REPUBLIC OF KENYA

IN THE HIGH COURT OF APPEAL OF KENYA AT MOMBASA

Criminal Appeal 239 of 2004

1. KAZUNGU KASIWA MKUNZO

2. SWALEH KAMBI CHAI…….....……..APPELLANTS

AND

REPUBLIC…….....……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Maraga & Khaminwa JJ)

in

H.C.CR.A. NO 20 & 21 of 2003)

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JUDGMENT OF THE COURT

The appellants before us are Kazungu Kasiwa Mkunzo (1st appellant) and Swaleh Kambi Chai (2nd appellant). The two of them were tried and convicted by a Chief Magistrate at Malindi on one joint count of robbery with violence contrary to **section 296(2)** of the Penal Code and the particulars contained in that charge were that on 14th day of December, 2000 at Shauri Moyo trading centre in Magarini location, Malindi District, Coast Province, the two appellants, jointly with others not before the court and while armed with dangerous weapons, namely a G3 rifle and knives, they robbed Josephat Karisa Kazungu of one camera, 11 sufurias one radio cassette, 6 bed-sheets, 21 constumes, one lesso, a tin of ballgums, a tin of Koo cooking fat and Kshs. 4,000/- all valued at Kshs. 20,000/- and that during the robbery, the appellants threatened to use actual violence to the said Josephat Karisa Kazungu. Upon their conviction on this count, each appellant was sentenced to death as is mandatorily required by the section under which they were charged. The first appellant Kazungu Kasiwa Mukunzo was alone charged on two other counts of possessing a firearm and ammunition contrary to **section 4(2) (a)** of the Firearms Act, Cap 114 of the Laws of Kenya and each of those charges stated in their particulars that on 14th day of December, 2000, at Shauri-Moyo Trading Centre the 1st appellant was found in possession of a G3 rifle (count 2) and two rounds of 7.62mm ammunition (count 3) and that the 1st appellant did not have a firearms certificate in respect of the two items. Upon conviction on each of the two counts, the trial magistrate sentenced the 1st appellant to fourteen years imprisonment on each count, the sentences to run concurrently. Both appellants appealed to the High Court against their respective conviction and sentences, but by its judgment dated and delivered on 23rd November 2004, the High Court (Khaminwa and Maraga, JJ) dismissed their appeals against the conviction and the sentence of death imposed on

count one was confirmed in respect of each appellant, but the High Court ordered that the sentences of imprisonment imposed on the 1st appellant would remain suspended in view of the sentence of death on count one. The two appellants now appeal to this Court a second time and in view of the provisions of **section 361** of the Criminal Procedure Code, only matters of law fall for our consideration.

The first point of law raised by Mr Aboubakar, learned counsel for both appellants, concerns the 2nd appellant Swaleh Kambi Chai, and the point raised is with regard to his age at the time of commission of the offence. In that connection, Mr Aboubakar filed a supplementary memorandum of appeal containing only one ground, namely that

"**The High Court erred in law in failing to consider the issue of the age of the 2nd appellant at the time of the alleged offence."**

The appeals of the appellants were due for hearing on 17th January, 2006 when Mr Aboubakar asked for an order that the 2nd appellant's age be medically assessed. Pursuant to the order of the court, the 2nd appellant was produced before Dr Mwangombe, the Dental Officer in charge, Coast General Hospital, on 2nd February, 2006 and according to Dr Mwangombe, as at the date of the examination, the 2nd appellant's approximate age was 21 years. That would mean that at the time of the alleged offence on 14th December, 2000, the 2nd appellant was approximately 15 years old. Basing himself on the provisions of the Children Act, i.e. Act NO. 8 of 2001, which he did not even have in Court, Mr Aboubakar appeared to us to argue that the trial of the 2nd appellant was a nullity because the 2nd appellant was held in prison custody pending trial for more than twelve months. As he did not have the Act with him in Court, Mr Aboubakar was unable to show us which provisions of the Act he was referring to. We, of course now have the Act at the time of drafting the judgment and as far as we can see, it is only **section 186** of the Act which sets out the rights of a child who is alleged to have infringed any law and paragraph (c) of that section provides that the child shall

"**have the matter determined without delay"**

There is no provision with regard to what is to happen if the matter is not determined without delay. Then there are "**Child Offenders Rules"** contained in the 5th Schedule to the Act and **Rule 10(4)** of those rules provides:-

" **4. Remand in custody shall not exceed –**

(a) six months in the case of an offence punishable by death, or

(b) three months in the case of any other offence."

Then Rule 12 whose side note is "**Duration of cases"** provides:-

"**12 (1) Every case involving a child shall be handled expeditiously and without unnecessary delay**.

(2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to the its seriousness a case is heard by a court superior to the Children's Court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and the child shall not be liable to any further proceedings for the same offence."

At a glance, these regulations would appear to support the contention of Mr Aboubakar that under the Children Act, a child is entitled to have a case against it dismissed where the trial does not take place within twelve months. **Rule 12(4)** which we have set out herein specifically says so. The rule was made by the Minister pursuant to **section 197** of the Act which is in these terms:-

" **197. Subject to the provisions of this Act, the Minister may make regulations-**

(a) for prescribing anything that may be prescribed under this Act, or

(b) generally for the better carrying out of the provisions of this Act."

The Act itself, as we have seen does not set out any time -limit within which trials shall be held. **Section 186(c)** merely says that the child is entitled to have the case against it "**determined without delay".** We have anxiously gone through the Act and we do not find any provision authorizing the Minister to set time limits within which trials are to be held. The power to " generally make regulations for the better carrying out of the provisions of this Act" does not appear to us to give the Minister power to set time-limits within which trials are to be held. Such a power would fly in the face of various laws, including the Constitution itself. **Section 77 (1)** of the Constitution merely provides that:-

"**If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing <u>within a reasonable time</u> by an independent court established by law"**

The Constitution, wisely does not set out what is a "**reasonable time**" because in determining that issue, the court would have to take into account a whole lot of factors such as the diary of the court, the number of judicial officers available to hear such cases and such like factors. Then there are the provisions dealing with bail with regard to offences carrying the death penalty. **Section 72(5)** of the Constitution provides:-

"**If a person arrested or detained as mentioned in subsection 3(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial**."

So that under the Constitution of Kenya, a person charged with an offence punishable by death is not entitled to be released on bail and the Constitution itself does not draw a distinction between children and adults, where a charge is one punishable by death. This constitutional provision is amplified in **section 123** of the Criminal Procedure Act which states:-

"**123. When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence or any drug- related offence is arrested or detained without warrant by officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail."**

Leaving out the case of persons charged with drug-related offences, it is clear to us that the Criminal Procedure Code does not authorize the release on bail of persons charged with the three offences punishable by death namely murder, treason, robbery with violence and attempted robbery with violence. The 2nd appellant in this case was charged with the offence of robbery with violence. Under the Constitution, he was not entitled to be released on bail; nor was he entitled to be released on bail under the Criminal Procedure Code. Nor do those laws set any time limit within which he was to be tried. As we have seen, the Children Act itself did not purport to define any period which would qualify as amounting to "**without delay".** It is the Child Offenders Rules which purport to set time limits within which trials must be held or else the case be dismissed. We are not unmindful of the fact that the Children Act is

"**AN ACT of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and, for connected purposes."**

But even so, the Act itself must be in conformity with the provisions of the Constitution. The rules and regulations made pursuant to the Act must themselves conform to the provisions of the Act. In **MWALAGAYA VS BANDALI [1984] KLR 751 Law JA**, rendered himself thus at page 760 paragraphs 30 – 35:-

"**The rule is repugnant to the statute. There can be no doubt as to the outcome of that repugnancy. The subsection is not only special, it is a provision of statute; the rule is general, and it is subsidiary legislation. Section 57(5) prevails. The legislature must be presumed at least to have intended the consequences which flow from those of its enactments which suffer no taint of ambiguity. It is everyday task of the courts to give effect to the enacted will of Parliament. The provisions of section 75 (5) of the Act are plain. The whole contest of opposing a caveator must be fought on to the finish in the proceedings under the originating summons."**

All that which Law, JA was stating in this passage is that where a subsidiary legislation is in conflict with a substantive Act of Parliament, the Act must prevail over the subsidiary legislation. **Section 31(b)** of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya, which provides that:

"**no subsidiary legislation shall be inconsistent with the provisions of an Act"**

is the basis of those remarks by Law, JA.

In the same way, **section 186(c**) of the Children Act does not set any time **limits** within which trials must be completed. In any case, even if the Act had made such a provision, that would be contrary to **section 77(1)** of the Constitution, which does not define what "a reasonable time" would be. Again the rules under consideration purport to allow the release on bail of children charged with offences punishable by death. Both the Constitution and the Criminal Procedure Code prohibit that. In the event, we have come to the conclusion that **Rules 10(4)** and **Rule 12 (2) (3)** and **(4)** are ultra vires **section 186 (c)** of the Children Act, and are also contrary to **sections 72(5**) and **77(1)** of the Constitution. Those rules being ultra vires the provisions we have set out, they are null and void and are of no effect. We so declare. Accordingly the trial of the 2nd appellant was not a nullity as Mr. Aboubakar appeared to contend.

That was the main point of law raised by Mr. Aboubakar on behalf of the 2nd appellant. On the main appeal itself, the matters raised by Mr. Aboubakar on behalf of the two appellants were really not matters of law. True the question of identification is always one of law, but in this case the robbery itself started right in Malindi when the two appellants hired Jackson Karisa (P.W.1) to take them in his taxi to Shauri Moyo in Magarini. They hired P.W.1 at about 5 a.m. and they reached their destination at between 6 and 7 a.m. He swore he saw the two appellants well and that the 2nd appellant was a person well known to him. At the shop of Josephat Karisa (P.W.2) where the robbery occurred, P.W.2 also swore he saw the two appellants well before he ran to hide himself in a room at the back of the shop. Other witnesses such as Andrew Karisa (P.W.3) and Samson Kakala (P.W.5) all ran to the scene soon after hearing P.W.2's call for help. It was by then about 7 a.m and all these witnesses swore that they saw these appellants at the scene of the robbery and that the 1st appellant was armed with a gun while the 2nd appellant was armed with a knife. The two of them carried items stolen from the shop and they entered a nearby forest. The witnesses followed them into the forest and they were arrested there. The goods they had stolen were recovered and when police officers arrived at the scene a further search in the forest yielded the gun which the 1st appellant had been seen brandishing at the witnesses. Both the trial magistrate and the first appellate court believed the evidence of the prosecution witnesses and disbelieved that of each appellant. Credibility of witnesses is really not a matter for this Court on a second appeal unless there be something on the record which shows that a particular witness ought not to have been believed. Mr. Aboubakar was

merely complaining to us that there was no reason for the two courts below to believe the prosecution witnesses and not the appellants. But both courts below specifically found that the evidence against the two appellants was simply overwhelming. With respect, we agree with them and like them we are satisfied that the convictions recorded against the two appellants were soundly based. Submissions by Mr. Aboubakar that the trial was a nullity because the plea was taken two or more times have no basis in law and it has not been shown what possible injustice that could have been caused to the appellants. Nor can we find anything on the record to show that the appellants had wanted to make oral submissions before the trial magistrate and they were prevented from doing so.

The appeals with regard to the respective convictions have no merit and must accordingly fail. The sentence imposed upon the second appellant was lawful and there is nothing this Court can do about it. As respect the 1st appellant he was about fifteen years old when he committed these offences. He was, accordingly, not liable to be sentenced to death on count one. That being so, we set aside the sentence of death and substitute it with an order that the 1st appellant shall be detained at the pleasure of His Excellency the President. In view of the present sentence, we set aside the sentences of fourteen years imprisonment on counts two and three and discharge the 1st appellant unconditionally on those two charges.

In the event the appeal by the 2nd appellant wholly fails and we order that it be and is hereby dismissed. The appeal by the 1st appellant against the convictions recorded against him also fails but the appeal against the sentences imposed on him succeed to the extent indicated herein.

Dated and delivered at Mombasa this 21st day of July, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR