Kifunyi v Republic (Criminal Appeal 196 of 2017)
[2024] KECA 1107 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1107 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 196 OF 2017

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

RODGERS KIFUNYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kakamega (R.N. Sitati, J.) dated 13th October, 2019 in HCCRA No. 109 of 2014)

JUDGMENT

1. The appellant, Rodgers Kifunyi, was the accused person in the trial before the Senior Principal Magistrate's Court at Vihiga in Criminal Case No 790 of 2013. He was charged with four (4) counts. Two of the counts were of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*; one was for gang rape contrary to section 10; and the final one was for personating a public official contrary to section 105 of the *Penal Code*. All the alleged offences were committed on the night of 16th August, 2013 in Chavakali location within Vihiga County.

2. The appellant pleaded not guilty to all the charged counts and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate found the appellant guilty of all four counts and convicted him accordingly. He was sentenced to death on count I (of robbery with violence) as provided by the law, whilst the sentences on the remaining counts were held in abeyance.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Kakamega via Criminal Appeal No 109 of 2014.

4. The High Court (R.N. Sitati, J.) dismissed the appeal and upheld the convictions and sentences in a judgment dated 13th October, 2017.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He raised three (3) grounds in his Amended Memorandum of Appeal. They are that:

    1. The learned judge and magistrate erred in law by failing to consider the mitigation by the appellant herein as well as the respondent before sentencing.

    2. The learned magistrate erred in law by depriving the appellant his constitutional right to legal representation considering the nature of the charges he faced.

    3. The learned judge erred in law by failing to make a finding that the appellant did not have a fair trial.

6. Given the nature of these grounds, it is unnecessary for us to rehash the facts of the case as they emerged in the two courts below in any detailed fashion. However, we shall give a summary of how the proceedings were conducted at the trial court for purposes of contextualizing the grounds of appeal before us – all of which hinge on procedural due process.

7. The record shows that the appellant was arraigned in court on 19th August, 2013, and took a plea on the same day. He was represented by learned counsel, Mr. Lugadiru, who requested to be supplied with a copy of the charge sheet and witness statements. The court also ordered a release of the appellant on a bond of Kshs 200,000.00 with surety of a similar amount. However, the appellant remained in custody during the pendency of the trial, presumably because he was unable to meet the bond terms.

8. Thereafter, the hearing of the case was scheduled on 25th September, 2013, but on that day, the prosecution prayed for an adjournment as none of the witnesses were present in court, even though copies of bonds in the file showed that they were bonded. The court granted the prosecution the last adjournment; and hearing was again scheduled on 23rd October, 2013. On that day, the prosecution told the court that one witness was present in court and the rest were on their way. However, the appellant had not been brought to court prompting the prosecutor to apply for a production order. The court pointed out that it would be going for a prison visit later that day, and that, therefore, the matter would be mentioned there.

9. The next hearing was scheduled on 20th November, 2013, but no witnesses appeared in court on that day despite being called. The prosecution prayed for another adjournment which was objected to by the appellant, on the ground that he was suffering in custody. The appellant's counsel, Mr. Lugadiru, was not present in court when he objected to the prayer for adjournment. However, the court granted the prosecution "the very last adjournment" and scheduled the next hearing on 15th January, 2014. Later that afternoon, the appellant's counsel sought audience of the court and stated that the date issued for the next hearing was not convenient and prayed that the date be changed to 22nd January, 2014. The court obliged. In addition, copies of statements were issued to the appellant's counsel together with the copy of the identification parade form.

10. On 22nd January, 2014, the prosecution yet again prayed for an adjournment on the ground that none of the witnesses were present in court. The appellant's counsel objected to the said application for adjournment. He argued that the prosecution lacked seriousness since it had failed to follow up on its witnesses. He also argued that the appellant had been in custody all along and was entitled to a fair hearing without undue delay. Thus, his rights had been violated.

11. In this regard, the court noted that the prosecution had been granted the very last adjournment on 20th November, 2013, and witnesses summons were also issued. However, the then court clerk, Mr. Ojwang, did not write the said witnesses summons nor take them to the learned magistrate for signing. For this reason, the court made an order that Mr. Ojwang should write an explanatory letter and give

reasons why he did not adhere to the court order. Consequently, the court granted the prosecution the last adjournment and scheduled the next hearing date on 19th February, 2014.

12. On 19th February, 2014, the trial learned magistrate was indisposed and the next hearing was set on 11th March, 2014. On that day, however, the prosecution told the court that the file had been called for by the Senior DPP Kakamega for perusal, and had, therefore, been forwarded to him. In the premise, the prosecution prayed for a mention within two (2) weeks for directions on whether or not the case would proceed. The appellant had no objection and mention was set on 24th March, 2014, for further directions. On the said mention date, the prosecution prayed for another mention date in a week's time. The appellant had no objection and the court allowed the application for mention. On 31st March, 2013, the prosecutor told the court that the matter was "supposed to be withdrawn" but he did not have the police file with him. Therefore, he was unable to comment as he had been informed by one PC Mathenge, that the file had been taken to Kakamega. In the circumstances, he requested for summons to issue to the In- Charge crime office. The appellant's counsel was absent on that day and so the appellant, on his part, prayed for summons to witnesses and argued that he had suffered in remand for long and the case had never proceeded. The court concurred with the appellant but ordered that he be detained at Vihiga Police Station. It also directed that CCIO, Mr. Kenga, deals with the matter since summons and warrants of arrest against the witnesses could not issue as their whereabouts were unknown. For this reason, mention was set on 1st April, 2014.

13. On 1st April, 2014, the prosecutor informed the court that the file had been found at the station; and that it had not been taken to the State counsel as had earlier been indicated. As such, there was no advice from the State counsel. In the circumstances, he urged the court to issue summons to the Officer In-Charge Chavakali Police Station to explain the position of the case as he had no instructions and he did not understand why the Police had given the court a false indication that the matter was coming up for withdrawal. The appellant had no objection to the said application. However, even in allowing the application by the prosecution, the court observed that the appellant's constitutional right to have a speedy and fair trial had been infringed. It, therefore, issued a warrant of arrest against the prosecution witnesses and the In- Charge Chavakali Patrol Base; and set the hearing for 11th April, 2014.

14. On the set hearing date, Sgt. Farah Mohammed, the In-Charge Chavakali Patrol Base, appeared before the court and stated that the complainant was a Nairobi resident who worked as a maid. She explained that she had been bonded several times and came to court but the case never kicked off. Later on, she was informed by the investigation officer that the complainant used to switch off her phone and was nowhere to be found. The complainant had, reportedly, also said that she had no money to travel for court sessions. Sgt Mohammed said that she had instructed the investigation officer to write a forwarding letter and inform the OCPD and DPP of the plight of the complainant, so that they could get instructions on how the matter would proceed. Unfortunately, she got some family issues which she had to attend to. She, therefore, went on leave assured that the investigation officer had written a forwarding letter as she had instructed. Upon receiving summons by the court to appear before it, she found out that the investigation officer was on leave and had not written the forwarding letter as she had instructed. In the circumstances, she requested the court to grant her a short time to take the file to the State counsel; and pointed out that even though the complainant and her husband were nowhere to be found, the other witnesses, who were police officers, were available.

15. The appellant, whose counsel was not present in court that day, objected to the said application on the ground that he had appeared in court several times and the prosecution always said the same thing. He argued that he was suffering in custody and the witnesses who were free citizens did not bother to attend court. In reply Sgt. Farah Mohammed stated that there were times when the witnesses attended court but the case never proceeded; and given that the complainant had a three-month old baby during

the incident, she got tired of attending court. While the court appeared dissatisfied with the Police response, noting that the sergeant had only appeared in response to a warrant of arrest, the court acquiesced to the request to grant the prosecution and investigators one more chance to prosecute the matter. The "very final" mention was scheduled for 25th April, 2014.

16. On 25th April, 2024, Sgt. Farah Mohammed told the court that she had taken steps to write to the OCS, who, in turn, wrote to the OCPD; and the OCPD wrote to the DCIO and DPP. In the circumstances, she requested for two (2) weeks to personally follow up the matter and stated that if she got feedback from the DPP before completion of the two (2) weeks, she would request for the appellant's production order. Both the prosecutor and the appellant had no objection to the application made and so the last mention was scheduled for 9th May, 2014. Meanwhile, the appellant's counsel requested to be discharged from the record. The court granted his request and also noted that the last time he appeared before the court was in January, 2014.

17. On 9th May, 2014, Sgt. Farah Mohammed informed the court that she had a letter from the DPP. The prosecutor confirmed receipt of the letters dated 5th, 6th and 7th May, 2014, and an affidavit by the investigation officer. The letter from the DPP was to the effect that it declined to withdraw the matter as the office had taken the initiative to contact the complainant who had signaled her willingness to testify. In response, the appellant told the court that he was ready to proceed but needed time to read the statements and be prepared. On the same day, the court directed the complainant and the investigation officer (who were present in court) to explain their whereabouts since their failure to attend court for the ten (10) months had led to the infringement of the appellant's right to have a speedy trial.

18. On her part, the complainant told the court that she once attended court, although she could not remember the exact date, but the case did not proceed. The next time she was to attend court, one PC Kemboi called and informed her that the case had been adjourned to another date. Therefore, she travelled back to Nairobi since her employer had given a few days leave and she had to return as she feared losing her job. Since then, she had been in Nairobi but had no money to travel. She reported that she was only able to attend court on that material day because she had come home for a burial.

19. The investigation officer, PC Daniel Kemboi, told the court that he took the file to Mudete Police Station to enable the OCS to write a letter and forward it to the OCPD to report that the complainant could not be traced. However, the State counsel called the complainant the day before the said material date of the hearing and she indicated that she would attend court as she was attending a burial. She, however, said that she did not have money for transport, and as such, the investigation officer paid for her transport and she attended court.

20. Upon the explanation advanced by the complainant and investigation officer, by consent of the appellant, the hearing was scheduled on 14th May, 2014. However, on that day, the appellant complained that he was sick and needed treatment; and so hearing was scheduled on 16th May, 2014.

21. On the date of the hearing, the prosecution informed the court that it was ready to proceed with all six (6) prosecution witnesses present. The hearing of the case commenced with three (3) prosecution witnesses namely: the complainant; the clinical officer, Sammy Chelule, who examined the complainant; and the complainant's husband, G.L. They testified as PW1, PW2 and PW3 respectively. The appellant cross examined all of them. Thereafter, the appellant informed the court that he was not ready to proceed with the other three remaining witnesses as he wished to have PW1 and PW3 recalled on the ground that he was not satisfied with their answers. The prosecution had no objection to the application and further hearing was set on 23rd June, 2014.

22. On 23rd June, 2014, the appellant reiterated to the court that he was not ready to proceed with the three (3) remaining witnesses as he wished to recall PW1 and PW2 on the ground that he was not satisfied with their answers. The prosecution objected to the application and argued that the case had taken a long time to commence since the investigation officer had a difficult time tracing the complainant and her husband. He further stated that the court had the privilege of seeing them in person whereby the complainant explained their financial difficulty, which the appellant was well aware of and he had also been given time to prepare for the case by being supplied with witness statements. In short, the prosecutor argued that there was no basis for recalling the witnesses; and that granting the order would unreasonably lengthen the trial period.

23. The court briefly traced the history of the case – noting the lengthy delays caused by both the prosecution and the appellant – and pointed out that the appellant had not only been given sufficient time to prepare for the trial; but had also been given ample time to cross-examine the witnesses. The court also noted that although section 150 of the Criminal Procedure Code allows for prosecution witnesses to be recalled, the same was only permissible if that person's evidence is essential to the just decision of the court. Further, the section was conditional to the court's discretion based on whether either party would be prejudiced if the prosecution witnesses were not recalled. Be that as it may, the court ruled that even if it was to allow the recalling of witnesses, it did not mean that other witnesses could not testify until the previous witnesses were recalled. Consequently, the court ordered the case to proceed the following day with the witnesses present before the court, and if not, it would invoke section 99 of the Criminal Procedure Code.

24. On 24th June, 2014, the matter proceeded with Cpl Reuben Makacha, the arresting officer; and Sgt. Farah Mohamed, testifying as PW4 and PW5 respectively. Thereafter, the appellant requested to be supplied with identification parade forms which were subsequently supplied to him in open court. Further hearing was scheduled for the following day - 25th June, 2014 - whereby Chief Inspector Peter Kiema, the officer who conducted the identification parade, and PC Daniel Kemboi, the investigating officer, testified as PW6 and PW7 respectively. All these witnesses were cross examined by the appellant.

25. Afterwards, the prosecution informed the court that it had called all its witnesses. The appellant on his side told the court that if the complainant and her husband could not be found to be recalled, then the matter could proceed. However, he prayed for the OB from Mbale Police Station dated 17th June, 2013 to be availed in court as he wanted to compare the names of the people in the identification parade alongside the names of the people in the OB. The prosecution did not object to the said application and the court ordered the said OB to be availed to the appellant the following day during the further hearing.

26. On 26th June, 2014, the appellant informed the court that he wished to have the file closed. Meanwhile, the prosecution supplied the appellant with the OB for 17th June, 2013, in open court as had been ordered; and closed its case.

27. In a ruling dated 11th July, 2014, the court found that the prosecution had established a prima facie case against the appellant and put him on his defence. On the same day, the appellant gave sworn testimony and called no witnesses. He informed the court that he wished to file written submissions, an application which was allowed.

28. As afore-stated, the learned trial magistrate found the appellant guilty of all four counts and convicted him accordingly. During mitigation, the appellant informed the court that he had a family, who included his father who had two wives, and they solely depended on him. He also said that he was a sickly person. The prosecution informed the court that the appellant was a first offender.

29. Being dissatisfied with the decision of the trial court, the appellant appealed to the High Court initially through M/S Kiveu & Co. Advocates, who, through K.N. Wesutsa & Co. Advocates, filed a Supplementary Record of Appeal. The petition of appeal consisted of the following nine (9) grounds reproduced verbatim:

    1. That the learned magistrate erred in law in convicting the appellant in total disregard of the law.

    2. That the learned trial magistrate grossly erred in relying on contradictory, non-corroborative and unreliable evidence tendered by the prosecution in convicting the appellant.

    3. That the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.

    4. That the appellant's constitutional right to a proper defence collorary of which is timely provision of prosecution witness statements and documents for use in court was not upheld thereby occasioning an injustice.

    5. That the trial magistrate erred in fact and law by completely disregarding the appellants case and evidence thereby occasioning an injustice.

    6. That the trial magistrate erred in her judgment as she thereby inexplicably arrived at a conclusion that by merely being arrested as a suspect the appellant was guilty as charged.

    7. That the trial magistrate's evaluation and treatment of the appellant's evidence was perfunctory.

    8. That the trial Magistrates erred by holding that the prosecution had established its case against the appellant beyond reasonable doubt notwithstanding the omission on its part to summon and corroborate evidence linking the appellant to the offence charged.

    9. That the trial magistrate erred both in law and fact by imposing a sentence that was not only manifesting high but illegal.

30. It is unnecessary for us to go into the details of the grounds raised at the High Court except to point out that the appellant did not raise the argument about the constitutionality of the mandatory death penalty.

31. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr. Bagada appeared for the appellant, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions and gave brief oral highlights.

32. On the first ground of appeal, counsel for the appellant contended that the trial court fell into error for not considering the appellant's mitigation including the fact that he was a first offender. He argued that the record showed that the trial learned magistrate failed to consider the said mitigation due to the mandatory sentence prescribed in section 296(2) of the *Penal Code*. Thus, the court did not exercise its discretion in sentencing the appellant. He sought to rely on this Court's decision in *Cyrus Kavai Onzere v Republic*, [2023] eKLR.

33. Counsel argued the other two grounds of appeal together – ultimately arguing that the trial court violated the appellant's constitutional rights by not supplying him with an advocate considering the very serious charges the appellant was facing. At no particular time during the trial, counsel argued, was the appellant made aware of his right to have legal representation at the expense of the State. In this regard, he relied on this Court's decision in *David Njoroge Macharia v Republic*, Nairobi Criminal Appeal No 497 of 2007 [2011] eKLR, wherein it was held that Article 50(1) of the *Constitution*,

2010, provides that an accused person shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result. And that even though substantial injustice is not defined under the *Constitution*, the provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore, provisions of the *International Covenant on Civil and Political Rights* (ICCPR) and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

34. Opposing the appeal, Ms. Busienei reminded this Court of its role as the second appellate court, which is to deal with matters of law only and not delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. Counsel relied on this Court's decision in *Karani v Republic* [2010] 1 KLR 73.

35. Counsel submitted that she did not respond to the appellant's first and second ground because he never raised them at the High Court. In any event, she submitted that the record showed that the appellant was represented by counsel at the trial court and was supplied with all documentation necessary for his defence. Ms. Busienei further argued that the record showed that the appellant did not proceed with his advocate during trial but no reasons were indicated for his discharge.

36. On the third ground, the totality of counsel's written submissions was to the effect that the appellant was afforded a fair trial and convicted accordingly. Ms. Busienei argued that the entire record showed that the appellant was accorded a fair trial; and that the trial court went out of its way to ensure that the appellant's rights were respected. She further argued that the circumstances of the offence were so chilling and called for the death sentence to be maintained. The appellant and his accomplices, she argued, not only violently robbed the victims, but even though the victims cooperated and begged for mercy, they gang-raped the complainant who had only recently given birth – and even sadistically threatened to penetrate her using a panga.

37. This is a second appeal. As such, our jurisdiction is limited to a consideration of matters of law only, by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

> "This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong v R*, [1984] KLR 611."

38. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.

39. The first ground of appeal is that the trial court erred by not considering the appellant's mitigation since it sentenced him to the mandatory death penalty stipulated in section 296(2) of the *Penal Code*. Unfortunately for the appellant, this argument, which relies on the reasoning of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1), cannot succeed for two reasons. First, the Supreme Court has given categorical guidance in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others* (Amicus Curiae) (2021) eKLR (Muruatetu 2) that the holding in Muruatetu 1 is inapplicable to the offence of robbery with violence. Second, as the Supreme Court reiterated recently in *Republic v Joshua Gichuki Mwangi*; (Petition E018 of 2023) [2024] KESC 34 (KLR), this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court. To this extent, the appellant misunderstands this Court's holding in *Cyrus Kavai*

Onzere v Republic [2023] eKLR. In that case, this Court held that while this Court may consider the constitutionality of mandatory death sentence in section 296(2) of the *Penal Code* drawing from the analogous reasoning in Muruatetu 1, it can only do so where the constitutional question has been preserved for determination by this Court by first raising it in the High Court. The constitutional argument cannot be raised for the first time on second appeal.

40. The next due process argument the appellant raises is with respect to the right to representation. He heavily relied on this Court's decision in *David Njoroge Macharia v Republic* (*supra*). In fact, the decision does not state that all persons charged with capital offences in Kenya are automatically entitled to legal representation provided by the State as the appellant urges. The relevant holding of the Court is that:

> " The current Constitution provides:
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> 50.
>
> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
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> (2) Every accused person has the right to a fair trial, which includes the right—
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> ...
>
> (c) to have adequate time and facilities to prepare a defence;
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> ...
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"
>
> Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice.....
>
> Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the *ICCPR* and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
>
> We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re- trial where no such

legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

41. The position presently obtaining in Kenya is that an accused person is only entitled to legal representation provided by the State where he can demonstrate, in the unique circumstances of his case, that he cannot afford an advocate, and that he would suffer substantial injustice if he is not represented by counsel in his case. The potential penalty upon conviction is but one of the factors that the court considers in determining if substantial injustice would be occasioned if a State-appointed counsel is not provided at trial. The other factors include the accused person's own circumstances such as his ability to understand the nature of the case he is facing.

42. In the present case, we note that the appellant had secured his own private counsel when the trial began. The advocate later asked to be discharged from the case, and the appellant did not object to the application. It is not apparent why the advocate asked to be discharged. However, after discharge, the appellant asked for time to prepare for the case, and requested to be supplied afresh with witness statements and other documents to enable him to prepare for the trial. Both requests were granted by the trial court. Later on, the case proceeded to completion. The record indicates that the appellant cross-examined the prosecution witnesses vigorously – and even applied to recall some witnesses.

43. In the circumstances of this case, we are unable to come to the conclusion, as desired by the appellant, that he suffered substantial injustice when he was not provided with an advocate funded by the State. All indications are that the appellant was able to represent himself effectively; and that he suffered no substantial injustice from the fact that he was not represented by counsel.

44. Finally, we will address the general complaint that the whole trial suffered such serious procedural infirmities that it should yield the conclusion that the appellant did not receive fair trial and is, therefore, entitled to an order for re-trial. We took time to rehash the entire procedural history of the case in the first part of this judgment because we believe that the record speaks for itself that there were no such serious violations of procedural due process as would lead this Court to the conclusion that there was a mistrial. It is true that there was an unusual delay in starting the trial – and that the delay was characterized by a bizarre charade by the investigating team; a charade that involved seemingly untrue indications to the trial court that the DPP was mulling withdrawal of the charges. However, it is also true that the trial court actively took control of the docket and did everything in its power to ensure that the trial was completed in the shortest time possible. The efforts by the trial court to ensure justice was served included the unusual but necessary step to issue a warrant of arrest to the officer in charge of the police station whence the criminal charge originated; and requiring the investigating officer to explain why she had variously failed to summon witnesses to court.

45. Taking into consideration all the factors – including the various times that the appellant or his advocate requested for adjournments hence contributing to the delay in concluding the trial – it cannot be said that the appellant was subjected to a trial process that can be termed offensive to the concept of fundamental fairness. At the end of the day, the appellant's trial proceeded to full hearing; the appellant was accorded adequate facilities to prepare and conduct his defence; and was granted ample opportunity to confront and cross-examine the prosecution witnesses. In short, the trial process met the minimum threshold for procedural due process demanded by our Constitution.

46. The upshot is that the appeal herein is unmeritorious. It is hereby dismissed in its entirety.

47. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR