



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 7 of 2007

REPUBLIC..... PROSECUTOR

VERSUS

JAMES MWANGI GICHUKI

CHARLES CHEGE GICHUKI

DENIS WAMBUI ALIAS NGANDAVI

MARGARET WANGECHI GICHUKI ACCUSED

R U L I N G

The four accused persons were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They all pleaded not guilty to the charge and their trial for the offence was fixed to commence on 10th April 2008. On the said date, **Mr. Mwangi**, learned counsel appearing for all the accused raised a constitutional issue with regard to the proceedings as a preliminary point. Counsel submitted that all the four accused persons were detained in police custody for a period exceeding 14 days. This was in contravention of section 72 (3) (b) of the constitution of Kenya. Section 77 (1) too of the same constitution which guarantees a fair hearing within reasonable time was also breached in the process. Counsel went on to submit that the accused persons were arrested on 8th May 2006 and were arraigned in court on 12th March 2007, a period of about 10 months. Counsel concluded his submissions on the issue by stating that it is the duty of the court to uphold the constitution. Unless the delay was explained, the accused were entitled to an acquittal.

In response, **Ms Ngalyuka**, learned state counsel invited **police Constable Lameck Magoma Nyamweya**, to the stand to explain the delay as he was the investigating officer. **P.C. Nyamweya** testified that the accused were arrested on 8th May 2006 and on the same day he recorded statements from witnesses. On 13th May 2006 a post mortem was conducted. Shortly thereafter he proceeded to Nairobi to attend a course and handed over the investigations file to the OCS, Baricho police station. After the course he was transferred to Kirinyaga Divisional police headquarters. However from the record he could tell that between 21st September 2006 and 20th February 2007 the investigations file was oscillating between the offices of DCIO, PCIO and the state counsel. He conceded that there was a delay of about 10 months in charging the accused but hastened to add that the delay was occasioned by the movement of the file between the offices of DCIO, PCIO and the state counsel before a decision was made to charge the accused. Under cross-examination by **Mr. Mwangi**, the officer maintained that the process of investigations and the route the file had to follow before authority to charge the accused was given occasioned the delay. He was aware that the accused ought not to have been held for more than 14 days. That holding them for more than that period was a violation of their constitutional rights.

Under *section 72 (3)* of the supreme law of the land, that is the Constitution of Kenya, the accused is required to be arraigned in court on or before the expiry of fourteen (14) days following his arrest on a capital charge. Failure to do so a duty is cast on the holding authority to satisfy the court that the suspect had been brought before court as soon as was

reasonably practicable. As **Justice Mutungi** recently said in the case of **Ann Njogu & 5 others V Republic, Misc. Cr. App. No. 551 of 2007** whose sentiments I share:

“.... the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.....”

In the circumstances of this case however I would substitute 24 hours with 14 days and 60th minute with the 14th day.

There is a litany of authorities in relation to the right of an accused person to be brought to court within a prescribed period of time.

In the case of **Albanus Mwasia Mutua V Republic (2006) eKLR** the court of appeal held that the appellant’s constitutional rights guaranteed under *section 72 (3)* of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:

“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 their judgment, the judges of appeal **Omolo, Githinji** and **Deverell JJA** with **Githinji JA** dissenting made reference to various case law concerning violations of fair trial provisions including **Ndede V Republic (1991) KLR 567** where the appellant had been arrested without a warrant on 29th September 1987 and was held in detention, incommunicado, until 30th October, 1987 when he was brought before a Magistrate for plea. The period of delay was just over thirty days and **Mr. Ndede** was not charged with an offence carrying the death penalty. He pleaded guilty before the Magistrate on the charges preferred and was sentenced to long prison terms. He appealed to the High court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of *section 348* of the Criminal Procedure Code which bars appeals from persons who have been convicted on their own pleas of guilt. The sentences were however, reduced. **Mr. Ndede** next appealed to the court of appeal and the court, consisting of the late **Mr. Justice Gachuhi, J.A.** the late **Mr. Justice Masime, J.A.** and **Mr. Justice Omolo, Ag. J.A.** (as he then was) held that *section 348* of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own plea of guilty and that as there was no explanation offered for the delay of some thirty days before **Mr. Ndede** was brought to court, the trial magistrate ought not to have accepted **Ndede’s** plea of guilty. **Ndede’s** appeal was allowed and his conviction quashed on that basis. It did not matter that before convicting **Mr. Ndede**, the Deputy Public Prosecutor had stated the facts in support of the charges, that **Mr. Ndede** had admitted those facts and the facts themselves had disclosed the offences charged against him. The court in the **Albanus** case observed that the;

“Quashing of the convictions must have been on the basis that Ndede’s constitutional rights given to him by *section 72 (3) (b)* of the constitution had been violated and he was entitled to an acquittal.”

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. A year after delivering the **Albanus** decision the court of appeal in the case of **Eliud Njeru Nyaga V Republic (2007) eKLR** stated

“While we would reiterate the position that under the fair trial provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in automatic acquittal.”

The court noted that in the **Albanus** case the prosecution had had the opportunity to explain the cause of the delay but failed to do so. See also **Ronald Manyonge Chepkui V Republic (2007) eKLR**.

Once again the court of appeal in April 2007 deliberated on the question of the accused being brought to court within a specific period of time in **Gerald Macharia Githuku V Republic (2007) eKLR**. This is the case relied on heavily by the accused in his preliminary objection. I must state that this case stands out as a remarkably bold defence of due process and the constitutional right of an arrested person. Its point of departure from the previous jurisprudence on the subject is the subordination of the proven guilt of a violent robber to the constitutionality of his treatment by law enforcement authorities after his arrest.

The appellant in this case was arraigned before the Nairobi chief Magistrate's court on a charge of robbery with violence, which carries a mandatory sentence of death. The date of his arrest was stated in the charge sheet to have been January 13, 1995 while the date of his first arraignment in court was stated as January 30, 1995, that is 17 days latter.

The appellant was tried, convicted and sentenced to death. After his first appeal to the High court was dismissed, he appealed again to the court of appeal in which his counsel argued that the High court had erred in convicting and sentencing him when his constitutional rights had been violated.

Appeal Judges **E.O. O'Kubasu, J.W. Onyango Otieno** and **W.S. Deverell JJA** were unanimous in the defence of the accused constitutional rights. Even though the delay of three days in bringing the appellant to court did not cause him any substantial prejudice and although the evidence showed that he was guilty as charged, nevertheless the failure by the prosecution to abide by the requirements of the constitution could not be disregarded, so the court of appeal observed. The prosecution, the judges found, on whom the burden of proof rested, had failed to satisfy the court that the appellant, who was charged with a capital offence, had been brought before the court as soon as was reasonably practicable.

More recently in the case of **Paul Mwangi Murungu v/s Republic Criminal Appeal No. 35 of 2006** (unreported) the court of appeal observed:-

“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 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.”

All these cases point to the need for courts to strictly observe the fair trial provisions in our constitution.

What happened in the instant case? It is common ground that the accused were arrested on 8th May 2006. The investigations according to the investigating officer were commenced immediately. In fact he recorded the statements from all the probable witnesses on the same day. Postmortem on the deceased was done on 13th May, 2006 well within time. Thereafter he left for Nairobi to attend a course and handed over the file to the OCS. The OCS did not take any action on the same until 21st September 2006 when he forwarded the said file to the DCIO. So for 4 months, the file was simply on the desk of the OCS as the accused languished in police custody. No explanation has been forthcoming from the OCS for his inaction on the file. This is objectionable and highly unacceptable conduct. From the evidence of the investigating officer, between 21st September 2006 and 20th February 2007 the file was moving between the offices of the DCIO, PCIO and the state counsel. From my computation, it would appear that the file took 5 months to move from the DCIO, PCIO, state counsel and back to the DCIO with instructions to charge the accused. There is no rational explanation for this inordinate delay.

If in the cases of **Albanus** and **Gerald Githuku (supra)**, the accused were acquitted for a delay of 8 and 3 months respectively, how about the instant case where the delay is in excess of 10 months?

The law of the land has to be obeyed particularly by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing 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 that the DCIO, PCIO and the state counsel were just lax, did not treat this case with the seriousness it deserved and had no qualms trampling upon the accuseds' 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. 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 in court in breach of the provisions of section 72 (3) and 77 (1) of the constitution and the explanation given being unsatisfactory their continued prosecution will be illegal and a violation of their constitutional rights. Accordingly they are acquitted of the charges. I order for their immediate release, unless they are otherwise lawful held.

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

M.S.A. MAKHANDIA

JUDGE