



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

Criminal Appeal 300 of 2007

SIMON MWANGI MUCHIGIRI..... APPELLANT

VERSUS

**REPUBLIC.....
RESPONDENT**

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

Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 933 of 2006 at Karatina)

JUDGMENT

The appellant was charged and convicted of ***being in possession of bhang contrary to section 3(1) as read with section 2(a) of the narcotic drugs and psychotropic substances (control) act 1994***. The lower court sentenced the appellant to seven years imprisonment on conviction. This appeal is brought against that conviction and sentence. That as it may be this appeal turns on the period of detention of the appellant by the police. The appellant was arrested on 26th September 2006. He was kept in custody until the date he was taken before court that 2nd October 2006. The appellant was detained for a period of seven days. Under section 72 (3) (b) of the Constitution the appellant should have been produced before court within 24 hours. 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