



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Case 39 of 2007**

**REPUBLIC ..... PROSECUTOR**

*versus*

**JOSPHAT WACHIRA GATUNDA & OTHERS ..... ACCUSED**

**RULING**

The three accused are charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Before their trial began they raised a constitutional issue that the case could not proceed against them because their constitutional right had been violated in that they had been detained in custody before being brought to court for a period in excess to that provided under **Section 72(3)(b)** of The Constitution of Kenya. When the state was called upon to explain the delay in bringing the accused person to court the investigating officer said that the investigations began when the first accused surrendered himself to the police and confessed to having killed his mother and father. He was arrested on that occasion. When the police began to investigate the matter they found that there was conflicting evidence which showed that all the three accused persons had killed all parents. The three accused persons are all brothers. The second and third accused persons were arrested on 20.7.07. The investigating officer said that he experienced difficulty in carrying out the investigations because the witnesses he relied upon to give their statements were relatives of the accused. Because of this relationship they were reluctant to come forward to give their statements. On this police officer being cross examined by the accused counsel, he accepted that the civilian witnesses recorded their statements by 12<sup>th</sup> July 2007. He however said that it is those statements that had conflicting information. Because of that conflict he did not send his file to the DCIO until 20<sup>th</sup> July 2007 when he had completed recording all the civilian witness statements. The police officers recorded their own statements on 27<sup>th</sup> July 2007. That the period between when the last statements were recorded in July 2007 up to the time when the accused persons were brought before court that is 27<sup>th</sup> August 2007 the investigating officer said that he was awaiting the response from the DCIO and state counsel to authorize him to charge the accused.

It is obvious from the above explanation that even if the investigating officer is given the benefit of doubt and one begins to count time of delay from the date he obtained the last witness statement there was a delay of exactly one month before the accused were brought to court. The investigating officer says that time was spent waiting for authority to charge the accused persons. He failed to explain why their responses had to take one month. No one was called from DCIO or State Law Office to explain the reasonableness of that delay. Section 72(3) (b) places a burden on the person who alleges the provisions of that section had been complied with to prove an accused had been brought before court as soon as is reasonably practicable. The jurisprudence surrounding the cases where allegations are made of violation of the constitution provisions were well summarized 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 detained 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 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.”***

I do find the accused constitutional rights were violated since they were detained in custody before being brought to court for a period in excess of that which is allowed by our constitution. Having made that finding I do hereby acquit the accused persons of the charge of murder and I do hereby set all the accused free unless otherwise lawfully held.

***DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF APRIL 2008.***

**MARY KASANGO**

**JUDGE**