



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

Criminal Case 59 of 2008

REPUBLIC PROSECUTOR

VERSUS

DUNCAN MURITHI NJAGI ACCUSED

RULING

The accused raised an objection on a point of law to the continuing trial of this case on the basis that their constitutional rights were violated. The accused faces a charge of murder contrary to section 203 as read with Section 204 of the Penal Code. It was submitted by counsel for the accused that the accused constitutional rights embodied in section 72 (3) (b) of the Constitution were violated in that the accused person was detained for 9 extra days in custody beyond the limit set by Section 72 (3) (b). The accused was said to have been arrested on 12th January 2008. He was held at Marimanti Police Station in Tharaka District. The accused was at first charge with the offence of manslaughter before the lower court and a copy of the charge sheet of the lower court was handed to the court at the hearing of this objection. The accused was arraigned before court according to the submissions of the counsel on 26th January 2008. He however was not charged according to the submissions of the counsel until 4th February 2008. That on that date he was charged with manslaughter before the Chief Magistrate Court Meru Criminal Case No. 6 of 2008. The accused counsel submitted that the state needed to explain the reasons why the accused was detained more than 14 days in custody. 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.”

That section makes it clear that the state has the burden to show the courts that the accused was brought before court as soon as was reasonably practicable. The Court of Appeal in the case of Albanus Mwasia

Mutua Vrs. Republic Criminal Appeal NO. 120 of 2004, had this to say on violation of Section 72 (3)

(b)

“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 stated:-

“.....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.....”

Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported). The Court

of Appeal also 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.”

The state counsel informed the court that he had written a letter to the DCIO who had informed him that the investigating officer would attend court to give the explanation required under Section 72 (3) (b). On the state counsel contacting the investigating officer, the investigating officer said that he would not attend court to give that explanation. The court is therefore left with no explanation being offered by the state. I have looked at the charge sheet that was presented to court by the accused counsel. The charge sheet shows that the accused was arrested on 12th January 2008. That charge sheet also shows that he was due to be taken before court on 23rd January 2008. There is nothing else before court which shows that the accused was taken to court on 26th January. Even if he was taken to court on 26th January the days in which he was in custody up to 26th January are 14 days. If he was taken to court on 23rd January as shown in the charge sheet, he then was in custody for only 11 days. I find that there is no sufficient proof that the accused was detained beyond the 14 days provided under Section 72 (3) (b). Accordingly, the objection raised by the accused is dismissed and the accused trial shall proceed.

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

MARY KASANGO
JUDGE