**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 171 of 2008**

**CRIMINAL APPEAL NO. 171 OF 2008**

**OMAR DIKA GOA……………..…………………..…..……………1ST APPELLANT**

**HASSAN BAKASA IBRAHIM……………..………………………..2ND APPELLANT**

**V E R S U S**

**REPUBLIC………………………………………………………………..RESPONDENT**

**(From original conviction and sentence in Criminal Case No. 59 of 2007 in Senior Resident Magistrate Court at Isiolo)**

## JUDGEMENT

The Appellants along with one Yusuf Ibrahim as co accused were charged under Section 296(2) of the Penal Code (Cap 63 Laws of Kenya) with the offence of robbery with violence. The 1st appellant Omar Dika Goa was also charged with two counts of possession of a firearm without a firearms Licence Certificate under Section 4(5) of the Firearms Act, (Cap 114 Laws of Kenya). The 3rd accused (Yusuf Ibrahim) was acquitted for lack of evidence. These appellants were however convicted of the offence of robbery with violence, and also possession of firearms without a valid Firearms Certificate. The appellants were sentenced to death in respect of the offence of robbery with violence. The sentences in respect of the offence of possession of firearms without a valid Certificate were correctly put in abeyance.

Both appellants filed similar appeals on 21.08.2008 against their conviction and sentence on six grounds respectively. The appeals were consolidated by order of court made on 30.03.2009. However at the hearing of the consolidated appeals, the court allowed under the provisions of section 350 (V) of the

Criminal Procedure Code, Amended Grounds of Appeal (ten in respect of the 1st appellant) and (eight in respect of the 2nd Appellant). The issues raised in both grounds of Appeal may be summarized into whether:-

(a) the Appellants' Constitutional pre-trial rights were violated in that they were not brought to court within 14 days in contravention of Section 72(3) (b) of the Constitution of Kenya;

(b) the Appellants' trial rights were violated in that the proceedings were conducted in a language which was not translated to them and they did not understand;

(c) the appellants were not accorded a fair trial as is envisaged by Section 77(1) of the Constitution of Kenya;

(d) the Appellants were not properly identified as the circumstances were not conducive to their positive identification;

(e) the identification parade conducted by the Police was in contravention of Chapter 46 of the Force Standing Orders;

(f) there was evidence to connect the appellants with possession of the firearms recovered;

In their written submissions the appellants have respectively argued strenuously that the entire prosecution case lay upon the evidence of identification. Both appellants have argued that the circumstances prevailing at the time of the alleged offence were not conducive to their identification. The appellants also argued that the identification parade conducted by the Police violated (Police) **Force Orders Chapter** 46 (**Guide to Criminal Investigation (Revised Edition 2001** (1962). The appellants also argued that there were material contradictions in the prosecution's evidence and that for this reason they should have been given a benefit of doubt. Lastly the appellants urged that their constitutional rights to be brought before a court within 14 days of their arrest or detention as is prescribed by Section 72(3) (b) of the Constitution of Kenya were violated and for that reason alone their trial was a nullity and that therefore their appeals should succeed.

The appeals were opposed on all grounds by Mr. Kimathi learned State Counsel.

We have considered both the appellants written submissions and those of learned State Counsel. We are satisfied on consideration of respective submissions that no rights of the appellants were contravened in terms of Section 72(3)(b) of the Constitution. The explanation for the delay of 52 days offered in the evidence of P.W.7 P.C. NO. 66097, Clement Mwangi at p. 27 of the lower court's record was acceptable. Bringing the accused (the appellants) to court took time. The appellants had run away and escaped with the loot after the robbery. It took time first to get the appellants arrested and thereafter

other complainants had to be traced. They had lost their cell-phones during the robbery in a remote and inhospitable part of the country with very poor communication network by way of roads. The lower court accepted, and we accept the explanation given by (P.W.7). Ground 1 of the Grounds of Appeal therefore fails and we so hold.

***Of failure to comply with section 77 (1) of the Constitution and Section 197 and 198 of the Criminal Procedure Code*.**

Section 77(1) of the Constitution of Kenya provides that where a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time, by an independent and impartial court established by law. Section 198(1) of the Criminal Procedure Code provides that whenever any evidence is given in a language not understood by the accused, and he is present in person it shall be interpreted to him in open court in a language which he understands and if he appears by advocate and evidence is given in a language other than English and not understood by the Advocate it shall be interpreted to the Advocate in English.

The appellants contended in grounds 2 and 3 of the Amended Grounds of Appeal that they were not afforded a fair hearing because evidence against them was adduced in a language which they respectively did not understand and that no interpreter was availed to court to interpret the proceedings in a language they each understood and urged that this court should so find and hold.

As it is usual and demanded of this court as a court of first appeal, we have examined carefully the entire record of proceedings of the lower court. We are satisfied that the appellants took active part in the proceedings before the trial court. They each cross-examined each of the witnesses. They had no ability to do so if they did not understand or follow the trial proceedings. In our view therefore where an accused person has taken such an active part in the trial proceedings as the appellants did in this case, they are, or such person is, estopped from denying such participation and claiming on appeal that his rights to a fair trial were violated. We are satisfied that the appellants each understood the nature of the charges facing them and that Section 77(1) of the Constitution was complied with. This ground (3) of the appeal fails and we so find and hold.

**Of identification of the Appellants Ground 4, 5 and 6 merged**.

The Appellants argued that they were not conclusively and positively identified at all. Their argument fell into three scenarios. The first scenario relates to the upstaging of the complainant's motor

vehicle on the road. The appellants argue that no positive and conclusive identification could be made in a hold-up coupled with rapid firearm firing both at the front and back of the vehicle. The **second** scenario relates to the robbery in the bush where the vehicle was driven and the complainants and other victims were relieved of cash and other possessions. The Appellants argue that in a situation where the victims were ordered to lie face down they had no time to face and recognize the appellants. In light of this scenario no witness could claim to have positively and conclusively identified the appellants. The **third** scenario involved the Police identification parade. The appellants contend that the identification contravened the (Police) Force Standing Orders, in particular Order 6(ii) thereof. We have considered those scenarios.

On scenarios 1 and 2 of the robbery, we are satisfied that despite the difficult circumstances of rapid gun firing and beatings, the evidence of P.W.1 and P.W.4 is credible enough. The human eye coupled with the human computer, the mind or brain, works all the time including the time of crisis. The camera, the eye, captures the images or pictures, the computer brain stores those pictures in its memory bank. When it is played back in recollection, those pictures come back vividly. That memory was played back at the identification parade. Those pictures and memories were however scarred and besmirched at the identification parade.

The Officer (P.W.6) who conducted the identification parade did not follow the rules for playing back those memories. Those rules are contained and set out in Order 6(c) and (d) of the **Force Standing Orders,** and they provide as follows:-

> **"6.** ***(a)*** **…………………**
> ***(b)*** **…………………**
> ***(c)*** ***the witness or witnesses will not see the accused/suspect before the parade.***
> ***(d)*** ***the Accused suspect person will be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as him/her. Should the accused/suspected person be suffering from any disfigurement steps should be taken to ensure that it is not specially apparent. Not more than one accused/suspect person should appear on identification parade."***

The Appellants' complaint is not that the witnesses saw either of them before the parade. The appellant's complaint is that Order 6(d) of the Force Standing Orders was not complied with by the officer who conducted the identification parade. Instead of the accused/suspect person being placed among eight persons as is ordained by the Order the appellants were each placed between six persons.

In the case of **<u>MWANGI</u> VS <u>REPUBLIC</u> [1976] K.L.R. 127** the Court of Appeal considered the question whether an irregularity in holding an identity parade would necessarily lead to the exclusion of evidence of identification. The court held that whether or not the conduct of an identification parade is so irregular as to necessitate its being disregarded is a question of degree to be decided in the light of the circumstances of each case. Accordingly, where two of the fourteen people in an identification parade were suspects as the irregularity did not cause prejudice or require that the evidence be excluded, the court could properly admit the evidence.

In the case of **<u>Joseph Kariuki</u> vs <u>Republic</u> [1985] K.L.R. 507** the officer conducting the identification parade lined up four accused persons with twelve other persons in an identification parade. The court held that this was in breach of the Force Order which required that while conducting an identification parade, one accused person should be lined up against at least eight other than non accused persons. The court concluded that this rendered the parade an unreliable source of identification and held that as the identification of the appellant in the second count was unreliable and there being no other evidence on this count, the conviction on this count was unsound. The court quashed the conviction and set aside the sentence on that count.

In this case, according to the evidence of P.W.6 Inspector Anastacia Kitavi (p.26 of the record) the parade had six members. This was clearly contrary to Order 6 which requires that the identification parade must be conducted with scrupulous fairness otherwise the value of the identification as evidence will be lessened or nullified.

The Force Standing Orders are often referred to as the Judges Rules. They are not legal instruments in the sense of being subsidiary legislation made pursuant to any principal law or Act of Parliament. They are a set of administrative directions used for the guidance of the Police in questioning persons suspected of (committing) an offence. In England these Rules have been superseded by the provisions relating to detection, treatment and questioning of persons in custody by the Police and are contained in the **Police and Criminal Evidence Act 1984**, Part V and the relevant Codes of Practice. In Kenya and indeed East Africa, the rules of identification were approved by the Court of Appeal for Eastern Africa in the case of **<u>R.</u> Vs <u>Mwongo s/o Manaa</u> [1936] 3 E.A 29**.

In that case the Court of Appeal approved of the method of identification which was set out in

Kenya Police Order No. 15/26 and approved by the then Chief Justice of Kenya. Those rules entitled *"Instructions for Identification Parades"* originally thirteen (13) in number have, in essence survived to the current **Force Standing Orders Chapter 46 Order 6** already referred to above. These rules have guided the courts since their approval and have acquired the force of law. In the case of **SENTALE vs. UGANDA [1968] E.A. 365**, Sir Udo Udoma CJ held inter alia that evidence of an identification parade held in a manner contrary to the rule approved by the Court of Appeal in **R. Vs. Mwango** *(supra)* was irregularly admitted. He allowed the appeal, quashed the conviction, set aside the sentence and acquit the appellant.

This case is not dissimilar. The Judges Rules were not followed. Instead of providing eight persons in the identification parade P.W.6 provided only six persons. This was contrary to the Rules, the Force Standing Orders as outlined above. The evidence of identification was thereby inadmissible. It is nullified. The appellants succeed on this ground alone. The appeal is therefore allowed. The conviction is quashed and the sentence is set aside. The appellants are acquitted and are set free unless lawfully held.

Those are the orders of the court.

Dated, Delivered and Signed at Meru this ..16th day of April…….2010

**MARY KASANGO**

**JUDGE**

**M. J. ANYARA EMUKULE**

**JUDGE**