REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 160 OF 2008

JAMES ESINYEN NGAPETHUR……..……..…..…APPELLANT

VERSUS

REPUBLIC……..……..……..……RESPONDENT

JUDGMENT

The appellant, **James Esinyen Ngapethur** was charged with two counts and one alternative charge. The first count was the offence of **attempted murder** contrary to **section 220(a)** of the **Penal Code.** The particulars of offence of the first count state that on the night of 28th and 29th day of November 2005 at Ndabibi AP camp in Naivasha District within Rift Valley Province, the appellant unlawfully attempted to cause the death of Ramadhan Kitsao by shooting at him with a G3 firearm S/No 77094875.

The second count was the offence of unlawful use of firearm by Police Officer contrary to section 26(1) of the Firearms Act. The particulars of offence state that on the night of 28th and 29th day of November 2005 at Ndabibi AP Camp in Naivasha District within Rift Valley Province unlawfully used a firearm G3 S/No. 77094875 which was under his control by firing eighteen rounds of 7.62mm towards Ramadhan Kitsao thereby wounding the said Ramadhan Kitsao.

The alternative charge was the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of offence state that on the night of 28th and 29th day of November 2005 at Ndabibi AP camp in Naivasha District within Rift Valley Province, unlawfully did grievous harm to Ramadhan Kitsao.

The appellant was tried before the Principal Magistrate's Court at Naivasha and found guilty as charged in count 1 and count 2. He was sentenced to 25 years imprisonment for the first count and 3 years imprisonment for the second count. The appellant was discharged for the alternative charge of grievous harm contrary to section 234 of the Penal Code.

Being dissatisfied with both the conviction and sentence the appellant filed this appeal citing eight grounds of appeal namely that:

1. The learned trial erred in law and fact in failing to find that the appellant had been detained in police custody for more than 24 hours on suspicion of having committed bailable offences contrary to section 72(3) of the Constitution of Kenya.

2. That the learned trial magistrate erred in law and fact in failing to inform the appellant of the charges preferred against him in a language that he understood or in detail and in not taking down the appellant's

plea in the manner prescribed under section 77(2) (b) of the constitution.

3. That the learned trial magistrate failed to inform the appellant of his right under section 214(1)(2) of the Criminal Procedure Code to recall witnesses who had testified prior to the substitution of the charges.

4. That the learned trial magistrate erred in law and fact in failing to find that no medical evidence existed to show that the complainant was injured on the material date.

5. That the learned trial magistrate violated the provisions of section 57 of the Evidence Act (Cap 80) in admitting evidence of bad character.

6. That the learned trial magistrate erred in law and fact in failing to find that no firearm had been issued on the date of the alleged crime.

7. That the learned trial magistrate erred in law and fact in calling the appellant to tender evidence in his defence prior to the making of a ruling to the effect that a prima facie had been established as required under section 211 of the Criminal Procedure Code.

8. That the learned trial magistrate erred in law and fact in failing to take account the period the appellant had been in remand when passing sentence.

Learned counsel Mr. Maragia argued this appeal on behalf of the appellant while Mr. Mugambi learned state counsel appeared for the State and opposed the same. Grounds four and six of the petition of appeal were abandoned. Submitting on ground one Mr. Maragia pointed out that the appellant was arrested immediately after the commission of the offence on the night of 28th/29th November 2005 but was not brought to court until 6 days thereafter, on the 5th of December, 2005. The charge sheet exhibited before court shows that the appellant was arrested on 29th November 2005 and arraigned in court on the 5th December 2005. Mr. Maragia submitted that the offence herein being a bailable one the appellant ought to have been arraigned in court within 24 hours or failing that the prosecution ought to have explained the reason for delay. He cited the authorities of **Paul Mwangi vs. R. Criminal Appeal No. 35 of 2006** and **Ann Njogu vs. R. Criminal Application No. 551 of 2007** copies of which were availed to this court and have been duly considered. Mr. Maragia submitted that contrary to the legal requirements as set out in the said authorities prosecution in the present case did not discharge its burden to prove that the provisions section 72 (3)(b) of the Constitution and section 36 of the Criminal Procedure Code had been complied with.

Regarding the language Mr. Maragia submitted that the trial court did not indicate the language used at the time of taking the plea on 5th December 2005 and all that the learned trial magistrate recorded was words to the effect that:

"**COURT charge read over to accused who replies:-**

ACCUSED - Not guilty"

Counsel further pointed out that still the language used was not indicated when the complainant testified on 4th October 2007 and that when PW3 and PW5 gave their testimonies the language indicated was English while PW4 is shown to have testified in Kiswahili. It was counsel's further submission that the language of the court was again not indicated when the charges were substituted and the appellant called to plead afresh. Relying on the Court of Appeal decisions of **James Maina Wanjiru vs. Republic Criminal Appeal No. 20 of 2006** and **Mbaya vs. Republic [1984] KLR 657** Mr. Maragia submitted that there is clear doubt as to whether the appellant understood the language of the court and that the failure to indicate what language was used and/or whether any interpretation was accorded the appellant constitutes a fatal omission on the part of the trial court and that the said requirements being mandatory under the law such omission renders the proceedings null and void. Regarding ground five Mr. Maragia submitted that by finding as a fact that the appellant's sole intention was to use the firearm issued to him to commit a

crime the court erroneously admitted evidence of bad character when the appellant himself had not alluded to his good character. On ground seven Mr. Maragia referred the court to the lower court's proceedings of 3rd June 2008 which show that after the close of the prosecution's case no ruling as to whether a prima facie case had been established was recorded but a date was given for the hearing of the defence case following the appellant's request for time to prepare his defence. The date given was 5th June 2008. Counsel submitted that although the requisite ruling was made on the 5th of June 2008 after the appellant had told the court that he was ready with his defence the provisions of section 211 of the Criminal Procedure Code cannot be said to have been complied with owing to the sequence of events. Lastly Mr. Maragia submitted that when sentencing the appellant to 25 years imprisonment the learned trial magistrate ought to have considered that the appellant had been in custody for two years. On the above submissions Mr. Maragia asked this court to find that the conviction as a whole was unsafe and the appeal should succeed on all the grounds.

For the **State Mr. Mugambi** submitted that the delay in arraigning the appellant is explained by the fact that he was first charged with attempted murder after investigations into a crime of murder which is a capital offence and also the fact that the complainant was hospitalised for a month. The learned State Counsel submitted further that the appellant suffered no prejudice for failure by the court to indicate the language used and that he must have understood the language of the proceedings otherwise he would have been able to cross-examine the various witness or to tender evidence in his own defence. Regarding the alleged non compliance with section 214 of the Criminal Procedure Code Mr. Mugambi submitted that the recall of witnesses was not necessary since the substituted charge was not at variance with the previous charge having had the effect of only adding an alternative charge. According to Mr. Mugambi the appellant himself ought to have asked for such recall if he thought it necessary. On the issue of the recording of a ruling under section 211 of the Criminal Procedure Code vis a vis the defence case the learned state counsel submitted that such anomaly did not materially affect the trial court's proceedings since the accused elected to and did make an unsworn statement in his defence, hence the law was not contravened as alleged. Regarding sentencing Mr. Mugambi submitted that sentencing is a discretion of the court and that the failure to take into account the period the appellant had been in custody is of no consequence since sentences do not run prior to a conviction. He asked the court to dismiss the appeal.

Replying to the learned State Counsel's submission Mr. Maragia pointed out that the State's attempts to explain the delay in arraigning the appellant in court citing investigations into a murder charge cannot hold since no such charge was preferred. He asked the court to consider the various violations of mandatory legal requirements and declare the proceedings of the lower court null and void and to allow the appeal as prayed.

The prosecution called a total of 7 witnesses at the trial although by virtue of the 2nd witness APC Mohammed Wako being referred to as PW3 the trial court's record would appear to suggest that 8 witnesses testified for the prosecution. The complainant Ramadhan Kitsao testified as PW1. He stated that he was a Police Officer AP No. 224861 and that on 28th November 2005 he was working with the appellant who is also an administration policeman at Ndabibi Administration Police Post. He testified that he and the appellant were on the material date assigned duties to guard a farm owned by Benjamin Kosgei. They were both armed with G3 rifles. He told the court that he left the farm and returned to the camp at 5.00 p.m. where he returned his gun to the camp in-charge Mr. Wako. He had left the appellant at the trading centre. Asked by the in charge where the appellant was, PW1 told him he had left him at the trading centre. He returned to his house and slept. At about 2.00 a.m. he heard gunshots. Soon after he heard a knock at his door and the appellant talking to Wako. He got up opened the door for the two whereupon, Wako told him that the appellant was threatening that he would no longer work at the Ndabibi Administration Police Post and that he wanted to work in Naivasha. PW1 told them that he had telephoned the superiors in Naivasha in that regard. He offered the appellant some food which he refused to take. Suddenly the appellant started firing. PW1 tried to run away but was shot at the right side of the hand. He was taken to a nearby hospital and later transferred to Naivasha District Hospital where he was admitted for a month. He testified that the firearm used by the accused to shoot at him was the one before court a G3 rifle No. 7709485 which had been marked for identification as MFI-2. PW1 testified that no grudge existed between him and the appellant.

As already stated in this judgment APC Mohammed Wako was the second prosecution witness *(for the purposes of this judgment will be referred to as PW2).* He testified that on the date of the shooting incident he was at the Ndabibi camp with PW1 and the appellant. The complainant and the appellant spent the day together on patrol. In the evening the complainant returned his rifle but the appellant did not. Having been told that the appellant had proceeded to town with the rifle PW2 went to check and found the appellant drinking at a bar. The appellant told him that he had kept the rifle in the house. However on checking for it in the company of the complainant PW2 did not find the rifle. He proceeded to sleep. At 1.00 a.m. he heard gunshots and woke up. The appellant came to PW2's house and knocked at the door. Seized by fear PW2 told the appellant that he was unwell and could not open the door but because the appellant insisted PW2 obliged. He found the appellant holding the rifle at the door and ready to shoot. He was drunk. The appellant asked PW2 to call the boss at Naivasha and tell him that the appellant was fed up with *(the work)* and that he could come and pick the uniform. PW2 told the appellant that it would not be possible to call the boss at that time but the appellant, who would hear nothing of it became difficult and totally uncooperative. PW2 decided to wake up the complainant in the company of the appellant. While at the complainant's house the appellant was offered food but instead of eating it he started firing the gun. He fired many shots and PW1 was injured in the process. PW2 asked the appellant to call for first-aid claiming that he and PW1 and been injured. The appellant left and at Aquilla farm he reported that he had shot somebody. He was arrested. A police officer came and took PW1 to the Oserian Dispensary and later to Naivasha Distrist Hospital where he was admitted. PW2 also identified the gun marked as MFI 2 as the one used by the appellant to shoot the complainant. Under cross-examination by the appellant PW2 testified that he had no problems with the appellant prior to the incident and that although he believed the appellant was drunk when he shot PW1, PW2 was convinced that the shooting was not by mistake.

