REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Criminal Appeal 13 of 2005

GILBERT MURAGE MWANGI…................... APPELLANT

VERSUS

REPUBLIC…... RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 1835 of 2005 dated 5th August, 2005 by R.N. NYAKUNDI – CM)

J U D G M E N T

The appellant was charged with stealing contrary to *section 275* of the Penal Code before the Chief Magistrate, Nyeri. Following a full trial, the appellant was found guilty as charged, convicted and sentenced to a fine of Ksh.10,000/= in default 6 months imprisonment. That conviction and sentence has provoked this appeal. In the petition of appeal filed by **Messrs Gathiga Mwangi & Co. Advocates**, the appellant faults his conviction and sentence on 6 grounds, to wit:

"**1. THAT the learned trial Resident Magistrate erred in law in failing to appreciate that there was inordinate delay by the Republic in commencing with the criminal prosecution against the appellant contrary to** *Section 219* **of the Criminal Procedure Code.**

2. THAT the learned trial Resident Magistrate erred in law in failing to appreciate the fact that the appellant's constitutional rights were being infringed.

3. THAT the learned Magistrate erred in law in failing to appreciate that it was upon the prosecution to prove the case beyond reasonable doubt.

4. THAT the learned Chief Magistrate erred in law in relying on purely unfounded circumstantial evidence.

5. THAT the learned Chief Magistrate erred in law in convicting the appellant when there was no evidence adduced to support the charge of stealing.

6. THAT the learned Chief Magistrate misconstrued the burden of proof and erred in proceeding in totally inadequate evidence as a basis of conviction."

The prosecution's case was as follows; PW1 **Patrick Karogo** is an internal auditor with the complainant company Nyeri Water & Sewerage Company Ltd. In his testimony he told the court that after the company took over the water management from Nyeri Municipal council they experienced massive water

meter thefts. This necessitated them to peruse their records and liase with the sister company, Nyahururu Water & Sewerage Company with a view to unearthing the syndicate. The Nyahururu Water & Sewerage Company allowed them to peruse their records where water meter No.336245 belonging to Nyeri Water & Sewerage Company was detected in their records. PW1 testified that Nyeri Water & Sewerage Company had connected the said water meter at Zone 9 and 7 A/C No.8134. The water meter later went missing from the site where it had been connected. A report was made to CID Nyeri where PW4 Sgt. Lawrence Njagi commenced investigations. He testified that on receipt of the report he proceeded to Nyahururu where in company of officers from Nyahururu Water Company went to the site where the water meter had been connected. At the site used for car washing they recovered the said water meter S/No.3362645. The owner of the car washing company (PW5) was arrested for interrogation. During interrogation he stated that the water meter had been purchased from the appellant's hardware shop within Nyahururu town.

The appellant was placed on his defence. He denied the charge of stealing. He further denied that he sold the water meter to PW5. He went on to state that the police had arrested four people in connection with this water meter theft but released others leaving him alone. He felt that the charge is a fabrication between the Nyahururu Water Supply Company and the police. He called a witness DW2 **Samuel Maina** who lives in Nyeri town and is an uncle. His evidence was irrelevant, that is all I can say.

The trial magistrate believed the prosecution evidence and proceeded to convict and sentence the appellant as already stated.

Several grounds of appeal have been raised but I think that the ground touching on the delay in bringing the appellant to court is sufficient to dispose of this appeal. In his oral submission in support of this ground, **Mr. Mwangi**, learned counsel for the appellant submitted that the appellant was arrested on 24th March, 2005. He was charged one month later on 26th April, 2005. He was therefore incarcerated in excess of 24 hours. The detention was unlawful and was not explained away by the Investigating Officer. In response, **Ms Ngalyuka**, learned state counsel submitted that the delay in charging the appellant could not be explained as the issue was being raised too late in the day.

From the record, the appellant was taken to court more than a month after his arrest thereby breaching his constitutional rights and thus rendering the entire proceedings a nullity. The alleged breach of the constitutional rights is based on *section 72 (3)* of the constitution which provides interlia:-

"**A person who is arrested or detained –**

(a)

(b) Upon reasonable suspicion of him 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 subsection have been complied with."

A plain reading of that provision of the constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable.

The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the constitution has been complied with. Thus, where an accused person charged with a non-capital offence is brought before the court after twenty-four hours or after fourteen days where

he is charged with a capital offence complains that the provisions of the constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the constitution. In my view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in he constitution does not *ipso facto* prove a breach of the constitution. The wording of *Section 72 (3)* above is in my view clear that each case has to be considered on the basis of its peculiar facts and circumstances.

In this case, the proceedings show that the appellant was arrested on 24th March, 2005 for a non-capital offence and was brought to court on 26th April, 2004. By *Section 57 (a)* of the Interpretation and General Provisions Act, the day on which the appellant was arrested has to be excluded from computation of time. It follows therefore, that the appellant should, have been brought before the court on 26th March, 2005 when the 24 hours expired. He was brought to court 30 days plus later on 26th April, 2005. Much as the appellant did not complain in the trial court that he was not brought to court as soon as was reasonably practicable, needless to say the prosecution was duty bound to show that the appellant was brought to court as soon as was reasonably practicable. The prosecution failed in this task. Accordingly the appellant's prosecution was a nullity. The court too was minded on its own motion to inquire into the delay. There are several court of appeal decisions on the issue. Suffice however to mention **Mwangi Murunga Versus Republic, NKR.CR.APP.NO.35 OF 2006** (unreported). It is on this basis that I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be refunded forthwith the fine imposed of Ksh.10,000/= if paid.

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

M.S.A. MAKHANDIA

JUDGE