IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 52 OF 2018

BETWEEN

SWABIR BUKHET LABHED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Ongeri, J.) dated 20th March, 2018 **in H.C.CR.A. No. 100 of 2017)**

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JUDGMENT OF THE COURT

[1] On 20th September, 2014 Chief Inspector Thomas Nyamogo (PW2), the then OCS of Kiembeni Police Station and AP Abel Mogire (PW3), in the company of other police officers, were on patrol duty. At around 4:00 p.m while driving around Bamburi they came across motor vehicle registration number KBS 496L make Toyota Probox which was being driven in a reckless manner. They signalled the driver to stop but instead the driver accelerated and tried to evade them. This triggered the police officers to follow this car in a high speed patrol car with AP Abel in control.

[2] The pursuit continued until they came to a dead end at Mtopanga Estate. It was PW2's evidence that three occupants came out of the vehicle in question and fled. The reason behind the occupants' hesitancy to stop became apparent when the vehicle was searched. The police discovered five bags of dry plant based material which they suspected to be narcotic substances. Additionally, the appellant's identification card and driving license were recovered from the vehicle.

[3] The vehicle was towed to the police station and the anti-narcotic police unit took over the investigations. Thereafter, John Njenga (PW5), a government analyst, analysed the plant based substance and confirmed the police suspicion to be true, that the recovered substance was cannabis, a narcotic drug.

[4] Apparently, after the vehicle had been towed to Kiembeni police station, the appellant reported that the vehicle had been stolen by unknown persons at Nyali Police Station. By then information of the recovery of the suspected narcotics and the appellant's documents in the vehicle had been circulated to the neighbouring police stations. As a result, the appellant was apprehended as investigations were going on.

[5] It seems that the appellant had hired the vehicle from Anthony Kirima (PW4) who ran a car hire business on 18th September, 2014. According to PW4, the appellant had hired the car for purposes of ferrying his household items to his new residence. He failed to return the vehicle the next day as per the car hire agreement and paid an additional fee of Kshs.1,500.

[6] Based on the foregoing set of circumstances, the police suspected that the appellant was one of the three persons who fled from the police. As per CPL Samuel Nagate (PW1), the recovered cannabis was weighed at 222 kilogrammes in the presence of the appellant. CPL Samuel also gave the market value of the said drugs as Kshs.444,000. Ultimately, the appellant was charged before the Chief Magistrate's Court at Mombasa with one count of trafficking narcotic drugs contrary to ***Section 4(a)*** of the ***Narcotic Drugs and Psychotropic Substances (Control) Act***. He was also charged with another count of giving false information to a person employed in public service. This count was in relation to the report made by the appellant with respect to the vehicle being stolen.

[7] Upon hearing the prosecution's evidence, the appellant was found to have a case to answer. On being put on his defence, the appellant testified that he was a driver by occupation. He admitted that he hired the vehicle in question from PW4 save that he did so on 20th September, 2014 for purposes of taking his brother in law who lived in Kilifi to Mombasa airport. He stressed that after dropping his brother in law at the airport at around 4:00 p.m., he drove his sister in law and her children back to their home in Kilifi.

[8] While he was on his way from Kilifi back to Kisauni, he was hit from behind by another vehicle at Nyali. He stopped the vehicle and came out to assess the damage. Three occupants also came out of the car that hit him and without any reason began assaulting him until he lost consciousness. He regained his senses only to find himself beside the road and the vehicle missing. With the help of a Good Samaritan he went to Nyali Police Station to report the incident but to his utter shock the police turned against him and arrested him. He was subsequently, charged with the offences in issue, which he denied committing.

[9] On the totality of the evidence, the trial court acquitted the appellant of the second count on the ground that the charge sheet had not indicated under which provision of the law the appellant had been charged. Be that as it may, the trial court was satisfied that the prosecution had proved its case against the appellant on the first count of drug trafficking and convicted him. The trial court went on to sentence the appellant to 15 years imprisonment in addition to a fine of Kshs.200,000 or in default a term of one year imprisonment. The appellant was dissatisfied, and he filed an appeal in the High Court which was dismissed by Ongeri, J. in a judgment dated 20th March, 2018.

[10] Unrelenting, the appellant has preferred this second appeal challenging the High Court's decision on two main grounds; the learned Judge erred in law by-

a) Failing to appreciate that the evidence could not sustain his conviction.

b) Failing to interfere with the sentence which was excessive in the circumstances.

[11] **Mr. Okanga**, learned counsel for the appellant, argued that the two courts below failed to consider the appellant's defence, that is, that he was robbed of the vehicle in question. As far as he was concerned, that piece of evidence still stood in light of the fact that he was acquitted of the second count of giving false information. Further, that evidence weakened the circumstantial evidence relied on by the prosecution and cast doubt as to whether the appellant was in the vehicle when it was stopped by the police. Besides, none of the police officers who recovered the drugs identified the appellant as one of the occupants of the vehicle at the material time.

[12] He added that the recovery of the appellant's identification card and driving licence in the vehicle could not lead to the conclusion that he was one of the traffickers. The reasonable explanation for the presence of the said documents is that the appellant had hired the car and driven it prior to the incident. All in all, there was no evidence linking the appellant to the offence of drug trafficking. Counsel also claimed that the sentence meted out to the appellant was too harsh and asked us to reduce the same.

[13] Opposing the appeal, **Mr. Isaboke**, Senior Prosecution Counsel, submitted that the learned Judge properly re-evaluated the evidence and arrived at the right conclusion. In his view, the evidence placed the appellant at the scene, that is, the recovery of his identity card and driving licence in the vehicle. What is more, the appellant claims to have been carjacked yet he gave no explanation as to why he did not report immediately but conveniently waited until the police had towed the vehicle. Counsel went on to state that the appellant's evidence was unbelievable. Last but not least, Mr. Isaboke claimed that the sentence meted out to the appellant was not in accordance with ***Section 4(a)*** of the ***Narcotic Drugs and Psychotropic Substances (Control) Act***. He intimated that he had intended to file a notice of enhancement of the sentence in terms of the aforesaid provision.

[14] We have considered the record, submissions by counsel and the law. The scope of our jurisdiction as a second appellate court as circumscribed under ***Section 361*** of the ***Criminal Procedure Code*** is limited to points of law. As such, we are obligated to give deference to the concurrent findings of facts by the two courts below for the obvious reason that we did not have the opportunity to observe the witnesses as they testified. Nonetheless, we are not bound by such conclusions where we are satisfied that they are not supported by the evidence or are based on perversion of evidence. See this Court's decision in ***Ahamad Abolfathi Mohamed & Another vs. R*** **[2018] eKLR**.

[15] It is common ground that there was no eyewitness account or direct evidence connecting the appellant to the drug trafficking charge. The only evidence available was circumstantial evidence upon which the two courts below were convinced linked the appellant to the offence. Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It is trite that such evidence can sustain a conviction wherein it meets the threshold surmised by this Court in ***Musili Tulo vs. R*** **[2014] eKLR**, as follows:

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i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

[16] Did the evidence herein meet the above mentioned criteria? While we are conscious that the recovery of the appellant's documents in the vehicle by itself could not give rise to a presumption of guilt, we find the circumstantial evidence on record did satisfy the above threshold. We say so because firstly, the car hire agreement produced in the trial court evidenced that the motor vehicle in question was hired by the appellant on 18th September, 2014 at a cost of Kshs.3000. Likewise, PW4's MPESA statement gave credence to his testimony that the appellant failed to return the vehicle on the agreed date and that the appellant paid an additional fee of Kshs.1500 on 19th September, 2014.

[17] Further, the trial magistrate upon weighing the conflicting evidence tendered by the prosecution, on one hand and the appellant, on the other, with respect to the date the vehicle was hired and purpose for which it was hired, found the prosecution's version plausible. That is, that the appellant had hired the vehicle on 18th September, 2014 as opposed to 20th September, 2014 under the guise that he wanted to use it to ferry his household items to his new residence. We see no reason to interfere with that finding. In that regard, our position is buttressed by the case of ***Erick Onyango Ondeng' vs. R*** **[2014] eKLR**, wherein this Court held as follows:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."

[Emphasis added]

[18] Another aspect that linked the appellant to the offence is found in the appellant's own defence when he admitted he was in possession of the vehicle on the material day at 4:00p.m when he allegedly took his brother in law to the airport. The appellant's identification card was also found in the car. We also note that CI Thomas and AP Abel testified that the car chase and recovery of the narcotic substances occurred at around the same time. Consequently, we, like the two courts below, find the foregoing evidence coupled with the fact that the appellant reported the alleged robbery of the vehicle in question after the recovery of the narcotic substances, gave rise to the presumption that it was the appellant and none other had an opportunity to be in possession of the narcotic substances that were found in the car hired to him, which he was driving at the material time. We agree with the two courts below that the appellant's defence that he was carjacked did not dent the prosecution's case.

[19] In our minds, the surrounding circumstances taken as a whole formed unbroken chain of events that the appellant was in possession of the vehicle from the time he hired the same from Anthony up until when the police chase began and the occupants of the vehicle abandoned the same. This evidence was incompatible with the appellant's innocence and incapable of any other explanation other than he was one of the persons who was involved in trafficking of the narcotics in question Consequently, we find that the appellant's conviction was sound.

[20] In law, sentencing is a matter of discretion for the trial court. An appellate court can only interfere with sentence where it is shown that the sentencing court did not exercise its discretion properly or that the sentence is illegal. See this Court's decision in ***Bernard Kimani Gacheru vs. R*** **[2002] eKLR**. In this case, the appellant was sentenced under the provisions of ***Section 4(a)*** of the ***Narcotic Drugs and Psychotropic Substances (Control) Act*** which stipulates:

"4. Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life;…" [Emphasis added]

[21] It is common ground that where a sentence is couched under the prefix of 'shall be liable', such as in the above case, the same connotes that the sentence prescribed therein is not a mandatory sentence rather it is the prescribed maximum sentence. Therefore, the sentencing court is clothed with discretion to determine the appropriate sentence of course, taking into account the surrounding circumstances of each case. See this Court's decision in ***Fred Michael Bwayo vs. R [2009] eKLR***.

[22] Based on the above principles, can we interfere with the sentence in issue by either reducing or enhancing the same as requested by the appellant and the respondent respectively? Here ***Section 4(a)*** prescribes the maximum sentence which can be issued for the offence thereunder. Thus, we find the trial court properly exercised its discretion by sentencing the appellant to 15 years imprisonment and in addition, imposing a fine of Kshs.200,000 and in default of such payment, a term of one year imprisonment. Therefore, we see no justifiable reason to interfere with the said sentence.

[23] For the reasons outlined herein above, we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Malindi this 20th day of March, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR