



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

**AT NYERI**

**Criminal Case 44 of 2007**

**REPUBLIC ..... PROSECUTOR**

**versus**

**EPHRAIM MAINA NJOGU..... ACCUSED**

**RULING**

The accused faced the charge of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Before the hearing commenced the accused raised an objection to the hearing of this case on the basis that his constitutional right as enshrined in **Section 72(3) (b)** of the Constitution of Kenya had been violated. It was stated that he was arrested on 20<sup>th</sup> August 2007 but was not brought to court until 18<sup>th</sup> September 2007. The state in response called the investigating officer to explain how the investigation was conducted. The investigating officer stated that the accused is a brother of the deceased. The accused was first arrested in February 2007 but was released within four days. He was released because the police lacked sufficient evidence which could sustain a trial. The accused was again arrested on 20<sup>th</sup> August 2007 by Cpl Shikondi. He was arrested because members of the public were threatening to lynch him for what they allege was his involvement to the murder of the deceased and the public were disappointed that the police had released him without charging him. The DCIO instructed the investigating officer to gather more evidence in the case on the accused being arrested the second time. The investigating officer persuaded the mother of both the accused and deceased to write a statement. The officer said that the mother was the only eye witness to the murder. She wrote her statement on 14<sup>th</sup> September 2007. The investigating officer was of the view that it was that statement that assisted in a decision being made to charge the accused. The accused was presented before court on 17<sup>th</sup> September 2007 after the DCIO was confident about the evidence to be presented. On 17<sup>th</sup> September 2007 the accused was not presented before a judicial officer because of a confusion over his name. He was finally brought to court on 18<sup>th</sup> September 2007.

**S 72(3)(b)** stipulates as follows:

**“A person who is arrested or detained –**

- (a) for the purpose of bringing him before a court in the execution of the order of the 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 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.”**

This area of constitutional law has of recent times become the subject of vibrant practice in our courts. In the case of **ANN NJOGU & 5 OTHERS VS REPUBLIC MISC CRIM APPLI 551 OF 2007** Hon. Justice Mutungi had the following to say:-

***“Under section 72(3) of the Supreme Law of this country, the constitution, the applicants should have been brought before the court by 12 noon on 1<sup>st</sup> August 2007. That was before the expiration of the 24 hours permitted by the constitution. I dare add that the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60<sup>th</sup> minute of the 24<sup>th</sup> Hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.***

In the case of **ALBANUS MWASIA MUTUA VS REPUBLIC CRIMINAL APPEAL NO. 120 OF 2004** the Court of Appeal had the following to say in respect of such violation:-

***“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 a 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.”***

Similarly in the case of **GERALD MACHARIA GITHUKU vs REPUBLIC CRIMINAL APPEAL NO. 119 OF 2004**, the Court of Appeal in deciding the appeal found that the Appellant had been detained for a total of 17 days from the date of his arrest to the date of being taken before court. The court of appeal in upholding his appeal had the following to say:-

***“.....although the delay of the 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 not consider that the failure by the prosecution to abide by the requirements 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 the court as soon as was reasonably practicable.”***

**Section 72(3)(b)** affords the person alleging that there is no contravention to this section an opportunity to show that the person arrested was brought before court as is reasonably practicable. The accused in this case was arrested because his life was threatened by members of the public. He was under threat to be lynched by members of his village who were aggrieved that although he was suspected to have murdered the deceased herein he had been released by the police. Everyone in this country should be alive to that situation where members of the public feel frustrated by police action of releasing people they suspect to be implicated in criminal act. The result is that such members of public take the law into their own hands and proceed to lynch such a person. It was under those circumstances that the accused was arrested. The accused mother the only eye witness to the murder had also to be persuaded to record her statement. She did so on 14<sup>th</sup> September 2007. After necessary and bureaucratic consultations the accused was brought to court. In that background and the explanation given I am satisfied that the state has met the burden placed upon it by section 72(3) (b). I am satisfied that the accused was brought to court within reasonable and practicable time. I therefore dismiss the objection raised and find that the accused constitutional rights were not violated.

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF APRIL 2008.**

**MARY KASANGO**

**JUDGE**