



REPUBLIC OF KENYA

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

**Criminal Appeal 153 of 2007**

STEPHEN MUNYIRA KIHOSHIA ..... APPELLANT

*Versus*

REPUBLIC ..... RESPONDENT

*(Being an appeal against the conviction and sentence by V. W. NDURURU, Ag Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 295 of 2005 at MUKURWEINI)*

**JUDGMENT**

The appellant was charged in the lower court with ***Stealing stock contrary to Section 278 of the Penal Code*** on count 1. On count 2 the appellant was charged with being in possession of bhang contrary to ***Section 3(2)(a) of the Narcotic Drugs And Psychotropic Substances Control Act No. 4 of 1994***. After trial the appellant was convicted by the lower court and in respect of count 1 the appellant was sentenced to 7 years imprisonment and in respect of count 2 the appellant was fined kshs.10,000 and in default to serve 6 months imprisonment. The appellant has presented this appeal against conviction and sentence.

This appeal will turn on two issues. The first issue is that the lower court in receiving the evidence of PW 2 and 3 did not receive the same under oath. This means that the appellant was convicted on the evidence of witnesses who had not been sworn before giving their testimony. That would be in violation of ***Section 151*** of the Criminal Procedure Code. The Court of Appeal in the case of ***SAMUEL MURIITHI MWANGI V REPUBLIC Criminal Appeal No. 3 of 2005 (unreported)*** had the following to say on the issue:-

***“To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence.”***

It was imperative for the trial court to ensure that evidence adduced by the prosecution was received under oath.

On that basis alone that there were witnesses who were not sworn and on whose evidence the lower court relied upon in convicting the appellant the appellants appeal on conviction and sentence will succeed.

Over and above that the appellant in this case was arrested on 29<sup>th</sup> April 2005 and was detained in

custody until the 4<sup>th</sup> May 2005 when he was presented before the lower court. The appellant was detained for 5 days. **Section 72(3)(b)** of the constitution provides that a person should be presented before court after arrest within 24 hours when he is facing a non capital offence. In this case the appellant's offence was not a capital offence. The detention of the appellant for five days violated his constitutional rights and accordingly the conviction of the appellant cannot stand.

The Court of Appeal in **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 vs 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 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.”***

In the end the appellant's appeal against conviction and sentence does succeed on the basis that he was

convicted on evidence that was not received under oath and on the basis that the police violated his constitutional rights by detaining him for more than 24 hours. The appellant's conviction is hereby quashed and his sentence is hereby set aside. The appellant is ordered to be released unless otherwise lawfully held.

***DATED AND DELIVERED THIS 29<sup>th</sup> DAY OF JULY 2008***

**MARY KASANGO**

**JUDGE**