



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Case 4 of 2008**

**REPUBLIC ..... PROSECUTOR**

*versus*

**DUNCAN NDAMBIRI KIMUNYU ..... ACCUSED**

**RULING**

The accused person is charged with ***murder contrary to Section 203 as read with 204 of the Penal Code***. The particulars of the offence state that the accused on 30<sup>th</sup> of December 2007 at Kwa 'V' village in Kirinyaga District within Central Province murdered **PETER MWANGI HASSAN**.

Before the commencement of his trial the accused person raised an objection of him being tried of that charge on the basis that his constitutional rights under **Section 72(3)(b)** of the constitution had been violated. It was submitted by his counsel that the accused person was arrested for this offence on 31<sup>st</sup> December 2007. He was brought before court on 22<sup>nd</sup> January 2008. That it was 23 days from the date of arrest. Accused counsel stated that the witness statement showed that the last statement was recorded on 9<sup>th</sup> January 2008. That accordingly the accused should have been produced before court by 13<sup>th</sup> January 2008 which would have been the 14<sup>th</sup> day. That the accused was however detained for a further 9 days before being brought to court. It was therefore argued that such detention was a violation of his constitutional rights. The accused relied on the following cases:

1. ***Gerald Macharia Githuku vs Republic*** Criminal Appeal No. 119 of 2004
2. ***Albanus Mwasia Mutua vs Republic*** Criminal Appeal No. 120 of 2004

The jurisprudence of those case is to the effect that a delay in producing a person arrested for a period beyond that is provided under the constitution where there is no explanation that the accused was produced in court as soon as was reasonably practicable leads to a violation of that persons constitutional rights and if such a person is facing a charge before court as a result of that arrest, he is entitled to an acquittal. To quote one of those cases to illustrate that jurisprudence is the case of **ALBANUS MWASIA MUTUA vs REPUBLIC** Criminal Appeal No. 120 of 2004 CA NAIROBI as follows:-

***“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 of 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”.***

The State Counsel submitted in response that Chief Inspector Job Njiru was present and would be able to explain to the court that the accused person was brought before court as soon as was reasonably practicable. The investigating officer stated that he is the OCS of Sagana Police Station. That the offence occurred on 30<sup>th</sup> December 2007. The accused was arrested on 31<sup>st</sup> December 2007. The investigations had commenced on 30<sup>th</sup> December 2007. On that day the presidential results following the country’s General Election were announced where by hon. Mwai Kibaki was declared as the winner. Following that announcement there erupted chaos in the country which adversely affected the transport system. Riots also erupted in the country. It was in that background that he commenced his investigation which he completed on 9<sup>th</sup> January 2008. He forwarded his file to the DCIO who then forwarded it to the PCIO and finally to the state counsel. He attributed the delay that occurred thereafter to the fact that the state counsel was not in his office. It

was not until 20<sup>th</sup> January 2008 that the file was taken back to the PCIO then to the DCIO and finally to Sagana Police Station. The accused was then produced before court on 22<sup>nd</sup> January 2008. He stated that although investigations were completed on 9<sup>th</sup> January 2008 he needed to obtain the consent of the state counsel and to obtain the information of the charge before the accused could be produced in court. He produced before court a letter dated 10<sup>th</sup> January 2008 which letter forwarded the file to the state counsel with a request for consent to prosecute the accused to be given. He also produced before court a letter written by the state counsel to the PCIO dated 22<sup>nd</sup> January 2008 which letter gave authority to charge the accused person and to produce him before court. The accused was brought to court on that very day. He produced also before court the information which was stamped by the criminal registry of this court on 22<sup>nd</sup> January 2008. On being cross examined by the accused counsel he was emphatic that the accused could not be brought to court in the absence of the consent of the state counsel. He repeated under cross examination that the delay was in the background of the chaos that was in the country following the General Elections of December 2007. In submissions counsel for the accused person stated that Section 72(3)(b) is clear and it related not only to the police but to the whole of the prosecution which included the state counsel. That the state counsel office having failed to give explanation of their part in the delay of producing the accused person to court the court should uphold the constitution provision and should find that the accused persons constitutional rights were violated. The court of appeal more recently has had to deal with the issue of failure to produce a person before court within the period provided under the constitution. This is in the case of **DOMINIC MUTIE MWALIMU VS REPUBLIC Criminal Appeal No. 217 of 2005**. The Court of Appeal stated as follows:-

***“Thus, where an accused person charged with a non-capital offence brought before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence.”***

As it can be seen clearly from this decision the court of appeal stated that failure to produce a person to court as provided by the constitution does not ipso facto prove that a the person’s constitutional right had been violated. The prosecution is obligated by the provisions of Section 72(3)(b) to prove that that person was produced before court as was reasonably practicable. Bearing in mind what the investigating officer stated as the reason why there was a delay I make a finding that the accused persons constitutional rights were not violated. Most importantly this court takes judicial notice of the fact that following the announcement of the presidential results following the general elections of December 2007 this country found itself in interruptions to normal life which resulted as what is now commonly called post election violence. That period brought this country in unprecedented chaos and disruption of normal life to most people. The investigating officer completed his investigation way before the expiry of the 14 days period he was required to produce the accused person before court. The delay that occurred thereafter was clearly due to the absence of the state counsel who was said to be out of his office. The chaos that hit the country during that time left many stranded wherever they had been at the time when the elections took place because the public transport and also private vehicles were unable to move during to the insecurity within the country. Although the whereabouts at that time of the state counsel was not placed before the court having taken judicial notice of the violent climate that had engulfed the country I make a finding that the accused person was brought before court as was reasonably practicable. I do commend the police that immediately consent was given by the state counsel to prosecute the accused person he was produced before court on that very same day. The accused persons constitutional rights under those very peculiar circumstances were not violated and the preliminary therefore raised hereof is dismissed.

**MARY KASANGO**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF OCTOBER 2008**

**M. S. A. MAKHANDIA**

**JUDGE**