

REPUBLIC OF KENYA

Wachira v Republic

Court of Appeal, at Nairobi October 11, 1985

Platt AgJA

Criminal Application No 7 of 1985

(From an Order of the High Court at Nairobi, Cockar J, in High Court Criminal Appeal No 7 of 1985)

October 11, 1985, Platt AgJA delivered the following Ruling.

Mr Bernard Wachira applied by motion to extend the time for filing the notice of appeal to this court of his first appeal.

At first the proceedings at the trial and on first appeal were not before me and a further affidavit was permitted, attaching copies of those proceedings and the intended appeal to his court.

It now appears that the applicant was convicted on a plea of guilty to the charge of preparation to commit a crime contrary to section 308 (1) of the Penal Code. He was sentenced to 10 years imprisonment together with 8 strokes of corporal punishment. As far as I make out the first appeal lay against sentence only. Mr Gathenji spelt out an appeal against the plea, because the applicant referred to his being the victim of other accused persons. But I cannot think that that was so. Despite the argument of Mr Gathenji I cannot see that the learned judge could really have considered that there was material before him to conditionally discharge the appellant. That is the issue, because otherwise 10 years imprisonment is the maximum sentence, and the number of strokes was not severe; therefore if the conviction stood less there were seen to be very special circumstances, a conditional discharge would be quite out of question. The learned judge would appear to have dealt reasonably with the actual appeal before him.

But now Mr Gathenji wished to appeal on a matter of law that the charge and the particulars are at variance in an important particular, namely the date. No doubt, there is considerable slackness in the framing of the charge. The particulars put the offence on December 4, 1984. The facts outlined speak of the December 21, 1984 as the date when the gun was seized from the possession of the applicant. There may also be some vagueness as to who had the gun.

As against that learned state counsel who first appeared before me, Miss Mbarire had pointed out that while those discrepancies appear, yet in applying the Criminal Procedure Code, requiring the time and place of the offence to be specified, irregularities in this regard are only fatal to a conviction, if they cause a failure of justice, as provided by Section 382 of the Criminal Procedure Code. Again according to the provisions of this latter section regard must be had to the fact that this matter was not raised at the trial or on first appeal.

Having in mind this type of appeal, and without going too far in deciding such an appeal, I have to consider the reasons for the delay. The timetable is that the conviction was entered in December 1984. The first appeal was summarily dismissed on January 16 1985. The relatives of the applicant came to Mr Gathenji in March 1985. He applied for proceedings on April 16, 1985, and received them on June 17, 1985. The delay between January 16, and March 1985, 1985 is due apparently to lack of funds, ignorance of the procedure and lack of communication of the steps taken in the appeal. But of course, the prison authorities could have filed the appeal for him. He could have appealed as a poor person. None of these excuses in the event affected the applicant's rights; and he has sworn no affidavit saying that he himself was prevented from exercising any rights. That is the stand taken by the second learned state counsel, Miss Ngugi.

Mr Gathenji has attempted to explain less the applicant's own lack of activity, by saying that his first instructions from the relatives were that the appeal was still pending. He presumed that that was what the applicant had told his relatives. As Miss Ngugi pointed out, the applicant has not explained that on oath. From general knowledge of this procedure, the applicant must have been told that his appeal was dismissed summarily. He did not at that time wish to appeal, as it appears, but now spurred on by his relatives, he does. I would say that his problem probably is not that he was confused that the appeal was still pending, but that he was confused as to his chance of success. It is likely that he could have spotted the errors of law for himself.

In these circumstances it becomes important in this case to make some estimate of the value of the appeal. There is perhaps an arguable point of law taken now for first time. But it is not a very attractive application. Nevertheless it would perhaps be worthwhile to have the appeal heard because it is a minimum sentence, and the irregularities should be declared one and for all either a miscarriage of justice, or not, as the case may be. Accordingly time will be enlarged for the notice of appeal to be lodged within 7 days of today's date.