



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 15 OF 2018

SAMSON ONDUSO OSORO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimutai – SRM
in the original Keroka Principal Magistrate’s Court Criminal Case No. 1127 of 2014]**

JUDGEMENT

The appellant was charged on five counts namely: -

Count I – Attempted murder contrary to Section 220 (a) of the Penal Code.

Count II – Stealing contrary to Section 75 of the Penal Code,

Count III – Resisting or wilfully obstructing a police officer contrary to Section 253 (b) of the Penal Code.

Count IV – Careless driving contrary to Section 49(1) of the Traffic Act Cap 403 Laws of Kenya.

Count V – Failing to obey a verbal direction given by a police officer in uniform contrary to Section 52(1) (a) as read with Section 52(2) of the Traffic Act Cap 403 Laws of Kenya.

On count I, the particulars were that on 12th September 2014 at around 1820hrs at Keroka Township in Masaba North District within Nyamira County, he attempted unlawfully to cause the death of No. 75171 Cpl/W Jepkorir Mengich and Rodgers Omwoyo Samba by driving a m/vehicle reg. no. KBU 549L make Toyota Probox by colliding with other oncoming m/vehicle reg. no. KBJ 463Q Make Toyota Spacio.

On count II the particulars were that on the 19th day of August 2014 at Chebilat trading centre, Masaba North District within Nyamira County, he stole rubber shoes valued at Kshs. 19,920/= the property of Rodgers Omwoyo Samba.

Count III – particulars were that on the 12th day of September 2014 at Keroka Township in Masaba North District within Nyamira County, he resisted or wilfully obstructed No. 75171 Cpl/W Jepkorir Mengich a police officer who at the time of the said resistance, or obstruction was acting in the execution of her duty.

Count IV – it was alleged that on the 12th day of September 2014 at around 1820hrs along Keroka – Kisii road in Masaba North District within Nyamira County, being the driver of a m/vehicle reg. no. KBU 549 L Make Toyota Probox he failed to keep to the near side as the proper traffic lane and in the process collided head on with m/vehicle reg. no. KBJ 463Q make Toyota Spacio that was heading towards opposite direction driven by one Kennedy Lawrence Orindo and as a result, the following passengers were injured namely 75171 Cpl/W Jepkorir Mengich, Rodgers Omwoyo Samba, Mariola Nyamboke, Moraa Ongera, Robina Ombaba and Kemuto Ombaba.

On count V – the particulars were that on the 12th day of September 2014 at around 1820hrs along Keroka – Kisii road in Masaba North District within Nyamira County, being the driver of a m/vehicle reg. no. KBU 549 L make Toyota Probox he failed to obey a verbal direction given by a police officer in uniform one NO. 75171 Cpl/W Jepkorir Mengich in that she instructed him to drive the vehicle to Keroka Police Station only to pass the Police station at a high speed thus disobeying the instruction.

He pleaded not guilty on all the counts and the case proceeded to hearing with the prosecution calling four (4) witnesses and the appellant making an unsworn statement in which he maintained he was innocent of the charges.

Briefly the prosecution's case was that on 19th August 2014 the appellant approached Rodgers Omwoyo (Pw3), a trader at Keroka, and obtained shoes which were loaded into his vehicle, a Probox registration No. KBU 549L, whereupon he boarded the vehicle and left without paying. Pw3 reported the matter to Keroka Police Station. Pw3 told the court that he next saw the appellant when the appellant carried him and his son in his vehicle only to dump them in a hotel at Chebilat.

On 12th September 2014 he informed the OCS Keroka Police Station who advised him to wait for the appellant at a certain road block the police had mounted. The OCS also alerted Police Constable Jepkorir Mengich (Pw2) one of the officers manning the road block that the vehicle the appellant was driving was wanted by the police. When therefore the appellant's vehicle drove to the road block at 3pm, PC Mengich (Pw2) stopped it. She told the appellant that the vehicle was wanted at Keroka Police Station and boarded the vehicle with Rodgers (Pw3). The appellant obliged and did a U-turn to drive to the Police Station. He even asked the passengers he was carrying to alight as he was going to sort out an issue at the police station. However, when they reached the entrance of the police station he did not stop but accelerated and said that they were all going to die on that day. He accelerated and crushed his vehicle into an oncoming vehicle which was being driven by Kennedy Lawrence Orindo (Pw1). After causing the collision he came out of his vehicle and fled. The accident was reported to Keroka Police Station, scene visited and a search mounted for the appellant. He was arrested one month later and charged with these offences.

As stated in his defence, he maintained his innocence but upon evaluating the evidence the trial magistrate found him guilty on all five counts and on 9th April 2018 sentenced him as follows: -

Count I – one (1) year imprisonment.

Count II – six (6) months imprisonment.

Count III – six (6) months imprisonment.

Count IV – six (6) months imprisonment.

Count V – six (6) months imprisonment.

He did not appeal within the requisite period but on 30th May 2018 this court granted him leave to appeal out of I have looked at his petition of appeal. It is neither a petition against conviction nor against the extent or legality of the sentences imposed. It is a plea for reduction of the sentences on the grounds that he is a family man and sole bread winner not only of his family but of other dependants; that he suffers from a chronic illness (diabetes) since 2007 and his continued incarceration shall worsen his condition and that he has reformed and will not reoffend.

I have considered the gravity, nature and circumstances of the offences committed by the appellant, and the sentences imposed by the law and my finding is that the trial magistrate was indeed lenient. The offence of attempted murder attracts a sentence of life imprisonment yet the appellant got away with one-year imprisonment. I find it difficult to believe that the appellant has a chronic illness as firstly, he has not annexed any documents as proof and secondly if he was he could have informed the trial magistrate when he was given a chance to mitigate. It is my finding that the allegation is just an afterthought intended to hoodwink this court to pity him. I am also not persuaded that his being incarcerated for an offence whose conviction he does not oppose, in any way prejudices or violates the rights and fundamental freedoms of his offspring and further I find that the fact that he has reformed and promises not to reoffend is a factor that would perhaps entitle him to remission (parole) but not a reduction of the sentence by this court. The trial magistrate took all circumstances into consideration when he meted out the sentences and I am satisfied that the punishment fits the charges. The only thing I fault the trial magistrate for is for not stating whether the sentences will run concurrently or consecutively. I direct that they shall run consecutively. The appeal is otherwise dismissed. It is so ordered.

Signed, dated and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE