



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 51 OF 2016
PAUL TAYAI..... APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 282 of 2015 in the Senior Resident Magistrate's Court at Taveta delivered by Hon W.K. Kitur (RM) on 10th November 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Paul Tayia was tried and convicted by Hon W.K. Kitur, Resident Magistrate for the offence of entering a dwelling place with intent to commit a felony contrary to Section 305 (1) of the Penal Code Cap 63 (Laws of Kenya). He was fined Kshs 20,000/= and in default to serve two (2) years imprisonment.

2. The particulars of the charge were as follows :-

“On the 14th day of July 2015 at around 100 hours at Vikwayani Village within Taita Taveta County entered into the dwelling house of Ronald Mnjama with intent to commit a felony namely stealing therein.”

3. Being dissatisfied with the said judgment, on 19th September 2016, the Appellant herein filed a Notice of Motion application seeking leave to file his Appeal out of time which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on four (4) Grounds of Appeal in which he contended that the Prosecution did not prove its case beyond reasonable doubt. On 13th June 2017, he filed Amended Grounds of Appeal. He relied on five (5) Grounds of Appeal.

4. When the matter came up on the same date, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

6. It appeared to this court that the issues that had been placed before it for determination were:-

- a. Whether or not the Appellant was denied fair trial for not been assigned legal representation;**
- b. Whether or not the Prosecution had proven its case beyond reasonable doubt;**
- c. Whether or not the sentence was manifestly harsh and excessive in the circumstances.**

7. In respect of the first issue, the Appellant argued that although the offence he had been charged with was not serious, he ought to have been assigned legal representation since he was a lay man in matters of law. On its part, the State argued that the right to legal representation enshrined in Article 50 (2) (h) of the Constitution was not an absolute right and that the practise was to assign counsel to persons who had been charged with treason or murder.

8. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include *all situations where an accused person is charged with an offence whose penalty is death*. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person’s right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State’s expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

Article 261 of the Constitution provides *inter alia*:-

- (i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.**

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

9. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed as he had contended and his Amended Ground of Appeal No (2) was not merited and the same is hereby dismissed.

10. Turning to the question as to whether or not the Prosecution had proved its case beyond reasonable doubt, this court noted the Appellant's assertions that he was framed pursuant to existing grudge between his family and that of the Complainant, Ronald Mnjama (hereinafter referred to as "PW 1").

11. He also contended that the evidence of PW 1 and Kamakee Kanyungu (hereinafter referred to as "PW 2") that they disarmed him contradicted that of No 91607 PC David Komora (hereinafter referred to as "PW 3") who testified that when he went to arrest him, he found him with a knife. He wondered how many knives he had.

12. On its part, the State submitted that the Appellant never raised the issue of there having been an existing grudge as he had contended when he Cross-examined PW 1, PW 2 and PW3. It averred that this was a mere assertion that was not supported by any evidence and added that he was arrested red-handed.

13. A perusal of the proceedings shows that on 14th July 2015, PW 1 returned to his house and found the window open. Household items and beddings were strewn all over the house. Both he and PW 2 saw the Appellant who was armed with a knife trying to come out of the house. They subdued and disarmed him. PW 3 went to PW 1's house where he found the Appellant having been arrested with members of the public wanting to administer mob justice on him. In his unsworn evidence, the Appellant stated that on the material date, he went to Taveta where he worked as a barber at 5.00am. However, at 7.00am, he was arrested by the police.

14. The Learned Trial Magistrate considered the Appellant's defence and found the same to have been a mere denial as he was caught red-handed and the knife he had produced in court as an exhibit. He therefore found that the Prosecution proved its case beyond reasonable doubt as had been stipulated in the case of **R.T. Bhatt vs Republic [1957] E.A. 32** that the prosecution is under a duty to prove its case.

15. Notably, as the Appellant's evidence was not adduced under oath, it remained merely persuasive. On the other hand, having analysed the evidence that was adduced by PW 1, PW 2 and PW 3, this court found that there was no inconsistency in their evidence. The fact that PW 3 said that the Appellant had a knife did not contradict PW 1's and PW 2's evidence that they disarmed him. The bottom line was that on the material date, he had a knife at the time he was arrested at PW 1's house.

16. It was therefore the view of this court that the Prosecution proved its case beyond reasonable doubt and accordingly, Amended Grounds of Appeal Nos (1), (4) and (5) were not meritorious and the same are also hereby dismissed.

17. As regards the sentence, the Appellant submitted that the same was harsh and manifestly excessive in the circumstances as the Prosecution told the Trial Court that he was a first offender and that he had stated in his mitigation that he suffered from asthma.

18. The State argued that Section 305 of the Penal Code stipulates that a maximum sentence of five (5) years and consequently, the Learned Trial Magistrate exercised his discretion when he sentenced the Appellant to two (2) years with the option of a fine, which it stated was lenient considering that he was caught red-handed.

19. Section 306(a) of the Penal Code provides as follows:-

“Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for five years.”

20. As Section 305 of the Penal Code did not prescribe a minimum sentence, the Learned Trial Magistrate acted correctly in imposing a fine upon the Appellant herein. Section 26(3) of the Penal Code provides as follows:-

“A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”

21. Further, Section 28 (1) of the Penal Code provides as follows:-

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply-(b) in the case of an offence punishable with fine or a term of imprisonment, the imposition of a fine shall be a matter of discretion of the court(emphasis court).”

22. Appreciably, sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless such sentence is illegal, unlawful or is manifestly excessive, harsh and severe.

23. Section 28 (2) of the Penal Code stipulates as follows:-

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

24. It was therefore clear that when the Learned Trial Magistrate fined the Appellant Kshs 20,000/=, the maximum period he could have given for a default sentence was six (6) months. The default sentence of two (2) years for failure to pay the fine of Kshs 20,000/= was clearly illegal, unlawful, harsh, severe and manifestly excessive warranting this court to interfere with the said Learned Trial Magistrate’s discretion in imposing a penalty upon the Appellant herein.

25. Appreciably, the Appellant did not steal anything as he was caught in the act of doing so. It was therefore the view of this court that a fine of Kshs 20,000/= that was imposed by the Learned Trial Magistrate was reasonable and commensurate with the offence the Appellant had committed.

26. In the case of **Beshick Mombo Mwake vs Republic [2016] eKLR**, this very court reduced the sentence of harsh, severe and manifestly excessive three (3) years imprisonment to three (3) months imprisonment as the appellant therein had stolen three (3) pieces of timber valued at Kshs 1,500/=.

DISPOSITION

27. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 19th September 2016 was partly successful as regards the default sentence that was imposed upon him by the Trial Court. In this regard, the conviction is hereby upheld as it was lawful and fitting.

28. However, as the imposition of the default sentence for two (2) years imprisonment in the event the Appellant failed to pay a fine of Kshs 20,000/= was clearly illegal and unlawful, the said default sentence is hereby set aside as the same was manifestly harsh, severe and excessive in the circumstances of the case herein and in its place it is substituted with six (6) months imprisonment.

29. Bearing in mind that the Appellant has already served one (1) year and nine (9) months imprisonment, this court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

30. Appreciably, the Appellant lodged his appeal almost over one (1) year after he was imprisoned. This court received the lower court file in March 2017 and did its best to hear the Appeal herein expeditiously. In view of the delays herein, the Appellant was occasioned great miscarriage of justice by having been incarcerated almost two (2) years when he in fact, ought to have been released from prison on or about May 2016.

31. It is unfortunate that in the circumstances, other than ordering his release forthwith, the most that this court can do is to empathise with his plight.

32. It is so ordered.

DATED and DELIVERED at VOI this 17th day of October 2017

J. KAMAU

JUDGE

In the presence of:-

Paul Tayai - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk