



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

Criminal Case 20 of 2007

REPUBLIC PROSECUTOR

versus

PAUL WAWERU WARUCHUHI ACCUSED

RULING

The accused is charged with *Murder contrary to section 203 as read with section 204 of the Penal Code*. Before the trial commenced the accused through his counsel raised a preliminary issue that his constitutional rights had been violated in that he had been detained for a period in excess of 14 days as provided by *Section 72(3)(b)* of the constitution. It was submitted that the accused was arrested on 2nd February 2007 and was not presented before court until the 23rd May 2007. The investigating officer on being required to give an explanation for the delay in producing the accused before court stated that there was an inquest in respect of the death of the deceased herein and after the inquest that is, on 2nd February 2007 the police were ordered to arrest the accused immediately. The officer said that on arresting the accused further investigation was undertaken. On being cross examined by the accused counsel the investigating officer confirmed that the statements that had been obtained for the purpose of inquest in year 2003 were the same statements that were to be used in respect of the case against the accused. The investigating officer therefore admitted contrary to his statement before that the delay in presenting the accused before court was because there were procedures to be followed before consent could be given to charge the accused. That was the only explanation given by the investigating officer. It is clear when one considers that explanation that it does not suffice to explain that the police brought the accused before court as soon as was reasonably practicable as required by *Section 72(3)(b)*. The Court of Appeal has held that such violation of constitutional rights without explanation can lead to the acquittal of an accused person. 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 accused constitutional rights therefore having been violated as stated herein before the accused is hereby acquitted of the charge of murder and is hereby ordered to be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE