



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
Constitutional Petition 19 of 2008

JOSEPH OJWANDO OWINO PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

RULING:

The petitioner was charged jointly with Dedan Otieno Ojwado with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on the 29th day of August, 2005 at South Kabuoch Location, in Homa bay District, within Nyanza Province the petitioner and his co-accused jointly with others not before court murdered Johnson Okoth Rangango. The petitioner was arrested on 8th January 2006 and was held at Ndhiwa Police station for a period of 35 days before he was arraigned in court on 13th February 2006.

The petitioner filed a constitutional reference and urged the court to find and hold that his constitutional rights as provided under **Section 72 (3) (b)** of the constitution had been violated. The application was filed on 11th December, 2008. When the application came up for hearing on 26th February 2009, Mr. Mutai, Senior State Counsel, sought an adjournment so that the Attorney General could file a replying affidavit. He undertook to file the same within ten days from the said date. The court granted the application but the Attorney General did not file any affidavit to explain the cause of delay in arraigning the petitioner in court.

Section 72 (3) (b) of the constitution requires that a person charged with murder be taken to court within fourteen days from the date of his arrest. Where that is not done the burden of proving that the suspect has been brought before a court as soon as is reasonably practicable rests upon any person alleging that the provisions of the said subsection have been complied with. In this regard, the Officer Commanding Ndhiwa police station ought to have filed an affidavit and explain the circumstances that led to the petitioner's stay in police cells for a period of 35 days before he was brought to court. He failed to do so.

It is now well settled that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of a charge. It cannot be denied that the police violated the petitioner's constitutional right as guaranteed by the aforesaid section. It is the duty of courts and particularly the High Court which is mandated to deal with constitutional issues, to enforce the provisions of the Constitution. See **ALBANUS MUASYA**

MUTUA –VS- REPUBLIC, Criminal Appeal No. 120 of 2004. I find and hold that the petitioner's constitutional right was violated and no explanation has been offered by the police. In the circumstances, the petitioner is acquitted of the charge of murder which he was facing. This ruling will also apply to the petitioner's co-accused who has also filed a similar application vide Constitutional Reference No. 18 of 2008.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

30/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State.

Mr. Omwega for the Applicant.

Court: Ruling delivered on 30th April 2009 in open court.

D. MUSINGA

JUDGE.