REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 159 OF 2018

RODGERS NAMUNYANYI WEKESA..... APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from conviction and sentence in Original Bungoma CMR. No. 3049 of 2015 delivered on 6/12/2018 by Hon. E N Mwenda SRM))

J U D G M E N T

The appellant Rodgers Namunyanyi Wekesa was charged with 3 counts as follows:-

Count I: Malicious Damage to Property contrary to Section 339(1) of the Penal Code.

Rodgers Namunyanyi Wekesa: *Between 11th August, 2015 at 6.30 p.m. and 12th August, 2015 at 7.40 p.m. at Silalami Village in Bungoma Country jointly with another not before court willfully and unlawfully damaged handcuff Serial No. 024451 valued Ksh.5,000/- the property of National Police Service.*

Count II: Escape From Lawful Custody Contrary to Section 123 as read with Section 36 of the Penal Code.

Rodgers Namunyani Wekesa: On the 11th August 2015 at about 6.30 p.m. at Sikalami Village with Bungoma County being in lawful custody of NO. 236353 A.P.C Abdi Guyo Njiru and No. 23782 APC Isaac Chelimo escaped form the said custody.

Count III: Dealing in Alcoholic Drinks without Licence contrary to Section 7(1) (b) as read with Section 62 of the Alcoholic Drinks Control Act NO. 4 of 2011

Rodgers Namunyanyi Wekesa: *On the 11th August, 2015 at Sikalame village in Bungoma County was found dealing in Alcoholic Drinks (Kangala) to wit 20 litres without licence.*

He pleaded guilty to count 3 and was sentenced to one (1) year imprisonment. The prosecution evidence against appellant in count 1 and 2 is that on 11th August, 2015. **PW 1 PC No. 235363 PC Abdi Guyo** attached to Muchimeru AP Post received information that appellant was preparing changaa at his home. He and colleague went to the home of appellant. They found appellant and his wife in a kitchen house preparing Changaa. They arrested the accused and handcuffed him. As they prepared to pick the exhibits, changaa accused ran way with the handcuff. They recovered 3 litres of changaa and 30 litres of Kangara and arrested the wife of accused. The next day accused was arrested at his home with the handcuff Serial No. 0224451. He as then charged with present offence.

PW 2 No. 2378827 APC Isaac Chelimo who was with PW 1 testified that they visited home of appellant where they found appellant and his wife preparing changaa. He was handcuffed by PW 2 but he escaped while they were collecting the exhibits. The next day they received information that appellant had been seen at his home with one Chaplai Makokha. They went there and arrested him together with the handcuff he had cut.

PW 4 No. 76578 PC Moses Nyaga testified that the appellant was brought to Nzoia Police Station with AP Officers from Mechimeru AP Camp on allegations of malicious damage and escape from lawful custody. He was then chaged with the offence. He produced the handcuff as exhibits.

The appellant gave sworn evidence in his defence. He testified that on 11th August, 2015 he received information that his wife had been

arrested by Aps from Mechimeru AP Post. He went to the post. He was also arrested and taken to Nzoia Police Station. They tried to open the handcuffs but were unable and they cut them loses. The appellant called Daniel Wafula Mchanga as his witness. He testified that on 11 th August, 2015 he was at home of appellant when police came and arrested his wife on allegation of preparing changaa but appellant was not there.

It is upon this evidence that he was found guilty and convicted. In count 1 he was sentenced to 2½ years and in count 2 to one year imprisonment. Imprisonment term to run concurrently.

Aggrieved by the conviction and sentenced the appellant filed this appeal on the following grounds: -

1. The learned trial magistrate erred in law and fact when the convicted the appellant whilst the prosecution evidence was riddled with contradictions and inconsistence is, which were sufficient enough to raise a reasonable doubt.

2. The learned trial magistrate when erred in law and fact when the convicted the appellant while the prosecution had not proved its case the requisite standards,

3. The learned trial magistrate erred in law and fact when he considered the evidence on record in a biased manner, to the prejudice of the appellant.

4. The learned trial magistrate erred in law and fact when he shifted the burden of prove of the appellant.

5. The sentence handed down against the appellant was excessive and harsh sentence arrived at after a failure to considered relevant factors and considering matters not well placed before the learned trial magistrate.

Mr. Ocharo for the appellant filed written submissions counsel for appellant submitted that the trial magistrate was unduly influenced in his sentencing by a previous conviction in Criminal Case No. 2175 of 2010 which conviction was not proved by previous records. He submitted that it was an error for the trial magistrate to ignore the recommendations that appellant was suitable for non-custodial sentence and that the sentence meted out was excessive in the circumstances.

Counsel further submitted that there were contradictions in prosecution evidence in particular as to whether the appellant ran away with handcuffs and whether the wife was arrested on same day or next day there was also the issue of quantity of changaa and kangara recovered and how the recovered handcuffs were handed. Finally counsel submitted that the prosecution did not prove its case beyond reasonable doubt.

M/s Nyakibia for stated opposed the appeal. She submitted that the damaged handcuffs were produced as exhibits and therefore conviction was proper. She submitted that the sentence of 2½ years and 1 year's imprisonment for Count 1 and 2 respectively was not excessive when considering that the appellant had previous convictions.

The two main issues raised in this appeal is

a. That there were contradictions in prosecution evidence that materially undermined the prosecution case and

b. That the trial court considered extraneous matters in imposing the sentence on the appellant.

Mr. Ocharo for the appellant submitted that there were contradictions in evidence relating to the date and manner of arrest of appellant's wife. That the appellant ran away with the handcuffs, how many litres of Kangara was recovered and how the damaged handcuffs were handled.

The Appellant in Count 3 was charged with offence of dealing in alcoholic drinks without licence. The particulars were that he was found dealing with Kangara to wit 20 litres. He pleaded guilty to this charge, convicted and dealt with. Even if there was any discrepancy in the number of litres recovered, the mater was dealt with and is not an issue in this appeal. Even if I were to accept that it was an issue that discrepancy would not in my view materially affect the prosecution's case.

The other contradictions highlighted is the discrepancy on how the appellant escaped. PW 1 PC Abide Guyo testified that they handcuffed the appellant and when they went to gather the exhibits in the kitchen he ran with the handcuffs. The evidence of PW 2 is that when they arrested appellant they handcuffed him. When they went to collect the exhibits he ran away with the cuffs. They then took his wife to the police station. Though counsel submitted that there was discrepancy in this aspect, the evidence of the witnesses adduced did not show any contradictions. They are in agreement that appellant was arrested and handcuffed but ran away with the handcuffs. The next day he was arrested and the handcuffs recovered from him. I, therefore do not find any contradictions in their evidence.

The last issue is that the trial magistrate took into account a previous conviction in criminal Case No. 2175 of 2010 for the offence of grevious harm where he was sentenced to serve 3 years' probation. This information was provided by the prosecution on date of sentencing. From the record, the appellant did not dispute the previous conviction. However, the proper procedure where there is a previous conviction, whether received from criminal records office or by notification by prosecution or even the counts recollection if it has dealt with accused before, such information should be put to the accused and asked whether he admits the previous conviction. It and when he admits, then the same should be taken into account in sentencing.

In this case even when it was stated he had a previous conviction he did not dispute it. Even with consideration of the previous conviction, I find thee sentence of 2½ and 1 years for Count 1 and 2 respectively cannot be said to be excessive.

I, therefore, find no merit in this appeal which is hereby dismissed.

Dated, signed and delivered at Bungoma this 18th day of June, 2020.

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S N RIECHI

JUDGE