



REPUBLIC OF KENYA

High Court at Busia

Criminal Case 51 of 2011

GEORGE OMONDI ORENGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the judgement of M. MUNYEKENYE R.M. in Busia cr. Case no.1339 of 2010)

J U D G E M E N T

The appellant was convicted of the offence of escape from lawful custody contrary to Section 123 of the Penal Code and sentenced to serve four years imprisonment.

This appeal was opposed by the State on grounds that the conviction was safe and that any violation of rights, if any under Section 72 (3) of the former constitution may be addressed through a civil suit for compensation.

The facts of the case are that the appellant was a remandee at Busia G.K Prison awaiting hearing of Busia Chief Magistrate Criminal case no.916 of 2010 where he was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was produced in court in the morning of 03/09/10 together with other remandees for mention of the case at Busia Chief Magistrate's court and kept in the cells. Around 12.55 hours the appellant who was in the lawful custody of the court orderlies (PW1, PW2 and PW5). He escaped from the cells without the knowledge of the orderlies. He was in the company of four (4) other remandees. When the orderlies noticed that the five remandees were missing, they checked and noticed that exit had been gained through the roof by removing the iron sheets leaving a gaping hold.

A search was mounted by police officers from Busia police station assisted by their counterparts from GK prison Busia.

A short while later the appellant was arrested by administration police and brought back to the court cells and handed over to PW4. The appellant was later charged with the offence.

In his Amended petition of appeal the appellant puts forth the following grounds'

- a) that he was charged in court after more than 24 hours contrary to Art.49 (1) (f) of the Constitution thus violating his rights;
- b) that his rights were violated when he was forced to commence the trial while sick;
- c) that he was denied legal representation;

- d) that he was supplied with the statement of PW7 the same date of the hearing;
- e) that prison warders and other key witnesses failed to testify.
- f) that the prosecution's evidence was inconsistent and insufficient to sustain a conviction.
- g) that his alibi defence was not considered.

In respect to ground one, Article 49 (l) (f) limits the time that an accused person may be charged in court to 24 hours. The escape incident was said to have taken place on 03/10/2010 around 12.55 hours. The appellant was arraigned in court on 06/09/10 which was about 72 hours later. The appellant was a remandee at GK Prison Busia. It is not explained in the evidence whether he was remanded in police custody or whether he was returned to GK Prison Busia on 03/09/10 pending investigations of the case. The appellant himself did not explain where he was remanded. This issue of violation of rights was not raised before the trial court. The trial court would have dealt with the issue of delay and ruled on it. However, the normal practice is that when a prison remanded is accused of committing an offence, he is not remanded at the police station. He remains at the prison remand pending investigations into the alleged crime. The court in dealing with this issue will work on the assumption that the appellant was remanded in police custody. He was arrested on 3rd September 2010 which was on a Friday. The 4th and 5th September 2010 was during the weekend. Police arraigned the appellant in court on Monday 6th September 2010 which was the earliest working day after the weekend. Article 49 (l) (f) provides that an accused person has the right to:

Be brought before a court as soon as practicably

Possible, but not later than

i) twenty four hours after being arrested

ii) if the twenty four hours ends outside ordinary court hours, or on a day that is not ordinary court day, the end of the next court day.

The appellant could not have been charged on 4th and 5th September 2010 when the court was not sitting. The provisions of Article 49 (l) (f) (ii) were complied with and I find that the constitutional rights of the appellant were not violated.

On perusal of the proceedings I find that the appellant applied for adjournment twice on the 29/10/10 and on 18/10/10 on grounds that he was sick. The court granted adjournment on both occasions and ordered that the appellant be taken to hospital for treatment. On the 22/12/10 the matter was adjourned for a few hours to enable the prosecution supply the accused with witness statements. The statements were supplied the same morning and the matter proceeded for hearing later in the day. The matter commenced on that day when two witnesses were heard. There was no mention of sickness on part of the appellant. Sickness was not a ground for the application for adjournment on the day the trial commenced. The ground that the appellant was forced to proceed with the case when he was sick has no factual or legal basis.

It is alleged that the appellant was denied legal representation. I find nothing in the proceeding of the trial court regarding legal representation. The appellant did not apply to be given time to choose and instruct a counsel as provided for under Article 50 (2) (g).

The statement of PW7 was given to the appellant on 22/03/11 for which he was given time to read and prepare. The statement was said to be a very short one which did not call for adjournment to another date. PW7 later testified and he was cross-examined by the appellant. He was a formal witness who was just producing a criminal court file for the case facing the appellant when he escaped from lawful custody. This ground of appeal has not been established. It is my considered opinion that the appellant was granted sufficient time to prepare his defence in regard to PW7.

The evidence on which the conviction was based came from court orderlies and other police officers who were on duty at the court premises on the material day. The witnesses testified that they were on duty as court orderlies on the material day and that the appellant was one of the remandees at the cells. However, around mid-day it dawned on them that five remandees had already escaped the appellant being one of them. The gaping hole in the roof was the only exit the remandees would have used. Police officers swung into action immediately assisted by administration police officers. A motor bike was used to chase the appellant and he was arrested as he ran towards the office of the District Commissioner which is about 50 metres from the court premises. PW4 was standing outside the court building when he saw administration police come with the appellant under arrest. He took over the appellant from the arresting officers. PW7 confirmed that the appellant had a criminal case in the Chief Magistrates court for which he was remanded at Busia GK prison. On the material day, the appellant had appeared in court for mention of his case before plotting with his colleagues to escape.

In defence the appellant denied that he escaped from lawful custody. He said in his sworn defence that he entered into a toilet in the court cells. While there, he heard the court orderlies screaming saying some remandees had ran away. One police officer pulled him out of the cells and assaulted him. He was pushed back to the cells and later charged with the offence.

The trial court did not believe the appellant. The magistrate found the evidence of the police officers overwhelming on the escape. I have evaluated the evidence of the witnesses and I come to a conclusion that it is cogent and was not shaken by the defence during cross examination. The defence of the appellant was not convincing. The police officers had no good reason to fake an escape at the court premises and then charge the appellant with the offence. PW4's evidence on how he re-arrested the appellant from the administration police officers outside the court premises was sufficient on the arrest. The failure by the administration police officer and a remandee to testify is not fatal to the prosecution's case. The prosecution proved that the appellant was in lawful custody and that he escaped while in such custody. I find no inconsistencies in the prosecution's evidence. The magistrate considered the defence of the appellant and failed to buy his version of the incident.

It is my finding that the conviction was safe. The maximum sentence for the offence is three (3) years imprisonment. The sentence of three (3) years imprisonment imposed on the appellant was not excessive and was within the law. He was not a first offender since he said in mitigation that he was a convict serving another sentence. The prosecutor confirmed that he was a convict for a similar offence. I find the sentence lawful and reasonable.

F.N. MUCHEMI
J U D G E

Judgment dated and delivered on the 6th of November, 2012 in the presence of the appellant and the State Counsel Mr. Okeyo.

L. KIMARU
J U D G E