. Riechi

Judge

1/4/2020