



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 11 & 19 OF 2019

DAVID GITHAKWA KIARIE.....1ST APPELLANT

SOLOMON MBUGUA GITHAE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement and sentence of Hon. J.L.Tamar, PM.

dated 23rd January 2018 in Criminal Case No. 430 of 2017 in the Principal Magistrate's Court

at Eldama Ravine, Republic v David Githakwa Kiarie & Solomon Mbugua Githae)

JUDGMENT

1. In his petition to this court, the appellants have appealed against their conviction and sentence as follows.

Count 1 incitement - five years' imprisonment for the first appellant.

Count 5 obstruction - five years' imprisonment for each appellant.

Count 2 assault - five years' imprisonment for 1stappellant.

Count 3 assault- five years' imprisonment for 1stappellant.

Count 4 assault- five years' imprisonment for the 1st appellant.

1st appellant- David Githakwa Kiarie.

2. This appellant abandoned his appeal against conviction. He pursued his appeal against sentence only.

3. This appellant has not filed any grounds of appeal. Instead, he has only filed written submissions in support of his mitigation; which he calls "*MITIGATING GROUNDS*."

4. In his mitigation, the appellant has informed the court that he is a first offender.

5. He has also informed the court as follows. He was selling the illicit brew due to poverty which engulfed his family. Furthermore, the appellant has informed the court that he is the sole winner of his family of three children with the 3rd child being two days, when he was arrested.

6. Furthermore, he has also requested for forgiveness, since he is a first offender.

7. The appellant has also informed the court he has acquired skills, while in prison, which he will use to raise his family instead of selling illegal brew; if he is released. Further he has also promised to be a law-abiding citizen and intends to preach gospel peace.

8. It is in view of the foregoing reasons, that he has urged the court to give him a chance to reform himself.
9. Mr. Mong'are, counsel for the respondent has opposed the appellant's appeal against sentence.
10. In sentencing the appellant, the trial court does not seem to have taken into account that the appellant was a first offender.
11. The trial court also did not take into account that the appellant had been in pre-trial custody for about four days; which period the court was mandatorily required to take into account by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.
12. In view of the errors of law committed by the trial court, this court is entitled to interfere with the sentencing discretion of the trial court.
13. I have taken into account that the appellant is a first offender. I have also taken into account that he was in custody for about four days. Additionally, I have also taken into account that the appellant is the sole bread winner of his family. I have further taken into account that he has acquired skills while in prison, which he intends to use after being released.
14. Finally, I have also taken into account that the appellant has been in post judgement and sentence prison custody for about three years and four months to date.
15. I have not lost sight that the offences committed are serious in that the appellant incited youths to perpetrate violence against their police victims. **Additionally, I find that the appellant obstructed police officers from performing their duties.**
16. After taking into account all of the foregoing matters, I find that the ends of justice have been met and for that reason I hereby reduce the sentence to the period he has already served with the result that the appellant is hereby ordered set free unless he is held on other lawful warrants.

Appeal of the 2nd appellant- Solomon Mbugua Githae.

17. This appellant has raised three grounds in his amended petition of appeal to this court.
18. In ground 1 the appellant has faulted the trial court in convicting him for the offence of obstruction contrary to section 103 (a) of the National Police Service Act, 2011; when the person who **obstructed** the police is a certain lady. In his submissions the appellant has submitted that the person who obstructed the police was a certain lady, whose identity was not disclosed, and was released by the police. This submission is supported by the evidence of Sgt Jesse Nyamwange (Pw 4), who was the investigating officer. In this regard, the evidence of Pw 4 is that: "*We arrested one of the ladies who had obstructed the officer.*"
19. Furthermore, the evidence of No 92485 PC Sirwa Kemboi (Pw 1) was that while in the company of PC Gitau (Pw 2), PC Paul Kenei (Pw 3) and Elima, they received information from a good Samaritan (informer) of the sale of illegal brew. They rushed there and arrested four people. While they were in the process of getting exhibits (the illicit brew), the 1st appellant told Pw 1 that he will allow them to arrest anyone. The 1st appellant then shouted saying: "*jeshi jeshi.*" Suddenly, about 50 young boys armed with crude weapons namely stones, wood and pangas arrived at the scene. They then surrounded the police. These youth ordered the police to release the four people. Since the police were not armed, they released the four people.
20. Pw 1 continued to testify that 1st appellant and his youth took away the exhibits and ran away.
21. Pw 1 further testified that the 1st appellant got hold of the private parts of PC Gitau (Pw 2) and bit him. The 1st appellant also bit him in the left leg.
22. Pw 1 further testified that the 2nd appellant was part of the youths, who responded to the call of the 1st appellant. PC Paul Kenei (Pw 3) was also injured in the head. The 1st appellant also damaged the police handcuffs (exhibit 1). In cross examination, Pw 1 testified that he saw a scar in the head of the 2nd appellant.
23. The evidence of Pw 1 is supported by PC Gitau (Pw 2) except for the following. Pw 2 called for police reinforcement and in the confrontation that followed the four people, who they had been arrested were set free by the mob. It was the 1st appellant who damaged the handcuffs. More importantly, Pw 2 testified that he knew the 2nd appellant before this incident.
24. Furthermore, Paul Kemei (Pw 3) who also **testified and supported the** evidence of his fellow police officers namely Pw 1 and Pw 2. More importantly Pw 3 testified that he knew the 2nd appellant before this incident and he identified the 2nd appellant at the scene of crime on the material day.
25. The defence of the 2nd appellant through his unsworn statement was that on the material day he had gone to offload offcuts when he heard screams. He rushed to the direction of the screams. Upon arrival he was arrested by police. He further testified that he did not commit the offence and he was arrested inside his house.
26. I have re-assessed the entire prosecution and defence evidence as a first appeal court. As a result, I find as credible the prosecution evidence that the 2nd appellant jointly with the 1st appellant and about 50 youths surrounded the complainants (Pw 1, Pw 2 and Pw 3) and in the process violently freed four people, who the complainants had arrested. In the process the two appellants obstructed the police from

executing their duties. The two appellants then took the exhibits and fled away.

27. Furthermore, I find as incredible the defence evidence of the 2nd appellant, because he was not positively identified as one of the youths, who attacked the police and obstructed them from the due execution of their duties. Pw 2 and Pw 3 knew the 2nd appellant before this incident. The offences were committed during broad day light. And for that reason, Pw 2 and Pw 3 easily recognized the 2nd appellant. The circumstances favouring recognized were as follows. First, Pw 2 and Pw 3 knew the 2nd appellant before this incident. Second, they were very close to him. Third, the offences were committed during broad day light. Fourth, the appellant himself admitted that he went to the scene of crime in response to the screams.

28. In the circumstances, I find that the 2nd appellant was positively recognized.

29. This ground of appeal fails and is hereby dismissed for lacking in merit.

30. In ground 2 the appellant has faulted the trial court in failing to find that the failure of the prosecution to conduct a police identification parade resulted in the wrong conviction of himself. Since Pw 2 and Pw 3 knew the appellant before this incident, it was not necessary to hold a police identification parade. This ground of appeal fails and is hereby dismissed for lacking in merit.

31. In ground 3 the appellant has faulted the trial court in failing to find that the person who obstructed the police was the lady who was arrested and released and the fifty youths. On the evidence, I find that **both the unidentified lady and the fifty youths were co-accomplices to** the commission of these offences. The fact that they were not arrested and charged did not absolve the 2nd appellant from the commission of the offence of obstruction. I further find that the 2nd appellant and the co-accomplices shared a common intention in committing these offences in terms of section 21 of the Penal Code.

32. The release and non-prosecution of the lady who obstructed the police, by the investigating police officer (Sgt Jesse Nyamwange (Pw 4), is in the absence of any explanation by the police, amounts to an offence of obstructing the course of justice by Pw 4. This conduct amounts to inadmissible selective prosecution and it also amounts to discrimination under article 27 of the 2010 Constitution of Kenya. This conduct may easily bring disrepute to the administration of justice in the eyes of the public. This explains why the second appellant is unhappy with the release of this unidentified lady.

33. I hereby recommend that the Director of Public Prosecutions takes the initiative to investigate and take appropriate action against Pw 4. And for this reason, the Deputy Registrar is hereby directed to send a copy of this judgement to the DPP for his further directions.

34. In the circumstances, I find that this ground fails and is hereby dismissed for lacking in merit.

35. In ground 4 the appellant has faulted the trial court in failing to consider the defence evidence. I find that the trial court did not explicitly consider the defence evidence. I find that this is not fatal in view of the credible and ample evidence of the prosecution witnesses; which proved beyond reasonable doubt that the 2nd appellant committed the offence. I therefore reject and dismiss this ground for lacking in merit.

36. In the premises, I find that the prosecution proved the offence of obstruction beyond reasonable doubt and I hereby confirm the conviction of the 2nd appellant in that regard. His appeal in that regard fails and is hereby dismissed.

37. On sentence, I find that the 2nd appellant was arrested on 17th June 2017 and was taken to court on 20th June 2017; which translates to a pre-trial custody period of about four days. He was sentenced to five years imprisonment with effect from 23rd January 2018, which translates to a post judgement and sentence custody period of about three years and four months.

38. In the premises, I find that the ends of justice have been served with the result that the sentence imposed is hereby reduced to the period already served. The 2nd appellant is hereby ordered released unless held on other lawful warrants.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 30TH DAY OF APRIL 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Sitienei, Court Assistant.

Appellants present in person.

Mr. Abwajo for the Respondent.