



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 49 of 2007

REPUBLIC PROSECUTOR

Versus

NELSON MURIMI KINYUA 1ST ACCUSED

PETER KAROKI KINYUA 2ND ACCUSED

RULING

The accused is charged with the offence of *Murder contrary to section 203 as read with section 204 of the Penal Code*. Before trial the accused raised an objection to the trial proceedings on the basis that his constitutional rights had been violated. The accused according to the submissions before court was arrested on 23rd August 2007. They were not brought before court until 19th October 2007. The accused counsel stated that the period of detention clearly violated the accused constitutional rights as embodied in *Section 72(3)(b)*. On the state being required to give an explanation why the accused had been detained for that period the learned state counsel stated that the investigating officer had failed to attend court despite a letter being forwarded by the state counsel to the investigating officer through PCIO requiring him to attend court. The learned state counsel had no explanation to give for the delay and left the matter to the court to decide. *Section 72(3)(b)* requires the person who alleges that an accused person was brought before court as soon as was reasonably practicable to so prove to the court. Here the investigating officer failed to give that explanation. The court is left with no other alternative but to find that indeed that the accused constitutional rights were violated. Accordingly having found that their constitutional rights were violated the logical conclusion as well set out in the decided cases of the Court of Appeal is to acquit the accused persons. 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 persons were detained for a period of two months with no explanation being given for their long detention. That was a violation of their constitutional rights and leads this court to hereby acquit both accused persons of the charge of murder. Both accused shall hereof be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE