



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CRIMINAL APPLICATION 93 OF 2008

HARRISON G. MACHARIA

SAMWEL GACHUI MACHARIA

PETER KAMENWA MAHIGA

APPLICANTS

Versus

STATE RESPONDENT

RULING

The applicants in this matter were charged in the lower court with various counts of ***fraudulent false accounting contrary to section 330(b) of the Penal Code and of stealing by servant contrary to section 281 of the Penal Code***. Before the trial commenced in the lower court the applicant submitted that their constitutional rights as embodied in ***Section 72(3)(b)*** of the constitution were violated. This matter has been referred by the lower court for the determination of the alleged contravention as provided under ***Rule 24 of The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006***. The applicants in the lower court contended that the police had failed to present them before court within 24 hours as provided under section 72(3)(b). The first and 2nd accused in the lower court were arrested on 26th September 2002 in Muranga Town. That day was a Thursday. The third accused was arrested on 27th September 2002 in Kikuyu town. That was a Friday. All the three were arraigned before court on 2nd October 2002. That was on a Wednesday the following week. It was stated by the prosecution that the complainant reported his case to the police on 15th October 2001. The police officer who was called upon to explain the alleged delay in producing the accused before court gave various reason. Firstly he stated the matter involved many documents. This is assumed to be the reason he gave for failure to produce the accused before court within 24 hours of being arrested. As he continued to explain he however stated that before court he was intending to produce only 6 receipts. It is obvious from the charges that the accused faced that they related to accounting. The officer did confirm that the complainant had been advised to have an audit carried out. Since the complainant made his report a year previous to the arrest of the accused it is assumed that the audit must have been carried out within that year. Further the officer stated:-

“When I arrested the accused persons I was sure I was going to charge them with the offence.”

That being so the explanation that the volume of documents was the reason for the delayed production of

the accused before court has no basis. The officer secondly stated that the accused were uncooperative in providing specimen signatures and hand writing. He does not state when he did eventually get those specimen signatures. The lower court in the reference brought before this court did however state that the specimen memo was filed on 7th October 2002 forwarding the specimen to the handwriting examiner. That was on a date after the accused had been produced before court. It would therefore be clear that the lack of specimen signature was not an impediment to the production of the accused before court. Thirdly the officer stated that the Police Station Land Rover had broken down. He failed to state how he eventually took the accused to court if indeed the station vehicle was broken down. It does seem that the issue of the alleged breakdown of the land rover was simply raised to be amongst the many reasons given for failing to produce the accused before court within the constitutional time limit. The prosecution had a duty to make full disclosure in respect of the availability of an alternative means of transporting the accused to court. the accused were held in Muranga police station. They were eventually brought before Muranga senior principal magistrate court. It is not clear what the distance is between the police station and the court. I take judicial notice that Muranga town in itself is not a big town. That being so it is possible that the accused could have been escorted to the court by the police on foot. In the end I find that it was not enough for the police to simply say that the police vehicle was broken down. Section 72(3)(b) of the constitutions lays a burden on the prosecution/police to show that the accused were taken to court as soon as it was reasonably practicable. That section makes the following provisions:-

“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.”***

The recent case of *Dominic Mutie Mwalimu vs Republic Criminal Appeal No. 217 of 2005* the Court of Appeal in that respect had this to say:-

“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.”

The case of *ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004*, the Court of Appeal had the following to say in respect of such violation:-

“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 or 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".

Similarly in the case of ***GERALD MACHARIA GITHUKU Vs. REPUBLIC CRIMINAL APPEAL NO. 119 OF 2004***, the Court of Appeal in deciding the appeal found that the appellant had been detained for a total of 17 days from the date of his arrest to the date of being taken before court. The court of appeal in upholding his appeal had the following to say:-

"..... although the delay of the days in bring 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 prosecution in my view failed to discharge the burden laid upon it by the constitution. There was no explanation on why the accused were not taken before court within 24 hours of being arrested. The first and 2nd accused should have been presented before court on 27th September 2002. The third accused should have been presented before court on 30th September 2002. for the police to have detained all the accused up and until 2nd October 2002 when after all by time they arrested the accused a decision had been reached to charged the accused was a violation of the accused constitutional rights. I find that the accused constitutional rights were violated and I therefore hereby acquit them from the charges they face in SPM Court at Muranga Criminal Case No. 1209 of 2002. I order if the accused are in custody that they be set free unless they are otherwise lawfully held.

Dated and delivered this 3rd day of February 2009

MARY KASANGO

JUDGE