



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

**Petition 4 of 2009**

JAMES KIMANZI KILONZO.....PETITIONER  
VERSUS  
REPUBLIC.....RESPONDENT

**JUDGMENT**

The petitioner James Kimanzi Kilonzo has filed the petition under Section 72 (3) (b) of the Constitution. He prays that Maua Criminal Case No. 1118 of 2005 be declared a nullity and that an order be made for him to be compensated because of the violation of his constitutional rights under section 72 (3) (b). The petitioner was arrested on 15<sup>th</sup> March 2005. he was kept in custody from that date until the day he was arraigned before the Maua Magistrate Court on 23<sup>rd</sup> March 2005. On that day, he was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The charge sheet which was presented to the Maua Magistrate Court supports the petitioner's contention in regard to the date he was arrested and to the date he was arraigned before court. The petition was filed in court on 10<sup>th</sup> March 2009. On the first day it came before court, that is, on 23<sup>rd</sup> March 2009, the state counsel requested time to contact Maua police station to get their instruction. The matter came up on several other dates, 21<sup>st</sup> May, 9<sup>th</sup> July, 15<sup>th</sup> October and 10<sup>th</sup> November 2009. On all those occasions, the state counsel indicated that it had not obtained instructions from the police in order for police to explain the detention of the petitioner. The matter was finally heard on 15<sup>th</sup> March 2010. Again on that day, the state counsel requested an adjournment on the basis that the investigating officer had not attended court. The court declined to grant the adjournment. The court as it now considers the petitioner's petition, it does not have the benefit of the state's response to the allegation made by the petitioner. Section 72 (3) (b) 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.”***

By that section, the state is obligated to show that a person arrested was presented to court as soon as was reasonably practicable. In the case of a non capital offence such as the one the petitioner faces in Maua Magistrate's Court, the police can only hold a person for 24 hours. The burden under S. 72 (3) (b) in view of the absence of the police explanation was not satisfied. The courts have in various cases in past

interpreted the application of that section. 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 the Court of Appeal stated 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.”*

Gerald Macharia Vs. Republic [2007] e KLR. Again at the Court of Appeal it was held:-

*“.....That although the delay of three days in brining 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 consider that the failure by the prosecution to abide by the requirement 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 court as soon as was reasonably practicable.....”*

I make a finding that the petitioner’s constitutional rights were violated for having been detained in police custody for 9 days before being presented in court whilst facing a non capital offence. I however accept as correct the submissions of the state counsel that the petitioner cannot under this petition be awarded damages for such detention. Such an award would have to be the subject of a civil suit. In the end, I hereby acquit the petitioner James Kimanzi Kilonzo of the offence of obtaining money by false pretences in Maua Magistrate Criminal Case No. 1118 of 2005. I order the said James Kimanzi Kilonzo be set free in that matter unless he is otherwise lawfully held.

Dated and delivered at Meru this 14<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**