

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 24 of 2007

REPUBLIC PROSECUTOR

versus

FRANCIS MURIGU KAREITHI ACCUSED

RULING

The accused **FRANCIS MURIGU KAREITHI** 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 were violated. It was submitted that he was arrested on 12th January 2007. The accused's counsel submitted that all the witness statements, psychiatrist report and post mortem were ready by 27th January 2007. That the accused was brought to court on 11th June 2007. That he had accordingly been in custody for a period of five months. It was submitted that the keeping of the accused in custody for that period was in violation of Section 72(3)(b) of the constitution. The prosecution offered an explanation for holding the accused for that period through Senior Sergeant Peter Munene. He confirmed that the accused was arrested alongside with his brother on 12th January 2007. On 21st January 2007 they were taken to psychiatrist when it was confirmed that his brother was mentally unstable. On 15th February 2007 the investigation file was forwarded to the DCIO. It was returned to the station with instructions to cover certain other areas of investigation. On carrying that further investigation the file was returned back to the DCIO who forwarded it back to the station on 29th May 2007. On forwarding the file to the station the DCIO instructed the officer to charge the accused. On being cross examined the officer stated that he had recorded his statement by 17th January 2007. He said that by that date he had decided to charge accused. He was transferred from that police station in April 2007 and was therefore unable to explain why the accused was kept in custody till 11th June 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)(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 as can be seen quite clearly in that explanation given under oath by the investigating officer failed to give reason for the detention of the accused in custody for five months less one day. The accused was arrested on suspicion of murder. He should have been released or taken to court within fourteen (14) days. To have failed to give reasonable explanation for the police failure to either release or take the accused to court leads this court to find that the accused constitutional rights were violated. Having so found I do hereby acquit the accused of the charge of murder.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2008.

MARY KASANGO

JUDGE