REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal 267 of 2004

ANDREW MWATHE NABEA .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 358 of 2003 dated 10th August 2004 by P. C. Tororey – SRM)

JUDGMENT

Andrew Mwathe Nabea (the appellant) who was the first accused in the Senior Resident Magistrate' Court at Nanyuki in Criminal Case number 358 of 2003 is appealing against the judgment of the Senior Resident Magistrate **(P.C. Tororey)** delivered on 10th August 2004. The learned Senior Resident Magistrate convicted the appellant of two counts of robbery with violence contrary to section 296(2) of the Penal Code and sentenced him to death. The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal.

The appellant relied on the grounds of appeal set out in the supplementary Petition of appeal dated 26th November 2007. The grounds are:-

"**1.That the trial magistrate court erred in law and fact in convicting while not observing that the appellant was prejudiced or the provision (sic) of section 72(3) of the Constitution were breached.**

2. That the trial court erred in law and fact when convicting but failed to observe that the prosecution code (sic) suffered some procedural irregularities on provision of section 207 CPC and 198 CPC were not adhered to during plea taking.

3. That the trial court erred in law and fact by basing conditions (sic) and the resultant death sentence of rooters (sic).

4. That the trial magistrate court erred in law and fact in failing to (sic) duty evaluate the whole evidence on record as dute (sic) bound.

5. That the trial court erred in law and fact in decimating (sic) to attach any weight to the appellant cogent defence thus violated the stipulation of section 169 (1) CPC."

As ground one of the amended supplementary Petition of appeal may very well dispose of this appeal, we intend to deal with it first.

During cross-examination of PW10, the investigating officer of the case, the appellant posed a question which elicited this answer. "**...... I do not recall how many days you were held at the police station. I**

do not recall the day you were charged in court concerning this matter.....” Clearly from these answers the appellant seem to have raised the question of him having been held in police custody for an inordinate period of time. The answer given by the investigating officer to our mind was highly unsatisfactorily.

The appellant revisited the issue before us in his written submissions in this manner “**........ the appellant herein was arrested on 19.11.02. Kindly note the arresting officer’s evidence at page 34 line 8 P.C. Mohamed Abdi No. 45047. Of interest is that the appellant was produced before court or charged on 10.2.03 kindly vide the charge sheet for confirmation. Your lordships, what the police were waiting for or doing with the appellant in their custody is not accounted for. The delay I submit most humbly was unfair, unjust and unlawful as it contravened the provisions of section 72(3) the honourable constitution.**

Ms Ngalyuka, learned State Counsel, did not deem it necessary to respond to this very powerful submission. She merely glossed over the issue.

The date of arrest as correctly pointed out by the appellant was stated in the charge sheet to have been on 19th November 2002 and the “date to court” was stated to be 10th February 2003. Section 72 (3) of the Constitution provides:-

“**72 (3) A person who is arrested or detained –**

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

The record of the Senior Resident Magistrate **(P.C. Tororey)** for the first day of the proceedings is clear. The plea was taken on 10th February, 2003. The accused having been arrested on 19th November 2002 going by the charge sheet and also the evidence of the arresting officer, **P.C. Mohammed Abdi,** it means that the appellant was produced before court slightly over 2½ months following his arrest. In the case of **Albanus Mwasia Mutua v/s Republic, Criminal appeal number 120 of 2004 (unreported)** the court of appeal, **(Omolo, Githinji (dissenting)** and **Deverell JJA)** had this to say in relation to section 72 (3) of the Constitution.

“**At the end of the day it is the duty of the courts to enforce the provision of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the authorities we have cited in the judgment appears to be that unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”**

To our mind, the **Albanus** case (supra) was clearly a more extreme case than the case before us. However as the same count stated in the same case.

“**........ On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution........”**

In a similar case but where the delay was only 3 days, the court of appeal **(Okubasu, Onyango Otieno &**

Deverell JJA) had this to say in the case of **Gerald Macharia v/s Republic (2007) e KLR**.

"**......... That 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, as 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 requirement 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 court as soon as was reasonably practicable......."**

The same situation obtains here. As the court of appeal decisions are binding on this court, we have no other alternative but to hold that failure by the prosecution to present the appellant in court for his trial to commence within the stipulated period amounted to a violation of his Constitutional rights as provided for by section 72 (3) of the Constitution of this country. Accordingly his subsequent prosecution was a nullity. The appeal on that score is hereby allowed, the appellant's conviction quashed and the sentence of death imposed set aside. The appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of April 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE