IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 54 OF 1989

ODHIAMBO OLEL …….……. APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi

(Mbaluto, Tanui & Akiwumi JJ) dated 16th February, 1989

in HC CR A No 417 of 1987)

JUDGMENT

On 6th April, 1987, Dr Odhiambo Olel (the appellant), who is a doctor of medicine and was at the time of his arrest employed by the Kisumu municipality, was taken before the Chief Magistrate charged with the offence of being a member of an unlawful society contrary to section 6 (a) of the Societies Act (cap 108). The particulars of the offence alleged that between 1977 and 20th March, 1987, the appellant was a member of an unlawful society called "*Mwakenya*". When called upon to plead, the appellant, who was unrepresented, admitted the charge. The Chief Magistrate entered a plea of guilty, and Mr Chunga, who was the prosecutor, outlined the facts. He gave particulars of the appellant's education and his alleged involvement with *Mwakenya* laying emphasis on the fact that it was a cladenstine organization which was not registered. The appellant admitted all the facts. He was then convicted and sentenced to 5 years imprisonment.

The appellant appealed to the superior court against both conviction and sentence and also filed an application under section 358 of the Criminal Procedure Code for leave to adduce additional evidence at the hearing of the appeal. The application was filed on 23rd May, 1988. It was never heard. The appellant challenged his conviction on the ground that his plea was not unequivocal, alleging that it had been procured by torture and threats by the police.

When the appeal came for hearing in the superior court, Mr Chunga raised a preliminary objection based on section 348 of the Criminal Procedure Code, that the appeal against conviction was incompetent and should be struck out. He contended that the appellant having unequivocally pleaded guilty to the charge, he was barred by section 348 of the Criminal Procedure Code from challenging his conviction. He

submitted that the procedure laid down in the case *Adan v Republic* [1973] EA 445, concerning the recording by a trial court of a guilty plea, had been followed to the letter.

The position in law is that where a plea is unequivocal an appeal does not lie against conviction. That much is clear, but the appellant's case, throughout, has been that his plea was not unequivocal because he had been held *incommounicado* and his constitutional rights violated before being taken to Court for plea.

The judges accepted that if a plea is not voluntary or is obtained for force or threats or torture or deception, it cannot be said to be unequivocal and would, in those circumstances, be a nullity and the bar in section 348 of the Criminal Procedure Code would be inoperative. Mr Khaminwa had submitted on behalf of the appellant in the superior court that in determining whether or not a plea was unequivocal, the Court should not confine itself to the record of proceedings but should also take into account all the circumstances surrounding the case. In the case of this particular appellant, he submitted, the fact that he had been held in custody for 17 days before being taken to Court, and the allegations of torture and threats he had made against the police, should be considered

The judges rejected the appellant's allegations of torture and threats because these were not borne out by the record and were being raised for the first time on appeal. In our view, they were right because, if the appellant had indeed been threatened or tortured as he claimed, he should have raised this at the earliest possible opportunities *viz*, when he was taken before the Chief Magistrate for plea. What gives us cause for concern, however, is the length to which the judges were prepared to go to justify the illegal detention of the appellant in custody by the police for 17 days in flagrant violation of his fundamental rights. This is what they said:

"As regards the period of 17 days the appellant was in police custody, we accept that section 36 of the Criminal Procedure Code requires police to bring persons arrested without warrant to Court as soon as practicable. Section 72 (2) and (3) of the Constitution is to the same effect. What is practicable or reasonable in one case may not necessarily be so in another – each case must be judged in accordance with its particular circumstances. The charge the appellant faced covered a period of about 10 years and no doubt the police required time to investigate the matter fully before bringing the matter to Court. The question whether 17 days was reasonable or too long as not raised by anyone at (sic) the court below and was therefore not considered. It is suggested that the period of detention in police custody should have alerted the Chief Magistrate's mind to the possibility that in pleading guilty, the appellant may not have meant what he was saying and might have been acting under the threats and torture allegedly meted out to him while in the custody of the police. With due respect we cannot subscribe to such a view. Mere detention, long or short in itself cannot be a factor in determining whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material, except the record of the proceedings, on which we can judiciously determine the question, we must go by the record and accept as true the position stated therein." (underlining ours).

The judges upheld the preliminary objection raised by Mr Chunga and struck out the appellant's appeal against conviction, but as regards sentence, they reduced it to 3 years because they found that in the assessment of sentence, the Chief Magistrate had taken into account extraneous matters. It is against that decision that he now appeals.

The judges purported to have been going by the record but we can find no indication in the record that the police suggested to anyone that they detained the appellant illegally because they required time to investigate the offence. This finding was based on sheer speculation. The date of the appellant's arrest was clearly stated in the charge sheet, which formed part of the record, as being 20th March, 1987, and without a warrant. The prosecutor did not explain the delay and the Chief Magistrate made no inquiry.

Section 36 of the Criminal Procedure Code requires the police to produce persons arrested without warrant before a subordinate court within 24 hours but in the case of a serious offence, they have to do so as soon as practicable. This provision has to be read together with section 72 (3) (b) of the Constitution of Kenya which states that a person who is arrested or detained upon reasonable suspicion of having committed, or being about to commit a criminal offence, shall be brought before a Court as soon as is

reasonably practicable, and where this is not done within 24 hours of his arrest (or within 14 days if the offence involved is punishable by death), the burden of proving that he has been brought before a Court as soon as is reasonably practicable rests upon the person alleging that this provision has been complied with.

In relation to this particular appellant, these two important provisions, which were enacted specifically for the protection of suspects in police custody, were violated, without any explanation being given to the Court. We have already said that the prosecution did not justify the detention. The holding by the judges that mere detention regardless of its length cannot be a factor in determination whether or not a plea is unequivocal, was a material misdirection and cannot, in our view, reflect the correct legal position in this country having regard to the clear statutory provisions to which we have already alluded. It was the duty of the Chief Magistrate to seek an explanation from the prosecutor as to why the appellant had been kept in custody beyond the period permitted by law. The appellant did not have to raise it. He had been held *incommunicado* and unfairly denied access to counsel and family. It was a matter of record. In not raising the matter, the Chief Magistrate was guilty of serious dereliction of judicial responsibility. Having been held *incommunicado*, it is not surprising, at any rate to us, that the appellant came out singing, so to speak. He even put in a word of praise for the police for good measure.

Numerous authorities were cited by both sides to justify their respective positions but as this case is governed by authority, we do not find it necessary to analyse those cases. This Court has held in the relatively recent case of *David Mbewa Ndede v Republic* (Criminal Appeal No 1 of 1989) (unreported), that a plea of guilty taken in such circumstances is not unequivocal. In *Ndede's* case, the appellant faced the same charge as the appellant in the present case. He was charged of being a member of *Mwakenya* and was kept in police custody for 30 days before being taken before a magistrate. He also pleaded guilty but quickly challenged his conviction on appeal. He failed in the superior court but on a second appeal to this Court he was successful. In relation to the delay in bringing Ndede to Court, this Court said:

> "We would add that there as happened in this case at the time of the taking of plea there appears to be unusual circumstance such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused to Court from the date of arrest, then an examination of the circumstances must form an integral part of the facts to be stated by the prosecution to the Court. The Court should then put that explanation to the accused and inquire of him if it affects his plea."

This is an important passage and it adds a new dimension to the rule in *Adan's* case without, in any way, diluting its authority.

In the result, we allow the appeal, set aside the order of the superior court striking out the appellant's appeal to it against conviction, and quash that conviction and set aside the sentence. We understand that the appellant has served the sentence and has been released from prison.

Since the hearing of this appeal, Justice Masime has died, and this judgment has been given under rule 32(2) of the Court of Appeal Rules.

Dated and Delivered at Nairobi this 30th Day of June, 1993

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL