



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 18 of 2006

REPUBLIC PROSECUTOR

Versus

ELIJAH WANJUKI NGARI 1ST ACCUSED

JAMES MWANGI GATIKI 2ND ACCUSED

JAMES MBAU WAMBUGU 3RD ACCUSED

RULING

The accused persons Elijah Wanjuki Ngari, James Mwangi Gatiki and James Mbau Wambugu are charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. They were charged with the murder of Justus Gathuri Ngari. Before the case commenced all the accused persons raised a constitutional issue that their constitutional rights as embodied in **Section 72(3)(b)** of the constitution of Kenya.

The accused submitted that they were all arrested on 24th March 2006 and were not taken to court until 6th July 2006 four months later. On that constitutional issue being raised the state called the investigating officer Insp. Gerald Mwangi attached to the CID Nyeri to explain the delay in bringing the accused before court. He began by saying the deceased was reported as missing person on 15th March 2006. The previous investigating officer Cpl Onyango was assigned the duty to investigate that report. At first 6 persons who included the second and third accused were arrested on 17th March 2006. This officer was thereafter requested to take over the investigation file. He in the company of PC Margaret Wambui and PC Mohammed Maduma began their investigation. On 20th March 2006 they were informed that the first accused had ran away from his village. He was later brought to the police station by his father on 21st March 2006. He was interrogated and on 24th March 2006 he led the officers to the place where he had buried the deceased who was his brother. The second and third accused were arrested on 24th March 2006. Statements were recorded from witnesses and on 8th April 2006 the officers recovered an axe which was suspected to have been the murder weapon. The officers from 8th – 18th April 2006 attempted to have the accused persons mentally assessed by the doctor. They could not get the doctor until 18th April 2006. The delay that occurred thereafter was attributed by the investigating officer to the lack of witness statements of the father of the first accused. However all the statements had been recorded by 12th May 2006. On 15th May 2006 he forwarded the file to PCIO Central Province. The PCIO forwarded to the State Law Office. The file from state law office was received back at the station on 5th July 2006.

The accused were brought before court on 6th July 2006. That was the explanation that was offered by the state. As it can be seen that explanation lacks in detail of what is required under **Section 72(3)(b)**. It is clear that it does not suffice to show that the accused persons were brought before court as soon as was practicable or at least within 14 days of their arrest.

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 state failed to give an explanation why they failed to produce the accused persons before court within 14 days. Having failed to give that explanation I make a finding that the accused person constitutional rights as embodied in Section 72(3)(b) of the constitution were violated. Accordingly I do hereby acquit all the three accused persons of the charge of murder. The accused persons may be released unless otherwise lawfully held.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2008.

MARY KASANGO

JUDGE