



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Case 28 of 2007**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JOSPHAT MWANGI ..... ACCUSED**

**RULING**

The accused herein is charged with Murder contrary to section 203 as read with Section 204 of the Penal Code. Before the trial began the accused raised a preliminary issue that his constitutional rights had been violated in that he was detained in police custody before being brought to court for a period of three months. The accused counsel in submission stated that unless the state gave a reasonable explanation why the accused was not brought before court within 14 days the accused should then be discharged of the charge of murder. The state called Police Officer Acting Inspector Benjamin Kiprono to explain why the accused was not produced before court as provided by the constitution. This officer said that the accused presented himself at the police station on 8<sup>th</sup> May 2007 and confessed to have having murdered his wife on 6<sup>th</sup> May 2007. The officer confirmed that he was arrested on the day he represented himself to the police station. This officer however stated that at Murang'a there is no Government Pathologist. For that reason in the case of Post mortem the police relied on the relatives getting a doctor to conduct the same. Because of this lack he said that it took time to explain to the relatives of the deceased that they had to pay for the Post mortem. The Post mortem was finally performed on 19<sup>th</sup> May 2007. Further the officer said that in Murang'a there is no Psychiatrist who can confirm that the accused is fit to plea. This officer said that he eventually traveled to Nyeri and booked an appointment for the Psychiatrist and the date given for that appointment was 19<sup>th</sup> June 2007. He said that the accused could not be brought to court until that report had been availed. After the Psychiatrist examined the accused this officer did forward his investigation file to the D.C.I.O. and P.C.I.O. and finally to the state counsel. When the file was being circulated to those offices the accused according to the officer could not be brought before the court. As an example of the forwarding of the file this officer said that the file was forwarded on 28<sup>th</sup> June 2007 to the D.C.I.O. Murang'a. That file left the D.C.I.O.'s office and was forwarded to P.C.I.O. on 2<sup>nd</sup> July 2007. At the end of July the file was forwarded to the State Counsel. On 25<sup>th</sup> July 2007 State Counsel sent it to P.C.I.O. When the file reached the D.C.I.O it had certain recommendations made of further investigations. This officer said that he also experienced problems with the recording of witness statements of the deceased relatives. Some he said were unwilling to testify whilst others wanted to kill the accused. Because his life was in danger the police chose not to release the accused as the investigations were being carried out. The officer further stated that his police station does not own a Land rover and for the purposes of bringing the accused to court he had to rely on motor vehicle from other stations. On being cross examined by the accused counsel this officer confirmed that the Post mortem was carried out on 18<sup>th</sup> rather than 19<sup>th</sup> May 2007. On being questioned when he took the accused to Sagana only to find that the Psychiatrist was not available this officer was unable to state the exact date. The statement of the witnesses who were reluctant to record their statements as he had stated before were recorded on 19<sup>th</sup> May 2007. The officer confirmed that all statements had indeed being recorded by that date. The last statement to be recorded in this matter was after the arraignment of the accused person and that was on 7<sup>th</sup> August 2007. In what was about turn this officer said that it was not true that any witness was reluctant to record their statement. The accused counsel submitted that his client's constitutional rights as enshrined in section 72(3) (b) had been violated. 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 section lays a burden on the person alleging that the provisions of that section have not been violated to show the same. The explanation given by the police officer does not sufficiently meet the requirements of that section. It is clear that all the witnesses, except one, that is the Psychiatrist had recorded their statements by 19<sup>th</sup> May 2007. The last witness recorded his statement after the accused was brought before court. There is no sufficient explanation given by the state on why the accused was kept in custody from 19<sup>th</sup> May 2007 until 1<sup>st</sup> August 2007. I do make a finding that the accused’s rights were violated. Having made that finding the accused shall therefore be acquitted of the offence of murder. This indeed was the finding in the case of the Court of Appeal namely ***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.”***

The state having failed to give a reasonable explanation why the accused was detained for a period of almost three months and having made a finding that such detention did violate the accused’s constitutional rights I do hereby acquit the accused of the charge of murder and I do hereby order that the accused be set free unless otherwise lawfully held.

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

**MARY KASANGO**

**JUDGE**