



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 2 OF 2006

HARRISON MUTHINJI KURIA APPELLANT

VERSUS

REPUBLIC PROSECUTOR

*(Being an appeal from the judgment of L. Nyambura,
Senior Resident Magistrate in Principal Magistrate's
Criminal Case No. 655 of 2005 at Murang'a)*

JUDGMENT

The appellant Harrison Muthinji Kuria was charged in the Lower Court with breaking into a bar contrary to section 306 (a) of the Penal Code and of Burglary and Stealing contrary to section 304 (2) and section 279(b) of the Penal Code. Further he was charged with an alternative count of handling stolen goods contrary to Section 322(2) of the Penal Code. At the Lower Court he was charged with two other persons but at the time of the hearing of this appeal those other persons had been released on presidential amnesty on 20th October 2007. The prosecution by evidence of PW1 stated that the shop of PW 1 was broken into between 23rd and 24th April 2005. PW 1 was not at her shop when the breaking in occurred. From that shop the following items were stolen. One TV Philips black and white and clothes. During the hearing PW 1 identified two coats marked MFI 1, three skirts marked MFI 2, one blouse marked MFI 3, two T-shirts Marked MFI 4 and TV marked MFI 5. PW 2 said that on 24th April 2004 her bar was broken into

at 3a.m. The thieves stole therein money, cigarettes, four beers, TV and its deck. Before court the witness identified her TV which was marked as MFI 6, its deck marked as MFI 7 and two beers marked MFI 8. PW 3 stated that on 24th April 2005 at about 2a.m. whilst sleeping he heard some noise. On going out and flashing his torch he saw appellant and his co-accused. They ran away. Later this witness discovered that the shop of PW 1 had been broken into. This witness was able to identify the appellant. PW 4 stopped the appellant at Ngoe area on 24th April 2005. The appellant was carrying a yellow paper bag. PW 4 arrested him. It was found that in that bag were an assortment of clothes and one TV. This witness did not specify the make of the TV. Earlier before the arrest of the appellant this witness had arrested his co-accused and had also recovered a TV from him. In his testimony this witness produced the goods that he had recovered and on producing those items they had no correspondence to the items that had been marked when identified by their owners. This leads this court to find that the items recovered from the appellant were not produced before court for the purpose of the court ascertaining that the goods were the subject of the theft. That inconsistency in the prosecution's case will lead this court to construe it in favour of the appellant. But what perhaps concerns this court more is that the appellant and his co-accused were kept in custody for a period longer than that which is permitted by the constitution. According to PW 6 the appellant was arrested on 24th April 2005 and was not taken to court until 3rd May 2005. On being questioned by the 1st accused in the Lower Court, PW 6 responded that the accused, the appellant being one of them were kept in custody for ten days because the police were still carrying out investigations. That was the only explanation offered by the prosecution on their failure to abide by the provisions of section 72(3) (b) of the constitution. The accused argued that the provisions of Section 72(3) of the Constitution were violated in regard to his detention. That section provides as follows:-

“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 Court of Appeal has held that the violation of an accused's rights under the constitution can lead to an acquittal. This was the finding in 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 detain 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.”

In the case Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic the Court of Appeal stated;-

“We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.”

Bearing in mind that the prosecution even though questioned by the accused about the period of detention failed to give a reasonable explanation for their detention for ten days rather than for 24 hours as provided by the constitution I do find that the appellant’s rights under the said section of the constitution were violated. In view of that the appellant’s appeal does hereby succeed and the conviction against the appellant is hereby quashed and the sentence is set aside. The appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 19th day of March 2008.

MARY KASANGO

JUDGE