



REPUBLIC OF KENYA

ALLAN MAINA GICHIGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Resident Magistrate’s Court at Othaya in Criminal Case No. 799 of 2005 dated 10th November 2006 by Mutuku M. W. – R.M.)

J U D G M E N T

The appellant was charged with preparation to commit a felony contrary to section 308(1) of the Penal Code. After a full trial he was convicted as charged and sentenced to 5 years imprisonment. I must at once point out that the sentence imposed was illegal. Under the section of the law that the appellant was charged, the offence upon conviction attracts a minimum sentence of 7 years and a maximum sentence of 15 years. Accordingly in sentencing the appellant to 5 years imprisonment, the learned magistrate fell into error.

The appellant was nonetheless dissatisfied with the conviction and sentence and has accordingly brought this appeal. He has raised 6 grounds in his petition of appeal. However, I am of the view that only one ground will determine the fate of this appeal. That ground is to the effect that the proceedings in the trial court were unconstitutional and oppressive as the appellant was brought to court in violation of his constitutional rights. In effect what the appellant is saying is that he was not brought to court within 24 hours as required by the constitution of this country. According to the appellant, he was arrested on 2nd November 2005 and arraigned in court on 10th November 2005 well beyond the statutory 24 hours since the offence with which he was charged was not a capital one. To the appellant therefore his trial was a nullity and defective as it was conducted in violation of section 72(3) (b) of the constitution.

In response, Mr. Orinda, learned Principal State Counsel submitted that there was no basis for the claim that the appellant’s constitutional rights were violated. That the issue had been raised too late in the day. It should have been raised in the trial court. Each case must be considered on its facts.

Section 72(3) (b) of the constitution provides interlia:

Any person who is arrested or detained:

(a)

(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, of his arrest or detention where he is arrested or detained 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 sub-section have been complied with.”

So what happens if these provisions are breached? There are a litany of this court’s and court of appeal decisions on the issue. See *Albanus Mwasia Mutua v/s Republic* (2006) eKLR, *Gerald Macharia Githuku v/s Republic* (2007) eKLR and *Paul Mwangi Murunga v/s Republic*, Criminal appeal number 35 of 2006 (unreported) to mention but a few. The ratio *dicedendi* which runs through all these decisions and was poignantly captured in the case of *Albanus Mwasia Mutua* (*supra*) is to the effect that:-

“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 in support of 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.”

In the instant case, the appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the penal code.

Under the law he was required to be arraigned in court within 24 hours of his arrest. He was arrested according to the charge sheet on 7th April, 2007. Thus he ought to have been produced and charged in court latest by 9th April, 2007. Instead and from the record he was hauled in court on 11th April, 2007. No explanation was tendered by the prosecution. This was a violation of the appellant’s constitutional rights as he ought to have been charged within 24 hours of his arrest. The delay having not been explained, the trial of the appellant on the authorities cited was defective and a nullity. It matters not that the issue was never raised during the trial or that the issue has been raised too late in the day. It is a point of law which can be raised at any point in the proceedings. It is also a constitutional issue which goes to jurisdiction. The proviso to section 72 of the constitution is to the effect that in the event of delay, the burden of proving that the person arrested has been brought to court as soon as is reasonably practicable rests upon the person alleging that the provisions of this subsection have been complied with. It is thus the duty of the police in the event of delay in charging a suspect to explain the delay. This did not happen in this case. Yes the appellant did not raise it during the trial. However on the authority of *Paul Mwangi Murunga* (*supra*), he was not under duty or bound to do so. The court on its own motion ought to have raised the issue with the prosecution. In any event, nothing stopped the learned principal state counsel at the hearing of this appeal to invoke the provisions of the criminal procedure code to adduce further evidence in this appeal limited to explaining the delay. He did not and must bear the consequences.

As I have had occasion to state in the past the law of the land has to be obeyed particularly by those entrusted to enforce it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable.

A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the court of appeal said again in the case of *Albanus Mwasia Mutua*:

“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.”

In the end, and for the above reasons, I hold that the appellant’s constitutional rights having been violated during his trial, his prosecution was illegal and a nullity. Accordingly, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of September, 2008.

M.S.A. MAKHANDIA

JUDGE