



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

Criminal Appeal 22 of 2006

REPUBLIC PROSECUTOR

VERSUS

PETERSON GITARI WANGECHI 1ST ACCUSED

STEPHEN MWANGI WANGECHI 2ND ACCUSED

SOSPETER MURIITHI WANGECHI 3RD ACCUSED

R U L I N G

By an information dated 25th July, 2006 and filed in this court on the same day by the Attorney General, the accused, were jointly charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. It was alleged therein that the accused on the 16th day of February, 2006 at Gacharu village in Kirinyaga District of the Central Province jointly murdered **Harrison Kariuki Muchiri**.

The accused pleaded not guilty to the charge when presented to this court on 25th July 2007. The case was then set down for hearing on 11th February, 2008.

When the case opened before me on the 11th February 2008, as aforesaid a total of 4 prosecution witnesses testified. The case was then adjourned to the following day when again a total of 4 witnesses testified and then the prosecution closed its case.

Mr. Kimani, learned counsel who appeared for 1st and 2nd accused pitched his submissions on no case to answer on the ground that there was unexplained delay in arraigning the accused in court of about 5 months. That PW8 who was the investigating officer in the case had conceded under cross-examination on the issue that the delay was unreasonable. On the basis of the court of appeal decision in **Gerald Macharia Githuku v/s Republic, Criminal appeal No. 119 of 2004, (unreported)** Counsel urged me to hold that the accused persons' fundamental rights had been violated and were therefore entitled to an acquittal. He also made submissions on the other aspects of the case which are not relevant for purposes of disposing off this case at this stage.

Mr. Kiama, learned counsel for the 3rd accused associated himself fully with the submissions of the learned counsel for the 1st and 2nd accused persons. He submitted further that the 3rd accused was

arrested on 20th February 2006 but was not arraigned in court until after the expiry of 5 months. Counsel maintained that the accused rights to a fair trial within a reasonable time were thus violated. To buttress his case counsel referred the court to the recent decision of this court in the case of **Peter Njuguna Gitau v/s Republic, Criminal Case number 32 of 2007 (unreported)**. He also touched on other aspects of the case which again are not relevant for purposes of determining this case at this stage.

Section 72 (3) of the Constitution of Kenya provides that:

“A person who is arrested or detained –

(a) For the purpose of bringing him before a court in the execution of the order of 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.”

It is common ground that the accused were not brought to court timeously but after 5 months. That section cited hereinabove lays a burden upon the person who states that the provision has been complied with to so prove to the court. What explanation has the state given? According to PW8, the investigating officer, the delay which he concedes was unreasonable and inordinate was however occasioned by their own internal processes, whatever that means. I think that the state has failed to sufficiently explain as to why the accused were detained for 5 months before being brought to court. **P.W.8** was unable to expound or amplify on what he meant by their internal processes. It is not upto this court to surmise what he meant by those amorphous terms. As I have had occasion to state in the past, the liberty of a citizen and indeed accused’s right to a fair trial within a reasonable time cannot be sacrificed at the alter of

what the police officers prefer to call internal processes which term as already stated sound hollow and ambiguous to me. From the explanation given by the state which I do not buy, it is clear that the state has failed to discharge the burden placed upon it by *section 72 (3)* of the Constitution of Kenya. It has been unable to demonstrate that, it brought the accused before court as soon as reasonably practicable.

Commenting on the need for the courts to guard jealously the provisions of the constitution that secure the liberties of the citizen, the court of appeal in the case of **Albanus Mwasia Mutua** (supra) observed:

“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.”

Again in the case of **Gerald Macharia Githuku** (supra), the court of appeal reinforced the need for courts to be vigilant in enforcing the constitutional provisions that secure the fundamental rights of a citizen. It stated:

“.....Although the delay in bringing 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 accused’s rights herein were violated by the state’s failure to charge them within the mandatory fourteen (14) days period. The explanation given is not sufficient, persuasive nor convincing much as the offence committed was serious and abominable. Nonetheless I have to bear in

mind the wise counsel of the court of appeal in **Mutua’s case** aforesaid when it acquitted itself thus:

“.....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.....”

If in the case of **Gerald Macharia Githuku** (supra) a delay of a mere 3 days led to the acquittal of the accused on the grounds that his constitutional rights had been violated, how about in the instant case where the delay was over 5 months? Certainly this may sound and look like a kids play. The delay is neither reasonable nor excusable. Accordingly the accused stand acquitted of the charge of murder. The accused and each one of them is hereby set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 6th day of March, 2008.

M. S. A MAKHANDIA

JUDGE