

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 36 of 2006

JOSEPH IRUNGU KABIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.1591 of 2004 dated 1st February 2006 by G. K.

Mwaura), Principal Magistrate)

JUDGMENT

The appellant herein, JOSEPH IRUNGU KABIRU and one Duncan Kang'ethe Ndungu were jointly tried on a charge of Manslaughter contrary to *Section 202* of the Penal Code. The particulars of the charge are that on the 6th day of February 2003, at Githunguri village in Murang'a District of the Central Province, unlawfully killed Joseph Irungu Maina. After undergoing a full trial the Appellant and his accomplice were convicted and each sentenced to serve ten (10) years imprisonment. The duo were dissatisfied. Consequently they each preferred an appeal. Duncan Kang'ethe Ndungu filed Nyeri Criminal Appeal No. 35 of 2006 whereas Joseph Irungu Kabiru preferred this appeal. On 16th February 2009, Mr. Makwa, learned state counsel informed this Court that Duncan Kang'ethe Ndungu was dead. Consequently NYERI H.C. CRIMINAL APPEAL NO. 35 of 2006 was marked as having abated.

On appeal, Joseph Irungu Kabiru, put forward ten (10) grounds of appeal in his petition. On 8th day of October 2009, the Appellant was allowed to file Supplementary grounds of Appeal. In the Supplementary grounds of Appeal the Appellant alleged that his constitutional rights under *Section 72 (3) (b)* of the Constitution were breached in that he was held for eight (8) months before being taken to Court. When faced with this challenge Miss Ngalyuka learned State Counsel, applied for the hearing of the appeal to be adjourned to enable her secure some evidence from the investigating officer to explain the delay. This Court granted the adjournment and gave the learned State Counsel fourteen (14) days to file a replying affidavit to explain the reasons behind the delay to take the Appellant to court within the period fixed by the Constitution.

When the appeal came up for hearing on 11th November 2009, Miss Ngalyuka informed this court that she was unable to secure a replying affidavit from the investigating officer. She admitted that the appellant was held for less than a month in Police custody before being taken to court. She said she had no reasons to offer to justify the delay.

I have carefully perused the recorded evidence. The charge sheet shows that the Appellant was arrested on 2nd March 2004. He was arraigned before the Principal Magistrate's Court, Murang'a on 25th October 2004. The Appellant stated in his defence that he was arrested on 2nd September 2004 when he visited the Police Station. I will take it that the Appellant was arrested on 2nd September 2004. He was held in Police Custody until 24th October 2004 when he was presented before Court for plea. It is obvious he was held for about 53 days before being taken to Court. The prosecution was called upon to

give an explanation but they have offered none. The Police were required to present the Appellant before a court of law within 24 hours from the time of arrest or in the alternative within a reasonable time. The Court of Appeal in ALBANUS MWASIA MUTUA =VS= REEPUBLIC – CRIMINA APPEAL NO. 120 OF 2004 (unreported) stated that where there is an unexplained violation of a Constitutional right, the Appellant will be acquitted irrespective of the nature and strength of the evidence which may be adduced in support of the charge.

I have come to the conclusion that the Appellant's constitutional rights under *Section 72 (3) (b)* of the Constitution were breached. Consequently, the appeal is allowed on that ground alone with the resultant order that the conviction is quashed and the sentence is set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of November 2009.

J. K. SERGON

JUDGE

In open Court in the presence of Miss Ngalyuka for the State and the Appellant in person present.