REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL APPEAL 461 OF 2007

MICHAEL KIMANI KANIARU .....……..…....…….APPELLANT

- AND -

REPUBLIC …….....……..……RESPONDENT

(An appeal from the judgment of Principal Magistrate Mrs. T. W. C. Wamae dated 25th May, 2007 in Criminal Case No. 921 of 2005 at Nairobi Law Courts)

JUDGEMENT

The appellant faced a charge in three counts, respectively:

(i) preparation to commit a felony contrary to s. 308 (1) of the Penal Code (Cap. 63, Laws of Kenya);

(ii) being in possession of a firearm without a certificate contrary to s. 4 (1) as read with s. 4 (3) of the Firearms Act (Cap. 114, Laws of Kenya);

(iii) being in possession of ammunition without a firearm certificate contrary to s. 4 (1) as read with s. 4 (3) of the Firearms Act.

The particulars in the 1st count were that the appellant, on *16th April 2005* at Mathare North in Nairobi, was found armed with a pistol, make Tokalev Serial No. E 16960, with eight rounds of ammunition, in circumstances that indicated he intended to commit a felony, namely robbery.

The particulars on the 2nd count were that on the said date and at the said place, the appellant was found in possession of a Tokalev Pistol, Serial No. E 16960 without a firearm certificate.

It was specified, on the 3rd count, that the appellant, at the said place and time, on the said date, was in possession of eight rounds of ammunition of 7.62 mm calibre, without a firearm certificate.

Police Constable (P.F. No. 71704) *Norman Opini Onsula* (PW1) was on duty on the material date at 6.00 p.m., with his colleagues, Police *Constable Manyara,* Police *Constable Machiori* and Police *Constable Omoria* (PW3). PW1 and *P. C. Omoria,* at *7.00 a.m.* on *the following day*, took a footpath leading to Area I; while *P.C. Manyara* and *P. C. Machiori* took a different route. *P.C. Omoria* who was walking ahead of PW1, saw a young man walking towards the two officers, from the direction of the Social Hall. To *P. C. Omoria,* the young man bore a suspicious look, so *P.C. Omoria* stopped him; but he then

endeavoured to escape, and PW1 then arrested the young man. PW1 carried out a search on the young man, and found on the young man a *Tokalev pistol, Serial No. E 16969,* which was hidden on the right-hand side of the young man's pair of trousers. The gun had *eight rounds of ammunition.* PW1 and *P.C. Omoria* immediately called *P. C. Manyara, P.C. Machiori* and the Muthaiga OCS to come to the scene. The young man was the appellant herein; and the Police officers took him to the Police station and charged him with firearm offences.

PW1 had known the appellant before; he identified the appellant, and identified the said Tokalev pistol in Court. The pistol had a magazine; and it had *eight rounds of live ammunition,* which PW1 identified in Court.

On cross-examination, PW1 said he and his colleagues were not dressed in Police uniforms when they arrested the appellant herein; and that the appellant had looked shocked when he saw the Police officers. On re-examination, the witness testified that he had made a record in the Occurrence Book that he had recovered a pistol and eight rounds of ammunition from the appellant herein.

Police Constable (P.F. No. 81769) *Andrew Omoria* of Muthaiga Police Station was on duty around the Social Hall at Mathare North, in the company of PW1. The two were on patrol, and PW2 walked slightly ahead of PW1 and, at this time, he met the appellant coming towards him. Having formed the impression that the appellant looked suspicious, PW2 arrested him, and when a search was conducted on the appellant, a *Tokalev pistol, Serial No. E 16960* was found; and it had eight rounds of live ammunition, of 9 mm calibre; it was *tucked in the appellant's trousers*, in the front part. The appellant is the person who was arrested in those circumstances. PW2 had known the appellant before the material day.

On cross-examination, PW2 said he and PW1 had arrested the appellant at 5.30 a.m.; and the appellant had looked suspicious and shaken at the time of arrest.

PW3, Police *Constable Henry Njuguna* (Police Force No. 59942) of the CID office, Kasarani conducted the investigations, at the request of the DCIO, *Mr. Tebeni.* He recorded statement, and charged the appellant herein; and he took custody of a *Tokalev pistol Ser. No. E 16960* and *eight rounds of ammunition* handed over to him by Pw1 and PW2. PW3 forwarded the said exhibits to CID headquarters for analysis – and he later received a report on the same, Report No. CID/FM/Lab/1/06 dated 16th February, 2006, signed by *Lawrence Midiwa* the firearms examiner. PW3 produced the said report as an exhibit, and identified the appellant herein as the person he had charged. The report stated that the said Tokalev pistol Ser. No. E. 16960 and eight rounds of ammunition had been examined; the pistol was found capable of being fired; it was test-fired with two rounds of ammunition taken from the stock of eight live ammunition; the eight rounds of ammunition were 7.62 and 25 mm calibre. Two of the ammunition were dissected and found to be complete. The bullets were in good working condition.

On re-examination, PW3 said the bullets recovered were 7.62 mm calibre, and not 9 mm calibre. It was his testimony that even though the charge sheet referred to 9mm calibre ammunition, the examiner's report had shown them to be 7.62 mm; and he asked the Court to rely on the correct statement as 7.62 mm calibre.

The prosecution thereupon asked the Court to allow amendment to the particulars of the 3rd count of the charge, to refer to 7.62 mm calibre and not 9mm calibre. Learned counsel *Mr. Ouna* objected to the request, contending that "the amendment is being done after the prosecution realized that there were contradictions in the evidence". The ruling by the learned Magistrate, on this point, was that:

"Section 214 [of the Criminal Procedure Code (Cap. 75, Laws of Kenya)] clearly acknowledges that there are instances when the charge and [the] evidence can be at variance, and provides for amendment in such cases.

"There is no evidence that [the] accused has been misled or deceived ... [The] accused has a right to recall the witnesses for further cross-examination if he so wishes.

"From the foregoing, therefore, I find that the accused does not stand to suffer any prejudice and [the] application to amend is allowed".

The amendment to the 3rd count was then entered; it was read out in Kiswahili to the appellant who denied the charge; and a plea of not guilty was entered.

At a preliminary stage, the learned Magistrate found no case to answer in respect of the *1st count,* but put the appellant to his defence in respect of the *2nd and 3rd counts.*

The appellant gave a sworn defence in which he denied that he had a pistol on him at the time he was arrested by PW1 and PW2. The appellant denied the content of the testimonies of PW1 and PW2, and said he saw the Tokalev pistol in question for the first time in Court.

After hearing the submissions made on both sides, the learned Magistrate analyzed the evidence as follows:

"I have considered the evidence by PW1 and PW2 and it is to the effect that they recovered a Tokalve pistol and eight rounds of ammunition from the accused person. PW1 testified that [the] accused was arrested on 17th April 2005 at 7.00 a.m. and PW2 said he was arrested on 16th April, 2005 at 5.30 a.m. The two prosecution witnesses also testified that the accused was a suspect in a case of theft of [a] motor vehicle .... It is in evidence that PW1 and PW2 did not keep an inventory of the items they recovered from the accused.

"The issue in question is whether the prosecution has proved its case in view of the inconsistency in date and time of arrest, and also in view of the fact that [the] accused was known to PW1 before his arrest [and] that no inventory of recovered items was kept.

"PW1 and PW2 are in agreement that they arrested [the] accused at Mathare North. [The accused] confirms that he was indeed arrested by the [two] prosecution witnesses on 16th April, 2005 at 7.00 a.m. at Mathare North. There is no evidence that the accused has been misled or deceived, and I therefore find that the inconsistency in the date and time of arrest is not material. PW1 and PW2 have denied that they arrested [the] accused for being a suspect in any other case but for possessing a firearm and [ammunition]. There is no evidence that PW1 who knew [the] accused before his arrest was actuated by malice especially after considering the evidence of PW2 who did not know the accused before the arrest. Although it is a [normal] ... requirement that an inventory of items recovered from a suspect be kept, it is not a mandatory requirement and failure to comply is not fatal to the prosecution case.

"After considering the prosecution case *vis-à-vis* the defence, I find that the defence does not in any way shake the prosecution case which is well corroborated and the defence is hence rejected. In the end, I find that the prosecution case is sufficient to sustain a conviction, and the accused is hence convicted [on] counts 2 and 3 ...."

After treating the appellant herein as a first offender, and taking the *representations of counsel* in mitigation, the learned Magistrate imposed a five-year term of imprisonment in respect of each remaining count, these to run concurrently.

M/s Kanyi Koge & Co. Advocates filed a petition of appeal in which they contended that: the trial Court erred in law and fact by failing to find that there were material contradictions in the evidence led for the prosecution; the trial Court erred by failing to find that erroneous and inadmissible evidence had been adduced against the appellant; the trial Court erred by failing to find that inconsistencies and contradictions as to time, date of arrest, and the lack of an inventory should have favoured the appellant's case; there was no proof of the prosecution case beyond reasonable doubt.

The foregoing points were canvassed by learned counsel *Mr. Kanyi* who also urged that the maker of the ballistics report had not been called as a witness.

Mr. Kanyi raised a *new ground of appeal*; that the appellant had been arrested on *16th April, 2005* but not brought to Court until *4th May, 2005*. Counsel urged that the High Court, in exercise of the appellate jurisdiction, takes into account *all the evidence* – and therefore the question of delay before arraigning the appellant in Court was a relevant one. *Mr. Kanyi* asked for an adjournment to enable the respondent to put in any necessary response, on the issue of delayed arraignment of the appellant in Court; and an adjournment was granted on *26th May, 2008.*

At the resumed hearing of *14th July, 2008* learned counsel *Mr. Makura* said he would not contest the appeal – on the new ground that the appellant had been held in Police custody for *19 days* before being arraigned in Court; and *no explanation* had been given for the delay.

Mr. Makura also attached significance to the *inconsistencies* in the prosecution evidence, as to *dates* and *times* when the arrest of the appellant had taken place.

The assessment herein of all the evidence shows, in my opinion, that the learned Magistrate had exercised substantial care in fixing the appellant with criminal responsibility; she had, for good cause, trusted in the consistent evidence of PW1 and PW2, so far as issues of merit are concerned: these *two witnesses* found the appellant with *a gun* and with *ammunition* which he had no right in law to posses; and quite clearly, such firearm and ammunition posed a real and present danger to the safety of peaceful citizens.

PW1 testified that the appellant was arrested on *17th April, 2005* at 7.00 a.m.; whereas PW2 said the appellant was arrested on *16th April, 2005* at 5.30 a.m. But the learned Magistrate judiciously considered this discrepancy and held, quite correctly in my view, that it did not prejudice the appellant who was also quite clear on when the arrest had taken place, namely, in the *early morning* of the material date.

It was PW1's evidence that he and PW2, and other colleagues, started their work at *6.00 p.m.* on a certain day, and continued up to the *following morning,* when the arrest of the appellant herein took place. It is obvious, in the circumstances, that the relevant time-span of patrols by Pw1, PW2 and their colleagues would cover *two different dates,* and mid-night marks the beginning of a new date. This Court takes *judicial notice* that a mix-up of dates will easily occur when a relevant period of operations thus runs from one date into another. But more squarely, I am in agreement with the learned Magistrate that the appellant was not *misled* or *deceived* by the inconsistencies in dates and times contained in the respective testimonies of PW1 and PW2.

The issue of *delayed arraignment* of the appellant in Court, which learned counsel *Mr. Kanyi* raises, touches squarely on the subject of *trial-rights under s. 72 (3) (b) of the Constitution*. The basic rule is that, for non-capital offences, the Police authorities are to bring a suspect before the Court within 24 hours' of his arrest; but where there is any delay, then it is the obligation of the prosecution to provide *a reasonable explanation*.

Given, as both counsel have remarked, that *no such explanation was given*, is there an *obligation* resting on this Court to *acquit* the appellant?

The answer is clearly *no.* For the Court determines questions falling before it on the basis of *the law;* on the basis of its *interpretation of the law;* on the basis of its *assessment of fact and evidence;* and on the basis of responsible *exercise of discretion*. The Court's path, when a claim of trial-rights is made, is not pre-determined by a cut-and-dried template for decision-making.

The mother-statement of fundamental-rights law in the Constitution is set out in *s. 70*, and this should always be remembered, when there is any claim under the fundamental-rights provisions. That section reads:

"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual ... but subject to respect for the rights and freedoms of others and for the public interest ...."

The rights thus attributed to *all,* and not just to the person making a claim before the Court, include truly vital ones, the classic example of which is *the right to life*. And of right to life, s. 71 (1) of the Constitution provides that:

"*No person shall be deprived of his life intentionally save in execution of the sentence of a Court in respect of a criminal offence under the law of Kenya of which he has been convicted"*.

The learned Magistrate in this case found, and this Court has found, that the appellant herein was secretively armed with a lethal weapon which, judicial notice may be taken, could not have been kept for the purpose of cracking the rocks,, shooting into the soil or the water, or aiming at the trees; it is most likely to have been held for the purpose of overawing, hurting, maiming and killing *human beings.* It *is* the public-interest obligation of this Court to exercise its jurisdiction to protect *human life* as far as possible, and this must be a *policy commitment* lying at the very root of the judicial function.

Such is the principle that must guide this Court in its interpretation of the Constitution and the law, whenever a party such as the appellant herein, asks for acquittal on the basis that he was detained for longer than twenty-four hours for a bailable offence, before being arraigned in Court on a particular charge.

I have carefully considered the special *facts of this case*, and the mischief that could come to pass if the Police did not arrest and prosecute the appellant; and I have come to the conclusion that his conviction must be upheld.

I hereby dismiss the appeal; uphold conviction on the 2nd and 3rd counts of the charge; and affirm the sentences, in the manner in which they were imposed by the Court.

As it is true that the Police authorities had given *no explanation* for the delay in charging the appellant in Court after he was arrested, I hereby *declare* that there was a violation of his rights under s. 72 (3) (b) of the Constitution; and I further declare that the appellant may, at the right time, seek *compensation* for the said violation, on the basis of s. 72 (6) of the Constitution.

Orders accordingly.

DATED and DELIVERED at Nairobi this 5th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Appellant: Mr. Kanyi

For the Respondent: Mr. Makura