REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI

Criminal Appeal 182 of 2006

ELIUD NJERU NYAGA ……APPELLANT

AND

REPUBLIC …… RESPONDENT

(*Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J) dated 22nd May, 2005* In H.C. Cr. Case No. 23 of 2005)

****

JUDGMENT OF THE COURT

Eliud Njeru Nyaga, the appellant herein, was tried before Khamoni, J. sitting with assessors, on an information charging him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the information were that on 6th day of June, 2005 at Matandara village in Kirinyaga District of the Central Province, the appellant murdered Jamlick Muturi Njeri.

The appellant was apparently arrested on the same day of the alleged murder but the record before us shows that he first appeared in the court before a Deputy Registrar on 11th August, 2005 a period of nearly two months. No explanation is forthcoming from the record as to where he was between the date of the arrest and the date when he first appeared in court. In ground 4 of the supplementary memorandum of appeal which M/s Mwai, learned counsel for the appellant, filed with the leave of the court on the morning of the hearing the appellant complains that:-

"***The Learned Judge erred in law and fact in his failure to discern that the appellant's constitutional rights had been breached by his long incarceration in the police cells between the time of his arrest and production to court for plea. The appellant was entitled to an acquittal."***

The basis of this complaint is to be found in this Court's decision in **ALBANUS MWASIA MUTUA V. REPUBLIC**, Criminal Appeal No. 120 of 2004 (unreported). We, however, note that in **MUTUA'S** case, the delay involved was one of some eight months and **MUTUA** raised this complaint right from the court of the magistrate and the prosecution never sought to explain the reason for the very long delay of the eight or so months. In the present appeal, ground four was only raised during the hearing and one would not expect Mr. Orinda, learned Principal State Counsel, to have prepared an answer, if any, for the delay of one month and twenty days – not seventy two days as M/s Mwai contended before us. While we would re-interate the position that under the fair-trial provisions of the constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal. In **MUTUA's** case, the Court stated:-

"***----------. He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for the delay. It could be that he fell ill during the fourteen days the police were entitled to hold him in custody, that he was admitted in hospital and was detained in hospital for the eight months as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or the other, was discharged and subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay."***

So that in **MUTUA's** case the prosecution had had an opportunity to explain the cause of the delay but failed to offer an explanation. In the appeal before us the ground raising the violation of the constitutional right was raised only on the morning of the hearing when the court granted leave to M/s Mwai to file the supplementary memorandum of appeal out of time. We are, accordingly, unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity, and, therefore that there was no reasonable explanation for the delay. Even ***section 72(3)*** of the Constitution , which deals with the period of bringing an accused person to court recognizes that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable. By filing their complaint about the delay only in the morning of the hearing the appellant clearly deprived the prosecution of an opportunity to offer an explanation, if any, as to why the appellant, though arrested on 6th June, 2005 was only brought to court on 11th August, 2005. We reject ground four of the grounds of appeal.

The next ground we think we should consider is Ground 2 where the complaint is that:-

"***The Learned Judge erred in law in failing to sum-up the case for the assessors and thus failed to direct them as to what constitutes murder."***

We said at the beginning of this judgment that the learned Judge tried the case with the aid of the assessors. The trial before the learned Judge began on 28th March, 2006 and was concluded on the same day, the learned Judge and the assessors having heard a total of twelve prosecution witnesses and the unsworn statement of the appellant. Neither the prosecuting counsel nor the defence lawyer made any submissions before the learned Judge, either at the close of the hearing or at the close of the prosecution case. At the close of the defence case, the learned Judge said:-

"***Court – when evidence is still fresh in the minds of the assessors who are ready to give their opinions."***

The assessors then proceeded to give their opinion each finding the appellant guilty of murder as charged.

We think that on this aspect of the matter, M/s Mwai is undoubtedly right when she contends that the purpose of a summing-up by a trial judge to the assessors is not merely to remind or refresh the memory of the assessors as to what the evidence in the case is. That is only part of the summing-up. Assessors are chosen because they are lay-people, unschooled on the various principles of law. Assessors do not know the meaning of murder as understood by lawyers. They do not know the meaning of manslaughter, insanity, provocation, self defence and such like principles. They do not know of the standard of proof, the burden of proof and on whom that burden lies. It is the duty of a trial judge to explain to the assessors these principles where they or any of them is applicable. True, ***section 322(1)*** of the Criminal Procedure Code, ***Chapter 75*** Laws of Kenya, only requires that the judge "*may*" sum-up the case to the assessors. But if the judge chooses not to sum-up the case to the assessors, how are the assessors to know what constitutes malice aforethought which is the basic element in a charge of murder? How are lay assessors to know that in the absence of malice aforethought a charge of murder can be reduced to one of manslaughter? How are they to know that where provocation is proved a charge of murder can be reduced to manslaughter? This must be the basis on which this Court has consistently held that even though the word "*may*" is used in ***section 322(1)*** of the Criminal Procedure Code, the need to sum-up the case for the assessors is a long-standing practice of law, has acquired the force of law and must always be complied with by trial judges. It is no answer to say, as Mr. Orinda told us, that a trial judge is not bound by the opinion of the assessors. If a trial judge is disagreeing with the opinion given by the assessors the

judge is required to give the reason or reasons for disagreeing.

In the circumstances of the case, we think the learned trial Judge's failure to sum-up the case to the assessors rendered the trial fatally defective. The prosecution cannot be blamed for that defect and we also note that the appellant was only convicted on 22nd May, 2006 and the offence was said to have been committed on 6th June, 2005. It is still possible to hold a retrial and the evidence on record might well result in a conviction. We accordingly allow this appeal, set aside the conviction and sentence of death and order that the appellant be tried ***de novo*** before another Judge. Pending the new trial, the appellant shall be held in prison. Those shall be our orders in the appeal.

Dated and delivered at Nyeri this 18th day of May, 2007.

R.S.C. OMOLO

……

JUDGE OF APPEAL

P.K. TUNOI

…….

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL.

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

DEPUTY REGISTRAR