



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.50 OF 2011

PATRICK KIRIMI KATHUNI APPELLANT

VERSUS

REPUBLIC PROSECUTOR

From original conviction and sentence in Criminal Case No. 740 of 2011 at the Principal Magistrate's Court at Runyenjes by Hon. J.P. NANDI (DM II PROF.) on 5/4/2011

J U D G M E N T

PATRICK KIRIMI KATHUNI the Appellant was charged with the offence of escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code.

The particulars as stated in the charge sheet were as follows;

PATRICK KIRIMI KATHUNI: On the 29th day of June 2010 at Embu Police Station in Embu West District of Embu County, being in lawful custody of PC DAVID PONGE at Embu police station cells escaped from the said custody.

The matter proceeded to full hearing and the Appellant was convicted and sentenced to two years imprisonment. He was aggrieved by the Judgment and has appealed against both conviction and sentence raising the following grounds;

1. ***That the learned trial Magistrate erred in both law and fact when he convicted the Appellant on allegations of escape yet there was no evidence to support the same.***
2. ***The learned trial Magistrate erred in both law and facts when he failed to consider the fact that PW3 testified that the gap alleged the Appellant escaped through was too small.***
3. ***The learned trial Magistrate erred in both law and facts when he failed to consider the fact that PW2 and PW3 told the trial Court that a suspect is only given back his money upon an official release from the custody.***
4. ***The learned trial Magistrate erred both in law and fact when he failed to consider the contradictions between PW2 and PW3 on the mode of the alleged escape from the lawful custody.***
5. ***The learned trial Magistrate ignored the fact that PW1 testified that he did not witness any evidence of escape from the police cells.***
6. ***The learned trial Magistrate erred in the fact that he ignored the Appellant's defence without giving any good reason for that.***

The brief facts of this case were that the Appellant was re-arrested by members of the public on 26/6/2010 and booked at Embu Police Station cells. He appeared in Court on 29/6/2010 charged with the

offence of Burglary and stealing. He was further remanded at the Embu Police Station for 3 days. On the night of 29th – 30th June 2010 he escaped from the cells. PW1 & PW2 are the officers who discovered the escape. The Appellant in his defence denied the allegation saying he was released by PW3 after his people saw him (PW3).

When the appeal came for hearing the Appellant presented the Court with written submissions which I have considered alongside his grounds of appeal. The appeal was opposed by the State Counsel who submitted that the evidence was overwhelming. I have equally considered his submissions plus the evidence on record.

As a first appeal Court I have the duty to reconsider and reevaluate the evidence on record and arrive at my own conclusion. I am alive to the fact that I did not see nor hear the witnesses. I am guided by the case of **SOKI –V- REPUBLIC [2004]2 KLR 21** where the Court of Appeal held thus;

“It is the duty of a first appellate Court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this”.

The Appellant raised several grounds which all refer to the evidence adduced. I therefore consolidate them and will deal with one issue which is whether there was sufficient evidence to sustain a conviction.

The Prosecution called three (3) witnesses who are police officers. There is no dispute that the Appellant was arrested on 26/6/2010 for an offence of burglary and stealing. He was arraigned in Court on 28/6/2010. He was by a Court Order remanded at Embu Police Station for three (3) days. He then left the cells on 29/6/2010 – 30/6/2010 without any permission. The O.Bs (EXB1), Cells register (EXB2) and signal (EXB3) all confirmed the missing prisoner. This was the gist of the Prosecution evidence.

The Appellant in his unsworn defence confirmed all these facts save for what happened on 29/6/2010 when he stated that his relatives visited him and talked with PW3. Later P.C. David Ponge called him and told him that he had talked with PW3 and it was agreed that he be released. P.C. Ponge gave him his money and he left for Chuka. Later PW3 came to his house in Chuka asking for money. He arrested his wife. Later the Appellant was arrested.

The learned trial Magistrate framed the issues for determination very well. P.C. Ponge testified as PW2, and CPL Kiptoo as PW3. They were consistent in their evidence in chief and cross examination. And if it is true that the Appellant was released by PW2 and PW3 after an arrangement that does not make his case better. PW2 and PW3 had no authority to release him. They were not the OCS or OCPD. The police records did not confirm his official release. It was therefore evident that he escaped from lawful custody which is an offence. The learned trial Magistrate analyzed the evidence very well and came to the correct conclusion. I find no reason to make me interfere with his finding. The Appellant was sentenced to two (2) years imprisonment. Section 36 of the Penal Code provides for a sentence not exceeding two years or with a fine or with both. Considering the offence that had caused him to be in remand I find the maximum sentence of 2 years to have been excessive. I set it aside and substitute it with a sentence of twelve (12) months imprisonment. To that extent only does the appeal succeed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c