



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 2 OF 2015

ABDUAZIZ ADAN MOHAMED APPELLANT
VERSUS

REPUBLIC RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrates Criminal Case No. 1104 2012- B J. Ndenda SPM)

JUDGMENT

The appellant was charged in the magistrate's court at Garissa with nine counts. After the conclusion of the trial, he was convicted on count 1 and count 2 of engaging in acts intended to cause grievous harm contrary to section 231 of the Penal Code. He was also convicted on count 8 of malicious damage to property contrary to section 339(1) as read with section 339(2)(b) of the Penal Code. He was lastly convicted on count 9 for residing outside the designated area without permission contrary to section 25(f) of the Refugee Act No. 13 of 2006. He was found not guilty of count 3, 5, 4, 6 of engaging in acts intended to cause grievous harm contrary to section 231(f) of the Penal Code. He was also not found guilty of count 7 of engaging in criminal activity contrary to section 3(a) as read with section 4(1) of the Organized Crimes Act of 2010.

He was sentenced to serve life imprisonment on count 1, and life imprisonment on count 2. He was discharged under section 35 (i) of the Penal Code with regard of counts 8 and 9.

Dissatisfied with the decision of the trial court the appellant has come to this court on appeal. He filed his initial Petition of Appeal on 21st January 2015. Before the appeal was heard however, he filed another Petition of Appeal to replace his initial Petition of Appeal. He relied on the latter Petition of Appeal whose grounds are as follows:-

1. The learned magistrate erred in convicting him without considering the charge relied upon was fatally defective contrary to section 134 of the Criminal Procedure Code.
2. The trial magistrate erred in convicting him without considering that the evidence of PW1 failed to disclose the identity of the suspect at the scene of crime.
3. The trial magistrate erred in convicting him without considering that first report was not made on the clear identification and description of the perpetrator.
4. That PW1's claims of being warned not to step on the soil because a snake will bite him, was not enough evidence to prove that the appellant herein had knowledge of the implanted landmine.
5. The learned trial magistrate erred in convicting him without considering that he was not found in possession of any explosive material or firearms

The appellant also filed written submissions to the appeal which he relied upon and elected not to make oral submissions in court. In the written submissions the appellant emphasized that there was no corroboration of the evidence of the child PW1 who talked of a snake in the red soil. In any event, the appellant started talking about a snake was not enough to prove a charge of engaging in acts intending to cause grievous harm. He also said that when he was arrested he was selling miraa.

The appellant further submitted that he was arrested one day after the tragedy, and the prosecution did not thus prove beyond reasonable doubt that he was the culprit. According to him, the prosecution buried did not prove the origin of the explosive and did not also prove that he was the one who planted the same. The appellant emphasized that he had denied in his defence that he was involved in the incident.

Learned Prosecution Counsel Mr.Okemwa opposed the appeal. Counsel submitted that the court convicted on only on count 1,2,8 and 9. Counsel submitted that the evidence in support of the charges of causing grievous harm was that of a minor (PW1) who gave a revelation of what the appellant told him before the occurrence of the explosion. The appellant warned the witness to keep clear of the scene because there was a snake on the road. According to counsel, the evidence on record demonstrated that the appellant had the intention of harming the police officers. As such he was the person who planted the explosives. The P3 forms produced according to counsel confirmed the grievous harm suffered. Counsel submitted that count 1 and 2 were thus proved.

On count 7 of engaging in criminal activities contrary to section 3 (a) as read with section 4 (1) of the Organized Crimes Act 2010, counsel submitted that the evidence on record was sufficient to sustain the conviction. Counsel lastly, stated that count 9 was also proved on the appellant in his defence in fact admitted that he was a refugee attached to Kakuma refugee camp but had moved to Dagahaley refugee camp, where he resided and conduction business.

With regard to sentence, counsel submitted that the sentence imposed was neither harsh nor excessive.

In response to the prosecuting counsel's submissions, the appellant stated that someone planning dangerous things would not tell people about it. Further that all the prosecution witnesses did not know him before. He also stated that he was not found in possession of anything related to the alleged offences. He stated that what the prosecution witnesses' said was not true.

In summary, the evidence of the prosecution was that the appellant a refugee at Kakuma refugee camp, moved to Dagahaley refugee camp in Dadaab without permission from the authorities.

On 25th of July 2012 at around 11 am, a young man aged 13 w S M F (Pw1) a pupil at *particulars withheld* primary school, was proceeding to buy a grammar book from a book shop at the refugee camp near the CARE Kenya Food Distribution Centre, when he saw some loose soil. When he stepped on the loose soil, the appellant came from behind and told him that there was a snake inside the red soil, and ordered him to run away by showing him a pistol included around his waist. The young man initially thought of reporting the incident to the police post but heard an explosion and gun shots soon thereafter and ran home, after he saw a badly damaged motor vehicle.

On the following day, he reported the incident to the Dagahaley police post. Together with the police, that is PC Crispus Karisa (PW3) and PC Kennedy Kimani (PW7) , the young man proceeded and pointed at the appellant and he was arrested.

The subject explosion damaged a police vehicle in which several police officers were seriously injured. The injured included PC driver Victor Sekudi (PW2) PC driver Dismus Mose(PW4). The injured police officers were taken for medical treatment and P3 forms filled. Dr. Zefania Kamau (PW5) testified and produced two P3 forms for Victor Sekudi and pc Dismus Mogaka Mose. As at a time of trial, the other injured police pc Bashir Mohamed, pc Muktar Ali Said and pc Mohamed Osman officers were not able to attend court, to testify due to the injuries suffered. That was the reason why the magistrate did not convict the appellant for some charges.

This is a first appeal. As a first appellate court, I am required to re-examine all the evidence on record and come to my own conclusions and inferences. In doing so I have in mind that I did not have the opportunity to see the witnesses testify to determine their demeanor- and give due allowance to that fact. See the case of *Okeno Versus Republic* (1972) EA32.

I have re-evaluated the evidence on record. I have considered the submissions of the appellant as well as the submissions of the state.

This is a case based on the evidence of a minor W M F (PW1) who was aged 13 at a time of the incident. The said witness testified on oath and was cross-examined. The evidence of this minor Witness even under cross examination was not shaken. He maintained in cross examination that the appellant warned him not to step on a snake buried inside the red soil. In my view, the evidence of this minor witness was believable and straight forward, and I believe the same just as the learned trial magistrate believed the same. The reasons why the evidence of PW1 is credible are given thereafter.

The evidence of this minor witness talked about being told by the appellant not to step on the red soil because underneath was buried a snake. The offences for which the appellant was charged had nothing to do with a snake. He was arraigned for activities related to the planting of explosives under the soil to cause the grievous harm and malicious damage to property. PW1 in my view said the truth because he stated exactly what took place. PW1 stated that it was the first time he had seen the appellant, and stated what he told him PW1 also stated that he did not report the incident that day, and instead reported the incident to the police in the next day. The evidence on record from PW1 in my view is thus very clear and consistent.

This is a case based on circumstantial evidence. It is also a case based on the evidence of a single identifying witness. With regard to the evidence of a single witness in *Roria-vs-R*(1967) EA584 the Court of Appeal stated clearly a fact may be proved by the testimony of a single witness though such evidence needs to be tested.

With regard to circumstantial evidence no one saw the appellant planting the explosives. PW1 stated that the appellant merely said that under the soil was a snake which would bite him. In the case of *Muchene-vs-R*(2002)2 K LR 367 the Court of Appeal reiterated that a conviction can only be sustained on circumstantial evidence if the in a patory facts are inconsistent with innocence.

In my view, the circumstantial evidence placed before the trial court herein led to the irresistible conclusion that it was the appellant who either planted the explosive, or that was a party to the planting of the explosives and was an accomplice and thus a principal offender. Otherwise how did he know about the alleged “snake”. Why did he have to display a pistol to scare PW1? The fact, of the child (PW1) not reporting the incident immediately to the police in my view, was normal behavior of a child. He said in evidence that initially he thought of reporting the unusual incident but that after taking a few steps, he heard the explosion and went home to sleep. In the morning, he gathered the courage to go and report the matter to police.

From evidence on record, PW1 displayed no hesitation in identifying the appellant as the person who talked to him about a snake. The fact that the explosion occurred at the same point the appellant claimed had a snake under the ground, clearly established the fact the explosives were buried under the soil with the knowledge and connivance of the appellant.

Indeed, the appellant was not arrested in possession of any explosive or ammunition. However, there is no suggestion that there could have been a personal reason for PW1 to tender false evidence against the appellant, as they had no prior disagreement, nor did PW1 stand to gain anything by wrongly implicating the appellant.

In my view therefore, the evidence of PW1 and the medical evidence proved counts 1,2 and 8 beyond reasonable doubt.

On count 9 of residing outside the designated area, the appellant himself admitted that he was a refugee stationed at Kakuma refugee camp. He was not authorized to reside at Dagahaley refugee camp where he was residing. That count was thus proved beyond any reasonable doubt.

I will thus uphold the convictions of the trial court.

With regard to sentence, the magistrate sentenced the appellant to serve life imprisonment on counts 1 and 2 and discharged him in counts 8 and 9.

The maximum sentence for each of counts 1 and 2 under section 231(f) of the Penal Code is life imprisonment. That is the maximum sentence provided by the law.

In mitigation, the appellant asked for leniency. The prosecution stated that he was a first offender. The magistrate however felt that these were serious crimes which had left a trail a destruction and injuries, and sentenced him to life imprisonment on each of count 1 and count 2.

Though the offences for which the appellant was convicted were serious offences, I find no basis for the magistrate pronouncing the maximum sentence for a first offender who asked for leniency. Since the sentence was not a mandatory sentence, the magistrate in my view should have considered that the appellant asked for leniency and that the prosecution said that he was a first offender. I will thus set aside the sentence of life imprisonment on count 1 and count 2 and substitute therefore a sentence of 30 years imprisonment on each of the two counts. The two sentences will run concurrently.

To conclude, I dismiss the appeal on conviction and uphold the conviction of the trial court. I however set aside the life imprisonment for count 1 and 2, and order the appellant will instead serve imprisonment for 30 years on each of count 1 and 2. The two sentences will run concurrently, which means the appellant will serve a sentence of 30 years imprisonment from the date he was sentenced by the trial court. It is so ordered.

Dated and delivered at Garissa this 21st day of March, 2017.

GEORGE DULU

JUDGE