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

Civil Appeal 450 of 2007

JOSEPH AMOS OWINO ……..……..APPELLANT

AND

REPUBLIC ……...……..……..RESPONDENT

(Appeal from the judgment of the High Court of Kenya, at Kisumu (Mwera & Mugo, JJ) dated 25th September, 2007

in

H.C.CR.A. NO. 109 OF 2005)

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JUDGMENT OF THE COURT

The appellant *Joseph Amos Owino*, was together with another person charged in the subordinate court at Kisumu with six counts of robbery with violence contrary to *section 296 (2)* of the Penal Code and one count of assault causing actual bodily harm contrary to *section 251* of the Penal Code. He alone further faced counts of being in possession of a firearm without firearm certificate contrary to *section 4 (1) (a)* as read with *section 4 (2) (a)* Chapter 114 Laws of Kenya, one being in respect of possession of two home-made guns and the other being in respect of being found in possession of two rounds of live ammunition caliber 7.62 mm special type. They both pleaded not guilty. At the close of the prosecution case, the learned Principal Magistrate (K.W. Kiarie) found that no prima facie case had been made out against the co-accused who was the second accused in respect of the counts against both of them, found him not guilty of all the charges and acquitted him under *section 210* of the Criminal Procedure Code. The appellant was however, placed on his defence in respect of all the charges. After his defence, the learned Magistrate, in a considered judgment dated and delivered on 27th May 2005, acquitted the appellant on four counts of robbery with violence contrary to *section 296 (2)* of the Penal Code and that of assault causing actual bodily harm contrary to *section 251* of the Penal Code. He was however, found guilty and convicted of two counts of robbery under *section 296 (2)* of the Penal Code which were counts 4 and 5 in the charge sheet and of the two counts of being in possession of a firearm contrary to *section 4 (1) (a)* as read with *section 4 (2) (a)* Chapter 114 Laws of Kenya. He was sentenced to death in respect of each of the conviction for robbery charges and to serve five years imprisonment on each of the counts of being in possession of firearm which were counts 7 and 8.

He was not satisfied with that decision. He appealed to the superior court against the convictions and sentences. After hearing the appeal, the two learned Judges of the superior court (Mwera and Mugo JJ.) dismissed the appeal but rectified the sentences to read that the appellant would only suffer the death

sentence on count 4 while that on count 5 and the two concurrent terms (counts 8,9) would remain in abeyance. The appellant was still not satisfied and hence this appeal before us.

Before we go into the brief facts and grounds of appeal, we need to set out the charges in respect of which the appellant was convicted. As we have stated, these were counts 4, 5, 8 and 9. The particulars of each of these counts read as follows:-

"COUNT IV On 28:10:2004 at Korowe Trading Centre within Nyando District of Nyanza Province jointly with others not before court while armed with offensive weapons to wit two home made guns and other assorted weapons robbed one Phillip Odundo Ayugi of a Nissan Matatu reg. No. KAQ 981M Toyota valued at Ksh.480,000/= and at or immediately before or immediately after the time of such robbery threatened to use violence on the said Phillip Odundo Ayugi.

COUNT V On the 28.10.2004 at Korowe Trading Centre within Nyando District of Nyanza Province, jointly with others not before court while armed with offensive weapons to wit two home made guns and other assorted weapons robbed one Alphonse Odhiambo of cash 2,000/= and at or immediately before or immediately after the time of such robbery threatened to use violence on the said Alphonse Odhiambo.

COUNT VIII On 28:10:2004 at Ahero market within Nyando District, of Nyanza Province was found being in possession of two home-made guns without a firearm certificate.

COUNT IX On the 28th October, 2004, at Ahero Township within Nyando District of Nyanza Province, was found in possession of two rounds of live caliber 7.62 special type without firearm certificate."

The facts giving rise to the above charges were briefly that Phillip Odundo Ayugi (PW1) (Phillip) was at the relevant time a matatu driver. On 28th October 2004, at 6.20 p.m., he left Kisumu in a matatu motor vehicle registration Number KAQ 98M Toyota on his way to Kisii. The conductor was Alphonse Odhiambo (PW2) (Alphonse). He had three passengers in the vehicle. At Nyamasaria stage three men stopped them. They said they were going to Ahero. They got into the vehicle and the journey continued. At Korowe, the vehicle slowed down as there was a stationary motor vehicle in front and an on coming vehicle. After the on coming vehicle had passed, and as Phillip made to overtake the stationary vehicle, he heard a voice asking him to stop. It was not the conductor's voice. He looked behind and he saw the three passengers he had picked up at Nyamasaria each holding a gun and each pointing at him with the gun. One of those people jumped and sat between him and another passenger. That man ordered everybody to remove money and phones. By that time Phillip had stopped the vehicle, but later Phillip was ordered to drive slowly. As they went on those people took money from them. Phillip opened the door of the matatu and jumped out as the vehicle was still in slow motion. He ran into a bush and raised alarm. Alphonse and one other passenger also jumped out of the vehicle and ran towards the opposite direction. Some members of the public from the nearby villages responded to Phillip's alarm. The vehicle was driven away by the thugs. A police motor vehicle came from Ahero direction. Phillip and Alphonse stopped it and told the police what had transpired. The police officers took them to police road block near Ahero. At the roadblock Phillip was advised to report the incident to Ahero Police Station. He did so as Alphonse and others went to Ahero Girls School junction to enquire about the movement of the stolen matatu. While at the police station, Phillip learnt that the vehicle had overturned. Phillip was certain that the appellant was one of the thugs who boarded the matatu at Nyamasaria, but he said the appellant's colleague is the one who ordered him to stop the vehicle. Alphonse (PW2) confirmed the evidence of Phillip and added that the appellant was one of the people who stopped and entered the matatu at Nyamasaria and paid Ksh.50/= as fare from Nyamasaria to Ahero. Chief Inspector Dominic Biwott (PW5) was the OCS Ahero Police Station. On 28th October 2004 at 7 p.m. he was in police patrol car when he received a radio call that a motor vehicle which had been hijacked by robbers was moving towards Ombeyi along Ahero-Miwani road. He drove towards Ombeyi on the same road. He received further information that a motor vehicle had taken that route at a high speed. He continued but after about one kilometer, he saw that the vehicle had an accident and many people were rushing towards it shouting thieves, thieves. He saw a person running from the vehicle towards rice plantation. He stopped his

vehicle, came out and ran towards it warning the person that he was a police officer. He apprehended that man who was bleeding and was in a jacket. On quick inspection, he found a homemade gun in his jacket. He identified that person as the appellant. He took him, with the help of the members of the public to the police station. He also recovered Ksh.900/= inside the appellant's under pants. The officers including PC Kurgat (PW6) went to the scene and on searching the vehicle recovered another firearm. That other firearm was handed over to Chief Inspector Biwott by PC David Kurgat. He directed the appellant to be taken to hospital. Later that day Chief Inspector Biwott went to Kisumu Police Station where he handed over the vehicle to PC Johnstone Kiptanui Sang (PW13). The appellant was also later handed over to Kisumu Police Station, we believe, because several other incidences giving rise to other charges in respect of which he was acquitted took place in Kisumu and its surroundings. In his defence in court, the appellant stated that on 28th October 2004, he was going to the funeral of his sister who had passed on at Kisii hospital and where the body was to be removed from the hospital on 30th October 2004. He boarded a matatu at Kisumu and paid Ksh.200/=. He had Ksh.1,100/= and that after paying Ksh.200/= as fare he remained with Ksh.900/=. On the way, that matatu carried more people and after a short time they were ordered to look down and he was shot on his eye and was injured. The next day in the morning he found himself in police cells. Some people whom he presumed were police officers asked him if he had any money on him and he showed them where it was. Later he was charged in court. In cross-examination he said he did not know where, along the road, the hijackers entered the vehicle and he admitted that the injury he had on the eye appeared to be a cut wound and not a bullet wound. He further admitted that the money found on him was in the under-pants where he had placed it, and said he did not know if he was arrested with a homemade gun.

The above were the salient facts that the Principal Magistrate and the superior court considered and that led to their concurrent finding that the appellant must have been one of the perpetrators of two robberies and was also in possession of the home made gun and the ammunition.

In his home made memorandum of appeal the appellant's four grounds of appeal were in brief; that his constitutional rights were violated as he was taken to court one month later; that the proceedings were conducted in a language he did not understand; that the courts below failed to analyse and properly evaluate the evidence available before reaching a verdict and that the contradictions and inconsistencies in the evidence before the trial court were not considered. Later, his advocates filed a supplementary memorandum of appeal in which five grounds of appeal were preferred. However before us Mr. Keengwe, the learned counsel for the appellant argued only one ground of appeal which was the first ground. That ground was:-

"***That the Honourable Judges erred in law in confirming the judgment and sentence of the trial Magistrate Court when it was unsafe to do so as proceedings against the appellant were ultra vires (sic) section 72 (3) of the Constitution of Kenya, the appellant having been charged in a court of law 30 days after his arrest."***

Mr. Keengwe, in his submission, stated that the appellant was arrested on 28th October 2004 and was held in police custody till 29th November, 2004 when he was taken to court. That, he said, was in breach of the provisions of ***section 72 (3)*** of the Constitution which provides that he should not have been in custody beyond fourteen (14) days as he was facing an offence punishable by death and the prosecution adduced no explanation for such a delay. The breach could not have been raised in the trial court or in the first appellate court as the appellant was conducting his defence and his appeal in the respective courts in person and he could not have been aware of such rights in law. He referred us to several decisions of this Court on the issue. Miss Oundo, the learned Senior State Counsel on the other hand was of the view that while the prosecution had the duty to ensure that constitutional aspects are followed at the trial of an accused person, it was however the duty of the accused to point out to the Court when his constitutional rights were being violated. As the issue was not raised at the appellant's trial and was not raised in first appellate court, the appellant was stopped from raising it on second appeal as it should have been raised at the earliest opportunity but was not so raised. We will consider this point first as it is an important matter based on the provisions of the country's constitution.

It is not in dispute that the appellant was arrested on the date the offence was committed. That was on

the morning of 28th October 2004. Chief Inspector Biwott, who arrested him put the time at about 7.00 p.m. on 28th October 2004 as the date of arrest. That was not challenged by the appellant. The charge sheet shows that he was taken to court on 29th November 2004. The proceedings confirm that date as the date when he appeared before Mrs. Sewe when plea was taken. That in effect means he was taken to court after thirty one (31) days in police custody. ***Section 72 (3)*** of the Constitution states as follows:-

"***73 (3) A person who is arrested or detained:-***

(a) for the purpose of bringing him before a court in execution of the order of the court; or

(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 hours of his arrest 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."

Thus, the appellant, who was arrested on 28th October, upon reasonable suspicion that he had committed the offence of robbery with violence contrary to ***section 296 (2),*** an offence punishable by death, was required under ***section 72 (3)*** to be availed in court within 14 days of his arrest and detention by police, failing which the prosecution had the burden of demonstrating that the time within which he was brought to court, if after 14 days after his detention was the period that was reasonably practicable. In this case, the record shows as we have stated, that he was taken to court about seventeen days after 14 days allowed by law. The prosecution never gave any explanation to demonstrate that the date he was taken to court was the reasonably practicable time for producing him in court and never made any attempt to do so. He was thus detained in the custody for seventeen (17) days longer than the period provided by law and the prosecution did not give or attempt to demonstrate to the court that he was brought to the court within a time that was reasonably practicable. Before us Miss. Oundo did not dispute the allegation of violation of the appellant's constitutional rights in that respect. Her contention however, was that whereas the prosecution has a duty of ensuring that an accused's constitutional rights are not violated, it was however, also the duty of the accused to point the violation out to the court at the very first opportunity and that if the accused failed to do so, he should not be heard to raise it on second appeal. We would accept that proportion when the court is dealing with a complaint of that nature coming from an appellant who had been represented by an advocate either at his trial or on a first appeal. In such a case, the court will assume that the appellant was legally advised on his legal rights including constitutional rights and if he did not raise such an issue, then he would be taken to have waived his rights and would not be heard to reclaim the same on second appeal. That is what this Court meant when it stated in the case of ***James Githui Wathiaka & Another vs. Republic*** Criminal Appeal No. 115 of 2007 (unreported) as follows:-

