



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Case 12 of 2012**

**REPUBLIC ..... PROSECUTOR**

**versus**

**NEWTON MUCHEMI WAMBUI .....ACCUSED**

**RULING**

1. The applicant is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code the particulars of which were that on the 29th day of January 2012 at Sewage Area in Nanyuki Township within Laikipia County jointly with others not before court murdered MARTIN KARUMI MURIUKI.
2. A plea of not guilty was entered in respect of the charge herein and on 12th November 2012 the applicant through M/s Kimunya raised the issue of violation of the applicant's constitutional right in that he was not taken to court within the requisite period of time.
3. In response to the said constitutional issue the investigating officer herein Mr. Shadrack Juma swore an affidavit wherein he deponed that the accused was arrested on 30th January 2012 together with two people and was on 1st February 2012 taken to court for an extension of time and the said application fixed for 6th February 2012.
4. On 8th February the police were given four days to conclude investigation and on 15th February 2012 the other two suspects were released and the applicant remanded at Nanyuki Police Station until 28th February 2012 for mental assessment.
5. That on 29th February 2012 an order was made for the applicant to be taken to the High Court for charging which was done on 21st March 2012.

**SUBMISSIONS**

6. On behalf of the applicant it was submitted that the accused raise a preliminary objection on point of law that his intended trial is a nullity for failure by the prosecution to adhere to the strict provisions of Article 49(1)(f) of the constitution of Kenya in that he was not brought to court within 24 hours.
7. That the prosecution have not given an explanation of what happened to the accused for a period of 20 days and therefore his arraignment in court was unconstitutional and it is therefore submitted that the court should declare the trial a nullity to uphold the constitution and should not award any damage or order the trial to proceed.
8. In support of the submission the applicant relied upon the authorities of: REPUBLIC v JAMES

KAHUTHU MURAGE HIGH COURT AT NYERI CRIMINAL CASE NO. 10 OF 2007 where the court held that it had a mandate to ensure that the accused constitutional rights are protected and found that the accused right had been violated and acquitted the accused.

9. It should be noted that in the above case the accused was detained for a period of six months that is from 14th October 2006 to 13th March 2007 and might therefore be distinguished from the case before this court.

10. The applicant also relied upon the case of

1. ANN NJUGU & 5 OTHERS vs REPUBLIC MISC. CRIMINAL APPL. NO. 551 OF 2007 NAIROBI where the Judge held that the applicants should have been brought to court before the expiry of 24 hours and their continued detention was unmitigated illegality and violation of their rights.

2. GERALD MACHARIA GITHUKU v REPUBLIC COURT OF APPEAL CRIMINAL APPEAL NO. 119 OF 2004 NAIROBI where the court held that failure by the prosecution to abide by the requirements of then section 72(3) of the constitution should not be disregarded.

11. On behalf of the state it was submitted that the court jurisprudence hold that the remedy for violation of constitutional right if proved is a claim for damages and that the constitution provides for such a remedy.

12. It is submitted that the provision of Article 49(1)(f) of the constitution does not contain any requirement that proceedings be declared either illegal or null and void or that the applicant should be acquitted on proof of delay to arraign him in court within 24 hours of arrest.

13. In support thereby the state relied upon the cases of:

REPUBLIC v NJOMO KAMAU GACHERI (2009)eKLR CRIMINAL CASE NO. 21 OF 2007 where Justice Fred A Ochieng held that if the accused rights are violated he ought to be compensated in the following terms.

“Therefore it is still possible in my considered view for the accused person to obtain compensation from the person who detained him for the period that was longer than acceptable under the constitution.

That being the position if the accused were to be acquitted at this stage and if he then went ahead to also successfully lodge a claim for compensation, he would have been doubly successful.

In contrast the family of the victim and the society would have been deprived of an opportunity to prove the guilt of the accused. At the same time the very society of which the victims family was part may be compelled to compensate the accused. (Emphasises added).

2. SHEM HEZRON ASHIONO vs REPUBLIC KAKAMEGA HIGH COURT MISC. CRIMINAL APPEAL NO. 23 OF 2009 where the judge had this to say

***“I do therefore find that the petitioners rights were infringed. However it is unfortunate that there is no specific provision in the constitution stating that upon finding that a petitioners rights have been infringed, then the petitioner should be set free. I am alive to the decision by the Court of Appeal on this issue where petitioner have been set free. The important issue herein is what would happen if the petitioner was detained in police custody for 56 days and thereafter released without being charged in court. I believe the petitioner would still have had his right to pursue the violation of his detention by the police and would be a claim for damages”***

14. From the affidavit evidence and submissions there are only two issues for this courts determination.

***i. Whether the appellants constitutional right under Article 49(1)(f) of the constitution were violated.***

**ii. If so what order should the court make.**

15. Article 49(1)(f) states that an arrested person has right to be brought before a court as soon as reasonably possible but not later than (i) twenty four hours after being arrested.

16. In the matter before the court the accused was arrested on 30th January 2012 and taken to court on 1st February 2012 and therefore there was a delay of one (1) day which strictly speaking was a violation of the accused constitutional rights and I agree with the submission by the applicant that the state has offered no reason for the said delay. I however take the view that a delay of one (1) day was not inordinate.

17. On the issue of that order the court should issue under Article 23 this court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights and the court may grant appropriate relief including

**a) a declaration of rights**

**b) an order for compensation.**

18. In the present application before me I am of the considered view that an appropriate relief would be to declare that the applicants constitutional rights under Article 49(1)(f) were violated but on the authority of Republic vs Njomo Kamau Gacheru I decline to declare the arraignment of the accused unconstitutional.

19. In the final analysis I dismiss the preliminary objection herein and order that the accused proceed with his trial to conclusion.

Dated and delivered at Nyeri this 30th day of May 2013.

**J. WAKIAGA**

**JUDGE**

Mr. Njue for the State.

Mr. Kimunya for Mr. Gichuhi for accused.

Court: Ruling read in open court in the presence of the above named. Mention on 2/7/2013.

**J. WAKIAGA**

**JUDGE**