



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 67 of 2009**

**JOSEPH KAROBIA KINYUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal from the judgment of the Court Martial dated 20<sup>th</sup> February, 2009. JOSEPH KARORI KINYUA, the Appellant, was in Court Martial Case No. 1 of 2009 charged with six counts of committing a civil offence contrary to Section 69(1) of the Armed Forces Act, Cap 199 of the Laws of Kenya (the Act). The civil offences are malicious damage to property contrary to Section 339(1) of the Penal Code; breaking into a building with intent to steal contrary to Section 307 of the Penal Code; attempting to steal contrary to Section 389 as read together with Section 275 of the Penal Code; two counts of stealing contrary to Section 275 of the Penal Code and attempting to commit suicide contrary to Section 226 of the Penal Code. Save for the last count which was alleged to have been committed on 19<sup>th</sup> January, 2009 at 3 KR within Lanet Barracks at 0500 hours, all the other offences were alleged to have been committed at the same Barracks on 6<sup>th</sup> November, 2008 at 2200 hours.

He pleaded not guilty to all the charges, but after trial before the Court Martial, he was acquitted of count six but convicted of counts one to five and sentenced to serve two, three, and one and half, years imprisonment on counts one, two and three respectively and one year's imprisonment on each of counts four and five. The sentences were ordered to run concurrently. He was also dismissed from the Force. He has appealed to this court against those convictions and sentences and listed seven grounds of appeal which can be summarized to four main grounds namely that the trial was conducted in complete disregard of the Appellant's fundamental rights under Section 72(3) of the Constitution; that the trial contravened the provisions of the Act; that there was no evidence to support the Appellant's conviction; that the Court Martial did not give the Appellant's defence serious consideration and that the sentence imposed upon the Appellant was, in the circumstances of the case, excessive.

The prosecution case was that on 6<sup>th</sup> November, 2008, Joseph Kirwa Kimuge PW1, a civilian who was employed as a watchman, was on duty guarding the AFCO shop at 3KR, Lanet Barracks. At about 9.30 pm he saw lights in the shop building. Fearing that there were gangsters in the shop, he went to the Married Quarters and alerted Spte Joseph Sanka PW2 who went back with him to the shop and on peeping inside, confirmed that indeed there was somebody inside the shop. PW1 left Spte Sanka keeping watch and rushed to the main gate and informed the Guard Commander who dispatched Pte Gilbert Omondi, PW13, and Pte Samson Vidzo, PW10, to the scene. Others including Cpl. Oloo, PW11, were also alerted and went to the scene. When there, PW11 ordered the person in the shop to come out and the

Appellant came out through the window. He was arrested and placed in cells and on 19<sup>th</sup> January, 2009, he attempted to commit suicide by setting himself on fire but he was rescued and taken to hospital. After treatment he was later charged with the said offences.

In his defence the Appellant denied the charges and alleged that this was a frame up orchestrated by Spte Joseph Sanka, PW2, because the Appellant had a lover affair with his wife. In his lengthy sworn testimony, the Appellant said that he was enlisted into the Military in 2003 and as of November, 2008, he was attached to the School of Amour at Isiolo. On 6<sup>th</sup> November, 2008, while on pass leave, he went to Lips Restaurant in Nakuru town. While taking a beer in that bar Spte Sanka went there with two women, one of who was Elizabeth Chebet whom he had been courting. Elizabeth then left PW2 and joined the Appellant. At about 20.45 hours Elizabeth received a call after which she told him her aunt required the keys to her house at the Married Quarters at 3KR Lanet Barracks. He agreed to accompany her to deliver the keys after which they would go their separate ways.

At 3KR the Appellant identified himself to Spte Omondi and they were let in. Fearing that Elizabeth's aunt would detain her, they decided to give the keys to the watchman at the AFCO shop to give to her. Near the shop they met PW1 & 2 and two other men. Without uttering a word PW2, hit him on the head with a rungu that he was armed with. Elizabeth and PW1 ran away. With the assistance of the other two men Sanka took him to the rear of the shop and ordered him to remove his shoes and jacket and took his mobile phone and wallet. They thereafter beat him thoroughly alleging that he had been moving with Sanka's wife, Rhoda Cheron. It was later on when Cpl Mulwa of the Military Police went to the scene that Sanka alleged that the Appellant had attempted to steal from the AFCO shop.

Regarding the incident of 19<sup>th</sup> January, 2009, he said he was asleep at about 21.30 hours when he smelt petrol and when he uncovered his head he saw a flame of fire. He ran for safety and soon thereafter lost consciousness. He came to in hospital.

When the appeal came up for hearing before me on the 26<sup>th</sup> June, 2009, both the defence and state counsel chose to rely on written submissions which they had filed.

In their submissions on the first ground, counsel for the Appellant contended that contrary to Section 72(3) of the Constitution which requires any person charged with any non-capital offence to be taken to court within 24 hours of his arrest, the Appellant was held for 87 long days before being charged. They submitted that as the Constitution is supreme, I should not even bother myself with the provisions of the Armed Forces Act regarding unlawful detention before trial. They urged me to confine myself to this provision and allow this appeal. Even if I overrule them on the argument that I should disregard the provisions of the Armed Forces Act, they contended that the appeal must nonetheless succeed under both the Constitution and the Armed Forces Act on delayed prosecution.

On ground two, counsel for the Appellants submitted that the Appellant was arrested on 8<sup>th</sup> November, 2008 and placed in the guardroom in what is called closed arrest as opposed to open arrest. That means he was in a confined remand where he remained up to 3<sup>rd</sup> February, 2009 when he was charged before the Court Martial. They contended that the complaint against the Appellant was not investigated as required by Sections 80, 81 and 82 of the Act.

Counsel for the Appellant further contended that the Appellant continued to stay in remand until 20<sup>th</sup> February, 2009 when he was sentenced. They submitted that contrary to the mandatory provisions of Section 72(2) of the Act which requires the commanding officer to make a special report of any person subject to the Act who is arrested and remains in custody for more than eight days and send it to the officer responsible for convening a Court Martial as read with Rule 12 of the Armed Forces Act Rules (the Rules), no such report was made. They also submitted that contrary to Rule 6 of the Armed Forces Rules which outlaws detention of any person subject to the Act for more than 72 days, the Appellant was held for 87 days before he was charged. Taking all these acts of violation of both the Constitution and the Armed Forces Act into account, they cited the court of Appeal decision in Mark Wanjala Wanyama Versus Republic, .....and urged me to declare the Appellant's trial a nullity.

On ground three counsel for the Appellant submitted that the Court Martial relied on contradicted evidence to convict the Appellant. As an example of this they referred me to the evidence of the PW1, the watchman at A.F.C.O. who said that the other watchman by the name Odinga took over from him in the course of the material week although he could not remember when. They said that is contradicted by the evidence of PW8 who asserted that PW1 was the only watchman at A.F.C.O. that week as Mr. Odinga was sick. They also said the evidence of PW2 contradicted that of PW1 that there is no shortcut to the A.F.C.O. shop. As the shop is fenced and the break in was clearly forcible and must have taken long, they dismissed PW1's testimony that he did not hear the breaking in as unbelievable. Other than supporting their contention that the break in must have taken long, they dismissed the evidence of PW8 & 9 that some receipts were found in the Appellant's pockets. They urged me to make an adverse inference of the prosecution's failure to tender evidence of the results of the finger print dusting of the scene.

Counsel for the Appellant submitted that count 6 was premature and defective. They said this is because contrary to Rule 9(2) of the Rules, the Appellant was not supplied with an abstract of evidence on count 6. The offence in that count was alleged to have been committed on 18<sup>th</sup> January, 2009, while the Appellant was supplied with the abstract of evidence on 22<sup>nd</sup> December, 2008. Even if I find that that count was proper, they submitted that the circumstantial evidence relied upon could not support the Appellant's conviction as remnants in the guardroom and the guard commander had access and could have started the fire.

In conclusion, counsel for the Appellant submitted that the Court Martial did not seriously consider the evidence on record especially the Appellant's defence. They said that had it done so, it could have seen that the charges against the Appellant were a set up by Spte Sanka and Elizabeth who used PW1 to have the Appellant convicted. In the circumstances, they urged me to allow this appeal.

Replying to these submissions, the state counsel dismissed the complaint that the Appellant's constitutional rights were violated on the ground that it was only raised in his counsel's submissions and not during the trial. Relying on the case of Joseph Amos Owino Vs R [2009] eKLR in which the Court of Appeal held that where an accused is represented by counsel the court will assume that he was advised on his constitutional rights and where he does not raise their violation at the earliest opportunity, he is deemed to have waived them. At any rate, he further submitted, Section 72(2) of the Act and Rule 6 of the Rules permit the holding of a suspect for a period of up to 72 days. On evidence, he submitted that the Appellant was literally caught in the act as at the material time both PW1 and PW2 saw him come out of AFCO shop through the window in the manager's office. He urged me to dismiss this appeal.

I have considered these submissions and carefully read the record of the Court Marshal proceedings. The first point raised in this appeal is whether or not the Appellant's constitutional right to a fair trial was violated. There is no dispute that the Appellant was held for 87 days before he was arraigned in the Court Martial. I agree with the learned state counsel that Section 72(2) of the Armed Forces Act as read with Rule 6 of the Rules under that Act provides for holding a suspect subject to the Act for up to 72 days before taking him or her to court. It is clear from the record that while in custody, the Appellant attempted to commit suicide, or if he did not, there was a fire set to the cell where he was held which caused injury to him necessitating his hospitalization. The period beyond the 72 days is therefore explained. This notwithstanding, I find that the provisions of Section 72(2) of the Armed Forces Act as read with Rule 6 of the Rules under that Act which provides for holding a suspect subject to the Act for up to 72 days before taking him or her to court are, in my view, clearly in conflict with Section 72(3) of the Constitution. That section provides that:-

“A person who is arrested or detained, ... and who is not released, shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

This section is not expressed to be subject to any other law. It is a truism from Section 3 of the Constitution that any law inconsistent with the Constitution is void to the extent of its inconsistency. This provision is in mandatory terms. The offences the Appellant in this case faced required him to be taken to court within 24 hours or within a reasonable but explained time thereafter. No explanation has been given at all.

As I have pointed out, in his submissions, the learned state counsel contended himself with the argument that the Appellant, having not raised the issue of violation of his constitutional rights at the trial where he was represented, he is deemed to have waived it. He based himself on this contention on the Court of Appeal decision in the case of Joseph Amos Owino Vs R [2009] eKLR in which it held that where an accused is represented by counsel the court will assume that he was advised on his constitutional rights and where he does not raise their violation at the earliest opportunity, he is deemed to have waived them. In that case the Court of Appeal referred to its earlier decision in Paul Mwangi Murunga Vs Republic Cr. App. No. 35 of 2006 (Nkr) where it had dismissed the argument that the Appellant had not raised the issue at the trial and said that “where an accused is represented, the position is different.”

Although I find the delay of about 72 days in this case quite inordinate, the record shows that the Appellant in this appeal was represented by counsel and the issue of violation of his constitutional rights was not raised during the trial. My hands are therefore tied by the Court of Appeal decision in the said case of Joseph Amos Owino Vs R [2009] eKLR and I have no choice but to dismiss this ground of appeal.

I find no merit at all in any of the last three grounds that the trial contravened the provisions of the Act; that there was no evidence to support the Appellant’s conviction; that the Court Martial did not give the Appellant’s defence serious consideration and that the sentence imposed upon the Appellant was, in the circumstances of the case, excessive.

As I have already stated, at about 9.30 pm on 6<sup>th</sup> November, 2008, as he patrolled the AFCO shop compound, the watchman, Joseph Kirwa Kimuge, PW1, saw lights in the shop building. Fearing that there were gangsters in the shop, he went to the Married Quarters and alerted Spte Joseph Sanka PW2 who went back with him to the shop and on peeping inside, confirmed that indeed there was somebody inside the shop. PW1 left Spte Sanka keeping watch while he rushed to the main gate and informed the Guard Commander who dispatched Pte Gilbert Omondi PW13 and Pte Samson Vidzo PW10 to the scene. Others including Cpl. Oloo PW11 were also alerted and went to the scene. When there, PW11 ordered the person in the shop to come out and the Appellant came out through the window. In spite of thorough cross-examination by the defence lawyer, Joseph Kirwa Kimuge PW1, Spte Joseph Sanka PW2, Pte Samuel Vidzo Magwenje PW10 and Cpl Felix Oloo PW11 were firm that when ordered the Appellant came out of the AFCO shop through the clerk’s office window and he was immediately arrested. When these witnesses together with Susan Wangari Karume PW8, the Assistant AFCO shop manager, went into the shop, they found that the grille on the clerk’s office window had been cut. The cardboard partition between the manager’s office and the clerks’ had also been cut and a big hole made. Inside the manager’s office they found a hammer, 2 knives, an axe and a hack-saw. The money cabinet had been broken into and a large sum of money in various coin denominations stuffed in bags. Though the safe had been tampered with it was still intact. The grille on the window between the manager’s office and the electronic store had been removed. In the clerk’s office they found six bags containing several shop items which had been removed from the shelves.

Even if I were to accept the Appellant’s defence that Spte Sanka PW2 had a grudge against him because he had a love affair with his wife, and I do not, I cannot see how Spte Sanka could have caused all that damage to be done in the shop and marshaled all the five witnesses who arrested the Appellant to frame him up. I am satisfied that there was overwhelming evidence to support the Appellant’s conviction. Consequently I dismiss his appeal against conviction.

The offences the Appellant was convicted of carry up to five years imprisonment. Taking in account the fact that the sentences were ordered to run concurrently, the maximum of three years imprisonment imposed upon the Appellant cannot, in the circumstances of this case be said to be harsh. Consequently

the appeal against sentence is also dismissed.

In the upshot I dismiss this appeal in its entirety.

**DATED and delivered this 27<sup>th</sup> day of October, 2009.**

**D.K. MARAGA**

**JUDGE**