



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 105 of 2007**

(From original conviction and sentence in Criminal Case No. 109 of 2006 of the Senior Resident Magistrate's Court at Molo - Hon. Kirui {S.R.M.} dated 27th September, 2006)

SAMUEL MUNA NTHEGA.....1ST APPELLANT

PHILLIP MUTUA MUSYOKI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code (Cap. 63, Laws of Kenya), and were on the evidence convicted and sentenced to death. Both appealed to this court, and their respective appeals were consolidated by order of court made on 23rd February 2010.

Both Appellants have submitted written submissions in support of their respective grounds of appeal. The 1st Appellant raised five grounds while the 2nd Appellant raised four grounds of appeal. The 2nd Appellant raised the important issue of identification and submitted that he was not identified as the robber. The 1st Appellant complained that the trial court did not observe the requirements of Section 200 of the Criminal Procedure Code, that the trial court shifted the burden of proof to them, and that the judgment did not comply with the requirements of Section 169(1) of the Criminal Procedure Code. Lastly the 2nd Appellant complained that his rights under Section 72(3)(b) of the Constitution were violated as they were not brought to court within 14 days.

We have considered the Appellants grounds of appeal in light of the evidence before court. We have also considered the Appellants written submissions and set out in the paragraphs following our findings and holding on each of the grounds raised by the Appellants.

On the question of identification raised by the 2nd Appellant, it is borne out by his evidence that attack took place at night. The complainant (PW1) was unable to see and then identify any of his attackers. He however reported the matter to the Police, that he was attacked from the back.

Evidence was adduced by the prosecution that when investigations was carried out, the Police recovered the complainant's cell-phone, sim card from the 2nd Appellant's house, thus showing that the Appellant was involved in the attacks. The 1st Appellant was also found wearing the shoes of the complainant. The complainant demonstrated in his evidence that the shoes belonged to him. Neither of the Appellants was able to explain how they came by the complainant's cell-phone, sim card, or the shoes he was wearing. Besides the 1st Appellant was also found in possession of cannabis sativa.

In a succinct judgment, the learned trial magistrate considered both the prosecution evidence, as well as the Appellant's respective sworn testimony. Both Appellants narrated how they were arrested and avoided giving any plausible explanation as to how they came by the complainant's sim card (*in respect of the 2nd Appellant*) and the shoes of the complainant (*in respect of the 1st Appellant*). The learned trial magistrate came to the correct conclusion that the Appellant's were part of a gang which robbed the complainant (PW2). They could not explain their possession of the complainant's cell-phone, sim card, his shoes, his jacket, and cap. We have no reason for interfering with those findings.

The judgment of the learned trial magistrate was clear, contained the points for determination, the decision thereon and reasons therefor and was signed and dated. It specified the offence for which the Appellants were convicted, and sentenced. All this was in compliance with section 169(1) and (2) of the Criminal Procedure Code (Cap 75, Laws of Kenya).

On the question of alleged violation of the Appellants' constitutional rights, the 1st Appellant was arrested on 23rd August, 2005. The 2nd Appellant was arrested on 6th September 2005 and were not brought to court until 13th February 2006, a period well over 14 days required under Section 72(3)(b) of the Constitution. The Appellants relied on the case of **Albanus Mwanzia Mutua vs. Republic [2006] eKLR (CA)** at Nairobi. Detaining any of the Appellants beyond the 14 days constitutional period is certainly a violation of their constitutional rights. The said provision (S. 72(3)(b)) does not however say that if an accused is detained beyond the 14 days period he shall neither be prosecuted nor that his prosecution is a nullity. A decision of the court cannot nullify the provisions of the Constitution.

In fact the provision says that detention beyond 14 days can be justified by an explanation. If the explanation is not acceptable to the court or the accused or in this case the Appellant, the remedy is an action for damages under Section 72(6) of the Constitution.

In the upshot therefore we find no merit in the Appellants' appeal. We confirm the lower court's judgment and sentence, and dismiss the respective appeals.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 6th day of May 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE

