



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Criminal Appeal 72 A of 2007**

**ALFRED EFUMBI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The learned state counsel conceded that the appellant was not taken to court within twenty-four (24) hours of his arrest, as is envisaged by *section 72 (3) (b)* of the Constitution.

However, he says that as that issue was not raised by the appellant at the time of the trial, the appellant had ambushed the state, by raising the issue at this appeal.

In the event, the learned state counsel did not make any attempt to justify the delay in taking the appellant before the court.

The records before me show that the appellant did file an application on 25<sup>th</sup> September 2007, seeking bail pending appeal. When arguing that application, the appellant raised the issue about his having been taken to court later than the period stipulated in the Constitution.

As that application was argued on 3<sup>rd</sup> October, 2007, I hold the considered view that between that date and 21<sup>st</sup> May 2008 when this appeal was canvassed, the state had had sufficient notice. In effect, the state was not at all ambushed by the appellant, when he asserted that his constitutional rights had been infringed.

I hold that the state has failed to discharge the obligation of satisfying this court that the appellant had been taken to court as soon as was reasonably practicable.

In GERALD MACHARIA GITHUKU V. REPUBLIC, CRIMINAL APPEAL NO.119 OF 2004, the Court of Appeal said that the courts cannot disregard the failure to comply with the provisions of *section 72 (3)* of the constitution. And as the state made no attempt to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable, the Court of Appeal allowed his appeal, on that ground.

In ALBANUS MWASIA MUTUA V. REPUBLIC, CRIMINAL APPEAL NO. 120 OF 2004, the Court of Appeal held that:

*“...an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence in support of the charge.”*

On the strength of those authorities, which are binding on me, I find that the unexplained violation of the constitutional rights of the appellant herein, to be taken before the court within 24 hours, as enshrined

in section 72 (3) (b) of the Constitution has resulted in an order for his acquittal.

The appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant shall be set at liberty unless he is otherwise lawfully held.

In the event that the appellant had executed a bond, as per the orders made on 15<sup>th</sup> November 2007, the same and that of the surety (if any) are discharged. It is so ordered.

*Dated, Signed and Delivered at Kakamega, this 2<sup>nd</sup> day of July 2008*

**FRED A OCHIENG**

**J U D G E**