



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 106 OF 2017

ATANAS NANDI SHITANDI.....1ST APPELLANT

KENNEDY KADIMA SHIUNDU.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence by E. W. Muleka, SRM, in Butali SPMC Criminal Case No. 239 of 2017)

JUDGEMENT

1. The appellants were convicted of the offence of escape from lawful custody contrary to Section 123 of the Penal Code and each of them was sentenced to serve three years imprisonment. They were aggrieved by the conviction and the sentence. They filed two different appeals but the two were consolidated for purposes of hearing and determination. The grounds of appeal filed by the appellants in their separate appeals were similar. The grounds were that:-

1. The learned trial magistrate grossly erred in law and fact in convicting and sentencing the appellants on the offence of escaping from lawful custody without observing and considering that the counsel for the prosecution had misled the appellant when he indicated his discontinuation of charges thereby interfering with the appellants' defence.

2. The learned trial magistrate grossly erred in law and facts in taking the appellants through an unfair trial which did not meet the constitutional threshold as required under article 50 (2) (g) (h) and (j) of the constitution.

(c) The learned trial magistrate grossly erred in law and facts in sentencing the appellants to a harsh and excessive sentence without considering the period spent in remand custody.

(d) The learned trial magistrate grossly erred in law and facts in sentencing the appellants to the maximum sentence in such a charge without considering the appellants' mitigation.

2. The state opposed the appeal.

3. The particulars of the charge against the appellants were that on the 25th day of August, 2016, at Shibuli Market, within Kakamega County, being in lawful custody of CPI. Julius Bett and PC Dedan Oketch while being ferried on motor vehicle GKA 056V from Mumias Law Courts to Kakamega GK Prison escaped from the said custody.

Prosecution Case

4. The prosecution evidence was that the appellants were accused persons at Mumias Law Courts where they were facing some criminal charges. That on the material day at 3 p.m. the appellants were in a group of 12 remandees who were being escorted from Mumias Law Courts to G.K. Prison Kakamega where they were being remanded while awaiting the hearing of their cases. They were in motor vehicle registration No. GKA 056V landcruiser that was being driven by PC Kitiva PW1. The escorting officers were PC Bett PW4 and PC Oketch PW3. PC Oketch was sitting at the back of the vehicle with the remandees. PC Bett was at the front with the driver. That on the way the appellants and a third person attacked PC Oketch. Some women who were in the vehicle started to scream. The driver and PC Oketch heard the commotion. They stopped the vehicle. They were to be back. The appellants and their colleague overpowered PC Oketch. They escaped with a magazine of his gun. The officers reported to their seniors. Some days later the magazine was recovered a distance away from the scene of the escape. Later the appellants were arrested and charged with the counts of robbery with violence contrary to Section 296 (2) of the Penal Code and escape from lawful custody. They denied the charges. They were tried. The trial court acquitted them of the offence of robbery with violence but found them guilty of escape from lawful custody.

Defence Case

5. When placed to their defence the 1st appellant had given a sworn statement in which he stated that on the material day he was being returned to GK Prison Kakamega from Mumias Law Courts. He was handcuffed together with another remandee. That on getting to Shibuli Market the motor vehicle was going uphill. It slowed down. He and the person he was handcuffed with jumped out of the vehicle and escaped.

6. The 2nd appellant had given unsworn statement in which he stated that on that day he was being taken back to Kakamega G. K. Prison from Mumias Law Courts where he had attended the hearing of his case. He was not handcuffed. That on reaching Shibuli market the police officer who was escorting them dozed off. One of the remandees jumped out. He saw an opportunity to escape and escaped. He went to his home. Later he was arrested.

Analysis and Determination

7. The appellants are in essence not denying that they escaped form lawful custody. They admitted that in their defence. They are challenging their conviction on the grounds that:-

- (1) The prosecution misled them into believing that they were discontinuing the charges against them thereby prejudicing their defence.
- (2) Breach of fair trial under Section 50 (2) (g), (h) and (j) of the Constitution of Kenya 2010.
- (3) The trial magistrate erred by sentencing them to the maximum sentence provided by the law without considering their mitigation and the period spent in remand custody.

8. There is no record that the prosecution at any time stated that they wanted to discontinue the charges against the appellants. There is then no substance that their defence was prejudiced by such.

9. The appellants contended that the trial court did not accord them a fair trial in that the trial infringed on their rights under Article 50 (2) (g), (h) and (j) of the Constitution. Article 50 (2) (g), (h) and (j) of the Constitution states as follows:-

“(2) Every accused person has the right to a fair trial, which includes the right—

.....

(c) to have adequate time and facilities to prepare a defence;

.....

(g)to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h)to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

.....

(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

.....”

10. It is the duty of the trial court to comply with the provisions of Article 50 of the Constitution during trial. It was the right of the appellants to be supplied with copies of witness statements.

11. The court record indicates that on the day the appellants appeared for plea the trial court made an order for them to be supplied with witness statements. When the matter came up for hearing on 20/12/2016 the appellants stated that they had been supplied with copies of witness statements but they complained that they were typed statements. They demanded to be supplied with copies of statements that were handwritten. The prosecution stated that they were only in possession of typed statements. They submitted that the appellants would not be prejudiced in the case by the fact that the statements supplied to them were typed and not handwritten. The trial court agreed with the prosecution. When the hearing eventually started on 24/7/2017 before E. W. Muleka, SRM, the appellants stated that they were ready with the hearing.

12. It is then clear that the appellants were supplied with copies of witness statements before the hearing started. Hearing did not start until after 7 months later from the date of plea. The appellants had sufficient time to prepare for their defence. That they were supplied with typed copies of witness statements and not handwritten copies did not prejudice them in anyway.

13. The appellants were entitled to legal representation at state expense if substantial injustice would result if they were not provided with one. This issue was considered by the Court of Appeal in **Karisa Chengo & 2 Others –Vs- Republic**, where it was held that:-

“Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

14. The Supreme Court in **Republic –Vs- Karisa Chengo & 2 Others (2017) eKLR** held that the right to legal representation is not open ended but is only available “if substantial injustice would otherwise result”. The appellants were convicted of the offence of escape from lawful custody contrary to Section 123 of the Penal Code. There is nothing from the record to indicate that public interest warranted the state to appoint an advocate at the state’s expense. There is no indication that there were complex issues of law that would have caused substantial injustice if state provided counsel was not appointed. The appellants were fully aware of the charges levelled against them. They cross-examined the witnesses at length. At no point did they exhibit difficulty in understanding the charges that were facing them or defending themselves for charges of escape from lawful custody. In any case they did not request to be provided with a counsel. They all the same admitted to have escaped from lawful custody. The charge the appellants were convicted of did not warrant an automatic representation by a counsel at state expense. There is no substance in their argument towards that end.

15. Sentencing is a discretion of the trial court. In **Shadrack Kipchoge Kogo –Vs- Republic, Eldoret Criminal Appeal No. 253 of 2003** (quoted in Arthur **Muya Muriuki –Vs- Republic (2015) eKLR**), the Court of Appeal stated the following on principles of sentencing:-

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

16. In **Ambani –Vs- Republic (1990) KLR 161**, the court stated that a sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and that it is not proper exercise of discretion in sentencing for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence.

17. The offence of escape from lawful custody is a misdemeanor and as such attracts a maximum sentence of 3 years. The state did not present the previous antecedents for the appellants at the time of their sentence. They should therefore have been treated as first offenders. The state counsel however stated that the appellants had various cases in several courts around the region and that they were dangerous.

18. In mitigation the appellants pleaded with the court to consider the time they had been in custody awaiting trial. It is a general rule in sentencing that a maximum sentence should not be imposed on a first offender – See **Otieno –Vs- Republic (1983) KLR 295**. Also that a maximum sentence is intended for the worst kind of offender. Section 333 (2) of the Criminal Procedure Code requires the court when sentencing to consider the time spent in custody awaiting trial. In the case for the appellants it is apparent that the learned trial magistrate was swayed by the comments by the state counsel that the appellants had several cases in other courts and that they were dangerous people. These were irrelevant matters that the trial court should not have considered. The trial court failed to treat the appellants as first offenders and did not consider the period they had been in custody awaiting trial.

19. The appellants were charged on 18/10/2016. They were sentenced on 12/9/17. They were thereby in custody for 11 months awaiting trial. They have served 21 months of the sentence imposed on them. Considering the time spent in custody awaiting trial I consider that the time served is sufficient for the offence committed. The appellants are sentenced to the time already served. They are thereby to be released from prison custody unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 4th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Rotich for State

Appellants - present

Court Assistant - Ruto

14 days right of appeal