

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 12 of 2007

REPUBLIC PROSECUTOR

versus

TIMOTY MUKWIRI MBURIA ACCUSED

RULING

The accused **TIMOTY MUKWIRI MBURIA** 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 20th August 2006 and not brought before court until 13th April 2007. The accused was said to have been kept in custody for a period of eight (8) months. The accused counsel submitted that unless the state gave reasonable explanation for the delay in bringing the accused before court the accused should be acquitted. The state called inspector Tom Opiyo to give that explanation. He confirmed that the accused was arrested on 20th August 2006 on suspicion of murder. On 18th November 2006 the accused was taken to the psychiatrist for mental evaluation. This officer said that he had difficulty in getting witness statements because the witnesses resided 20 kilometres away from the police station. The investigation file was forwarded to the DCIO on 6th November 2006 for advice. Within one week it was returned to the station with instruction to the officer to cover certain areas of investigation. This he did and returned the file to the DCIO on 20th November 2006. He also had sent some specimen for testing by the Government Chemist whose report was returned to the police station on 24th November 2006. On being cross examined the officer said that the accused took himself to the police station on the day he was arrested. Between the 24th and 26th August 2006 he recorded witness statements. The psychiatrist report was recorded on 18th November 2006. The specimen was taken to the Government chemist on 25th November 2006. That specimen had been recovered from the scene of crime on 18th August 2006. He accepted in cross examination that apart from the statement of Dr. Gatangi all the other statements had been recorded by 10th September 2006.

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 who had surrendered himself to the police was kept in custody for over (eight) 8 months without being released or being charged. That detention was undoubtedly in violation of the accused constitutional rights as provided in Section 72(3)(b) of the Constitution. Having made that finding that the accused constitutional rights were violated without reasonable explanation being given I do hereby acquit the accused of the charge of murder.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2008

MARY KASANGO

JUDGE