



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 41 of 2004

SAMSON THUKU GATHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 1963 of 2002 of the Chief Magistrate's Court at Thika (Alex Anambo – PM))

J U D G M E N T

SAMSON THUKU GATHARA was convicted for four counts of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. Since he was below 18 years of age, the learned trial magistrate exercising his discretion under **Section 25(2)** of the **Penal Code** sentenced the Appellant to detention at the President's pleasure. It is against the conviction and the sentence that he now appeals to this court.

The Appellant has raised seven grounds of appeal and among the issues raised was under **Section 77(2) (b)** and **(f)** of the Constitution in which the Appellant contended that he was denied Constitutional rights when the evidence of PW5, PW6, PW7 and PW8 was taken in a language he did not understand and was denied interpretation services. The Appellant also raised a second Constitutional ground that his rights under **Section 72(3) (b)** of the Constitution were denied by the police because he was held for 26 days in police station before being arraigned in court.

We shall consider both issues together. The Appellant was arrested inside a public service vehicle on the date of the alleged robberies i.e. 25th April 2002 and taken to the police station the same night. He was then taken to court for plea on 21st March 2002, exactly 27 days later.

Section 72 (3) of the Constitution provides: -

“72(3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of the court; or

(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.”

The Appellant was arrested without a warrant on reasonable suspicion he had committed a crime. The police held him in custody for 27 days before arraigning him in court. There was no explanation forthcoming why the Appellant was not taken to court within the 14 days stipulated in law.

There seems to be no explanation forthcoming for the delay. In the Court of Appeal case of **ALBANUS MWASIA MUTUA VS. REPUBLIC CA NO. 120 OF 2004**, Omollo, Githinji and Deverell, JJA, in a case where the Appellant was held by the police for 8 months before being charged in court held: -

“In the appeal before us there was undoubtedly a gross violation of the Appellant’s constitutional right guaranteed to him by Section 72(3) (b) of the Constitution. He was brought before the trial magistrate some 8 months from the date of his arrest and no explanation at all was offered for that delay. Constitutionally, the burden was on the police to explain the delay.”

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 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.”

That holding is binding on us that where the police hold an accused person for longer than the law allows without any reasonable explanation, then the person is entitled to an acquittal. In the instant case the police did not explain the delay and therefore we do not know whether the explanation they may have offered, if at all, would have been accepted as reasonable. That notwithstanding, we noted that the police recorded a confession, albeit later retracted by the Appellant during trial, at 11.00 a.m. on 25th April 2002 which was the morning following the Appellant’s arrest. There is also evidence from record that statements from the Complainants were recorded within two days of incident including examination of some of the Complainants by the Clinical Officer PW5. It would be true to state that the police had completed most of their investigations within the 14 days they were entitled to hold the Appellant and therefore their prolonged delay to arraign him in court could not have been for a reasonable cause.

We have also perused the record of the proceedings and have noted that the Appellant was assessed to be 18 years of age by **DR. NYAKERI** of **KAMITI MAXIMUM PRISON** on 25th May 2003 which means the Appellant was approximately 17 years of age at the time of his arrest. For this reason also the police should have been more sensitive in the manner in which they handled the Appellant.

The Appellant contends that he was denied interpretation services when the evidence of PW5 to PW8 all inclusive was heard. We have again perused the record of the proceedings. On the 21st May 2002, the Appellant pleaded not guilty to one Capital Charge. During the plea, the record indicates that there was interpretation from English to Kikuyu. On the 10th July 2002, the trial magistrate allowed the prosecution to substitute the charge against the Appellant with a charge containing four capital robbery charges which the Appellant denied. During the plea the learned trial magistrate specifically recorded that the proceedings were interpreted to the Appellant into Kikuyu language being the one he understood. We also note that during the trial, the taking of the evidence of PW1 through to PW4 the witnesses were shown to have testified in the Swahili language and interpretation having been made into Kikuyu language. That was however not the case in the taking of the evidence of the remaining witnesses.

Each of the remaining witnesses testified in English language and there is no record that any interpretation was done. The Appellant is recorded to have given his evidence under the trial within trial in the Kikuyu language and his defence in Kiswahili all suggestive of the fact that he may not have understood English. In the circumstances, we agree with the Appellant that he was denied his fundamental right to a fair trial and in a language that he understood. The proceedings were therefore defective and accordingly we quash the conviction and set aside the sentence.

The issue that remains is whether or not to order a retrial, even though following the **Albanus Mutua case**, supra, we ought to set the Appellant at liberty. The prosecution case was that the Appellant was among five or six or seven robbers who commandeered a matatu driven by PW1 and robbed the passengers of properties before releasing them. The number of robbers involved is not clear. We considered that the only evidence against him is that of confession, exhibit 6 and the evidence of identification by PW1, PW2, PW3 and PW6. For the confession statement **Section 28** of the **Evidence Act** which enabled the Appellant's confession to be admissible during the trial has since been repealed. Even if we ordered for a retrial, that vital evidence will no longer be available to the prosecution and it lends a serious blow to the prosecution case. As for visual identification by the four witnesses named, PW2 identified the Appellant as the one who hit him with a hammer and emphasized that the Appellant was one of the accomplices because from him, vital documents including identity cards and receipts robbed from other passengers in the 'matatu' were recovered from him. That evidence was not established for three reasons. First the documents were not exhibited in court as exhibits, putting to doubt whether such a recovery was ever made. Secondly none of those who lost documents was called as a witness. Thirdly the police officer who allegedly retrieved the documents from the Appellant was not called as a witness and neither was the investigating officer called as a witness. The thread on which the evidence of PW2 hang therefore falls through leaving his basis of identifying the Appellant as one of the accomplices far too weak to be accepted as evidence to sustain a conviction.

On PW3's part, her evidence was that she was assaulted with a hammer by the Appellant. It does seem from her evidence that she was assaulted with a hammer at two different scenes, the first time while inside the matatu and the second time outside the matatu. At the last scene, which was outside the matatu, PW3 said that they were ordered to alight from the matatu, assaulted before being ordered back in. After they were ordered back into the matatu, the robbers ordered PW1 to drive off leaving them behind. If indeed the robbers had alighted from the matatu, purposefully to assault them what explanation could there be that one of the robbers went back in to be driven off alone while his accomplices remained? That does not seem reasonable to us. We find that given the evidence of the victims of these crimes, especially PW3, the Appellant must have been a victim like anyone else. The fact that none of the properties stolen from the passengers was recovered from the Appellant is a clear indication that he may have been a victim and mistaken for a robber.

PW1 in his evidence was not helpful as he merely reported what he learnt from other passengers that the Appellant was one of the robbers.

PW7 jumped out of the matatu in the cause of the robbery and was therefore not present when the Appellant was arrested. PW7 identified the Appellant in court for the first time. That was dock identification. The police should have subjected PW7, himself an IP who should have known legal processes, to an identification parade in order to establish whether indeed he could identify the Appellant. PW1's evidence was therefore very weak indeed and needed corroboration to sustain a conviction.

We find on the whole that a retrial is not required in the circumstances of this case. The circumstances of identification were not conducive for positive identification rendering the evidence of visual identification weak and insufficient. There is no other evidence to corroborate it. In the circumstances we decline to order a retrial and order rather the immediate release of the Appellant unless he is otherwise lawfully held.

Dated at Nairobi this 26th day of April 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mrs. Kagiri for State

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE