REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 118 & 120 of 2005

TABITHA NJERI ……...……..…….APPELLANT

versus

REPUBLIC …… RESPONDENT

(Being appeal against the conviction and sentence by G. K. MWAURA, Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1693 of 2004 at Muranga)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 120 of 2005

DANIEL IRUNGU MWANGI …….APPELLANT

versus

REPUBLIC …….....…… RESPONDENT

(Being appeal against the conviction and sentence by G. K. MWAURA, Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1693 of 2004 at Muranga)

JUDGMENT

At the hearing of this appeal an order was made to consolidate the same with Criminal Appeal No. 120 of 2005. In the lower court the appellants were charged jointly in the first count with robbery with violence contrary to ***Section 296(2)*** of the Penal Code. The first appellant faced an alternative charge of handling stolen goods contrary to ***Section 322(2)*** of the Penal Code, a second count of having suspected stolen property contrary to ***Section 323*** of the Penal Code. After trial the second appellant was convicted on the robbery with violence charge. The first appellant was convicted on the alternative count of handling stolen goods and on the second count. The first appellant was sentenced to 10 years imprisonment in respect of the alternative count and six months imprisonment in respect of count two. The second appellant was sentenced to death on the first count. At the very initial stage of the hearing of this appeal, the learned state counsel conceded to this appeal on the ground that two witnesses who gave

evidence in the lower court were not sworn before giving their evidence. We have examined the typed proceedings and have noted that not only did the two witnesses fail to be sworn but that there were other witness who also were not sworn. The original record of the lower court is not clear whether the witnesses were sworn. To give an example of the recording by the learned magistrate to illustrate what we are saying is as follows: " **PW 3 A/M/S in English/Kikuyu."** This recording is replicated against all the witnesses. One is not sure whether the short form of that writing refers to **Adult/Male/States in English/Kikuyu** or whether it refers to **Adult/Male/Sworn in English/Kikuyu**. The typist who typed the original proceedings seemed to have relied on guess work. This is because as shown above it is not clear what those letters of the alphabet stood for. We therefore entertain doubt whether the witnesses who gave evidence in the lower court were sworn. We can only conclude that witnesses were not sworn before giving their evidence. The law requires that any evidence in criminal trials be given under oath. **Section17 and 18** of the oaths and statutory declarations Act Cap 15 provides as follows:-

"***17 Subject to the provisions of section 19, oaths or affirmations shall be made by –***

(a) all persons who may lawfully be examined, or give evidence or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by witnesses.

18. All oaths made under section this Act or section 151 of the Criminal Procedure Code shall be administered according to such form as the Chief Justice may by rules of court prescribe, and until any such forms are so prescribed such oaths shall administered according to the forms now in use."

Having concluded that the witnesses were not sworn when they gave evidence during the trial it would therefore seem that the appellants were convicted on unsworn testimony.

That would render the appellants trial to be a nullity. See the case of ***SAMUEL MURIITHI vs REPUBLIC Criminal Appeal No. 3 of 2005***. There is another issue we have noted which was not raised either by the appellants or by the learned state counsel. This is in relation to the period of detention of the appellant from the date of their arrest up to the date they were charged in the lower court. At the lower court the appellants both faced a capital charge. The appellants were arrested on 9th November 2004 and were not taken before court until the 24th November 2004. According to our calculation the appellants were in custody for 15 days. That was one day more than what is provided for by ***Section* 72(3)(b)** of the Constitution. That section provides the period of detention to be 14 days for capital offences. The Court of Appeal in considering this provision in respect of a matter that had began at the lower court had the following to say in the case of **PAUL MWANGI MURUNGU vs REPUBLIC CR. APPEAL NO. 35 OF 2006** (***unreported***).

"***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."

The prosecution did not give an explanation why the appellants were not taken to court within the period provided by the constitution. The courts are required to uphold the constitution at all times. Indeed that was the holding of 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 of 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."***

We find that the detention of the appellants for one extra day than what is required by the constitution to have been a violation of their constitutional rights. For what it is worth we are also of the view that the evidence adduced in the lower court was not sufficient to satisfy the criminal burden of proof. The first appellant was found in possession of a mobile phone which belonged to PW 1. That phone was stolen from PW1 in January 2004. The recovery of it was April 2004. According to the police they went to the first appellant's house asking for a man called Kamau at 3 a.m. When they saw the phone they inquired from the first appellant of its ownership, whereupon she respondent that it belonged to Kamau who lived with her. The prosecution did not adduce evidence to show that the mobile phone belonged to the first appellant rather than the said Kamau. It therefore follows that the conviction of the first appellant on the evidence adduced was not safe. In respect of second appellant he was arrested on the road with no item the subject of the present case. The complainant could not identify him other than he said that the robbers had red jacket. PW 2 a policeman did accept that the red jacket was a common attire. Having accepted that the prosecution did not adduce sufficient evidence, we find that the conviction of the second appellant was not safe.

In the end we conclude by finding that the appellants' appeal do succeed and we do hereby allow the appeal, quash the convictions against both appellants and set aside the respective sentences imposed and order that they be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 22ND DAY OF MAY 2008

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE