



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 175 of 2008

JAMES WACHIRA NDERITU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*(Appeal from the original conviction and sentence in the Principal Magistrate's Court
at Nanyuki Criminal Case No.810 of 2007 dated 27th May 2007
by Ndungu H. N. (Miss) Ag. Senior Principal Magistrate)*

JUDGMENT

JAMES WACHIRA NDERITU, the appellant herein, was tried on a charge of three counts. The first count is in respect of a charge of robbery with violence contrary to *Section 296(2)* of the Penal Code while counts 2 and 3 relate to a charge of assault causing actual bodily harm contrary to *Section 251* of the Penal Code. After undergoing a trial, the Appellant was convicted on all counts. He was sentenced to suffer death in count I. The sentences in counts 2 and 3 were kept in abeyance. Being dissatisfied, the Appellant preferred this appeal.

On appeal, the Appellant put forward a total of eight (8) grounds in his Petition of appeal. When the appeal came up for hearing one preliminary issue was raised, that is to say that the learned trial magistrate failed to resolve that the appellant's rights under *Section 72(3)* of the Constitution as read with *Section 198* of the Criminal Procedure Code were violated. We think we should determine the preliminary issue before considering the merits of the appeal. It is the submission of Mr. Chweya, learned advocate for the Appellant, that the Appellant was held for 16 days before being taken to court. This ground was specifically raised as ground 1 in the Petition of Appeal. Miss Ngalyuka did not address us over this ground. We have examined the recorded evidence and it is apparent that the Appellant was arrested on 22nd April 2007 and taken to court for plea on 7th May 2007. It is obvious he was held for 16 days in Police custody without being taken to court. The Constitution under *Section 72 (3) (b)* allowed the Police to hold a suspect of a capital offence for 14 days. The same section placed a burden of proving that the person arrested or detained has been brought before a court of law as soon as reasonably practicable upon any person alleging that the provisions of this sub-section have been complied with. Despite having being prompted by the Appellant through his Petition of Appeal, Miss Ngalyuka, learned State Counsel did not attempt to explain the reasons why the Appellant was held beyond the days allowed by the Constitution. The Court of appeal stated *inter alia* the case of ALBANUS MWASIA MUTA =VS= REPUBLIC CRIMINAL APPEAL NO. 120 OF 2004 (unreported) AT PAGE 7 as follows:

“At the end of the day, it is the duty of the `courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.....an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”

We have no doubt that Appellant's constitutional rights were breached and no explanation was given. Having come to the aforesaid

conclusion, we are of the view that we do not need to consider the merits of the appeal. We allow the appeal with a consequential order that the conviction of the Appellant is quashed and the sentence of death is set aside. We order the Appellant to be set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE

In open court in the presence of Mr. Macharia h/b Chweya for Appellant and Mr. Makura for the State

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE