

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 83 of 2007

JAMES NGANGA IRUNGU APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of A. K. NDUNGU - Principal Magistrate in the Principal Magistrate's Criminal Case No. 67 of 2006 at MURANGA)

JUDGMENT

The appellant was charged and convicted before the lower court with *robbery with violence contrary to Section 296(2) of the Penal Code*. He was also charged in the second count with attempted robbery contrary to Section 297(1) of the Penal Code. He was acquitted in respect of the second count. On the first count he was sentenced to death. He has appealed against both conviction and sentence. In our reconsideration of the lower court evidence we found that the case was first heard by G. K. MWAURA PM who presided over the evidence of PW 1 and 2. Thereafter the case was taken over by A. K. NDUNGU PM in unclear circumstances. A. K. NDUNGU PM heard the evidence of PW 3 and 4 and also the appellant's defence. The proceedings do not show that when A. K. Ndungu took over the case he complied with the provisions of *Section 200(3) of the Criminal Procedure Code*. That section requires the court to inform an accused person that he has a right to witnesses that had given evidence before the preceding magistrate. Our examination of the proceedings do not show that PW 1 and 2 were recalled nor does it show that the appellant was given an opportunity to ask for the case to begin de novo. In view of failure to comply with that section the appellants appeal will succeed. Over and above that looking at the charge sheet we have found that the appellant was arrested on 18th March 2005. He was kept in custody until the date he appeared before court that 6th January 2006. That is a period of almost a year in detention. The prosecution did not call the investigating officer and we are unable to determine the reason why the appellant was detained in police custody for that period of time. The Court of Appeal by a decision made while it was sitting in Nakuru stated that an appellant did not necessarily have raised an issue before the trial court relating to his detention. The Court of Appeal in the case *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic* stated;-

“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.”

It is obvious that the detention of the appellant from March 2005 to January 2006 was a violation of his rights as embodied in section 72(3)(b) of the constitution. On that ground also the appellant's appeal does succeed. The appellant's conviction before the lower court is hereby quashed and the sentence set aside.

The appellant is ordered to be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2008

MARY KASANGO

JUDGE

M.S. A. MAKHANDIA

JUDGE