



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 153 OF 2018

CHRISPINUS SIMIYU MASIBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the conviction and sentence by Hon G.P Omondi (S.R.M))

in original Bungoma CMC Criminal Case No. 324/2016 delivered on 3/12/2018)

JUDGMENT

1. The Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the penal code. The facts were that on 22/1/2016 at Bungoma South Sub County within Bungoma County while armed with an offensive weapon namely sharp object, robbed ROBBINSON WANGILA SIMIYU of a Motor Cycle Registration Number KMDJ 598S TVs Star, red in colour valued at Kshs 93,000/= the property of MOSES WABWIRE ODUORI and during the time of such robbery used actual violence to the said ROBBINSON WANGILA SIMIYU.
2. The Appellant faced an alternative charge of handling stolen property contrary to Section 322(1) as read with Section 322(2) of the penal code. Particulars being; on 30/1/2016 at Bukembe Market in Bungoma South, within Bungoma County, otherwise that in the course of stealing, dishonestly retained a Motor Cycle Registration Number KMDJ 598S TVs Star, red in colour knowing or having reasons to believe to be stolen property.
3. PW1 APC Michael Kombe and PW2 Chris Ochieng Kongele were at Bukembe A.P Post on 30th January, 2016, when a BodaBoda cyclist came and informed them that somebody had been arrested for having in his possession a motorcycle that had not been registered for that stage. PW1 and PW2 went to the scene, arrested the person and took him and the motorcycle to the A.P Post. The person who was arrested is the Appellant herein and he did not have ownership documents for the motorcycle. The Appellant was later taken to Bungoma Police Station.
4. PW3, Benard Fwamba Mutila stated that he received a call on 26th January, 2016 from the leader of the general laborers at Nzoia Sugar Factory that they had sighted a body while working. He proceeded to the scene and found the deceased's body with reflector jacket lying on its back with a deep facial cut. The body had started decomposing. He called the factory security officer who came with a police officer. They found a provisional identity card of Robinson Wangila Simiyu.
5. PW4 Eliud Fwamba Simiyu, the deceased's father stated that his son left home on 22nd January, 2016 at around 5 a.m. At around 8 p.m., the deceased's wife told him he had not returned home. PW4 went to his son's boss PW5 to inquire on his son's whereabouts. On 23rd January, 2016, they extended their search to Bungoma hospital to no avail. He then made a report of the missing man at Bungoma Police Station, and at Harambee A.P Camp.
6. On 26th January, 2016, PW4 heard over the radio of a body that had been found in the Nzoia Sugar factory farm. He went to the mortuary and identified the body as that of his son. A post-mortem was done on 29th January, 2016.
7. PW5 Moses Wabwire Oduori had employed the deceased as his motorbike rider. He stated that the deceased normally returned the motorcycle to him between 6 p.m. and 7 p.m. everyday. On 22nd January, 2016, however, he did not return. PW5 heard over the radio on 26th January, 2016 that the body of the deceased had been found in the Nzoia Sugar Factory farm.
8. PW7 Dr. Philip Kosgey from Bungoma County referral Hospital conducted a post-mortem on the body of the deceased and formed the opinion that the deceased died of severe head injury. The post-mortem was witnessed by PW6 PC Douglas Njoroge of the Nzoia Police Station.
9. PW8 Inspector Patrick Bet, the O. C crime Nzoia Police Station received a report from PW-3 of a body in the farm. He went to the scene,

drew the sketches and took photographs of the scene. The body had started decomposing.

10. PW9 Corporal George Kinywa was the investigating officer who preferred the charges against the Appellant.

11. The Appellant gave a sworn statement in his defence. He stated that he was arrested by PW2 who had warned that he would fix him and did not understand why he was charged.

12. The Appellant was convicted on the alternative charge and sentenced to serve seven (7) years imprisonment. He was dissatisfied and preferred this appeal which is anchored on the following grounds:

a) *That he pleaded not guilty to the charges.*

b) *The learned trial magistrate erred in law and fact by failing to appreciate that there was no first report made linking him to the offence.*

c) *That the conviction was based on speculations and fabrications and circumstantial evidence.*

d) *That the decision of the court was not supported by the evidence on record.*

e) *That the trial court failed to consider his defence of alibi.*

f) *That the prosecution did not proof its case beyond reasonable doubt.*

g) *That the trail court did not protect his rights under Article 50 (2) of the constitution as regards the language used as well as the name of the interpreter.*

13. Both the Appellant and the Prosecution filed submissions on the appeal. The Prosecution dwelt on the grounds that the Appellant had advanced. The Appellant’s submissions however abandoned the grounds of appeal. In his submissions, he sought leniency on the sentence. He urged the court to consider the time he had spent in prison and that he had been in remand since his arrest on 30th January, 2016. He also stated that he was remorseful and a first offender.

14. This appeal is therefore only against the sentence imposed upon the Appellant. **Section 322(2)** of the **Penal Code** provides that upon conviction on the offence of handling stolen property, the sentence is a prison term not exceeding 14 years with hard labour.

15. The Appellant herein was sentenced to serve seven (7) years. The sentence is by no means lenient. In his mitigation, the Appellant stated that he has children and young brothers who depend on him. Due to the fact that he was a first offender, the court called for a pre-sentencing report which recommended a custodial sentence.

16. This court is also alive to the fact that one of the objectives of sentencing is to rehabilitate an offender. The Appellant submits that he is remorseful and has reformed following counselling while in prison, but I bear in mind that the young man from whom the motorbike was stolen lost his life in the robbery.

17. The Appellant was in remand all through the trial, from the date of arrest until sentencing. Under **section 333(2)** of the **Criminal Procedure Code**, the court ought to consider the period of time spent in remand when imposing a sentence.

18. Having considered the above, the appeal is hereby dismissed save to order that the sentence of seven (7) years shall run from the day of arrest that is, 30th January, 2016.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.