

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 41 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KIPKEMBOI CHUMBA *alias* KIPMSOP.....ACCUSED

RULING

The accused person was charged with the offence of **murder** contrary to **section 203 as read with section 204** of the **Penal Code**. The particulars of the offence stated that on diverse dates between 9th and 13th day of March 2005 at Kipkandule Village of Mchongai Division in Baringo District of the Rift Valley Province, he murdered **Paulina Chemitil Tarus**. Although this offence is alleged to have taken place in March 2005, the accused person was not arraigned in court until the 7th July 2006.

The accused person pleaded not guilty to the charge on 17th July 2006. The matter was set down for hearing on several occasions but the hearing never started due lack of prosecution's witnesses. On the 22nd of September 2008, Counsel for the accused person raised a preliminary objection based on the provisions of **Section 72(3) (b)** regarding the accused person's fundamental rights to a fair trial.

Counsel submitted that the Constitutional rights of the accused person were infringed upon, and he was denied a fair trial because he was arrested on 22nd February 2006, he was detained in the Police Station for a period of five (5) months. No explanation has been offered for the prolonged detention which is beyond the statutory period of 14 (days) or within reasonable time. This was an infringement of the accused person's fundamental rights and denial of a fair trial. Counsel made reference to several decisions by the High Court especially HCCC at Nakuru Petition No. 1 of 2008 where the Court followed the decision in the case of **Paul Mwangi Murunga vs. Republic Court of Appeal No. 5 of 2006**, and discharged the accused persons. The provisions of **section 72 (3) (b) of the constitution** provides as follows:

“(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.”

It is clear from the above provisions that anybody arrested for alleged commission of a capital offence should be arraigned in court within a period of 14 days or within a reasonable time. There is a long line of authorities by the High Court and the Court of Appeal, which have underlined the need for the trial court to review pertinent circumstances in every case in the interest of justice, I pay full respect to the principle that every case where an accused person alleges his fundamental rights were infringed upon by prolonged detention in police custody should be evaluated on its own merit. As much as possible the police should be given an opportunity to offer reasons. **(See the case of Albanus Mwasia Mutua V Republic CR. App. No 120 of 2004).**

In this particular case, no explanation has been offered by the prosecution, Mr **Mugambi** merely attempted to explain that the accused person went underground after the commission of the offence and was arrested after one year on the 17th February 2006, by officers from Mogotio Police Station. That may very well be so, but there was no explanation why upon arrest, the accused person was not arraigned in court. The accused person was transferred to **Mchongoi** Police Station, where the offence allegedly took place; he remained there, until the matter was brought to the attention of the State Law Office on 20th April 2006. The State Law Office advised the Police to charge the accused person with the offence of murder. Even the State Law office could not understand why the accused person was kept in police custody for such an inordinate period.

In the absence of reasonable explanation by the prosecution, I find the delay of five (5) months before arraigning the accused person in court inordinate. There is no explanation why the Police were quick to arrest the accused person before knowing where, or what offence to charge him with. This situation is further compounded by the fact that, even from the time the accused person was arraigned in court, the matter has been fixed for hearing on several occasions. Not a single witness has been availed by the prosecution. Accordingly I am satisfied that the accused person should be discharged, the circumstances under which he was arrested and detained at the police station were rather speculative rather than for the ends of justice, he is discharged of the offence of murder and set at liberty.

It is so ordered.

Ruling read and signed on 31st October, 2008

M. KOOME

JUDGE
