

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 123 of 2007

ELIJAH KABUI MUTAHI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by V. W. NDURUGU, Ag Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 864 of 2005 at MUKURWEINI)

JUDGMENT

The appellant was charged in the lower court with ***Attempted defilement of an imbecile contrary to section 146 of the Penal Code***. Although the complainant was unable to give oral evidence in court relating to this offence there were two eye witnesses to the offence. PW 1 and PW 2 gave clear evidence of how they entered into the house and found the appellant lying on top of the complainant. They noticed that he had dropped his trousers up to the knee level and the complainant was undressed. The lower court convicted the appellant and he was sentenced to 10 years imprisonment. The appellant has now appealed against conviction and sentence. In his submission on the shortfall of the prosecutions evidence the appellant stated that he was detained in custody by the police after his arrest for three days before being presented to court. The appellant was arrested on 18th December 2005 and was kept in custody until the 21st December 2005. The offence that the appellant faced was not a capital offence. That being so the appellant in accordance with **Section 72(3)(b)** of the constitution ought to have been presented before court within 24 hours of being arrested. The appellant was arrested on 18th December 2005 at 9 p.m. That day was a Sunday. The following day being a Monday the police should have taken him before court. That was not to be. The police in detaining the appellant for 3 days before presenting him before court violated the appellant's constitutional rights. Such violation will lead this court to quash the conviction of the appellant and to set him free.

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 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 Mwacharia 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 constitutional rights having been violated by that detention this court does hereby quash his conviction and set aside his sentence. The appellant is ordered to be released unless otherwise lawfully held.

DATED AND DELIVERED THIS 29th DAY OF JULY 2008

MARY KASANGO

JUDGE