



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 79 of 2007**

**REPUBLIC.....PROSECUTOR
VERSUS**

**DANCAN KIURA NKARE.....1ST ACCUSED
JOSEPH MUAO KITHOME.....2ND ACCUSED
SIMEON MURIUKI3RD ACCUSED**

RULING

This ruling relates to objection raised by the accused that their constitutional rights embodied in Section 72 (3) (b) of the constitution were violated. Counsel for the accused at first stated to the court that the objection only related to first and 2nd accused because the 3rd accused was produced within the period provided under that section. It was argued by counsel that the first accused was arrested on 23rd November 2007 and the 2nd accused was arrested on 9th November 2007. It is on record that the accused persons were brought before court on 24th December 2007. Counsel for the accused said that the accused persons having not been brought before court within 14 days had their constitutional rights violated and should therefore be acquitted of the present offence they face, that is the charge of murder. Counsel for the state informed the court that the investigating officer despite being informed that he was required to appear to give explanation why the accused were not produced within 14 days, he had failed to attend court. The state counsel however was useful in his submissions before court because he informed the court that the accused were produced before court on 10th December 2007 but it was found that there was no judge sitting in the High Court. That the court was sitting on 24th December 2007 and that was the date they were produced. As I received the submissions of the counsel of the accused, I must admit that it was not clear to me how many days the accused were kept in custody. This is because the accused counsel in response to what was said by the state counsel said this:-

“1st and 2nd accused were in custody for 19 days. The production of the 3rd accused on 24th December 2007 makes it 30 days. The delay is not explained. I urge the court to find accused rights were violated since even the 3rd accused plea was on 24th December 2007.”

As can be seen from that submissions, it is not clear whether it is alleged that the accused were in custody for 19 days or for 30 days. The accused counsel did not give a date of arrest of the 3rd accused. To therefore have submitted that his rights were also violated only added more confusion to the counsel's submissions. It is correct that the courts have now stated that where the rights of an accused are violated by failing to be produced before court within 14 days in case of capital offences and within 24 hours in other cases, such violation can lead to acquittal of the accused persons of the charges they face. See the case of 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.”

Gerald Macharia Vs. Republic [2007] e KLR. The Court of Appeal had this to say:-

“.....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 believe that the state can only be called upon to state that an accused person was produced before court as soon as was reasonably practicable where the accused clearly states how long he had been detained in custody. In this case, the accused were not clear in that regard. Furthermore, I accept the explanation given by the state counsel that there was no High Court Judge sitting in court when the accused were first produced and it was not until the 24th December that a judge was available and the accused were

produced. I find that that the accused rights were not violated. The objection raised is dismissed and the case shall proceed for hearing.

Dated and delivered at Meru this 14th day of May 2010.

MARY KASANGO
JUDGE