



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Miscellaneous Criminal Application 73 of 2008

REMICUS LIKAVO MUHALIA APPLICANT

V E R S U S

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of escape from lawful custody contrary to *section 123* of the Penal Code as read with *section 36* of the same code. He was found guilty and sentenced to serve two years imprisonment.

The appellant filed this appeal with the following grounds of appeal.

- *The sentence imposed was excessive.*
- *Officers who were on duty did not testify*
- *The appellant ought to have given the option of a fine*
- *Investigating officer, re-arresting officer and some other witnesses did not testify*
- *The appellant requested for the Occurrence book (O.B.) of 29th October 2004 and the Chief journal but these were not produced in court.*
- *Appellant's sworn defence was not considered.*

Other than the above grounds of Appeal the appellant further

submitted that the lower court record shows that he was charged on 21/8/2004 yet the offence was committed on 29/8/2004. Further, that he was not taken to a police station. He submitted that he was in prison custody serving two sentences of one year and 7 years respectively.

Mr. Karuri, learned State Counsel opposed the appeal. He submitted that the plea was taken on 31st August, 2004. The offence was committed during day time and all the witnesses who testified were prison officers. The appellant's mitigation was considered and the appellant is not a first offender.

The prosecution's case was that on 29th August 2004 at about 4.15 p.m. the appellant escaped from

prison custody by jumping over the security wall. PW2, Musa Chacha Boke was on duty at the prison Tower 2 and noticed the incident. He raised alarm and shot in the air but the appellant defied and jumped out of the fence. PW4, Meshack Okiya, a prison officer heard the gun shots and also raised the alarm bell.

PW1, William Obonyo was off duty that day. He was coming from Amalemba Estate when he saw someone emerging from the prison fence wearing prison uniform. He saw the person removing the uniform and he recognized him as the appellant. The appellant started running but the witness managed to catch up with him and arrested him. PW3, Frank Ndale, a prison officer, was in the neighbour and heard the commotion. He went out and assisted PW1 in arresting the appellant.

The appellant called two witnesses who were fellow inmates. He testified that he was the prefect for one of the prison cells and prison warders smelt someone smoking bhang. The appellant was taking a shower and the warders asked him why he was not taking action yet he was the prefect. This was on 30th August 2004. One prison warden went to the bathroom but the appellant pushed the door and the warden was injured. The appellant was beaten and he became unconscious. He was taken to Kakamega Provincial Hospital.

The appellant called two defence witnesses namely DW2, Obedi Mugeni and DW3, Erick Oscar Makanga. They both gave the same testimony as the appellant.

The prosecution evidence establishes that the appellant was under prison custody serving sentences. The appellant himself confirms that he was serving prison sentence. The only issue is whether the appellant escaped from lawful custody. I do not see the reason why out of all the prisoners at Kakamega prison, the prison warders would pick on the appellant and allege that he escaped from custody. Although the appellant contends that the charges were meant to cover up the fact that he was beaten up on 30th August 2004, I have looked at the medical treatment notes produced by the appellant and note that the same have alterations on the dates. However, even if indeed the appellant was assaulted, charging him with escape from prison would not have stopped him from pursuing his assault case against the prison warders. I do find that indeed the appellant escaped from lawful custody and the prosecution proved its case beyond reasonable doubt.

The handwritten record indicate that the plea was taken on 31/8/2004. The appellant's contention that the plea was taken on 21/8/09 is misplaced. The prison officer the appellant alleged to have brought other officers to assault him, chief officer Meshack Okiya, also testified and denied the allegations. The trial court noted that the appellant was in custody when he attempted to escape and gave the maximum sentence without the option of a fine. I do find that there is no need to interfere with the sentence as the same is lawful.

In the end, I do not find merit in this appeal and the same is disallowed.

Delivered, Dated and Signed at Kakamega this 8th day of October, 2009

SAID J. CHITEMBWE

J U D G E