REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 302 OF 1988

BETWEEN

MUCHIRI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

RULING

(Appeal from the original sentence and conviction of the Resident Magistrate's Court at Nairobi, J A Mango Esq CM, dated 3rd March 1987,

May 12, 1989, the following Ruling of the Court was delivered.

In this appeal the learned DPP has taken the preliminary point that the appellant has no right of appeal consequent upon S 348 A of the Criminal Procedure Code.We have considered the record, and there is no doubt whatever that the appellant's plea from the record is unequivocal in terms of *Adan v Republic*.The effect of S 348 A has been considered in detail in *Olel v Rep* CA 417/87 by a bench of three judges. We consider that it would be perverse to go against the decision in that case until it is examined by another court.The appellant however points out that he was kept in custody for 51 days before he was brought to court, and he argues, as has been argued before, that there was such a breach of Constitutional rights and of S 36 of the CPC that it could not be said that his trial was satisfactory.The effect of the *Olel* decision is that if the appellant said nothing about the matters he now complains of in the court below, S 348 A operates to shut him out from rehearsing his grounds of appeal if they are based upon new matter, as whatever grounds are to be relied upon are required to be set out in the record.

But we view with concern the development of the practice of the Police in cases which have come up since the *Olel* decision.

In a recent case where the appeal against conviction was withdrawn the period involved was nearly a month.

In CA 767/87 which was a robbery case, the period involved was 14 days, and the appellants pleaded guilty after such period in custody without saying anything about having been beaten. They came up in

another related case 3 days later, and asked to be medically examined and were found to have had whiplash marks all over their backs which was consistent with their account that they had been tortured to obtain their confessions.

On that occasion we were forced by the *Olel* decision to apply S 348 A, as that record was in another file and did not appear on the record before us.

We do not know why they said nothing on the first occasion to which our attention was directed.

And further in this case, it is quite clear that the learned trial Magistrate could have been misled by the declaration on the charge form that the appellant was arrested on 10.3.87 and brought to Court on 31.3.87 which would have made him think that the period involved was only 21 days without report to court under S 37 CPC, bad enough in itself, but insignificant compared to the period of 51 days quite properly mentioned by the learned DPP. That however was after the conviction was entered.

But it is quite clear from *Olel's* case that the consensus of opinion is that the mere period of Police Custody cannot be a factor in determining whether or not a plea was unequivocal. It is a question of what is done during that period which is said to be relevant, and if no allegation appears on the record of what was done, then the court cannot consider any possibilities later raised. We cannot in this case.

We view with concern however the development of this line of authorities. We wonder if where such long periods of Police Custody are involved the lower court, in discharge of its duty to see that the plea of guilty was freely entered, should not be required to put on record an enquiry as to the period of detention, which even nowadays, after the recent amendment to the Constitution the prosecution would have been required to answer, as the burden of proof would have been on them (S 72 (3) of the Constitution). *Olel's* case touched on this matter, but did not resolve it.

We do not otherwise see how the courts can fulfil the obligation to be the watchdog for the Constitutional rights of a citizen where, as does happen, as can be seen from CA 767/87, a plea of guilty is entered in unsatisfactory and unexplained circumstances. *Olel* makes it clear that if this happens the Appeal Court can do nothing.

However as we said above, the decision in *Olel* is clear, and it would be perverse of us not to follow it. Nothing in this case can be distinguished in matters of principle.

Accordingly we allow the preliminary objection and dismiss the appeal against conviction and now turn to the question of sentence.

Dated and delivered at Nairobi this 12th day of May , 1989

PORTER **TANK**

JUDGE **JUDGE**