REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 40 OF 2019

MUSTAFA SIMIYU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(*Being an appeal from the judgement of Hon. D.O.Onyango, SPM, delivered on 29/3/2019 in Criminal Case No. 120 of 2018, in the Senior Principal Magistrate's Court at Kimilili, R v. Mustafa Simiyu*)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of forty (40) years imprisonment in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya in count 1. The appellant was acquitted of handling stolen property. He was also acquitted of breaking into a building and committing a felony in count 2.

2. The state has supported the conviction and sentence

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

4. In ground 1 the appellant has faulted the trial court for convicting him over a framed case and that the doctrine of recent possession was not proved against him. In this regard, the evidence of Antony Wameya Simiyu (Pw 1) was that he was asleep on 12/2/2018 at 3.00 am, when he heard noise at the shop. Before long Pw 1 saw two men who flashed a torch at him. They ordered him to lie down and demanded money. He told them he did not have any money. They pushed a metal rod on his neck and warned him not to scream. These men took his cell phone and an LG 50-inch TV, which was the property of Henry Namasokha. Pw 1 was unable to recognize the faces of these two men.

5. Later Pw 1 was told that the LG 50-inch TV had been recovered on the same day. He went to the police and identified the TV, which was put in evidence as exhibit 1 and the bag in which it was carried was also put in evidence as exhibit 2.

6. In addition to the foregoing evidence, there is the evidence of Henry Khamala Masika (Pw 3), who was the owner of the stolen TV. Pw 3 testified that he was alerted that his video shop had been broken into and a number of items had been stolen. These items included the LG 50-inch TV and the remote for the DVD. PW 3 reported the robbery at Kimilili police station and to all matatu operators at Kimilili bus stage.

7. At 6.00 am in the morning, Pw 3 took a car to Maliki, following receipt of information. Upon arrival at Kitale bus stage at Maliki, he found the appellant, who had been arrested with the LG 50-inch TV, a remote to his DVD and a bag, which he identified as his properties. They took the appellant to Kimilili police station.

8. In cross examination, Pw 3 testified that he found the appellant in a matatu holding the TV rapped in a box. Pw 3 found that members of the public had almost lynched the appellant.

9. The appellant was with another suspect, who had sensed danger and had escaped.

10. Furthermore, there is evidence of James Nalianya (Pw 6), a matatu driver in which the appellant was a passenger. He saw the appellant carrying something that looked like a TV. Since he had heard that the complainant had lost a TV; Pw 6 rang him. The complainant arrived at the scene and he positively identified his TV. The appellant was arrested, tied and was then taken to Kimilili police station.

11. Upon being placed on his defence, the appellant testified on oath. He testified that on 12/2/2018 he harvested vegetables and took them to sell at Kimilili market. After selling, he returned home riding a bicycle. While en route he accidently knocked a child. Members of the public descended upon him and assaulted him. He was rescued by the police. Thereafter he was taken to the police station and charged with this robbery.

12. He was shocked about the charges in court. He denied boarding any matatu. He testified that he did not know about the TV, which he saw in court.

13. This is a first appeal. As a first appeal court I am required to re-assess the entire evidence and make my own independent findings. I have also considered the submissions of the appellant. As a result, I find that the appellant was arrested in a matatu of Pw 6 while holding the stolen TV. The complainant positively identified the TV as his property.

14. I find that the stolen property was recovered within a few hours after being stolen.

15. I also find that the evidentiary burden shifted to the appellant to explain his possession of the recently LG 50-inch TV. In this regard, the response of the appellant was that he had been framed up.

16. The trial court saw and heard the appellant and the prosecution witnesses testify. That court on the evidence found the evidence of the appellant to be incredible and rejected it.

17. Upon re-assessing the entire evidence, I find that there is ample evidence that the appellant along with two other accomplices robbed the complainant of his properties.

18. In the premises, I find no merit in ground 1, which I hereby dismiss.

19. In ground 2 the appellant has faulted the trial court for failing to find that crucial witnesses including the arresting and the investigating officers were not called to testify. He has therefore urged the court to draw an adverse inference. In this regard, the prosecutor informed the court that he had not been able to get the police to testify. He further told the court that the investigating officer had been transferred to Kilifi and could not call him without causing delay.

20. The appellant in response to the foregoing, is recorded as telling the court that: "*No objection.*" In this regard, I find that there is ample evidence that the appellant was arrested by the public and taken by Pw 3 to the police station. It therefore follows that the role of the police was limited to re-arresting the appellant. The fact that the re-arresting police officer did not testify did prejudice the case against the appellant.

21. I now turn to the issue of the non-calling of the investigating officer. I find that the prosecution was willing to call the investigating officer but they did not do so because they did not want to delay the trial. The appellant consented to the prosecutor's request to dispense with the evidence of the investigating officer. He cannot now be heard to complain that the prosecution failed to call the investigating officer. I therefore find no basis to draw an adverse inference. This ground lacks merit and is hereby dismissed.

22. In ground 3 the appellant has faulted the trial court both in law and fact in failing to evaluate the entire evidence, as a result of which the court wrongly found that the case was proved beyond reasonable doubt. In this regard, the trial court pronounced itself as follows: "*From the evidence as a whole, none of the prosecution witness identified the accused at the scene of the robbery. The prosecution's case as against the accused turns on the recovery of the LG TV positively identified by pw 1, pw2, and pw 3 and remote controls identified by pw 4 and pw 5."*

23. It is clear from the foregoing passage that the trial court considered the evidence as a whole. After doing so, it found that the offence of robbery which is charged in count 1 as against the appellant was proved beyond reasonable doubt. I therefore find that this ground lacks merit and is hereby dismissed.

24. It also found that the offence of breaking into a building and committing a felony contrary to section 306 (a) and the alternative charge of dishonestly retaining three control remote controls of Florine Bisieri Onyonka were not proved and the appellant was accordingly acquitted.

25. In ground 5 the appellant has faulted the trial court both in law and fact in failing to find that the circumstances obtaining at the scene of crime were not favourable for positive identification and therefore the witness was mistaken. The appellant was convicted of robbery on the basis that he was found in possession of recently stolen property within hours following the commission of the offence; which property was positively identified by the complainant as his property. He was not convicted on the basis of visual identification.

26. I therefore find no merit in this ground of appeal and is hereby dismissed.

27. In ground 4 the appellant has faulted the trial court both in law and fact in imposing a forty years (40) years imprisonment sentence that is manifestly harsh, excessive, arbitrary and inhuman. He cited the Supreme Court decision of *Francis Muruatetu & Another v Republic [2017] e-KLR* in support of his appeal. The appellant submitted that the sentence is contrary to articles 50 (2) (p), 19 (2) and 24 (1) (e) of the 2010 Constitution of Kenya. He further submitted that the court failed to take into account his mitigation.

28. In sentencing the appellant, the trial court took into account that he was a first offender. It also took into account that he had three children and that his father died of AIDS. Finally, the court took into account that the offence carried a sentence of death. The court then proceeded to sentence him to 40 years' imprisonment.

29. It is clear from the sentencing notes of the trial court that it failed to take into account that the stolen property namely the LG make TV valued at shs 56,000/= had been recovered. This was a relevant and mitigating factor. Admittedly, sentencing is a matter for the discretion of the trial court. An appeal court may only interfere if the trial court failed to take into account a relevant factor or took into account an irrelevant factor. It may also interfere if the sentence imposed is manifestly low or high to the extent that it amounts to a failure of justice. In the instant appeal, the trial court failed to take into account that the LG make TV had been recovered.

30. Furthermore, I find that the appellant has been in custody since 12/02/2018 to date, which period the trial court did not take into account as required of it by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya

31. This court is therefore entitled to interfere with the sentencing discretion of the trial court. In the circumstances, I find that the sentence of 40 years' imprisonment was manifestly excessive. After taking into account the circumstances of the offence including both the mitigating and aggravating factors, I hereby reduce the sentence to a term of ten (10) years imprisonment, which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok through video link this 6th day of October, 2020 in the presence of the appellant and Mr. Mwangi for the respondent.

J. M. BWONWONG'A.

J U D G E

6/10/2020