



REPUBLIC OF KENYA



**Leisuku & 2 others v Republic (Criminal Appeal E011 of 2023)
[2023] KEHC 22093 (KLR) (11 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E011 OF 2023
CM KARIUKI, J
SEPTEMBER 11, 2023**

BETWEEN

JAMES LEISUKU 1ST APPELLANT

LOLETU LONGITUNDU 2ND APPELLANT

RIARI LOORIA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellants herein were charged with three counts as follows: -

Count I

2. Disobeying a lawful order given by the police officer contrary to Section 54 (2) as read with Section 129 of the *National Police Service Act*, 2011
3. Particulars are that on the 22nd day of November 2022 at Olmoran Market in Kirima Sub-County within Laikipia County with others not before the court disobeyed a lawful order to maintain peace and give police officers humble time to effect an arrest issued by Corporal Fredrick Mambuya, Constable Felix Nzomo, and Constable Edwin Kasembeli.

Count II

4. Wilfully obstructing a police officer contrary to Section 103 (a) of the *National Police Service Act*, 2011
5. Particulars are that on 22nd November 2022 at Olmoran Market in Kirima Sub-County within Laikipia County with others not before court wilfully obstructed the arrest of stock theft suspect by Corporal Fredrick Mambuya, Constable Felix Nzomo, and Constable Edwin Kasembeli.



Count III

6. Aiding a prisoner to escape contrary to Section 124 (a) of the *Penal Code*
7. Particulars are that on the 22nd November 2022 at Olmoran Market in Kirima Sub-County within Laikipia County with others not before the court, aided a stock theft suspect to escape from the lawful custody of Corporal Fredrick Mambuya, Constable Felix Nzomo, and Constable Edwin Kasembeli.
8. Upon full hearing, the Appellants were placed on their defence, where they denied the offences. Consequently, on 12th April 2023, the trial court convicted them and sentenced them as follows: -
 - a. Count I: each accused person to pay a fine of Kshs 50,000 in default to serve six months imprisonment.
 - b. Count II: each accused to pay a fine of Kshs 100,000 in default to serve one-year imprisonment
 - c. Count III: each accused to pay a fine of Kshs. 100,000 in default to serve one-year imprisonment
9. Having been dissatisfied by the whole of the said judgment, the Appellants filed the instant appeal against both conviction and sentence vide the petition of appeal dated 25th April 2023 wherein they enumerated seven grounds of appeal as follows: -
 - I. That the learned trial magistrate erred in law by relying on the prosecution evidence, which did not prove the appellants' guilt beyond a reasonable doubt.
 - II. That the learned trial magistrate erred in law and fact by failing to consider and give credence to the Appellants' defense when convicting them.
 - III. That the learned trial magistrate erred in law and fact by holding that the Appellant's identification was well enabled and accurate when there was no corroboration from any other individual from the scene.
 - IV. That the learned trial magistrate erred in law and fact to rely on the prosecution witnesses who failed to prove that Olmoran Market is indeed a prison.
 - V. That the learned trial magistrate erred in law by relying on the malicious prosecution witnesses and seeking to punish the Appellants for the pandemonium that allegedly arose.
 - VI. That the learned trial magistrate erred in law by convicting the Appellants when no nexus was drawn between the Appellants and the escape of the suspects as well as the pandemonium on the scene.
 - VII. The learned trial magistrate erred in law and fact in convicting the Appellants by relying on conjectures, suppositions, and extraneous matters.
10. Reasons wherefore the Appellants prayed that this appeal be allowed, and the conviction and sentence be allowed.

Submissions

11. On their part, the Appellants submitted that the prosecution did not discharge the burden of proof to the requisite standard for the following doubts: -There was no connection between the rioters and the Appellants herein. There was no record of any reports made to the police station about the stolen



cows. There was no evidence that Mr. David Githinji made a complaint at the police station. There is no evidence that he exists.

12. There was no evidence that the police held any prisoner, allegedly aided to escape. There was no evidence of any prison in Olmoran Market. There is no evidence tendered before the court by the prosecution concerning the existence of the alleged criminal cases and offences committed by the alleged prisoner who was aided to escape.
13. The Appellants were prejudiced by the multiple charges since the particulars of offence of all three charges were the same for all three counts. The name of the prisoner or prison was not provided. From the record of appeal, there is evidence that the Appellants were arrested in an open-air market called Olmoran. And there was no mention of any prison whatsoever.
14. The said David Githinji was not called to testify, and no report of the stolen cow was made. The two prosecution witnesses failed to give any evidence that they indeed went to pursue a reported police matter. The prosecution failed to show any order issued by the police to the Appellants or any other person that the Appellants failed to obey. Reliance was placed on *Pius Arap Maina v Republic* [2013] eKLR, *Gordon Omondi Ochieng v Republic* [2021] eKLR
15. Additionally, the Appellants averred that they needed to be properly identified owing to the prevailing circumstances during the alleged incident at the Olmoran Market. It was stated that the prosecution witnesses admitted that so many people were in the market that day and that the Appellants were arrested in a swoop.
16. PW1 and PW2's testimony contradicted in that while they said that they could identify the Appellants as they were in the front line, PW2 proceeded to state that they arrested the Appellants in a swoop. Further, no parade was performed to identify the Appellants, and PW2, who testified on behalf of Mr. Kasembeli, was not at the crime scene. Therefore, his testimony cannot be relied on. Reliance was placed on *Yahya Ahmed Shee v Republic* [2021] eKLR.
17. It was asserted that the prosecution failed to show that there was any prisoner in the possession of the police officers and if there was any prison in Olmoran Market. They also reiterated that the charges were prejudicial as they were charged with three different charges on account of the same facts. Reliance was placed on *Zachariah Matoke Bokea v Republic* [2016] eKLR
18. The Appellants also contended that the sentence passed against the applicants does not indicate whether the sentences are concurrent or consecutive and is harsh and excessive. They requested that this court allow the appeal because of the period already served in prison.
19. On the other hand, the Respondent stated that based on the evidence of PW1 and PW2, the young man selling the stolen cow had not been arrested as, at the time, the Samburu community intervened in large numbers making it impossible to arrest him. Similarly, for the offence to have been fully proved, the main complainant of stock theft was not called as a witness to shed more light on the offence of aiding the suspect to escape.
20. Furthermore, it was averred that the trial magistrate did not indicate whether the sentences meted out were to run concurrently or consecutively despite the offences committed in the same transaction. Reliance was placed on *Peter Mbugua Kabui v Republic* [2016] eKLR, Judiciary Sentencing Policy Guidelines No. T. 13
21. Moreover, the Respondent stated that upon perusing the submissions by the Appellants, which essentially prays that the appeal be allowed on account of the harsh sentence and further seeks the honourable court to allow the appeal on account of the period already served in prison. The court will



note that the plea, in this case, was taken on the 25th of November 2022, and judgment was passed on 24.3.2023, and the court did not mention or factor the period the appellant had been in custody before being released on bond.

22. The Respondent also noted that when the matter commenced for hearing, there was an indication that the police station and the village elders had held talks of reconciliation. The police were no longer willing to pursue the matter though the Sub County Commissioner gave no express consent. Be that as it may, the appeal is conceded, given the issues cited. Further, if the appeal is not wholly allowed, the prosecution urged the court to allow the appeal to the extent of the sentence so far served.

Issues, Analysis and Determination

23. Considering the petition of appeal, the evidence, and the submissions from both parties, the only issue that falls for determination is whether the instant appeal is meritorious.
24. In determining this appeal, this court being a first appellate court, is alive to and considers the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32, where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A. 336 and the appellate Court’s own decision on the evidence. The first appellate court must weigh conflicting evidence and conclude (*Shantilal M. Ruwala v. R* [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its findings and draw its conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post* 1978) E.A. 424.”

25. Accordingly, I have re-evaluated the evidence, thoroughly examined the trial record, and find that the prosecution's evidence was marred with contradictions and inconsistencies as to the circumstances that led to the Appellants' arrest and ultimately did not satisfy the burden of proof required in such a case.
26. I agree with the Appellants' submissions that although there appears to have been commotion on the material day herein, there is no nexus between the Appellants and the charges levelled against them.
27. The evidence on the complaint made by Mr. David Githinji on a stolen cow was scanty at best and the existence of the said complainant is questionable as he was not even called to testify even though he was a key witness in this case; a fact that the Respondent supported.
28. Furthermore, it is my view that there was no reliable evidence that any prisoner was being held by the police who was allegedly aided to escape. It appears that the Appellants arrest was merely a witch hunt based on malicious allegations by the officers involved, and the trial magistrate erred in law and fact in relying on their evidence on all three counts against the Appellants.
29. I find that the prosecution failed to show any lawful order issued by the police and directed to the Appellants and that the Appellants disobeyed the same.
30. Additionally, I agree with the Respondent that based on PW1 and PW2’s evidence, there was no prisoner that the Appellants aided in escaping, given the circumstances of what happened on the material day. In any case, it appears that the officers were surrounded by so many people from the Samburu community on that day that they attempted to arrest the said offender who had stolen the cow but they could not do so; therefore, they had not arrested the prisoner at the time.



31. In totality and for the foregoing reasons and not forgetting that the Respondent conceded the instant appeal, I find the appeal is meritorious and allowed. Thus, the court makes the orders that;
- i. Accordingly, the appellants' conviction is quashed, and the sentence meted out is set aside. The Appellants shall be released forthwith unless otherwise lawfully held.

DELIVERED AND DATED AT NYAHURURU THIS 11TH DAY OF SEPTEMBER 2023

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CHARLES KARIUKI

JUDGE

