REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPELA NO. 101 OF 2017

1. JOSEPH AKASA RICAHRD

2. DAVID MABIALA OMUKOYA

3. STAUSI OKURO ORIEDI

4. DAVID MOI ALWANGA

5. DAUGLAS OMBONYA LITOLI.....APPELLANTS

V E R S U S

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(*from the original conviction and sentence by J.A. Orwa ,P.M, in Vihiga PMC CR case No. 751 of 2017 dated 28/8/2017)*

J U D G M E N T

1. The appellants were on the 28th August , 2017 convicted on their own plea of guilty of the offence of aiding a prisoner to escape contrary to section 124 (a) of the Penal Code and each of them sentenced to serve 3 years imprisonment . They were dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are that:

1. The trial magistrate erred in law and fact in convicting and sentencing the appellants on an ambiguous plea of guilty not taken in a language understood by the appellants and in accordance with the provisions of section 207 (1) of the Criminal Procedure Act established Rules and Practices in Criminal Cases.

2. The trial magistrate erred in law and fact in failing to make a finding that the charge and the facts as presented did not disclose an offence against the appellants.

3. The trial magistrate erred in law and fact in failing to appreciate that the facts read out by the prosecution did not support the charge of aiding a prisoner to escape from lawful custody contrary to section 124 (a) of the penal code against the appellants.

4. The sentence meted against the appellants was manifestly excessive in the circumstances.

2. The particulars of the offence against the appellants were that on the 24th March, 2017 at Emurembe village in Emuhaya sub county within Vihiga County they jointly aided one Walter Ehachi Nakaya to

escape from lawful custody of No. 20115702 , Jackson Esiahilo , the assistant chief of Emurembe sub location.

3. The court record indicated that the appellants appeared at Vihiga Court for plea on the 19th July, 2017 when the charge was read out to them in Kiswahili language, a language which they understood. Each of them replied to the charge in Kiswahili language that:

" It is true"

4. The trial magistrate then recorded a plea of guilty. The prosecution then proceeded to give the facts of the case which were that on the 24/3/2017, the assistant chief of Emurembe sub location Jackson Esialo was in his office when he received a complaint from the father of Walter Ehachi Nakaya that the said person had uprooted maize . That the Assistant chief went and arrested Walter Ehachi and escorted him to his office. The appellants then stormed the Assistant chief's office and asked him why he had arrested the person. They ordered him to release the person. They beat up the Assistant chief. The arrested person then took advantage of the situation and escaped. The Assistant Chief reported the matter at Mwicho Police Patrol Base. Investigations commenced. The appellants were arrested and charged.

5. When asked whether they admitted the facts of the case as read out to them, each of them replied that:-

" Facts are correct"

6. The court then convicted them on their own plea of guilty. The prosecution stated that they could be treated as first offenders. When they were asked to mitigate they said as follows:-

Appellant 1:- I plead for leniency

Appellant 2:- It is true. I aided a prisoner to escape while under custody of Assistant Chief. I did not know he was the Assistant Chief. I pray for leniency.

Appellant 3:- I pray for leniency. I admit i aided a suspect while under custody of an Assistant Chief.

Appellant 4:- I participated in rescuing our colleague yet it was an offence. I pray for leniency.

Appellant 5: I pray for leniency. I did not know it was an offence.

7. The trial court then called for a pre – sentence report. When the report was presented to the court, the trial magistrate stated that acts of lawlessness should be deterred for peace and order to be maintained in the community. She then sentenced each of the appellants to serve 3 years imprisonment.

8. The grounds of appeal are basically 3 that the plea was not taken in a language understood by the appellants, that the charge and the facts as presented did not disclosed an offence against the appellants and that the sentence was merit…. Excessive in the circumstances.

9. The procedure of taking plea was set out by the Court of Appeal in **Adan Vs Republic (1973) EA 446.** The procedure as set out in that case is that the charge and the particulars should be read out to the accused person so far as possible in his own language, but if that is not possible then in a language which he can speak and understand . The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all the essential elements, the magistrate

should record what the accused has said, as nearly as possible in his own words, and then formally enter plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to 'not guilty' and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must be recorded.

10. Section 198(1) of the Criminal Procedure Code states that:-

> " **Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."**

11. In this case the charge was read out to the accused persons in Kiswahili language. It is recorded that they understood the said language. Each of them replied to the charge in Kiswahili language and said that the charge was true. Each of them replied to the facts of the case and responded that the facts were correct. When asked to mitigate they did so. From the above, I have no doubt that the proceedings were conducted in Kiswahili language which language the appellants well understood. There is no substance in the urguement that the proceedings were conducted in a language not understood by the appellants.

12. The second ground of appeal is that the charge and the facts did not disclose an offence against the appellants. The advocate for the appellants **Mr. Ondieki** submitted that the Assistant Chief is not a police officer and that he has no powers of arrest. Therefore that Walter Ehanji was not in lawful custody of the assistant chief.

13. Section 24 (a) of the penal code states that:

> "**any person who aids a prisoner in escaping or attempting to escape from lawful custody…**
>
> **is guilty of a felony and is liable to imprisonment for seven years".**

The question then is whether the said Walter Ehanyi was a prisoner in lawful custody of the Assistant Chief.

14. The Criminal Procedure code establishes two types of offences – cognizable and non –cognizable offences. The Interpretations section in section 2 of the penal code defines a " cognisable offence " to mean an offence for which a police officer may , in accordance with the first schedule or under any law for the time being in force , arrest without warrant . " Non – cognisable offence" on the other hand means an offence for which a police officer may not arrest without warrant. A "police officer" under the section means a police officer or an administrative police officer.

15. An Assistant Chief is therefore under the definition in the penal code not a police officer. He thereby has no powers of arrest equal to those of a police officer.

Section 34(1) of the Criminal Procedure Code provides that :-

> **Any private person may arrest any person who in his view commits a cognisable offence, or whom he reasonably suspects of having committed a felony.**

The facts given by the prosecution did not indicate that the suspect had committed a cognisable offence in view of the Assistant Chief. The Assistant Chief was not there when the offence was committed. The offence was in fact reported to him. He therefore had no powers to arrest the suspect under the first limb as the offence was not committed his view.

16. The report made to the Assistant Chief was one of uprooting of maize crops. There was no allegation of malicious damage to property in the facts given to the court. It was not indicated that the offence, if any, committed amounted to a felony. The Assistant Chief could thereby not arrest the suspect under the second limb for reasonably suspecting the person of having committed a felony. The Assistant chief could therefore not exercise the powers of a private person under section 34 of the penal code to arrest the suspect.

17. In the foregoing the arrest and confinement of Walter Ehanji Nakaya by the Assistant chief was unlawful. The person was not in lawful custody. The appellants did nothing wrong in freeing a person from unlawful custody of the Assistant Chief. The charge and the facts thereby did not disclose any offence against the appellants. The appellants were wrongly convicted of the charge.

18. An accused person can change plea at any stage of the trial. In **John Muendo Vs Republic, Nairobi Criminal Appeal No. 365 of 3011** (2013) eKLR the Court of Appeal stated that :

> "We ***want to add here that if the accused wishes to change plea or in mitigation says anything that negates any of the ingredients admitted and been convicted for, the court must enter a plea of not guilty. That is to say, an accused can change plea at any time before sentence."***

When called upon to mitigate, the 2nd appellant stated that he did not know that the person who had arrested the suspect was an Assistant Chief. The 2nd appellant was in effect denying that he aided a prisoner to escape from lawful custody. That negated a plea of guilty and the court should have entered a plea of not guilty against him.

19. The 5th appellant stated in mitigation that he did not know that the act amounted to an offence. The trial court should have proceeded to find out whether the act in fact amounted to an offence. If it had done so it should have found that the facts did not disclose an offence. As the conviction was illegal, the court need, not consider whether the sentence was excessive or not.

20. In the foregoing the facts against the appellants did not disclose that they aided a prisoner to escape from lawful custody. The appellants were wrongly convicted of the offence. The appeal is thereby merited. The conviction is quashed and the sentence set aside. The appellants shall be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 31st day of July, 2018

J.NJAGI

JUDGE

In the presence of :

No appearance ……for appellants

Mr. Juma…….……...…….for respondent/state

George …….……..court assistant

Appellants……present

14 days Right of Appeal.