



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

Criminal Appeal 236 of 2008

SAMBELU KITISIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

This is the appeal of SAMBELU KITISIA (the Appellant) against his conviction and sentence by the Senior Resident Magistrate Taveta Court. The Appellant who appeared in person relied wholly upon his written submissions which had been duly filed before the court. Mr. Monda learned State Counsel gave oral submissions in which he opposed the appeal and urged the court to uphold both the conviction and sentence on the Appellant.

The Appellant was on 21st January 2008 charged with the offence of Defilement of a Girl under the age of 13 years contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. In addition the Appellant faced an alternative charge of Indecent Assault on a Female contrary to S.11(1) of the Sexual Offences Act No. 3 of 2006.

In brief the prosecution case was that on 15th January 2008 at about 11.00 A.M. the complainant N N a girl of 13 years together with a companion Nwere herding livestock in J Village. The Appellant emerged from the nearby bushes and began to beat them. He threw the complainant to the ground and defiled her. The complainant screamed for help and fellow villagers came to her aid. The Appellant was arrested and taken to a nearby police station. The complainant was taken to Taveta District Hospital where she was treated appropriately.

After being put to his defence by the learned trial magistrate the Appellant gave a sworn defence and denied the charges. In his judgement delivered on 21st April 2008 the learned Senior Resident Magistrate convicted the Appellant of the offence of Defilement and after hearing mitigation from the Appellant sentenced him to serve twenty (20) years imprisonment. It is against that conviction and sentence that the Appellant now appeals.

I have perused the Appellant's written grounds of appeal which can be reduced into three main grounds:-

(1) *Insufficiency of Evidence*

(2) *Violation of his rights under S. 72(3) Constitution of Kenya and*

(3) *Harsh and Excessive sentence*

I will consider first the second ground. In his written submissions the Appellant alleges that having been arrested on 15th January 2008 he was not arraigned in court until 21st January 2008 a full six (6) days after his arrest. This is well borne out by the charge sheet which confirms that the Appellant was arrested by police on 15th January 2008 and held in custody at Taveta Police Station. However he was not brought to court until 21st January 2008. Section 72(3)(b) of the Constitution of Kenya provides that:-

(4) *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 or detention where he is arrested 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 sub-section have been complied with.”*

In its clear and ordinary meaning this provision of the constitution makes it mandatory that a suspect in a non-capital offence (such as the Appellant) must be arraigned before a court of law within twenty-four hours or as soon as is reasonably practicable. Although earlier cases involved a very strict and rigid interpretation of this provision (see Albanus Mwasia Mutua –vs- Republic Criminal Appeal No. 120 of 2004), it is now generally accepted that not every delay in bringing an accused person to court will result in an automatic acquittal. This which in my view is the more sober approach, was succinctly elucidated by the Court of Appeal in the case of DOMINIC MUTIE MWALIMU –VS- REPUBLIC, CRIMINAL APPEAL NO. 217 OF 2005 in which it was held at page 7 that:-

“In our view the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the constitution does not ipso facto prove a breach of the constitution. The wording of Section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances.”

Basically the Court of Appeal was saying that each case must be considered on an individual basis. In the present case the issue of the delay in bringing the Appellant was not considered or addressed at all in the trial court. The wording of S.72(3) is that it behoves the person alleging that these provisions of the Constitution have been properly complied with to convince the court that indeed that was the case. As such the police ought to have been called upon to explain this delay. As I have stated earlier this issue was not addressed in the lower court and I note from the record that the Appellant did not raise the issue at all in the lower court. Is he now entitled to rely on this as a ground of his appeal having not raised it at his trial? Again the previous and generally held view was that the duty lay on the accused to point out this delay to the court of first instance at the earliest opportunity and having failed to do so he is not at liberty to raise it on appeal. This view would seem to make sense so as to prevent Appellants’ merely using this ground as an afterthought to secure their release upon appeal. That would appear to have been the view of the Court of Appeal in the above cited case of Dominic Mutie Mwalimu in which their Lordships held as follows:-

“The appellant did not complain in the trial court that he was not brought to court as soon as was reasonably practicable. Needless to say the prosecution was not called upon to show that the appellant was brought to court as soon as was reasonably practicable. There is no merit in this ground”

Their Lordships found in this case that where the question of the breach is not raised by the Appellant at the time of his trial in the subordinate court, such a ground will not be available to him upon appeal to the High Court. This would appear to put the matter to bed. The Appellant failed to raise the matter, the prosecution were not called upon to explain the delay and that was that.

However this matter was addressed yet again at some length in the subsequent Court of Appeal case

of Mwangi Murunga –vs- Republic Criminal Appeal No. 35 of 2006 where it was held that:-

“We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves knew the time and date when the accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know whether the arrested person has been in custody for more than twenty four hours in case of ordinary offences and fourteen days in case of capital offences. Under S.72(3) of the Constitution, the burden to explain delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint.”

This ruling therefore stated that even where an accused fails to raise any complaint about his unlawful detention in police custody the prosecution, who in any event are well aware of exactly how many days the accused has spent in the police cells, have an obligation to explain this delay to the courts.

Once again in 2007 the Court of Appeal placed the obligation to ensure that the Constitutional rights of an accused were adhered to upon the court itself. In the case of Joseph Amos Owino –vs- Republic Criminal Appeal No. 450 of 2007 the Court of Appeal made a distinction between an accused who is represented by legal counsel and one who has no legal counsel at his trial and held that:-

“In short whereas we agree that in cases where an accused person was represented by an advocate in both or either of the courts below, [subordinate court and High Court] ... through his advocate was expected to have raised the question of his constitutional rights before that court and if he did not do so through his advocates then he would be deemed to have waived that right and cannot raise it here with success. However in cases where he is not represented as was the case here and particularly where the matter started by way of a charge sheet as was the case in the case before a magistrate, the trial court and the first appellate court in its exercise of jurisdiction should have on its own ensured that the constitutional rights of the appellant were fully complied with notwithstanding that the appellant did not raise the same. This is an acceptance that being illiterate in law, the appellant may not have been aware of his constitutional rights as an advocate would have been aware and therefore he relied wholly on the court to ensure compliance of such rights by the prosecution.”

In other words it is the courts who must be the custodian of the constitutional rights of those who appear before us. We cannot and ought not to turn a blind eye to the breach of such rights merely because an accused person has failed to raise them. This is more so in the case of an unrepresented accused person who being a lay person and therefore illiterate in the law, may be totally unaware of the existence of such rights. This I believe is as it should be. In the present case the Appellant did not have the benefit of legal counsel at his trial in the subordinate court. He did not raise the issue of his lengthy detention in the police cells. This in my view does not deny him of the right to raise it now as a ground of his appeal to the High Court. The charge sheet clearly indicates that the Appellant was taken to court a full six (6) days after his arrest instead of the twenty-four hours provided for by the Constitution. The trial magistrate to whom this information was available ought to have called upon the prosecution to explain this delay. The prosecution likewise ought to have volunteered an explanation to the court without any prompting by the accused. This did not happen. I consider myself bound as a custodian of the Constitution, to enquire into the issue. I find that no explanation reasonable or otherwise has been given for this delay. There therefore exists a violation of the accused constitutional rights which remain unexplained to date. This I cannot ignore. I find that the six (6) day retention of the accused in police cells contrary to Section 72(3) of the Constitution of Kenya was illegal and amounted to a violation of his constitutional rights. As such I find that his trial in the lower court was a nullity. For that reason I do hereby allow this appeal and quash the conviction against him. Without a conviction the subsequent sentence has no legal basis and I do hereby set aside the same. I further order that the Appellant be released forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 25th day of November 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

25/11/2009