



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

apparent on the face of the records that the appellant's constitutional and fundamental right of speed (sic) trial as enshrined in the constitution of Kenya had been violated.

2. THAT the learned judges erred in law and fact in upholding the conviction against the appellant when common intention under Section 21 of the penal code was never proved to the required standard i.e. "beyond reasonable doubt".

However, at the hearing before us on 17th September, 2009, learned counsel for the appellant, Mr. S. B. Keengwe chose to argue only the first ground, and abandoned the 2nd ground.

Mr. Keengwe, in his submission, stated that the appellant was arrested on 3rd November, 1997 and arraigned in court on 19th November, 1997. He was held in police custody for 17 days. That, he argued, was in breach of the provisions of **Section 72 (3)** of the Constitution which provides that he should not have been in custody beyond 14 days as he was facing an offence punishable by death and the prosecution adduced no explanation for such a delay. The alleged offence, Mr. Keengwe argued, was committed in Jamhuri, within 10 km of Nairobi, and therefore, there could have been no excuse for the appellant's incarceration beyond the permitted 14 days. According to learned counsel, the complaint relating to breach could not have been raised in the trial court or in the first appellant court as the appellant was conducting his defence and his appeal in the respective courts in person and he would not have been aware of his rights in law. He referred us to several decisions of this Court on the issue, especially the cases of **Joseph Amos Owino vs Republic (Kisumu Criminal Appeal No. 450 of 2007)** and **Thomas Sangare Kelolon vs Republic (Kisumu Criminal Appeal 169 of 2006)** emphasizing the point that the appellant in both the courts below was **unrepresented** and so could not have raised the issue of the breach of his Constitutional rights in those courts, and is accordingly not deemed to have waived his rights.

In opposing the appeal, Mr. J. Kaigai, learned state counsel for the respondent argued that the record before the court clearly showed that the appellant was being held in custody beyond the 14 days in relation to other criminal cases pending against him. In any event, he argued, that the delay was only three days, and was attributable to administrative and logistical reasons, and was not prejudicial.

We concur with the learned state counsel that it is clearly discernible from the record that when the appellant was charged with the offences which are the subject of this appeal, he was already in custody over other offences. For example, the record shows that when the appellant appeared before the SRM's Court (Mrs. Nzioka) on the 26th January, 1998, the prosecutor applied for an adjournment on the ground that the appellant faced a similar case in a different court, and that the exhibits and statements were in that other court. Similarly, on 23rd February, 1998 another adjournment was sought pending return of the exhibits in Criminal Case No. 6183 of 1997 involving the appellant.

Accordingly, we discern no evidence on record that the appellant was held in custody beyond the stipulated 14 days before he was taken to court, and therefore we cannot say that his Constitutional rights were violated. Our decision in this matter is that there was as per the record no contravention of Section 72 of the Constitution but if this matter were to turn on actual proof of a contravention, we would have ruled that the appellant complies with Section 84 of the Constitution.

In the result, this appeal has no merit, and is dismissed, and we so order.

Dated and delivered at Nairobi this 23rd day of October, 2009.

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR