REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 243 of 2008

GEORGE WACHIRA GITHAIGA……..…..……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No.1131 of 2006 dated 26th August 2008 by L. Mburgua, Ag. Principal Magistrate)

JUDGMENT

GEORGE WACHIRA GITHAIGA, the appellant herein, was tried on a charge of two counts. In the first count he faced a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code. On the second count he faced a charge of being in possession of cannabis sativa (bhang) contrary to *Section 3 (1)* as read with *Section 2 (A)* of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994. At the end of the trial the Appellant was acquitted in count II. He was, however, convicted for simple robbery under *Section 296 (1)* instead of robbery with violence under *Section 296 (2)* of the Penal Code. He was sentenced to three years imprisonment. He is dissatisfied with the aforesaid decision hence this appeal.

On appeal, he put forward the following grounds:

1. ***That the learned trial magistrate erred both in law and facts when relying with a single evidence of the complainant of which his evidence was not sufficient.***
2. ***That nobody witnesses the alleged robbery and no arresting officer.***
3. ***That the learned trial magistrate erred both in law and facts not considering that the duration between the time of offence and the time of my arrest and the duration I was delayed in the police custody and the offence which I was charged with before.***
4. ***That the learned trial magistrate misled herself when convicting me with a single evidence.***
5. ***That the learned trial magistrate erred when rejecting my defence without giving proper reason why…? And failing the provision of law under Section 169 (2) off C.P.C.***

It is the submission of Mr. Makura, the learned State Counsel,

that the appeal should be dismissed because there is overwhelming evidence to support the charge. It is also argued that there was electric lights which assisted the complainant recognize the Appellant.

I have carefully perused the record of appeal. Two main issues are apparent. First, is that the trial magistrate did not comply with the provisions of *Section 200* of the Criminal Procedure Code. The evidence of the only witness called by the prosecution was presented before P. C. Tororey, the then learned acting Principal Magistrate. When she left the Judiciary, L. Mbugua, learned acting Principal

Magistrate, took over the case. On 12th February, 2008, the court prosecutor indicated that the case would start *denovo.* The record does not show that the learned acting Principal Magistrate sought for the opinion of the Appellant on how he intended to proceed with his case upon the departure of M/S P. C. Tororey. The record shows that on 31st July 2008 the learned acting Principal Magistrate denied the prosecution an adjournment prompting the prosecution to close its case. The learned acting Principal Magistrate promptly placed the Appellant on his defence. I am not convinced the learned Principal Magistrate appreciated the fact that the prosecution had wanted the case to start afresh. By that time, strictly speaking, there was no evidence which could have been used to place the Appellant on his defence.

The second issue which was argued by the Appellant is that his constitutional rights under *Section 72 (3) (b)* of the Constitution were breached. It is apparent from the record that the Appellant was arrested on 13th November 2006 and held in Police custody upto 13th December 2006 when he was taken to court. He was held beyond 14 days allowed by the Constitution. This ground was specifically pleaded but the prosecution failed to give an explanation for the delay. Where there is no explanation for such a constitutional breach, the Appellant is entitled to an acquittal irrespective of the strength of the case facing the accused.

For the above reasons the appeal must succeed. The appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 12th day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Orinda for the State and the Appellant in person.