IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & M'INOTI JJA.)

CRIMINAL APPEAL NO. 248 OF 2009 (R)

BETWEEN

MUSEMBI KULI ……..…….…… APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court at Machakos (Lenaola & Ochieng, JJ.) dated 24th September, 2009

In

HC.CR.A. NO. 42 OF 2006)

****

JUDGMENT OF THE COURT

This is a second appeal by Musembi Kuli (the appellant) against the conviction and sentence of death imposed on him by the Machakos Chief Magistrate for the offence of robbery with violence. The particulars of the charge were as follows;

> ***"MUSEMBI KULI: On the 4th day of October 2005 at Makutano Market Mwala Division in Machakos District within the Eastern Province being armed with dangerous weapons namely an axe and pangas, jointly with others not before court robbed CAROLINE MWIKALI KIMULI of her handbag containing Kshs. 2,000, one gold chain, one pair of earrings and one ring all valued at Kshs. 5,000 and at or immediately before or after such time of robbery used actual violence on the said CAROLINE MWIKALI KIMULI."***

Upon conviction and sentence by the trial court, the appellant filed an appeal before the High Court in Machakos. That appeal was heard by **Isaac Lenaola** and **Fred A. Ochieng** (JJ) who, by a judgment dated and delivered on 24th September 2009, dismissed it.

Being aggrieved by that decision the appellant filed a Notice of Appeal to this Court. He also prepared and filed a document styled "Grounds of Appeal" raising various grounds of grievance against the said judgment. These were however abandoned by the appellant's learned counsel Mrs. Nyamongo. Counsel instead relied on and argued before us some three grounds contained in a Supplementary Memorandum of Appeal as follows;

> **"1. THAT the Superior Court judges erred in law and in fact in failing to resolve that the appellant's constitutional rights as spelt out under Sections 72 (3) and 77 (1) of the Constitution had been violated.**
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> **2. THAT the Superior Court judges erred in law by failing to resolve that the appellant's rights under Section 77(1) 2(a) (b) (c) (d) (e) (f) of the Constitution as read together with Section (198) of the Criminal Procedure Code (Cap 75). Laws of Kenya were violated to the prejudice of the appellant.**
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> **3. The Superior Court judges erred in law and in fact by failing in revaluating the entire evidence with much accuracy and note that the prosecution evidence was full of discrepancies and fatal contradictions which render the whole evidence scanty and unworthy to sustain conviction and sentence against the appellant."**

In her submissions, counsel for the appellant first contended that the appellant's pre-plea incarceration was too long and vitiated the entire proceedings against him. He was brought to court some 27 days after his arrest, counsel urged, which was beyond the 14 days limit set by the former Constitution and so the entire trial was a nullity. When we asked counsel to provide authority for the proposition that such prolonged detention renders the proceedings a nullity, she had none. We are at a loss to fathom how counsel can be content to make what should be an important submission without case law in support of it when there is a sufficiency of such authority.

This same issue had been raised before the High Court and this is how the learned judges dealt with it;

> ***"Finally, on the issue of the delay in bringing the appellant to court, we can only say that it was raised too late. We say so because it was only raised, for the first time, at the hearing of the appeal. In those circumstances, the State did not have any opportunity to put forward any explanation for the delay in bringing the appellant to court. Given the fact that by virtue of Section 72(3) of the Constitution, the State is accorded a window of opportunity to demonstrate that an accused person was brought to court as soon as reasonably practicable, even though it was after 24 hours or the 14 days, from the time of his arrest, it would be wrong to enable the appellant to benefit from his failure to accord the state the opportunity to utilize that window of opportunity."***

The learned judges dealt with this issue correctly in our view. The retired Constitution provided for a mechanism of explanation for any delay in presenting an accused person to court. But such explanation was called upon when a complaint arose about the permitted period of pre-plea incarceration having been overshot. Failure to raise the matter before the trial court at the earliest moment, preferably at plea-taking, amounts to a forfeiture of the right to obtain an explanation from the State. Such failure, moreover, invites views that any later raising of the issue is a mere afterthought.

It is our respectful view that extra- judicial detention, otherwise known as prolonged detention or delay has nothing to do with the nature of the charges facing an accused person. Criminal culpability or liability is an offence committed against civil order or an individual, therefore delay committed by indolent or inattentive police officers cannot vitiate a proper charge/s attributed to an individual. As a Court we have to undertake a balancing exercise in terms of public right and individual liberty when addressing delay/detention caused before a person is brought to court. We are not advocating for a blanket or prolonged detention by police officers but what we are saying is that delay or detention cannot lead to an

automatic acquittal or release. We think the accused has a cardinal duty to raise the delay at the earliest opportunity, so that the court could satisfy itself from all the surrounding circumstances, and make an informed view based on the scales of justice. Once a trial begins and results in a conviction, there is need to separate the two issues, as the conviction is an accrued public right while the delay is an unproven factual issue. We therefore think that it is preposterous to submit that delay is an automatic answer or defence to a conviction. If that were to obtain, the administration of justice would be prone to abuse and manipulation.

The violation of the right to be brought to court within the constitutional time limits cannot lead to a conclusion that the entire trial becomes a nullity as counsel tried to persuade us. Such a conclusion is not to be found in the constitutional text itself and nor can a logical and practical approach to the issue permit it. The violation of the right if proved can only found an action for damages. We reiterate what this Court stated in **JAMES KABWARO NYASANI Vs. R Nakuru Cr. Appeal NO. 54 OF 2011** (Unreported);

> **"The appellant's complaint that the original trial was a nullity by reason of alleged violation of his constitutional rights under Section 72(3) of the former Constitution cannot, with respect, succeed. We note that the appellant never raised this issue before the trial court…We view his attempt to raise the said questions here an afterthought …**
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> **We also agree with Mr. Chirchir, the learned Senior Prosecution Counsel for the respondent, that even if there had been such violation, which there is not, the appellant's recourse would have been in damages."**

The foregoing sentiments reflect the current and, in our respectful view, correct thinking of this Court on the proper remedy and consequence of prolonged pre-charge or extra judicial detention of a person facing criminal charges. One of the best analysis of the previously conflicting decisions of this Court and the High Court on this point is to be found in the case of **JULIUS KAMAU MBUGUA Vs. REPUBLIC Criminal Appeal No. 50 of 2008** (unreported). The Court (Githinji, Waki & Visram JJA.) traced the genesis and development of the drastic jurisprudence that posits an acquittal as the consequence of pre-trial breach of the personal liberty rights of an accused person beginning with this Court's pioneering decision in **ALBANUS MWASIA MUTUA Vs. REPUBLIC Criminal Appeal No. 120 of 2004** (unreported) where it had been held 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. The Court considered the case of **PAUL MWANGI MURUNGA Vs. REPUBLIC Criminal Appeal No. 35 of 2006** (Nakuru) (unreported) where an unexplained delay of 10 days was held to warrant an acquittal and in which this Court had said, contrary to the view we have ourselves expressed, that the duty to explain on the part of the prosecution was not dependent on a complaint being raised by the accused person.

The **JULIUS KAMAU MBUGUA** court also considered decisions of the High Court which had followed that strict, pro-acquittal philosophy including **ANN NJOGU & 5 OTHERS Vs. REPUBLIC High Court Misc. Appl. No. 551 of 2007** (unreported) where Mutungi J. had held that any prosecution following inordinate incarceration is a violation of the rights of the arrested or detained person and is therefore illegal null and void.

Against that line of authorities is another that posits a more pragmatic approach that finds its footing in considerations of the general law and public policy and that Court, after analyzing them came to this conclusion with which we fully agree;

> ***"Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed,***

> ***secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84 (1) would be an order of compensation for such breach. The rationale for prescribing monetary compensation in Section 72 (6) was that the person had already been unlawfully arrested or detained. Such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages. Again, we respectfully agree with Emukule, J. that breach of Section 72 (3) (b) entitles the aggrieved person to monetary compensation only."***

As regards the complaint that the Prosecution did not make available to the appellant the witness statements and that they were finally availed upon payment of photocopying charges, we thought it rather melodramatic for the appellant's counsel to submit that it was "inhuman" for the appellant to have to pay the charges. True it is that since it is the State that brought the appellant to court and was prosecuting him on a criminal charge, the onus was on the prosecution to avail the statements to him. Much as it may be the practice, as was pointed out to us by Mr. Kamula, the learned Senior Assistant Director of Public Prosecutions, that accused persons normally pay the photocopying charges, we do not see why it should be so. The accused has a right to receive, and the prosecution bears the concomitant duty to supply, all the materials it intends to rely on so that the accused is not hampered in the preparation of his defence. The witness statements are an integral part of those materials. The prosecution ought to be able to discharge that burden without requiring the monetary input of the accused.

Having said so, however, we do note that the appellant is on record as having told the trial magistrate as follows;

> **"ACCUSED: My relatives are present today. They will pay for photocopying expenses."**

We are not prepared to hold that the appellant suffered any significant violation of his fair trial rights by reason of having to pay for the photocopying of the witness statements. At most, the appellant is entitled to a refund of the photocopying charges that he incurred. This point of grievance therefore fails.

The second ground of appeal also raised a constitutional issue in that the appellant contends that he was not accorded a fair trial in two respects namely that he was allegedly not asked which language he understood and further that he had to pay for copies of the witness statements. On the question of language, we find no substance in the grievance. The record is quite clear that when the matter proceeded for hearing, there was present in court one Nyalo who was the court clerk translating the proceedings from English to Kikamba. It is clear that the appellant took part in the proceedings including by cross-examination of prosecution witnesses and his participation is captured on the record. When it came to his defence, the appellant elected to give an unsworn statement. The record then states that he proceeded to do so in Kamba language which was of course translated into and recorded in English. This complaint about language, which the appellant is raising for the very first time before this Court not having been raised before the High Court, must also fail.

The appellant's final assault on the judgment of the High Court is premised on that Court's alleged failure to re-evaluate the whole evidence and thereby unearth inconsistencies and fatal contradictions. It is not in doubt that the appellant was entitled to expect that the High Court as a first appellate Court do perform its duty of essentially re-hearing the case. That duty was expressed by the predecessor of this Court in **DINKERRAI RAMKISHAN PANDYA Vs. R [1957] EA 336** as entailing a weighing of conflicting evidence and drawing its own conclusions. It involves a rehearing of the case, a reconsideration of the materials before the court and making its own mind on the same. The Court went on to say, and we accept it to be the basis of our considering this point, as follows;

> ***"On a second appeal, to this Court where, as in the present case, the trial was before a magistrate, it becomes a question of law as to whether the first appellate court, on approaching its task, applied or failed to apply those basic principles."*** (at p 338)

From our own consideration of the record and the judgment of the High Court, we are not prepared

to find that that court failed in its duty. Rather, it appears quite clear that the learned Judges fully and carefully considered all the evidence before arriving at the conclusion that the complainant did recognize the appellant, whom she had known 'from the early nineties' as one of the robbers who attacked her on the material night. It is he that was armed with an axe and he that hit her. She mentioned him by name to several people. The learned Judges also observed as follows;

> ***"During cross-examination by the appellant, PW1 said that although the appellant was wearing a hat and a great coat, he did not cover his face. She also explained that immediately after the incident, the appellant went into hiding, hence the delay of 3 days before he was arrested."***

The learned Judges in their judgment delved deeper into analysis of all the evidence before arriving at the conclusion, entirely justified from what we see on the record, that the evidence against the appellant was simply overwhelming and his conviction well-founded. The result of such thoroughgoing analysis of the evidence that independently confirms the findings of the trial court on matters of fact is that as the second appellate court, we are faced with two concurrent findings of fact by the two courts below. We would have absolutely no basis for disturbing such findings. This includes the findings on identification which Mrs. Nyamongo tried to improperly introduce in submissions the same not being part of the grounds of appeal.

In the result, we find and hold that the appellant's conviction was safe and agree with Mr. Kamula that the appeal lacks merit. It is dismissed in its entirety.

Dated and delivered at Nairobi this 8th day of November, 2013.

M. A. WARSAME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR