

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 6 of 2005

ROBERT MWANIKI MAKANGA APPELLANT

Versus

REPUBLICRESPONDENT

(Being an appeal against the conviction and sentence by A. Lorot, Resident Magistrate, in the Resident Magistrate's Criminal Case No. 71 of 2002 at Gichugu)

JUDGMENT

The appellant was charged with the offence of stealing by servant contrary to **Section 281** of the Penal Code. After trial he was convicted and the sentence imposed upon him was a fine of Kshs.1 million and in default to serve 12 years imprisonment. The appellant preferred this appeal against conviction and sentence. The appellant was arrested on 5th February 2002. He was kept in custody without bail until when he appeared before court on 11th February 2002. He was therefore in custody for a period of 6 days. The offence the appellant faced was not a capital offence. Accordingly section 72(3)(b) of the constitution provides that he ought to have either been produced before court or released within 24 hours of his arrested. No explanation was given for the delay in producing the appellant before court. There being no reasonable explanation the court finds that the appellant's constitution rights were violated. Having made that finding I find that the appellant's appeal on that ground alone would succeed. 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 or 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.”

Due to the violation of the appellant’s constitutional rights his appeal does hereby succeed. The appellant is hereby set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 24TH DAY OF JUNE 2008

MARY KASANGO

JUDGE