



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

Criminal Appeal 83 of 2006

JOSEPH MURUMBA WANDERI APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of T.W. Murigi,
Senior Resident Magistrate in Principal Magistrate's
Criminal Case No. 1934'A' of 2005 at Murang'a)*

JUDGMENT

The Appellant was convicted in the lower court of the offence of being in possession of an offensive weapon contrary to Section 89(1) (3) of the Penal Code. The evidence tendered in the lower court was that the Appellant was said to have been known to own a gun and was suspected to be dangerous. This led to the police officers mounting a raid into his home. On so doing the police officers recovered under the bed in one of the children's room a toy pistol. The Appellant was arrested on 26th

August 2005. It should be noted that he was not produced in court until 2nd September 2005. That was after a period of delay of seven days. No explanation was given by the police why the Appellant even though the toy pistol was recovered on the day of his arrest he was not produced before court until 7 days later. The Appellant has brought this appeal against conviction and against the seven years imprisonment sentence. In his argument he stated that the prosecution failed to show that the toy pistol was his and that the prosecution failed to prove that it could explode. Section 89(1) (3) of the Penal Code provides as follows:-

“(1)Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon,

incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to

imprisonment for a term or not less than seven years and not more than fifteen years. (3) In any prosecution for an offence under this section, it shall be presumed, until the contrary is proved, that a weapon having the appearance of a firearm is a firearm.

The section does not provide that a toy pistol or an imitation pistol is an offensive weapon. In the case of *Kimemia and another v Republic (2004) 1 EA*. The Court of Appeal had this to say:-

“An offensive weapon is any article made or adapted for use for causing injury to the person. Mwaurea and others v Republic [1973] EA 373 followed. Knives would therefore amount to offensive weapons. A toy gun may however not be considered an offensive weapon unless defined as a firearm by the Minister under section 2 of the Firearms Act.”

Firearm is defined in the Firearms Act Cap 114 as follows:-

“Firearm” means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes-

Further in that definition in (d) it stated;-

“Any weapon or other device or apparatus which may be specified by the Minister by order published in the Gazette to be a firearm for the purposes of this Act;

It is clear that a toy pistol is not defined as an offensive weapon either in the Penal Code or in the Firearms Act. Also there was no evidence offered by the prosecution from a government analyst to show that the toy pistol was an offensive weapon. To that extent the Appellant’s appeal would succeed. But perhaps much more than that is that the Appellant’s Constitutional Rights as embodied in Section 72(3) (b) of the Constitution were violated. The Appellant was detained in custody for seven days whilst he ought to have been either released or presented before court within 24 hours, since the charge he was facing was not a capital offence. Having violated his Constitutional Rights the Appellant’s conviction cannot stand. The Court of Appeal in the case *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic* stated;-

“We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.

That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case.”

In this case there was no explanation given by the prosecution as required by the provisions of section 72(3) (b). There having been no explanation the appellant’s appeal will succeed. Indeed that was the

holding in the case of **ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004**, when 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 Appellant’s appeal does succeed and the Appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of June 2008.

MARY KASANGO

JUDGE