



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Revision 9 of 2009

ZAKARY MUGAMBI KIIHIKAAPPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(Arising from Chief Magistrate's Court, Anti Corruption Case No.2 of 2007 at Nyeri)

RULING ON REVISION

ZAKARY MUGAMBI KIIHIKA, applicant herein, was arraigned before the Nyeri Chief Magistrate's Court to face a charge of soliciting for a benefit contrary to *Section 39 (3) (a)* as read with *Section 48 (1)* of the Anti-corruption and Economic Crimes Act No. 3 of

2003. A total of three witnesses testified in support of prosecution. At that juncture the Applicant raised a Preliminary Objection against his prosecution on the basis that he was held beyond 24 hours in Police custody before being taken before a court of law. The learned Chief Magistrate framed the issues and referred the matter to this court for interpretation under *Section 67 (i)* of the Constitution of Kenya. The reference is the subject matter of this ruling.

It is the submission of **MR. PETER MUTHONI**, learned counsel for the Applicant, that the Accused's Constitutional rights under *Section 72 (3) (b)* of the Constitution were breached when he was kept in Police custody for more than 24 hours. It is said that the Applicant was arrested on 14th April 2007 and kept in Police custody until 18th April 2007 when he was taken before court for plea. Mr. Makura, learned Senior State Counsel, conceded that there was a delay of two (2) days by the Police. According to Mr. Makura, the delay was not inordinate, hence the court should countenance the same.

I have considered the rival submissions made by learned counsels from both sides. It is not in dispute that the accused person was arrested on 14th April 2007 and kept in Police custody upto 18th April 2007 when he was taken to court. The calendar for the year 2007 indicates that 14th April 2007 was a Saturday and 18th April 2007 was a Wednesday. The issue was raised before the trial court but the prosecution offered no explanation to justify the delay of two days. When the reference came up for hearing before this court, the prosecution again failed to explain the reasons which prevented the Police from taking the accused to court. In the case of **JAMES GITHUI WATHIAKA & ANOTHER =VS= REPUBLIC CRIMINAL APPEAL NO. 115 OF 2007 (Unreported)** the Court of Appeal stated in part as follows:

“So that if the twenty-four hours or the fourteen days is exceeded the burden of proving that the arrested or detained person was brought to court “as soon as was reasonably practicable” is on the person making the claim Otherwise the reasonable time for a non-capital offence is twenty-four hours and for a capital offence is fourteen days. If the period of twenty four hours or fourteen days is exceeded and it is still claimed the Time taken to bring the arrested or detained person was nevertheless the reasonable and practicable one, then the person making that claim must prove it.”

In the case before me the prosecution have not given any explanation to make this court exercise its discretion to countenance the delay. Where there is no explanation for a constitutional breach, the result will be an acquittal irrespective of the nature and strength of evidence in support of case against the accused. The evidence of the three witnesses does not show that the case was complex so that one can infer that the Police may have taken time piecing up the evidence. The Police simply held the accused in Police custody for more than two days for no good reasons at all. I find that the Applicant's constitutional rights were breached. I am convinced he is entitled to the orders sought.

The end result is that the charge preferred against the Applicant vide **NYERI CHIEF MAGISTRATE'S ANTI-CORRUPTION CASE NO. 2 OF 2007** is declared to be null and void. The same is ordered dismissed. Consequently **ZAKARY MUGAMBI KIHKA**, the accused/applicant is acquitted. He is hereby set free forthwith.

Dated and delivered at Nyeri this 9th day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Wachira holding brief Peter Muthoni for the Applicant.