



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

Criminal Appeal 70 & 71 of 2007

AMOS NJOGU WANJIKU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

AND

Criminal Appeal 71 of 2007

IRENE WAMUTIRA MURAGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeals against conviction and sentence arising out of the Judgment of J. N. Onyiego Esq, Senior Resident Magistrate Kerugoya dated 2/5/2007 in Senior Resident Magistrate's Court Criminal Case No.2/2005(Kerugoya).

JUDGMENT

(Consolidated)

The two appeals are consolidated for purpose of hearing having arisen from the same trial.

Both appellants were represented by Counsel Hon. Gacheru J. The appellants were charged with the offence of manslaughter contrary to Section 202 read with Section 205 of the Penal Code in main count and count 2 and count 3 all involving three deceased persons. They were tried and convicted on all 3 counts and sentenced to 15 years imprisonment on each. The petitions of appeal were drawn and filed by their advocate Hon. Gacheru.

In his submissions Mr. Gacheru submitted that the appellants were arrested on 24/1/2005 and for 65 days their constitutional rights were breached and no explanation was given why they were in custody for so long. Mr. Gacheru drew the attention to two decisions of Court of Appeal; Criminal Appeal No. 120 of 2004 and Criminal Appeal No. 119 of 2004.

Upon hearing these submissions Counsel for the Republic informed the court that he conceded the appeal on the ground of the opinion expressed in decisions of court of Appeal quoted. That the appellants

were kept in custody for 65 days was not disputed. They were arrested on 21/11/2004 without warrants and were produced in court on 24/1/2005.

I have perused the authorities cited and it is clear the court is to enforce the provisions of Constitution, Section 72 (3) thereof specifies the periods within which a person may be detained before being produced before court as 24 hours for the bailable offences and 14 days in bailable offences namely those punishable by death. The burden of proving that the person arrested or detained has been brought to court as soon as is reasonably practicable shall rest on any person alleging that the provisions of the subsection (72 (3)) have been complied with.

In the circumstances of this case the prosecution did not explain or discharge its burden. **“The jurisprudence emerging now is that the unexplained violation of constitutional rights will normally result in an acquittal irrespective of nature and strength of evidence which may be adduced in support of the charge”** Apart from the delay caused under section 72 (3), there is a complaint that the language used is not indicated on record. Section 72 (2) **“a person who is arrested or detained shall be informed..... In a language that he understands the reason for his arrest or detention”** Section 198 CPC also demands that the interpreted of language is a right of accused failure to use language accused person understands is also a breach of his constitutional rights. Seeing that the state concedes this appeal and upon perusing the two Judgments of Court of Appeal, it is my finding that the appellants are entitled to be acquitted without considering more in view of the failure by state to explain the violation of the express provisions of constitutional.

The appeal is allowed and the Appellants shall be set at liberty forthwith unless otherwise lawfully held.

Dated this 19th November, 2007.

J. N. KHAMINWA

JUDGE

Mr. Gacheru: When the appellants are released in court it takes about 4 days to get out.

Order: The appellants shall be released forthwith otherwise the state may be found guilty of false imprisonment.

J. N. KHAMINWA

JUDGE

19/11/2007

Khaminwa – Judge

Njue – Clerk

Mr. Kimathi for State

Mr. Gacheru for both Appellants

Appellants – present.

J. N. KHAMINWA

JUDGE