



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

**Criminal Case 21 of 2009**

**REPUBLIC ..... ACCUSED**

**VERSUS**

**BENSON KAIGERA MUTUNGWA ..... 1<sup>ST</sup> ACCUSED  
COSMAS MWIRIGI RAIKANYA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

At the conclusion of the prosecution’s case, counsel for the accused persons submitted that the prosecution had failed to prove a case against the accused who is facing the charge of murder. Further, he argued that the accused constitutional rights have been violated. I confirmed that I have reconsidered the evidence tendered before court and I find that the prosecution have shown a probable case against the accused sufficient to put the accused to his defence. On the issue of violation of constitution rights, it was argued that the police held the accused for a period of more than 14 days provided under Section 72(3) (b) of the Constitution. That section is in the following terms:-

“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases: -  
.....

- (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 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.”

The accused was arrested on 10<sup>th</sup> February 2009. They were produced before court on 27<sup>th</sup> February 2009. The investigating officer, PW7 stated that on 10<sup>th</sup> February he received information from the OCS Meru Police station that there had been murder on the previous night within Giaki area. When he went to where the body was, he viewed the body and could not see any visible injuries. He suspected poison. During his investigation, three suspects were arrested. Because poisoning was suspected, during the post mortem, the doctor took some samples for testing. He failed to inform the court the result of the analysis of those samples. He however stated that the delay of two days in bringing the accused before court was because he had to take the accused for psychiatric report and because of other investigations that needed to be carried out. On being cross examined by counsel for the accused he responded by saying that it had been reported that the accused was in the company of the deceased the night when the deceased died. The explanation given by the investigation officer that the delay in bringing the accused to court for two days because of delayed psychiatric report and because of investigations he needed to carry, in my view, considering the circumstances under which police work is reasonable. The doctor who examines suspects for purposes of determining whether they are mentally capable of pleading to a case is the same doctor who would attend to members of public who go to hospital. Without a doubt, such a doctor is under pressure and can only do so much. It is therefore understandable that delay would be

experience when such report is required. Further to that, is that the police in their investigation do work under extreme difficulties which cannot be overlooked. A delay of two days in my view is not unreasonable. The prosecution under Section 72 (3) (b) needs to show that the accused was produced before court as soon as reasonably practicable. In the case of Dominic Mutie Mwalimu Vrs. Republic Cr. Appeal No. 217 of 2005. The Court of Appeal stated that the mere fact an accused is not produced before court within 14 days of arrest is not *prima facie* evidence of a violation. The court had this to say:-

*“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.”*

Having stated that the reason given by the police was reasonable, I do hereby reject the submissions that the accused constitutional rights was violated. I now therefore inform the accused of his right to address the court either personally or by his advocate, to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence.

Dated and delivered at Meru this 19<sup>th</sup> day of March 2010.

**MARY KASANGO**  
**JUDGE**