



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

**Criminal Case 23 of 2004**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**1. NDIKIRA MVUMBA KIZUNDU alias HAMISI .....1<sup>ST</sup> ACCUSED**

**2. CHANGOTI CHIBAO GANJA alias SAIDI .....2<sup>ND</sup> ACCUSED**

**R U L I N G**

Ndikira Mvumba and Changoti Chibao, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein are before this court on information of the Attorney General facing a charge of murder contrary to Section 203 as read with Section 204 of the penal code. The particulars in count I are that on the 9<sup>th</sup> day of December 2003, at about 12.30 p.m. at Kibokoni area within Mombasa District of the Coast Province, the duo jointly murdered Bilkis Bhaiji. In Count II, the particulars indicate that on the same date, the time and place the accused persons jointly murdered Asgarali Bhaiji. The prosecution lined up the evidence of thirteen (13) witnesses in support of its case. At the close of the prosecution's case, Mr. Monda, the learned Senior State Counsel and Mr. Gichana, learned defence counsel were called upon to make submissions pursuant to Section 306 of the Criminal Procedure Code. At this juncture, Mr. Gichana successfully sought to argue the Preliminary Objection stated in the notice of Preliminary Objection dated 22<sup>nd</sup> July 2008. The accused persons applied to have the charge preferred against them to be dismissed because the police violated their constitutional rights guaranteed under Sections 72(3) and 77(1) of the Constitution of Kenya. It is the submission of Mr. Gichana that the accused persons were held in police custody from 21<sup>st</sup> March 2004 and taken to court on 30<sup>th</sup> April 2004. It is the submission of learned defence counsel that the accused persons were held persons beyond 14 days, hence the charge should be declared as a nullity. Mr. Gichana urged this court to find the reasons given in the replying affidavit of Sgt. Erastus Ogutu to justify the delay to be unacceptable. It is further the argument of Mr. Gichana that the accused persons should not be placed in their defence because there are no sufficient evidence to link them with the offences stated in the information dated 29<sup>th</sup> April 2004.

Mr. Monda, learned Senior State Counsel opposed the Preliminary Objection by relying on the replying affidavit of Sgt Erastus Ogutu. It is his submission that the prosecution has made out a prima facie case that justify the accused persons to be placed in their defence. Mr. Monda further beseeched this court to accept the reasons for the delay to take the accused persons to court.

I have considered the evidence of the 13 prosecution witnesses. I have also taken into account the oral submissions presented by learned counsels on both sides. After a careful consideration of the evidence, I am convinced that the same incriminate the accused persons as having committed the offence stated in the information dated 29.4.04.

On this account alone, the accused persons should be placed on the defence. However the issue raised in the notice of Preliminary Objection must be determined, because if the same is upheld, then the case will have to be dismissed and the accused persons acquitted of the charges facing them. It is not disputed that the accused persons were arrested on 21<sup>st</sup> March 2004 and kept in police custody until 30<sup>th</sup> April 2004 when they were taken to court. The constitution requires suspects facing a capital offence such as murder to be taken to court within 14 days save that the court has the discretion to excuse any delay for

sufficient reasons. The court of Appeal expressed itself on the interpretation of Section 72(3)(b) of the Constitution in Dominic Mutie Mwalimu =vs= R Cr. Appeal No. 217 of 2005 (unreported) as follows:

**“The alleged breach of a constitutional right is based on S.72 (3) (b) of the constitution which provides:**

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

**(a) .....**

**(b) Upon reasonable suspicion of him 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 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”. (Emphasis ours).**

**A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).**

**The section further provides that where such a person is not taken to court within either the twenty-four hours for a non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court *as soon as is reasonably practicable* rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person is charged with a non-capital offence is 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 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 has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence.”**

Let me apply the above statement of law to this case. In the replying affidavit of Sgt. Erastus Ogotu, it is said that the police had to carry out investigations covering a distance of 4000 kms taking them to Nanyuki town next to Mt. Kenya. When the accused persons were arrested, they raised the defence of alibi at the police station. These averments were never denied nor controverted by another affidavit. It is also alleged that Dr. Mwang’ombe the Provincial Psychiatrist who examined the mental status of the accused persons at the Coast Provincial General Hospital took time to examine the accused persons because he was on leave. There is also an explanation to the effect that the postmortem forms had been misplaced and it took time to obtain copies. All these averments were not contradicted. I find the reasons given to be acceptable. I excuse the delay and proceed to dismiss the preliminary objection.

Having dismissed the Preliminary Objection, I hereby place the accused persons on their defence. The accused persons and their legal advisors should now inform court how they intend to tender the evidence in defence.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of October 2008.**

**J.K. SERGON**

**JUDGE**

Read in open court in the presence of Mrs. Umara h/b Monda for the State and in the presence of the accused person.