

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 24 of 2006

REPUBLIC PROSECUTOR

VERSUS

PETER MWANGI THIAKA ACCUSED

R U L I N G

The accused Peter Mwangi Thiaka is charged with murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty to the charge and his trial commenced before me on 19th November, 2007. The prosecution called a total of ten witnesses. In summary the prosecution case seem to be as follows:

The deceased Thiaka Ngari was a maternal grandfather to the accused. The accused's mother was a daughter to the deceased. She passed on before the incident leaving behind the accused and his brother. The two were being looked after by their grand parents the deceased included. They had put up their house in the same compound as their grandparents. The deceased had given a portion of his land to the accused to cultivate.

On the night of 19th February, 7.30 for reasons which did not come out clearly through the prosecution, the accused suddenly attacked his grandfather and viciously cut him with a sharp panga causing instant death. Members of the public who heard the screams rushed to the scene and found the deceased lying on the ground dead in a pool of blood. The accused was standing with a panga in his hands next to the body of the deceased. He was arrested by members of the public and taken to Kiangwaci police post where he was re-arrested by police officers. The body of the deceased as well as the panga were retrieved by the police officers. A post-mortem was later conducted on the body of the deceased and it was established that the deceased had died of acute haemorrhage. The panga collected at the scene and deceased blood was submitted to Government analyst laboratories for examination. Upon examination, the Government analyst found out that the panga was slightly stained with human blood of group A and secondly that the blood sample of the deceased was found to be of group A. Based on this the Government analyst formed the opinion that the blood stains on the panga could have come from the deceased after injury. Upon arrest the accused was examined by a consultant Psychiatrist and was found to be physically and mentally normal. He was then charged with the offence.

At the conclusion of the prosecution case, Ms. Mwai, learned counsel for the accused submitted on no case to answer. Her submissions were along the following lines: that no prima facie case had been made out against the accused to warrant the accused being placed on his defence. That the accused had not been subjected to a fair trial following a breach of his constitutional rights enshrined in section 72 of the constitution of Kenya. That the accused was brought to court after fourteen days. In fact he was brought to court five months after his arrest. That the delay had not been explained. Relying on the case of Gerald Githuku Macharia v/s Republic, the learned counsel urged me to acquit the accused of the charge.

On the merits of the case, counsel submitted that nobody saw the accused attack the deceased. That if the attack was vicious as claimed then the accused clothes should have been splashed with blood. However the accused's clothes had no blood stains and were in any event not taken for analysis. Ms Ngalyuka, learned state counsel had no response to make in response to those submissions of the

accused. Instead she opted to merely rely on the evidence on record.

Section 72 (3) (b) of the constitution of Kenya provides interalia:

“72 (3) A 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.”

The Court of Appeal in various decisions handed down over the years has held that the violation of an accused’s rights under the constitution will lead to an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge. See in particular the cases of Albanus Mwasia Mutus v/s Republic Cr. Appeal No. 120 of 2004 (unreported), Gerald Macharia Githuku v/s Republic (2007) eKLR and Paul Mwangi Murungu v/s Republic, Criminal Appeal Number 35 of 2006 (unreported). In the case of Albanus (supra), 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 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.”

Similarly in the case of Gerald Macharia Githuku (supra) 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 was 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.”

Finally in the case of Paul Mwangi Murungu v/s Republic 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.”

In the circumstances of this case when the issue of delay was raised in cross-examination by counsel for the accused, PW2, P.C. Elly Biwott who assisted PW10, Inspector Ereck Chemocheke in the investigations merely stated that “..... *the accused was in police custody for over 6 months as the case was being investigated.*” As for PW10, he responded thus “..... *the delay was occasioned by the procedure adopted in having the file forwarded to DCIO, PCIO and the state counsel.*” I am unable to accept the reasons advanced for the delay in presenting the accused to court as valid and or satisfactory. From the evidence on record the investigations were concluded in good time. PW10, did not at all explain what was it between the offices of DCIO, PCIO and the state counsel that occasioned the delay of 6 months to have the accused charged in court. The delay is simply inordinate and unexplained. This court cannot countenance a situation where those charged with enforcing the law should be the ones to violate and disregard it. Yes evidence on record against the accused person is overwhelming and points at the accused irresistibly as having committed the offence. However he is bound to walk free because of the unmitigated violation by the police of his constitutional and fundamental rights as enshrined in the constitution of this great nation. If in the case of Gerald Macharia Githuku (supra) where the delay in bringing the accused to court was a mere 3 days, the court observed that much as the delay did not cause the accused substantial prejudice and although the evidence showed as in this case that he was guilty as charged, nevertheless the failure by the prosecution to abide by the requirements of the constitution could not be disregarded, how about in this case where the delay is in excess of 6 months! The prosecution to whom the burden of proof rests has failed to satisfy me that the accused though charged with a capital offence, had been brought before court as soon as was reasonably practicable. The prosecution’s position was even made more precarious and untenable by failure by the learned state counsel to submit on the issue. Bearing in mind that the prosecution though questioned by the accused about the inordinate detention failed to give a reasonable explanation, I do find that the appellant’s rights under the said section of the constitution were therefore violated. In view of that, the accused’s prosecution is an illegality and therefore a nullity. The accused is thus acquitted of the charge as he has no case to answer. Accordingly he is set free unless otherwise lawfully held.

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

M. S. A. MAKHANDIA

JUDGE