REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 212 OF 2005

WILLIAM KIPROTICH ARAP MAINA..…… APPELLANT

VERSUS

REPUBLIC..…….. RESPONDENT

(Being an appeal from the judgment of R.N. Muriuki,

Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 1655 of 2004 at Nanyuki)

JUDGMENT

The Appellant in Lower Court was charged with Robbery with violence contrary to section 296(2) of the Penal Code in respect of count I. In respect of count II he was charged with attempted robbery contrary to section 297(2). The lower court found him guilty of count II and sentenced him to death as provided by law. He was aggrieved by the conviction and sentence and has therefore preferred this appeal before court. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."

In the lower court the appellant had a co-accused who was acquitted. PW 1 had the misfortune of having two attacks of robberies at his premises. The first one was on 24th September 2004. During that robbery

there were many men who came to his premises where he recognized the appellant's co-accused. The second attack was on 30th October 2004. He said that he was asleep on that night when men came and said that they were robbers who attacked him previously. One man entered and hit a lamp that was lit and broke it. He threatened PW 1 with a panga. PW 1 said that he identified him when he hit the lamp. PW 1 hit him with a rungu. Another witness in this case called Mutembei got hold of that man and hit him with a bottle. The man however managed to escape. After his escape PW 1 found a wallet, cap and a torch. On second November 2004 a man came to his shop to buy cigarettes. PW 1 identified him as the robber who came to his shop on 30th October 2004. He was arrested on that day by the police. When this appeal came up for hearing the appellant raised two issues. Firstly he said that he was Nandi by tribe. He said that he did not understand English, Swahili or Kikuyu. He drew the attention of the court to the fact that some of the witnesses gave their evidence in English and Kikuyu. Indeed it is correct that PW 1 and PW 2 gave their evidence in English/Kikuyu. PW 3 to PW 9 gave their evidence in English/Swahili. The appellant's defence was recorded as English/Swahili. There is no evidence that the appellant in the lower court complained that he could not understand the proceedings that were going on. It does even seem that during his cross examination of the witness he asked pertinent questions. The law requires that criminal proceedings be interpreted in a language which the accused understands. The Constitution of Kenya by section 77 (1) (b) thereof makes it mandatory that a person facing a criminal offence be informed in a language he understands the offence he is charged with. That section provides as follows:-

"***(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged."***

Similarly the criminal procedure code section 198 (1) provides:-

"***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."***

It would have assisted this court if the lower court had recorded the language which the accused understood. From his name it is clear that the appellant is not a Kikuyu. It is therefore probably a valid complainant that he did not understand Kikuyu. For that reason we entertain doubt whether the appellant understood the proceedings and particularly the evidence of PW 1 and 2. These two witnesses were the ones that suffered the robberies. It therefore was essential that the appellant understood their evidence. The second issue raised by the appellant was that he was detained in custody before being taken to court for a period in excess of that which is allowed by the constitution. We have examined the Charge sheet and it does indeed support his claim. The charge sheet shows that the appellant was arrested on 2nd November 2004 and was detained in custody until the 15th February 2005 when he was presented before court. The appellant informed us that he was unaware at that time of the legal provision that required him to be brought before court within 14 days for a capital offence. The court of appeal in the case Criminal *Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic* stated;-

"***We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful 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 this case there was no explanation given by the prosecution as required by the provisions of section 72(3) (b). There having been no explanation the appellant's appeal will succeed. Indeed that was the holding in the case of ***ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004,*** when 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 or 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 Vs. 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 the days in bring 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."***

The appellant's appeal does succeed and we do hereby quash the conviction and set aside his sentence. The appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of May 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE