



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

**AT MERU**

**Criminal Case 61 of 2005**

REPUBLIC ..... PROSECUTOR

VERSUS

JAMES KINGE MUTIGA ..... ACCUSED

**RULING**

The accused was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The accused was arrested for that offence on 20<sup>th</sup> May 2005 and was produced before court on 20<sup>th</sup> September 2005. It is clear that the accused was produced before court beyond the 14 days' period provided in the old constitution under section 72 (3) (b). He therefore raised a preliminary objection seeking that he be acquitted of the charge of murder in view of the contravention of S. 72 (3) (b) of the old constitution.

It ought to be noted that the objection was raised before the new constitution was promulgated. The new constitution became the supreme law of Kenya on 27<sup>th</sup> August 2010. Under section 72 (3) (b) of the old constitution, the police were required to present a person charged with a capital offence before court within 14 days of arrest. If they failed to so present a person the state was obligated to show that such a person was presented before court as soon as was reasonably practicable. The courts in interpreting section 72 (3) (b) made findings that where such section was violated, a person could be acquitted of the offence that they faced. To quote that some of the cases that interpreted that section on the violation of accused person's constitutional rights is:- **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.....”***

Under chapter 4 of the Bill of Rights of the new constitution, in particular Article 49 (1) (f) an arrested person is required to be represented before court as soon as reasonably possible but not less than 24 hours of his arrest. That Article does not distinguish an arrest for capital or non capital offence. The 24 hours rule applies in all cases. Article 23 (3) however provides that where a person alleges that their Rights and Fundamental Freedoms have been violated the court can grant various reliefs. That Article is in the following terms:-

**“23. (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including –**

- (a) a declaration of rights;**
- (b) an injunction;**
- (c) a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) an order for compensation;**
- (f) an order of judicial review;**

One of those reliefs that the court can grant is compensation. I am of the view that if the accused person alleges that his Rights were infringed, he ought, in my view, to seek compensation from the court. In a decision made on 26<sup>th</sup> January 2009 which was way ahead of the law then, Justice Ojwang' made a decision which is now supported by Article 23 of the Constitution. The case is **Evanson K. Chege Vs. Republic** Misc. Criminal application No. 722 of 2007. The Judge in that case found that the applicant's constitutional rights was violated in that he was not produced before court within 24 hours of being arrested. The judge then went on to say thus:-

**“I hold that there was a violation of the applicant's trial-rights as provided for in S. 72 (3)(b) of the Constitution. I hereby declare that the applicant thus suffered in his safeguarded right; and that the applicant may make an application before the High Court for compensation, by virtue of s. 72 (6) of the Constitution The trial file shall forthwith be returned to the trial court, for continuation with the trial proceedings.”**

Similarly, in this case and most particularly because of the provisions of Article 23, I decline to terminate the prosecution of the accused. I order that the trial of the accused do continue. The accused can, if he so wishes, seek compensation for the alleged prolonged detention at the police station following his arrest

Dated and delivered at Meru this 8<sup>th</sup> day of October 2010.

**MARY KASANGO**  
**JUDGE**