



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Case 6 of 2007**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. JOTHAM MURIITHI MUNENE**

**2. DAVID BUNDI MUNENE**

**3. MORRIS GACHOKI MUNENE**

**4. DICKSON CHOMBA MUNENE ..... ACCUSED**

**R U L I N G**

The four accused were charged with one count of murder contrary to section 203 as read together with section 204 of the Penal Code. They all pleaded not guilty to the charge and their trial was scheduled for 2<sup>nd</sup> April 2008. On that day, **Mr. Muhoho**, learned counsel for the accused raised a preliminary objection to the charge. The objection was premised on the alleged violation of sections 72 and 77 of the constitution of Kenya. Those sections broadly, set out the constitutional provisions relating to procedures for fair trials for persons charged with criminal offences. In respect of the accused, the issue arises in this manner. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused were arrested on 21<sup>st</sup> November 2006 whereas the 4<sup>th</sup> accused was arrested on 30<sup>th</sup> June 2007.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> first appeared before this court on 20<sup>th</sup> February 2007. This means that the said accused persons were held in police custody for a continuous period of 3 months or so. As for the 4<sup>th</sup> accused he was presented in court on 17<sup>th</sup> September 2007 a period of 2 or so months after his arrest. It is noteworthy that the initial information only faced the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> accused. Later on it was consolidated with that of the 4<sup>th</sup> accused. The delay in bringing the accused persons to court within fourteen (14) days as prescribed by the constitution since they faced a capital offence informed **Mr. Muhoho's** preliminary objection. It is on the basis of this unexplained delay of three and two months respectively before taking the accused to court that **Mr. Muhoho** submitted before me that the accused constitutional rights under sections 72 and 77 were violated, that the subsequent trial and other proceedings were a nullity and finally on that basis alone, I ought to acquit the accused.

**Mr. Orinda**, the learned Principal State Counsel who represented the Republic before me decided that the investigating officer in the case was best placed to explain the delay. **Inspector Tom Opiyo** testified that on 21<sup>st</sup> November 2006 he arrested the first three accused. However he initially had problems in recording statements from four key witnesses. The four had volunteered to cooperate with the police. Subsequent thereto however they declined to record statements. Nonetheless the investigating officer finished his investigations on 25<sup>th</sup> November 2007 and forwarded the file to the D.C.I.O. It was his

contention that he arrested the accused to prevent them from being lynched by members of public. However it was not until 4<sup>th</sup> February 2007 that they were instructed to charge the accused. He conceded that he had no explanation to offer as to why the 4<sup>th</sup> accused was not brought to court in time.

I must admit that the matter has caused me some considerable thought and anxiety. As stated by the court of appeal in **Albanus Mwasia Mutua, Cr. Appeal No. 120 of 2001**, on the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution. Section 72 (3) which provides:

**“72 (3) A person who is arrested or detained –**

- (a) for the purpose of bringing him before a court in 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 as soon as is reasonably practicable, and where he is not 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 sub-section have been complied with.”**

The accused were arrested without a warrant on reasonable suspicion that they had committed the offence of murder which offence is punishable by death. That being the case the police were entitled to keep them in their custody for a maximum period of fourteen days before bringing them before the court as section 72 (3) of the constitution allows for that. But from what the investigating officer said all the accused were arraigned in court long after the expiry of fourteen (14) days. For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused they were detained in police cells in excess of three months and for 4<sup>th</sup> accused, two months. The explanation proffered does not jell with me. The police in any event still went ahead and charged the accused with the offence without statements from the so called four crucial witnesses. Nothing therefore stopped the police from charging the accused with the offence in time. I also do not buy the explanation that the accused were arrested prematurely for their own safety as they were under threat of being lynched. If that was the case how come that the 4<sup>th</sup> accused who was not arrested until 30<sup>th</sup> June 2007 more than a year later was never lynched by the same irate members of public.

In the case of **Ndede v/s Republic [1991] KLR 567**, the appellant had been arrested without a warrant on 29<sup>th</sup> September 1987 and was held in detention, incommunicado, until 30<sup>th</sup> October, 1987 when he was brought before a magistrate. The period of delay was just over thirty days and **Ndede** was not charged with an offence carrying the death penalty. He pleaded guilty before the magistrate and was sentenced to long prison terms. He appealed to the High Court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of section 348 of the Criminal Procedure Code which bars appeals from persons who have been convicted on their own pleas of guilt. The sentences were however, reduced. **Ndede** next appealed to the court of appeal and the court, consisting of the late **Mr. Justice Gachuhi, J.A. the late Mr. Justice Masime, J.A. and Mr. Justice Omolo, Ag. J.A.** (as he then was) held that section 348 of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own admission and that as there was no explanation offered for the delay of some thirty days before **Ndede** was brought to court, the trial magistrate ought not to have accepted **Ndede's** plea of guilty. **Ndede's** appeal was allowed and his conviction quashed. It did not matter that before convicting **Ndede**, the Deputy Public Prosecutor had

stated the facts in support of the charges, that **Ndede** had admitted those facts and the facts themselves had disclosed the offences charged against him. According to the *Albanus* case, the quashing of the convictions must have been on the basis that **Ndede's** constitutional rights given to him by section 72 (3) (b) of the Constitution had been violated and he was entitled to an acquittal.

In this matter before me, there was undoubtedly a gross abuse and violation of the accused's constitutional rights guaranteed to them by section 72 (3) (b) and 77 of the constitution. They were presented before this court for their trial to commence some two and three months respectively from the date of their respective arrest.

The grounds advanced for the delay cannot pass the slightest test of reasonability. Their constitutional rights were thus violated. Even without the statements from four key witnesses as already stated the accused were still charged. It cannot even be a bar to the prosecution of suspects merely because one of them is still at large. I would reiterate to the prosecuting authorities once again what the court of appeal said in the *Albanus* case.

**“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 in support of 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 93) (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.”**

Finally in the case of **Gerald Macharia Githuku v/s Republic (2007) e KLR**, which case I must say stands out remarkably as a bold defence of due process and the constitutional rights of an arrested person subjected the subordination of the proven guilt of a violent robber to the constitutionality of his treatment by law enforcement authorities after his arrest. Appeal judges **E.O. O'Kubasu, J.W. ONyango Otieno** and **W.S. Deverell JJA**, held that Even though the delay of three days in bringing the appellant to court did not cause him any substantial prejudice and although the evidence showed that he was guilty as charged, nevertheless the failure by the prosecution to abide by the requirement of the constitution could not be disregarded. The prosecution, the judges found, on whom the burden of proof rested as in this case, had failed to satisfy the court that the appellant, who was charged with a capital offence had been brought before court as soon as was reasonably practicable.

I think I have said enough to show that the preliminary objection was well taken. Accordingly, I hold that the accuseds' having been brought to court in breach of the provisions of section 72 (3) and 77 of the constitution, their continued prosecution is illegal and a violation of their constitutional rights. Accordingly, they are acquitted of the charge. I further order for their immediate release, unless they are otherwise lawfully held.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of May 2008*

**M. S. A. MAKHANDIA**

**JUDGE**