REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NOS. 70 AND 74 OF 2018

DAN SIMIYU MUKHWANA.....1ST APPELLANT

HOSEA SITATI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal against conviction of Hon. D. O. Onyango – Senior Principal Magistrate, Kimilili Law Courts that gave rise to the

Appellant being Sentenced to nine (9) years imprisonment on 3/8/2018 – Kimilili SPM'S Court Criminal Case No. 1033 of 2014)

J U D G M E N T

The Appellants have appealed against their conviction and sentence of nine (9) years imprisonment in respect of the offence of **robbery contrary to section 295 as read with section 296(2) of the Penal Code (Cap 63) Laws of Kenya**.

The State has supported both the conviction and sentence of both the appellants.

Although the 2 appeals have been consolidated, the law requires that the appeal of each appellant has to be considered separately. I now turn on the appeal of the 1st Appellant.

The **Appeal of the 1st appellant – Dan Simiyu Mukhwana.** This appellant has raised 8 grounds in his petition of appeal to this Court.

In grounds 1 and 2, the appellant has faulted the trial court both in law and fact for convicting him on the evidence of identification, which was not proper. Additionally he has faulted the trial court for convicting him, when the prosecution had not proved its case beyond reasonable doubt. In this regard, the evidence of **Caleb Mwenya (PW 1)** was that on 30th January 2014 at around 11:00 pm he was going home after attending a funeral of a deceased prison warder. While en route, he met the appellants and one Samuel Simiyu. They stopped and surrounded him. Dan Simiyu ordered him to surrender his mobile phone. Hosea Sitati held his hand and took his phone. Samuel Simiyu stabbed him in the stomach using a knife. Samuel Simiyu has not been arrested todate.

In the process of this confrontation, Edwin Busolo (PW 2), who was following PW 1 went running towards PW 1. PW 1 raised an alarm and PW 2 flashed a torch at the appellants and their accomplice (Samuel Simiyu). In response to his screams, the young men who were at the funeral site responded and went to the scene of crime. These young men assisted him.

PW 1 was able to recognize the 2 appellants as his assailants due to moon and torch light. The evidence shows that the 2 appellants were in close proximity with the 2 complainants. The evidence also shows that PW 1 had known the 2 appellants as his former primary school mates. The evidence of PW 1 is corroborated by that of PW 2.

The defence of this appellant who made an unsworn statement, was that he was asleep in his house when the offence was committed. He called 2 witnesses who supported his evidence. It is clear that the defence of this appellant was that of an alibi. The trial court directed its mind that the evidence against the appellant was that of recognition. It believed the recognition evidence of PW 1 and PW 2 that they positively identified the appellant. There is evidence that PW 1 and PW 2 were able to recognize the appellants due to moon and torch light. The evidence further shows that PW 1 and PW 2 knew the appellants before this incident as former school mates. There is further evidence that the appellants were in close proximity to PW 1 and PW 2.

Furthermore PW 1 reported to his father namely, Joshua Mwenya Kanicho that he had been attacked by the appellants.

I have re – assessed the entire evidence of the prosecution witnesses and that of the appellants as I am required to do as a 1st appeal court. As

a result, I find that the appellants were positively identified by PW 1 and PW 2. I therefore dismiss **grounds 1 and 2** for lacking in merit. In **ground 3**, the appellant has faulted the trial court for shifting the burden of proof to him and for wrongfully dismissing his defence evidence. In this regard the trial court found that the defence of the appellant was that of an alibi. The court then proceeded to warn itself that even when such a defence is raised by an accused person, the accused does not assume the burden of proof. It went further to bear in mind that the burden of proof remains with the prosecution and not the appellant. In that regard, it cited **WAGOMBE -VS- R (1976 – 80) KLR 149**. Furthermore, the court analyzed the evidence of the defence witnesses and found them to be incredible and then proceeded to dismiss the defence evidence.

It is therefore clear that the burden of proof was not shifted to the appellant. It is equally clear that the defence of the appellant was considered and rejected by that court. In the circumstance, I find that ground 3 has no merit and is hereby dismissed.

In **ground 4**, the appellant has faulted the trial court in failing to find that there was no proper investigations of the offence. In this regard, counsel for the appellant submitted that in the initial report to the police, it is not indicated as to what the complainant lost. He further submitted that there was no OB entry in respect of the lost items. PW 5, the Investigating Officer testified that the father (PW 3) of the complainant was told by the complainant that he lost his cellphone. The failure by the father of the complainant to tell the police that the son lost his cellphone is a matter which I find to be curable defect in view of the evidence on record. I therefore find that the investigations were properly done. I therefore dismiss ground 4 for lacking in merit.

In **ground 5**, the appellant has faulted the trial court for failing to call key witnesses. In this regard I find that counsel for the appellant has not indicated the witnesses who were not called by the prosecution. I find from the evidence of PW 1 that one Kepha Barasa and Douglas Baraza were the young men who were with PW 1 at the funeral site. They helped PW 1 and PW 2 after they had been attacked by the appellants. These are the only potential witnesses who did not testify for the prosecution. I find from the evidence on record that it is impossible to say whether their potential evidence could have made a difference. In the circumstances, I find that this ground of appeal lacks merit and I hereby dismiss it.

In **ground 6 and 7** the appellant has substantially faulted the trial Court in finding that the prosecution proved their case beyond reasonable doubt. In the light of the evidence and the findings that I have made in the foregoing paragraph 5 I find that the case against this appellant was proved beyond reasonable doubt. I find that these grounds lack merit and are hereby dismissed.

Finally, in **ground 8**, the appellant has faulted the trial court for failing to consider the submissions of the appellant. I have considered this ground and I find that the trial court directed itself on the issues for determination which were mainly **identification** and the **alibi defence** of the appellant. I find that the trial court did not explicitly consider the submissions of the appellant, but it nevertheless indirectly considered them and rightly came to the correct conclusion. As a first appeal court, I have re – assessed the entire evidence produced during trial. I have also considered the authorities of the appellant. As a result, I find that the appellant was convicted and sentenced on sound evidence. I, therefore find that his appeal fails, and is hereby dismissed in its entirety.

The **Appeal of the 2nd Appellant – HOSEA SITATI.** This appellant has raised 4 (four) grounds in his petition to this court.

The ground 1, the appellant has faulted the trial court both in law and fact for convicting him on contradictory, uncorroborated and on witty evidence on the identification of the appellant. In this regard, I have already made a finding in respect of similar ground in respect of the appellant **Dan Simiyu Mukhwana**. I wish to add that the evidence of PW 1 and PW 2 mutually corroborated each other. They positively identified this appellant. In the circumstances, I hereby dismiss ground 1 for lacking in merit.

In ground 2, the appellant has faulted the trial court both in law and fact in relying on the evidence of a single witness of voice identification without warning herself on the voice identification. This was not the only evidence upon which the conviction was based. The conviction was based on the evidence of PW 1 and PW 2. I therefore find no merit in this ground and the same is dismissed.

In ground 3, the appellant has faulted the trial court for relying on the evidence of the prosecution which was tainted with contradictions and was uncorroborated. In this regard, I have already found that PW 1 and PW 2 mutually corroborated each other. Furthermore, I find from the submissions of Mr Sichangi that, he has not shown the contradictions in his submissions. Indeed, I have not found any material contradictions in the evidence of the prosecution witnesses. I, therefore find that this ground lacks merit and I hereby dismiss it.

As regards sentence, the appellant has faulted the trial court for imposing an unlawful and oppressive sentence. I find from the sentencing notes of the trial court that it considered the mitigation of the 2nd appellant. It also considered the circumstances under which the offence was committed. Finally, it also considered that both the appellants and complainant were at one time school mates. After doing so, the trial court found that the sentence of death was not merited. It then proceeded to impose a sentence of 9 (nine) year imprisonment.

I find that the trial court did not commit any error in imposing the sentence of 9 years imprisonment. I therefore find no ground to interfere with the discretion of the trial court.

After re-assessing the entire evidence as I am required to do as a first appeal court, I find that the appellant was convicted and sentenced on ample evidence. I therefore find no merit in this appeal which I hereby dismiss in its entirety.

Judgment signed, dated and delivered at Bungoma this 9th day of August, 2019

in the presence of Mr. Sichangi holding brief for Mr. Nyamu for 1st appellant and in the presence of 2nd appellant and Ms Nyakibia for the state.

J. M. Bwonwong'a.

J U D G E

9th August, 2019.