



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 131 of 2001

SALESIO KARIUNGA APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 214 of 1990 of the CM's Court at Meru dated 10.5.2000)

JUDGMENT OF THE COURT

The appellant, SALESIO KARIUNGA, was the first of eight accused persons in Meru Chief Magistrate's Criminal Case No. 214 of 1999. He was jointly charged with those seven others in count one with attempted robbery contrary to section 297(1) of the Penal Code. The particulars of the offence being that:-

“On the 19th day of January 1999 at around 11.00am at Meru Law Courts in Meru Central District within Eastern Province, jointly with others not before the court attempted to rob No. 30256 PC JOHNSON NYAMWEYA of one G3 Rifle No. 069016 and at or immediately before or immediately after such attempt, used actual violence to the said No. 30256 PC JOHNSON NYAMWEYA.”

In the second count, the appellant and his seven co-accused were charged with escape from lawful custody contrary to section 123 of the Penal Code. The particulars were that:-

“On the 19th day of January 1999 at around 11.00am at Meru Law Courts in Meru Central District within Eastern province, being remand prisoners jointly with others not before court, escaped unnoticed from the said court cells when being guarded by police officers.”

Briefly, the facts were that on the day in question, the appellant was among other remandees at the Meru Law Courts Cells. At about 11.00am, an advocate opened the door leading to the cells where the appellant and others were being held. When the advocate opened the door to go out, the appellant and his co-accused grabbed PC Nyamweya (PWI) and tried to snatch the rifle that PWI was holding. The ensuing commotion attracted the attention of other officers on duty among them PW3 Cpl George Laichena and PW5, (PC) (W) Agnes Kinya. When PW5 noticed the appellant and his co-accused making their escape, she blew the whistle. PWI fired once. PW3 assisted in chasing the escaping prisoners so did PW4, PC David Mutuku. The appellant and his co-accused were re-arrested, taken back to the cells and

later escorted to the police station pending investigations into the matter. After investigations, the appellant was charged with the two offences.

From the printed record, the following evidence emerges. PW1 PC Johnson Nyamweya testified that on the material day at about 11.00am, he was on duty at the Meru Law Courts with other police officers among them Pw2 – PW5. The appellant and his co-accused in the lower court tried to rob him of a G3 Rifle No. 069016 and also escaped from lawful custody. Other police officers went to PW1's rescue when he raised the alarm. During the struggle, PW1 sustained injuries on the finger. PW1 produced the register of prisoners to show that the appellant and his co-accused in the lower court were among the escapees. PW1 also testified that the prisoner who jumped at him and tried to grab the gun was never re-arrested.

In his judgment, the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt against each of the eight accused persons on each of the two counts and convicted them accordingly. The appellant, along with his co-accused was sentenced to serve seven (7) years imprisonment.

The appellant set out six grounds of appeal in his Petition of Appeal filed in court on 11.5.2001. The appellant has complained that the evidence against him was not corroborated, was contradictory and that the same does not identify the appellant as one of those who were involved in the alleged offences. He has also complained that the sentence against him was not passed in open court.

In his defence, the appellant testified that at the time of the alleged offence, he was inside the courtroom and only went out of the court in the presence of court orderlies. That it was only after his co-accused in the lower court had been arrested that he was lumped together with them.

At the hearing of the appeal, the appellant put his submissions in writing and contended that his was a case of mistaken identity since the attack upon the complainant was by a gang of prisoners and especially because the prisoner who is said to have jumped at PW1 and tried to grab the gun was not one of those arrested and charged.

In his submissions, the learned state counsel conceded the appeal on the first count on the ground that there was no evidence to connect the appellant with the commission of the offence. However, the learned state counsel contended that there was sufficient evidence to support both conviction and sentence on the second count.

As the first appellate court, I am under a duty to reconsider the whole of the evidence on record with a view to reaching my own conclusion in the matter. I have reconsidered the evidence on record. My findings are that there was absolutely no evidence against the appellant on the first count. None of the witnesses said that they saw the appellant trying to snatch the gun from PW1. Infact, according to PW1, the person who pounced on him and tried to snatch the gun from him was and is still at large. In my considered view therefore, there is no evidence connecting the appellant to the offence. His appeal on count 1 therefore succeeds.

As for the appellant's appeal on the second count, I find that there is ample evidence on record connecting him directly with the offence. PW2, PW3 and PW4 all testified to the fact that the appellant was one of those who broke loose from the temporary cell at the Meru Law Courts when an advocate opened a door leading to the outside of the cell. PW4 testified that he personally arrested the appellant outside the law courts premises. PW3, together with PW4 escorted the appellant back to the cells. PW2 saw the appellant being escorted back to the cells by PW3 and PW4. In light of such overwhelming evidence, I find no reason for interfering with the learned trial magistrate's finding.

In his unsworn statement in defence, the appellant told the court that he was still inside the courtroom when he heard a gunshot from outside. That only later on, was he placed among those who had escaped. I have considered this piece of evidence against the testimonies of PW2, PW3 and PW5 and find that the same is not convincing.

In the result, the appellant's appeal on count one is allowed. The conviction is quashed and the sentence of seven (7) years' imprisonment imposed upon the appellant is set aside. The appellant's appeal on the second count lacks merit. The same is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Meru this 27th day of July 2006.

RUTH N. SITATI

J U D G E