



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

**AT MERU**

**Criminal Case 57 of 2006**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SAMWEL MWIRIGI NKANATA ..... ACCUSED**

**RULING**

The accused person is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. At the close of the prosecution's case, submissions were made by counsel for the accused that the state had not shown a *prima facie* case sufficient to put the accused person to his defence. In those submissions, counsel submitted that the accused person's constitutional rights were also violated. In this ruling, I will consider those submissions on violation of constitution rights in preference to the submissions that there was no case to answer. It is accepted by the state that the accused person was arrested on 8<sup>th</sup> July 2006. He was brought to court on 30<sup>th</sup> October 2006. He was held in custody for over 3 months. Section 72(3) (b) of the Constitution provides that where one is suspected of having committed a capital offence and he is arrested he ought to be produced before court within 14 days. Where there is failure to produce him within those days the prosecution is expected to show that he was brought before court as was reasonably practicable. That section 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.”***

When the investigating officer was questioned about this prolonged detention, in his response he stated that it was suspected that the accused committed the murder with other persons who are not before court. Those persons had not been arrested when the accused was put under arrest. The police sought the advice of the state counsel and they were advised that they should await the production of the accused before court until the other suspects had been arrested. The police who was investigating the matter said that it was reported that the other suspects were hiding in Nairobi. In his investigation, he made many trips to Nairobi. He however did not succeed to locate those other suspects and to date they had not been

arrested. That was the only explanation given by the State. On being asked whether the police considered bringing the accused to court and later seeking consolidation of his case with the other suspect if they were arrested, the officer responded by saying that such a consolidation of the cases could have been sought. He however stated that they did not take that course of action because of the advice given to them by the state counsel. It is clear that by detaining the accused person at the police station for 3 months flew against the provisions of section 72(3)(b). The rights that are embodied in the constitution for an accused person just like any other rights in the constitution are of great importance since the constitution is the supreme law of this country. The Court of Appeal in the case Criminal Appeal No. 116 of 2007 **Thomas Patrick Gilbert Chomondeley Vrs Republic** in considering the rights enshrined in the Constitution had this to say:-

***“.....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 by Sections 70 to 82 inclusive of the Constitution.”***

Similarly the Court of Appeal in the now well known case of **Albanas Mwasia Mutua Vrs Republic** Criminal Appeal No. 120 of 2004, the Court of Appeal in respect of such violation of Constitutional rights have this to say:-

***“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 prosecution failed to produce the accused person before court within the 14 days provided under section 72(3) (b). When given the opportunity to explain the delay the explanation given did not meet the threshold of that section. The police could have brought the accused to court and subsequently if the other suspects were arrested, their cases could have been consolidated. To have held the accused for 3 months whilst attempting to arrest the other suspects is not reasonable explanation at all. I have no doubt that the constitutional rights of the accused were violated. Accordingly, the trial of murder cannot continue in the right of that violation. I therefore hereby acquit the accused of the charge of murder and I do order that the accused person be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 1<sup>st</sup> day of October 2009.

**MARY KASANGO**

**JUDGE**