



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Criminal Appeal 22 of 2009**

**JOSEPH OWUOR OBONYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From previous conviction and sentence at Winam SRM'S Court in Kisumu*

*Criminal case No. 865 of 2008]*

**J U D G M E N T**

The appellant **Joseph Owuor Obonyo**, appeared before the Senior Resident Magistrate at Winam charged with the offence of escape from lawful custody contrary to.....of the penal code, in that on the 22<sup>nd</sup> June 2008 at the Chief Magistrate's court Kisumu, being a remand prisoner in lawful custody in Kibos prison undergoing remand for the offence of robbery with violence contrary to section 296 (2) of the penal code escaped from such lawful custody.

The provision of the penal code under which the appellant was charged was not indicated in the charge sheet but ought to be section 123 of the penal code.

Nonetheless, the appellant pleaded not guilty. He was tried, convicted and sentenced to three (3) years imprisonment. Being dissatisfied, he lodged this appeal on the basis of the grounds contained in the petition of appeal filed herein on 4<sup>th</sup> February 2009.

The grounds are essentially a complaint on the inadequacy of the prosecution evidence and the failure by the trial court to consider the defence raised by the appellant.

The appellant appeared in person at the hearing of the appeal and contended that he did not escape from lawful custody but was only arrested and taken to the police station where he was interrogated about his alleged escape and then charged. He further contended that he was released by the first prosecution witness (PW1).

The learned Senior State Counsel, **Miss Oundo**, appeared for the respondent and opposed the appeal. She argued that the appellant was in custody for the offence of robbery with violence and on the 22<sup>nd</sup> June 2008 after court proceeding, he was taken to the court cells from where he escaped. He was later arrested and charged.

The learned State Counsel contended that the appellant's defence was considered by the trial court and disbelieved. She called for the dismissal of the appeal.

Both the arguments and contention by the appellant and the respondent have duly been considered by this court which being the first appellate court is obliged to re-consider the evidence afresh and make its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness

**(see, Okeno –VS- Republic [1972] EA 32).**

Briefly, the prosecution case was that on the 22<sup>nd</sup> June 2007 prison officers **Maurice Orego Ombogo(PW1), Dinah Afande Lugungo (PW2), Benson Lameli (PW3), John Rotich (PW4) and Kiprono Koech (PW5)** had taken remand prisoners to the Chief Magistrate's Court at Kisumu.

Among the prisoners was the appellant who was later found missing from the court cells. A search for him proved futile. He was traced after one year, arrested and charged accordingly.

In his sworn statement, the appellant contended that he did not escape but was released by the prison officers who guarded him. He said that the said prison officer had previously known him and owed him Kshs. 4000/=.

The appellant also stated that the prison officer called Ombogo released him in exchange for the Kshs. 4000/=.

The officer removed the handcuffs from the appellant and set him at liberty.

The learned trial magistrate after considering all the foregoing evidence found that the prosecution had discharged its burden of proof and convicted the appellant.

On the evidence, this court is satisfied that there was more than sufficient evidence showing that the appellant had in one way or the other escaped from lawful custody while being held at the Chief Magistrate's court cells in Kisumu.

The evidence by PW1, PW2, Pw3, PW4 and PW5 was sufficient and corroborative in establishing the fact of escape against the appellant.

Although the appellant implied that he was released by one of the prison warders, the prosecution evidence invalidated the claim. In any event, a prison officer is not authorized under the law to release a suspect facing a criminal offence in court.

The learned trial magistrate held the view that the prison officer Ombogo (PW1) co-operated with the appellant in the escape and ordered that the officer be arrested and charged for aiding the escape of a prisoner.

In this court's opinion, the order was rather drastic and made in haste. This is not to say that the learned trial magistrate had no right to form an opinion and perhaps make necessary and lawful orders but prior to ordering the arrest and arraignment of the prison officer he ought to have firstly ordered the Officer Commanding Station Kisumu Police station to carry out the necessary investigation to determine whether or not the prison officer ought to be charged with aiding the escape of a prisoner.

Basically, the prosecution case against the appellant was sound and credible such that this court cannot interfere with his conviction by the trial court.

It may however be pointed out that the error by the prosecution to include the provision of the penal code under which the appellant was charged did not occasion a failure of justice.

The particulars of the charge as supported by the evidence made it clear that the appellant was very much

aware of the charge facing him although there was variance of the date of the offence between the charge and the evidence.

The learned trial magistrate correctly noted the foregoing defects and said that they did not prejudice the appellant who fully participated in the trial.

All in all, this appeal is devoid of merit and is dismissed accordingly. However, the order to have prison warder Maurice Ombogo arrested and charged with aiding the escape of a prisoner contrary to section 124 of the penal code, if not yet complied with, is set aside and substituted for that of having the O.C.S Kisumu Police Station investigate the matter with a view to determining whether or not there is sufficient evidence to have the said prison officer charged.

[Delivered and signed this 25<sup>th</sup> day of November, 2009].

**J.R. Karanja**

**JUDGE**

**J.R.K/va**