Case Number:	Criminal Appeal 334 of 2008
Date Delivered:	07 Aug 2009
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Emmanuel Okello O'Kubasu, John walter Onyango Otieno, Joseph Gregory Nyamu
Citation:	Charles Chacha Sasi v Republic [2009] eKLR
Advocates:	Mr. Odhiambo for the Appellant. Miss Oundo, Senior State Counsel, for the Republic.
Case Summary:	Criminal Law - robbery with violence - second appeal against conviction and sentence of death - evidence - identification evidence - concurrent findings of the trial court and first appellate court - Penal Code section 296(2) Constitutional law - rights of an accused person - right to be brought to court within a reasonable time after arrest - person arrested on suspicion of a capital offence to be arraigned within 14 days unless cause is shown why he was held for longer - computation of time - public holidays and weekend not to be considered in computing the time that an arrested person was held in custody - duty of an arrested person to raise the complaint about his prolonged incarceration early in the trial - Constitution section 84(7)
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 44 OF 2005

Case Outcome:	Appeal dismissed
History County:	Kisii
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 334 of 2008

CHARLES CHACHA SASI ……..……...APPELLANT

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Bauni & Warsame, JJ) dated 16th May, 2008

in

H.C.CR.A. NO. 44 OF 2005)

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JUDGMENT OF THE COURT

This is a second appeal from the decision of the superior court at Kisumu which dismissed an appeal from a conviction and sentence by the Principal Magistrate's Court at Migori in Criminal Case No. 523 of 2004. The appellant was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charge were that on 16th May 2004 at Ng'usiru Sub location, Kuria District within Nyanza Province jointly with others not before the Court, while armed with swords and pangas robbed George Nyanza Nyapara of his mobile phone make saron, one wrist watch make omax; one coat, national identification card and cash Kshs.500/= all valued at Kshs.11,500/= and at or immediately before or immediately after the time of such robbery wounded the said George Nyanza.

After a full trial the appellant was convicted as charged and the trial court sentenced the appellant to death as provided by law whereupon the appellant filed an appeal to the superior court which in turn dismissed the appeal on 16th May 2006.

Aggrieved by the superior court's decision the appellant filed this appeal on 6th June, 2009. The appeal raised only two grounds:-

"1. The trial magistrate and the first appellate court erred in fact and law by convicting and sentencing the appellant to death despite the fact that his constitutional rights as enshrined in section 72 (3) of the Constitution had been grossly violated.

2. The first appellate court erred in law and in fact in failing to analyse and re-evaluate the evidence tendered in the subordinate court."

Mr. Odhiambo the learned counsel appeared for the appellant and Miss Oundo, learned Senior State Counsel appeared for the state.

On first ground, Mr. Odhiambo submitted that the appellant was arrested on 21st May 2004 and taken to court on 9th June 2004. According to Mr. Odhiambo's calculations, the appellant was not taken to court until after a period of 18 days and although he concedes that there was a public holiday in between, he contended that the period of 14 days stipulated in ***section 72 (3)*** of the Constitution was exceeded rendering the trial illegal and a nullity. He further submitted that under ***section 72 (3),*** the burden of explaining any delay is on the prosecution and in this case the burden had not been discharged because no explanation for the delay had been offered. He concluded by urging the Court to follow its previous decisions on the point and quash the conviction and set aside the sentence.

On the second ground, he submitted that the superior court failed to re-evaluate the evidence rendered in the subordinate court, first, because the complainant had testified that he was found at 8.00 a.m. by the Assistant Chief of the area whereas under cross-examination he contradicted himself by saying that, other people came and placed twigs on him at the same time and for this reason the complainant's evidence was unreliable. Second, there was no proof of the nature of injuries inflicted on the complainant in that the P3 form had not been produced by the clinical officer who had completed it but by another witness. He contended that the nature of the injury was an important ingredient of the offence of robbery with violence.

Miss Oundo, in her submissions contended that the appellant was arrested on 21st May 2004 and that there was an intervening weekend and the first official day after the arrest was Monday 24th May 2004 and since it was not in contest that the appellant was taken to court on 9th June 2004 and in addition 1st of June 2004 was a public holiday, the prescribed period under the Constitution was exceeded by one (1) day only, and a delay of one day was excusable, going by the recent decisions of this Court.

On the second ground of appeal, Miss Oundo submitted that the inconsistency concerning whether the appellant was seen by the Assistant Chief or other people before he was taken to the hospital was immaterial, as the appellant had not only been identified by the complainant but the identification was by recognition, the complainant having known him for 20 years.

She concluded her submissions by stating that, it was not necessary for the prosecution to have proved the nature of injuries using the P3 form since the other ingredients under ***section 296 (2)*** of the Penal Code namely, the appellant was in the company of one other person or persons, and were armed with swords and pangas, were proved.

We have carefully considered the rival arguments as set out above and the law. On the first ground, what emerges from our calculation of the days the appellant was held before his first appearance in court, is that the period of detention was for 13 days and well within the prescribed period of 14 days. In our view, because the appellant was arrested on 21st May 2004, taken to the Assistant Chief on 22nd May 2004 and the following two days were not working days as they were Saturday and Sunday respectively, the prescribed time started running from Monday 24th May 2004. After taking into account that 1st June 2004 was a public holiday (Madaraka Day) and the 6th and 7th were non working days being Saturday and Sunday, the appellant was as a matter of fact held for 13 days, which are well within the stipulated time. Moreover, on this point, although we are not making any determination, we consider it important to draw the attention of litigants and counsel to the provisions of ***section 84 (7)*** of the Constitution for the purpose of underscoring the importance of

raising any alleged violations under the Constitution as early as possible***. Section 84 (7)*** reads:-

"A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right."

As a result, nothing turns on the first ground and the same fails.

We would also wish to observe that some of the recent authorities concerning this Court's interpretation of the Constitution have not prescribed a rule of thumb concerning compliance with ***section 72 (3).*** In this regard, the Court, in the case of ***PAUL MWANGI MURUNGA V. REPUBLIC*** 2008 (e KLR) stated:-

"These are no more than examples which would and can provide the prosecuting authorities with an explanation to enable them discharge the order placed on them by section 72 (3) of the Constitution. So long as the explanation prefered is reasonable and acceptable, no problem would arise. Again the Court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that."

In our view the alleged inconsistencies concerning time are all matters of fact, upon which the two courts below have made concurrent findings. In ***NJOROGE V. REPUBLIC*** [1982] KLR 388 this Court held:-

"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by the concurrent findings of fact made by the lower courts unless those findings were not passed on evidence."

Concerning the second ground, the challenged identification was by recognition, by a complainant who had known the appellant for twenty years. In addition the two lower courts having made concurrent findings of fact, we cannot disturb such findings as indicated above. Again we are of the view that the ingredients of the offence charged were proved as stipulated in ***section 296 (2)*** of the Penal Code and consequently the alleged failure of re-evaluation of evidence is in our view unfounded in the face of adequate proof that the appellant was in company of more than one other person or persons and they were armed with offensive weapons.

All in all, we find no merit in this appeal and the same is dismissed.

Dated and delivered at Kisumu this 7th day of August, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR