



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 27 of 2007

REPUBLIC PROSECUTOR

VERSUS

JOHN KINYUA MURIUKI ACCUSED

RULING

The accused is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on the 13th October, 2006 at Kiangoma village in Kirinyaga District within the Central province jointly with others already before court murdered Margaret Wambura Kariuki. The accused pleaded not guilty to the charge. However before the case could proceed to hearing, Mr. Chweya, learned counsel for the accused person raised a preliminary objection claiming that the accused's Constitutional rights had been violated for having been kept in police custody in excess of nine months. Counsel argued that his rights as embodied in section 72(3) of the constitution had thus been violated. That section as we already know provides interalia:-

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

(2)

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 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.”

Mr. Chweya submitted that the accused was arrested on 13th October, 2006 on suspicion of having murdered Margaret Wambura Kanuki. He was detained in police custody until 11th July, 2007 when he

was arraigned before court for the taking of the plea. Counsel submitted that, that it was in excess of 9 months that the accused had been kept in police custody which was a violation of the aforesaid Constitutional provisions. He therefore urged me to find that those rights having been violated with impunity by the police the accused should be entitled to an acquittal ipso facto.

Initially the state through Ms. Ngalyuka, intended to call the investigating officer herein, I.P. Chirchir to rebut the accused's claim. However having adjourned the matter severally to enable I.P. Chirchir to attend court to no avail the learned state counsel opted to dispense with his presence and leave the matter to court. As it is therefore there is no explanation forthcoming from the state as to why it took the police 9 months or so to arraign the accused in court following his arrest.

The Constitution provides in section 72 thereof that no person shall be deprived of his personal liberty save as may be authorized by law. In that section it is provided that for a capital offence such as the one the accused is facing a person can only be detained for a maximum of fourteen (14) days upon arrest before he is brought to court. The burden is cast upon the one who alleges that the provisions of the law have been complied with to satisfy the court. In the case of ***Gerald Macharia Githuku V Republic Criminal Appeal 119 of 2004*** the Court of Appeal in considering a situation where an accused person was facing a capital offence and who had been detained for 17 days rather than 14 days as provided under the law had the following to say:

“..... although the delay of three days in bringing 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 not consider that the failure by the prosecution to abide by the requirements 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 the court as soon as was reasonably practicable.”

The Court of Appeal in the case of ***Albanus Mwaura Mutua V Republic Criminal Appeal Number 120 of 2004 (UR)*** had the following to say in respect of violation of section 72 of the Constitution;

“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 a 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”.

In the light of no explanation being given by the state for the delay in bringing the accused before court and in the light of the provisions of the constitution I do find that the state failed to satisfy the burden cast upon it by virtue of section 72(3) of the constitution. The delay of nine months is certainly inordinate and wholly unexplained and Ms. Ngalyuka did not even bother to submit before me that the said delay was in all the circumstances of this case, reasonable. As stated by the court of appeal in the case of ***Elizabeth Akinyi Odoyo & Anor. V Republic CR. APP. NO. 161/of 2006 (UR)***. ***“The prosecution must learn to operate within the laws upon which our fledging democracy is based. We are all, the police, the Attorney General and the court bound to accept that we are governed by law and the concept of the rule of law must be given a practicable reality.”***

Mr. Chweya was right in raising the preliminary objection. That violation of the accused's Constitutional rights leads this court to acquit the accused of the charge of murder. The accused unless otherwise

lawfully held is hereby set free.

Dated and delivered at Nyeri this 30th day of January 2009.

M.S.A. MAKHANDIA

JUDGE