Dr. Jackline Kerubo Gichana a medical officer at Naivasha (District Hospital) testified as the third witness *(for the purposes of this judgment she will be referred to as PW3)*. She stated that she saw the complainant when he was admitted in hospital with a bullet wound on the right scapula area. She noted more than five gun shot wounds and classified the degree of injury as main. She stated that at time of examining PW1 the injury was less than seven hours old and she filled the P3 form on 18th July 2006. Under cross-examination by the appellant she stated that the complainant had big wound on the shoulder and several others on the leg of the complainant. Nothing material came from William the Assistant Chief Ndabibi location who only testified having been informed of the shooting incident, calling the D.O. and the officer in charge of Administration Police and collecting four spent cartridges at the scene. **PC Abdi Godana,** the 5th prosecution witness was the investigating officer in this case. He inspected the scene of the shooting where he found the door to the complainant's house shattered by bullets. He recovered one bullet stuck on the door and 17 spent cartridges. There was another empty cartridge handed to him making a total of 18. He recorded statements of witnesses and of those who were drinking with the accused before he shot the complainant. He did not interrogate the appellant but charged him with the offence before the trial court. **Emmanuel Lagat** a forensic ballistic expert of the CID headquarters testified as the 6th prosecution witness. His evidence was that he examined the exhibited rifle, magazine, 18 expended cartridge cases and one fired bullet. His analysis revealed that the cartridges shown to him were fired by the same gun the rifle marked as MFI-1 and produced as exhibit A which in his opinion was capable of being fired as per the definition provided in the Firearms Act. Sgt. John Njoroge testified that he knew the appellant and that he is the one who had issued him with the rifle in question on 22nd February 2005. He told the court that the appellant signed for the rifle but the movement register produced as exhibit 5 showed that the rifle was not returned.

The appellant elected to given an unsworn statement in his defence. He confirmed PW1's evidence that the two of them were, on the material date based at Ndabibi AP Camp and that had been assigned duties at a farm owned by one *(Kulei)* Benjamin where they worked for nine hours. He testified that he sought permission to go and eat at Ndabibi *(trading centre)* where he ate and drunk beer. On the way back to the camp he met some armed men who declined his order to stop. They tried to beat him wanting to steal the gun. The appellant fired and they ran away. He returned to the camp while drunk, went to the house of the complainant with the gun already corked. He fell down and since he was still holding the gun all the bullets came out hitting the complainant who was nearby. The appellant testified that he sought forgiveness of his colleague the complainant who was now writhing in pain. He went to Acquilla farm

and reported the incident to the Police Officer there. His report was that he had shot somebody. The appellant's further testimony was that he borrowed a vehicle and took the complainant to hospital and informed the O.C.S. Kongoni Police Station what had transpired. He handed over the gun and was locked up in the cells. He denied the offence and asked to be acquitted of the charges.

After stating the facts of this case as brought out by the various prosecution witnesses and considering the same against the defence tendered by the appellant the learned trial magistrate proceeded to convict the appellant of the charges in count 1 and 2 of the charge sheet and discharged him on the alternative charge. He based his conviction mainly on the fact that the appellant admitted that he did shoot the complainant '*by mistake'* and that he misused and '*almost'* caused the death of the complainant with the firearm issued to him *(Exhibit 1)*. The learned trial magistrate stated in the judgment that:

"***This court has absolutely no doubt that the accused person deliberately refused to return the rifle back (sic) to PW3 APC Mohammed… because the accused intended to put the gun into unlawful use; and he did put it into that unlawful use".***

He proceeded to say that;

"***the accused should only use the gun for lawful intended purpose to protect life and property but not destroy life and property unless there is a compelling reason for him to use the firearm. In the present instance there was absolutely no reason to use the firearm."***

The learned trial magistrate dismissed the appellant's defence as a mere denial.

Having considered the judgment of the lower court the submissions made both for and against this appeal and having analysed and re-evaluated the evidence tendered at the trial I am of the considered view that the appeal herein must succeed on grounds 1 and 7. It is clear from the record that the appellant herein was arrested on 29th November 2005 and was not taken to court until 5th December 2005 contrary to the requirements of **section 72(3)(b)** of the **Constitution** which requires *in mandatory terms* that a person arrested upon reasonable suspicion of having committed or being about to commit an offence not punishable by death must be brought to a court of law within 24 hours of such arrest or commencement of his detention. Where that is not possible the said provision places an onus upon the prosecution to prove that the delay in taking the person to court is justifiable or that it was not reasonably practicable to produce the accused person before court within the statutory period of 24 hours. It is in the same spirit that **section 77(1)(b)** of the **Constitution** provides that:

"***a person who is charged with a criminal offence shall be informed as soon as reasonably practicable of the nature of the offence with which he is charged."***

It is incumbent upon the state to prove that the provisions of **section 72(3)(b)** have been complied with. As earlier stated in this judgment the learned State Counsel Mr. Mugambi attempted to excuse the delay in arraigning the appellant before court as having been due to investigations into a murder charge. The said explanation is not backed by the record of the trial court even considering that the charge initially preferred against the appellant was substituted with one containing additional charges. The main charge of attempted murder remained unaltered. Mr. Mugambi's explanation does not fall within the exemptions set out in the authority of **Paul Mwangi Murunga vs. R. Nakuru Criminal Appeal No. 35 of 2006 [2008]eklr.** In this regard I accept the appellant's contention that his constitutional rights under **section 72(3)(b) and 77(1)(b)** *(where relevant)* have been violated.

Section 211 of the CPC provides that at the close of the prosecution's case 'and' after hearing such summing up submission or arguments as may be put forward, if it appears to the court that a case is made out against the accused person to sufficiently require him to make a defence the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box and that if he does so he will be liable to cross-examination, or to make a statement not on oath from the dock and shall ask him whether he has any witness to examine or other evidence to adduce in his defence." Clearly from the above it is imperative upon the trial magistrate to

invite a summing up, submission or argument before making a ruling as to whether a prima facie case has been made out requiring an accused to make a defence. The court is also required in mandatory terms to explain the substance of the charge to the accused person and to inform him of his rights as to the mode and manner in which to defending himself. The learned trial magistrate in this case failed to do so and appears to have abdicated his authority and responsibility as the manager of the proceedings. That the appellant requested for time to prepare his defence should not have influenced the learned trial magistrate to quickly conclude as he appears to have done that the appellant has a case to answer. I find the above to have been gross violations of statutory violations which were fatal to the trial proceedings.

Regarding ground three the appellant complains that he was not given an opportunity to recall witnesses who had testified prior to the charges against him being substituted. Section 214 of the Criminal Procedure Code provides that: Where a charge is altered by amendment, substitution or addition of (a) new charge(s);

(i) The court shall thereupon call upon the accused to plead to the altered charge

(ii) the accused may demand that witnesses or any of them be recalled.

The record shows clearly that when the charges herein were substituted on 4th January 2008 the appellant did plead to the additional charges. He did not object to the application to substitute the charge. From my reading of proviso (ii) of section 214 of the Criminal Procedure Code it is for the accused person to demand that witnesses or any of them be recalled. No duty is placed on the trial court to order for such recall if none has been asked for. I do not consider the complaint that the appellant did not understand the language with which the trial was conducted to be well founded. Section 198(1) of the Criminal Procedure Code read together with 77(1)(b) of the Constitution only require that the language used in criminal trials be one that is understood by the accused person. Indeed section 198(1) states that whenever any evidence is given in a language not understood by the accused and he is present in person it shall be interpreted to him in open court in a language which he understands. Subsection 4 of section 198 specifies the language of a subordinate court to be either English or Swahili. Counsel for the appellant has pointed out that at certain instances both languages were used interchangeably when the various witnesses testified. There is nothing on the record to show that the appellant who was an administration police man did not understand English or Kiswahili and have no reason to believe that he did not do so. I find nothing from the lower court record to suggest that evidence of bad character was imported or relied upon by the learned trial magistrate in arriving at his findings upon which he convicted the appellant. What I find the learned trial magistrate to have done and erroneously so was to impute a motive for the appellant's shooting of the complainant in this case when there was no evidence tendered to impute any ill intent on the part of the appellant whose defence was that he was drunk and shot the complainant by mistake. Given the above I am persuaded that from the proceedings, which I must find to have null and void by virtue of the gross violations of both the Constitution and the Criminal Procedure Code the conviction and sentence herein cannot be sustained. The appeal is hereby allowed, the conviction quashed and the sentence set aside.

Accordingly the appellant is to be set free forthwith and released from jail unless he is otherwise lawfully held.

Dated, signed and delivered at Nakuru this 11th day of June 2009

M. G. MUGO

JUDGE

In the presence of:

N/A - For State

Mr. Kigamwa - For appellant