

PETER ITHEBU MWANGI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 3283 of 2006 by T.W. Murigi – S.R.M.)

J U D G M E N T

On 27th December, 2006, **Peter Ithebu Mwangi**, hereinafter referred to as “*the appellant*” was charged with the offence of defilement contrary to *section 8 (1) (2)* of the Sexual Offences Act. He also faced an alternative charge of indecent act with a child contrary to *section 11 (1)* of the Sexual Offences Act. The appellant was said to have committed the said offences on 12th December, 2006. Following the full trial, the appellant was found guilty of the main count, convicted and sentenced to life imprisonment. The learned Magistrate correctly made no finding in respect of the alternative charge.

The appellant was aggrieved by the conviction and sentence aforesaid. Accordingly he filed the instant appeal. At the hearing of the appeal, the appellant abandoned all the other grounds of appeal outlined in the petition of appeal save for the ground that his trial was a nullity and unconstitutional. He argued that his trial was a nullity since he was brought to court 6 days after arrest contrary to *section 72* of the constitution. Secondly, he alleged that the police failed to either release him on bond or grant him cash bail during the period of incarceration at Kahuro police station.

In response, **Mr. Orinda**, learned Principal State Counsel submitted that the issue was being raised too late in the day. It ought to have been raised during the trial so that the investigating officer could deal with it.

According to the charge sheet filed in court on 27th December, 2006, the appellant is said to have been arrested on 21st December, 2006 without a warrant of arrest. However it was not until 27th December, 2006 that he was brought to court and the charges were read out to him and pleaded to them. In the case of **Ann Njogu & 5 others V Republic, Miscellaneous Criminal Application No.551 of 2007**, (unreported) **Justice Mutungi** held that 24 hours meant exactly that and any prosecution beyond it for a non-capital offence as in the instant case is null and void. The learned Judge went on to state that there is no known cure for violation of the accused constitutional rights as guaranteed by *section 72 (3)*. This court is also aware of the court of appeal decision on the issue in the case of **Gerald Macharia Githuku, V Republic, Criminal Appeal No.119 of 2004** (unreported) where it was held that an unexplained delay in charging an accused person in court would lead to an acquittal irrespective of the weight of evidence on record.

In determining whether the police had flouted the constitutional rights of the appellant one has to see whether the police provided a plausible explanation for the delay. In the case of **Paul Mwangi Murunga V Republic, Court of Appeal Criminal Appeal No.35 of 2006** (unreported) the court observed that as long as the explanation for the delay is reasonable no problem would arise. In the same case however the court went on to observe that the accused person need not raise the constitutional issue. If he does not then the court *Suo Moto* or *Suo Spante* can raise it. This holding partly answers **Mr. Orinda's** submission that the appellant ought to have raised the constitutional question during the trial. Finally I wish to revert to the case of **Eliud Njeru Nyaga V Republic, Court of Appeal Criminal Appeal number 182 of 2006** (unreported) where the court held that it would be unreasonable to hold that every delay amounts to a constitutional breach. What is important is whether the police have offered the explanation for the delay and whether that explanation is plausible and reasonable. Should the court come to the conclusion that the explanation offered by the police is unreasonable and not plausible then the accused person would be entitled to an acquittal irrespective of the weight of evidence that may be on record or in the possession of the prosecution for such trial would be a nullity and unconstitutional.

The appellant herein was arrested as already stated on 21st December, 2007 for a non capital offence. He ought to have been arraigned in court within 24 hours. He was not. Indeed he was brought to court after 6 days. This was unconstitutional. The police offered no or no reasonable explanation for the delay. It can therefore safely be assumed that the police had no explanation to offer for the delay. The court too, it would appear failed to secure and protect the appellant's constitutional rights with regard to the fair trial provisions of the constitution. It failed to extract from the prosecution the reasons behind the late arraignment of the appellant in court.

Mr. Orinda has submitted that the issue has been raised too late in the day. I do not subscribe to the notion that a constitutional violation can be sacrificed at the expense of time. A constitutional violation is not subject to constraints of time. It is an ongoing violation that is not even subject to any Limitations, time or otherwise. It can therefore be raised at any stage in the proceedings whether in the trial court or even the appellate court. It is an issue that goes to jurisdiction. The appellant was therefore right when he raised the issue in this appeal. If **Mr. Orinda** felt ambushed and could perhaps not answer the issue raised appropriately in the absence of the evidence of investigating officer, with regard to the alleged delay, nothing stopped him from invoking the provisions of the Criminal Procedure Code so as to call further evidence limited to explaining the delay in arraigning the appellant in court.

In the end, I have come to the conclusion that the appellant's prosecution in the trial court was undertaken in violation of his constitutional rights. He was not brought to court within 24 hours as required by our supreme law of the land, the constitution. The prosecution offered no explanation, plausible or otherwise for the delay of 6 or so days. The trial court failed in its duties of securing the constitutional rights of the appellant. The trial of the appellant was thus defective and a nullity. Much as the evidence on record is weighty and points irresistibly at the appellant having committed the offence, on the authorities already cited the appellant is nonetheless entitled to walk scot-free. Accordingly I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set free

forthwith unless otherwise lawfully held.

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

M.S.A. MAKHANDIA

JUDGE