



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 226 of 2007

DANIEL KINYUA MATHAI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by H. N. NDUNGU, Ag Senior

Principal Magistrate, in the Senior Principal Magistrate's Criminal Case No. 2030 of 2006

at NANYUKI)

JUDGMENT

The appellant was charged with the offence of *preparing to commit a felony contrary to Section 308(1) of the Penal Code*. The lower court after the trial convicted him as charged and sentenced him to 7 years imprisonment. His co-accused who is not a party in this appeal on being convicted was sentenced to 3 years probation. The appellant filed this appeal against the conviction and sentence. In his written submissions the appellant raised a ground that his constitutional rights had been violated by his detention in custody from the date of arrest to the date of being presented before court. The charge sheet indicates that the appellant was arrested on 19th October 2006. It also indicates that he was kept in custody until the date he appeared before court for plea on 26th October 2006. The appellant was essentially detained in custody for seven days. The investigating officer did not give any explanation why the appellant was detained for seven days and why he was not presented before court within 24 hours as required by section 72(3)(b) of the constitution. Such detention is a violation of the appellant's constitutional right. Such violation will lead this court to find that the conviction of the appellant cannot stand and ought to be quashed.

The Court of Appeal in the case *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic* stated;-

“We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any

explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.

That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case.”

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) 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.”

Having found that the appellant’s constitutional rights were violated this appeal does succeed. Accordingly I do hereby quash the lower court conviction and set aside its judgment. I order the appellant to be set free unless otherwise lawfully held.

MARY KASANGO

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2008

M. S. A. MAKHANDIA

JUDGE