



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

Criminal Case 10 of 2008

REPUBLIC PROSECUTOR

Versus

JAMES MAINA KIAMA ACCUSED

RULING

The accused is charged with *Murder contrary to Section 203 as read Section 204 of the Penal Code*. Before the trial commenced the accused raised a preliminary issue that his constitutional rights had been violated and that accordingly he should be acquitted of the charge of murder. It was submitted by his counsel that the accused presented himself to the police on 17th November 2007 on learning that the public were alleging that he had murdered the deceased. He was arrested on presenting himself at the police station. The postmortem had been done on 16th November 2007 before the arrest of the accused. Counsel stated that the accused was in custody for 77 days. It was argued that this was a violation of his constitutional rights as provided by Section 72(3)(b) of the constitution. His counsel stated that going by the decisions of the Court of Appeal on this issue to put the accused on trial would lead to a nullity of that trial. He therefore sought the acquittal of the accused. The investigating officer on being requested to give explanation stated that the death of the deceased occurred between 4th - 6th November 2007. That on 17th November 2007 the accused and his wife presented themselves to the police station saying that their lives were in danger. They said that members of the public wanted to lynch them. Both of them were placed in custody as investigations began. Whilst investigations were going on a 12 year old witness stated that he had witnessed the murder in the company of Ndirangu. That Ndirangu on being questioned denied being in the company of the witness. This complicated the matter and the police contemplated carrying out an inquest. Further the officer stated that there was difficulty experienced in tracing the psychiatrist. On being cross examined the witness stated that he had recommended that an inquest be carried out on 7th December 2007. This recommendation was not accepted by his superiors. He confirmed that accused wife was eventually released even though there was fear for her life. On being put to task to confirm the non availability of the psychiatrist this witness was unable to show evidence of his failure to trace the psychiatrist. As can be seen the accused person was detained in custody for almost three months. There was no reasonable explanation given by the police for that detention as required by Section 72(3)(b) of the constitution. I therefore find that the accused constitutional rights were violated by the police. 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.”

Having found that the prolonged detention of the accused person beyond the 14 days provided by the constitution led to the accused constitutional rights being violated, I do hereby acquit the accused of the charge of murder and I do order that he be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE