

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 171 of 2007

JOHN MAINA GITHAE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence by T. W. MURIGI,

Senior Resident Magistrate, in the Principal Magistrate's

Criminal Case No. 448 of 2006 at MURANGA)

JUDGMENT

The appellant was charged in the lower court with *Defilement of a girl contrary to section 145(1) of the Penal Code*. After trial he was convicted as charged and the court sentenced him to 40 years imprisonment. In re-examining the lower courts evidence I find that there is clear and sufficient evidence which justified that conviction. I therefore find that I am in agreement with the trial magistrate. This appeal however will turn on the issue relating to *Section 72(3)(b)* of the Constitution and whether the appellants constitutional rights as embodied in that section were violated. The appellant was arrested on 3rd February 2006. On being arrested he was detained in custody. 3rd February 2006 was Friday. He ought to have been presented before court on the 6th February 2006. He however was not taken to court until the 8th February 2006. The prosecution failed to give explanation for the police failure to present the appellant in court as soon as was reasonably practicable. I do find therefore that the appellant's constitutional rights were violated. Having so found it would lead this court to quash the conviction against the appellant.

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 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.”

In the end since I find that the appellant was not taken to court as was required by Section 72(3)(b) I do hereby quash the conviction against the appellant and I do set aside the sentence against him. The appellant is ordered to be released from custody unless otherwise lawfully held.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2008

MARY KASANGO

JUDGE