



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

**AT NYERI**

**Criminal Case 31 of 2007**

**REPUBLIC ..... PROSECUTOR**

**Versus**

**SAMUEL MBOGO NDWIGA ..... 1<sup>ST</sup> ACCUSED**

**PATRICK KABENGI MUKONO ..... 2<sup>ND</sup> ACCUSED**

**RULING**

The accused are charged with *Murder contrary to Section 203 as read with 204 of the Penal Code*. Before his trial commenced they raised preliminary objection based on their allegation that their constitutional rights embodied in **Section 72(3)(b)** of the Constitution were violated. The counsels for the accused persons in raising that objection were not clear of the sequence of events that took place from the date of accused arrest to the date of arraignment before court. Mr. Njuguna Kimani learned counsel for first accused submitted as follows:-

***“It does look like both accused were arrested in the year 2000. They were brought to court 2007.”***

Learned counsel Mr. Peter Muthoni for the second accused associated himself with that submission and added that the second accused was arrested on 27<sup>th</sup> January 1999 and was presented before the lower court on 26<sup>th</sup> February 1999. The state in response through learned Senior Principal State Counsel Mr. Orinda began by saying that this matter had a chequered history. That the accused was charged in High Court Criminal Case No. 55 of 2001 on 9<sup>th</sup> October 2003. The trial in that case was terminated by the Attorney General. Prior to that the death of the deceased the subject of this case was subjected to an inquest before the lower court. The lower court in the ruling of 12<sup>th</sup> May 2006 ordered the accused to be arrested. The first accused who was present at the reading of the ruling was arrested. The police thereafter put in place attempts to arrest four others that had been ordered to be charged. However the police only managed to arrest the 2<sup>nd</sup> accused. Learned advocate Mr. Kimani Njuguna in reply to the State’s submissions said that from what was said by the state counsel it was clear that the first accused rights were violated. That since the accused was said to have been arrested on 12<sup>th</sup> May 2006 but was not produced before this court until August 2007 it was clear his rights had been violated. On hearing those submissions the court adjourned the matter to enable the Learned State Counsel to produce the investigating officer in order for him to give an explanation if any of any delay in producing the accused persons before court. On the date that the investigating officer was expected to attend court, he failed to appear. Learned State Counsel on that day chose to do away with his attendance and concluded in his submissions by giving dates of the arrests of the accused which dates were at variance with the dates he had given before. On this occasion the state counsel stated that the accused were arrested on 16<sup>th</sup> February 2000 and were subjected to committal proceedings at the lower court. He submitted that that was the prevailing law as at that time. Indeed that was before Section 230 – 235 were repealed by Act 5/03. The submissions on the accused having undergone committal proceedings were supported by the proceedings of the lower court in the case No. 7/00. The accused by those proceedings were committed to trial at High Court on 17<sup>th</sup> November 2000. Nolle prosequi was entered at the trial at the High Court. What followed thereafter was the inquest. The proceedings of the inquest were also supplied to the court and they showed that the inquest commenced on 29<sup>th</sup> November 2004. The ruling on that inquest was on

12<sup>th</sup> May 2006. As submitted by the learned state counsel the first accused being present at the time of the ruling was arrested at the court. Reading through the ruling it does seem as though the second accused was by then serving a jail term. The proceedings do not however show that the first accused was arrested on the date the ruling was read. As can clearly be seen from what is stated herein before the accused, their counsels and the state counsel are not clear when the accused were arrested for this offence. The investigating officer who might have assisted to unravel this confusion failed to attend court. Under those circumstances this court finds itself unable to determine if the provisions of Section 72(3)(b) were violated. In any case in the recent past the court of appeal has found that the mere detention in excess of the period provided under Section 72(3)(b) does not amount to violation of constitutional rights. In the case of DOMINIC MUTIE MWALIMU vs REPUBLIC Criminal Appeal No. 217 of 2005 the court stated as follows:-

***“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).***

***..... 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 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 working 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.”***

To that end I find that in view of the failure to show clearly when the accused was arrested in relation to the date they were brought before court I cannot find the accused constitutional rights were violated. In view of that the preliminary objection is dismissed.

***Dated and delivered this 18<sup>th</sup> day of December 2008.***

**MARY KASANGO**

**JUDGE**