



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

**Criminal Case 44 of 2008**

REPUBLIC.....PROSECUTOR

*Versus*

FRANCIS WANYOIKE GUCHU.....ACCUSED

**R U L I N G**

On 27<sup>th</sup> August, 2008, the accused was arraigned before this court on one count of Murder contrary to *section 203* as read with *section 204* of the Penal Code. It was alleged in the particulars of the offence that the accused on 13<sup>th</sup> July, 2008 at Gitura Village in Murang'a South District of the Central Province murdered **Stanley Mungai Guchu**. The accused entered a plea of not guilty. On the same day through his learned counsel, **Mr. Kimani**, the accused put the prosecution on notice that on the day of hearing of the case he would be raising a preliminary objection based on the provisions of the constitution of this country.

True to his word, when the case came up for hearing on 15<sup>th</sup> June, 2009, the accused threw down the gauntlet. He challenged the constitutionality of his trial. Through **Mr. Kimani** he submitted that he had not been brought to court within the prescribed period in violation of *section 72 (3) (b)* of the constitution. He had been arrested on 14<sup>th</sup> July, 2008 but it was not until 11<sup>th</sup> August, 2008 that he was brought to court. The post mortem on the body of the deceased was conducted on 23<sup>rd</sup> July, 2008 and he was psychiatrically evaluated on the same day. All witness statements were recorded between 14<sup>th</sup> and 30<sup>th</sup> July, 2008 respectively. There was therefore no need or justification to delay his arraignment in court by the prosecution. In the absence of any explanation as to the reason for the delay, counsel urged the court to find that there had been a violation of the accused's constitutional rights and therefore his trial was a nullity.

**Mr. Makura**, learned Senior State Counsel was unable to respond immediately to the above objection. He sought albeit successfully an adjournment to enable him avail the investigating officer in the case so that he may shade light on the alleged delay. On 29<sup>th</sup> September, 2009, when the matter next came up, the investigating officer was still not available. **Mr. Makura**, opted to dispense with his presence and or explanation. In opposing the objection raised by the accused, however, **Mr. Makura** first conceded that there had been indeed a delay of about two weeks in arraigning the accused in court. He however hastened to add that the delay was not inordinate taking into account the seriousness of the offence. He therefore urged the court not to declare the trial of the accused a nullity. Instead the accused should have his day in court to exonerate himself on the charge he is facing.

In reply, **Mr. Kimani** submitted that **Mr. Makura** had put the cart before the horse. It was up to him to explain the delay. That had not been done. In the absence of the explanation, the court must of

necessity find that the attempted explanation if at all was futile the seriousness of the offence notwithstanding.

I have now carefully considered the preliminary objection, the response and the law. *Sections 72 (3) (b) and 77 (1)* respectively of the Constitution of this country provide inter alia:

**“Any person who is arrested or detained:**

**(a) .....**

**(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 as soon as is reasonably practicable, and where he is not 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 sub-section have been complied with.”** And

**77 “If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be accorded a fair hearing within a reasonable time by an independent and impartial court established by law.”**

So what happens if these provisions are breached? There is a litany of court of appeal and this court’s decisions on the issue starting with Albanus Mwasia Mutua v/s Republic (2006) eKLR, Gerald Macharia Githuku v/s Republic (2007) eKLR through to Paul Mwangi Murungu v/s Republic, criminal appeal number 35 of 2006 (UR) to mention but a few. The ratio decidendi which runs through all these decisions and which was poignantly captured in the case of **Albanus Mwasia Mutua** is to the effect that:

**“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 in support of 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.”**

It is not in dispute that the accused was not arraigned in court within fourteen days of his arrest. Instead he was arraigned twenty eight days later. There was therefore a delay of about fourteen days. It is upon the prosecution to offer an explanation for the delay short as it may be. No such explanation was however forthcoming from **Mr. Makura**. He was content with saying that the delay was not inordinate and that the offence charged was serious. That cannot amount to an explanation by any stretch of imagination. And even if it was an explanation can it pass the litmus test set out in *section 72 (3) (b)* and 77 of the constitution i.e. that the accused person despite the delay was brought before a court as soon as

was reasonably practicable and or that accused would be accorded a fair hearing within reasonable time? I don not think so. A delay of 14 days delay cannot be wished away on the basis that it was not inordinate and that the accused faced a serious charge.

The law of the land has to be obeyed particularly by those entrusted to enforce it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable. I do not think that the prosecution has been able to discharge that heavy burden in the circumstances of this case.

A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally it matters not that the evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the court of appeal said again in the case of **Albanus Mwasia Mutua**:

**“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.”**

In the end, and for the above reasons, I hold that the accused having been brought to court in breach of the provisions of *section 72 (3)* and *77 (1)* of the constitution, his continued prosecution is illegal and a violation of his constitutional rights. The preliminary point was thus well taken by counsel for the accused. Accordingly, the accused is acquitted and set him free of the charge.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of October 2009.***

**M. S. A. MAKHANDIA**

**JUDGE**