REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CRIMINAL APPEAL 65 & 297 OF 2007

(From the original conviction and sentence in Criminal Case No. 54 of 2005 in the Senior Resident Magistrate's Court at Moyale)

ABDUL JARSO WARIO……..…… APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 297 OF 2007

GALOGALO DULO IDD…… APPELLANT

VERSUS

REPUBLIC……..…….....RESPONDENT

JUDGMENT

Abdul Jarso Wario (1st appellant) and Galogalo Dulo Idd (2nd Appellant) were charged in the Senior Resident Magistrate's Court, Moyale jointly with others not before the court, with attempted murder contrary to section 220 (a) of the Penal Code. They also faced a second count of being unlawfully present in Kenya contrary to section 13 (2) (c) of the Immigration of Persons Act. The 1st appellant pleaded guilty to both counts whereupon he was sentenced to life imprisonment on count I, and fined KShs. 3,000/= or 3 months imprisonment on count II, and ordered to be repatriated back to Ethiopia.

The 2nd appellant, on the other hand, pleaded not guilty to both counts. Six witnesses testified for the prosecution after which the 2nd appellant was put on his defence. He made a sworn statement in his defence notwithstanding which he was found guilty as charged. He was then sentenced to imprisonment for life on count I, and fined KShs. 3,000/= or to serve 3 months imprisonment. He was also ordered to be deported to Ethiopia after serving sentence.

Both appellants moved to this court on appeal. Although both appellants alleged in their respective amended memoranda of appeal that their constitutional rights were breached by being held in custody for

more than 24 hours, each of them applied to withdraw the alleged breach of his rights from among his grounds of appeal. Against that background, the only remaining substantive ground of appeal by the 1st appellant is that the life sentence imposed on him was inordinately harsh and manifestly excessive in the circumstances.

Having pleaded guilty to count I, the 1st appellant is precluded from appealing against conviction by virtue of Section 348 of the Criminal Procedure Code which provides that –

"***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."***

The 1st appellant can, therefore, appeal only against the sentence.

Section 220 (a) of the Penal Code under which the 1st appellant was charged provides for a maximum sentence of imprisonment for life, and that was the sentence which was imposed on him. I have no doubt in my mind whatsoever that the offence which the 1st appellant admitted having committed deserved a custodial sentence. However, by sentencing him to imprisonment for life, the court thereby imposed on him the maximum sentence, yet it is a general rule of practice that a maximum sentence should not be imposed on a first offender. And not only was the 1st appellant a first offender, but he also pleaded guilty. In **OTIENO** v. **REPUBLI**C [1983] KLR 295, the appellant was convicted on his own plea of guilty for theft of a bicycle. The prosecution said that he was a first offender. Nonetheless, the trial magistrate sentenced him to the maximum sentence of three years imprisonment. On appeal, it was held that it was wrong to depart from the general rule which was that a maximum sentence should not be imposed on a first offender. The court further held that the sentence was manifestly excessive. These observations apply with equal force to this case in which the appellant not only pleaded guilty, thereby saving the court's precious judicial time, but he was also a first offender. For these reasons, I find that the maximum sentence imposed on the 1st offender on count I was contrary to the general rule of practice that a maximum sentence should not be imposed on a first offender, and that the said sentence was also manifestly excessive. Where the sentence imposed by a trial court is manifestly excessive, as it is in this case, it is appropriate for the appellate court to interfere with that sentence, and this court is inclined to do so.

The 2nd appellant appealed against both conviction and sentence. According to the evidence of complainant, Hadija Hazra, who testified as PW1, she was selling khat (miraa) outside a shop verandah when the appellants, came asking for miraa to buy. They selected the miraa they wanted to buy and as she gave out the miraa, the 1st appellant shot her while accompanied by the 2nd appellant. They did not pay her for the miraa. The gunshot attracted the attention of PW2, P.C. Mohammed Wario Roba who rushed to the scene and found PW1 lying on the ground bleeding profusely. He also saw some two men running away from the scene, with one of them carrying a gun. The 2nd appellant was following the man who was holding the gun. Both men were arrested by members of the public, and one of them had a gun which was later referred to the Ballistics expert for examination.

The gunshot also attracted PW3, one Administration Police Constable Stephen Boru Bonaya, from his shop. He took his gun and went to the scene of the shooting where he saw two men running away. He shot at them and they hid near a slaughterhouse from where they were arrested by members of the public. This evidence was corroborated by PW4, Police Constable Warfa Abdi Warfa, who said that while he was near Liboni Hotel, he heard a gun shot and when he looked he "**found**" a woman fall down. One of his colleagues (PW3) appeared with a gun, and the man who had shot the woman started running away and was joined by the 2nd appellant. Both PW3 and PW4 and members of the public ran after the appellants, arrested them and handed them over to the O.C.S. Moyale Police Station. The 2nd appellant had stood next to the 1st appellant when the latter shot the woman.

At about 10.00 p.m. the same evening, PW5, one Mbura Richard of Moyale Hospital examined PW1 (the complainant) and admitted her to the hospital. She had a wound on the forehead penetrating through

the skin into the tissue to the bone and to the brain. In his opinion, the weapon used was a bullet/sharp object and he assessed the degree of injury as harm.

From the above evidence, it is clear beyond controversy that the complainant was shot by the 1st appellant, and only one shot was fired. Although the 2nd appellant was in the company of the 1st appellant, there is no evidence that he handled the gun or fired any shot from it. Even more important is the fact that there was no evidence that he knew that the 1st appellant was in possession of a gun, and that he intended to use it against the complainant. In these circumstances, I find that it was improper to convict the 2nd appellant merely because he was perceived to be in the company of the 1st appellant. In the absence of evidence to demonstrate that the 1st and 2nd appellant had a common intention to use the gun against the victim, it would be unsafe to convict the 2nd appellant jointly with the 1st appellant. Any such conviction would be based on sheer speculation. The 2nd appellant's appeal against conviction for attempted murder jointly with the 1st appellant is accordingly allowed. The said conviction is quashed, and the sentence of imprisonment for life is set aside.

As for the 1st appellant, having found that the sentence of life imprisonment imposed upon him was contrary to the general rule of practice that a maximum sentence should not be imposed on a first offender, and that the said sentence was manifestly excessive, and considering further that he has already served 4½ years in prison, this court takes the view that the term served todate is sufficient and accordingly reduce the term of imprisonment to the term served todate.

I also note that each appellant was fined KShs. 3,000/= or 3 months' imprisonment in default for being in Kenya unlawfully. The learned trial magistrates did not indicate whether the imprisonment sentences would run concurrently or consecutively. Seeing that the term of imprisonment on count I was for life, the two terms could only have been intended to run concurrently and not consecutively. I therefore find that both appellants have already served the term on count II.

Finally, I also note that both accused were ordered to be repatriated back to Ethiopia after serving the sentence. Logically, it is difficult to reconcile this order with a term of life imprisonment, unless we were thinking repatriating the bodies of the appellants after they had died. However, since the 1st appellant has already served the sentence on both counts I and II, and the 2nd appellant's appeal on Count I has been allowed and he has also served the term on count II, I direct that both appellants be released forthwith, unless they are otherwise lawfully held, and that they be repatriated to Ethiopia forthwith.

It is so ordered.

Dated and delivered at Nairobi this 16th day of September 2009.

L. NJAGI

JUDGE