



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

Criminal Case 45 of 2008

REPUBLIC PROSECUTOR

VERSUS

- 1. ANDELINA GATWIRI M'ARITHI)**
- 2. KENNETH MWIRIGI MAGAJU)**
- 3. KENNEDY GITONGA MBERIA)**
- 4. JOHN GITHINJI RIUNGU) ACCUSED PERSONS**

RULING

There are four accused persons in this matter. They are charged with Murder contrary to Section 203 as read with 204 of the Penal Code. The accused persons before their trial raised a Preliminary Objection to their trial commencing on the ground that their Constitutional Rights embodied in Section 72(3) (b) of the Constitution had been violated. The matter was adjourned from the 25th September 2008 to the 22nd October 2008 to enable the investigating officer Inspector Kisanga to attend court to give explanation on the alleged prolonged detention of the accused person. As it is clear Section 72 (3) (b) requires that the one alleging that a person was brought before court as soon as was reasonably practicable to so prove to the court. That section provides as follows:-

“A person who is arrested or detained –

- (a) for the purpose of bringing him before a court in the execution of the order of the 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 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.”

When the matter came before me on 22nd October 2008 Inspector Kisanga failed to attend court. The accused counsel submitted that the accused were arrested on 25th July 2008 and were presented before court on 14th August 2008. Counsel calculated that the accused were kept in custody for 20 days which was in excess of 14 days period provided under the Constitution. Counsel placed before court statements obtained by the police in their investigation of this matter. The statement of Inspector Edward Kisanga the counsel stated that the accused were arrested on 25th July 2008. He also brought to the court’s attention the statement of PC Nganga. He submitted that the police statement of PC Kanyaru indicated that the accused were examined by a psychiatrist on 31st July 2008 on which date they found fit to plea. The accused relied on the now well known cases of the court of appeal on the issue of detention. The first case they relied on is Albanus which provides as follows:-

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 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 second case they relied on was 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 detain 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.”

When the state counsel was called upon by the court to respond to the accused counsel’s submission he stated that the Investigating Officer Inspector Kisanga was expected to attend court to give explanation on the delayed detention of the accused. State counsel informed the court that the said Investigating Officer had failed to attend court. Further he stated that the police station had confirmed that a signal was sent to the effect that Inspector Kisanga was required to attend court. As evidence that the said signal was sent state counsel said that Corporal Muli from that police station had attended court was not in a position to give explanation on the delayed detention of the accused because he was not involved in the investigation of this matter. State counsel then finally said,

“We should have had Kisanga to explain. We do not know why Kisanga did not come. I take police have no explanation of the six days I leave it to court.”

The accused counsel then submitted that since the police had failed to explain the delay in the detention of the accused the accused were entitled to an acquittal.

It ought to now be known in the legal circles that the court of appeal has held that delay in producing an accused before court within the period provided in the constitution is not ipso facto proof of breach of the constitution. The court of appeal delivered itself in the case of **Dominic Mutie Mwalimu vs Republic Criminal Appeal No. 217 of 2005** as follows:-

“A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours). 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. Additionally, a careful reading of section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.”

The accused relied on the police statements to show the day of their arrest to be 25th July 2008. But on closer scrutiny of the statements provided to the court I find that they do not show conclusively that all the accused were arrested on 25th July 2008. The statement of PC James Nganga states that

“On the 25th day of July I accompanied IP Kisanga, P.C. Waweru and 3 A.P.Cs to South Imenti to arrest the murder suspects. We went straight to the house of Gatwiri and arrested her. She was interrogated and later she led us to the homes of the other 3 suspects. We arrested them. Others were not traced. They were taken to Ngobit police station and later I made my statement.”

That portion of statement does not indicate that the accused were arrested on 25th July 2008. It does seem from that statement that there were some suspects who were not traced. The query that rises in the court’s mind is whether those suspects who were not traced are the accused before court. Part of the statement of Inspector Edward Kisanga is as follows:-

“On the 25th day of July in company of P.C. Waweru, P.C. Nganga, two A.P.Cs and PC Muharabu proceeded to South Imenti and arrested four suspects. We picked 1st accused Gatwiri and led us to the homes of the three suspects and we managed to arrest them.”

Again apart from the mention of the first accused one cannot discern which other suspects were that were arrested by this police officer on 25th July 2008. It is a concern to this court that the one person who could have rendered assistance to the court that is Inspector Edward Kisanga to explain the alleged prolonged detention of the accused failed to attend court when called upon to do so. The question that arises is; was the failure to attend court by design? The state counsel confirmed that a signal was sent to the police station where Inspector Kisanga is stationed. Why did he fail to attend court? It is now common knowledge that the courts are perhaps more than ever strictly enforcing the constitution provisions relating to the period of detention of arrested persons. It cannot escape the court’s attention that armed with that knowledge in an attempt to get an acquittal of the accused person police can either

hold a suspect for a longer period than provided by the constitution or can fail when required to give explanation for the prolonged detention. The accused in his case stated although not supported by police statement to have been in detention for twenty days. The twenty days would be six days more than the period provided under section 72(3) (b) relating to capital offences. The Court of Appeal in the case of *Dominic Mutie Mwalimu vs Republic (Supra)* that when confronted with the issue of determining if there was a Constitutional violation each case has to be considered on the basis of its peculiar facts and circumstances. This case as far as I can discern involved investigation where the deceased had been taken by a group of people from his home and later his body was discovered on 19th July 2008. The group was said to be large one. The police undoubtedly needed to carry out investigations to ascertain the persons in the group. The investigation carried out by the police at this stage I am not privy to the same. If indeed the accused were arrested on 25th July 2008 from that date upto 14th August 2008 there were three weekends. It is possible that those weekends could have hampered the police in their investigations and could be the reason why the accused were not produced in court within 14 days. On my part having considered the submissions made before me I find that the accused's Constitutional Rights in this case were not violated. As I have stated before in this ruling I am concerned that a signal was sent requesting the investigating officer to attend court to give explanation on the allegation of the accused but he failed to attend court. Had Inspector Edward Kisanga attended court he would have assisted the court in explaining the reason for the prolonged detention of the accused in any. Because I am not sure whether failure to attend court was deliberate on his part or not I will request the Deputy Registrar of this court to send this ruling to the P.C.I.O of Central Province for further investigations or action to be taken on the failure of Inspector Edward Kisanga to attend court. It will be a sad day when an accused will due to either negligence or connivance of police be acquitted of a serious offence such as this one Murder. Such an acquittal could undermine the rule of law and could lead to people taking the law into their hands such as the family of the deceased person. The end of the matter is that the preliminary objection raised by the accused is dismissed.

Dated and delivered at Nyeri this 18th day of December 2008.

MARY KASANGO

JUDGE