



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 382 OF 2009**

**BETWEEN**

**ELIZABETH WAIATHERA MARY ..... 1<sup>ST</sup> APPELLANT**

**ELISPHER MUTHONI .....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a ruling of the High Court of Kenya at Nairobi (Ochieng, J.) dated 30<sup>th</sup> June, 2009***

***in***

***H.C.CR.C.NO.68 OF 2004)***

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**JUDGMENT OF THE COURT**

***Elizabeth Waithera Mary and Elispher Muthoni***, the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein, appeal to this Court against the ruling of ***Ochieng, J.*** in ***High Court Criminal Case No. 68 of 2004.***

Before the superior court, the two appellants were charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, the particulars of which are that, between 21<sup>st</sup> February and 27<sup>th</sup> February 2004 at Tukuyu Village in Murang'a District of the Central Province, jointly with others not before Court, murdered ***Alexander Kungu Wangui***. At the point when a preliminary point was taken by the defence counsel in the superior court, the prosecution case had been concluded and the court had put the appellants to their defence on 20<sup>th</sup> August, 2007, but they did not raise the preliminary point until 14<sup>th</sup> July, 2008, a period of close to one year.

In brief, the preliminary point raised in the superior court and now in this appeal is that, the appellants' constitutional rights had been violated because, before the commencement of the trial, they were held in police custody for two (2) months and fifteen (15) days. They urge that, the delay in taking them to court was not justifiable in the circumstances of the case, and that the State had not offered any explanation for the delay. The preliminary objection was dismissed. The appellants' main ground of

appeal is that, the admitted delay entitles them to an acquittal even at this stage of the trial in the superior court because **sections 72(3)(b)** and **77** of the Constitution were contravened.

In the interest of clarity, it is important to observe that although what is being substantively raised in the grounds of appeal contained in the Memorandum of Appeal filed on 19<sup>th</sup> March, 2010 is an alleged contravention of a fundamental right, the appellants did not move the superior court by way of petition, pursuant to **section 84(1)** of the Constitution and the Rules promulgated under the section but instead, opted to raise the preliminary point in the course of the proceedings. Quite rightly, in our view, Ochieng, J. in reliance of **Rule 23** of the Rules contained in Legal Notice 6 of 2003 (popularly known as the Gicheru Rules) treated the point raised as a preliminary point and proceeded to hear it and to determine it in a ruling dated 30<sup>th</sup> day of June, 2009.

At the hearing before us on 25<sup>th</sup> May 2010, the appellants were represented by **Mr Kinuthia**, advocate while the State was represented by **Mr Monda**, Senior State Counsel.

In his submissions, Mr Kinuthia learned counsel for the applicants stated that because the prescribed period as per **section 72(3)(b)** had been exceeded and this had not been refuted by the State, his clients are entitled to be acquitted because, the contravention of his clients' constitutional rights per se call for an automatic acquittal and that it was not necessary for his clients to be put on their defence in the circumstances. He relied on the case of **ALBANUS MWASIA MUTUA v REPUBLIC, Criminal Appeal No. 120 of 2004 (unreported)**.

Mr Monda, learned counsel responded by saying that the superior court had made findings that, although the delay in taking the appellants to court had not been denied, the preliminary point was raised too late in the day and nearly one year after the applicants were put on their defence and such inaction went against the holding in the case of **DOMINIC MUTIE MWALIMU v R, Criminal Appeal No. 217 of 2005** whose ratio decidendi was that, an allegation of the contravention of the Constitution by accused persons has to be raised at the earliest opportunity. He also submitted that there was no proper appeal before this Court in view of the provisions of **section 379** of the Criminal Procedure Code.

On our part, we have considered the grounds raised by the appellants and the submissions of counsel.

In this regard, this Court has repeatedly stated that it does not entertain preliminary applications in criminal cases except in very exceptional situations as was the case in the case of **THOMAS PATRICK GILBERT CHOLMONDELEY v REPUBLIC, Criminal Appeal No. 116 of 2007 (unreported)** where a petition under **section 84** of the Constitution had been filed. On the same point see the recent decision of this Court in the case of **DAMIANO JOSIAH NYANYA vs REPUBLIC Criminal Appeal No. 52 of 2008 (unreported)**. The reason for this approach is in line with **section 379(1)** of the Criminal Procedure Code which states:-

***“A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve (12) months, or to a fine exceeding two thousand shillings (Kshs.2,000), may appeal to the Court of Appeal”***

It is therefore quite clear that, appeals to this Court arise from convictions and since, in the matter before us there is no conviction, no appeal lies to us. The applicants should have timely raised the preliminary point and awaited the outcome of the hearing before filing an appeal.

Alternatively, the applicants should have moved the superior court by way of petition pursuant to **section 84(1)** of the Constitution and the Rules made under **section 84(6)** of the same section. Following a determination by the superior court, an appeal would lie to this Court as a matter of right under **section 84(7)** of the Constitution. Again, it is clear to us that the procedure set out in the Constitution was not followed by the applicants.

In the result, no appeal lies to this Court and the same is hereby dismissed.

It is so ordered.

***DATED and delivered at Nairobi this 2<sup>nd</sup> Day of July, 2010.***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**