REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 30 OF 2018

CEASAR MURIMI MUGO....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.T.T. Nzyoki(SPM) delivered on 15/08/2018 in Criminal Case No.1156 of 2016 Embu)

JUDGMENT

1. The appellant **Ceasar Murimi Mugo**, was charged with the offence of Breaking and Stealing contrary to **Section 306(a) of the Penal Code;** the particulars of the charge are that on the 4th day of November, 2016 at Siakago Township in Mbeere North Sub-County within Embu County, jointly with others not before the court broke and entered a shop of Dorothy Kawira and stole from therein merchandise valued at Kshs.16,007/- and cash Kshs.510/- being the property of the said Dorothy Kawira.

2. The prosecution called a total of three (3) witnesses to prove its case; and the appellant was found guilty and was convicted on the main charge and sentenced to five (5) years imprisonment.

3. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed seven (7) grounds of appeal which are summarized inter alia;

i. The trial magistrate erred in relying on the identification evidence of a single witness (**PW2**) as a basis of conviction;

ii. The witness **PW2** did not provide the name of the appellant when making the first report to the police in support of identification and recognition of the appellant;

iii. The appellant was not positively identified;

iv. Nothing was recovered and no exhibits produced connecting the appellant to the offence;

v. The appellant's defence was not considered by the trial court.

vi. The sentence was harsh and excessive.

4. At the hearing hereof the appellant was unrepresented whereas Ms.Chemenjo represented the State; both parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions;

APPELLANT'S CASE

5. The appellant submitted that the circumstances surrounding the scene of crime were difficult for identification and recognition by the **PW2**; the incident occurred at night; the witness was in a state of fear and shock and that the duration of the attack and struggle was too short and he did not indicate whether the source of light was sufficient to enable identification of the attacker who came out of the shop; **PW2** couldn't have been able to positively identify his attacker and this was a case of mistaken identity;

6. The evidence of **PW2** was that of a single eye witness and it was also inconsistent;

7. In his final submissions, the appellant submitted that the trial court convicted and sentenced him based on evidence that was not proven beyond reasonable doubt as it is by law required and prays that the sentence be set aside.

RESPONDENT'S CASE

8. In response counsel submitted that the appellant contends that he was a victim of mistaken identity; but **PW2** testified that he caught the appellant and struggled with him; he identified him by name and stated that he was a fellow resident in Siakago; and that he had known the appellant since childhood and had attended the same school with the appellants' mother; he also knew the appellants' other relatives namely the grandfather and the uncles;

9. He stated that the incident took place at night but there were bright electric security lights near the scene; case law relied on **Douglas Muthaura Ntoribi vs Republic [2014] eKLR**;

10. Counsel submitted that the identification was based on recognition and it was correct and free from error;

11. The court should take note that the appellant was charged with shop breaking and stealing without the alternative charge of handling stolen property; therefore, the lack of recovery of the stolen goods was not proof that the offence did not take place;

12. On the ground of appeal that the sentence was harsh counsel submitted that it was trite law that sentencing was at the discretion of the trial court; the penalty provided under Section 306 of the Penal Code for the offence in this instance is seven (7) years imprisonment; and the trial court was lenient when it granted the appellant a term of five (5) years imprisonment; counsel argued that this court could interfere with the sentence when it was illegal, improper or incorrect; but in this instance the sentence meted out was fair and just;

13. In conclusion counsel prayed that the appeal be disallowed as it lacked merit as the prosecution had proved its case beyond reasonable doubt and the trial court had followed due process.

ISSUES FOR DETERMINATION;

14. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

i. Whether the appellant was positively identified;

ii. Whether the prosecution proved its case to the desired threshold;

iii. Whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

15. This court being the first appellate court, it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the appellant was positively identified;

16. On identification; In this instance it was not identification, but a case of recognition of the appellant as being one of the assailants; recognition is usually more satisfactory and reliable than identification of a stranger because it is dependant on personal knowledge of the assailant;

17. PW2 had testified that he caught the appellant as he emerged from the shop and that he had struggled with him; he stated that he could identify the robber and indeed identified him by name and stated that he was a fellow resident in Siakago; that he had known the appellant since childhood and had attended the same school with the appellant's' mother; he also knew the appellants other relatives namely the grandfather and the uncles;

18. On the issue of the conditions and circumstances for identification; the trial court made an observation in its judgment that the identification was by way of recognition by a single witness and that the incident occurred at night; and it is noted from the court record that it proceeded to caution itself that such evidence needed to be examined carefully and that it needed ***'to be satisfied that that the circumstances of identification were favourable and free from possibility of error'*** before it could safely utilize the evidence and make it a basis of a conviction.

19. The trial court found that the appellant was a person well known to **PW2** since birth; that they hailed from the same location and the witness knew the appellants mother and other relatives; that there was sufficient lighting from the bright security electric lights at the scene and that the attack and struggle with the appellant was at close range to enable him to see and recognize the appellant;

20. It is this court's considered view that the trial court had the opportunity to see and observe the demeanor of **PW2** and it found his evidence on recognition to be consistent, **'reliable and free from any possibility of error**'; therefore, upon having re-examined the evidence on record on identification this court finds no good reason to interfere with the trial court's finding it is satisfied that **PW2** was able to positively recognize the appellant and the identification was free from any possibility of error;

21. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution proved its case to the desired threshold;

22. The court takes note that nothing was recovered from the appellant; as submitted by the respondent the fact that the stolen goods were not recovered does not mean that the offence did not take place; Section 306(a) of the Penal Code under which the appellant was charged requires the prosecution to prove that the complainant's premises were broken into, goods were stolen therefrom and the appellant was involved;

23. PW3 who was the owner of the shop testified that upon inspecting the shop she confirmed that the door had been damaged and the latch had been cut off; **PW2** who was the watchman confirmed that the robbers gained access to the kiosk through the damaged door; the evidence of these two witness proved that there was forceful entry into the shop; and this court is satisfied that the prosecution proved that there was a break-in;

24. On the goods that were stolen from the shop the trial court in its judgment stated as follows;

> **"…….the intent to permanently deprive the owner or fraudulent conversion of a thing capable of being stolen were ingredients of the offence of stealing. In this case the goods and money stolen from the kiosk of the complainant were indeed *'things capable of being stolen'* and were never recovered. In the circumstances of this case I find no reason to doubt the complainant's evidence that she had goods and coins at the kiosk which were stolen……"**

25. The evidence of **PW2** on identification of the appellant places him at the locus in quo on that material date; in view of this evidence this court is satisfied that the prosecution had proved that the appellant was part of the group that broke into **PW3's** premises and stole goods belonging to the complainant with the intention of permanently depriving her of the same;

26. This court finds no reason to interfere with the trial courts finding that the prosecution ***'had discharged the burden of proof beyond reasonable doubt'*** and duly proceeded to convict the appellant for the offence of shop breaking and stealing contrary to Section 306(a) of the Penal Code.

27. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the sentence was harsh and excessive in the circumstances.

28. The contention of the appellant was that the sentence was harsh and excessive;

29. The penalty provided under Section 306 of the Penal Code for the offence is seven (7) years imprisonment; the respondent submitted that the trial court was lenient when it granted the appellant a term of five (5) years imprisonment; counsel submitted that the sentence meted out was fair and just but argued that this court could interfere with the sentence if it was found to be illegal, improper or incorrect;

30. It is evident from the court record that the trial court invited the appellant to mitigate and took into consideration the fact that the appellant was a first offender; there is no evidence provided by the appellant that the trial court acted upon some wrong principles of law and or failed to take into account the provisions of the punitive section of the law; it can therefore be validly concluded that the trial court properly exercised its discretion when passing the sentence and this court is satisfied that the sentence was as provided for in law; and in the circumstances sentence is found not to be manifestly harsh and excessive; Refer to the case of **Wanjema v Republic (1971) EA 493;**

31. For the forgoing reasons this court finds no good reason that warrants interference of the sentence imposed of five (5) years for the offence that carries a minimum sentence of seven (7) years; and the sentence imposed is found to be both lenient and justifiable;

32. This ground of appeal lacks merit and it is hereby disallowed;

FINDINGS & DETERMINATION

33. In the light of the forgoing this court makes the following findings and determinations;

i. The appellant was positively identified by way of recognition;

ii. The trial court is found to have considered the appellant's ***'alibi'*** defence and gave good reasons for disregarding it;

iii. This court finds no good reasons to justify interference with the sentence imposed of five (5) years which is found to be very lenient in the circumstances; the sentence is hereby upheld.

iv. The appeal is found lacking in merit in its entirety and it is hereby dismissed; the conviction is found to be safe and the sentence are both hereby upheld.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 3rd day of December, 2020.

HON.A.MSHILA

JUDGE