



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Case 18 of 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MOSES KOBIA NCHEBERE ..... ACCUSED**

**RULING**

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused has raised in this matter objection to his continued trial on the basis that his constitutional rights as embodied in section 72(3) (b) of the Constitution were breached. It was submitted on behalf of the accused that any further hearing of this case in view of such breach would be prejudicial to him. The accused stated that he was arrested on 25<sup>th</sup> December 2004. He was brought before court on 15<sup>th</sup> May 2005 having been held in police custody for 166 days. In response to that submission, the state admitted that there was that delay in bringing the accused before court but that such delay alone cannot entitle the accused to an acquittal if there is noble explanation is offered. The learned state counsel lead the investigating officer to give explanation for the delay in bringing accused before court. Inspector Ishah Duba stated that the accused was in police custody from the 25<sup>th</sup> December 2004 and was produced before court on 15<sup>th</sup> May 2005. That the accused was arrested by officers who were on mobile patrol along with other petty offenders. He had been arrested for assaulting the deceased. The investigating officer said there however was no formal complaint or report of the assault until the 31<sup>st</sup> December 2004. later and he did not state when, the relatives of the deceased reported that the person assaulted had died. The police then begun to investigate the case. Again, he did not give the date that the report of death was made nor when the investigation was commenced. He said that in the cause of investigation, the police discovered that the witnesses were related to the accused and because of that relationship, they were reluctant to record statement. He stated that some witnesses even disappeared. All this while, the accused was held in police custody. He said that eventually he did record statements of some of the witnesses and even then not all the witnesses attended court to give evidence. He was cross examined and responded by saying that the witnesses who disappeared had not been traced todate. He further stated that had the accused been released he would have faced the wrath of the members of public. That was the explanation given by the state for holding the accused for almost 5 months. It was indeed ten days shy of 5 months. The learned state counsel Mr. Kimathi quite rightly submitted that not all prolonged detentions at the police station would entitle an accused person to an acquittal. Indeed that is correct and the court of appeal recently expressed itself to that effect in the case of Dominic Mute Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005 (unreported). The court 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 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.”*

I need to scrutinize the reason given for the prolonged detention of the accused at the police station. The investigating officer said that when the accused was arrested, there was no formal complain made against him. The formal complaint was only made on 31<sup>st</sup> December 2004. It then therefore follows that from the 25<sup>th</sup> December to 31<sup>st</sup> December the accused was unlawfully held by the police there being no formal complaint against him. The right to liberty is one of the fundamental rights protected under the constitution. Section 70 of the Constitution provides that every person in Kenya is entitled amongst other things to the right of liberty. Section 72(1) recognizes that ones rights to personal liberty can only be deprived in cases that are set in paragraphs (a) to (f). the investigating officer failed to inform the court under which of those circumstances in paragraph (a) to (f) which lead to the accused person being denied his liberty under those paragraphs. The investigating officer however said that the accused was later told that the person he assaulted had died. The investigating officer failed to give a date when he related this information to the accused. He also did not give sufficient reason why it took him almost five months to decide to bring the accused to court. He stated that the witnesses who he could not trace at that time had todate not recorded their statements. It seems therefore even without their statements that he was satisfied with the evidence on record because he did eventually bring the accused to court to face the murder charge. Then one would ask, why did he not bring the accused person immediately he recorded the witness statements? He was obligated under the constitution to bring the accused person to court within 14 days of arrest. For him to state that the accused was kept in custody for almost 5 months for his own safety from the irate members of public is unreasonable in my view. Perhaps had the delay been a few days in which he decided to detain the accused for his own safety that explanation might have been reasonable. Section 72(3) (b) of the constitution lays a burden on the state to explain why the accused was not brought to court within the period provided therein. In this case, since the accused faces the charge of murder, he should have been brought to court within 14 days of arrest. Section 72(3) (b) is in the following terms:-

*“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.”*

A constitutional right is a right which may not be denied a person other than in the manner which is recognized under the Constitution. The jurisprudence of the Court of Appeal cases on this area of law is that where the constitutional rights of a person are violated, this could lead to an acquittal of the criminal charge. Some of those cases are 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.”*

The Court of Appeal considered those rights which are in the constitution in the case of Thomas Patrick Gilbert Cholmondeley Vrs. Republic HCA No. 116 of 2007 and stated 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 court further in that case stated thus, which is pertinent to this court;

*“We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is in the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges. We know the good book says that in the end of times the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb.”*

The state without a doubt did violate the accused rights by holding him for almost 5 months in police custody without bringing him before the court. Having found that the accused rights under the constitution were violated to allow his trial to continue would further compound that violation. I therefore hereby acquit the accused of the charge of murder and I do hereby order that the accused be released from custody unless he is otherwise lawfully held.

Dated and delivered at Meru this 2<sup>nd</sup> day of October 2009.

**MARY KASANGO**

**JUDGE**