"***The two appellants, right from the time their trial opened in the High Court, were each represented by an advocate. Their trial was before the High Court which by law is "the constitutional court" in Kenya. The appellants and their advocates knew or must have known that their constitutional rights had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is the constitutional court in Kenya and if the appellants' advocates had raised the issue there, the Judge would have had to deal with the issue just as Mutungi J. did in the Njogu case, (supra). When we asked Mr. Muthoni and Mr. Nganga why the advocates representing the appellants did not raise the matter with the Judge, their answer was that they did not know. An information before a judge is different from a charge sheet before a magistrate. The charge-sheet would normally show on its face the date on which an accused person was arrested and the date on which he is brought to Court. An information does not have on it details such as the date of arrest. So that a magistrate is able to see at a glance the relevant particulars from which it can be deduced if section 72 (3) of the Constitution has been complied with. A judge by merely looking at an information will not be able to tell when the accused person was arrested. The date on which the offence was allegedly committed is not necessarily the date of the arrest. We think we cannot equate advocates to poor and illiterate***

accused persons and where an advocate is present in court and does not raise such relevant issues, the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to Court. Different considerations must continue to apply where the accused person is unrepresented…"

We think that decision answers Miss Oundo's submissions. 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, he, 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 in 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 with such rights by the prosecution. In the case of ***Paul Mwangi Murunga vs. Republic*** Criminal Appeal No. 35 of 2006, this Court had the following to say:-

"***Under section 72 (3) of the Constitution, the police were entitled to hold the appellant in custody for fourteen days, he having been charged with the offence of robbery carrying with it the death penalty upon conviction. The police, therefore, detained him in their custody for a period of some ten days beyond the permitted period of fourteen days. No explanation was offered to the magistrate before whom the appellant first appeared as to what the cause of that delay was or to this Court, when the issue was raised before us. Mr. Njogu contended himself by simply saying that as the matter of delay had not been raised before, it was too late to raise it now and it would be impossible for them to find out why the delay had been there. In other words Mr. Njogu was in effect submitting that there ought to be a complaint by an accused person when he or she is taken to court before the prosecution can be called upon to discharge the burden placed upon them by section 73 (2) of the Constitution……***

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 section 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."

As we have stated, where an accused is represented, the position is different.

In this appeal, the appellant was not represented at his trial in the Principal Magistrate's Court. He conducted his appeal in the superior court in person and before us, he was represented and has raised this issue of violation of his constitutional rights. We cannot ignore it simply because he did not raise it in the courts below. The scenario would have been different if he was represented in both or either of the courts below. As we have stated, he was taken to court about seventeen days outside the time he should have been taken to court. No explanation was given in the trial court, or in the first appellate court nor in this Court. His rights were clearly violated and no explanation exists for such violation. We need to make it clear that all the law requires the prosecution to do is to demonstrate to the court in cases where a person is taken to court outside the period allowed by ***section 72 (3)*** that there were reasons for the delay such that when such reasons are considered then it would appear to court that the accused has been taken to court as soon as was reasonably practicable notwithstanding the apparent delay. This Court has given instances of what explanations would suffice, for example that the accused fell sick soon after his arrest and would not be taken to court immediately within the fourteen (14) days provided or that he was required in other courts and so could not be taken to court for the particular offence for which he was arrested in time or such like other explanations.

We think we have said enough. We need not consider other grounds of appeal which in any case were not canvassed before us. We hold that the appellant's constitutional rights were violated and no explanation is availed for such delay.

That being our view of the matter, we allow this appeal, quash all the convictions recorded against the appellant under ***section 296 (2)*** of the Penal Code and under ***section 4 (1) (a)*** as read with ***section 4 (2) (a)*** of Chapter 114 Laws of Kenya. We set aside the sentences of death imposed upon him and those of five years imprisonment on each of counts 8 and 9. We order that he be released from prison forthwith unless he be held for some other lawful cause.

Dated and delivered at KISUMU this 8th day of May, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR