



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL CASE NO. 244 OF 2007

ANTONY MURAGE KABETHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of R. N. Nyakundi Chief Magistrate, Nyeri, in the Chief Magistrate's Criminal Case No.78 of 2004)

JUDGMENT

Anthony Murage Kabethi, the appellant herein, was tried on a charge of robbery with violence contrary to *Section 296(2)* of the Penal Code. At the end of trial the Appellant was convicted and sentenced to suffer death. He is now before this Court seeking to challenge the conviction and sentence.

On appeal, the Appellant put forward the following grounds in his Petition:

- 1. That the learned trial magistrate greatly erred in both points of law and fact by failing to consider that the appellant's constitutional rights were violated as stipulated under Section 72(3) of the Constitution.**
- 2. That the learned trial magistrate erred in both points of law and facts by not considering that section 198 CPC read with section 77(2) (b) and of the Constitution were violated.**
- 3. That the learned trial magistrate erred in both law and fact by failing to observe that the column during the ruling was not indicated.**
- 4. That the learned trial magistrate erred in both points of law and fact by convicting I the appellant in a case where there was no any identifying witness.**
- 5. That the learned trial magistrate erred in both points of law and fact by convicting I the appellant on the evidence of the government analyst (PW5) without observing that:-**
 - (i) Sample dated 6/1/04 was hard to group.**
 - (ii) Samples submitted as per records in memo form got misplaced by the government analyst as indicated in the exhibit memo prepared by the government analyst.**

(iii) *The object alleged to have injured the suspect was not taken for a DNA test and it was not exhibited.*

(iv) *The scene of crime was not given proper service as required.*

6. *That the learned trial magistrate erred in both law and fact by ignoring court's ruling that the appellant not to be extracted more blood samples (in crc 4314 of 2004). Your lordships I apply for it is CRC FILE No. 4314/04 to be produced at the hearing date of this appeal.*

7. *That the learned trial magistrate erred in both points of law and fact by being impressed by my mode of arrest.*

8. *That the trial magistrate erred in both points of law and fact by not observing that vital witnesses, including the scene of crime personnel and the officer who escorted other blood sampled were not summoned to testify, thus the case remained clearly doubtful.*

9. *That the learned trial magistrate erred in both law and fact by rejecting my alibi defence without giving cogent reasons of so doing, and further erred by dismissing my defence witnesses.*

10. *And that I pray for a copy of lower court proceedings to assist me to prepare a reasonable hypothesis to forward during the hearing of this appeal, and I wish to be present during the hearing date of my appeal. Reasons wherefore I the appellant prays that may my appeal e allowed, convictions quashed, sentence set aside and I be set at liberty forthwith.*

We wish to state in brief the case that was before the trial court before considering the appeal. A total of twelve (12) witnesses testified in support of the prosecution's case. The particulars of the offence are that on the night of 3rd May 2003 at Micha village in Nyeri District, the appellant jointly with others not before Court, while armed with dangerous weapons, namely pistols robbed one Paul Maina Njogu and Phylis Ndunge Njogu of Ksh.15,000/=, mobile phone make siemens C25, a bunch of keys and personal documents and at the time of the said robbery used actual violence and shot dead one Paul Maina Njogu and also threatened the use of violence against Phylis Njogu. Phylis Njogu (P.W.1) told the trial Court that on 2nd May 2003 she, together with her husband, Paul Njogu, travelled from Nairobi to their rural home at Gatitu. At about 2.00 a.m. P.W.1 said she heard a bang and shortly she heard people who had surrounded the house claiming to be Police officers demand for the door to be opened. Gunshots rent the air and at this juncture, Paul Njogu is said to have told P.W.1 that he had been shot. Paul Njogu, now deceased is said to have picked up a panga, moved towards the thugs and managed to cut one of the attackers in an ensuing struggle. The thugs shot at the deceased fatally injuring him. Christopher Njogu (P.W.2), and Michael Njogu (P.W.3), told the trial court that they were at home to prepare for the celebration of the wedding of their brother. The duo stated that they heard gunshots at night from the deceased's house and proceeded to the deceased's house to check at what had happened. They found P.W.1 holding Paul Njogu, deceased. By that time, the deceased had been shot. P.W.1, P.W.2 and P.W.3 took the deceased to Nyeri Provincial General Hospital where he passed away while undergoing treatment. P.C. Joseph Kamau (P.W.8) told the trial Court that on the tip of a Police informer, the appellant was arrested at Samaria Bar and handed over to the D.C.I.O., Nyeri for further investigations. P.C. Thomas Muriuki (P.W.9), told the trial Magistrate that Police visited the scene of crime where they collected blood samples which were spilt all over. The blood samples of the Appellant were also drawn for analysis and comparison since there was evidence that the deceased had assaulted one of his attackers with a panga. **John Kimani Mungai** (P.W.5) stated that on receipt of the blood samples of the Appellant he analysed the same and compared with the blood stains collected from the scene of crime. P.W.5 came to the conclusion that the blood stains collected from the scene of crime matched with that of the Appellant. When placed on his defence, the appellant gave unsworn testimony where he denied the offence. The Appellant claimed that on 8th August 2003 he was stung by a spider thus making his hand swell leading to an amputation at Menengai hospital. Having set out the case that was before the trial court we now shift our attention to the appeal.

When the appeal came up for hearing, Mr. Wahome, learned advocate for the appellant, attacked the trial court's decision on various fronts. It is the submission of Mr. Wahome that the judgment of the trial court was not dated contrary to the provisions of *Section 169* of the Criminal Procedure Code. Miss Ngalyuka, learned Senior State Counsel, conceded that the judgment was not dated. She is of the view that the defect is not fatal. We have carefully examined the original record and it is apparent that both the handwritten and the typed judgment were not dated. The provisions of *Section 169(1)* of the Criminal Procedure Code expressly provides *inter alia* that the judgment shall be dated and signed by the presiding officer in open court at the time of pronouncing it. The question which we must grapple with is whether the defect is fatal as to render the whole judgment as a nullity? In our view, we think the correct exposition of the law is that the failure to date a judgment will not invalidate the whole decision despite the express provisions of the law which is stated in mandatory terms. In **Kagoye s/o Bundala =Vs= R. [1959] E.A. p. 900**, the Court of Appeal for Eastern Africa adopted the decision of the Supreme Court of Seychelles in **Willy John =Vs= R 1 [1953] E.A.C.A. 509**, in which it was stated in part as follows:

“The failure to date and sign the judgment is a mere irregularity which can be cured by the application of S 304 C.P.C. (equivalent to s. 346 C.P.C.) since the whole of the record of the proceedings is in the hand of the trial judge and there was no prejudice to the appellant. But the failure to comply with the other requirements of the section is fatal to the conviction.”

We shall apply the above statement of law to this case.

The Appellant's counsel further argued that the Appellant did not undergo a fair trial. It is alleged that *Section 122A* and *B* of the Penal Code were breached. It is said the Court jumped into the arena to assist the prosecution to secure evidence. Miss Ngalyuka, did not address us over this issue. We have carefully looked at the recorded evidence. The Appellant was required by law under *Section 122A* of the Penal Code to voluntarily permit the Police to draw his blood for DNA testing. Where he refuses to give his consent, the Police are enjoined to make an application in Court to permit the Police forcefully obtain the blood under *Section 122B* of the Penal Code. The second option was exercised in this case. In our humble view, we think the court did not enter the arena to assist the prosecution but it merely exercised its statutory power in granting the orders sought according to the merits of the application.

The third serious ground argued by Mr. Wahome is that the person who prepared the exhibit memo and the person who collected the blood samples at the scene of crime were not summoned to testify. The learned advocate further stated that the inventory of the blood stains collected at the scene was not produced before the trial Court. It is further the argument of the Appellant that it was necessary to compare the blood of the deceased and that of the Appellant in order to reach at a conclusive decision to link the Appellant with the offence. It was also pointed out that the exhibit memo talks of the blood samples collected at Skuta Estate while the charge sheet states that the incident took place at Micha village. Those places are totally different. Again, Miss Ngalyuka, did not address us on the above issues. We have carefully considered the recorded evidence. With respect, we agree with the submissions of Mr. Wahome Gikonyo learned advocate for the Appellant that there was need to analyse the blood samples of the deceased and compare with that of the Appellant to clear any doubts. It is possible the Appellant and the deceased are of the same blood group. The evidence of P.W.9 clearly shows that both the deceased and the suspect shed blood at the scene of crime. We also agree with the submissions of Mr. Wahome that there was need to summon the witness who prepared the exhibit memo and the person who collected the blood stains at the scene. This is necessitated by the fact that there was conflict as to whether the blood stains were collected in Skuta Estate or in Micha Village. Had those witnesses been summoned the appellant could have a chance to cross-examine the witness to clarify where the blood samples were collected from. We have entertained in our thoughts some doubts. First, we think there was no credible evidence to place the Appellant at the scene of crime. The only evidence which placed the Appellant at the scene of crime is the blood stains allegedly collected from the scene of crime which is said to match with that of the Appellant. We have already pointed out that the prosecution failed to summon the witness who collected the blood stains from the scene. Such a witness could have clarified the place where he collected the blood stains. Even if such a witness had been summoned and he truly confirmed that the blood stains were collected from the scene of crime, there was need to establish the blood group of the deceased and compare with that of the Appellant to displace the Appellant's defence of alibi. If it turns

out that the appellant and the deceased were of same blood group then there will be doubt whether the blood stains found at the scene was that of the Appellant or the deceased. We shall given the benefit of doubt to the Appellant.

In the final analysis we allow the appeal. The conviction is quashed and the sentence of death set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 10th day of February 2012.

J. K. SERGON
JUDGE

J. WAKIAGA
JUDGE