

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Case 21 of 2007

REPUBLIC PROSECUTOR

VERSUS

BENARD KIMATHI MIANGA ACCUSED

RULING

The accused person faces the charge of murder contrary to section 203 as read with 204 of the Penal Code. He raised a preliminary objection on the basis that his constitutional right was violated. It was submitted on his behalf that he was arrested on 12th Feb. 2007 and was produced before court on 21st May 2007. That was a detention of over 3 months. Section 72(3) (b) of the Constitution provides as follows:-

“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-

(3) A person who is arrested or detained:-

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

That section provides that a person arrested for a capital offence such as the one the accused faces herein the police should produce such a person before court within 14 days of being arrested. As it can be seen, the accused in this case was held in police custody for more than 14 days. The state called the investigating officer to give explanation why the accused could not be produced before court within 14 days of his arrest. The investigating officer acknowledged that the accused was arrested as submitted. He was however unable to give explanation as to why the accused could not be produced before court within 14 days. The investigating officer Chief Inspector Benjamin Mwanthi stated that he was not handling this case initially because he was transferred to Marimanti Police Station in July 2007. He said that explanation for the delay should be sought from the DCIO. Although he made that statement, the learned state counsel did not advance an application for summons to issue for the DCIO. It therefore can only be said that the state failed to meet the burden laid upon it by section 72(3) (b). I have in the criminal case No. 18 of 2005 considered the authorities that guide the court when an issue of violation of the constitutional rights is considered. Those cases are as follows:- **Albanus Mwasia Mutua Vrs. Republic** Criminal Appeal No. 120 of 2004, where the court of appeal stated:-

“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 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."

Thomas Patrick Gilbert Cholmondelye Vrs. Republic HCA No. 116 of 2007 as follows:-

"The rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake you must be prepared to be bitten by it". It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed in sections 70 to 82 inclusive of the Constitution."

The accused was in custody for 3 months. In my view, it was encumbered upon the state to give explanation for such prolonged detention. The state failed to give any explanation and accordingly I make a finding that the constitutional rights under section 72(3) (b) of the accused were violated. For that reason, the accused cannot be made the subject of a trial where his rights under the Constitution have been breached. I therefore hereby acquit the accused person of the charge of murder and I do order that the accused person be released unless he is otherwise lawful held.

Date and delivered at Meru this 2nd day of October 2009.

MARY KASANGO

JUDGE