



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

**Criminal Case 27 of 2006**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JOSEPH NYAMU WANJIKU ..... ACCUSED**

**RULING**

The accused herein faces the charge of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 18<sup>th</sup> February 2006 at Kagicha village in Nyeri District the accused murdered John Maina Nyamu. At the close of the prosecution's case the accused raised two issues. Firstly, the accused said that the state had not established a prima facie case sufficient to put the accused to his defence. Secondly, the accused submitted that his constitutional rights under section 72(3) (b) had been violated. In respect of the first issue the evidence of the prosecution by PW 4 was that on the material date the deceased child had been left in the custody of the accused. PW 4 said that the accused was her husband. They got married in the year 2005. They were living together at Kagicha village. They had established their home on the accused's grandfather's land. On 18<sup>th</sup> February 2006 at about 12p.m. this witness had just finished preparing lunch. The accused was not in at that time. He arrived later and she served him with lunch. He had come home with two bottles of beer. This witness also served lunch to the deceased child. The witness wanted to go to the well to wash her clothes. She picked up the clothes for washing and a jelicin. The accused told her to leave the deceased child with him since she could not cope going with the child and also carrying the load of clothing for washing. She said that the child was three years old. She left the child with the accused and went to wash her clothes in the company of another lady whom she called WaNjoroge. They returned together with Wanjoroge at 4.40p.m. Wanjoroge was their immediate neighbour. This witness was carrying a jelicin with water and the clothes she had washed. On reaching the fencing of their homestead she first took to the home the jelicin with water. She met the accused and inquired of the where about of the deceased child. She said that she made that inquiry because the child's food was uneaten. The accused responded by saying that the child had slept. By then the accused was himself in another room on the

bed. The witness on making inquiry again about the child the accused said that the child fell asleep and he directed this witness to check on the child where he normally slept. She said that the deceased child normally slept in a separate room. She went to that room but did not see the child on the bed. She then noticed that he was on the floor under the bed at corner. She said that what first alerted her was the child's hand which was sticking out from under the bed. She said that the child's bed was a small one but not too small. That it did not have a cover like a baby cot. This witness in seeing her child noticed that the child was bleeding from the mouth and the nose. She went outside screaming but her neighbours did not respond. She went back to the room, carried the child and took him to Kagicha. She met the accused's grandfather at the shopping centre and showed him the child. He directed her to take the child to hospital. She took the child to a private dispensary and on going there the doctor advised her to go to the police. When she arrived at the police station the police told her that the child was dead. She then narrated how she left the child in the custody of the accused. On being asked about her relationship with the accused this witness responded by saying that they were at peace except for the week in which the child died. Within that week the witness had again left the child in the custody of the accused and on her return she found that the child had been burnt on his back. On inquiring from the accused what had happened the accused responded by quarreling and beating her. She also did state that the deceased child was born out of wedlock. That the accused was not the father of the child. The evidence of PW 3 and 5 was that the accused did not have a peaceful relationship with PW 4. They also confirmed that the child had been burnt some few days before his death. That by the date of death of that child that wound had not healed. PW 5 who had been with PW 4 at the well washing clothes said that she tried to persuade PW 4 to return home quickly to look after the child. Considering the evidence of the prosecution which includes the Investigating Officer's evidence and the doctor's evidence of Post mortem I do find that there were no major contradictions as argued by the accused counsel. The evidence before court did indeed prove a prima facie case sufficient to require an answer from the accused. On the second issue raised by the accused that his constitutional rights had been violated the explanation on the accused's detention was given by PW 6. PW 6 was a Police Officer based at Othaya Police Station. He said that the accused was arrested by PC Peter Wanjohi on the same day of the offence that is 18<sup>th</sup> February 2006. He stated that the accused was taken to court on 10<sup>th</sup> August 2006. When questioned in chief by the state counsel this witness said that he could not explain why the accused was not taken to court before the expiry of 14 days. He responded by saying, "*I had a commander and everything passes through his office*". After the arrest of the accused person this witness said that he was engaged in looking for the murder weapon. On being cross examined on that issue he said that in the accused's house he only saw a panga and beer bottles. These he said were not the murder weapons. He did however collect them for his investigations. This officer said that after the Post mortem he again tried to look for the weapon without success. On being cross examined he confirmed that in his statement which was made four days after the post mortem he did not state that he was looking for the weapon. That he was involved in the investigations of whether another person could have entered the house of the accused and committed the offence. In giving that explanation this officer failed to explain why the accused was detained in custody from 18<sup>th</sup> February 2006 upto 10<sup>th</sup> August 2006 when he was brought before the Deputy Registrar of this court. 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.***"

That section requires an explanation that a person held in custody was brought before court as soon as reasonably practicable. The Court of Appeal *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic* the Court of Appeal stated in this regard;-

***“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 is taken to court and accordingly, they know or ought to 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.”***

From the evidence of PW 6 it is clear that the witness statements were recorded within one month of the death of the child. There was no explanation why the accused was detained for further period of five months before being brought to court. There being no sufficient explanation I find that I am in agreement with the submission of the counsel for the accused that the accused’s constitutional rights were violated. Having found that there was that violation I do find that the charges against the accused cannot stand. That indeed was the finding in the Court of Appeal 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.”***

Having made the finding that the accused’s rights under the constitution were violated, I am very conscious of the finding in the case of Albanus as follows:-

***“On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished: this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the constitution.”***

Having reached that finding I do hereby acquit the accused of the charge of murder. The accused is hereby set free unless otherwise lawfully held.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of March 2008.*

**MARY KASANGO**

**JUDGE**