



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

Criminal Case 12 of 2006

REPUBLIC PROSECUTOR

VERSUS

AMOS KARUGA KARATU ACCUSED

RULING

Sections 72 (3) (b) and 77 (1) respectively of the Constitution of this country provides interalia:

Any person who is arrested or detained:

(a)

(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 as soon as is reasonably practicable, and where he is not 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 sub-section have been complied with."**

and

77 "If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be accorded a fair hearing within a reasonable time by an independent and impartial court established by law."

So what happens if these provisions are breached? There is a litany of court of appeal and this court's decisions on the issue starting with **Albanus Mwasia Mutua v/s Republic (2006) eKLR**, **Gerald Macharia Githuku v/s Republic (2007) eKLR** through to **Paul Mwangi Murungu v/s Republic, criminal appeal number 35 of 2006 (unreported)** to mention but a few. The ratio decidendi which runs through all these decisions and which was poignantly captured in the case of **Albanus Mwasia Mutua** is to the effect that:

"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 in support of 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."

In the instant case, the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. He pleaded not guilty to the charge and his trial was first fixed for 13th December 2006. Eventually the trial commenced before me on 4th January 2007 and between the said date and 9th April 2008 I heard a total of 10 witnesses and then when the prosecution closed their case. **Mr. Gathiga Mwangi** learned counsel appearing for the accused then made brief submissions on no case to answer.

In this submissions, counsel alluded to the alleged violation of the accuseds' constitutional rights enshrined in section 72 (3) (b) and 77 (1) of the constitution of Kenya. Counsel contended that the accused was arrested on 19th January 2006 but was only charged on 9th June, 2006 over 5 months later. This was a violation of the accused constitutional rights as he ought to have been charged within 14 days upon his arrest. He was also not tried within a reasonable time. The delay according to counsel had not been sufficiently explained by the investigating officer. Relying heavily on the **Albanus Mwasia Mutua, Gerald Macharia Githuku** cases (supra) and this courts decisions in **Robert Lobura Ekai v/s Republic Cr. Case No. 31 of 2006 (unreported)** and **Josephat Mwangi v/s Republic Cr. Case No. 28 of 2007**, Counsel urged me to acquit the accused in line with those authorities. Counsel maintained in the premises that no prima facie case had been made out by the prosecution in the circumstances to warrant the accused being put on his defence.

Mr. Orinda, the learned Principal State Counsel opted not to respond to those submissions. All he said was that he would rely on the evidence on record and that indeed a prima facie case had been established against the accused.

The issue of the violation of the accused's constitutional rights arose this way; whilst cross-examining PW10, the investigating officer in this case, **Mr. Mwangi** put questions to the witness which elicited these responses:

"..... I arrested the accused on 19/1/06 at 11 p.m. We were through with investigations in 2 weeks I took 6 months to bring him to court because of processing the file through the DCIO, PCIO and the state counsel. It is a tedious process. It is true that I acted outside the law but our hands are tied due to the procedure of processing our files....."

So here is a police officer who concedes that he locked up the accused in the police cells for a period in excess of 6 months merely because the investigations file had to pass through the offices of the DCIO, PCIO and the state counsel. He does not even tell the court what the DCIO, PCIO and the state counsel were required to do with the file yet by his own admission he was through with the investigations within two weeks of arresting the accused. Can this explanation pass the litmus test set out in section 72 (3) (b) and 77 of the constitution i.e. that the accused person despite the delay was brought before a court as soon as was reasonably practicable and or that accused would be accorded a fair hearing within reasonable time? I do not think so. A period of 6 months delay cannot be explained away on the basis that the investigating officer's hands were tied and could do nothing due to the procedure of processing the investigations file in their systems. The constitutional and fundamental rights of an accused person cannot be sacrificed at the alter of the so called police procedures.

The law of the land has to be obeyed particularly by those entrusted to enforce it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police

have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable. I do not think that the Investigating Officer herein has been able to discharge that heavy burden in the circumstances of this case.

I think the whole courtship of the investigating officer, the DCIO, PCIO and state counsel were just lax, did not treat this case with the seriousness it deserved and had no qualms trampling upon the accused's constitutional rights more so fair trial provisions of the constitution of Kenya.

We are no longer in 1980's where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to challenge such conduct. As the court of appeal said recently the courts chose to see no evil and hear no evil giving rise to the infamous Nyayo house torture chambers. The consequences of this silence of conspiracy on the part of the courts was as the court of appeal went on to observe the infamous Nyayo house torture chambers, a history which the courts can never be proud of. It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person. A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the court of appeal said again in the case of **Albanus Mwasia Mutua**:

“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.”

In the end, and for the above reasons, I hold that the accused having been brought to court in breach of the provisions of section 72 (3) and 77 (1) of the constitution, his continued prosecution is illegal and a violation of his constitutional rights. No prima facie case has therefore been made to warrant the accused being put on his defence. The point was thus well taken by counsel for the accused. Pursuant to the provisions of section 306 (1) I record a finding of not guilty against the accused person with the consequence that the accused is acquitted and set him free of the charge.

Dated and delivered at Nyeri this 26th day of May 2008

M. S. A. MAKHANDIA

JUDGE