



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

Criminal Case 61 of 2008

CRIMINAL LAW

Ø **Allegation of violation of constitutional rights under S. 72(3) (b) of the Constitution**

REPUBLIC PROSECUTOR

VERSUS

ISAAC KIMATHI NDURUMA ACCUSED

RULING

The accused is charged with the offence of murder. The particulars of the offence are that he on the 7th day of September 2008 at Ndamene Village Gaitu Sub location, Gaitu location in Meru District of the Eastern Province murdered Kenneth Kiunga Maganju. He was arrested on 8th September 2008. Before his trial could proceed, he raised a preliminary objection that his constitutional rights as provided under Section 72(3) (b) of the Constitution have been violated. His counsel submitted that having been arrested on 8th September 2008, he was not produced in court until the 2nd October 2008 which was beyond the 14 days period provided under Section 72(3) (b). He therefore submitted that his constitutional rights had been violated. The investigating officer responded by explaining the circumstances surrounding the production of the accused beyond the 14 days. He stated that the accused was related to the deceased in that the accused was the uncle to the deceased. As they were preparing the file with a view to presenting it to the State Counsel, he was approached by the accused and even members of his family requesting that the family be allowed to see the state counsel before the plea was taken with a view to discussing the reduction of the charge to one of manslaughter. He was informed by the family members that counsel for the deceased family also wished to see the state counsel in this regard. That the family saw him in total, 3 times making that similar request. In all this time, he had wanted to bring the accused to court for plea. He was however called by the state counsel on 1st October 2008 and was instructed to produce the accused before court for plea. He explained that the only reason he delayed in producing the accused before court was the request made by the family members of both the accused and the deceased. He was however confident that the evidence they gathered sufficed for a charge of murder being preferred against the accused. He was cross-examined by counsel for the accused. He stated in response that the accused surrendered to the police on 8th September 2008. He again repeated that the accused did not want to be produced for plea because he wanted the charge to be reduced to one of manslaughter. That was the explanation offered by the state. The accused in bringing the preliminary objection relies on Section 72(3) (b) which provides as follows:-

“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.”

There has been a wealth of decisions of the Court of Appeal where the court has found that in certain circumstances the accused constitutional rights have been violated. To name but a few, one is **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.”

There is also the case **Thomas Patrick Gilbert Cholmondelye 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.”

As it can be seen from Section 72(3) (b) the law requires the state to show that the accused was produced before court as soon as was reasonable practicable. The explanation given by the investigating officer in this matter is credible to me. It certainly was not controverted by the accused. He stated that even before the 14th day he had obtained the statements necessary to charge the accused with the offence of murder. He however held back because the accused, his family and the family of the deceased prevailed upon him to await their approach of the state counsel with the view to having the state counsel reduce the charge from murder to manslaughter. With that pressure, it is not a surprise that he heeded. Having heeded, the accused, in my view, cannot be heard to seek a declaration that his constitutional rights have been violated when he himself consented to being held beyond the constitutional period, that is, 14 days. The explanation given by the investigating officer suffices and accordingly, I find that the accused constitutional rights were not violated and I order that the accused trial does proceed for hearing. The preliminary objection is dismissed.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO

JUDGE