

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 3 of 2008

REPUBLICPROSECUTOR

versus

JOSEPH WAMBURA alias

WANYORO MURUGI..... ACCUSED

RULING

The accused **JOSEPH WAMBURA alias WANYORO MURUGI** is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The accused raised a preliminary point that his constitutional rights as enshrined in **Section 72(3)(b)** of the Constitution of Kenya were violated. It was submitted that he was arrested on 9th December 2007. He was not taken to court until 22nd January 2008. His counsel submitted that all the civilian witness statement were recorded by 14th December 2007. That the police officers took time to record their own. The counsel submitted that the delay in either releasing or charging the accused as provided in the constitution was a violation of the accused constitutional right. That unless reasonable explanation was given by the prosecution that the court should proceed to acquit the accused of the charge before him.

The state called inspector Johana Nzau. He confirmed that accused was arrested on 9th December 2007. That there was difficulty in getting him mentally evaluated due to the unavailability of the doctor. That also due to the elections that took place on 27th December 2007 some police officers were sent to Nairobi for security reasons. The officer said that he could not release the accused because he was likely to be lynched by the members of the public because of the present charge he faces. On being cross examined on that issue the officer said that he got the information from the ground that the accused would be lynched if released by the police.

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.”

The accused was arrested on 9th December 2007. The delay in releasing or charging him is partly attributed to the general elections that took place on 27th December 2007. It should however be noted that the fourteenth day provided by the Constitution within which a suspect should either be released or charged fell on 23rd December 2007. It was stated that all the civilian witness statements were recorded by 14th December 2007. As this officer gave his testimony in giving reason for that delay I got the impression that he was very half hearted on the explanation. As a result I have reached a conclusion that the explanation given by the state was not reasonable and accordingly I do find that the accused Constitutional rights were violated. Having made that finding I do hereby acquit the accused of the charge of murder.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2008

MARY KASANGO

JUDGE