



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

**Criminal Appeal 174 of 2005**

**WALTER GUDA ADERO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**[From Original Conviction and Sentence in Criminal Case Number 176 of 2005 of the Chief Magistrate's Court at Kisumu ]**

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk – Raymond/Laban**

**Appellant in person**

**JUDGMENT**

The appellant Walter Guda Adero was the first accused in the lower court where he and another faced three (3) counts of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the nights of 1<sup>st</sup> and 2<sup>nd</sup> March 2005 at Nyalenda “B” Sub location in Kisumu District jointly with others not before court while armed with a pistol and panga robbed Priscilla Awuor Oketch of her T. V. Set make Sony 14 inches, three in one music system make Sharp, three mobile phones, two car batteries, four hand bags containing personal documents, cash Kshs.5,000/=, a pair of spectacles, bunch of keys, ATM cards all valued at Kenya Shillings One Hundred and Sixty Thousand (Kshs. 160,000/=). Similarly they robbed Beriyl Atieno Oketch of two mobile phones make Erickson 520 and Motorola T 190 all valued at Kenya Shillings Thirteen Thousand (Kshs. 13,000/=) and finally they robbed Emma Achieng Oketch of one handbag containing personal documents, one passport, national identity card, post bank card and cash

Kshs. 2,500/= all valued at Kenya Shillings Twelve Thousand Five Hundred (Kshs. 12,500/=). And that at or immediately before or immediately after the time of robbery the robbers threatened to use actual violence to the said Priscilla Awuor Oketch, Beriyl Atieno Oketch and Emma Achieng Oketch.

The plea was taken on the 23<sup>rd</sup> March 2005, whereupon the appellant pleaded not guilty. Hearing commenced on the 25<sup>th</sup> May 2005, before the learned Senior Resident Magistrate W. B. Mokaya at Kisumu and ended on the 17<sup>th</sup> August 2005 with the delivery of the judgment. The appellant was found guilty as charged in all the three counts and was sentenced to death. It was however, not indicated how the sentence was to be carried out. The appellant's co-accused was found not guilty of the charges and acquitted accordingly. Being dissatisfied with the decision of the lower court, the appellant has appealed to this court on the basis of the grounds contained in the petition of appeal filed in court on 22<sup>nd</sup> August 2005. The said petition contains four basic grounds which when looked at collectively form an attack on the identification evidence adduced in the lower court which the trial magistrate relied on to convict the appellant.

At the hearing of the appeal, the appellant appeared in person and presented what he termed supplementary grounds of appeal, which are in effect an elaboration of the earlier grounds and an introduction of a new factor relating to the date of his arrest. This is vital in determining whether or not the appellant's constitutional rights were violated by the police. The learned Senior Principal State Counsel Mr. Musau appeared for the State. He did not support the appellant's conviction by the lower court and cited the uncertainties created in the evidence of identification adduced by PW1, PW2 and PW3. He said that the evidence was not conducive for positive identification. As to the date of arrest of the appellant, the learned Senior Principal State Counsel stated that going by the date indicated in the charge sheet. (3<sup>rd</sup> March 2005) it would follow that the appellant's constitutional rights were breached, but going by the evidence of the arresting officer that the appellant was arrested on 9<sup>th</sup> March 2005 then his constitutional right under Section 72 of the constitution was not breached.

The Constitution of Kenya is the foundation of all the Laws of the Republic of Kenya. Therefore, any proceedings conducted contrary to the requirements of the constitution would be null and void "**ab initio**". A court of law is thus required to uphold the Constitution and ensure that a suspect's constitutional rights are not breached or violated prior to and after commencement of criminal proceedings against him. The issue pertaining to breach or violation of a suspect's constitutional right must be dealt with as soon as it brought to the attention of the court. The court as a custodian of the law may also act on its own motion and demand an explanation from the responsible authority if it thinks that there has been a breach or violation of a suspect's constitutional rights and more so, the rights guaranteed by Section 72 of the Constitution. In this way, there would be a reduction of cases from the lower courts being thrown out on appeal on the basis of Section 72 of the Constitution.

