

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 14 of 2008

REPUBLIC PROSECUTOR

versus

MIRIAM NJOKI WANGU ACCUSED

RULING

The accused **MIRIAM NJOKI WANGU** is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The accused raised a preliminary point that her constitutional rights as enshrined in **Section 72(3)(b)** of the constitution were violated. It was submitted that she was arrested on 17th October 2006. That she was detained in custody for (six) 6 months that is up to 30th April 2007 when he was taken to Kangema Resident Magistrate court for an inquest. The Inquest Case No. 2 of 2007 commenced in April 2007 and was concluded on 18th February 2008. The court recommended that the accused be charged with murder. Counsel for the accused submitted that from the date of arrest up to 5th March 2008, the accused constitutional rights were violated because the accused was detained throughout that period without any reasonable explanation by the police. The state called Inspector William Sirengo to give explanation of that delay. However when this officer began to give reasons for that delay he stated that he was unable to explain why the accused was kept in custody for six months prior to the commencement of the inquest. This is because he only took over the case from another officer on 19th September 2007. After the inquest was concluded he was instructed by the DCIO to get the certified proceedings of that inquest before charging the accused. Proceedings were applied for by a letter on 18th February 2008. The proceedings were supplied by the court on 4th March 2008. The accused was brought before court for this present charge on 5th March 2008. This officer however accepted that the accused had been in custody from 17th October 2006 and remained in custody up to 30th April 2007 when the inquest was carried out.

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)(b) 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 prosecution failed to explain why the accused was not released or brought before court within fourteen (14) days after arrested on 17th October 2006. She remained in custody until the inquest was commenced and it does seem she continued to be in custody even as the inquest proceeded and was concluded on 18th February 2008. The accused was further kept in custody from the day of the conclusion of that inquest up to 5th March 2008 when she was brought before court on this charge. It is blatantly clear that the accused constitutional rights as provided in section 72(3)(b) were violated by that detention. Having made a finding that the accused constitution right were violated I do hereby acquit the accused on the charge of murder.

DATED AND DELIVERED THIS 21ST DAY OF MAY, 2008

MARY KASANGO

JUDGE