



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

**Criminal Case 28 of 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIPHAS KIMATHI KAMUNDE ..... ACCUSED**

**RULING**

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that he committed murder on 16<sup>th</sup> May 2006. The accused has raised a preliminary objection alleging that his constitutional rights as embodied in Section 72 (3) (b) of the Constitution were violated. It was submitted on behalf of the accused that he was arrested on 10<sup>th</sup> June 2007. That was one year after the offence was alleged to have been committed. It was further submitted that he was not produced before court until the 9<sup>th</sup> July 2007 which was a period in excess of the 14 days provided under Section 72(3) (b). The state called the O.C.S. of Nkubu Police Station to explain why the accused was not produced within 14 days of arrest. The O.C.S. confirmed that the accused was arrested on 10<sup>th</sup> June 2007 and was brought before court on 9<sup>th</sup> July 2007. The officer conceded that that period was in excess of 14 days. The officer stated that the statements of witnesses were recorded by 18<sup>th</sup> May 2006. On the accused being arrested as earlier stated after the offence, he informed the investigating officer that he did not commit the offence but rather that it was committed by his brothers who are in hiding but he requested that he be allowed to show their whereabouts to the police. It was alleged, according to this officer, that the 3 brothers, including the accused, had attended a burial where a disagreement occurred and they threw stones killing their father and an aunt. On being arrested, the accused told the police that his other brothers would exonerate him and that he was willing to point them out to the police. To this end, he took the police to Mombasa for 10 days. The brothers, however, were not found there and the police eventually charged the accused with the present offence. That was the explanation given by the state. The state under Section 72(3) (b) has a burden to prove that when accused persons is not produced within 14 days in respect of a capital offence, that he was produced as soon as was reasonably practicable. 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 court has dealt with this particular section in various cases. Albanus Mwasia Mutua Vrs. Republic Criminal Appeal No. 120 of 2004, where the court of appeal stated:-

“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 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.”

Thomas Patrick Gilbert Cholmondeley Vrs. Republic HCA No. 116 of 2007 as follows:-

“The rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: “If you rattle a snake you must be prepared to be bitten by it”. It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed in sections 70 to 82 inclusive of the Constitution.”

Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported). The court stated as follows:-

“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.”

As can be seen from the case of Mutie (supra) not every prolonged detention amounts to violation of constitutional rights. Each case has to be looked at bearing in mind the peculiar evidence brought before court. In this case, it was the accused that requested the police not to charge him because he alleged he was innocent and his innocence would be proved by his brothers whom he requested he be allowed to point out. The police agreed to the suggestion of the accused. The accused having made that request cannot now be allowed to raise an issue that his constitutional rights were

violated. In my view, the explanation given by the police which is uncontroverted is reasonable and I reject the objection raised by the accused which is hereby dismissed. I order the trial of the accused to proceed.

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

**MARY KASANGO**  
**JUDGE**