The police authority has on many occasions not been alert and circumspect when it comes to breaches or violations of the requirements of Section 72 of the Constitution. It has in most cases not come up with any satisfactory explanation. The authority must change its attitude by seriously taking note that a majority of Kenyans are now very much aware of their legal rights courtesy of the various NGO's in their commendable quest to create awareness among the general populace. Change is inevitable and the police must embrace it otherwise forever keep quiet in blaming the courts for releasing dangerous criminals on so called flimsy grounds. Matters of the Constitution are never flimsy grounds. Why has it been necessary for us to state the foregoing? Because, this is yet another of the so many appeals where Section 72 of the Constitution comes into play.

The charge sheet herein shows that the appellant was arrested on the 3<sup>rd</sup> March 2005 and brought to court for the first time on 23<sup>rd</sup> March 2005. Indeed, the court record shows that the appellant appeared in court for plea on that 23<sup>rd</sup> March 2005. This interprets roughly to about twenty (20) days after his arrest. The evidence by Nicholas Odhiambo Oketch (PW5) indicated that the appellant was apprehended by members of the public on 6<sup>th</sup> March 2005 and handed to the police. The investigating officer P. C. Charles Munyeko (PW6) was not sure when the appellant was arrested. He said that he found him in the cells already under arrest. He also said that the appellant was arrested after two days. He did not say two days

after what. Whether the date of arrest was the 3<sup>rd</sup> March 2005 or the 6<sup>th</sup> March 2005, the appellant was brought to court after the 14 days period stipulated by Section 72 of the Constitution for capital offences. There was no explanation from the State for the delay. The appellant's rights under Section 72 of the Constitution were violated by his long stay in police custody.

Section 72 (3) of the Constitutional States: -

**“A person who is arrested or detained: -**

**(a) .....**

**(b) Upon reasonable suspicion of his having committed or being about to commit a criminal offence, 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 (24) hours of his arrest or from the commencement of his detention or within fourteen (14) days of his arrest or detention 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 vest upon any person alleging that the provisions of this sub section have been complied with”.**

In the Court of Appeal decision in the case of [ALBANUS MWASIA MUTUA =vs= REPUBLIC NRB CRIMINAL APPL NO. 120 OF 2004]. The following statement was made:-

“ 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 of the human rights guaranteed to them under our Constitution”.

The same court in the same case also stated:-

“ ..... that an unexplained violation of a constitution right will unusually result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge”.

The success of this appeal and the acquittal of the appellant are inevitable factors in the light of all the foregoing facts. The requirements of Section 72 (3) (b) of the Constitution need not be over emphasized and have been considered in numerous decisions of the Court of Appeal as well as the High Court including this court's decision in the case of [JAMES OCHIENG RASAWO =vs= REPUBLIC KSM H. CR. APP NO. 5 OF 2005 J. W. MWERA, M. G. MUGO JJ]

Keeping aside the provisions of the Constitution, our re-examination and re-evaluation of the evidence adduced in the lower court reveals that the material ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code were duly established by the prosecution's evidence. However, with regard to the identification of the offenders, we agree with the learned Senior Principal State Counsel, that the evidence was far from satisfactory. The evidence by the prosecution witnesses Priscilla Awuor Oketch [PW1] Beriyl Atieno Oketch (PW2), Johnes Ochieng Were (PW3) and Emma Achieng Oketch (PW4) indicated that favourable conditions for identification did not exit.

The offences occurred in the night at about 2:00 a.m. It was obvious that none of the said witnesses could make a positive identification of the offenders without light from any source. They talked of moonlight and a torch but did not state how these enabled them identify the offenders who were already outside the house escaping. Would someone really be able to identify a thief escaping in darkness by simply peeping through a window?. The moon and a torch would indeed provide light but not necessarily enough to enable positive identification of a person. Priscilla (PW1) whose house was raided and who is the mother of Beriyl (PW2) and Emma (PW4) was so contradictory in her evidence such that she was unable to clearly state, whether she identified the appellant visually or by recognition or even by voice. And if she and her daughters (PW2 & PW4) and her neighbour (PW3) had previously known the appellant why did

they have again to identify him on police identification parade. Identification parade signify that a person was not certain of his identification of an offender at the scene of the offence in unfavourable circumstances. Identification by recognition would not call for an identification parade.

The trial magistrate was at fault in convicting the appellant on the basis of identification evidence which was not credible, uncertain and not free from the possibility of error or mistake. It was unsafe for the court to act on such evidence. All in all, we strongly hold that this appeal is merited in all the facets. We allow it with the result that the conviction is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully withheld.

**Dated, signed and delivered at Kisumu this 3<sup>rd</sup> day of June 2008.**

**J.W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

JRK/aao