



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

Criminal Case 38 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

GRACE MUTHONI MURIUKI.....ACCUSED

RULING

Grace Muthoni Muriuki was first arraigned in court on 15th December, 2005 on an information dated 7th December, 2005 charging her with Murder contrary to *Section 203* as read together with *Section 204* of the Penal Code. At her first appearance in court, she was found not fit to plead and accordingly committed to Nyeri PGH and thereafter Mathare mental hospital for management and treatment of her mental condition. She remained thereat until 20th May, 2008 when she was found to be fit to plead and was then presented to court for that purpose on the same day. However as the state counsel was absent on that occasion, the taking of the plea was differed to 9th June, 2008. On that date, the accused entered a plea of not guilty. Through **Mr. Nderi**, learned counsel, however, the accused gave notice of her intention to raise a constitutional issue at her resumed trial.

The trial opened before me on 15th September, 2008 with **Mr. Nderi** taking up the constitutional issue as a preliminary point. **Mr. Nderi** submitted that the accused was arrested on the 31st July, 2005. However, it was not until 15th December, 2005, slightly over 4 ½ months later that she was arraigned in court. The law requires that an accused person facing a capital charge be arraigned in court within 14 days. The accused having been arraigned in court in excess of the fourteen days permitted by the law, it was the contention of the learned counsel that her constitutional rights as enshrined in *Sections 72 and 77* of the constitution were thereby violated. If the delay was not satisfactorily explained by the police then the accused was entitled to an acquittal. Counsel maintained that the delay was inordinate.

In response, **Ms Ngalyuka**, learned State Counsel conceded that the accused was held in police custody for 4 ½ months. However the investigating officer who would have explained away the delay, if at all, had since passed on. The state therefore had no explanation to offer for the delay. Counsel therefore opted to leave the matter to court.

Section 72 (3) (b) of the Constitution of Kenya provides interlia:-

“A person who is arrested or detained

(a)

(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.”

Essentially what the section is saying is that for a capital offence such as the one the accused is faced with, she can only be detained in police custody for no more than fourteen days upon arrest before she is arraigned in court. In the event of any delay beyond the stipulated period aforesaid then a duty is cast upon the police to explain to the satisfaction of the court that the accused was after all brought before court as soon as was reasonably practicable.

There are several decisions of this court and court of appeal on the issue. The ratio decided in those decisions is to the effect that where an appellant is held in custody for a period beyond the period provided by *Section 72 (3) (b)* of the Constitution of Kenya without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is held under unlawful custody and in such circumstances, his constitutional rights will be deemed to have been violated or breached, entitling him to an acquittal notwithstanding that the case against him may very well be overwhelming. In the now celebrated case of **Albanus Mwasia Mutua VS Republic Criminal Appeal No.120 of 2004**, (*unreported*) the court of appeal re-asserted this position thus:-

“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 above principles were recently adopted by the same court in the case of **Paul Mwangi VS Republic Criminal Appeal No.35 of 2006** (*unreported*) where the court went out of its way to indicate what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under *Section 72 (3) (b)* of the Constitution. Having done so, and considering the period of delay in that particular case, it stated:-

“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the court in Mutua’s case.”

Thus, the law as to the treatment the courts should give to cases where the provisions of *Section 72 (3) (b)* of the Constitution is alleged to have been violated without acceptable and reasonable explanation is now well settled. As stated in the case of **Daniel Munyoki Nyanza & Anor Vs Republic, C.A. CR.APP. No.134 of 2005** (*unreported*)

“The facts must exist to show that the police have detained a person in unlawful custody before courts can act on the allegation. Such facts would be readily available in the record before the court in case of first or second appeal or would be adduced in evidence in case of the trial court. Courts of law do not act in a vacuum nor would a court of law act on half-baked evidence. In the

cases we have cited above, there was, in the record, clear undisputed evidence of such violation and the period of the delay to take the appellants to court was well established.”

In this case the prosecution has conceded that there was a delay of over 4 ½ months in charging the accused. This was the period between her arrest and first arraignment in court before she was found to be unfit to plead. It has nothing to do with the period the accused remained in the mental institution. The prosecution have proffered no explanation at all under the pretext that the investigating officer has passed on and having so passed on the state had no explanation to offer for the delay. I do not think that the investigating officer died with the investigations file. I do not think either that he was the only person involved in the investigations in this case. The investigations file must have been at the police station and any literate officer at the station would have been able to peruse the same and see how the delay came about and perhaps offer an explanation. However, since the prosecution did not deem it necessary to take that route, it is not my business to advise the prosecution on how to go about their work. I will contend with the fact that the prosecution has no explanation for the delay in charging the accused in court. They have also not discharged the burden cast on their shoulders to satisfy me that despite the delay, they were able to bring the accused to court **“as soon as is reasonably practicable.”** I therefore hold that any further prosecution of the accused in these proceedings is an illegality, oppressive, unconstitutional and a nullity. The accused is thus acquitted of the charge and set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of October, 2008.

M.S.A. MAKHANDIA

JUDGE