



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Case 18 of 2007**

**REPUBLIC .....RESPONDENT**

***Versus***

**EL .....ACCUSED**

**RULING**

The subject is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The subject was assessed on the 26th June, 2007 to be twelve and half years old. When this matter came up for hearing his counsel raised a preliminary point in law. Counsel submitted that since the subject was twelve and half years old the proceedings should be in accordance with The Children Act. He referred to section 194 (1) of the act. That section provides as follows:-

***“Proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the rules set out in the Fifth Schedule”.***

As can be seen that section refers to schedule 5 of the act. Counsel relied on paragraph 4 (1) of that schedule. That paragraph provides as follows:-

***“ Where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable. Provided that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of the court.”***

Counsel referred to the particulars of the offence as seen in the information. He said that those particulars shows that the offence was committed on 5<sup>th</sup> March 2007. Counsel referred to the written statement of the arresting officer, a copy of which he also provided to the court, which showed that the subject was arrested on 8<sup>th</sup> March 2007. Counsel further submitted that the subject was not brought to court for plea until the 4<sup>th</sup> of June 2007. This he submitted was a period of 3 months. That there was nothing to show the police had sought the permission or leave of the court to continue detaining the subject for that period. This he submitted was a violation of paragraph 4 (1) of the schedule 5 of The Children Act. Further he stated that the subject is entitled to his constitutional rights enshrined in our constitution as per section 72 (3) of the constitution. That section provides that the subject can be in custody only for 14 days before being brought to court in case of capital offences. In contravention of that section counsel submitted that the subject was detained for 3 months. In his submissions he relied on the case of **ALBANUS MWASIA MUTUA V/S REPUBLIC CRIMINAL APPEAL No. 120 of 2004**. In this case the court of appeal allowed the appeal on the basis that the appellant had been in custody for more than 14 days. The appellant in that case was facing a charge of robbery with violence. Counsel further submitted that the subject’s rights of trial within reasonable time were violated because he was kept in custody for more

than 3 months. In considering those violations the advocate requested the court to take a more serious stand since the subject was a minor. The advocate also relied on the case of **GERALD MACHARIA GITHUKU V/S REPUBLIC CRIMINAL APPEAL NO. 119 OF 2004**. In this case the appellant was convicted of robbery with violence. The court of appeal acquitted him on the basis that his constitutional rights had been violated because he was detained in custody for 17 days rather than 14 days as required by section 72 (3) of the constitution. In response to the preliminary point raised state counsel submitted that the provisions of the constitution cannot be contradicted by any other Act. He therefore stated that the provision of The Children Act to the extent where they go beyond the provisions of the constitution, they cannot stand. He further submitted that the days in which the subject was held contrary to the 14 days rule would be from 22nd March 2007. He therefore submitted that the delay of bringing the subject before court was only 2 months. The state called **P.C SAMMY MUSYIMI** the investigating officer in this case to explain the delay in bringing the subject before court. He stated that this case originated from Muiga Police Station. The subject was taken to Kiawara police post on being arrested on the 8<sup>th</sup> of March 2007 by members of public. On the same day the subject was re-arrested from the public by police. He was thereafter brought before court on 22nd May, 2007. On being arrested and after investigations the police file was taken to D.C.I.O Nyeri and thereafter it was returned to the station with request that certain points be covered. The police officer however was very categorical that the delay in bringing the subject before court was due to the recording of witness statements of 3 witnesses who work as conductors on Eldoret Express Bus. He said that because of the nature of their work they could not easily be available to record their statement. He identified those witnesses as Peter Kahuthu Wambugu, Judy Nyambura Wambugu and Alex Githinji Wambugu; all of them according to their statement are described as conductors on the Eldoret Express Bus. The officer said that these witnesses were the main witnesses in this case. On being cross examined by the advocate for the subject the officer accepted that the statement of those 3 witnesses were recorded between the 9<sup>th</sup> and the 10<sup>th</sup> March 2007. Although the officer did say that he had to get further statement from Judy Nyambura Wambugu. On being asked the date on which the further statement was recorded he said that it was undated. He however accepted that the further statement referred to the identification of deceased's body. He accepted that after the recording of those statements no further statement were recorded. The advocate for the subject in response to the submission of state counsel stated that paragraph 4 (1) of schedule 5 of The Children Act was not contradictory to the provisions of the constitutions. In any case, he argued, the court has not declared that paragraph to be unconstitutional. He stated that the state had failed to show that there was reasonable excuse why the subject was held for 3 months in custody before being brought to court. In view of the violation of the subject's constitutional rights his advocate prayed that he be acquitted of the charge before him.

The subject who as stated is twelve and half years old was arrested on 8<sup>th</sup> March 2007 for the offence which has brought him before this court. He was brought before the Deputy Registrar of this court on 22<sup>nd</sup> May 2007. On that date the Deputy Registrar fixed this case for plea before a judge on 4<sup>th</sup> June 2007. It is important at this stage to quote the provisions of section 72 (3) of the constitution. Section 72(3) of the Constitution states:

***“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.”***

P. C. Musyimi on being questioned by the state counsel attributed the delay of bringing the subject to court to the fact that the essential witnesses found it difficult to get permission from their employer in order to record their statements. At cross examination P. C. Musyimi admitted that those witnesses

recorded their statement between 9<sup>th</sup> and 10<sup>th</sup> March 2007. Although he alleged to have carried out other investigation he was unable to prove the same. It does seem that the subject was detained for over 2 months before being brought to court. As can be seen from the provisions of section 72 (3) of the constitution such a delay was in violation of that provision. In the case of **ALBANUS MWASIA MUTUA V/S 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.”***

Similarity in the case of **GERALD MACHARIA GITHUKU V/S 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 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 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.”***

In our case it will be seen that the delay was over 2 months. As correctly submitted by the counsel for the subject the fact that subject was a minor was more the reason why such violation should not have been allowed. I also find that I am in agreement with the counsel for the subject that schedule 5 of The Children Act does not contradict the constitution. It merely requires that where a minor would be detained for a period exceeding 24 hours from the date of his arrest, leave of the court be obtained. The investigating office did not state that such leave was obtained. What in deed was also of concern to the court is that the subject was detained at the police station until the date he appeared before the Deputy Registrar on 22 May 2007. On appearing before the Deputy Registrar an order was made for the subject to be remanded at a juvenile home. I therefore find that the state has violated the constitutional rights of the subject and his rights as a child as recognized by The Children Act. In reaching that decision I am very conscious of the finding in the **ALBANUS CASE** as follows:-

***“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.”***

The court will not shy away from upholding the constitutional rights of the subject. Accordingly this court has found that the constitutional right of the subject were violated and that the provisions of the childrens act were not adhered to. The state failed to satisfy the burden as provided in section 72 (3) of the constitution to show that the subject had been brought before court as soon as is reasonably practicable. This court in response to such violation does hereby acquit the subject of the charge of murder. Accordingly, the subject is hereby set free unless otherwise lawfully held.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of August, 2007.*

**MARY KASANGO**

**JUDGE**