



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

**Criminal Case 69 of 2006**

**REPUBLIC ..... PROSECUTOR  
VERSUS  
LAWRENCE MUNGATIA ..... 1<sup>ST</sup> ACCUSED  
ELIAS MWENDA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

Both appellants were charged before this court with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. They were charged that on 30<sup>th</sup> October 2006 at Kariene Location in Meru Central District within the Eastern Province jointly with others not before court murdered Stanley Nkoroi Kimani. This case proceeded for hearing and indeed the accused closed their defence. However, before making final submissions, the accused requested that they be allowed to raise an objection to the charges before court on the basis that their constitutional rights had been violated. The court allowed them to raise their objection. In that regard, the investigating officer who had previously given evidence was recalled to enable him give explanation in respect of the detention of the accused at the police station. It was submitted by the learned counsel Mr. Muriuki for the accused that the accused were arrested on 31<sup>st</sup> October 2006 and were not presented before court until 30<sup>th</sup> November 2006. This, he submitted, was an infringement of the accused constitutional rights as provided under section 72 (3) (b) of the Constitution. He submitted that all the witness statements were recorded by 31<sup>st</sup> October 2006. That the postmortem was done thereafter. The accused were subjected to psychiatrist examination on 11<sup>th</sup> November 2006. He said, despite all that, the accused were not presented before court until 30 days later which was a period beyond the 14 days provided for capital offences under Section 72 (3) (b). The learned state counsel, Mr. Kimathi submitted that although the accused were not presented before court within 14 days of arrest, each case was to be determined on its own facts. He called upon the investigating officer to give explanation why the accused were not produced before court within the provided period under the constitution. Chief inspector of police, Mohammed Mohamud Kullow stated that he was previously the O.C.S of Kariene Police Station and he confirmed that he personally

arrested the accused persons on 31<sup>st</sup> October 2006. This followed the murder committed on 30<sup>th</sup> October of the deceased herein. He also confirmed that the accused were produced before court on 30<sup>th</sup> November 2006. The reason he gave for the overstaying in police custody of the accused was that at the time there was only one psychiatric doctor stationed at Meru General Hospital. At the time of the arrest of the accused, this doctor was on leave but resumed duty on 15<sup>th</sup> November 2006. He proceeded to carry out mental assessment on the accused on the same day, that is, 15<sup>th</sup> November 2006. Once that was done, the investigation file was forwarded to D.C.I.O for directions on the matter. He stated that that was the police practice and procedure because the D.C.I.O. is the ultimate investigative officer of all capital offences. When he forwarded the file to the D.C.I.O. however, he was informed that the said D.C.I.O. was attending an anti terrorist training in Mombasa from 12<sup>th</sup> November up to 29<sup>th</sup> November 2006. On his return on 29<sup>th</sup> November 2006, the D.C.I.O. advised him to prefer murder charges against the accused. The accused were then arraigned before the High Court Meru on 30<sup>th</sup> November 2006. He then stated that the accused were therefore arraigned within reasonable time. 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.”**

As it is clear from the provisions of that section, the burden of proof that the accused was produced before court within reasonable and practicable time lies upon the one who is so alleging it. I have perused the court file and I find that the post mortem of the deceased was carried out on 6<sup>th</sup> November 2006. There is no documentary evidence of when the mental assessment of the accused was carried out. However, there is no legal requirement known to me for the accused to be mentally examined before being arraigned in court. The law requires the court if it is of the view that the person presented before court displays mental disability for the court to order him to be examined. It is therefore not reasonable to hold the accused in police custody whilst awaiting their examination by psychiatrist. Similarly, the police practice and procedure of obtaining instructions from the D.C.I.O. cannot under any

circumstances subordinate the constitutional provisions. The Constitution is the Supreme Law of this country and when it provides a period within which a person should be presented before court, such a provision ought to be followed. But then again section 72 (3) (b) does provide an opportunity to the one alleging that a person was brought before court as soon as was reasonably practicable to so prove. That did not happen in this case. As stated, the two reasons given, that is, lack of a psychiatrist and lack of instructions from the D.C.I.O. is not reasonable in my view. The investigating officer did not also show by documentary evidence that the psychiatrist and D.C.I.O were unavailable as alleged. The accused were indeed held in police custody beyond the period provided under Section 72 (3) (b). It has been held in various cases that the courts have a responsibility to uphold the constitutional rights of the citizens of this country. The following cases clearly show the position that the court have held where there has been delayed detention of the accused. **Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported)**. The court 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.”***  
**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.**

***“.....That although the delay of three days in bringing 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, since the prosecution failed to show that the accused persons were presented before court as soon as

was reasonably practicable, I do not hesitate to make a finding that the accused constitutional rights as embodied in

section 72 (3) (b) of the Constitution were violated. Having made that finding, the charges before court against the accused cannot be upheld. Accordingly, I hereby acquit the accused of the charge of murder and I order the accused to be set free unless they are otherwise lawfully held.

Dated and delivered at Meru this 2<sup>nd</sup> of July 2010.

**MARY KASANGO**  
**JUDGE**