



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU Criminal Miscellaneous Application 41 of 2009

REPUBLIC PROSECUTOR
VERSUS

ALEX MURITHI MUGAMBI 1ST ACCUSED
MERCY NKIROTE MURITHI 2ND ACCUSED

RULING

The applicants Alex Murithi Mugambi and Mercy Nkirote Murithi have brought before court for consideration their allegation that their constitutional rights as embodied by Section 72(3) (b) of the Constitution were violated. It is conceded by the state that both were arrested on 17th October 2009. The applicants are facing the charge of office breaking and committing a felony contrary to section 306 (a) of the Penal Code before the Chief Magistrate Court, Meru. It is when they appeared before that court that they raised the issue of the violation of their constitutional rights. The learned magistrate when that issue was raised forwarded the matter to the High Court for determination. That court identified the following issues for determination by this court.

4. (a) *Were the accused persons in custody of the police from 17.10.2009 until 4.11.2009*
(b) *Was there good reason to detain the accused person in police custody longer than the 24 hours prescribe by law established*
(c) *Were the accused persons informed of the charges they were facing in good time.*
(d) *Have the fundamental rights and freedom guaranteed by the Constitution to the accused person been violated.*
(e) *What remedy if any is entitled to the accused persons.*

The state called the OCS of Subuiga Police Station with a view to explaining the reason why the applicants were not brought before court within 14 days as required by Section 72(3) (b). The OCS stated that both applicants were arrested on 17th October 2009 at 10.15pm. Mercy Nkirote was very cooperative with the police and because she had a young child she was released on 18th Oct. 2009 at 8am. She was given free bond at the police station. Alex Murithi however was not released. He confessed his participation in the offence and also mentioned another man Gitonga who was his accomplice. The OCS stated that they did not have sufficient evidence at the time of arrest to be able to take the case before court. There was need to continue investigating further the matter. That investigation involved traveling as far as Naivasha and Nairobi. Further, he said that many of the police officers from his station were involved in the manning of schools during that time when the National Examinations were taking place. It is as a result of those two components that Murithi was not produced to court within the 24 hours required under Section 72(3) (b). Section 72(3) (b) provides as follows:-

“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-

(3) A person who is arrested or detained:-

(a) for the purpose of bringing him before a court in execution of the order of a 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.”

As can be seen from that Section, it is required that when a person is not produced before court within 24 hours when the offence is not a capital offence such as this one, that the prosecution would show that the person was taken to court as soon as was reasonably practicable. The courts have had opportunity to interpret that section in previous decisions. Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported). The court stated as follows:-

“Thus, where an accused person charged with a non-capital offence brought before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence.”

are Albanus Mwasia Mutua Vrs. Republic Criminal Appeal NO. 120 of 2004, where the court of appeal stated:-

“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 Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support 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.”

Gerald Macharia Vs. Republic [2007] e KLR.

“.....That although the delay of three days in brining the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged we nevertheless do consider that the failure by the prosecution to abide by the requirement of Section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before court as soon as was reasonably practicable.....”

I wish to zero in the case of Mutie (supra). In that case, the Court of appeal as can be seen stated that the fact that a person is not produced before court within the period stated under Section 72(3) (b) does not necessary show that the constitutional rights of that person have been violated. The police as was stated by the OCS needed to investigate the matter to make it ready to bring it before court. That investigation involved traveling to Naivasha and to Nairobi from Subuiga Police Station in Timau. It is common knowledge that the police force do not have the necessary equipment to carry out investigation of crimes. In this case, it may very well have been that the police did not have motor vehicles to travel to Nairobi and Naivasha. Further, the explanation was given of the police being involved in the National Examination to give security and these police officers were the same officers who were to carry out the investigation of this matter. I find the explanation given by the OCS to suffice to show that the applicants were brought before court as soon as was reasonably practicable. In making that

decision, I make it being aware that the police force do work under very difficult circumstances. I therefore respond to the reference by the lower court and state that there is proof that Alex Murithi Mugambi was kept in custody from 17th October 2009 to 4th November 2009. I accept the evidence given by the OCS that Mercy Nkirote was released on 18th October 2009. In response to the other issues raised in the reference, I state that although Alex Murithi Mugambi was detained in Police Station for more that 24 hours, the explanation given by the OCS Subuiga Police Station showed that he was brought before court as soon as was reasonably practicable. I therefore dismiss the objection raised by the applicants and order that Meru Magistrate Court Criminal Case No. 1593 of 2009 do proceed to hearing.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE