REPUBLIC OF KENYA

IN THE COURT OF APPEAL KENYA AT NAIROBI

Criminal Appeal 120 of 2004

ALBANUS MWASIA MUTUA …… APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbaluto & Kubo, JJ) dated 29th July, 2003

In

H.C.Cr. Appeal No. 621 of 2001)

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JUDGMENT OF THE COURT

Albanus Mwansia Mutua, the appellant herein, appeals to this Court from the judgment of the superior court (Mbaluto & Kubo, JJ.) which dismissed his appeal to that court against his conviction and sentence of death, imposed on him by a Senior Principal Magistrate at Kibera. The appeal to the Court is thus a second appeal and that being the case the Court can only deal with issues of law – see ***section 361(1)*** of the Criminal Procedure Code, ***Chapter 75*** Laws of Kenya.

The first issue of law which Mr. Ondieki, learned counsel for the appellant, raised before us was in connection with the alleged violation of ***section 77*** of the Constitution of Kenya. That section, broadly, sets out the constitutional provisions relating to procedures for fair trials for persons charged with criminal offences. In respect of the appellant, the issue arises in this way.

The charge upon which the appellant was convicted and sentenced to death was one of attempted robbery with violence contrary to ***section 297(2)*** of the Penal Code, ***Chapter 63*** Laws of Kenya. The particulars contained in that charge were that on 17th day of June, 2000, at Nairobi West Shopping Centre within Nairobi Area, jointly with others not before the court and while armed with a Beretta Pistol, the appellant attempted to rob Alphonse Murwanashyaka of a motor vehicle Reg. No. KAG 620V, Toyota Corolla, and that immediately after the time of the attempted robbery, the appellant did use personal violence to the said Alphonse Murwanashyaka. There were two other charges under ***section 4(2) (b)*** of the Firearms Act, ***Chapter 114*** of the Laws of Kenya and those charges stated in their particulars that on the same date, time and place, the appellant was found in possession of a Beretta Pistol (count two) and two rounds of ammunition (count 3) without a valid firearms certificate in respect of those items. On the latter two counts, the appellant was sentenced to seven years imprisonment on each count to run concurrently. The High Court, on appeal to it, confirmed the conviction on all the three counts but

ordered that the sentences of imprisonment on counts two and three were suspended, obviously in view of the sentence of death on count one.

The typed charge-sheet we have on the record before us shows that the appellant was arrested on 16th February, 2000; that obviously cannot be correct because the offences charged in that charge-sheet were said to have been committed on 17th June, 2000; if the appellant had been arrested on 16th February, 2000, that arrest must have been for offence(s) other than those said to have been committed on 17th June, 2000. The charge-sheet further shows that the appellant appeared before the Principal Magistrate's Court at Kibera on 19th February, 2002. Again that cannot be correct because the appellant's case before the Magistrate's Court at Kibera was registered as Criminal Case No. 1066 of 2001, not 2002. The appellant first appeared before a Senior Principal Magistrate at Kibera on 19th February, 2001. That is what is in the record of the trial Magistrate. This Court is a Court of record and we must take that date to be correct. That means that the appellant, if he was arrested on 17th June, 2000, the date of the alleged offences we are concerned with, was not taken to the Kibera Magistrate's Court until 19th February, 2001. That would be a period of some eight months and it is not clear from the record before us where the appellant was between the date of his arrest and the 19th February, 2001 when he first appeared before the Magistrate to answer the charges with which we are concerned. Even if the appellant had been arrested for other offences on 16th February, 2000 as the charge-sheet shows, was released on bail and committed the offences now before us on 17th June, 2000, that would not provide an explanation as to why the appellant was not taken to court on the charges we are dealing with until some eight months later. It is on the basis of this unexplained delay of eight months before taking the appellant to court that Mr. Ondieki submitted before us that the appellant's constitutional rights under ***section 77*** of the Constitution were violated, that the subsequent trial and other proceedings were a nullity and that on that basis alone, we ought to allow the appellant's appeal. Additionally, Mr. Ondieki contended that the police required the eight months in order to manufacture evidence to support their allegations of criminality against the appellant.

Mrs. Murungi, the learned Principal State Counsel who represented the respondent\Republic before us, candidly admitted that the delay of eight months was wholly unexplained, but she went on to submit that the delay did not affect the nature and quality of the prosecution's evidence against the appellant and that the convictions recorded against the appellant were based on sound evidence.

We must admit that the matter has caused us some considerable thought and anxiety. 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 our Constitution.

Mr. Ondieki relied on the fair-trial provisions contained in ***section 77*** of the Constitution, but in the circumstances of this appellant, the relevant provisions of the constitution appear to us to be in ***section 72*** of the Constitution. ***Section 72(3)*** states:

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

(a) for the purpose of bringing him before a court in 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 sub-section have been complied with.***"

The appellant was arrested without a warrant on reasonable suspicion that he had committed the offence of attempted robbery with violence under ***section 297(2)*** of the Penal Code; that offence is punishable by death. The date of arrest, according to the recorded evidence before us was on 17th June, 2000. That was the day Murwanashyaka Alphonce (P.W.1), his wife Naomi Nduruka Njau (P.W2) and their son Peter Gakua Mbugua (P.W.3) said they were attacked by the appellant and two others while they were in Nairobi West. Police Corporal Peter Tirop (P.W4) also said he was on patrol in Nairobi West on 17th June, 2000 and arrested the appellant from P.W.1, P.W.2 and P.W.3 who had detained him. On the evidence adduced by the prosecution in this case, the date of arrest of the appellant was clearly 17th June, 2000, and not 16th February, 2000 as shown in the typed charge-sheet. As the appellant was arrested on reasonable suspicion that he had committed a capital offence under ***section 297(2)*** of the Penal Code, the police were entitled to keep him in their custody for fourteen days before bringing him before the court; ***section 72(3)(b)*** of the Constitution allows for that. But the record of the Magistrate shows that the appellant first appeared before the court on 19th February, 2001, some eight months after he was arrested. There was and there still is absolutely no explanation for that extraordinary delay and Mr. Ondieki submitted that the prosecution was making-up a case against the appellant during that period.

In the case of **NDEDE VS. REPUBLIC [1991] KLR 567**, the appellant had been arrested without a warrant on 29th September 1997 and was held in detention, ***in communicado***, until 30th October, 1997 when he was brought before a magistrate. The period of delay was just over thirty days and **Ndede** was not charged with an offence carrying the death penalty. He pleaded guilty before the magistrate and was sentenced to long prison terms. He appealed to the High Court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of ***section 348*** of the Criminal Procedure Code which bars appeals from persons who have been convicted on their own pleas of guilt. The sentences were however, reduced. **Ndede** next appealed to this Court and the Court, consisting of the late Mr. Justice Gachuhi, J.A. the late Mr. Justice Masime, J.A and Mr. Justice Omolo, Ag. J.A. (as he then was) held that ***section 348*** of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own admission and that as there was no explanation offered for the delay of some thirty days before **Ndede** was brought to court, the trial magistrate ought not to have accepted **Ndede's** plea of guilty. **Ndede's** appeal was allowed and his conviction quashed. It did not matter that before convicting **Ndede**, the Deputy Public Prosecutor had stated the facts in support of their charges, that **Ndede** had admitted those facts and the facts themselves had disclosed the offences charged against him. The quashing of the convictions must have been on the basis that ***Ndede's*** constitutional right given to him by **section 72(3)(b)** of the Constitution had been violated and he was entitled to an acquittal.

Then there are the cases concerned with the violations of the fair-trial provisions under ***section 77*** of the Constitution. First, is the case of **KIYATO VS. REPUBLIC (1982-88) KAR 418** where the appellant was tried and convicted of the offence of robbery with violence under ***section 296(2)*** of the Penal Code and sentenced to death. His first appeal to the High Court was dismissed and on his appeal to this Court, it was held that as **Kiyato** had not been provided with an interpreter contrary to ***section 77(2)(f)*** of the Constitution, his appeal would be allowed. The nature and strength of the evidence adduced by the prosecution in support of their charge did not really count in such a situation.

Next is the recent case of **SWAHIBU SIMBAUNI SIMIYU AND ANOTHER VS. REPUBLIC**, Court of Appeal Criminal Appeal No. 243 of 2005 (unreported). The constitutional violation alleged in that appeal was the language used in the trial court and this Court held that since ***section 77(2) (b)*** of the Constitution requires that:

"***Every person who is charged with a criminal offence –***

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged. ……"

and since the record of the magistrate did not show the language used by the two appellants, there was a violation of the appellant's constitutional rights under the foregoing section and the appeal was allowed.

Once again, the nature and strength of the evidence brought by the prosecution in support of its charge did not really count.

In the appeal now before us, there was undoubtedly a gross violation of the appellant's constitutional right guaranteed to him by ***section 72(3) (b)*** of the Constitution. He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for that 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 was subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay.

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 in support of 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.

Having taken that view of the matter, we find it unnecessary to consider some of the outlandish submissions made before us by Mr. Ondieki. We doubt whether Mr. Ondieki's other submissions would have carried any weight with us. But we have said enough, we think, to show that we are for allowing the appellant's appeal. We accordingly allow the appeal, quash all the three convictions recorded against the appellant, set aside the sentences imposed on him, and order that he shall be released from prison forthwith, unless he is held for some other lawful cause. Those shall be our final orders in the appeal. We must add that this judgment is delivered pursuant to ***Rule 32(2)*** of the Court's Rules, Githinji J.A. having declined to sign the judgment.

Dated and delivered at Nairobi this 7th day of July, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.