REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & MURGOR JJ.A)

CRIMINAL APPEAL NO. 267 OF 2010

BETWEEN

JOSEPH KIBE WANGARI ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi (Lesiit & Warsame, JJ) dated 8th July 2010

in

H.C.CR.A. No. 338 of 2007)

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JUDGMENT OF THE COURT

In this second appeal, *JOSEPH KIBE WANGARI*, the appellant was tried and convicted before the Senior Principal Magistrate at Kibera, Nairobi for the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that on the 10th day of November, 2005 at Kawangware within Nairobi area province, jointly with others not before court while being armed with dangerous weapons namely pistols, robbed Johnstone Bwala of a motor vehicle make Toyota G-Touring dark blue in colour Registration number KAM 927R valued at Kshs.550,000/=, a mobile phone make bird valued at Kshs.5,500/= and cash Ksh.800/= all valued at Ksh.556,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Johnstone Bwala.

Briefly, the facts of the case were that, at about 12.30 pm on 10th November 2005 ***Johnston Bwala, (PW1)*** was driving his car to Kawangware, when upon reaching Rusinga School, he came upon a road block mounted with logs and barbed wire. As he attempted to reverse, two men came to the driver's side of the vehicle, pointed a gun at him, and ordered him to move to the back seat and lie on the floor. As he did so, he pressed the "Track It" panic button, thereby activating a car tracking device. They were immediately thereafter joined by three other men. One of the robbers then took control of the vehicle and drove off. A few minutes later, the motor vehicle stalled in Karen, and the robbers together with Johnson Bwala pushed the vehicle into a Delta Petrol Station. The car tracking device had alerted the Car Track It

vehicle on duty manned by two Police Officers, ***PC Paul Kipkorir Ng'eno, PW2*** and ***PC Joab Owino, PW3*** as well as Track It personnel. The Track It vehicle followed the subject vehicle to the petrol station where the Police officers confronted the robbers, following which a gunfire exchange ensued. Four of the robbers escaped from the scene. Johnson Bwala testified that he identified himself to the Police officers as the driver of the subject motor vehicle of the robbery, and informed them that one of the robbers, the appellant, was seated in the vehicle.

PC Ng'eno and PC Owino the two Police officers on duty in the Track It vehicle, testified that they tracked down the vehicle to the petrol station at the Karen shopping centre, where they saw the vehicle being pushed into the petrol station. It was then that they confronted the robbers and a shoot- out ensued. Four of the robbers escaped. They stated that Johnson Bwala identified himself as the driver and victim of the motor vehicle. They also found the appellant sitting in the back seat of the vehicle, and arrested him. They recovered a firearm magazine and four rounds of 9 x 19mm calibre ammunition, which were produced as exhibits. ***CIP Lawrence Ndhiwa, PW4*** a ballistics examiner, testified that the four rounds of ammunition were live ammunition as specified within the Firearms Act Chapter 114, Laws of Kenya.

The appellant gave a sworn statement but did not call any witnesses. He testified that he was passing by the Delta Petrol station, where a vehicle had stopped. Two people had called him, and ordered him to give them his possessions, and enter the vehicle. He stated that he was found inside the vehicle by the Police officers, and had informed them that he was a victim of the robbery. He nevertheless was taken to the Karen police station, where he was charged with the offence.

Upon evaluating the evidence, the trial Magistrate convicted the appellant, and sentenced him to death as by law prescribed.

Being dissatisfied with the conviction and sentence the appellant then filed an appeal in the High Court, where *Lesiit, J* and *Warsame, J.* (as he then was) re-evaluated the evidence on record, upheld the appellant's conviction and sentence and dismissed his appeal.

Being further dissatisfied with the High Court's decision, the appellant in person filed this appeal which is before us, and which is based on seven grounds as follows:-

> ***"1. That the learned superior court judges erred in law by failing to find that I was detained in police custody for more than the stipulated period of time before I was arraigned in court. This violated section 72 (3) of the Constitution.***
>
> ***2. That the learned superior court judges erred in law by failing to find that the succeeding magistrate did not comply with the provisions of section 200 (3) of the Criminal Procedure Code.***
>
> ***3. That the learned superior court judges erred in law by failing to find that I was not accorded a fair trial. This violated section 77 (1) of the Constitution of Kenya.***
>
> ***4. That the learned superior court judges erred in law by failing to find that the prosecution had not proved the charge preferred against me to the legal standard required.***
>
> ***5. That the learned superior court judges erred in law that the learned superior court judges erred in law in failing to analyse and re-evaluate the trial record exhaustively and drew (sic) a conclusion as duty bound.***
>
> ***6. That the learned superior court judges erred in law by failing to consider or adequately consider my sworn defence which is cogent and plausible to displace the prosecution's case.***
>
> ***7. That since I am not in a position to recall all what transpired in the high court, I request the court to avail me the court proceedings and judgment to enable me rise more***

grounds to be adduced during the hearing of this appeal."

Mr. Onalo, learned counsel was subsequently appointed to appear for the appellant and adopted those grounds of appeal after withdrawing a supplementary grounds of appeal filed by the appellant. He also abandoned all the grounds of appeal save for grounds 1, 2 and 5 which he argued before us. In summary, he submitted that the appellant was arrested on 10th December 2005, but was not produced in court until 15th December 2005, a delay of over 30 days, which delay was not explained by the prosecution, contrary to **section 72(3) (b)** of the repealed Constitution; that the appellant was not accorded a fair trial contrary to **section 200 (3)** of the Criminal Procedure Code, as the trial magistrate made a decision to commence the trial *de novo* and without informing the appellant of the right to recall or rehear any witness; and finally, that the High Court failed to evaluate and analyse the evidence, and to consider the appellant's defence despite the existence of numerous contradictions among them: the number of robbers present, whether the appellant remained in the vehicle, or was one of the robbers that was outside pushing the vehicle.

Mr. Monda, Senior Principal Prosecution Counsel opposed the appeal, and contended that on the issue that the appellant's rights had been violated contrary to ***Section 72 (3) (B)*** of the Constitution, this had been comprehensively addressed by the High Court; that with respect to the contention that Section 200 (3) had been violated, no prejudice was visited upon the appellant as the evidence omitted was similar in nature to the evidence provided by PC Ng'eno and PC Owino; and finally that both the trial Magistrate's court and the High Court had substantially evaluated the evidence made the concurrent finding that the appellant was not a victim of the robbery.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of ***Section 361(2)*** of the Criminal Procedure Code, this Court can only address matters of law, and shall not interfere with concurrent findings of facts made by the two courts below, unless such findings are not based on any evidence on record or based on a perverted appreciation of the evidence or the courts are shown demonstratably to have acted on wrong principles in making the findings. See ***CHEMAGONG V. R. [1984] KLR 611*** and ***M. RIUNGU VS. R. [1983] KLR***

We will turn to the first issue on whether the appellant's rights under ***section 72 (3) (b)*** of the former constitution were violated, in that no explanation was provided by the prosecution as to the reason for the delay. It is clear from the record that the High Court indeed addressed this issue, yet despite these considerations, *Mr. Onalo's* complaint was that, the prejudice to the appellant more particularly arose from the failure by the prosecution to provide an explanation to the trial court on the reasons for the delay, and thus discharge the burden of proving that the person had been arraigned before the court as soon as was reasonably practicable. Counsel's argument is that the constitutional provision makes it a requirement for the prosecution to explain the reason for delay to the satisfaction of the court, failure of which would result in a discharge of the appellant from the criminal charges or proceedings.

Section 72 (3) (b) stipulates:-

> ***"(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 to before 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 of 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 the provisions of this subsection have been complied with*."(emphasis added)

From the provision, it is clear that, it is not in all cases arising under ***section 72(3)(b) t***hat an explanation requires to be provided by the prosecution. The provision only makes it a requirement for the prosecution to explain and to discharge the burden of proof in respect of delay in arraigning the accused in court

within a reasonable time, where the prosecution alleges that the provision has been complied with.

Having said this, the question that arises is whether the failure to explain, in and of itself gives rise to the remedy of acquittal or discharge from criminal offence or prosecution.

The issue of violation of rights under ***Section 72(3)(b)*** and the remedies thereunder was settled in the case of ***JULIUS KAMAU MBUGUA -VS- REPUBLIC*** **- *Criminal Appeal No. 50 of 2008,*** where this Court rendered itself thus:-

> *"**In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of personal liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages."***

To arrive at its determination, in that case this Court considered a variety of different decisions of the High Court where the violation of rights under ***section 72(3)(b)*** were held to have existed, including cases where explanations were not provided by the prosecution, or where the explanation was not provided to the satisfaction of the court. (See ***AMOS KARUGA KARATU VS REPUBLIC*** Nyeri Criminal Case No. 12 of 2006, ***REPUBLIC VS DAVID GEOFFREY GITONGA*** Meru Criminal Case No. 76 of 2006 (unreported) and ***REPUBLIC VS GEORGE MUCHOKI KUNGU*** Nairobi Criminal Case No. 49 of 2007).

In the instant case, the prosecution was silent on the question of delay during the trial court hearings, and did not at any time allege that ***section 72 (3)(b)*** had been complied with. The question of delay in arraigning the appellant in court, was raised on appeal in the High Court, where it was found that there had indeed been a delay of 36 days. Again, no attempt was made to explain the delay, or to prove that the section had been complied with.

Needless to say, there is no doubt that there was a delay, but we reiterate as we stated in the ***MBUGUA'S*** case (supra), that the appellant's entitlement in the face of this delay would be monetary compensation in a constitutional reference, and not an acquittal. We therefore find no merit in respect of this complaint, which accordingly fails.

With respect to the issue of whether the court failed to inform the appellant of his rights under **section 200 (3) of the Civil Procedure Code,** *Mr. Onalo* contended that the trial magistrate's decision to commence the case *de novo* was prejudicial to the appellant, as the testimony of one ***Edwin Njeru Mundati***, that was recorded in the initial trial was subsequently excluded in the *de novo* trial, to the detriment of the appellant.

Section 200 (3) stipulates

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the hearing has been recorded by his predecessor, the accused may demand that any witness be resummoned or reheard and the succeeding magistrate shall inform the accused person of that right."***

This provision encompasses the situation where a succeeding magistrate takes over the trial from an

outgoing magistrate, who has already recorded evidence from witnesses, and proposes to continue with the trial to its conclusion. In such circumstances, the accused must be informed of his rights to recall or have any of witnesses to be summoned. In the instant case however, when the trial magistrate *Mr. Kiarie* took over the trial from the outgoing magistrate, *Ms. Mwangi*, he commenced the case *de novo*, and did not continue with the trial where Ms. Mwangi stopped. Consequently, we find that *section 200 (3)* was not applicable in the circumstances of the trial. *Mr. Onalo* has also complained that the appellant was denied the benefit of the testimony of one *Edwin Njeru Mundati* which had been recorded before Ms. Mwangi. On this, *Mr. Monda* submitted that the testimony of the particular witness would not have enhanced the facts in any way and as such would have been superfluous, as the prosecution did not require the same evidence given by other witnesses gave before the court. We have considered the issue and we are satisfied that, **Section 143** of the Evidence Act which provides that no particular number of witnesses is required to prove a particular fact is relevant. As such, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case. As a consequence this ground fails.

Finally, on the issue of whether the High Court failed to re-evaluate the evidence and take into account the appellant's defence, *Mr. Onalo* argued that in convicting the appellant, the High Court did not consider that the evidence was contradictory, as it did not state how many robbers were involved in the robbery or properly place the appellant with certainty either inside or outside the vehicle. Counsel submitted that, the High Court failed to consider the appellant's defence by rejecting his contention that he was a victim of the robbery, without having regard to the contradictions in the evidence. In considering the appellant's defence, the High Court stated thus:-

> ***"We have considered the appellant's defence before the trial court at length. We find that the evidence adduced against him clearly shows that he was in the company of the four who escaped from the police and that he had a common intention with those others to rob the complainant of his vehicle."***

We are in no doubt that the High Court, did carry out a re-evaluation of the evidence on record before making concurrent findings with that of the trial court.

As for the alleged contradictions, *Johnston Bwala* clearly testified that there were five robbers that entered and took control of his vehicle. When the vehicle stalled, all the robbers, pushed the vehicle to the petrol station. Johnston Bwala was categorical that between the carjacking and the petrol station, no passengers were picked by the robbers, therefore the appellant must have been with the robbers from the time the vehicle was stolen. Once they reached the petrol station, the appellant who also pushed the vehicle, returned to the vehicle, and remained there, where he was found by the police officers. From PC Ng'eno's and PC Owino's evidence, four robbers escaped following the shoot-out. Johnson Bwala stated that one person remained in the vehicle, whom he did not know, and was not his passenger. He testified that he had informed the police officers that this person, the appellant, was one of the robbers. That evidence from the three witnesses is both mutually supportive and consistent.

The appellant on the other hand testified that the subject vehicle passed him at Gitanga Road. He also stated that the vehicle passed him at the Delta petrol station. He then stated that he found the vehicle had stalled, and it was when he was passing it that the robbers called him out. His evidence is self contradictory when he states that, when the vehicle stalled he was ordered to enter the stalled vehicle, and to remain there. When he was found inside the vehicle by the police officers, PC Owino testified that the appellant had informed him that he was a passenger, and insisted that he was a victim of a robbery.

From the sequence of events, we can find no contradictions in Johnson Bwala's evidence, which we consider to be clear, logical and cogent, and provided a graphic account of the events as they transpired, and which was believed and relied upon by both the trial court and the High Court. We say this because from his evidence, it is clear that, there were five robbers that entered the vehicle. When the vehicle stalled, the robbers together with the appellant, pushed it to the petrol station. Thereafter, the appellant returned to sit at the back of the vehicle. After the exchange of gun fire, four robbers escaped leaving the fifth robber, the appellant, sitting in the car.

The appellant's testimony on the other hand is difficult to comprehend. It is unclear as to whether the vehicle passed him on Gitanga Road or at the Delta petrol station, or whether the vehicle stalled while he was inside the vehicle, or whether it had stalled by the time he came upon it or even whether he was robbed or not.

As to whether the appellant could be considered a victim, according to *Johnston Bwala*, the appellant's behavior was not that of a person who had just been hijacked and robbed. To the contrary, he sat at the back seat of the vehicle with the other robbers, and stepped on *Johnson Bwala*, who had been made to lie on the floor. He also testified that at the time the appellant was found by the police officers inside the subject vehicle, he did not hear him complain or report to the Police officers that he had been robbed.

We find as the two courts below did, that the appellant's contention that he was a victim is incredible and unbelievable, as his behavior was inconsistent with that of an innocent person going about his affairs. After being accosted, robbed and inadvertently caught up in a gun fire exchange, such a person would ordinarily be shaken and in a state of shock, but from the evidence on record, the appellant's conduct after being found inside the vehicle by the police officers, was one of composure. He was completely unperturbed by the violent events of the night. His calm and unaffected demeanor can only lead to the conclusion which the two courts below correctly made, that the appellant was not a victim, but was the fifth robber who was left behind after the other robbers had escaped, and who sought to masquerade as a victim of the robbery.

As such, we are satisfied that the High Court adequately re-evaluated the evidence including the appellant's defence. We therefore see no reason to interfere with the concurrent findings of fact by the two courts below, and find that this ground is without merit.

Consequently, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed in its entirety.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of FEBRUARY, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

P. N.WAKI

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JUDGE OF APPEAL

A. K.MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR