

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 65 of 2006

REPUBLIC PROSECUTOR

VERSUS

BENJAMIN GITONGA

ACCUSED

RULING

The accused is charged in this case with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. He however raised an objection to his trial under the said charge on the basis that the state violated his constitutional rights as embodied in section 72(3) (b) of the Constitution. The accused submitted that he was arrested on 14th September 2006. Although he said that he was brought to court on 22nd November 2006 he was, according to the court proceedings, brought before the Hon. Mr. Justice Lenaola on 20th November 2006. He was therefore in custody for almost 2 months. The state conceded that he was arrested as stated and that he was brought before court on 20th November 2006. The investigating officer was called in order to give explanation to the effect that the accused person was brought before the court as soon as was reasonably practicable. He stated that the accused had assaulted the prospective witnesses who were then admitted in hospital. Since they were in hospital, their statements could not be recorded. To this end, he produced the medical record of the witnesses which showed that they were admitted in hospital on 14th September and released on 20th September 2006. The investigating officer further stated that the family of the deceased was unable to afford the money required for the post mortem to be carried out. The deceased body was at the Methodist mission hospital and being a mission hospital payment for such service had to be made. He further stated that time was taken trying to get the accused person assessed on his mental condition. The post mortem was finally carried out on 16th November 2008. That day was a Thursday The police file was forwarded to the state counsel for advise. The accused was eventually produced before court on 20th November 2006. Section 72(3) (b) 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.”

The burden is laid upon the state to prove that the accused person was produced before court as soon

as it was reasonably practicable. In the case of Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported) the Court of Appeal stated that that delay does not *ipso facto* prove that a violation has been suffered. The Court of Appeal in the case stated as follows:-

“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 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 had to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a beach of the above provision the court must act on evidence.”

In my view, the explanation given by the state counsel and the investigating officer was reasonable in the circumstances. There is evidence that the accused had attacked the witnesses and therefore their statements could not be recorded immediately he was arrested. Further, I do accept the evidence of the investigating officer that the family of the deceased were unable at first to afford payment due for the post mortem to be done. It was carried out and immediately thereafter the accused was produced before court. That in my view is reasonable and I find that the accused constitutional rights were not violated and the objection raised by him is hereby dismissed. The accused trial will therefore proceed.

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

MARY KASANGO

JUDGE