



**SAMUEL MURIITHI NYAGA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from Conviction and Sentence of the Chief Magistrate’s Court at Embu in Criminal Case No. 1106 of 2006 dated 13<sup>th</sup> February 2008 by S. N. Riechi – Ag. C.M.)***

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

The appellant **Samuel Murithi Nyaga** was charged jointly with **Nicholas Muriithi Karanja, Josphat Njeru, Opendi Gitonga** and **Isaiah Kariuki Ndwiga** with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence were that on the 18<sup>th</sup> day of May 2006 at Kigumo village, Kigumo Sub-location, Kieni South Location in Embu District within the Eastern Province, with others not before court while armed with dangerous weapons namely panga and rungus robbed **Silas Nyaga Njiru** of mobile phone make Siemens M30, leather jacket, wallet and cash Kshs.800/= all valued at Kshs.7,200/= the property of the said **Silas Nyaga Njiru** and at or immediately before or immediately after the time of such robbery beat the said **Silas Nyaga Njiru**.

In count 2 they were jointly charged again with robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence were that on the 18<sup>th</sup> day of May 2006 at Kigumo village, Kigumo Sub-location, Kieni South Location in Embu District within the Eastern Province jointly with others not before court while armed with dangerous or offensive weapons namely, pangas and rungus robbed **Esther Muthoni** of a bag, porch, cash Kshs.1000/=, track trouser, skirt, blue blouse, bed-sheet, two lessos, and one pant all valued at Kshs.2,460/= and at or immediately before or immediately after the time of such robbery beat the said **Esther Muthoni**. They all pleaded not guilty to the charges and were tried. In the course of the trial however the charges against the appellants co-accused aforesaid were withdrawn under Section 87(a) of the criminal procedure code and they were discharged. However the charge sheet as initially laid remained the same. It was never altered nor amended so as to be in tandem with the changed circumstances. The significance of this omission on the part of the learned magistrate as well as the prosecution will become clearer in the course of his judgment.

On 18<sup>th</sup> May 2006 PW1 **Silas Nganga Njiru** the complainant in count 1 was with his wife **Esther Muthoni** the complainant in count 2. They were enroute home. After passing the Salvation Church Kieni they met two people on the road whom they greeted and they responded. After passing them the two people suddenly started following them. Indeed one of them even overtook them. He then flashed a torch on them and ordered them to lie down. He then demanded money saying “*simu hata pesa tunataka.*” He put his hand in the complainant’s pocket and removed a mobile phone, wallet, which contained an ID card, elector’s card, and cash 800/=. That person then stabbed him on the right leg with a knife. He then started to remove the jacket from the complainant and that is when he flashed a torch on the person he was with and PW1 was able to recognise that person as **Muriithi** the son of **Nyaga**, the

appellant. He had known the appellant before as his home is about ½ a km away from his. He pleaded with them to spare his life. The robbers then left him and ran away. The complainants went home and reported the incident the next day at Gathageri police post. The appellant was then traced, arrested and charged with the present offence.

PW2 **Esther Muthoni** is the complainant in count 2. Her evidence was more or less along the same lines as PW1. Suffice to add that on the material day she was with her husband PW1 going home. They met 2 people whom they greeted and passed. Those people followed them and ordered them to lie down. One person remained with her as the other who had a torch robbed the 1<sup>st</sup> complainant. During the incident she was able to recognise the appellant. Indeed it was the appellant who cut her with a panga and took away her bag which 1<sup>st</sup> complainant was carrying and which contained her clothes, and a Safaricom purse containing her Shs.1000/=. They were treated at Runyenjes health centre for the injuries they sustained during the robbery.

PW3 **Mary Karimi Muchoki** was a registered clinical officer at the material time attached to Runyenjes Health Centre. She examined PW1 and PW2 and later filed their P3 forms which she produced in court as Exh. 1 and 2. As a result of her examination she found that PW1 had injuries on the right leg, caused by sharp object and assessed the degree of injury as harm. PW2 had a healed scar on her forehead probably caused by a sharp object. She assessed the degree of her injury as harm.

PW4 **P.C. Moses Muraguri** was at Gathageri Police Post when he received a report from the complainant on 19<sup>th</sup> May 2006 that they had been robbed the previous night by 2 people. He observed them and noted that PW2 had injury on the forehead whereas PW1 had a cut on his right leg. Both complained of injuries on other parts of the body. They gave him the name of one of the two people who robbed them as **Muriithi** son of **Nyaga** whom they said had recognised as they knew him before. On 28<sup>th</sup> May 2006 he together with other police officers went to the home of the appellant where they arrested him and recovered a knife and white muslim cap. He later caused him to be charged with the present offence.

The appellant denied the charge. In unsworn statement of defence, he stated that on 29<sup>th</sup> May 2006 he was in his house at about 4.00 a.m. when he heard a knock on the door. He opened and saw that they were police officers. They demanded his mobile telephone but he told them he did not have any. They then arrested him and took him to Runyenjes police station where he was later charged with present offence.

The learned magistrate having carefully considered and appraised the evidence tendered by both the prosecution and defence, found in favour of the prosecution, convicted the appellant and sentenced him to death as mandatorily required. The appellant was aggrieved by the conviction and sentence. Through **Messrs Njeru Ithiga & Co. Advocates**, he lodged the instant appeal. He put forth four grounds of appeal to wit;

- “1. That the learned Chief Magistrate erred both in law and fact by proceeding with trial and conviction against the appellant on a defective charge and charge particulars.**
- 2. That the learned Chief Magistrate erred both in law and fact by proceeding with trial, convicting and sentencing the appellant to suffer death despite the fact that his constitutional rights as enshrined under Section 72(3) (b) and Section 77(1) of the Constitution of Kenya had been violated when the police detained him in custody for 18 days before arraigning him in a court of law instead of the maximum 14 days as provided under the Constitution of Kenya.**
- 3. That the learned Chief Magistrate erred in law by passing a sentence against the appellant which was ambiguous as it relates to the appellant.**
- 4. That the learned Chief Magistrate erred both in law and fact by finding that the prosecution had proved its case beyond reasonable doubt as against the appellant despite the fact that none of**

**the items allegedly robbed of the two complainants PW1 and PW2) were recovered from the appellant or the dangerous weapons and that even the muslim cap and the knife (MF 1 and MF2) allegedly recovered from him by PW4 were not produced as exhibits.”**

When the appeal came up for hearing, **Mr. Omwenga**, learned Senior State Counsel conceded to the same on the technical ground that when the charges against the appellant's co-accused were withdrawn the charge sheet was not amended to reflect the correct position. **Mr. Ithiga**, learned counsel for the appellant associated himself with the submissions of the learned state counsel and added that the appellant's constitutional rights too were violated as he was held in custody in excess of the fourteen days permitted by our constitution for the kind of offence that he was facing.

We have on our part carefully gone over the record of the trial court and we are satisfied that the learned Senior State Counsel was right in conceding the appeal on that score. The record shows that initially there were five accused persons. Midway through the trial however, the charges against the four co-accused were withdrawn and the appellant was left in the trial alone. However the particulars of the charges remained unchanged. They were not amended. That being the case, the appellant, it would appear was convicted on a defective charge. The withdrawal of the charges against the appellant's co-accused, in our view completely changed the characteristics of the initial charge. It behoved the prosecution therefore to prepare a fresh charge as the particulars in the earlier charge sheet referred to the five accused persons including the appellant. Indeed going through the record, we are left in no doubt at all that the learned magistrate proceeded with the case as though the case for the four co-accused had not been withdrawn. For instance when it came to sentencing the learned magistrate stated “..... **Each accused sentenced to death.....**” By this statement, the learned magistrate, it would appear was making reference to all the five accused persons.

It cannot be said that the failure to amend the charge sheet after the case against the appellant's co-accused was withdrawn did not occasion the appellant prejudice.

According to **Mr. Ithiga**, the appellant's constitutional rights enshrined in Section 36 of the Criminal Procedure Code and Section 72(3) of the Constitution were also violated. Accordingly his subsequent trial was a nullity. In support of this submissions, counsel relied on the case of **Mark Wanjala Wanyama v/s Republic, Criminal Appeal No. 69 of 2006 (UR)**. **Mr. Omwenga's** response was that it was difficult to pinpoint from the record when the appellant was actually arrested.

**Mr. Omwenga** cannot possibly be right. According to the charge sheet, the appellant was arrested on 28<sup>th</sup> May 2006. The evidence of the investigating officer is to that effect too. The same witness stated again that the appellant was arraigned in court on 15<sup>th</sup> June 2006. Therefore the appellant was brought to court after 18 days. The fact that the appellant was facing a capital offence is not in dispute. In that event the provision of the constitution requires that he ought to have been brought to court within fourteen (14) days of his arrest. He was not brought within that time. Further notwithstanding that he was not brought to court within fourteen (14) days, he was also not brought to court as soon as reasonably practicable.

In the case of **Mark Wanjala Wanyama** (supra) the court of appeal observed:-

**“..... The question of deprivation of a constitutional right is a matter of law and this court cannot stop the appellant from raising it in his last appeal simply because it was not raised at the trial court or at the first appellate court. Neither can this court down its tools on the mere reason that a legal point is being raised before it for the first time. That would be abdication of our powers. The issue was raised, and the prosecution, which produced the appellant in court after twenty four hours, is not able to show that, that was as soon as reasonably practicable. That being the case, this court has no reason to reject the appellant's contention that his rights were violated.....”**

The same situation obtains here. No reason was given for the delay nor did the prosecution demonstrate that although the appellant was not produced in court within fourteen days as required he was nonetheless produced in court as soon as was reasonably practicable. Accordingly appellant's constitutional rights were violated and we so hold.

The upshot of the foregoing is that we allow the appeal, quash the conviction recorded against the appellant and set aside the sentence imposed on him. We order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Embu this 28<sup>th</sup> day of October 2009*

**M. S. A. MAKHANDIA**

**JUDGE**

**WANJIRU KARANJA**

**JUDGE**