

REPUBLIC RESPONDENT

VERSUS

ALFRED MUTEMBEI MWANGIRE 1ST ACCUSED

ERASTUS MURITHI 2ND ACCUSED

JOHN KINYUA 3RD ACCUSED

RULING

The accused hereof are charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. At the close of the prosecution's case, all accused raised an objection based on section 72(3) (b) of the Constitution arguing that their constitutional rights had been violated. The first and 2nd accused were arrested on 1st August 2007. The 3rd accused was arrested on 7th or 8th of August 2007. They were all presented before court by the state on 3rd September 2007. Their contention is that the state breached section 72(3) (b). That section is in the following terms:-

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 state under that section has a burden to prove that the accused persons were brought before court as soon as was reasonably practicable. In their explanation, the state counsel having called the investigating officer stated that the high court was on its Summer Vacation when the accused persons were arrested. At that time, there was no judge sitting during the vacation period until 3rd September 2007. In the case of **Dominic Mutie Mwalimu Vrs. Republic** The court of Appeal stated that when the issue of the breach of constitutional rights under section 72(3) (b) are raised, each case is to be considered in the light of its particular circumstances. The Court of Appeal in that case 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 had to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a beach of the above provision the court must

act on evidence.”

The court takes judicial notice that apart from the High Court sitting at Mombasa the rest of the High Court stations starts their Summer Vacation from 1st August to 15th September every year. Bearing that in mind, I am of the view that the state has satisfied the burden under section 72(3) (b) by showing that the accused were brought as soon as was reasonably practicable. Since there was no judge sitting until 3rd September 2007 the accused could not be presented to court in the absence of a judge. Bearing those facts in mind, I find that the 1st 2nd and 3rd accused constitutional rights were not violated. The objection raised is dismissed. I have considered the evidence adduced by the prosecution witnesses 11 of them and I find that the same shows that the state has proved a prima facie case which will lead this court to put the accused to their defence. I now therefore inform the accused of his right to address the court either personally or by his advocate, to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence.

Dated and delivered at Meru this 30th day of October 2009.

MARY KASANGO

JUDGE