

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 33 of 2006

REPUBLIC PROSECUTOR

Versus

**LUCY WANGUI GICHOHI
RESPONDENT**

RULING

The accused is charged with *murder contrary to section 203 as read with 204 of the penal code*. She raised a preliminary objection before her trial. It was submitted on her behalf by his counsel that she was arrested on 28th August 2006 and was not brought before court until 13th November 2006. Counsel said that that was a total of 93 days that she was held in police custody. It was argued that the prolonged detention in the police station contravened her rights under section 72(3)(b). The investigating officer CI Paul Kuria stated that the accused presented herself at the Nyeri Police Station on 11th August 2006. She reported that she had burned down her house whilst her husband was inside. By then there was no reported crime and the matter had not been investigated. The officer traced the village where she comes from and on initial investigation discovered that her husband was still alive. The accused was charged in the lower court with attempted murder on 14th August 2006. The husband passed away on 15th August 2006. It was then investigation for murder was commenced. The lower court charges were withdrawn although he was unable to give the exact date of such withdrawal. On being taken to the psychiatrist for her examination into her mental ability to plea the psychiatrist found that the accused was not fit to plea. She was put on medication and it was after the treatment that she was brought before this court that is, 15th November 2006. He also added that during his investigation he had encountered difficulties because there were no witnesses to the crime since it occurred at night.

The argument raised by the accused is that the alleged prolonged detention in the police station violated her 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.”

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 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.”

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.”

Having considered the explanation given by the investigating officer that it was the accused who surrendered herself at the police station before any investigation had been carried out and the fact that the accused was first charged in the lower court with attempted murder, I find that the explanation by the police properly meets the requirement of section 72(3)(b). I therefore find no basis for raising the objection and the same is hereby dismissed.

Dated and delivered this 3rd Day of February 2009

MARY KASANGO

JUDGE