

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 54 of 2007

REPUBLIC..... PROSECUTOR

versus

JOHN NJOKA MUCHIRA..... ACCUSED

RULING

The accused **JOHN NJOKA MUCHIRA** is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. When the matter came before court the accused submitted that his constitutional rights as contained in **Section 72(3)(b)** of the Constitution of Kenya had been violated. It was submitted that he was arrested on 17th October 2007 and was brought before court on 11th December 2007. The accused counsel submitted that the burden was on the prosecution to give reason why the accused was not arraigned in court as soon as was practicable after his arrest. That failure of the prosecution to give that explanation the court ought to acquit the accused. Chief inspector Chebii of the Kianyaga Police Station said that the accused was arrested immediately the offence was committed. That the accused was arrested five kilometers away from his home. The officer said that he went to the scene of crime and carried out investigations. The clothes of the accused which were blood stained were sent to the Government Chemist for testing. That the blood of the deceased and of the accused was also taken for testing. These samples were taken to the Government Chemist on 31st October 2007. The report was received back at the station on 3rd December 2007. On being received the investigation file was sent to the DCIO for authority to charge the accused. This officer said that he could not release the accused because he was afraid that the accused would run away. On being cross examined the officer accepted that there was no problem with the recording of witness statement since the witnesses resided in close proximity with the accused. That by 24th October 2007 all the witness statement had been recorded. The postmortem was carried out on 26th October 2007. The accused was examined by psychiatrist on 20th November 2007. In response to accused's counsel question, the officer said that he had no document before court to prove that he received the Government Chemist report on 3rd December 2007.

That was the only explanation offered by the prosecution on their failure to abide by the provisions of section 72(3)(b) of the constitution. The accused argued that the provisions of Section 72(3) of the Constitution were violated in regard to his detention. That section provides as follows:-

“A person who is arrested or detained –

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

The Court of Appeal has held that the violation of an accused's rights under the constitution can lead to an acquittal. This was the finding 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 bring 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.”

Arrest of the accused was only 17th October 2007. He was not brought before court until 11th December, 2007. That was a period of two months. The explanation given by the investigating officer that the accused could have escaped if released, or that the Government chemist took too long to produce a report, is not sufficient reason for the violation of the accused constitutional right. Section 72(3)(b) of the Constitution does not provide that a suspect can be kept in custody as investigation is being carried out nor that that section envisage as a good reason for detaining the suspect beyond the period provided by the Constitution that the suspect may escape if released. I find that the prosecution failed to give reasonable explanation for the detention of the accused for a period of two months. Accordingly I do hereby acquit the accused.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2008.

MARY KASANGO

JUDGE