



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

**Miscellaneous Criminal Application 43 of 2009**

**REUBEN SAKASA MUNYASA ..... APPLICANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

The Petition before this court is for the Petitioner who seeks orders to the effect that his Constitutional rights as enshrined in the Kenya Constitution specifically *Section 72 (3) (b)* and *77 (2)* were violated and that this court upon finding that indeed the Petitioner's rights were violated should terminate High Court Criminal Case No.47 of 2008 and set the Petitioner free forthwith.

In his application, the Petitioner sated that he was arrested on 29<sup>th</sup> June, 2006 and was kept in police custody for 105 days before he was arraigned in court on 10<sup>th</sup> October, 2006. The Petitioner submitted that since he was charged with a capital offence, he ought to have been arraigned before the court within 14 days and that *Section 72 (3) (b)* and *77 (2)* of the Constitution were contravened.

The Respondent did not file and serve an affidavit in reply to the Petition within 14 days as required by rule 14 of the Constitution of Kenya (Supervising Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules.

The Petitioner is charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. There is no information provided by the respondent as to when the Petitioner was arrested. It can be taken that the Petitioner was detained for 104 days as the respondent has not provided any information or explanation on the application by the Petitioner. I do therefore find that the Petitioner was not arraigned before the court within 14 days as provided by *Section 72 (3) (b)* of the Constitution. This is a violation of the Petitioner's rights and it is so declared.

The next issue for determination is whether the Petitioner should be set free forthwith and join his family in the building of our great Nation. It is clear that the Petitioner's rights were infringed. However, it is unfortunate that there is no specific provision in the Constitution stating that upon finding that a Petitioner's rights have been infringed, then the Petitioner should be set free. I am alive to the decisions by the Court of appeal on this issue where Petitioners have been set free.

The important issue herein is what would have happened if the Petitioner was detained in police custody for 104 days and thereafter released without being charged in court. I believe the Petitioner would still have had his right to pursue the violation of his detention by the police and this would be a claim for damages.

It therefore follows that right to compensation for violation of one's rights as provided by *Section 72 (6)* of the Constitution is the most ideal and correct remedy in such a situation.

It is therefore my finding that the Petitioner's rights to be arraigned in court within 14 days after arrest as enshrined in *Section 72 (3)* of the Constitution were infringed. However, that infringement would not lead to the setting the Petitioner free. The Petitioner will be accorded a fair trial as provided by *Section 77* of the Constitution which trial should not be held to be unfair due to the detention of the Petitioner for

more than 14 days. I do therefore find that the criminal case facing the Petitioner shall proceed for hearing and the Petitioner is at liberty to claim compensation from the Attorney General on behalf of the Police who infringed the Petitioner's rights. High Court Criminal Case No. 47 of 2006 shall proceed for hearing. Otherwise the application is dismissed.

*Delivered, Dated and Signed at Kakamega this 21<sup>st</sup> day of October, 2009*

**SAID J. CHITEMBWE**

**J U D G E**