



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

Criminal Case 70 of 2007

REPUBLIC PROSECUTOR

VERSUS

**SEVERIO NJAGI MUCENA 1ST ACCUSED
JOSPHAT KIMATHI MUGAMBI 2ND ACCUSED
JOSPHAT NJAU CHABARI 3RD ACCUSED**

RULING

The three accused persons are charged before this court with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The accused gave notice to the prosecution on 14th October 2009 that they intended to raise a preliminary objection to the charges before court. The objection was on the basis that their constitutional rights had been violated by the police when they were first arrested. When notice was given, the state counsel applied for an adjournment to enable him produce the investigating officer who was to give explanation for the prolonged detention of the accused. The matter was further adjourned to 10th November 2009 and again the state applied for an adjournment on the basis that the investigating officer was not available. The matter was adjourned to 15th March 2010. On that date, the state applied for an adjournment on the basis that the investigating officer was said to have been in Kitui. The state also informed the court that there was some information that had reached the state law office that there was possibility that the offence in this case had been committed by persons other than the accused before court. An adjournment was allowed to enable the state clearly state the position it was to take on this case. On 10th May 2010 when this matter was again before court, the state requested for a further adjournment for further investigation to be carried out on certain names that had been given of possible suspects of this offence. Since the court had on previous occasions granted the state the last adjournment, when the accused counsel objected to a further adjournment, the objection was upheld. The learned counsel Mr. Omayo for the accused

presented his preliminary objection by saying that the accused persons constitutional rights under Section 72 (3) (b) had been violated. That section had been violated because the accused persons were arrested on 9th October 2007 and were first brought before court on 7th November 2007. The learned state counsel Mr. Kimathi was at pain to explain that delay in the absence of the investigating officer who had failed to attend court. He however submitted that the delay was not excessive considering that the case involved mob justice. Section 72 (3) (b) of the Constitution 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.”

It is clear from the provisions of that section that the prosecution had a burden to show to the court that even though the accused were not brought before court within 14 days of their arrest they were brought as soon as was reasonably practicable. The state did not satisfy that burden. As can be seen from the submissions made by the accused counsel, the accused were held in police custody for over a month. That is certainly a period in excess of the 14 days provided under the above section. It has often been held by the courts that it is the court's duty to uphold the constitutional rights of the citizenry. The following cases interrogate that section, Section 72 (3) (b), and are relevant to this matter.

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 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.”

Gerald Macharia Vs. Republic [2007] e KLR.

“.....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.....”

In the end, bearing in mind the period of detention of the accused and the fact that the state failed to give reasonable explanation for that detention, I make a finding that the accused persons constitutional rights were violated and I therefore acquit all the accused of the charge of murder and order all the accused to be set free unless they are otherwise lawfully held.

Dated and delivered at Meru this 18th day of June 2010.

**MARY KASANGO
JUDGE**