



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO 23 OF 2013**

**Appeal from the conviction and sentence by Resident Magistrate at Garissa (D.W Mburu) in  
Criminal Case No 1289 of 2009.**

**TORE HALAKE GALGALLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

Tore Halake Galgallo, the appellant, is challenging a two year sentence. He was tried, convicted and sentenced by the lower court for escaping from lawful custody contrary to section 123 of the Penal Code. At the time of the alleged offence, the appellant was serving a fifteen year prison term for the offence of rape. He escaped from Garissa Provincial General Hospital where he had been admitted for treatment and was being guarded by Prison Warders.

The appellant lists six grounds of appeal that are badly drafted. My reading of the grounds reveal that the appellant is challenging the judgement of the lower court on issues relating to the evidence which he claims was inconsistent; lack of an independent witness other than the Prison Warders; lack of exhibits to support the allegations of shooting; rejection of his defence by the trial magistrate and lack on investigations of the case in the lower court.

The appeal was filed out of time with leave of this court on 2<sup>nd</sup> August 2012 although the record shows that it was handed to the prison authorities on 23<sup>rd</sup> July 2012. Considering that the appellant was sentenced on 6<sup>th</sup> January 2010. My calculations tell me that the appeal was filed way after the period of two years of sentence has elapsed. Record also shows that delay in forwarding the proceedings from the lower court also contributed to the delay in admitting this matter. The sentence of two years is to run consecutively with the earlier sentence of fifteen years on the charges of rape the appellant was serving prior to this case. This makes a total of seventeen years. The appellant is specific that he is challenging the two year jail term.

Evidence in support of the prosecution case was adduced by three witnesses, all prison warders. The three had been tasked with guarding the appellant while at Garissa Provincial General Hospital. According to No 31575 Ahmed Ali Kossar (PW1) he was on duty guarding the appellant in company of No 33287 Osman Abdow (PW2) and No 36957 Abubakar Omar Dube (PW3). PW1 puts the date as 29<sup>th</sup> November 2009 but PW2 and PW3 put the date as 26<sup>th</sup> November 2009. The date as per the charge sheet was 29<sup>th</sup> November 2009 and it is not clear why PW2 and PW3 quoted a different date.

According to PW1, on 29<sup>th</sup> November 2009 at about 11.00am they escorted the appellant to the toilet

about 5 metres away and brought him back to his bed and handcuffed him. At about 12.00pm PW1 noticed that the appellant was not on his bed. PW1 went behind the Ward and saw the appellant running away. He tried to stop the appellant but he did not stop. PW1 shot the appellant twice to stop him from escaping. PW2 puts the time when the appellant was taken to the toilet as 12.00pm. PW2 further testified that the appellant ran away as they were taking him back from the toilet. According to PW3 the appellant ran away before reaching the bed. PW3 is not one of the warders who escorted the appellant to the toilet.

The appellant testified under oath. He stated that a warder by the name Issa who was guarding him at night while admitted at Garissa Provincial General Hospital told him that it would be difficult for him to escape once he was transferred to Kamiti Maximum Prison; that Issa asked for money so that he could release him; that Kshs 2,000 was sent to Issa by M-Pesa; that the following day one Wario spoke to Issa and they agreed that they would release the appellant and then shoot in the air pretending that they were trying to arrest him; that he gave Wario USD 400 which he had in his pocket; at 9.00am he was taken to the toilet and returned to his bed where they tied his leg to the bed; that Wario untied him at 11.00am and took him to the door where he was told to run to the bushes; that he fainted outside the ward and did not know how he was shot; that he was later told he had been shot by Wario. The appellant called Anab Khalif as a witness. Anab told the court that she was the wife to the appellant and that she sent money (Kshs 2,000) to Issa who said the money would be used to buy food and cigarettes for the appellant.

The trial magistrate analysed this evidence, found it credible and was convinced that the offence had been proved. He convicted the appellant. Parts of the judgement relevant to this appeal read as follows:

**“On 29<sup>th</sup> November 2009 the said warders escorted the accused person to the toilet at about 11.00am at his own request. The toilet is about 5M from the Block. He was then brought back to the bed. He had been handcuffed before being taken to the toilet but it appears that after coming back from the toilet, he was left free. The evidence is not clear whether the guards left the accused alone or what really transpired because they all said that at about noon, they realized that he was missing from his bed and they set out looking for the accused outside the ward”** (emphasis added).

I have underlined the sections of the judgement to compare with the following reasoning, still found in the judgement:

**“All the three warders who were guarding the accused person testified for the prosecution and their evidence was concise and consistent..... There are no contradictions whatsoever and I find no reason to doubt that they were speaking the truth.”**

I have analysed the evidence of the three witnesses and I do not agree with the trial court. I do not find the evidence consistent. On the contrary, I find contradictions in the evidence of the three witnesses. PW1 said the appellant was brought back to his bed from where he escaped. PW2 and PW3 stated that the appellant escaped as he was being escorted back and before he reached his bed. The three witnesses do not agree on the date this offence is alleged to have been committed. Their evidence is not clear whether it was 29<sup>th</sup> or 26<sup>th</sup> November 2009. The evidence is not specific that the appellant was handcuffed. The only witness to mention handcuffs is PW1 who stated that: **‘At about 11.00am we escorted the accused to the toilet which is about 5M away. We then brought him back to his bed. He was handcuffed’**. On cross examination he stated that **“We had to remove the handcuffs when we took the accused to hospital”**. With this evidence, it does not make sense for the trial court to state that the appellant had been handcuffed before being taken to the toilet especially when no such evidence was adduced. As the evidence stands, it is not clear whether the appellant was handcuffed when being escorted to the toilet or when on his bed. According to the defence the appellant stated that one of his legs was tied to the bed. Does this mean handcuffed to the bed?

Further contradictions are found in the time the appellant was taken to the toilet; was it 11.00am as PW1 says or was it 12.00pm as stated by PW2? Could it also be 9.00am as stated by the appellant? These contradictions escaped the trial magistrate who found the evidence consistent!

Further finding by the court that the appellant admitted that he had all along been planning to escape from lawful custody is not supported by evidence. I did not find such evidence on record. It is my view that the trial magistrate misdirected himself on the evidence of the prosecution witnesses. To my mind, their evidence is contradictory. It seems they were not performing their guarding duties well and may have left the appellant unguarded or they knew more about the escape attempt than was revealed in evidence.

A conviction of an accused person in a criminal trial must only be entered after the prosecution has discharged its mandate of proving a case beyond reasonable doubt. It was the duty of the prosecution in this case to prove the case to this required standard. The appellant has raised issue that the prison warders asked money so as to aide him in escaping. He said one Issa asked for money and that his wife Anab who testified as DW2 sent Kshs 2,000 by M-Pesa to the said Issa. The appellant further testified that he gave USD 400 to Wario who was working with Issa and who untied him from the bed in order to escape.

I find crucial evidence missing. Who is Issa and why was he not called as a witness? Who is Wario and why was he not called to testify? Were Issa and Wario prison warders and if so were they guarding the appellant at one time during his stay in hospital? The evidence of the appellant points to them as the ones who engineered his escape by asking for money. Of course without evidence to confirm the same this court is not able to know the truth or otherwise of these allegations by the appellant. Again, although unconfirmed, the allegations by the appellant cast some doubt to the involvement of the named persons.

I want to fault the trial magistrate for the hands-off manner he handled this case. He was presiding on this case and as such he was in charge of the manner the trial and proceedings were handled. It was perfectly in order for him to call for inquiry into the allegations of payment more so when it is so easy nowadays to get records of payment from M-Pesa. He could have asked for investigations from Prison Authorities on the issue or even from the police.

Another area I find un-concluded is the issue of shooting. This is one of those cases where an investigating officer was required to shed some light on missing links in the case. Incidences of shooting are police matters whose duty is investigative among others. This shooting of the appellant to stop him from escaping is a police matter. It must have been reported and booked in the Occurrence Book. It must have been investigated. What happened to those investigations if they were carried out? The trial magistrate did not enquire into this matter and although he noted that the appellant must have been aided to escape by those guarding him, he did not do anything to establish the truth. While bearing in mind that to be criminally liable, a person must have intended to do wrong or have acted in a reckless and negligent manner knowing that his actions would cause the result complained of I have taken into account the circumstances of this case and my view is that the appellant ought to be given the benefit of doubt. To my mind any incarcerated person desires for a chance to escape. When such a person is enticed to do so with the help of those who are under the obligation to guard him and prevent such and escape it becomes very tempting to do so.

In conclusion of this matter, I find the evidence contradictory as explained above. However, the contradictions do not go to the root of this matter especially when the appellant admits that he was assisted to attempt to escape. Further I agree with the appellant that there is no independent witness other than the prison warders who were guarding him; there is no investigating officer and as I have indicated above there must have been a report made to the police whose duty it was to investigate. On the issue of the court rejecting the defence of the appellant this is not true. The record clearly shows that the trial court considered it and rejected it.

Given the circumstances under which the appellant attempted to escape from custody and the complicity of the prison warders who were guarding him, although not all of them were implicated, this court will and does hereby give the appellant the benefit of doubt. I will and do hereby allow the appeal, quash the conviction in respect to the charge of the offence of escape from legal custody under section 123 of the Penal Code and set aside the sentence of two (2) years. The appellant will continue serving the fifteen (15) year sentence imposed on him in respect of the offence of rape. These are the orders of this court.

**S. N. MUTUKU**

**JUDGE**

**Dated this 4<sup>th</sup> day of June 2013.**

**Signed, dated and delivered in open court this 10<sup>th</sup> day of June 2013.**