



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 119 of 2004

GERALD MACHARIA GITHUKUAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nairobi (Makhandia & Kimaru, JJ) dated 10th February, 2004

in

H.C.CR.A. NO. 1155 OF 1995)

JUDGMENT OF THE COURT

Gerald Macharia Githuku (the appellant) who was the 2nd accused, in the Chief Magistrate's Court at Nairobi Criminal Case No. 429 of 1995 is appealing against the judgment of the High Court at Nairobi Criminal Appeal Number 1155 of 1995 (Kimaru and Makhandia JJ) delivered on the 10th February 2004 on an appeal from the decision of the Chief Magistrates Court (Mrs. C.W. Meoli) delivered on 7th August 1995.

The Chief Magistrate's Court convicted the appellant together with John Wanjohi Ndegwa (*Ndegwa*) who was the 3rd accused, and Alfred Machiri Macharia (*Macharia*) who was the 1st accused, of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and all three were sentenced to death.

Ndegwa and *Macharia* lodged appeal Nos. 1153 of 1995 and 1154 of 1995 respectively against their convictions and sentences in the superior court but before their respective appeals could come for hearing they both died whilst in prison custody so that their appeals to the superior court abated.

The **appellant** filed appeal No 1155 of 1995 in the superior court which appeal was dismissed. The appellant's appeal to this Court is therefore a second appeal and can only be allowed by this Court if it finds that the superior court erred on a point of law.

Mr. Mutuamwari, learned counsel for the appellant, relied on the grounds of appeal set out in the

Supplementary Grounds of Appeal dated 13th February 2007 as follows:-

- “1. The trial Magistrate and the first appellant (sic) court erred in fact and law by convicting and sentencing the appellant to death despite the fact that his constitutional rights as enshrined in section 72 (3) of the Constitution has (sic) been violated.**
- 2. The trial Magistrate erred in law in failing to observe the provisions of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).**
- 3. The first appellant (sic) court erred in law and in fact by affirming the decision of the trial Magistrate whilst there is material contradiction in evidence.**
- 4. The first appellant (sic) court erred in law and in fact by affirming the decision of the trial Magistrate notwithstanding of (sic) the fact that she did not give proper consideration to the evidence for the defence by balancing it against that for the prosecution.**
- 5. The first appellant (sic) court erred in law by affirming the decision of the trial Magistrate despite the fact that there was not evidence on record that the trial in the Lower Court was conducted in a language the appellant understood contrary to the provisions of section 77(2) of the Constitution and section 198 of the Criminal Procedure Code.**

WHEREFORE the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.”

We will first consider the point of law raised by defence counsel in his reliance on **section 198 (2) and (4)** of the Criminal Procedure Code which states:-

198. (1) Whenever any evidence is given in a language other than English not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

198. (4) The language of High Court shall be English, and the language of a subordinate court shall be English or Swahili.

The record of the trial court shows that the evidence of PW 1, PW 2, PW 3, PW 4, PW 5, and PW 6 was given in Kiswahili. There is nothing in the record to suggest that the appellant (the second accused) was not able to understand Kiswahili. He chose to cross examine PW 2, PW 3, PW 4, PW 5, and PW 6. The record does not state that the cross examination of these witnesses by the appellant and other accused persons was in any language other than the language, Kiswahili, chosen by the respective witnesses.

The complainant, PW1 was not cross examined by any of the accused persons.

In these circumstances we do not consider that the appellant has any grounds for complaint that **section 198** of the Criminal Procedure Code (supra) was infringed.

The particulars of offence in the Charge Sheet dated 30th January 1995 stated:-

“ALFRED MUCHIRI MACHARIA. 2. GERALD MACHARIA GITHUKU 3. JOHN WANJOHI NDEGWA.

On 13th day of January, 1995 at Pangani shopping centre within the Nairobi area, jointly while armed with a toy pistol robbed STEPHEN KARIUKI KAMWERU of motor vehicle Reg. No. KMH 853 Datsun 1600 Saloon valued at Kshs. 175,000/- cash Kshs. 2,500/- pair of shoes, coat, wrist watch make RADO, socks and 4 cheque books all valued at Kshs. 9,100/- and at or immediately before or immediately after the time of such robbery used personal violence to the said STEPHEN KARIUKI KAMWERU.”

The date of arrest was stated in the Charge Sheet to have been 13th January, 1995 and the “date to court” was stated to be 30th January, 1995 some 17 days later.

Section 72 (3) of the Constitution states:

“72 (3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in the execution of the order of the court; or

(b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The record of the Chief Magistrate (Mrs. U.P. Kidula) for the first day of the proceedings does not, unfortunately, state the date of the first day on which the pleas were taken of the three accused and their pleas of not guilty recorded and the hearing date was fixed for 24th March 1995. The hearing in fact is recorded as having eventually commenced on 31st May 1995 and was concluded on 30th June 1995. The judgment of the Chief Magistrate was delivered on 7th August 1995.

Learned Counsel for the appellant, Mr. Mutuamwari relied on the case of **Albanus Mwasia Mutua v Republic**. Criminal Appeal No 120 of 2004 (unreported) in which this Court (Omolo, Githinji (dissenting) and Deverell JJA) had this to say in relation to **section 72(3)** of the Constitution.

“At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be 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 to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72 (3) (b) of the Constitution also amounted to a violation of his rights under section 77 (1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone. ”

The **Albanus Case** (supra) was clearly a more extreme case than that now before us.

However, as the Court stated in that case:-

“On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished: this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution.”

We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with **section 72(3)** of the **Constitution** did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of **section 72(3)** of the **Constitution** should be disregarded. Although the offence for which

he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.

In reaching this conclusion we have also been mindful of the fact that the appellant has now been in custody for in excess of 12 years and that his two co-accused have died while in custody.

We therefore hereby order that the appeal be allowed, the appellant's conviction quashed and the sentence of death is set aside. The appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 27th day of April, 2007.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR