REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 35 of 2006

PAUL MWANGI MURUNGA……..…….APPELLANT

AND

REPUBLIC……..…….…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nakuru (Musinga & Kimaru, JJ) dated 3/11/2005

in

H.C.CR.A. NO. 126 OF 2003)

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JUDGMENT OF THE COURT

PAUL MWANGI MURUNGA, "the appellant" hereinafter, appeals to this Court from the judgment of the High Court *(Musinga and Kimaru, JJ)* which judgment the two learned Judges chose to head "JUDGMENT OF THE COURT", probably copying that heading from the judgments of this Court, but without appreciating the reason or reasons why the Court styles its single unanimous judgments as "Judgment of the Court". Each and every judge of this Court is normally entitled to write his or her own judgment and where all the judges of the Court are agreed on a decision they normally write a single judgment which then becomes the "Judgment of the Court". In criminal appeals heard by two judges of the High Court we doubt, and we have never come across a situation, where each judge has written his or her own judgment. Indeed, if the two judges disagree on the outcome of such an appeal, there would be no judgment at all and the appeal would have to be reheard afresh before a different bench of three judges - see for example *section 359(2)* of the Criminal Procedure Code. Accordingly, there is no reason or occasion for styling a judgment of two judges of the High Court as a "Judgment of the Court."

Be that as it may, the appellant was tried before the Principal Magistrate at Naivasha on three counts of robbery with violence contrary to *section 296(2)* of the Penal Code and one count of rape contrary to section 140 of the Penal Code (now repealed). Mr. Njogu who represented the Republic before us during the hearing of the appeal readily conceded that the charge of rape as framed was incurably defective and this Court cannot sustain the conviction based thereon. The particulars of that charge were that on 2nd day of March, 2000 the appellant and one John Ndegwa Waswa who was the second accused before the magistrate, "jointly with another not before the court had carnal knowledge of *FWG* without her consent". This Court has repeatedly said that two or three men or whatever may be their number cannot

jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time "jointly" enter or try to enter her genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape. We accordingly allow the appeal as regards the charge of rape, quash the conviction recorded thereon and set aside the sentence which the High Court had correctly ordered to be held in abeyance as the appellant had been sentenced to death on the charges of robbery.

This being a second appeal to the Court, the Court can only deal with matters of law.

The main matter of law raised before us by *Mr. Maragia* for the appellant is with regard to the alleged violation of the appellant's fundamental rights enshrined in *section 72* of the Constitution of Kenya. The charge sheet before the magistrate shows that the appellant was arrested without warrant on 18th March, 2000. The charge sheet further shows at its last portion "Court and date" that the appellant was taken to the court at Naivasha on 3rd April, 2004. The record of the Magistrate also shows that the appellant first appeared before Mr. Muya, a Senior Principal Magistrate at Naivasha, on 3rd April, 2000. That would be some twenty four days from the date of arrest. Under *section 72 (3)* of the Constitution, the police were entitled to hold the appellant in custody for fourteen days, he having been charged with the offence of robbery carrying with it the death penalty upon conviction. The police, therefore, detained him in their custody for a period of some ten days beyond the permitted period of fourteen days. No explanation was offered either to the Magistrate before whom the appellant first appeared as to what the cause of that delay was or to this Court when the issue was raised before us. Mr. Njogu contented himself by simply saying that as the matter of delay had not been raised before, it was too late to raise it now and it would be impossible for them to find out why the delay had been there. In other words Mr. Njogu was in effect submitting that there ought to be a complaint by an accused person when he or she is first taken to court before the prosecution can be called upon to discharge the burden placed upon them by section 72(3) of the Constitution. Of course well-heeled Kenyans who can afford legal representation invariably raise such complaints and even go as far as asking the magistrate to stay the proceedings to enable them go before the High Court to challenge the constitutionality of their so having been detained. *ANNE NJOGU & 5 OTHERS VS. REPUBLIC, HC MISC. Application No. 551 of 2007* (unreported) is a classic example of such a situation. There, twenty advocates, led by *Mr. Nowrojee*, asked *Mutungi, J* on behalf of the six applicants and even before a plea could be taken by the magistrate, to rule that as the applicants' constitutional rights had been violated their prosecution ought not to proceed. *Mutungi, J* duly obliged. So the question is: is the enjoyment of these basic constitutional rights to be confined to those who are able to muster representation by twenty advocates? What about those who are now popularly referred to as "*the poor and vulnerable"?*

In the case of *NDEDE VS. REPUBLIC [1991] KLR 567* this Court dealing with a similar situation, held as follows:-

"*where, as happened in this case, at the time of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest etc, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the Court".*

The appellant in the above case had been brought to court some thirty days after his arrest. It was one of those cases which were then called "*The Mwakenya cases"*. The courts then chose to see no evil and hear no evil, and sought no explanation as to where the accused persons involved in those cases had been before being brought to court. The consequence of the silence on the part of the courts was the infamous "*NYAYO HOUSE TORTURE CHAMBERS*". It is a history about which the courts of this country can never be proud of.

Again, it must not be forgotten that the period within which prosecuting authorities are bound to produce an accused person before a court is not an issue confined to Kenya. In the United Kingdom and the United States of America for example, "terrorism" is an extremely emotive issue and the Labour Government in the United Kingdom sought from Parliament the extension of the period. Parliament gave

the prosecuting authorities 29 days and invariably that period is complied with and if sufficient evidence to charge the accused is not available the police will dutifully release the accused persons. In the United States of America the current Government has sought to evade the issue by detaining terrorism suspects in *Guantenamo Bay*, far away from the meddlesome hands of the Supreme Court. There is no reason why the courts in Kenya should act any differently.

We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know whether the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under *section 72(3)* of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue. That is what this Court said way back in the case of *NDEDE V REPUBLIC* already cited herein. Of course the Magistrates before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this Court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case.

This appellant was held in unlawful custody for some ten days and no explanation for that delay is forthcoming either from the record or from the prosecuting counsel. In the case of *ALBANUS MWASIA MUTUA VS. REPUBLIC, Criminal Appeal No. 120 of 2004,* (unreported) the Court suggested some examples of what might amount to an acceptable explanation for the delay. It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on a Friday evening and as our courts do not work on weekends and it being not possible to release the accused on bail, he is brought to court on the next working day. Or it may be that the court-house is far from the police station and the station vehicle broke down or had no fuel. These are no more than examples which would and can provide the prosecuting authorities with an explanation to enable them discharge the burden placed on them by *section 72(3)* of the Constitution. So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the Court in *MUTUA'S* case. That being our view of the matter we allow this appeal, quash all the convictions recorded against the appellant under *section 296(2)* of the Penal Code, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless he be held for some other lawful cause. This judgment is delivered pursuant to *Rule 32(2)* of the Court's Rules and is not signed by Githinji, J.A.

DATED and DELIVERED at NAKURU this 22nd day of FEBRUARY, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL