REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 265 of 2007 & 266 of 2007 (Consolidated)

JOE MWANGI WANJOHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 266 OF 2007

JOSPHAT WAMBUGU GICHUKI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Resident Magistrate's Court at Mukurweini in Criminal Case No. 543 of 2007 dated 11th September 2007 by V. W. Ndururu – Ag. S.R.M.)

J U D G M E N T

The two appellants whose appeals I have consolidated for ease of hearing and as they arose from the same trial were accused of allegedly robbing one, Stephen Ngunjiri of Kshs.2000/=. It was alleged that on 22nd July 2007 at A-Z bar within Kiahungu market in Nyeri District of the Central Province the two robbed **Stephen Ngunjiri** Kshs.2000/=. Both appellants denied the charge and their trial ensued in earnest.

Briefly the prosecution case was that on 22nd July 2007, at about 5.00 p.m., PW1 **Stephen Ngunjiri** the complainant herein arrived at A-Z bar and took some drinks worth Kshs.25/=. 10 minutes later he decided to go for a call of nature at the rear of the bar where apparently urinals were located.

On his way back from the urinal two men came from behind and held him. In the process they strangled him as they demanded money from him. In the ensuing struggle he managed to identify the two men as the appellants herein. It was the 2nd appellant who was strangling him with both hands as the 1st appellant kept murmuring "**what is happening"** He then put his other hand into the complainant's breast pocket wherein he had kept a sum of Kshs.2,000/=. The complainant screamed and attracted the attention of other bar patrons who came to his rescue. By which time the appellants had escaped from the scene. PW2 **Ann Wambui** is a bar attendant at A-Z bar. She testified that at about 5.00 p.m. on the material day, the 2nd appellant came to the bar and requested for a tissue paper. He then proceeded to relieve

himself at the bar's washrooms at rear. Shortly afterwards, she heard someone screaming from the vicinity of the toilets. On coming out she found the 2nd appellant holding the complainant by the neck. The complainant's pockets had by then been emptied. The 2nd appellant then released the complainant on seeing her and escaped through the fence. She denied seeing the 1st appellant at the scene. PW3 **Mathew Nderitu** is the proprietor of A-Z bar. He confirmed that the complainant was among the patrons in his bar on the material day and time. He told the court, that shortly after the complainant proceeded for a short call behind the bar, the 2nd appellant came to the bar. The 2nd appellant was given some tissue paper by PW2 and proceeded to the toilets as well followed by the 1st appellant. After about 1 minute or so he heard screams from the direction of the toilets and promptly responded. He went towards where the screams were coming from only to find 2nd appellant straggling with the complainant as he tried to free himself. The 2nd appellant promptly escaped through the fence on seeing him. 1st appellant on the other hand was hesitant and on seeing PW3 pretended to have been assisting the complainant a fact PW3 denied as he witnessed him struggling with the complainant in the company of the 2nd appellant. When the 1st appellant realised that other patrons were streaming to the scene he sneaked out.

PW4 No. 65897 apprehended and charged both the appellants.

Put on their defence, the appellants elected to give unsworn statemens of defence and called no witnesses. The 2nd appellant who was the 1st accused during the trial conceded his presence at A-Z bar on the material day and time for a call of nature. When done he left. It was his defence that he never at any one time saw the complainant. As for the 1st appellant who was the 2nd accused, he claimed to have been dragged into the case simply because he was drinking with PW1. He denied witnessing the incident or attempting to rescue the victim.

The trial court having carefully evaluated and considered the evidence tendered found the prosecution case proved to the required standard and proceeded to convict and sentence each of the appellants to 10 and 5 years imprisonment respectively. Both appellants were aggrieved by the conviction and sentence hence the instant appeals which as I have already said were consolidated. The appellants jointly fault their conviction by the learned magistrate on the violation of their constitutional rights, insufficiency of evidence and them not being arrested in possession of any stolen item(s).

When the appeal came up for hearing, the appellants with the permission of the court tendered written submissions in support of their appeals which I have carefully read and considered.

The state through **Mr. Orinda**, learned Senior Principal State Counsel opposed the appeal. Counsel submitted that the appellants did not dispute their presence at the scene of crime. They were recognised by the prosecution witnesses in the act. The sentence imposed according to counsel was lenient. In fact the appellants were lucky to get off with simple robbery charge when the ingredients of a more serious charge of robbery with violence had been met.

As a first appellate court, it is my duty to submit the evidence tendered during the trial to fresh and exhaustive evaluation bearing in mind of course the injunctions alluded to in the case of **Okeno v/s Republic (1972) E.A. 32**. However I am of the considered view that this appal may very well be determined on the question of the constitutionality or otherwise of the appellants' trial in the subordinate court.

The appellants were arrested for the offence on 28th July 2007 and were detained in custody until 31st July 2007 when they were arraigned before court to face the charge. The offence that the appellants were charged with was not a capital offence. Accordingly under section 72(3) (b) of the constitution the appellants should have been presented before court within 24 hours on their being arrested. Failure to present an accused person in court within the 24 hours of his arrest and with no reasons proffered for the delay has always led this court to find that his constitutional rights have been violated and consequently the conviction by the lower court would be quashed. The court of appeal in the case of **Paul Mwangi Murungu v/s Republic NKR Criminal Appeal No. 35 of 2006** (UR) commented on the issue in the

following terms:-

"**We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.**

That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case."

In the case of **Albanus Mwasia Mutua v/s Republic Criminal Appeal No. 120 of 2004** (unreported), the Court of Appeal had the following to say in respect of such violation:-

"**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. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that 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 to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the constitution also amounted to a violation of his rights under Section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone".**

Similarly in the case of **Gerald Macharia Githuku v/s Republic Criminal Appeal No. 119 of 2004,** the Court of Appeal in deciding the appeal found that the appellant had been detained for a total of 17 days from the date of his arrest to the date of being taken before court. The court of appeal in upholding his appeal had the following to say:-

"……**. although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable."**

I note that this issue was raised by the appellants in their respective written submissions. However **Mr. Orinda**, in his wisdom chose not to respond to the same. Accordingly there is no explanation proffered by the state as to the delay of 4 or so days in arraigning the appellants before court.

In the end and in view of the appellants' detention in police custody for 4 or so days following their arrest for the offence they faced in the lower court I find that the conviction entered against them must be

quashed. I do therefore quash the conviction of the appellants and do set aside their sentences and order that they be released from custody forthwith unless otherwise lawfully held.

Dated and delivered this at Nyeri 29th day of January 2009.

M. S. A. MAKHANDIA

JUDGE