



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 14 OF 2020**

**AMINA JUMA KALASINGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.368 of 2020 of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi–Chief Magistrate)*

**JUDGMENT**

1. Amina Juma Kalasinga, the appellant herein, was convicted after pleading guilty to the offence of aiding a prisoner to attempt to escape contrary to section 124(a) of the Penal Code and the offence of wilfully obstructing police officers in due execution of their duties contrary to section 103 (A) [sic] of the National Police Service Act, No. 11(A) of 2011.
2. The particulars of the offences were that on the 6<sup>th</sup> day of February 2020 at Nambale Township, Nambale sub County of Busia County, she attempted to aid Dorine Nabwaya to escape from the lawful custody of police officers after locking the said Dorine Nabwaya in her house and fled. On the same day and at the same place and time, locked the said Dorine in her house knowing that she had attempted to escape lawful custody of police officers for dealing with alcoholic drinks and possession of narcotic drugs and therefore obstructed the police officers from arresting her.
3. The appellant was sentenced to serve one year imprisonment on each count. She has appealed against both conviction and sentence.
4. The appellant was represented by Mr. Ashioya, learned counsel. She raised three grounds of appeal through her advocate as follows:
  - a) That the learned trial magistrate erred in law and in fact in that she did not confirm that the plea was taken in a language the appellant was conversant with.
  - b) That the learned trial magistrate erred in law and in fact as she did not satisfy herself that the plea was unequivocal.
  - c) That the learned trial magistrate erred in law and in fact in not taking into account the appellant's mitigation.
5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the plea was properly taken.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. Section 348 of the Criminal Procedure Code provides:

**No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.**

In the instant appeal, the issues are questioning the legality of the charges the mode of taking the plea.

8. The charge and the particulars ought to be read in a language that the accused understands. This forms the basis of fair trial. An accused must understand the charge for him to respond adequately. This is what the Court of Appeal in the celebrated case of **Adan vs. Republic [1973] EA 445** held. It stated as follows;

**1. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**

**2. the accused's own words should be recorded and if they are an admission, a plea guilty should be recorded;**

9. The record indicates that the language of the court was Kiswahili. After the facts were read out, the appellant confirmed that they were true and pleaded for forgiveness. In my view, there is nothing to suggest that she did not understand Kiswahili.

10. Section 124(a) of the Penal Code states:

**Any person who—**

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

**(b) ...**

**is guilty of a felony and is liable to imprisonment for seven years.**

11. Who is a prisoner? **Black's Law Dictionary, 10<sup>th</sup> Edition** defines a prisoner as follows:

**1. Someone who is being confined in prison.**

**2. Someone who has been apprehended by a law-enforcement officer and is in custody, regardless of whether the person has yet to be put in prison; a person who is kept in prison as a legal punishment or who is kept there while awaiting trial as a criminal defendant.**

**3. Someone who is taken by force and kept somewhere.**

In the instant case, the prisoner the subject of the case falls in the second definition hereinabove.

12. In the **Black's Law Dictionary, 10<sup>th</sup> Edition**, while quoting Charles H. White-bread, **Criminal Procedure para. 3.02 at 61 (1980)** it is stated:

**The question of what constitutes an arrest is a difficult one. On one end of the spectrum, it seems apparent that detention accompanied by handcuffing, drawn guns, or words to the effect that one is under arrest qualifies as an "arrest" and thus requires probable cause. At the other end, a simple questioning on the street will often not rise to the level of an arrest.**

**Somewhere in between lie investigative detention at the stationhouse...**

From this definition of what constitutes an arrest, it is evident that the “prisoner “whom the appellant was accused of aiding to attempt to escape was not at the time arrested and therefore, this offence was incapable of being committed.

13. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported). In the instant case, the facts of the case do not indicate that the police officers had arrested the said prisoner before the appellant locked her in her house. The conviction in count one was therefore not supported by the facts that were read out in court to the appellant. I accordingly quash the conviction and set aside the sentence therein.

14. The facts that were read over to the appellant and which she confirmed to be true disclosed an offence of obstruction. Section 103 (a) of the National Police Service Act, No. 11(A) of 2011 provides:

**Any person who—**

**(a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer’s duties;**

**(b) ...**

**(c)...**

**commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both.**

15. Obviously section 103 (A) of the National Police Service Act is non-existent. The drafter of the charge meant to charge the offence under section 103 (a). This error did not prejudice the appellant. The error is therefore curable under section 382 of the Criminal Procedure Code.

16. The circumstances under which an appellate court would interfere with the sentence of trial court were spelled out in the case of in the case of **Nelson vs. Republic [1970] E.A. 599** as follows:

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.**

17. In the instant case, the appellant was a first offender and her actions were not aggravated. The learned trial magistrate may have been persuaded to mete out the sentence without an option of a fine because of the actions attributed to her husband. I am persuaded to interfere with the sentence. I set aside the sentence imposed by the learned trial magistrate in count two and substitute it with a fine of Kshs.50, 000/= or in default to serve six(6) months imprisonment. The sentence to run from when she was sentenced by the trial court.

**DELIVERED and SIGNED at BUSIA this 9<sup>th</sup> Day of July, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**