



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

CRIMINAL APPEAL 161 & 162 OF 2006

ELIZABETH AKINYI ODOYO
ELISHA OTIENO ODERO APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Bauni & Warsame, JJ) dated 27th day of March, 2006

in

H.C.CR.A. NOS. 49 & 62 OF 2003)

JUDGMENT OF THE COURT

Elizabeth Akinyi Oduyo, the 1st appellant and *Elisha Otieno Odera*, the second appellant, were tried before the Senior Resident Magistrate at Homa-Bay on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code and upon their conviction on that charge, the magistrate duly sentenced them to death as the law prescribes. The two then appealed to the High Court at Kisii and by its judgment dated and delivered on 27th March, 2006, the High Court (K. Bauni and Mohamed Warsame, JJ) dismissed their appeals, the two learned Judges being satisfied on the recorded evidence that the prosecution had proved its case against each appellant beyond any reasonable doubt. The two appellants now come to this Court by way of a second appeal, and that being the position, **Section 361 (1)** of the *Criminal Procedure Code*, Chapter 75 Laws of Kenya, restricts the jurisdiction of the Court to dealing only with matters of law.

The first matter of law raised on behalf of the appellant by their learned counsel Mr. Obuo is to be found in what was designated as “**ADDITIONAL GROUND OF APPEAL**” filed by Mr. Menezes who originally acted for the appellants; that ground was lodged in Court on 12th June, 2007 and in it, the appellants jointly complained that:

“The trial magistrate and the First Appellate Court erred in law and in fact by convicting and sentencing (sic) the Appellants to death despite the fact that their constitutional rights, as enshrined in section 72 (3) had been violated. The appellants were brought to court eight days beyond the period within which they could lawfully be held by the police”.

Mr. Musau, the learned Senior Principal State Counsel, conceded the appeal on this ground. Mr. Musau, in conceding the appeal submitted to us as follows:

“I would admit that the appellants were arrested on 20/04/02. They said in their defences that they were arrested on 20/04/02. The law allows the police to have kept them in custody for fourteen days. The period is not explained. Their rights under the constitution were violated and rendered the trial a nullity”.

Mr. Obuo, for his part told the Court on this point:

“Appellants were arrested on 20.04.02. Taken to court on 13.05.02. Late by about eight days. The trial based on an illegality and was accordingly a nullity”.

So both Mr. Musau and Mr. Obuo were agreed that the appeals of the two appellants ought to be allowed on the single point that before the appellants were taken before the magistrate, they had been kept in custody for some eight days outside the fourteen days for which the police were entitled to hold them in their custody before they could be taken to court. The delay of eight days was wholly unexplained and Mr. Musau did not even submit before us that they delay of eight days was, in all the circumstances of the case, reasonable.

We agree with both learned counsel. As this Court has said time and time again, the prosecution must learn to operate within the laws upon which our fledging democracy is based. We are all, the police, the Attorney General and the Courts bound to accept that we are governed by law and the concept of the rule of law must be given a practical reality. Mr. Musau was right in conceding the appeals and we accordingly allow the appeals, quash the conviction recorded against each appellant, set aside the sentence of death imposed on each of them and order that each appellant be set at liberty forthwith unless held for some other lawful cause. Those shall be our orders in the appeal. We only need to add that this judgment is not signed by Githinji, J.A.

Dated and delivered at Kisumu this 20th day of June, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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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