

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 47 of 2007

REPUBLIC PROSECUTOR

versus

BENSON MWANGI MARUBU ACCUSED

RULING

The accused person was charged with ***Murder contrary to Section 203 as read with Section 204 of the Penal Code.*** Before the trial began the accused person submitted that he had been detained in custody for 24 days before he was presented before court. The accused was said to have been arrested on 23rd September 2007 and was presented before court on 17th October 2007. The accused in making the submission stated that his constitutional rights as embodied in ***Section 72(3)(b)*** of the constitution had been violated. He therefore sought that he be acquitted of the charge of murder. The investigating officer on being called to give explanation for that delay stated that it was due to the difficulty of getting the psychiatrist to confirm that the accused was fit to plead and also that it was due to the relative's inability to raise post mortem fees. On being cross examined, the officer did accept that the psychiatrist examined the accused person on 4th October 2007. He also confirmed that the post mortem results was done six days after the death of the deceased that was on 28th September 2007. He then went on to confirm that the witness statements all except one were recorded between 28th September and 8th October 2007. The officer stated that after recording his statement on 29th September 2007 the file was forwarded to the DCIO and the PCIO. He attributed the delay in presenting the accused to court to the procedure used in obtaining consent to charge. If indeed the statements were lastly recorded on 8th October 2007 there is no reasonable explanation given why the accused was still detained in custody until the 17th October 2007. In any case it is not reasonable to hold a person as the police continue their investigation. The more reasonable thing to do is to arrest the accused once the investigation is completed. I do therefore find that the accused is correct in submitting that his constitutional rights were violated. The decided cases for the Court of Appeal do clearly show that such violation can lead to an acquittal. The accused argued that the provisions of Section 72(3) of the Constitution were violated in regard to his detention. That section provides as follows:-

“A person who is arrested or detained –

(a) for the purpose of bringing him before

a court in the execution of the order of

the court; or

(b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The Court of Appeal has held that the violation of an accused's rights under the constitution can lead to an acquittal. This was the finding 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)(b) 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 prosecution failed to give reasonable explanation for failure to present the accused person before court within 14 days of his arrest. That being so I do find the accused person constitutional rights were violated. Accordingly I do hereby acquit the accused person of the charge of murder and I do hereby order the accused person to be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE