REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 270 of 2007

JOSEPH MURAGE KARIUKI ……...….……. APPELLANT

Versus

REPUBLIC ……. RESPONDENT

(Being an appeal from the Judgment of B. M. KIMEMIA – Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 1027 of 2006 at Karatina)

JUDGMENT

In the lower court the appellant was charged with ***shop breaking and stealing*** contrary to ***Section 306(a)*** of the Penal Code. After trial the lower court convicted the appellant and sentenced him to serve 4 years imprisonment with corporal punishment. That sentence was passed on 14th August 2007. The appellant being aggrieved of conviction and sentence preferred this appeal. The evidence against the appellant was by PW 2. PW 2 stated that he was confronted by a group of men 6 of whom were hooded and the appellant who had not concealed his identity. PW 2 stated that he was able to identify the appellant because there were security lights at the scene. The prosecution did not lead evidence on the intensity of that light or on how long PW 2 observed the appellant. Having re-examined the prosecution's evidence I make a finding that it was not safe to base a conviction on that evidence. Further the sentence meted out by the lower court for corporal punishment against the appellant was illegal because that punishment was deleted from the Penal Code by Act No. 5 of 2003. However in considering this appeal, it does in my view turn on the police violation of the appellants rights under ***Section 72(3)(b)*** of the constitution. The appellant was held in custody from sat 21st October 2006. Monday was the 23rd October 2006. The appellant should have been taken to court on that date. He was however taken to court on 27th October 2006. In my view he was detained illegally for four days. The prosecution and particularly the investigating officer did not offer any explanation with regard to that detention. Such violation has been held by the court of appeal to be such that if found would lead to the acquittal or the quashing of a conviction of a person.

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 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 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."***

Having found that the appellant was detained for four days without reasonable explanation being given by the prosecution, I find that the appellant's appeal does succeed. Accordingly the appellant's conviction is hereby quashed and his sentence is hereby set aside. I do hereby order that the appellant be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2008

MARY KASANGO

JUDGE