



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

CRIMINAL APPEAL 353 OF 2008

BETWEEN

JOSEPH ONYANGO OWUOR 1ST APPELLANT
CLIFF OCHIENG ODUOR 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja JJ.) dated 28th October 2008

in

H.C.C.R.A. NO.142 OF 2006

JUDGMENT OF THE COURT

In this second appeal there are two appellants, **Joseph Onyango Owuor** *alias Jobiso* (1st appellant) and **Cliff Ochieng Oduor** *alias Sensi* (2nd appellant). The two appellants were charged jointly with another person whose appeal is not before us, with four counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The 1st appellant faced an additional count of being in possession of ammunition without a firearm certificate contrary to **section 4(1)** as read with **section 4(3)** of the Firearms Act Cap 114 of the Laws of Kenya. There were alternative counts, but they related to the person whose appeal is not before us. At the conclusion of their trial, both appellants were found guilty of the respective charges and were convicted. Each of them was sentenced to death. The 1st appellant was in addition sentenced to a term of 5 years imprisonment for the charge relating to possession of ammunition. It is noted that the trial magistrate, L.N. Mbugua, S.R.M, did not order the sentence of imprisonment to be in abeyance, as she was expected to. A person sentenced to death ought not, in addition, to be ordered to serve an imprisonment term in the same trial as happened here. The rationale for this is not difficult to understand. Once the death penalty is carried out, the person affected will not be available to serve the imprisonment term. On the other hand, it will be cruel and inhuman if such a person is ordered to complete the imprisonment term before the sentence of death is carried out. Besides, where, as here, a person is sentenced to death in more than one count the proper approach is the one the superior court adopted here, in that the court ordered the death penalties subsequent to the first one to be held in abeyance as a person cannot be hanged more than once.

Being dissatisfied with their respective convictions and sentence, both appellants appealed to the superior court, and that court, after analyzing and evaluating the evidence against each appellant came to the conclusion that there was no basis or proper basis for interfering with the trial court's decision, and thus provoked this appeal. Each appellant filed on his own a memorandum of appeal, but which when this appeal came up for hearing were abandoned by their mutual counsel, Joseph N. Musomba, who in substitution thereof adopted a supplementary Memorandum of Appeal, he filed, in which he has raised four grounds, as follows:

“(1) That the charge (statement of the offence) and particulars of offence were fatally defective for duplicity.

(2) That the charges were fatally defective in failing to disclose the specific offence or offences or aggravations with which the accused were charged with (sic).

(3) That the Constitutional Rights of the accuseds (sic) under section 77(8) were violated in that the accused persons were charged under a section of the law that does not define any offence.

(4) That the charge sheet drawn and particulars of offences as drafted inherently reveal too many offences so as to embarrass or prejudice the accuseds (sic) in their defence.”

In urging the appellants respective appeals Mr. Musomba put forward various arguments. Firstly, he submitted that **section 296 (2)** of the Penal Code as worded does not create an offence but merely makes provision for punishment for the offence of robbery with violence. **Section 296(2)** of the Penal Code, provides as follows:

“296 (2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Mr. Musomba submitted that unless the aforementioned sub-section is read with **section 295** of the Penal Code, then reliance on **section 296(2)**, above, without more will not disclose the commission of an offence. **Section 295** of the Penal Code defines the offence of robbery. **Section 296(1)** and **292(2)** of the Penal Code, have a common marginal note, namely “*punishment of robbery*”. In this country marginal notes are as a general rule, read together with the section. By the *ejusdem generis* rule **section 296 (1)** and **296 (2)**, have to be read together. **Section 296(1)**, above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under **section 296(2)** of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under **section 296(1)** of the Penal Code. It is no wonder therefore the 2nd schedule of the Criminal Procedure Code, provides for one standard form for an offence under both **section 296(1)** and **296(2)** of the Penal Code. The Standard Form reads as follows:

“8 – ROBBERY

Robbery with violence contrary to section 296 of the Penal Code.

PARTICULARS OF OFFENCE.

A.B. , on the Day of 19.... in..... District within the Province, robbed C.D., of a Watch, and at, or immediately before or immediately after the time of such robbery did use personal violence to the serial C.D.”

As we stated earlier, the marginal note provided under **sections 296(1)** and **296(2)** is one, namely, “*punishment of robbery.*” For the foregoing reasons, it is our view that Mr. Musomba’s argument has no merit.

Likewise the submission that the violence envisaged under **296 (2)** is different from that envisaged under **section 295** of the Penal Code is untenable. **Section 295**, does not deal with the degree of violence being merely a definition section. It is analogous to **section 268** of the Penal Code which deals with the definition of “*stealing*” and subsequent sections which deal with different categories of the offence of stealing. **Sections 296(1)** and **296(2)** of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.

There was also the related ground that the appellants’ Constitutional rights under **section 77 (8)** of the Constitution had been violated. Mr. Musomba submitted that in view of what he termed as a vague statement of the offence of robbery, the appellants were not able to formulate a plausible defence. **Section 77(8)**, above, provides as follows:

“77(8) No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law.”

Following his earlier submission that the statement of the offence for an offence under **section 296 (2)** of the Penal Code did not disclose an offence Mr. Musomba submitted that because of that fact, appellants were prejudiced. In view of what we stated earlier in this judgment this submission is untenable. That is also true concerning the submission that the particulars of the offence for all the robbery counts are duplex. The particulars merely disclose different ways of committing the offence of robbery with violence under **section 296 (2)** of the Penal Code.

The final argument presented to the court related to delay in taking the 2nd appellant to court. Mr. Musomba submitted that there was a three days delay in doing so. Learned counsel submitted that the decision of this court in **Paul Mwangi v. Republic Criminal Appeal No.35/2006** (unreported) was made in excess of jurisdiction. In that case it was held that because the delay in that case was not inordinate it was excusable. In Mr. Musomba’s view if the delay is not explained the court lacks the discretion to excuse the delay.

According to the charge sheet, the appellant was arrested on 30th March 2005. He was presented to the court on 15th April 2005. By ordinary computation he was presented to the court about 16 days after arrest. If that be true, then he was presented to the court two days out of the time stipulated under **section 72(3)** of the Constitution which as material provides that a person who is arrested, or detained for an alleged offence which is capital in nature, should be presented to court as soon as is reasonably practicable but not later than 14 days after arrest unless it can be shown that the date when he is presented to the court was on the circumstances of the case, reasonably practicable.

In the case before us there is no explanation given to explain the two days delay. The issue was neither raised before the trial court nor the 1st appellate court. The alleged two days delay is not absolutely clear. It is apparent from the record of appeal that this was not the only case which the appellants faced. At page 3D of the record is a note by the court as follows:

“Court: The accused persons have cases before magistrates with jurisdiction over robbery matters in this court, Winam and Maseno.

Order: M. on 12th May 2005 at Ahero Court for a hearing date before that court.

L.W. KIARIE P.M.”

It is quite clear that the appellants were shuttling between one court and another, and this could perhaps explain the delay in presenting them before the court which heard this matter. In fact the 1st appellant in his defence stated that he was presented before the Chief Magistrate's Court, at Kisumu on 12th April 2005, which was within the 14 days period, for another offence. It is clear he was in prison and not police custody when he was charged with the offences herein. In view of the facts and circumstances of this case, it cannot be said, as Mr. Musomba appeared to suggest, that the court does not have the discretion to consider the facts and circumstances of each case to enable it to determine whether a particular period of delay is, or is not excusable. After all when an explanation is given for any delay, the court is being called upon to weigh and determine whether the explanation is acceptable or otherwise. In exercising that power the court is in effect exercising judicial discretion for the benefit of an accused person. That, in our view, would explain the wording of **section 72(3)** of the Constitution. The 14 days duration is not absolute. The delay could be even for a month, provided that the delay may be justified in one way or another.

We wish also to add that an accused person cannot be said not to have a duty to raise the issue of delay. In our view he has a duty to raise the matter at the earliest possible opportunity so as to enable the prosecution to obtain an explanation on the delay.

As regards the merits of the appeal, the main issue is identification. The 1st appellant has distinct features which prosecution witnesses noted and which aided their identification of that appellant in an identification parade which was organized for him. The 2nd appellant was also picked out in an identification parade. The trial and first appellate courts considered the circumstances under which witnesses said they identified both appellants and were satisfied, that the circumstances were favourable to a correct identification of the appellants. Those were concurrent findings of fact and we have no basis for interfering.

In the result, we are satisfied that the appellants' respective appeals are without merit. Accordingly we dismiss the appeals. It is so ordered.

Dated and delivered at Kisumu this 30th day of April 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR