



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

Criminal Appeal 249 of 2007

JOHN IRUNGU KANGETHE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of B.M. Kimemia,

Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 98 of 2006 at Karatina)

JUDGMENT

The appellant was charged in the lower court with ***possession of narcotic drugs contrary to section 3(1) of the narcotic and psychotropic substance control act No. 4 of 1994*** as read with section 2(a) of the same act. The appellant after trial before the lower was convicted of the charge. He has brought this appeal against conviction and sentence of five years imprisonment. This appeal however will turn on the appellant's Constitutional Rights being violated by his prolonged detention by police before being taken to court. The appellant was arrested on 30th January 2006 and kept in custody until 9th February 2006 when he was produced before court. The appellant was detained in custody for ten days. Section 72 (3) (b) of the constitution provides;-

“72 (3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a 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 as soon as is reasonably practicable,

and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days 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 had occasions to decide cases relating to such violation. In the case of *Albanus Mwasia Mutua Vs Republic Criminal Appeal No. 120 of 2004* the court had this to say;-

“At the end of the day it is the duty of the courts to enforce the provision of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the authorities we have cited in the judgment appears to be that unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”

However as the same court stated in the same case.

“..... On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution.....”

In a similar case namely *Gerald Macharia v/s Republic (2007) e KLR*.

“..... That although the delay of three days in bringing 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 requirement 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 court as soon as was reasonably practicable.....”

The lower court's conviction in the light of the appellant's rights being violated cannot stand. Accordingly on that basis alone the appellant's appeal does succeed. I do hereby quash the lower court's conviction and set aside its sentence against the appellant. I order the appellant to set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 7th day of October 2008.

MARY KASANGO

JUDGE