REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 113 of 2005

DAVID WAIGANJO WAINAINA ……………………….………….. APPELLANT

AND

REPUBLIC …………………………………………….………… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia, JJ) dated 22nd July, 2004

in

H.C. Cr. Appeal No. 746 of 2001)

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JUDGMENT OF THE COURT

The appellant, ***David Waiganjo Wainaina***, was charged in the Senior Principal Magistrate's Court at Kiambu with two counts. On the first count the appellant was charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code; and on the second count the appellant was charged with attempted robbery with violence contrary to ***section 297(2)*** of the Penal Code. After a full trial, in which the prosecution called five witnesses, the learned trial Magistrate found that the prosecution had failed to prove the case against the appellant in respect of the first count and consequently acquitted him. However, as regards the second count, the learned trial Magistrate found that the prosecution had proved its case beyond reasonable doubt. Accordingly, the appellant was convicted and sentenced to death as provided by law. The appellant was aggrieved by the conviction and sentence, and consequently lodged an appeal in the superior court. The superior court considered the matter but in the end reached the same conclusion as did the trial court; to the effect that the appellant was guilty.

The appellant now comes before us by way of second and final appeal.

The summary of the facts as accepted by both the trial court and the first appellate court were that Peter Kihara (PW 1) was a matatu driver along Nairobi-Naivasha route. On 16th November, 1998 at about 7.30 p.m., Kihara was ferrying passengers from Nairobi to Naivasha when on reaching Chunga Mali Stage, the remaining two "passengers" suddenly confronted Kihara and one of them ordered the complainant (Kihara) to leave the driver's

seat. Sensing danger, the complainant engaged the first gear and started struggling with the intruder. Meanwhile, his conductor, Joseph Kamau Muiru (PW 2) was also engaged in a struggle with the other "passenger" at the back of the vehicle. The complainant was, in the process, stabbed with a knife by the intruder. The "passenger" at the back then ordered that the complainant be shot but that order was defied. As this incident was near a petrol station, the petrol station attendants were attracted by the commotion and rushed to the vehicle where the struggle between Kihara and his conductor on one hand and the two intruders on the other hand was taking place. The "passenger" who was struggling with the complainant sensing danger, bit the finger of the complainant and ran away while the other "passenger" who was struggling with the conductor (PW 2) kept the petrol station attendants at bay by threatening to shoot any of them who approached the vehicle. At this point the complainant shouted that the "passenger" had no gun. It was then that the petrol station attendants confronted the "passenger" and arrested him. This "passenger" turned out to be the appellant who had inflicted serious injuries on the conductor who was left bleeding profusely. The appellant was then taken to Tigoni Police Station and thereafter to Tigoni Hospital for treatment since he had been injured by the mob, as is common in such circumstances. The police carried out investigations which led to the appellant being charged with the two offences.

In the course of their judgment, the learned Judges of the superior court (Ochieng and Makhandia, JJ) stated:-

"In the instant case, there is evidence that the appellant was armed with a knife and also a gun. He used the knife to stab and seriously injure PW 2. He was also in the company of another person, who on failing to rob PW 1 and sensing that they may not succeed in their mission ran off having also injured PW 1. From the foregoing it is clear to us that the ingredients of the charge of attempted robbery with violence were met, contrary to the submissions by the appellant.

Was there sufficient evidence to convict the appellant" The appellant was arrested at the scene of crime. He does not deny his presence in the motor vehicle. Indeed in his own unsworn state (sic) of defence he states:-

"………. The passengers who were in the vehicle said their home was near and opted to walk. I asked for my money back but they refused saying that the vehicle had been damaged. I was injured during the incident along with the turn boy….."

There were only four people in the motor vehicle during the incident; the driver (PW 1), the conductor (PW 2), the Appellant who attacked and injured the conductor and his colleague who attacked and injured the driver (PW 1). Although his colleague managed to escape when their mission to take charge of the motor vehicle aborted, the appellant was not so lucky. He was arrested on the spot, was subjected to mob justice before being handed over to the police from Tigoni Police Station, together with the knife. In the circumstances of this case, it cannot be said that the appellant was wrongly charged with the offence or as he claims that the charge was contrived against him. Both PW 1 and PW 2 did not know the appellant before the incident. There is no evidence that either PW 1 and (sic) PW 2 had any grudge against the appellant. We are, on the material before us, satisfied that the appellant was properly identified as one of the perpetrators of the crime. Accordingly he was properly charged and convicted of the offence."

Having so analysed the evidence and re-evaluated the same, the learned Judges concluded their judgment thus:-

"On the consideration of the entire evidence tendered in the trial court, we find that the court below was perfectly entitled to find the appellant guilty as charged and it cannot be faulted. The appellant's conviction is sound and safe and must stand. Accordingly we conclude that this appeal is unmeritous and is dismissed."

It is the foregoing order dismissing the appellant's appeal in the superior court that provoked this appeal before us.

The learned counsel for the appellant, Mr. Evans Ondieki, filed the following Supplementary Grounds of Appeal:-

"1. THAT the appellant was denied his fundamental right to cross-examine prosecution witnesses in respect to the subject exhibit (Motor vehicle) thus contrary to section 77(2) (c) (d) sub-section (e) of the constitutional (sic) as well as section 213 and 214 of Criminal Procedure Code.

2. THAT the learned first appellant (sic) Judges erred in law by failing to analyze and to re-evaluate the evidence and draw their own conclusions as required by law.

3. THAT the learned first appellate Court Judges erred in law by failing to find that the charge is fatally defective to the prejudice of the Appellant.

4. THAT the Trial Magistrate and the first appellate court erred in law by misdirecting themselves in upholding the conviction in reliance of PW 1 and PW 2 (sic) evidence without considering that the two witnesses were un-worthy to be believed.

5. THAT the Superior Court erred in law by confirming the conviction on the basis of suspicion without cogent evidence.

6. THAT the prosecution failed to discharge its legal burden of proof beyond reasonable doubt.

7. THAT the superior court and subordinate court erred in law by failing to resolve that the Constitutional rights of the appellant as envisaged by section 72(3) (b), 77(1) (2) (a) (b) (c) (d) (e) had been violated to the prejudice of the appellant.

8. THAT the superior court erred in law by failing to hold that section 214 of the Criminal Procedure Code was never complied with to the prejudice of the Appellant."

When the appeal came up for hearing on 8th October, 2007, Mr. E. Ondieki assisted by Mr. Okero Opolo appeared for the appellant while the learned Senior Principal State Counsel, Mrs. G. Murungi, appeared for the State.

In his opening remarks, Mr. Ondieki stated that they (counsel for the appellant) had decided to condense their grounds into three so that they were to argue only grounds 1, 3 and 7 of the Supplementary Grounds of Appeal.

Mr. Ondieki chose to start with ground 7 and on this he submitted that the appellant was arrested on 16th November, 1998 and brought to court on 11th August, 1999 when he took plea before the trial court. In Mr. Ondieki's view, this was a serious violation of the appellant's constitutional rights since the appellant was brought to court nine months after his arrest. He referred us to ***section 72(3) (b)*** of the Constitution, and his list of authorities, particularly this Court's decisions in **Albanus Mwasia Mutua v. R – Criminal Appeal No. 120 of 2004 (unreported)** and **Gerald Macharia Githuku v. R. – Criminal Appeal No. 119 of 2004 (unreported).**

Mr. Ondieki was of the view that this appeal ought to be allowed on this ground alone and he therefore asked us to declare the proceedings a nullity.

On ground 1, Mr. Ondieki contended that the appellant never recalled and cross-examined the first two prosecution witnesses and that the trial court shifted the burden of proof.

As regards ground 3, Mr. Ondieki submitted that there was failure by the superior court as it did not analyse the evidence and come to its own conclusion.

On her part, Mrs. Murungi asked us to dismiss this appeal. She pointed out that the issue of 9 months delay was never raised in the two courts below. Mrs. Murungi was of the view that the State was denied the chance to explain the delay since that matter was not raised in the two courts below. On this issue, Mrs. Murungi sought to rely on the decision of this Court in **Eliud Njeru Nyaga v R – Criminal Appeal No. 182 of 2006 (unreported)**.

As regards ground 1, Mrs. Murungi pointed out that the appellant was given an opportunity to recall the witnesses but he said that he did not wish to have the two witnesses recalled.

As regards ground 3, Mrs. Murungi submitted that the superior court re-evaluated the evidence afresh and came to its own conclusion.

We shall now deal with the three grounds argued by Mr. Ondieki, but before we come to that, we must briefly comment on the case against the appellant. This was a case in which the appellant and his colleague attempted to rob the complainant his motor vehicle registration number KAD 469V Nissan Urvan valued at Shs. 450,000/= and that in so doing they used violence on the said complainant (Peter Kihara – PW 1). Both the trial court and the first appellate court found that the appellant was positively identified and arrested – the appellant was, so to speak, caught red-handed. The two courts below had no difficulty in finding the appellant guilty.

This being a second appeal, only points of law fall for our consideration by dint of ***section 361(1)*** of the Criminal Procedure Code. That being so, this Court would not interfere with concurrent findings of facts of the two courts below unless they are shown to have not been based on evidence – see **KAINGO V REPUBLIC [1982] KLR 213**.

We may now proceed to the grounds argued by Mr. Ondieki. We shall start with the issue of the first appellate court having failed to re-evaluate the evidence afresh. We have considered this ground *vi-a-vis* the judgment of the superior court and it is our view that the superior court was well aware of its duty in re-evaluating the evidence and coming to its own conclusions as stated in **OKENO V R** ***(1972) E.A 32***. Indeed, in the course of its judgment, the superior court stated:-

"We remind ourselves of the holding in GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 – 1988) KAR 134 that:-

"it is the duty of the first Appellate Court to remember that parties are entitled to demand of the Court of first Appeal a decision on both questions of fact and law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions, bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this."

It is with the above in mind that we now consider this appeal"

Having so reminded itself, the superior court in a well reasoned and detailed judgment re-evaluated the evidence and came to the conclusion that the appellant's conviction was based on acceptable and sufficient evidence. We therefore find no merit in that ground of appeal.

As regards ground 1 which was in respect of cross-examination and recalling of the two witnesses, all we can say is that the appellant was invited to recall the witnesses but declined to do so. The trial court was not expected to force the appellant to recall the witnesses. We therefore find no merit in that ground too.

Lastly, we come to the vexed question of Constitutional rights of the appellant as a result of what appeared inordinate delay in bringing him to court after he had been arrested on 16th November, 1998. Ground 7 of the Supplementary Grounds of Appeal stated:

"THAT the Superior Court and Subordinate Court erred in law by failing to resolve that the Constitutional rights of the appellant as envisaged by section 72(3) (b), 77(1) (2) (a) (b) (c) (d) (e) had been violated to the prejudice of the Appellant."

This complaint was based on the fact that according to the record of the trial court the appellant was arrested on 16th November, 1998 but was not taken to court until 11th August, 1999 – a delay of about nine months. It was for this reason that Mr. Ondieki submitted with considerable force that the appellant's Constitutional rights had been infringed and that for that reason alone, his trial should be declared a nullity. We were very much concerned about this aspect of this appeal and we decided to call for the original record of the trial court. We found that there was a reference to another case in which the appellant was involved. This resulted into calling for the police records from Kiambu District (as the offence was reported to Tigoni Police Station within Kiambu District). Our efforts in trying to find out what had happened led us to the conclusion that the appellant had another case in Kiambu Court apart from the case that gave rise to this appeal. For that reason, we accept Mrs. Murungi's submission that the State should have been given an opportunity to explain the reason for what was otherwise un-explained delay in bringing the appellant to court. In the recent decision of this Court delivered at Nyeri on 18th May, 2007 in the case of **Eliud Njeru Nyaga v. Republic (supra)** this Court dealing with a similar situation of delay in bringing an accused person to court stated:-

"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."

Hence in the foregoing case, this Court rejected the submission on Constitutional rights of an accused person who was arrested on 6th June 2005 and brought to court on 11th August 2005 on the ground that the complaint was brought to the attention of this Court too late and without allowing the State the opportunity to investigate the reason for the delay.

This same issue of delay in bringing an accused person to court was considered in the recent decision of this Court delivered at Nairobi on 12th October, 2007 in **Morris Ngochi Njuguna & Others v Republic – Criminal Appeal No. 232 of 2006 (unreported)** in which this Court stated:-

"2nd appellant also complained about his alleged long incarceration in police custody before he was presented to the trial court. In his counsel's view his rights under section 72(3) (b) of the Constitution were violated. Relying on the record of appeal before us, he submitted that the 2nd appellant was arrested on 9th June, 2001, a period which, according to counsel, exceeded the 14 days allowed under the aforesaid section, and thus the rights of 2nd appellant were breached. At page 6 of the record of the appeal it is clear that an order was made consolidating criminal case Nos. 5468 of 2001 and Criminal Case No. 6005 of 2001. There is also a note at page 5 about other accused persons being brought to that court, as their case had been withdrawn, and apparently they were being recharged. In absence of the records of those cases, it cannot be said that the 2nd appellant's right was violated. If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the Constitution to enable the relevant court investigate the issue. As the matter stands now, the issue having not been raised in the two courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the 2nd appellant's rights under s. 72(3) (b) of the Constitution were breached. This ground also fails."

In view of the foregoing, we think it would be wrong for anybody to contend that where there has been inordinate delay in bringing an accused to court then without any further investigation such a person ought to be set free regardless of what had led to his arrest and incarceration.

We have considered the foregoing but it must be remembered that this is a Court of record. We go by the record. That record shows that there was a delay of nine months from the time the appellant was arrested and when he was taken before the trial court. That long delay has remained unexplained. Our own efforts of trying to find out what led to this long delay have not helped the situation. Mrs. Murungi lamented that the State had not been given time to investigate the matter but she did not ask for time to do so. Hence, the position remains that the appellant was not brought to court as provided by the Constitution. There may be an explanation for this long delay – which in itself is a violation of the appellant's constitutional rights. That being the position, we would say that taking into account the circumstances of this case, we think that it would be unjust to sustain the appellant's conviction.

As it was stated in the case of <u>**Albanus Mwasia Mutua**</u> (supra):

"On 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."

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."

It was in view of the foregoing that in <u>***NDEDE V. REPUBLIC***</u> ***[1991] KLR 567*** this Court quashed the convictions on the basis that Ndede's constitutional right given to him by ***section 72(3) (b)*** of the Constitution had been violated and that he was entitled to an acquittal.

In the present appeal, there has been no explanation why the appellant was detained in police custody for nine months before he was brought to court. In our view, it would not be difficult for the police/prosecution to investigate the delay and come up with an explanation. It is not enough to say that the State should have been given time to investigate and leave the matter there. The State must ask for time to carry out investigation. It would be improper to expect this Court to take over the role of the State to investigate inordinate delays.

There is yet another issue to be considered in this appeal. The record of the trial court shows that the witnesses were sworn but there is no indication as to the language used. Sample the following:

"<u>PW 1 (SWORN) AND STATES</u>

My name is Peter Kihara ………….

<u>**PW 2 (sworn) and states**</u>**:**

My name is Joseph Kamau Muiru ….……"

That pattern was repeated throughout the record of the trial court. It was not clear in what language the witnesses were testifying. It may appear a minor issue but this being a court of record we can only rely on what is recorded.

We think we have said enough in this matter. On the whole, we are satisfied that the appellant was guilty as charged but we do not consider that the failure of the trial magistrate to indicate the language used by various witnesses and the failure by prosecution to abide by the requirements of ***section 72(3)*** of the Constitution should be disregarded.

In reaching this conclusion, we are mindful of the fact that the appellant has been in custody since 16th November, 1999.

In view of the foregoing, we allow this appeal, quash the conviction and set aside the death sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

This judgment has been delivered pursuant to rule 32(2) of the Court of Appeal Rules. The Hon. Justice Githinji has not signed it.

Dated and delivered at Nairobi this 9th day of November, 2007.

E.O. O'KUBASU

………………………….

JUDGE OF APPEAL

E.M. GITHINJI

………………………….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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