**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**CRIMINAL APPEAL 295 OF 2007**

**PETER WAIGURU MBUGU ................................ APPELLANT**

**VERSUS**

**REPUBLIC ........................................................ RESPONDENT**

***(Appeal from original Conviction and Sentence in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1281 of 2005 dated 7th August 2007 by T. W. Murigi – S.R.M.)***

**J U D G M E N T**

The appellant Peter Waigoro Mbogo was arraigned before the Senior Principal Magistrate's Court at Murang'a to answer to the charge of attempted rape contrary to section 141 of the Penal Code.

Particulars of the offence were that on the 24th day of April 2005 at Murang'a District within the Central Province he attempted to have carnal knowledge of **G W M** without her consent

He also faced an alternative charge of indecent assault on a female contrary to section 144(1) of the Penal Code particulars thereof were that on 24th day of April 2005 at Kahatia village in Murang'a District within Central Province, unlawfully and indecently assaulted **G W M** by touching her private parts.

He faced a second count of stealing contrary to section 275 of the Penal Code. The particulars being that on the 24th day of April 2005 at Kahatia village in Murang'a District within Central Province stole a pair of shoes, 2kg packets of unga and cash Kshs.500/= all valued at Kshs.1255/= the property of **GW M**. The appellant pleaded not guilty to all the charges and his trial ensued.

The complainant **GW M** (PW1) testified before the trial court that she was from Kahatia, Ithenyo village and had known the appellant since childhood as they were from the same village. On 25th April 2005 she was from Nairobi on her way home at about 7 p.m. and was carrying two bags. She then saw two people walking ahead of her and as she neared them one of them greeted her. When she inquired who it was the man identified himself as the appellant. She did not however know the other man that the appellant was with. That the other man started walking behind them and the appellant told her not to worry since he was a respected man in the neighbourhood and would not harm her. She continued walking with the appellant and when they got to a junction facing her home the other man had disappeared. The appellant told her to stop but she continued walking briskly and that is when he held her bag, pulled her dress and told her he will have sex with her. She however managed to shake him off. It was her evidence that she

had worn a skirt and he pulled both her pant and skirt downwards. The pant in the process got torn, she identified her torn pant in court. That after pushing him away she ran off with one bag leaving the other bag and went to the nearby home of one Mr. Kibiru and informed him that a man she knew had attempted to rape her and that she had left her bag behind. That in the company of Kibiru they went back to the scene but they did not find the appellant nor the bag though some other men informed them that they had met with the appellant carrying a bag. That very same night she also went to the home of the appellant in the company of her son (PW3) but they did not find him. Next morning she recovered her bag behind her house though a packet of maize flour, Kshs.500 and shoes were missing. She identified the appellant as the person who had attempted to rape her.

PW2 No. 79324 P.C. **Benard Ndirangu** testified that he was the investigating officer in the case. It was his evidence that on 25th June 2007 at about 12.00 p.m. the appellant was brought to Kahuro Police Station by **A.P.C. Wachirui** attached to Kahatia A.P.C. camp with the allegation that on 25th April 2005 he had attempted to rape PW1. That he also received a pant belonging to PW1 which he produced as an exhibit in court. He re-arrested the appellant, and upon investigations, preferred the instant charges against him.

The appellant was found to have a case to answer. He elected to give unsworn statement of defence and called two witnesses. He testified that on 25th April 2005 he was at Ichichi and returned home the following day since there were elections. It was his evidence that on 27th April 2005 he was arrested over the instant offences. It was his further evidence that he did not see PW1 on 25th April 2007.

DW2 **Robert Gitau** testified that he knew both the appellant and the complainant since they were from his village.

It was his evidence that on 25th April 2005 he was with the appellant at Kahatia town but they parted ways at 1 p.m. when the appellant informed him that he was proceeding to attend some elections at Kahuti. That he later heard on 27th April 2005 that the appellant had been arrested by A.P. officers. At the A.P. Camp, he met the complainant who informed him that the appellant had attempted to rape her and she had in the process lost her bag which had maize flour, Kshs.500/= and her clothes.

The third defence witness called by the appellant was DW3 **Harrison Kuria Mbogo**. He testified that the appellant was his brother. It was his evidence that on 25th April 2005 PW1 went to his house at about 10 p.m. and inquired regarding the whereabouts of the appellant but he informed her he did not know. That she informed him that some people had frightened her and one of them was the appellant and that he should tell him to take her bag back to her.

The learned magistrate having carefully evaluated and analysed the evidence tendered by both the prosecution and defence found favour with the prosecution's version of events. She disbelieved the alibi advanced by the appellant. Accordingly she convicted the appellant and sentenced him to 30 years imprisonment on count 1 and 3 years imprisonment on count II. The learned magistrate made no findings with regard to the alternative count and correctly so in my view.

The Appellant felt dissatisfied with both conviction and sentence. Hence this appeal. Through **Messrs Gacheru J. & Co. Advocates**, the appellant has faulted his conviction and sentence on various grounds. However the ground urged before me by **Mr. Gacheru**, learned counsel for the appellant was with regard to the alleged violation of constitutional rights of the appellant. That he was arrested and held in custody for a period in excess of 24 hours. On that basis alone, the appellant was entitled to an acquittal. For that proposition, counsel relied on the now notorious case of **Gerald Macharia Githuku & Another v/s Republic Cr. Appeal No. 119 of 2004** (unreported).

**Mr. Orinda**, learned Senior Principal state counsel countered that argument on the basis that the issue of delay in arraigning the appellant in court ought to have been raised during the trial. That it was the appellant to lay down the basis why he thinks his rights to liberty were violated. We can only go by the record but again the record may be inconclusive. Finally counsel maintains that this court cannot be

satisfied with such an allegation from the bar. He was of the view that the authority cited by the appellant was distinguishable. On his part however, **Mr. Orinda** sought to rely on the recent court of appeal decision in the case of **Muriithi Mwai & Another v/s Republic, Cr. Appeal No. 286 of 2006 (unreported).**

With tremendous respect to the learned Senior Principal State Counsel, I do not agree with him when he submits, that the issue of delay in arraigning the appellant in court and in the process violation of his constitutional rights ought only to be raised in the trial court. To my mind the issue is a matter of law which can be raised at stage in the proceedings whether in the trial court or even in the appellate court. Indeed it is a matter that goes to jurisdiction. Accordingly the mere fact that the issue is not raised during the trial cannot bar the affected party from raising it at the appellate stage. I am also unable to agree with Mr. Orinda's submission that we cannot go by the record of the trial magistrate as it is likely to be inconclusive. Ours is a court of record and we can only go by what is reflected in the record before us and not on the basis of presumptions, conjecture and or speculation. I am of the view therefore that **Mr. Gacheru** was right in taking up the issue in this appeal.

This court has, in several decisions, made it clear that where an appellant is held in custody for a period beyond the period provided by law which as in this case is 24 hours as the appellant had been charged with a non capital offence without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is under unlawful custody in violation of section 72(3)(b) of the constitution. In such circumstances, his constitutional rights would have been violated or breached, entitling him to be released by this court notwithstanding that the case against him may very well be strong. This position was succinctly enunciated by the court of appeal in the now celebrated case of **Albanus Mwasia Mutua v/s Republic Criminal Appeal No. 120 of 2004** (unreported) and reiterated by the same court in the case of **Gerald Macharia Githuku** (supra) and again adopted by the same court in the most recent case of **Paul Mwangi v/s Republic, Cr. App. No. 35 of 2006** (unreported). In the latter case the court indicated what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under section 72(3) (b) of the constitution. Thus, the law as to the treatment the courts will give to cases where section 72(3) (b) of the constitution are violated without acceptable and reasonable explanation is now well settled. That, however, depends on such violation being established. The court of appeal again had this to say on the issue in the case of **Daniel Munyoki Nyanza & Another v/s Republic, Cr. App. No. 134 of 2005** (unreported). "**...... The facts must exist to show that the police have detained a person in unlawful custody before the courts can act on the allegation. Such facts would be readily available in the record before the court in case of first or second appeal or would be adduced in evidence in the case of the trial court. Courts of law do not act in a vaccum nor would a court of law act on half baked evidence."** In this case before me, there is on record, clear undisputed evidence of such violation and the period of the delay to take the appellant to court well established. From the charge sheet and the evidence of the investigating and re-arresting officer, the appellant was arrested and or re-arrested on 24$^{th}$ June 2005. However it was not until 29$^{th}$ June 2005 that the appellant was arraigned in court. For the kind of offence that confronted the appellant, he ought pursuant to section 72(3) (b) have been arraigned in court within 24 hours of his arrest. The explanation for the delay was not given during the trial nor during the hearing of the appeal. Under all those circumstances, there is proper evidence on the complaint based on violation of the appellant's rights under section 72(3) (b) of the constitution. The appellant must thus get the benefits of the consequences of the alleged violation of that provision as there is ample evidence of such violation that is discernable from the record.

Accordingly, I would allow the appeal, quash the conviction and set aside the sentences imposed on the appellant. The appellant is entitled to his liberty unless he is otherwise lawfully held.

***Dated and delivered at Nyeri this 29$^{th}$ day of January 2009***

**M. S. A. MAKHANDIA**

**JUDGE**