IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 118 OF 2007

PROTUS MADAKWA alias COLLINS……..……...……1ST APPELLANT

OSCAR MMENYA alias EVANS ….……..…..…..…. 2ND APPELLANT

JOHN MUGITA alias JOHNIE ……..……... 3RD APPELLANT

AND

REPUBLIC ……..…..…….. RESPONDENT

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

Rawal, J) dated 28th November, 2005

In

H.C.Cr.C. No. 47 of 2004)

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JUDGMENT OF THE COURT

The three appellants, Protas Madakwa alias Collins, 1st appellant, Oscar M'Menywa alias Evans, 2nd appellant and John Mugita alias Johnie, 3rd appellant, were tried before Rawal, J sitting with assessors on an information which charged them with murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in that information were that on 16th day of November, 2003 at Kawangware in Nairobi Area, they jointly murdered Benard Wirage Magale, hereinafter the deceased. The learned Judge and the assessors heard evidence from a total of six witnesses brought by the prosecution. Each appellant in turn made an unsworn statement and at the end of it all, the learned Judge summed up the case to the three assessors. The verdict of each assessor was that each of the three appellants was guilty of murder of the deceased as charged. By her judgment dated and delivered on 28th November, 2005, the learned Judge also found each appellant guilty of murder and duly sentenced each of them to death. Each appellant now appeals to the Court against the conviction and sentence and as is now usual in such matters, the main ground which was pressed upon the Court by Mr. Wamwayi for the 1st appellant and Mr. Ondieki for the 2nd and 3rd appellants was the alleged violation of the appellants' constitutional rights to be brought to court within the time prescribed by law, in this case within fourteen days. They contended that the appellants were brought to court after 120 days from the date of arrest and that being so, the prosecution of the appellants was in their view a nullity.

The record we have before us shows that the three appellants gave their plea before Osiemo, J on 20th May, 2005. The appellants were represented by counsel, Mr. Kariuki, and that learned advocate represented them throughout the trial. In the recent decision of this Court in the case of **JAMES GITHUI WAITHAKA & ANOTHER VS. REPUBLIC**, Criminal Appeal No. 115 of 2007 (unreported) this Court, having cited previous authorities such as **ALBANUS MWANSIA MUTUA V. REPUBLIC**, Criminal Appeal No. 120 of 2004 (unreported) **DOMINIC MUTIE MWALIMU VS. REPUBLIC**, Criminal Appeal No. 217 of 2005 (unreported), **PAUL MWANGI MURUNGA V. REPUBLIC**, Criminal Appeal No. 169 of 2006 (unreported) and **ANNE NJOGU & 5 OTHERS VS. REPUBLIC**, H.C. Misc. Application No. 551 of 2007 (unreported) remarked as follows:-

"In this passage [i.e. the passage taken from PAUL MWANGI MURUNGA VS. REPUBLIC case,] the Court clearly recognized the role of advocates in the conduct of these matters. The two appellants, right from the time their trial opened in the High Court, were each represented by an advocate. Their trial was before the High Court which by law is "*the Constitutional Court****" in Kenya. The appellants and their advocates knew or must have known that their constitutional rights had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is the Constitutional Court in Kenya and if the appellants' advocates had raised the issue there, the Judge would have had to deal with the issue just as Mutungi, J did in the NJOGU Case, supra. When we asked Mr. Muthoni and Mr. Nganga why the advocates representing the appellants did not raise the matter with the Judge, their answer was that they did not know. An information before a judge is different from a charge sheet before a magistrate . The charge sheet would normally show on its face the date on which an accused person was arrested and the date on which he is brought to court. An information does not have on it details such as the date of arrest. So that a magistrate is able to see at a glance the relevant particulars from which it can easily be deduced if section 72 (3) of the Constitution has been complied with. A judge by merely looking at an information, will not be able to tell when the accused person was arrested. The date on which the offence was allegedly committed is not necessarily the date of the arrest. We think we cannot equate advocates to poor and illiterate accused persons and where an advocate is present in court and does not raise such relevant issues , the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to court. Different considerations must continue to apply where an accused person is unrepresented. -------"***

We have already said that the three appellants herein were, throughout their trial in the superior court, represented by Mr. Mwangi; he could have easily raised with the trial Judge the alleged violations of the appellants' constitutional rights to be brought to court within fourteen days. Rawal, J. would then have had to deal with the issue, the learned Judge being a constitutional Judge herself by virtue of her membership of the High Court. We are satisfied on the material before us that the three appellants waived their right to complain against the alleged violation of their rights to be brought to court within fourteen days and having waived that right, they cannot now raise it here. The explanation given by Inspector Reuben Muthoka as to why they did not bring the appellants to court within the prescribed time thus becomes irrelevant.

On the conviction for murder, we think the learned Judge did not properly direct herself and the assessors on relevant issues. It is clear from the recorded evidence that the attack on the deceased was at about 7.00 p.m. Both Kalvin Kihara (PW1) and Stanslaus Turubu (PW2) said the three appellants were talking amongst themselves, mentioning the name of the deceased. The deceased came out and heard his name being mentioned. He approached the three appellants and asked them why they were still discussing a matter which had already been settled. Neither Kihara nor Turubu was able to explain what matter had been settled and the only explanation available from the recorded evidence appears to be that offered by the 1st appellant in his unsworn statement. That explanation was to the effect that the deceased and the 1st appellant had earlier on been drinking at some bar and that the two of them subsequently disagreed over some woman called Mary or Wambui who would appear to have been the girl-friend of the deceased who thought the 1st appellant was also paying undue attention to the same woman. It is clear to us that the struggle started between the deceased and the 1st appellant and then the 2nd and 3rd appellants joined in. Apart from the explanation given by the 1st appellant, no other explanation was available as to what

exactly caused the fight . The 2nd and 3rd appellants denied having been involved in the fight but Kihara and Turubu knew them and saw them join the fight . The time was just 7.00 p.m. and there was electricity light in the area. The learned Judge and the assessors believed the evidence of the two eye-witnesses and there is nothing on the recorded evidence to make us think that the Judge and the assessors were mistaken. We are satisfied on the recorded evidence that these three appellants were involved in the attack upon the deceased and that they caused his death.

But the learned Judge did not direct herself or the assessors on the fact that there might have been a fight over a woman and that the deceased himself might just as well have been the aggressor for thinking that the 1st appellant was involved in a relationship with his (deceased's) girl-friend. Nor did the Judge direct herself or the assessors on the issue of the consumption of liquor by the parties in a nearby bar and the effect of such liquor on the mental capacity of the appellants to be able to form the specific intent to cause death – see ***section 13(4)*** of the Penal Code. We do not know whether the learned

Judge and the assessors would have come to the same conclusion on the issue of murder if they had directed their mind to these points. We must, in the circumstances, give the benefit of doubt to the appellants by holding that had the Judge properly directed herself and the assessors on these points they may well have come to the conclusion that the three appellants were guilty of the lesser offence of manslaughter rather than murder. We note that at some stage of the trial , the three appellants had offered to plead guilty to the offence of manslaughter and that offer was rejected by the Director of Public Prosecutor. Taking into account all the relevant matters, we allow these appeals to the extent that we set aside the conviction for murder and the sentence of death imposed thereon and substitute them with a conviction for manslaughter under ***section 202*** of the Penal Code and under ***section 205*** of the Code we sentence each appellant to ten (10) years imprisonment to run from the date when they were convicted and sentenced by Rawal, J. Those shall be our orders in the three appeals.

Dated and delivered at Nairobi this 19th day of December, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.