



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE 51 OF 2007

REPUBLIC ..... PROSECUTOR

Versus

ALEX MAINA MUGO .....  
RESPONDENT

**RULING**

The accused is charged with ***murder contrary to Section 203 as read with 204 of the Penal Code***. He raised a preliminary objection before his trial. In submissions his counsel stated that he was arrested on 18<sup>th</sup> September 2007 and was not brought before court until 12<sup>th</sup> November 2007. It was his argument that the accused constitutional rights had been violated. The state called the investigating officer to give explanation of the prolonged detention if at all. The investigating officer stated that if there was delay in presenting the accused before court it was due to confusion between the Attorney General's office and the court. He said that he brought the accused to court on 15<sup>th</sup> October 2007 having arrested him on the 9<sup>th</sup> October 2007. He represented the accused to the Deputy Registrar of this court the accused was taken from him by the prison wardens. The investigating officer was asked to leave the accused in the hands of the Deputy Registrar. As far as he was concerned the record should show that the accused was presented before court on 15<sup>th</sup> October 2007. He was unaware of what could have happened after he left the accused in the Deputy Registrar's chambers and in custody of the prison wardens. He therefore denied that the accused was detained for a period beyond 14 days. He had recorded the last statement of the prosecution witness by the 10<sup>th</sup> October 2007. He emphasized that he personally presented the accused to the deputy registrar on 15<sup>th</sup> October 2007. The record of this file shows that the accused came before the deputy registrar on 26<sup>th</sup> October 2007. The argument raised by the accused is that the alleged prolonged detention in the police station violated his rights under Section 72(3)(b) of the constitution. That section provides:

***“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.”***

There are other decisions of the Court of Appeal where the Court of Appeal held that where there is prolonged detention of accused without explanation. Such detention amounted to violation of constitutional rights. 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 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”.***

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 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.”***

Of more recent time the Court of Appeal held in the case of *JAMES GITHUI WATHIAKA & ANO VS REPUBLIC CRIMINAL APPEAL NO. 115 OF 2007* that when an accused person who is represented by counsel fails to raise the allegation of violation of his constitutional right at the first available opportunity it can be taken that he was waived his rights to raise that objection. The court had this to say in that case:-

***“Their trial was before the High Court which by law is “the Constitutional Court” in Kenya. The appellants and their advocates knew or must have known that their constitutional rights had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is***

***the constitutional court in Kenya and if the appellant's advocates had raised the issue there, the judge would have had to deal with the issue just as Mutungi J. did in the NJOGU case, supra. When we asked Mr. Muthoni and Mr. Ng'ang'a why the advocates representing the appellants did not raise the matter with the judge, their answer was that they did not know. ....We think we cannot equate advocates to poor and illiterate accused persons and where an advocate is present in court and does not raise such relevant issues, the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to court. Different considerations must continue to apply where an accused person is unrepresented."***

The date of arrest given by accused counsel and the date given by the investigating officer are at divergence. Since the information filed in this case does not give the date of arrest I am unable to confirm which of the two are correct. The investigating officer was emphatic that he brought the accused to the Deputy Registrar and he noted that he was in the company of prison warders. He later noted the accused being escorted by the wardens away from the court. I had the opportunity to observe the investigating officer and I formed the opinion that he was an honest witness. I accept as the correct events as reported by him. Having so accepted what may have occurred after he left the accused with the Deputy Registrar may never be known. I do however find that the explanation he gives is sufficient under section 72(3) (b). I therefore dismiss the objection raised by the accused.

***Dated and delivered this 3<sup>rd</sup> Day of February 2009***

**MARY KASANGO**

**JUDGE**