

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 23 of 2008

REPUBLIC PROSECUTOR

VERSUS

PERIS WANJIKU MUNDIA..... ACCUSED

RULING

The accused person is facing a charge of ***Murder contrary to section 203 as read with section 204 of the Penal Code***. Before her trial began her counsel raised a Preliminary Objection to the trial proceedings on the basis that her Constitutional Rights had been violated in that she was detained in police custody for a period in excess of 14 days as provided under Section 72 of the Constitution. It is not disputed that she was arrested on 15th March 2008 and she was presented before court on 19th April 2008. In that regard she was in detention for nine days in excess of the period provided under the Constitution. Her prayer was that she be acquitted of the charge for that violation. The state counsel called evidence from the Investigating Officer with a view to explain the delay in producing the accused before court. Cpl. Charles Gitendi stated that when the accused was arrested on 15th March 2008 it was under such circumstances that there was a threat to her life by a mob that wanted to lynch her. The accused was then arrested by police from Ndathi police post to secure her life. Later that day she was escorted to Kiganjo police station. The Investigating Officer said that she was kept in custody for her safety as they tried to find out the cause of the mob justice. With a view to giving a background to the matter he said that the deceased who was 3½ years old suffered with stomach ache and on being taken to Mathari hospital on 15th March 2008 was pronounced dead. It was as a result of his death that the mob wanted to attack the accused. The post mortem of the deceased was carried out on 18th March 2008. It did not reveal the cause of death of the deceased. As a result the stomach content was taken to the Government Chemist on 20th March 2008 for examination. The Investigating Officer said that he kept checking with the government chemist but each time the results of the testing were not ready. All this time the accused remained in custody. On 9th April 2008 the investigating officer decided to seek the advice of the state counsel. He was advised to have the accused arraigned before court. The investigating officer was cross examined by the accused counsel. He confirmed that he was aware of the requirements of producing an accused person before court within 14 days in case of a capital offence. He however explained that the only reason the accused was detained for a longer period than provided under the law was because the Government Chemist delayed in providing its report and because the accused was in danger if released. Indeed he stated that the accused was kept in custody for her own safety. On being questioned by the court he responded that the accused did not state of any where else she could go where she could be in safety and that on being released she intended to return to her husband's house where her life was in danger. That was the explanation given by the police for their failure to produce the accused before court as required under the Constitution. The learned state counsel submitted that the explanation was sufficient as required under Section 72(3) (b) of the Constitution. The court of appeal in considering whether the detention of an accused person for a period longer than provided under the law has come up with two divergent decisions. The recent case of *Dominic Mutie Mwalimu vs Republic Criminal Appeal No. 217 of 2005* the Court of Appeal in that respect had this to say:-

“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.”

There are other decisions of the court of appeal which differ from that case. The case of **ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004**, when 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 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”.

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) 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.”

Considering the facts of this case I make a finding that the police in detaining the accused person under the guise of keeping her in safety for a period longer than the fourteen days provided under the law violated her Constitutional Rights. It also did not escape the court’s attention that the accused person when she appeared before me was carrying an infant child. What that would mean is that the infant child also was subjected to that detention. That however is not a matter for decision in this case. The investigating officer although attributed as one of the reasons for not producing the accused before court to the delay in obtaining the Government Chemist Report, it is noteworthy that even by the time the accused was brought before court on 9th April 2008 that the said report had not being received by the police. The investigating officer was not ignorant of the Constitutional Rights of the accused. Despite that he waited until 9th April 2008 to seek the advice of the state counsel on what he should do with the accused. Having found as herein above that the rights of the accused were violated I am of the view that the charges against the accused cannot stand. Accordingly as a result of that violation I do hereby acquit the accused person of the charge of Murder. I order the accused to be released from custody unless otherwise lawfully held.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 29th day of October 2008.

BY

M. S. A. MAKHANDIA

JUDGE