REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 160A of 2009

JAMES NGOLO AWUOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.2948/2009 by Hon W. A. Juma, Chief Magistrate, dated 28th May, 2009)

JUDGMENT

Although the appellant pleaded guilty to three counts, namely, **forgery** contrary to **section 349** of the **Penal Code**, **uttering a false document** contrary to **section 353** of the **Penal Code** and **attempted obtaining money by false pretences** contrary to **section 388** as read with **section 389** of the **Penal Code** and sentenced to two (2) years in each count to run concurrently, he has, through counsel challenged the whole decision of the court below. **Section 348** of the **Criminal Procedure Code** provides that:

> **"348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

It is now settled that the above provision is not an absolute bar to challenge an appeal on any other ground.

See **Albanus Mwasia Mutua** Vs. **Republic,** Court of Appeal Cr. Appeal No.120 of 2004.

The appellant relies on eight (8) grounds in the petition but one ground was abandoned. These grounds may be summarized as follows:-

i) that the plea was not unequivocal

ii) that the conviction and sentence were passed yet the trial court had not investigated the appellant's claim that his constitutional rights had been violated

iii) the facts as stated did not support the charge

iv) that the trial magistrate proceeded to take the appellant's plea yet the appellant was ill and not in a position to understand the charges

v) that the sentence was harsh, oppressive and illegal

Learned counsel for the respondent opposed the appeal arguing that the plea was unequivocal; that the appellant fainted after sentence and that **section 72(3)** of the **Constitution** was not violated.

I have considered these arguments. Starting with the last point, there is no debate that the appellant was arrested on 26th May, 2009 and brought to court on 28th May, 2009. Counsel for the respondent, relying on the **Interpretation and General Provisions Act** (I suppose **section 57**) submitted that the day of arrest was to be

excluded in the computation of time and that would bring the case within the period prescribed.. But the **Interpretation and General Provisions Act** is specific with regard to its application to the Constitution. **Section 2** thereof stipulates:

> **"2. This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act."**

That being so, the position remains that the appellant was detained between 26th May, 2009 and 28th May, 2009. Learned counsel for the appellant estimated that that is a period of 40 hours.

The question is whether that was enough delay to constitute a violation of Constitutional rights guaranteed under **section 72(3)** of the **Constitution**. **Section 72(3)** aforesaid provides that a person who is arrested upon reasonable suspicious of his having committed or about to commit an offence not punishable by death must be brought before the court as soon as is reasonably practicable and in any case within twenty-four hours of his arrest, unless there is justification for delay beyond the twenty four hour limitation. How does a suspect who has been detained beyond this period seek redress from the court?

Section 84(1) of the **Constitution** empowers the High Court to hear and determined any such allegation of violation. In particular and relevant to this appeal, where the violation is alleged in proceedings before the subordinate court, the presiding officer by dint of **section 84(3):**

> **"….may, and shall if any party to the proceedings so requests, refer the questions, to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious."**

Finally on this, pursuant to **sub-section 6** of **section 84**, the Chief Justice has made rules with respect to the exercise of jurisdiction, by the High Court for the application of **section 84** aforesaid. Those rules, **the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual), High Court Practice and Procedure Rules**, 2006 now simply referred to as the **Gicheru Rules** make elaborate procedure for the exercise of the High Court jurisdiction in matters of human rights violation**. Rule 24** framed in more or less the same language as **section 84(3)** aforesaid, provides that where in proceedings before the subordinate court a question arises as to the contravention of any rights provided under **section 70** to **83** (inclusive), the presiding officer (magistrate), if he is of the opinion that the question raised is not frivolous or vexatious may refer the question to the High Court. The suspect can also make an informal application, under **Rule 25**, to the presiding officer during the pendency of the proceedings that reference be made to the High Court to determine the question of alleged violation. The presiding officer is enjoined if he finds substance in the informal application to frame the questions to be determined by the High Court.

In the instant matter, the appellant immediately after pleading guilty to the three counts and before facts could be outlined raised the issue of delay in bringing him to court. The court ordered that:

> **" COURT: Same to be replied to on a date to be set"**

But after that order was recorded, the prosecutor proceeded to give the facts to which the appellant pleaded as correct and was accordingly convicted and sentenced as earlier stated.

Clearly, there was no chance for the learned magistrate's order regarding the issue of delay. The appellant was not represented by counsel and unlike the learned magistrate, is not versed in matters of law. It was incumbent upon the learned magistrate to resort to the provisions of **section 84(3)** of the **Constitution** and **Rules 24** and **24** of the **Gicheru Rules**.

By requiring a reply to those allegations, it appears to me that the learned magistrate found some substance in the allegations. She was required to frame the question for determination by the High Court before proceeding further with the matter.

Without considering the other grounds, from the manner the plea was taken, it can be said that it was not unequivocal. It amounted to a plea on condition or subject to incarceration beyond constitutional limits. For these reason, I come to the conclusion that the appellant's constitutional rights were violated entitling him to an acquittal. The appeal is allowed, conviction quashed and sentence on each count set aside. The appellant shall be set at liberty forthwith unless held for some other lawful cause.

Dated, Signed and Delivered at Nakuru this 12th March, 2010.

W. OUKO

JUDGE