



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHUNGA, C.J. AKIWUMI & O'KUBASU, JJ.A.)

CRIMINAL APPEAL NO. 95 OF 1999

BETWEEN

SAMUWL KARISA KITSAOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Justice Hayanga) dated 9th July, 1999

in

H.C.CR.A. NO. 15 OF 1999)

JUDGMENT OF THE COURT

This appeal is against the sentence of 17 years passed on the appellant upon his plea of guilty to the lesser charge of manslaughter in the course of his trial on a charge of murder.

The original charge of murder was based on the following facts that on the 16th January, 1996, whilst the appellant was serving a term of imprisonment at Hola Prison, he, after obtaining permission to go to the toilet, climbed up the watchtower and snatched a loaded rifle which had been carelessly left behind there by a warder. The appellant had obviously been keeping an eye on what was going on in the watchtower. After getting hold of the loaded rifle, the appellant in trying to escape from the prison, shot dead a warder, Aden Hassan, and wounded another warder, Omar Ahdi Mohammed. During the course of his trial for murder, his counsel, Mr. Mungatana, applied for the charge of murder to be reduced to manslaughter to which the appellant was prepared to plead guilty. In spite of the glaring evidence that the appellant's action was deliberate and had been well planned, counsel for the Republic did not object to this application which was furthermore, strangely, accepted by the trial judge.

The charge of murder was then withdrawn and substituted for by one of manslaughter based on the same facts. The appellant then pleaded guilty to this lesser offence.

Counsel for the Republic then set out the facts which were the same as those already set out, and also drew the court's attention to the fact that the appellant had already been charged with other offences arising out of the same facts, to which he had already pleaded guilty and had been accordingly, convicted.

These, as appear in the record of appeal, relate to the attempted murder of Omar Ahdi Mohamed, the theft of the rifle, unlawful possession of the rifle, and the unlawful possession of the rounds of ammunition with which the rifle had been loaded. It is not quite clear, but counsel for the appellant in his plea in mitigation, stated that the appellant had in respect of these four charges, without stating precisely which of them, had been sentenced to 8 years imprisonment and 6 strokes of the cane and 9 years imprisonment making a total of 17 years imprisonment and 6 strokes of the cane. The appellant it seems, had not then began to serve this sentence which appeared to be consecutive.

What has, however, given us some cause for concern, is that the learned judge did not take into account the fact that if the sentence that he had passed on the appellant was to take effect consecutively, after the appellant had finished serving the apparently consecutive sentence of 17 years imprisonment earlier passed on him, he would end up if these sentences are even concurrent, serving a minimum sentence of 26 years and if consecutive, a total of 34 years imprisonment, in respect of the various crimes that arise out of the same set of facts. In either case, the total sentence arising from the same set of facts would be excessive. To avoid this, the learned judge should have ordered that the sentence of 17 years that he passed on the appellant, should be concurrent with those passed on him in respect of his earlier convictions and sentences in connection with the offences arising out of the same facts as those on which the charge of manslaughter arose.

We would therefore, order that the sentence of 17 years passed on the appellant by the learned judge, shall run concurrently with the earlier sentences of 8 years imprisonment and 6 strokes of the cane and of 9 years imprisonment whether they be concurrent or consecutive.

It is so ordered.

Dated and delivered at Mombasa this 19th day of January, 2000.

B. CHUNGA

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CHIEF JUSTICE

A. M. AKIWUMI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.
DEPUTY REGISTRAR.