REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 121 of 2007

RICHARD KAMAU KINUTHIA …… 1ST APPELLANT

MATHEW WAMBUGU MUTURI ……...…….. 2ND APPELLANT

AND

REPUBLIC…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at

Nairobi (Ombija J.) dated 13th April 2007

in

H.C.CR.C. 4 OF 2004)

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JUDGEMENT OF THE COURT

By an information dated 30th December, 2003, the High Court was informed that Richard Kamau Kinuthia and Mathew Wambugu Muturi did on 10th November 2003 at Muchatha Trading Centre in Kiambu District within Central Province jointly with others not before the court murder Samson Mutuma Mburugu. By the same information it was alleged that the two did on 16th November, 2003 at the same place jointly with others not before the court murdered Patrick Kobia.

The two accused were allegedly arrested on 16th November, 2003, but were not presented to court until 5th January 2004, notwithstanding the provisions of section 72(3) of the Constitution which stipulates among other things, that a person arrested and accused of a capital offence who is not released should be taken to court within 14 days of his arrest unless reasonable grounds exist for showing that the time he is presented to the court though exceeding 14 days was reasonably practicable in the circumstances. The issue of delay in presenting the accused to court was not raised before the superior court but has been raised in the appeal before us as one of the grounds for challenging conviction.

The two persons above were arraigned and both of them pleaded not guilty to both counts, particulars of which we set out earlier. They were later tried with the aid of three assessors and were convicted and sentenced. The prosecution called six witnesses, two of them formal while the remaining four stated that they witnessed the alleged murders. David Kirimi (PW1) was the first witness. It was his evidence that both murders were committed on 16th November, 2004 at Ruaka. A group of people who were called by Richard Kamau Kinuthia, the 1st accused, attacked the deceased persons among other people including

himself and caused the death of both deceased persons.

Daniel Muturi Mutembei (PW2) likewise testified to the same effect as PW1. It is also instructive, that Maurine Karuma (PW3) and Joseph Mwangi (PW4) like PW1 and PW2 testified that the two alleged murders were committed on 16th November, 2004. That is the date when the hearing of the appellants' case commenced. It is quite clear that the date given by all the four witnesses is incorrect. We have checked the trial court's original record, and apart from PW4 who gave the date of the offence as 16th November, 2003, all the other three witnesses are recorded as having given the date of the offence as 16th November 2004.

As we stated earlier that date cannot be correct. It is a misrecording by the trial Judge or so we think, because it could not possibly be that the offence was committed on the day the trial commenced.

We have also checked the trial court's original record on the testimony of the investigating officer inspector Michael Misati (PW5) as also the testimony of Dr. Jane Wasike Simiyu (PW6) and it is quite clear to us that there is a typographical error on the dates given by each of the two witnesses. PW5 is shown in the record before us as having testified that a report of the murders at Ruaka was made to him on 15th November, 2005 at 5 p.m. The original record reads 15th November 2003 not 2005. Likewise the date given by PW6 when the post mortem examination was performed on the body of Samson Mutuma Mbaruku is 28th November, 2005 when infact the correct date as shown in the original record is 28th November, 2003. It is noteworthy that even the date 15th November, 2003 given by PW5 is itself incorrect. The particulars on the information show the date of the offence as 16th November 2003. As the matter stands it is not clear when the alleged murders were committed. We, however, have no doubt that the two deceased persons were killed. Moreover both appellants testified that indeed those two people were killed but by a mob.

The case before the trial court against the appellants was as follows. Richard Kamau Kinuthia (1st appellant) was the driver of a Nissan 'matatu' registration No.KAP 494D. Mathew Wambugu Muturi (2nd appellant) was the conductor. The vehicle left Nairobi heading toward Muchatha with about18 passengers who included PW1 – PW4 and the two deceased persons. PW1 -PW4 testified that the appellant refused to give one of them change for the fare he had paid and as a result an argument ensued. At Ruaka the 1st appellant allegedly left to go and call some people. These people came armed with stones, iron bars and a tyre lever. They pelted the deceased person along with PW1 – PW4 with stones. The deceased persons were unlucky as they succumbed to the injuries sustained in the process and died. Witnesses were not in agreement on whether the appellants personally assaulted the deceased persons. PW1 testified that the 1st appellant used a tyre lever to hit the deceased. The other eye witnesses testified that an iron bar was used by particularly the 1st appellant.

The appellants by sworn statements denied they assaulted the deceased. They also denied having caused any other person or people to assault the deceased. Their respective cases were that the two deceased persons and PW1- PW4 were passengers in their vehicle. The six refused to pay their fare and started a fight when they were prevented from alighting at Ruaka before paying. They then attacked the conductor and robbed him of the day's collection. They were then attacked by a mob as a result of which the two deceased persons died.

The trial Judge (Ombija J.) believed the prosecution witnesses, and although the assessors returned a unanimous finding that both appellants were not guilty of murder he found the appellants guilty, convicted and proceeded to sentence each of them in both counts. This was notwithstanding the fact that no post mortem report was produced on Patrick Kobia and also notwithstanding the fact that there was variance between the particulars of the information and the evidence regarding the date and **locus in quo** of the offences.

After submissions were concluded on behalf of the appellants, Mrs Murungi who appeared for the State conceded the appellants appeals. She agreed with Messrs. Njanja and Chege for the 1st and 2nd

appellants respectively, that because the evidence adduced by the prosecution was at variance with the charge, and also because no medical evidence of death was adduced in the 2nd count the convictions were improperly entered against the appellants.

We agree that on the material on record the appellants were improperly convicted. The prosecution is bound by the particulars of the charge (see state of **Uganda v. Wagara** [1964] EA 366 at P.368). In absence of any amendment pursuant to the provisions of section 275 of the Criminal Procedure Code, it was prejudicial to the appellants for the trial to have proceeded as it did.

Clearly there was uncertainty whether indeed the appellants were part of the mob or the specific role each one played in the matter as to show they had any common intention with the mob which killed the deceased persons. Besides, no evidence was adduced to show any death occurred on 10th November, 2003. We do not understand why the learned trial Judge failed to notice this serious anomaly in the case. It is also incomprehensible why the State counsel who prosecuted the case failed to detect this serious flaw in the prosecution case.

Besides, the record is quite clear that the assessors returned a unanimous finding of not guilty. Each assessor gave reasons why he or she came to such a conclusion. This Court has repeatedly held that where as here, a trial is held with the aid of assessors, the trial Judge, if he differs with the finding of the assessors, is obliged to give reasons for doing so. Otherwise failure to do so will vitiate the conviction whether or not based on sound evidence and reasoning. This Court said so in **Dickson Mwaniki M'Obici and Another v. Republic**, **Criminal Appeal NO. 78 of 2006 (UR).** That holding was re-echoed in the case of **Maurice Otieno Ogola v. Republic Cr. Appeal No. 240 of 2006**.

Before we conclude this judgment we wish to comment on a constitutional issue which was raised by the 2nd appellant. The 2nd appellant in his memorandum of appeal lamented that he was not presented to the court after arrest, within the time stipulated under ***section 72 (3)*** of the Constitution. This Court in past decisions among them **Ndede v. Republic Cr. Appeal [1991] KLR 567**, **Albanus Mwansia Mutua v. Republic Criminal Appeal No. 120 of 2004** and **Paul Mwangi Murunga v. Republic Criminal Appeal NO. 35 of 2006** recognised that there may be instances where the prosecution may have good reason for not presenting an accused to court within the stipulated period. It is however quite clear from the record that neither the prosecution, the court nor the defence raised the issue. The Constitution places the burden on the prosecution to explain the delay. When this appeal was called for hearing, Mrs. Murungi requested for an adjournment to enable her to file an affidavit to explain the delay. It was her submission in that regard that such an explanation could not be provided earlier as the issue was raised in this Court for the first time. Mr. Njanja for the 1st appellant on his part did not think such affidavit could be filed at this late stage as doing so would be tantamount to adducing additional evidence otherwise than as provided under this Court's Rules. In the end we declined to grant an adjournment. However, when the time came for Mr. Chege for the 2nd appellant to submit he cited the decisions we early cited as authority for the proposition that a constitutional point may be raised for the first time before this Court and the Court would in that event have jurisdiction to deal with it. We note that in **Ndede v. Republic** (supra), ***section 84 (7)*** of the Constitution was not brought to the Court's attention.

A constitutional issue like the one above needs to be argued exhaustively. For instance we were not fully addressed on whether **section 84(7)** of the Constitution can be invoked in this, court to deny a party the right to raise a constitutional issue if an application was not made as provided under **section 84(1)** of the Constitution as was the case here. Unfortunately in this matter the State conceded the appeal on other substantive grounds and did not think it was open to the 2nd appellant to raise it. In the circumstances dealing with the issue will be basically academic, and we think that it should wait for a more appropriate occasion when the Court will be addressed fully on the matter. Suffice it to say that there was no clear evidence before the trial court to show the appellants had any common intention with the mob that is said to have killed the deceased persons or that they specifically caused the fatal wounds on them.

Accordingly, we allow the appellants' respective appeals, quash their respective convictions and set aside the sentence imposed thereof. They shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 17th day of July 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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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