



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

Criminal Appeal 83 of 2005

HENRY ODHIAMBO OTIENOAPPELLANT

AND

REPUBLICRESPONDENT

**(An appeal from a judgment of the High Court of Kenya at Kisumu (Tanui, J.) dated
22nd February, 2004**

in

H.C.CR.A. NO. 190 OF 2001)

JUDGMENT OF THE COURT

Henry Odhiambo Otiemo, the appellant, has come to us, on second appeal, challenging his conviction and sentence of 3 years imprisonment for the offence of grievous harm contrary to **section 234** of the **Penal Code**.

The appellant’s first appeal to the superior court was dismissed in its entirety. In the appeal before us, several issues have been raised, but we propose to deal with only one of those as we think it will dispose of this appeal.

Although the appellant was duly represented by counsel during his trial, this case shows the dangers inherent in a situation where both the court and counsel make shortcuts to finalise matters they are seised of. It is a good thing when courts and counsel show a desire to urgently conclude matters. However, where as in this case justice is compromised the practice of making shortcuts, is to be deprecated. What happened in this case?

The appellant was tried by a Resident Magistrate, A.N. Kimani. He received evidence from both the prosecution and the defence. He then made the following order:

“COURT

Written submissions 24/5/2001. Judgment 5/6/2001 2.00 p.m.”

In obedience to that order, the defence counsel filed written submissions which the court considered in its judgment. It is, however, doubtful whether the appellant had access to them before judgment, as

after counsel prepared the same he must have passed them on to the trial magistrate.

In **Robert Fanali Akhuya v. Republic Criminal Appeal NO. 42 of 2000** this Court dealt with a situation similar to this one and after quoting with approval the remarks of the Court of Appeal for East Africa in **Salim Dean v. Republic [966] E. A. 272**, itself said;

“On our part we say this. The Criminal Procedure Code provides a precedent for the making of submissions in the court. In no part of the legislation is there a mention of written submissions. A presiding officer of a court is expected to orally hear such submissions as both sides in a criminal case wish to make and to seek clarification of such submissions as found necessary, in order to appreciate each side’s case before delivering his opinion. The accused person is also supposed to hear those submissions and has the right to clarify any point raised or to object to it being raised where he considers it necessary for his own benefit. Written submissions deny the accused that fundamental right. It is fundamental because if it were not so, the drafters of the Constitution of this Republic would not have entrenched it in the Constitution.”

Section 77(2) of the Constitution of the Republic of Kenya, provides, in pertinent part, as follows:

“77 (2) Every person who is charged with a criminal offence.

(a)

(b)

(c)

(d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice.

(e)

(f)

and except with his consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impossible and the court has ordered him to be remanded and the trial to proceed in his absence.”

It cannot be said that merely because the appellant’s counsel acceded to putting in written submissions the accused thereby consented to that course of events. The question as to whether or not written submissions could be put in was not put to him. The Constitution envisages express consent.

So when *section 213* and *310* of the **Criminal Procedure Code** are read with *section 77(2)* of the Constitution, it is clear that where written submissions are tendered without the accused’s express consent, the proceedings of the court concerned are thereafter rendered null and void. That is the conclusion we have come to herein.

Accordingly, we order that the proceedings of the trial court after 8th May, 2001, when the order for written submissions was made are null and void and thus render the appellant’s trial unsatisfactory.

We have agonized on what order to make in the circumstances. Under the law as the trial of the appellant was unsatisfactory in ordinary circumstances a retrial would be ordered. However, in the circumstances of this case the long lapse of time since the appellant’s trial was concluded militates against such a course of action. The appellant’s trial was concluded in May 2001. Since then over five years have gone by. It might not be easy to trace witnesses and also, there may arise various imposable obstacles due to passage of time. That being the position we quash the appellant’s conviction, set aside the sentence which was imposed on him and order that the appellant be set at liberty forthwith, if under incarceration, unless

otherwise lawfully held.

Dated and delivered at Kisumu this 23rd day of June, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR