REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 41 OF 2015 [consolidating Criminal appeal 41 &42 of 2015]

1. MARIIRA THAITUMU

2. GEDION KIMATHI KIBURI .....APPELLANTS

VERSUS

REPUBLIC …….....……. RESPONDENT

(From the original conviction and sentence in Criminal Case NO. 4026 of 2010 of the Chief Magistrate's Court at Maua by C.M. Maundu – Senior Principal Magistrate)

JUDGMENT

MARIIRA THAITUMU and **GEDION KIMATHI KIBURI**, the appellants, were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on the 11th day of November 2010 at Nceme sub location, in Igembe District within Meru County, jointly with others not before court while armed with pangas robbed **TIMOTHY KIMATHI NJUKI** of property and cash all valued at Kshs. 26,600 and during the time of the said robbery used violence on the said **TIMOTHY KIMATHI NJUKI.**

The appellants were tried and convicted for the offence. They were sentenced to suffer death. They now appeal against conviction and sentence.

The 1st appellant was represented by M/s Thibaru, learned counsel. The 2nd appellant was in person. The first appellant raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact by failing to that the first appellant was not properly identified.

2.That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

3. That the learned trial magistrate failed to uphold that the appellant was entitled to legal representation.

The second appellant also raised three grounds as follows:

1.That he was held in police custody longer than the law prescribes.

2.That the learned trial magistrate erred in law and fact by not making a finding that there was a grudge.

3.That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

When the appellant alighted from a matatu, he started walking and after about half a kilometer, he was accosted by robbers. The appellants were among the robbers.

The appellants denied any involvement in the offence and contended that the allegations were false.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The court of Appeal sitting in Malindi had occasion to deal with the issue of legal representation in the case of **KARISA CHENGO, JEFFERSON KALAMA KENGHAK KITSAQ CHARO NGATI vs. REPUBLIC [2015] KLR held:**

> **"State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal and is mandatory. We are of the considered view that in addition to situations where 'substantial injustice would otherwise result,' persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."**

My perusal of the record in the instant case does not reveal any complexity that may have resulted in substantial injustice for lack of legal representation.

The issue of the breach of the constitutional right of an accused person has long been settled by the court of appeal in the case of Julius Kamau Mbugua v Republic [2010] eKLR Where the court said;

> **In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police *per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory**

duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.

Furthermore, we respectfully agree with the decision of Emukule, J. in the Republic vs. David Geoffrey Gitonga that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated in that case subsists. Indeed, Section 77 prohibits a prosecution where a person has already been convicted or acquitted of the same offence (double jeopardy) or where he has been pardoned. Further, Section 77 prohibited a conviction for an offence which did not constitute an offence when it was committed or where the offence is not defined and the penalty therefor prescribed in a written law. Section 77 also stipulated that the court should be established by law and should be independent and impartial. Nor is it correct to say that the court has no jurisdiction to try a suspect after his rights to personal liberty have been breached by police before he was charged. The law gives jurisdiction to the criminal courts to try any person suspected of having committed a criminal offence subject to the constitutional safeguards.

I have quoted extensively so as it can be very clear where the redress for such a breach can be sought. Although the court of appeal was at the time addressing the provisions of the former constitution, the same still applies in the present constitution.

The second appellant raised an issue of grudge with the complainant. The learned trial magistrate addressed this issue before dismissing it, and rightly so. There is no logical explanation as why the complainant would be robbed by another person in broad day light and then implicate the second appellant due to existing differences over water. Secondly, he gave out the name of the second appellant to Sabera Kaimuri (PW2) and to Regina Nkirote (PW3) the area assistant chief.

The complainant testified that the two appellants were people known to him earlier This has come out also from their defence. He immediately informed Sabera Kaimuri (PW2) after catching up with her and also reported to the area assistant chief the identity of the two. The investigating officer, PC Peter Muthama (PW5) testified that at the time of reporting he (complainant) gave out the names of the two appellants as part of the gang that robbed him.

Both appellants raised the issue of sufficiency of evidence. The complainant's evidence was supported by that of Sabera (PW2). The latter witnessed the robbery. In my view, there was ample evidence on record on which the learned trial magistrate based his conviction. The incident was promptly reported to the area assistant chief and the names of the two appellants given.

The upshot of the foregoing analysis is that the appellants' appeal lacks merit. The same is dismissed.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE