



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

Criminal Case 63 of 2006

REPUBLIC PROSECUTOR

VERSUS

SARAH KAGENDO ACCUSED

RULING

The accused is charged with murder contrary to section 203 as read with 204 of the Penal Code. He has raised an objection to his trial proceeding on the basis that his constitutional rights as embodied with Section 72 (3) (b) of the Constitution were violated. Counsel for the accused submitted that the accused was arrested on 16th October 2006 and that it was not until 20th November 2006, some 33 days later that, the accused was presented before for plea. Counsel submitted that the state needed to explain that delay. The state counsel admitted that the accused was held in custody beyond the 14 days. He however was unable to explain that delay in producing the accused before court because of the absence of the OCS Gatunga Police Station. State counsel said that he wrote to the OCS a letter on 10th December 2009 informing the OCS that he was required to attend court for the hearing of this objection. The OCS had dispute that letter failed to attend court. He finally stated that in the absence of the OCS he could not tell why the accused was not brought before court within the time provided under Section 72 (3) (b). 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.”

The court in interpretation that section have held that where an accused rights have been violated he ought be acquitted of the criminal offences he faces. **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 appellants 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....."

Thomas Patrick Gilbert Cholmondeley Vrs. Republic HCA No. 116 of 2007 and 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."

Since the accused was held for a period beyond that which is provided under section 72 (3) (b) and because the state is unable to give reasonable explanation for that delay, I make a finding that the accused constitutional rights were violated and I therefore acquit the accused of the offence of murder and I order the accused to be released from custody unless she is otherwise lawfully held.

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

MARY KASANGO
JUDGE