REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Criminal Appeal 170 of 2007

FRANCIS KIBIRWA WACERA……................... APPELLANT

VERSUS

REPUBLIC…... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Kangema in Criminal Case No. 63'B' of 2007 by S.N. MBUNGI – S.R.M.)

J U D G M E N T

The appellant was charged with the offence of assault causing actual bodily harm contrary to *Section 251* of the Penal Code. He pleaded not guilty to the charge and his trial ensued in the Senior Resident Magistrate's Court, Kangema.

The state's case was that on the 7th day of April, 2007 at Kairi Sub-location in Murang'a District within Central Province the appellant unlawfully assaulted **James Kariuki Mwangi** thereby occasioning him actual bodily harm.

PW2, the complainant told the court that on the material day while in his house he heard as if his house had been hit. He went out to check and found that it was the appellant and his sister who were throwing stones. When he asked them why they were going, the appellant cut him near the neck with a panga and members of public came and arrested the appellant whilst still in possession of the panga.

PW3 testified that he was present when the appellant cut the complainant as aforesaid. He went on to testify that he was the one who rescued the complainant in the company of members of public.

PW4 the Investigating Officer testified that he received the complainant at Kiriaini police post on 7th April, 2007. He had a panga that had been used to cut him. He issued him with a P3 form which was subsequently filled by PW1, a clinical officer, at Kangema Health Centre. After investigations he charged the accused.

When placed on his defence the appellant denied having committed the offence. He said it is him who was beaten by the complaint's workers when he intervened to rescue his mother from being assaulted by the complainant. His witness, the mother testified along the same lines.

At the conclusion of the trial, the learned Magistrate was convinced that the appellant had committed the offence charged, convicted him and subsequently sentenced him to 3 years imprisonment. The appellant was aggrieved by the conviction and sentence, hence he preferred the instant appeal through **Messrs Macharia Kenneth & Associates, advocates**. In his memorandum of appeal, which ought to

have been instituted "*petition of appeal,*" the appellant faulted his conviction by the learned Magistrate on 6 grounds to wit:-

1. THAT the learned Magistrate erred in law and on fact in convicting the appellant in the absence of evidence to sustain a conviction.

2. THAT the learned Magistrate erred in law and fact in failing to accept the defence of the appellant without justifying the rejection.

3. THAT the learned Magistrate erred in law and fact in failing to find that the appellant was defending himself when the incident occurred.

4. THAT the learned Magistrate erred in law and fact in failing to find that there has been previous conflict between the complaint and the appellant's family.

5. THAT the learned Magistrate erred in law and in fact in passing a sentence that was excessive in the circumstances of the case.

6. THAT the learned Magistrate erred in law and fact in failing to note inconsistency in the prosecution evidence which to ought to have favoured the appellant.

When the appeal came up for hearing, **Mr. Macharia**, learned counsel for the appellant submitted that his trial was in violation of *section 72 (3) (b)* of the Constitution. The appellant had not been brought to court within 24 hours of arrest and no explanation had been given for the delay. In support of this submission counsel referred to his court the decision of this court in the case of **Republic V Amos Karuga Karatu, HCCR. Case No.12 of 2006** (unreported). Counsel went on to submit further that the evidence adduced during the trial was inconsistent and had material contradictions. That there was no basis for the rejection of the appellant's defence.

In reply, **Mr. Orinda**, learned state counsel submitted that the issue of delay in charging the appellant was raised too late in the delay. That the delay in the authority cited was extreme. However the delay herein was not inordinate. On the merit of the case, counsel thought that the evidence tendered was sufficient. That medical evidence was given by PW1. That the complainant and appellant were relatives and the offence was committed during the day. PW3 was an independent witness and not embroiled in the land dispute between the two. To him therefore the conviction was safe.

To my mind, the decision of this appeal will turn on the provisions of *section 72 (3) (b)* of the Constitution of Kenya.

Those provisions are interlia in these terms:-

"**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 is a litany of court of appeal and this court's decisions on the issue starting with **Albanus Mwasia Mutua v/s Republic (2006) eKLR, Gerald**

Macharia Githuku v/s Republic (2007) eKLR through to Paul Mwangi Murungu v/s Republic, criminal appeal number 35 of 2006 (unreported) to mention but a few. The ratio decidendi which runs through all these decisions and which was poignantly captured in the case of **Albanus Mwasia Mutua** 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 in court on 11th April, 2007. No explanation was tendered by the prosecution for the delay. 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 stage 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 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 provision of this subsection have been complied with. It is thus the duty of the police in the event of delay in a 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. In any event, nothing stopped the learned state counsel to invoke the provisions of the criminal procedure code to adduce further evidence at the hearing of this appeal limited to explaining the delay. He did not and must bear the consequences.

As I have had occasion to sate in the past the law of the land has to be obeyed. 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 the 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