REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 109 of 2006

SAMUEL JUSPER OMONDI alais SAM……..……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From Original Conviction and Sentence in Criminal Case Number 1112 of 2005 of the Principal Magistrate's Court at Siaya]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant Samuel Jusper Omondi alias "**Sam**" was jointly charged with another with the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code, in that on the 29th September 2005, along Kisumu – Busia road at Rang'ala junction in Siaya District within Nyanza Province, while armed with offensive weapon namely a gun, they attempted to rob Reuben Osumu Ongaga of a motor vehicle registration number KAK 326 C Mitsubishi Canter white in colour valued at Kenya Shillings Three point Eight Million (Kshs. 3.8. m) and at or immediately before or immediately after the time of such attempted robbery used actual violence to the said Reuben Osumu Ongaga.

Additionally, the appellant was charged with being in possession of a firearm without a firearm certificate contrary to Section 32 (2) of the Firearms Act and being in possession of ammunition without a firearm certificate contrary to Section 26 (1) as read with Section 26(2) of the Firearms Act, in that on the 29th September 2005 at Rang'ala junction along Kisumu – Busia road in Rang'ala Sub location in Siaya District within Nyanza Province was found in possession of a firearm namely Taurus .38 special serial number SG 47974 without a firearm certificate and two rounds of ammunition . 38 special as well as an empty cartridge without a firearm certificate.

The appellant appeared before the Principal Magistrate at Siaya on the 16th November 2005 and pleaded not guilty to all the counts. The trial commenced before the learned Senior Resident Magistrate (S. A.

Okato) on the 20th March 2006 and was taken over by the Learned Principal Magistrate (G. K. Mwaura) on the 29th May 2006. In the end, the appellant was found guilty as charged in all the counts and was sentenced to suffer death in the first count and to serve twenty (20) years imprisonment for the second and third counts all the sentences to run concurrently. The Learned Trial Magistrate did not direct as he ought to have clone that the death sentence would be effected while the prison terms were held in abeyance. (see below). Being dissatisfied with the decision of the lower court the appellant has appealed to this court on the basis of grounds set out in his petition of appeal filed herein on the 21st June 2006.

The grounds are basically an attack of the prosecution's evidence of identification of the offenders and evidence of the recovery and the possession of the firearm and ammunition. The appellant also raises issue with the non- consideration of his defence by the trial court. He appeared in person at the hearing of the appeal and presented written submission to fortify his grounds of appeal. He, in the process, introduced factors touching on the ingredients of the charge of attempted robbery with violence and on his long stay in police custody prior to being arraigned in court.

The learned Senior Principal State Counsel, Mr. Musau, appeared for the State and without much ado conceded that the appellant's rights under Section 72 of the Constitution were violated by being detained in police custody for well over a month prior to being arraigned in court. The learned Senior Principal State Counsel had no explanation and offered none for that violation of the appellant's constitutional rights. He however, contended that the evidence upon which the appellant was convicted was sound as he was arrested immediately after the offence and was found in possession of the firearm and ammunition.

The issue pertaining to Section 72 of the Constitution is

" **déjà vu"** for this court. We have encountered similar situations in the past and made our stand and indeed of any court of law, known. We were not surprised to see the sad expression in the learned Senior Principal State Counsel's face when referring to the said Section 72 of the Constitution.

We, once again say, that a court of law is required to uphold the Constitution of the Republic of Kenya and ensure that a suspect's constitutional rights are never breached or violated prior to and after commencement of any criminal proceedings against him. Any proceeding conducted in the face of an apparent violation of his constitutional rights would be null and void "**ab-intio**". Section 72 (3) (b) of the Constitution is clear. A person arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death has to be charged in court within fourteen (14) days and for any other offence within twenty four (24) hours unless there is satisfactory explanation for the delay.

In the case of [**ALBANUS MWASIA MUHIA =vs= REPUBLIC NRB CR. APP NO. 120 of 2004]** the Court of Appeal stated:-

"On the one hand is the duty of the courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under our constitution".

The court further stated:-

" …….. that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge".

Section 72 of the Constitution aside, we now turn to the evidence adduced in the lower court, which we have re-examined and re-evaluated.

With regard to the first count of attempted robbery with violence contrary to Section 297 (2) of the Penal Code, the trial magistrate concluded that the offence had been established against the appellant and proceeded to convict him. The particulars of the charge indicate that there was an attempt to rob the

complainant Reuben Osumu Ongaga (PW1) of the motor vehicle he was driving while in the course of his employment distributing bread. The complainant stated that he was on the material date with his turnboy Sammy Owiti

(PW2) when they stopped at the Rang'ala junction to sell bread. Thereafter, he entered his vehicle and ignited it but as the turnboy entered a person followed him, the person had a pistol and ordered him to drive the vehicle towards a different direction. He slowly followed the instructions but jumped out of the vehicle with its ignition key and ran away. He was followed by the strange person whom he identified as the appellant.

The turnboy Sammy Omwere Owiti (PW2) stated that he was followed into the vehicle by a person armed with a pistol who ordered the driver to drive towards a rough road. He said that the driver jumped out of the vehicle and was followed by the stranger person whom he identified as the appellant. This evidence of the turnboy coupled with that of the driver showed that a lone gunman who was identified as the appellant had entered the vehicle with a view to rob. The fact that he entered the vehicle and ordered the driver to drive towards an unscheduled direction while armed with a pistol was clear indication that his intention was to unlawfully take away the vehicle and anything else and use violence if need be. The lone gunman was identified as the appellant. The evidence adduced in respect thereof was cogent and credible. The offence occurred in broad daylight at 11:00 a.m. This provided favourable conditions for positive identification. The appellant was apprehended almost immediately after the attempt to commit the offence. He was not arrested by mistake as implied in his defence which was rejected by the trial magistrate after due consideration. He was all in all properly identified as the culprit as correctly held by the trial magistrate.

With regard to the second and third counts the findings and conclusions by the trial magistrate in respect thereof were based on sound evidence. The appellant entered the complainant's vehicle while in possession of a pistol. His mission aborted and while fleeing was caught up by members of the public who bayed for his blood. He was luckily rescued by P. C. Nyarangi Omboga Eric (PW4) who found him with the pistol containing two rounds of ammunition and a spent cartridge. The pistol and ammunition (PEX 1, 2, & 3) were examined by a ballistic expert Johnstone Musyoki Mwongela (PW5) who confirmed them to be firearms as classified by the Firearms Act. There was sufficient and credible evidence, which established beyond reasonable doubt that the appellants was found in possession of a firearm and rounds of ammunition.

A total consideration of the appeal would not call upon us to interfere with the conviction or sentences. The sentencing in counts two and three should however have been held in abeyance in view of the mandatory death sentence imposed in count one. But for Section 72 of the Constitution, the appeal succeeds to the extent that the conviction and sentence in all the counts are quashed and set aside. The appellant shall be set at liberty unless otherwise lawfully withheld.

Those are our orders.

Dated, signed and delivered at Kisumu this 3rd day of June 2008.

J. W. MWERA J. R. KARANJA

JUDGE JUDGE

JRK/aao