Case Number:	Criminal Appeal 580 of 2010
Date Delivered:	20 Dec 2013
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	David Kenani Maraga, George Benedict Maina Kariuki, Philomena Mbete Mwilu
Citation:	Patrick Njuru Mwangi v Republic [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	HCCRC. 314 OF 2007
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, G.B.M. KARIUKI & MWILU, JJ.A)

CRIMINAL APPEAL NO. 580 OF 2010

BETWEEN

PATRICK NJURU MWANGI……APPELLANT

AND

REPUBLIC……..……..……RESPONDENT

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

(Khaminwa&Warsame, JJ) dated 28th October, 2010

in

HCCRC. NO. 314 OF 2007

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JUDGMENT OF THE COURT

1. On 20th July 2005 at about 10.00 p.m., as Paul Gaitho, PW1, walked home at Githurai 44, he saw four people, two on either side of the road with pangas and iron bars. He became apprehensive and decided to turn back and enter the compound whose open gate he had just passed. He did not make it into that compound. One of those people hit him with an iron bar and broke his teeth. After he had fallen down, they ransacked his pockets and took Kshs.4000/= he had and his Siemen A 35 mobile phone and started running away. He screamed and members of the public went to his aid. They chased the robbers and managed to arrest one of them a few metres away from the scene of robbery. They handed him to police at Maziwa Police Post who later charged him with capital robbery.

2. After trial before the Senior Principal Magistrate's Court at Kiambu, the appellant was convicted and sentenced to death. His appeal to the High Court having been dismissed, he has now preferred a second appeal to this Court.

3. Learned counsel Mr. Ondieki argued the appeal before us on behalf of the appellant. He raised

more or less the same points that he had argued in the High Court. He contended that the appellant's constitutional rights to a fair trial were violated;that the charge was defective; thatthe appellant was mistaken as one of the people who assaulted and robbed PW1; and that the sentence imposed on the appellant was illegal.

4. On failure to accord the appellant a fair trial, Mr. Ondieki raised two issues. One, that the appellant was held in police custody for about 26 days before he was taken to court. Counsel argued that that compromised his rights to liberty and fair hearing within a reasonable time contrary to **Sections 72(2)**and **77(1)** of the former **Constitution** respectively. In counsel's view, the remedy for that illegal detention is an acquittal irrespective of the evidence against the appellant. He said even an award of damages in a civil case will not be enough.

5. Secondly, counsel contended that the appellant did not follow or comprehend the proceedings as they were conducted in English which he does not understand. He referred us to the trial court's record which does not show the language used on most occasions. The appellant had also applied to recall PW3 for further cross-examination and for copies of the proceedings but neither of those applications was granted.

6. Counsel for the appellant also took issue with the evidence tendered in court which he said was at variance with the particulars of the charge thus making the charge fatally defective. He argued that while PW1 claimed he went for treatment after one day, the P3 form states that he was treated after 16 days.

7. On identification, Mr. Ondieki argued that the offence having allegedly been committed at about 10.30 p.m., the circumstances were not favourable for a positive identification and that is why PW1 was unable to identify any of his attackers. Counsel also censured both the courts below for relying on an alleged confession by the appellant to PW1 that he (the appellant) was one of the people who robbed him and allegedly named his confederates. He said if at all the appellant made any such confession, it was as a result of the threat to lynch him.In the circumstances he said the appellant was mistaken for one of the robbers.

8. Lastly, Mr. Ondieki argued that the death sentence meted out to the appellant is illegal having been outlawed by the UN Convention Against Torture. He concluded that had the High Court properly re-evaluated the evidence on record and considered all these points, it would have allowed the appellant's appeal. He urged us to allow this appeal.

9. Mr. Monda, Senior Principal Prosecution Counsel, urged us to dismiss this appeal as it has no merit. He dismissed the appellant's complaint that his constitutional rights to a fair trial were flouted as that should have been raised at the trial to give the prosecution an opportunity to explain. On identification he submitted that in response to PW1's distress call, PW2 and PW3 went to his aid and with the aid of security lights, they saw people assaulting PW1. They chased them and managed to arrest the appellant but the others disappeared. From the scene until they caught up with him a few metres away, they neverlost sight of him. Moreover, the appellant's conviction was not based on mere identification but, as it were,on being caught red-handed.

10. On the death penalty Mr. Monda said he knows of no international convention outlawing it. He submitted that the sentence is permitted by our Constitution and urged us to dismiss this appeal in its entirety.

11. We have considered these submissions and carefully read the record of appeal. On the first ground, we agree with Mr. Ondieki that the appellant was indeed detained for a period of 26 days before he was taken to court. The charge sheet shows that he was arrested on 20th June 2005 and taken to court on 15th August 2005. We, however, reject his contention that for that illegal detention of 12 days, the appellant was entitled to an acquittal. In that submission, Mr. Ondieki must have had in mind this court's decision in **AlbanusMwasiaMutua v. Republic,**[1]and **Paul Murunga v. Republic**[2] in which that view was espoused. This court has since, however, departed from that view and for good reasons.In**JuliusKamauMbugua v. Republic,**[3] **Peter KihiaMwaniki v. Republic,**[4]and most recently in **Philip OdhiamboOwino v. Republic,**[5]this Court held that the recourse of anyone illegally detained by police is a claim for damages against the State and not an automatic acquittal of the criminal charges.

12. It is not in dispute that **Section 72(3)** of theformer **Constitution** required people arrested for non-capital offences to be arraigned before court within 24 hours. That requirement is retained under **Article 49(1) (f)** of our current **Constitution** which makes it quite clear that except where the 24 hours end outside the ordinary court hours, or on a day that is not an ordinary court day, an arrested person should be taken to court not later than 24 hours. That provision is quite clear. We should not try to justify any

delay on the complexities of the cases or lack of personnel or physical facilities in complying with it as was done in **Paul MwangiMurungav. Republic (supra), Eunice Kalama Jabuv.Republic**[6]and others. We want to believe that the framers of the Constitution bore in mind our local circumstances before they came up with the provision. Accused persons should be taken to court within the time stated. Failure to do so, however, does not lead to the acquittal of the accused persons irrespective of the evidence against them. It would be a violation of the constitutional rights of the victims of crime and a travesty of justice if that were to be done. Failure to take an accused person to court entitles him to a claim for damages against the State and/or those who violated his rights. Failure to or delay in complying with that requirement can only be a factor to be taken into consideration in the assessment of damages. In the circumstances, we find that the learned Judges of the High Court were right in rejecting the Appellant's plea that he should have been acquitted on account of delay in taking him to court.That remains to be this court's position on the issue and the reason why the first limb of ground 1 must therefore fail

13. The second limb of ground 1 that the appellant's constitutional right to a fair trial was compromised was that the appellant did not follow the proceedings because they were conducted in English, a language that he does not understand.

14. Having perused the record, we find no merit in that contention. The record shows that on 15th August 2005 when plea was taken, the proceedings were interpreted into Kiswahili language which the appellant understands. Although the record does not show which language was used on all subsequent court appearances, it, however, shows that PW1, PW2, PW3 and PW5 testified in Kiswahili. PW4 testified in English and there was translation into Kiswahili language. The record also shows that the appellant cross-examined all the prosecution witnesses at length. When he was put on his defence, he made an unsworn statement. He cannot have done all that if he did not follow the proceedings. In the circumstances we find no merit in this limb of ground 1 and we also dismiss it.

15. With regard to the alleged defective charge on account of the evidence tendered being at variance with the particulars of the charge, Mr. Ondieki argued that whereas PW1 said he went for treatment, after one day, the P3 form shows he went after 16 days. That argument also has no merit. The P3 form is not the treatment chit. PW1 testified that after reporting the crime, he went for treatment at Kenyatta National Hospital where he was given a note which he later took to the police surgeon who completed the P3 form.The age of the injuries on the P3 form was therefore right as it referred to the date of injury as recorded on the treatment note that the police surgeon used to complete the P3 form.

16. It is not correct that the appellant's conviction was based solely on visual identification as one of the people who robbed PW1. The evidence on record shows that in response to PW1's distress call, PW2 and PW3 went to his rescue and with the aid of security lights, they saw people assaulting PW1. They may not have identified any of them but they chased them and managed to arrest the appellant. Those witnesses were categorical that from the scene of crime until they caught up with the appellant a few metres away, they never lost sight of him. After that he was handed over to police who later charged him with capital robbery. So the appellant's conviction was not based on mere identification but, as the learned state counsel said,on being caught red-handed. In the circumstances we find no merit on the ground of identification and we similarly dismiss it.

17. That leaves us with the ground on sentence.Mr. Ondieki referred us to a UN convention on torture which outlaws the death penalty and promised to avail a copy to us but he did not. We agree with him that by virtue of **Article 2(4)** of our Constitution, the UN conventions that Kenya ratifies form part of our law. Several UN Conventions outlaw torture, cruel, inhuman or degrading treatment. They include the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). CAT defines torture in the following terms:

"For purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any person based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[7]

18. That Convention, including its Protocol of 22nd June 2006, does not talk of, leave alone prohibit the death penalty. The UN convention we know of which has a provision on the death penalty is the **International Convention on Civil and Political Rights(ICCPR).**

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."[8]

19. The death penalty, particularly the mandatory death penalty, has been and will no doubt continue to be a controversial issue globally. The pivotal point of the controversy is the differential culpability of the crime committed and the imposition of the death penalty, the argument being that the mandatory death penalty deprives the court of the right to consider mitigating circumstances. The argument is that since "[n]o simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion,"[9] despite the urge for retribution against those who commit what society considers as heinous crimes, the mandatory death penalty is "barbaric and incompatible with the modern 'civilized' society."[10]

20. This point was succinctly expressed by the Indian Supreme Court in the case of**Mithu v. State of Punjab**in which Chandrachud CJ sated that:

"…a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair."[11]

21. The controversy also arises from the interpretation of Articles 6 and 7 of the International Convention on the Civil and Political Rights (the "ICCPR") (which has been domesticated into the municipal legal systems of many member states) as read together with the Second Protocol to that Convention as well as what has been described as "the best sentencing practice"[12] and the "standards of decency that mark the progress of a maturing society."[13]

22. The ICCPR itself does not outlaw the death penalty. Instead it permits the penalty for the crime of genocide and serious crimes in countries that have not abolished it but requires that the execution thereof be carried out in accordance with that convention.

23. The provisions of that Covenant include Article 7 which states that "[n]o one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment." Most States parties to the ICCPR have domesticated Article 7 thereof in their constitutions. The 2010 Kenya Constitution has simply not just domesticated that provision. It has gone further and categorically stated, inter alia, that the "freedom from torture and cruel, inhuman or degrading treatment or punishment…shall not be limited."[14]

24. In interpreting Article 7 of the ICCPR or its equivalent, courts from a good number of world jurisdictions have held the death penalty as violating that provision and declared it unconstitutional.[15] Others have held that what violates that provision is not the sentence per se but the inhumane manner of carrying it out.[16]

25. Prior to the promulgation of the 2010 Constitution, the Kenya Court of Appeal had in the case of **Geoffrey NgothoMutiso v. Republic**[17] considered the provisions of Article 7 of the ICCPR, which had been domesticated by section 74(1) of the former Constitution. Although the Court of Appeal was in that case concerned with the issue of whether or not the mandatory death penalty was constitutional and not whether the execution of the death penalty was per se inhuman and degrading, when it ultimately outlawed the mandatory death penalty for offences of murder, it described it as "antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial." [Emphasis supplied].

26. That was on 30th July 2010. On 10th June 2011, Justice AnyaraEmukule of the Kenya High Court, while sentencing the accused in **Republic v. John KimitaMwaniki**[18], whom he had found guilty of murder, followed the Court of Appeal decision in the **Ngotho case**(supra) but was of the view that the death penalty "is inconsistent with the right to life preserved under Article 26(1) of the Constitution." The same view had been expressed by the South African Constitutional Court in the case of **State v. T. Makwanyane& Another**[19] in which several cases from other jurisdictions, which have held the mandatory death penalty as inhuman, cruel and degrading punishment were considered.

27. Although in **Republic v. Dickson Munene& Another**[20] Justice Warsame of the Kenya High Court subsequently expressed the view that as long as the death penalty remains in our statute books, the same should be meted out, the above stated observations in the two earlier cases suggest that the Kenyan courts and the legal fraternity at large[21] are inclined to support the global campaign for the total abolition of the death penalty. This is particularly clear from the words of the Court of Appeal in the **Ngotho case**. While observing that despite the global campaign to abolish the death penalty the Kenya Constitution 2010 nevertheless retains it, in its statement that "the dynamism of society will take care of future developments," the Court of Appeal made it clear that it may in the not distant future, abolish the death penalty.

28. **Section 71(1)**of our former Constitution which was in operation when the appellant in this case was charged with the offence giving rise to this appeal permitted the death penalty. **Sections 296(2)**and

204of our **Penal Code**provide for the death penalty for the offences of robbery with violence and murder respectively. As stated, in **Geoffrey NgothoMutiso v. Republic**[22]this Courtdid not abolish the death penalty.

29. The death penalty is therefore in our Constitution and statute law and we have no evidence in this case that the same is being executed in a cruel, inhuman or degrading manner. In the circumstances we have no basis for outlawing it. As a matter of fact, we are aware that all death penalties have and are being commuted to life sentences.

30. For these reasons, we find no merit in this appeal and we hereby accordingly dismiss it in its entirety.

DATED and delivered at Nairobi this 20th day of December, 2013

D.K. MARAGA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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[1]

[1] Cr. App. No. 120 of 2004 (unreported).

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[2] Cr. App. No. 35 of 2006.

[3] [3] Cr. App. No. 50 of 2008.

[4] [4] Cr. App. No. 280 of 2005.

[5] [5] Cr. App. No. 281 of 2010.

[6] [6] CR. App No. 327 of 2008.

[7] [7] Article 3 thereof.

[8] [8] Article 6 thereof.

[9] [9] English Royal Commission (1-2 Minutes of Evidence, p 13(1949)).

[10]

[10] Nyamboga, E. 2011. Death Penalty Steers Debate Towards Global Best Practice. *The Nairobi Law Monthly*, 2(11).

[11]

[11] [1983] 2 SCR 690 at p.707.

[12]

[12] Nyamboga, E. 2011. Death Penalty Steers Debate Towards Global Best Practice.

[13]

[13] Privy Council in the case of Reyes v. The Queen, [2002] 2 A.C. 247.

[14]

[14] Kenya Constitution 2010, Article 25(a).

[15]

[15] Examples are the decision of the South African Constitutional Court in State v. T. Makwanyane& Another, Case No. CCT/3/94, Reyes v.The Queen, [2002] 2 A.C. 235 P.C (Belize), Francis Kafantayeni.& 5 Others v. AG, Const'l Case No. 12 of 2005; [2007] MWHC 1 (Malawi) and Susan Kigula& 414 Others v. AG, Const'l Petition No. 6 of 2003 (Uganda).

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[16] In the Makwanyane case (supra), it was suggested that its execution by asphyxiation in a gas chamber or by lethal injection may not be cruel and degrading.

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[17] [2010] eKLR.

[18]

[18] Nakuru HCCRC No. 116 of 2007.

[19]

[19] Case No. CCT/3/94.

[20]

[20] Nairobi HCCRC No. 11 of 2009.

[21]

[21] In his article, 'Death Penalty Steers Debate Towards Global Best Practice', ErneoNyamboga described Justice Warsame's said view as "retrogressive." Conceding the Ngotho Appeal, Mr. KeriakoTobiko, the Director of Public Prosecutions, invited the Court to read the mandatory term "shall" in section 204 of the Penal Code in respect of the death sentence as "may."

[22]

[22] [2010] eKLR.