



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NOS.60 & 61 OF 2003

(From original conviction and sentence of the CM's court at Kisii in criminal case

No.3364 of 2001 – J. OMBONYA, C.M.)

JUSTUS KERAITA MIGIRO).....
APPELLANTS

DANIEL CHIDA)

VERSUS

REPUBLIC
RESPONDENT

JUDGMENT:

The two appellants were charged with the offence of aiding a prisoner to escape c/s 124(a) Penal Code in that on the night of 21st December 2001 in Kisii, they aided PAUL NYAKUNDI NYAMWEYA, EVANS MIRUKA and ELIJAH OMBOTO NYANDORO who were under their guard at Kisii District Hospital to escape from lawful custody.

The prosecution case in the lower court was that on 21st December 2001 there were four prisoners from Kisii G.K. Prison who were sick and admitted at Kisii District Hospital under guard. That evening warden MOSES BOSIRE (PW1) and another known as SIGILALI were guarding the prisoners from 7 p.m. At 10.30 p.m. they handed over to the two appellants who were to be on duty up to 1 a.m. The prisoners were all handcuffed. The warders had no firearms. At about midnight the three of the four prisoners escaped. The two appellant informed PW1 and SIGILALI that they were attacked by three armed robbers who released the 3 prisoners. Report was made to police who after investigations did not believe the appellants.

They were consequently arrested and charged. In their defence both appellants retaliated that they were ambushed by three gangsters who held them and released the prisoners. Both denied the offence.

The trial magistrate considered the evidence and found both appellants guilty. The first appellant was sentenced to one year imprisonment and the 2nd to 2 years imprisonment. Being dissatisfied by the conviction they have now come to this court on appeal.

The appellants cited five grounds of appeal, which were argued simultaneously. The first ground was that the magistrate erred in conviction the appellants without any tangible evidence; the second was that there was contradictions in the evidence of PW2 & 5 the only eyewitnesses. Thirdly it is claimed that the magistrate did not appreciate the standard of proof required and who has the burden of proof.

In ground four it is stated that the magistrate failed to take into account the evidence of the appellants in their defence thus occasioning miscarriage of justice.

Lastly it was said the magistrate contravened s.169(1) C.P.C.

Mr. Oguttu for the appellants submitted at length on all the grounds. He submitted that the evidence the appellants were convicted on was not credible. The magistrate relied on the evidence of PW2 & 5 who were accomplices. Their evidence was not corroborated by any other independent evidence and as such it should not have been relied on.

Further it was submitted that PW2 told police in his statement a different thing from what he said in court. There was also contradiction between his evidence and that of PW5. PW5 also said he was released at 8 p.m. and not midnight. He was not truthful. Further it was submitted that in his judgment the magistrate did not analyze the evidence and give the reason for his decision and why he disbelieved the defence. It was also submitted that the magistrate skipped the burden of proof to the appellants from the prosecution. The prosecution did not fully discharge its burden and any benefits should have gone to the appellants.

Failure by the magistrate to give reasons for his decision was contrary to s.169(1) C.P.C. it was said. That led to miscarriage of justice which cannot be cured. Lastly it was submitted that the magistrate's judgment was based on hypothesis. Mr. Kemo, the learned State Counsel opposed the appeal and supported the conviction. He submitted that though PW2 & 5 may have been accomplices s.141 Evidence Act allows courts to rely on such evidence.

He stated that the magistrate properly considered all the evidence and the conviction was proper.

There was no dispute that the prisoners run away then PW2 & 5 who were re-arrested later, escaped while they were under the guard of both appellant. This being a first appeal I have reviewed the evidence on record and the judgment of the learned magistrate. It is clear that the two appellants were properly convicted. The evidence on record was quite credible and the magistrate was right to rely on the same to convict. The evidence of PW2 & 5 was very candid and contrary to the submission there are no contradictions. True PW2 & 5 were accomplices but I concur with the State Counsel that s.141 of the Evidence Act clearly provides that such evidence can be relied on. True the magistrate should have cautioned himself about the evidence and need of corroboration but that was not fatal. PW2 & 5 were the only eye witnesses.

The nurse who was on duty ROBINA KERUBO (PW3) said she had left the ward briefly to fetch water. There was therefore nobody else around at the time except PW2 & 5 and the appellants. The magistrate was therefore right to rely on the evidence of PW2 & 5 even though they were accomplices.

As I said there was no discrepancies in the evidence of PW2 & 5. They both said the appellants opened the handcuffs and released them leaving the handcuffs on the beds. PW5 did not say that he was released at 8 p.m. What he said in his evidence was that the 2nd appellant went to the ward at 8 p.m. and promised to release him that night. This is clearly so on record.

There was no miscarriage of justice occasioned. The magistrate did not shift the burden of proof to the appellants. He also cannot be said that he did not take into account the evidence of the appellants. He clearly set out the evidence of both appellants and their witnesses but said he did not believe it. That was not shifting the burden of proof. He can also not be faulted of not taking into account the defence account. He clearly did so and he concluded that the two appellants were guilty. He did not float provisions of s.169(1) C.P.C. The judgment was well reasoned.

The upshot of the above therefore is that I do uphold the convictions of both appellant.

The appeal is dismissed.

Signed, dated and delivered on 24th May 2004.

KABURU BAUNI

JUDGE

24/5/04

Mr. Oguttu for Appellants

Mr. Kemo for State

KABURU BAUNI

JUDGE