



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Case 30 Of 20007**

**REPUBLIC ..... PROSECUTOR**

*versus*

**PETER WANYOIKE WAINAINA ..... ACCUSED**

**RULING**

The accused **PETER WANYOIKE WAINAINA** 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 5<sup>th</sup> May 2007 and brought before court on 6<sup>th</sup> August 2007. That he was detained for a period of three (3) months. His counsel submitted that the witness statements were recorded by the police between May and June 2007. That the witnesses were residents of the same neighbourhood as the accused. Accordingly his counsel submitted that if there was no explanation given for the failure to release the accused or to take him to court within 14 days the court should proceed to acquit him of the charge. The OCS of Makuyu Police Station Chief Inspector Abel Sande said that he was the investigating officer of this case. He said that when the accused was arrested he was on leave. He reported back from leave from 10<sup>th</sup> April 2007. On 13<sup>th</sup> June 2007 he forwarded the investigation file to the DCIO. It was brought back to the station on 21<sup>st</sup> June 2007 where he was instructed to carry out further investigation by obtaining further witness statements. On obtaining those witness statements the file was returned the DCIO. He consulted his superior for advice whether to release the suspect. He was advised not to release him and not to take him to court until further advice. The investigation, he said, was completed on 4<sup>th</sup> July 2007. Thereafter he was transferred from that station. On being cross examined by the accused counsel he said that the accused was first arrested on 5<sup>th</sup> May 2007 on suspicion of having committed assault. The victim died within 5 days. He confirmed that the investigation that had been carried out on the assault charge were used in respect of the fresh investigation of murder. He finally said that he could not explain the delay between the final instruction given by the DCIO on 4<sup>th</sup> July 2007 and the date that the accused was brought before court that is 6<sup>th</sup> August 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.”***

The accused was kept in custody for (three)3 months without being released or without being brought to court. That was in violation of Section 72(3)(b) of the Constitution. Having considered the explanation given for failure to comply with that section by the investigating officer, I find that there was no reasonable explanation and therefore find that the accused constitutional rights were violated. I therefore proceed and do hereby acquit the accused of the charge of murder.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF MAY 2008.**

**MARY KASANGO**

**JUDGE**