REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 50 of 2008

PETER WANJOHI GITHU……..……APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No.1280 of 2007 by J.N. ONYIEGO – SRM)

J U D G M E N T

The appellant, **Peter Wanjohi Githu** was charged before the Senior Resident Magistrate's Court, Kerugoya with one count of Grievous Harm contrary to *Section 234* of the Penal Code whose particulars were that on 10th September, 2007 at Mukure sub-location of Kirinyaga District within Central Province he unlawfully did grievous harm to **Grace Wanjiku Mwai**. The appellant entered a plea of not guilty and he was duly tried.

The case for the prosecution was that PW1 **Grace Wanjiku** on 10th September, 2007 at 7.00pm was in her house preparing supper in the company of her husband PW4 when the appellant, who is her brother-in-law, called her husband outside. The appellant also called out **Margaret Nyawera**, a sister of the complainant and the three left together. After a short while, she heard appellant's wife crying. She heard the appellant swearing that he wanted to do something for the community to know that he was taking drugs and beer. The complainant called for her sister and went to pick her. While leaving the appellant's house in the company of her sister, the appellant followed them whilst making noise. He then snatched a walking stick from his father, PW6 and hit the complainant on the mouth thereby shattering both jaws and several teeth. She lost four lower incisor teeth on the spot, two got cut and two became loose. She lost her left jaw completely. Appellant swore to kill her as she lay on the ground. She was taken to the hospital where she was admitted for three days. She later had all her teeth wired. Appellant was apparently annoyed with the complainant sister's desire to get married to his younger brother, one, Martin.

PW2 **Margaret Nyawera,** a sister to complainant corroborated the complainant's evidence. She stated in detail how the appellant called her to his house and told her that he had a case with her and his wife. That while quarrelling, her sister, PW1, came for her. That as they were leaving the appellant grabbed a walking stick from his father and for no apparent reason hit PW1 on the mouth. Everybody ran away as the appellant turned wild.

PW3 **Martin Mwai,** brother to appellant testified that on the material day, he was in his

house when he heard screams from the appellant's house. After a short while, his other brother and husband to PW1 took his child to him and requested him to look after him. Later PW1 and PW2 passed through this house and told him that things were bad and that they had left. Later the appellant went to the house. When he asked him what the problem was, he punched him. Appellant told him that he had fought his brother Joseph and wife. He appeared violent. Later the complainant's husband requested him to take him to the police to report. He accompanied him to Kabonge police post. At the police post, he found the complainant seriously injured on the mouth.

PW4 **Joseph Mwai**, husband to PW1 corroborated evidence of PW1, PW2 and PW3. He explained how the appellant, his brother, called him to accompany him with his sister in law, PW2 to his house only to attack them. He said it was the appellant who injured the wife, the complainant.

PW6, **Michael Githu** father to the appellant also corroborated the above evidence. He said it was the appellant who snatched from him his walking stick but was deliberately ambiguous as to whether the appellant used the said walking stick to assault the complainant.

PW7 **James Mithamo** Clinical Officer filed the complainant's P3 form and classified injuries sustained as maim. He said that complainant had a cut wound on the lower lip and fracture on the mandible. She had lost three teeth of the lower incisors and one canine.

Put on his defence, the appellant denied the offence and said that the case was a fabrication. He said that the complainant must have fallen down and got injured as a result.

The learned Magistrate having considered evidence on record came to the following conclusions.

"**From the evidence of PW1 the complainant, PW2 Margaret, PW6 Githu and PW4 Joseph, it is clear that the complainant was attacked on the material day. The medical report is very clear, she sustained injuries. I have no doubt the complainant sustained injuries on the material day. Who was responsible? All prosecution witnesses especially witnesses PW1, PW2, PW4 and PW6 corroborated each consistently that it was accused who assaulted her (PW1). PW1 is sister-in-law to accused, PW2 is also sister-in-law, PW4 is his brother and PW6 is the father. They all saw accused assault pw1. There is no element of mistaken identity. The event took so long. In fact accused even proceeded to his brother PW3 Martin and punched him as he asked why he was fighting. Accused was very violent. From the nature of injures sustained, it was not as a result of a fall. Infact, even the walking stick produced in court was particularly broken due to the impact. The injuries sustained by PW1 are so grievous that the only thing one can see in her mouth when she opens are shining wires adjoining (sic) the teeth. The attack was so brutal and only a beast can be subjected to such like attack. The attack was malicious. If accused differed with the complainant's sister, he had no reason to attack the complainant. I do dismiss the theory of a fall. It was the accused who attacked the complainant without any provocation or justification. I do condemn the heinous attack.**

I do find that prosecution has proved its case beyond reasonable doubt and accused is convicted as charged."

Upon conviction as aforesaid the appellant was sentenced to serve 10 years imprisonment. Aggrieved by the said conviction and sentence, the appellant lodged this appeal through **Messrs Maina Karingithi & Company Advocates**. He raised 3 grounds of appeal in his petition of appeal to wit:

"**1. That the learned trial magistrate erred in law in finding that the constitutional right of**

the appellant had been violated as he had been held in custody in excess of the period allowed by *Section 72 (3)* **of the Constitution.**

2. That the learned trial magistrate erred in law in not finding that the prosecution of the appellant was based on an illegality and was null and void.

3. The learned trial magistrate erred in law in convicting and sentencing the appellant on the basis of evidence tendered pursuant to a null and void prosecution."

At the hearing of the appeal, **Mr. Karingithi**, learned advocate for the appellant argued only one ground of appeal; that the constitutional rights of the appellant were violated when he was arrested on 16th September, 2007 but was not arraigned in court until 18th September, 2007, a delay of about 2 days. In passing he also argued that the sentence imposed was harsh and excessive.

Mr. Orinda opposed the appeal. He submitted that this was a family dispute. Apparently, the appellant's wife had differed with his brother's wife's sister. He had gone to ask the reason behind the bickering between his wife and sister-in-law's sister. The sister-in-law insinuated unpalatable things about him and he reacted on the spar of the moment. In the circumstances the sentence was legal but the learned Magistrate should have considered the circumstances of the case. As for the breach of the appellant's constitutional rights, **Mr. Orinda**, submitted that the issue ought to have been raised at the trial. Otherwise evidence tendered by the prosecution was sufficient to find a conviction.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent findings. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – **Kimeu V Republic (2002)1 KLR 756 and Soki V Republic (2004)2 KLR 21.**

As already stated the only ground argued in support of this appeal is the alleged violation of the appellant's constitutional rights during the trial. Indeed **Mr. Karingithi**, clearly conceded that the conviction of the appellant on the evidence on record has not been challenged in the grounds raised in the petition of appeal. Their only challenge was on the basis of the constitutional violation of the appellant's rights during the trial. The alleged violations are premised on the fact that the appellant was arrested without a warrant of arrest on 16th September, 2007 and arraigned in court on 18th September, 2007. Having been arrested for non-capital offence, it was expected that he would be arraigned in court within 24 hours as required by the supreme law of our land, the constitution.

Sections 72 and 77 of the Constitution of Kenya are part of chapter V of the constitution that deal with the protection of fundamental rights and freedoms of the individual. *Section 72 (3) (b)* thereof in particular provides interlia:-

(b) "**A person who is arrested or detained 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."**

Section 77 (1) provides:-

If a person is charged with a criminal offence, then, unless the charge is withdrawn, the

case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

From the charge sheet, it is common ground that the appellant who had not been arrested for a capital offence was not brought to court within 24 hours as required by law. Indeed he was brought to court after 2 days following his arrest. It is his case therefore that the police had no basis to hold him for that long when they could easily have arraigned him in court within 24 hours.

However I am aware that not every longer detention in police custody amounts to a breach of constitutional rights. Indeed *Section 72 (3) (b)* has proviso. It allows the detaining authority to arraign a suspect within a reasonable time. In other words detention beyond 24 hours for non-capital offence and 14 days in case of capital offence can be tolerated for as long as the suspect is brought to court within reasonable time. In other words, a plain reading of that provision 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 court as soon as is reasonably practicable. It is not that he must be brought to court within 24 hours or 14 days as the case may be. Those requirements are not cast in hard stone. The section further provides that if such person is not taken to court as required, 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. As stated by the Judges of appeal in the case of **Dominic Mutie Mwalimu V Republic, CR.APP.NO.217 of 2005 (UR)**

"…….**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 is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the constitution. In our view, the mere fact that an accused person is brought to court either after twenty four hours or the fourteen days, as the case may be, stipulated in the constitution does not ipso facto prove a breach of the constitution. The wording of** *section 72 (3)* **above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on the evidence….."**

I totally agree with these observations.

In the circumstances of this case, much as the explanation was not sought and obtained during the trial as the appellant never raised the issue the delay in my view was not inordinate. By dint of *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. If that is taken into account then there was only a delay of a day in arraigning the appellant in court.

It is also not lost on me that the appellant could as well have sought from the detaining authorities police bond. He did not. He cannot blame the detaining authorities for his own inaction.

I am therefore far from being convinced that a delay of 1 day in arraigning the applicants in court amounted to a breach of his constitutional rights. He was arraigned in court within reasonable time. Indeed the court of appeal in the case of **Paul Mwangi Murunga V Republic, Cr.App.No.35 of 2006 (UR)** stated:

"……**Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that…."**

That is the situation obtaining here. Accordingly, I would dismiss this appeal on conviction.

As regards sentence, I note that though the appellant was charged with grievous harm, the evidence led shows that the injuries sustained by the complainant were classified as maim going by the evidence of the clinical officer on recorded as well as the complainant's P3 form tendered in evidence. It would appear that the learned Magistrate proceeded to sentence the appellant as though the offence committed was grievous harm. He thus fell into effort.

However that error did not render the sentence imposed a nullity. After all both offences attract a maximum sentence of life imprisonment. The appellant was sentenced to 10 years imprisonment. The sentence was legal. Considering the injuries sustained by the complainant, the sentence was well deserved. The complainant had a cut wound on the lower lip, communited fracture of the mandible and lost 3 teeth lower incisor and 2 lower canines. As correctly pointed out by the learned Magistrate in his sentencing notes, "***the complainant's beauty is no more. Her left jaw is totally disfigured. She will forever be traumatized….***" I must therefore resist Mr. Orinda's invitation to have a fresh look at the sentence considering that the appellant and the complainant are members of the same family. The actions of the appellant were beastly and the fact that they are members of the same family cannot move me to interfere with the sentence. The appeal on sentence too fails.

Dated and delivered at Nyeri this 3rd day of June, 2009.

M.S.A. MAKHANDIA

JUDGE