



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE -J)

CRIMINAL APPEAL NO. 47 OF 2019

BETWEEN

JARED ABANDE NYAKOYE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 824 OF 2016 in the Principal Magistrate's Court at Winam by J.Mitey (SRM) on 16.08.19)

JUDGMENT

Background

1. **JARED ABANDE NYAKOYE**, the Appellant herein has appealed against the conviction and sentence for the offence of aiding a prisoner one **PAUL ONYANGO OTIENO** to escape contrary to Section 124 (b) of the Penal Code. The offence is alleged to have been committed on 27th August, 2016 at Jaramogi Oginga Odinga Teaching & Referral Hospital.

THE PROSECUTION'S CASE

2. The prosecution case as stated by PW1 and PW2 both of whom are police officers is that **PAUL ONYANGO OTIENO (prisoner)** who was suspected to have been injured in a robbery and was taken to the hospital for treatment was placed under the charge of PW2 to await his treatment and release so that he could be investigated for a robbery incident that had taken place within Kondele area of Kisumu.

3. It was the evidence of PW2 that the prisoner was visited by persons that turned hostile towards him and he retreated and left the crowd with the Appellant. It was his evidence that when he returned a while later, he found that the prisoner had escaped and left the handcuffs on the bed. That he also noticed the Appellant closing the rear door and suspected that he had let out the prisoner through that door.

4. As a result of the foregoing, the Appellant was arrested and charged with aiding the prisoner to escape.

DEFENCE CASE

5. The Appellant conceded that he was in charge of security at the hospital on the material date. He recalled that he was called to ward 2 by the guard one Karanja who informed him that some persons posing as police officers were creating disturbance in the ward. That he went to the nurse station in the said ward with PW2 and one Langat and one Sister Lucia informed them that the prisoner had been discharged. That although he did not see the said patient, PW2 accused him of aiding the patient to leave the hospital and had him arrested and charged.

6. In a judgment dated 16.08.19, the Appellant was convicted and sentenced to pay a fine of Kshs. 30,000/- and in default serve a 6 months' imprisonment. Appellant managed to pay the fine.

THE APPEAL

7. The conviction and sentence provoked this appeal. In a petition of appeal filed on 28.08.19, the Appellant raised 8 grounds of appeal which I have summarized into two grounds to wit:

1) That the prosecution did no avail evidence of the arrest, detention and admission at the Jaramogi Oginga Odinga Teaching & Referral Hospital in respect of PAUL ONYANGO OTIENO that is alleged to have escaped from lawful custody

2) The defence case was not given due consideration

8. This appeal was argued by way of written submissions which the Appellant's counsel and the State duly filed. The Appellant's counsel reiterated the grounds of appeal whereas the State submitted that the prosecution case had been proved and the Appellant rightly convicted and sentenced.

Analysis and Determination

9. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005**.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and the State.

11. The gravamen of this appeal really turns on the issue of whether Appellant aided one **PAUL ONYANGO OTIENO** to escape from lawful custody.

12. Section 124 of the Penal Code that deals with aiding escape states as follows:

Any person who—

(a) aids a prisoner in escaping or attempting to escape from lawful custody; or

(b) conveys anything or causes anything to be conveyed into a prison with intent to facilitate the escape of a prisoner, is guilty of a felony and is liable to imprisonment for seven years.

13. Appellant was charged with Section 124 (b) which creates an offence if any person conveys anything or causes anything to be conveyed into a prison with intent to facilitate the escape of a prisoner.

14. The prosecution led evidence that one **PAUL ONYANGO OTIENO** escaped from Jaramogi Oginga Odinga Teaching & Referral Hospital. Section 2 of the Prisons Act Cap 90 Laws of Kenya defines "prison" to mean one that is established or deemed to have been established under section 24 of this Act. On the other hand, Section 24 of the same Act provides that the Minister may, by notice in the Gazette, declare any building, enclosure or place, or any part thereof, to be a prison for the purposes of this Act, and may, in a like manner, declare that any prison shall cease to be a prison for the purposes of this Act.

15. The prosecution did not lead evidence that Jaramogi Oginga Odinga Teaching & Referral Hospital had been declared to be a prison. And even for the sake of argument that Jaramogi Oginga Odinga Teaching & Referral Hospital had been declared to be a prison, the prosecution did not lead evidence that the Appellant had conveyed anything or caused anything to be conveyed with intent to facilitate the escape of the said **PAUL ONYANGO OTIENO**.

16. A careful reading of the proceedings and the judgment discloses that the prosecution and the learned trial magistrate proceeded on the mistaken believe that the Appellant had been charged with Section 124 (1) which deals with aiding a prisoner in escaping.

17. And even then, the prosecution failed to provide evidence that the said **PAUL ONYANGO OTIENO** had indeed been arrested and was admitted at the Jaramogi Oginga Odinga Teaching & Referral Hospital under the custody of PW2.

18. The learned trial magistrate's finding that the prosecution case implicating the Appellant was overwhelming and un rebutted was at variance with the particulars of the charge and against the weight of evidence and ought not to be allowed to stand.

19. Consequently, the appeal succeeds. The conviction is quashed and the sentence set aside. It is further ordered that the thirty thousand (Kshs. 30,000/-) paid by the Appellant in respect of fine be refunded to him.

DATED THIS 14th DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant - Ms. Amondi

Order

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID - 19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.