



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Petition 110 of 2009**

**IN THE MATTER OF SECTION 71 (2) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER SECTION 77 (2) (c) AND (e) OF THE CONSTITUTION**

**BETWEEN**

**ALBERT MORACHA BAGWASI ..... APPLICANT**

**VERSUS**

**STATE ..... RESPONDENT**

**RULING**

The applicant was charged with assault causing actual bodily harm contrary to **section 251** and stealing contrary to **section 279 (a)** of the **Penal Code**. On the first count it was alleged that on the 23<sup>rd</sup> day of November 2008 at Kisii bus park in Kisii central District jointly with others not before court, he unlawfully assaulted **David Otieno** thereby occasioning him actual bodily harm. In respect of the second count it was alleged that on the same day and place as in the first count, jointly with others not before court, he stole one bag, one wrist watch and a gold necklace from **Yunes Wambura Wambui**.

In his petition, the applicant alleged that on the same day the aforesaid complainants assaulted and inflicted him grievous harm. As a result he made a report at Kisii Police station where his complaint was registered in the Occurrence Book as OB 15/23/11/08. He was issued with a P3 form and proceeded to Kisii Level 5 Hospital where he was treated. The P3 form was filled by one **Mr. Jackson Murauni**, a Clinical Officer at the said hospital.

The applicant alleged that the Investigating Officer, one **Sgt. William Langat**, retained all the copies of P3 forms. When the case against the applicant came up for hearing, his advocate applied to be supplied with a copy of the applicant's P3 form for purposes of preparing the defence case. The trial court ordered the Investigating Officer to furnish the applicant's advocate with a copy of the P3 form as well as witness statements and the complainant's P3 forms.

The case came up for hearing on several occasions and the police were unable to furnish the applicant with a copy of his P3 form. The Investigating Officer swore an affidavit and deposed that the applicant's P3 form had been misplaced. He requested the court to direct the applicant to produce his treatment notes to enable the hospital fill another P3 form. The trial court gave the police an option of collecting a copy of the applicant's P3 form that was retained at Kisii Level 5 Hospital but the police failed to do so, the applicant alleged.

In view of the foregoing, the applicant alleged that his right to be furnished with facilities for the preparation of his defence and examination of witnesses as provided under **section 77 (2)** of the **Constitution** had been contravened. He sought a declaration to that effect. He further urged this court to declare that in view of the alleged contravention of his constitutional right aforesaid, he is entitled to an acquittal in **Kisii Chief Magistrate's Criminal Case No. 2511 of 2008**. He further urged the court to find that he is entitled to claim for damages for infringement for his fundamental rights.

Mr. Kemo, Senior Principal Prosecution Counsel, told the court that he had not received any instructions from the police and was therefore unable to respond to the petition.

Mr. Minda for the applicant relied on the petition and the applicant's affidavit on record.

From the applicant's affidavit in support of the petition, it is apparent that on 23<sup>rd</sup> November 2008 he was attended to at Kisii Level 5 Hospital. The treatment notes are annexed to his affidavit. The treatment notes also refer to the police OB No. 15/23/11/08. The P3 form in respect of the applicant is alleged to have gone missing. The issue that requires determination by this court is whether failure by the police to supply the applicant with his P3 form contravenes his constitutional right and renders his prosecution in Criminal Case No. 2511 of 2008 invalid. I do not think so.

The purpose of the P3 form was to enable the applicant demonstrate to the court that he was assaulted on the material day. That evidence can be tendered by way of the applicant's treatment notes. In any event, the applicant can still adequately defend himself of the two charges that have been preferred against him in the absence of his P3 form. The police have explained that the same was misplaced.

I do not agree with the applicant that his constitutional rights as provided under **section 77 (2)** of the **Constitution** have been violated. I dismiss this petition in its entirety.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18<sup>TH</sup> DAY OF MARCH, 2010.**

**D. MUSINGA  
JUDGE.**

**18/3/2010**

Before D. Musinga, J.

Mobisa - cc

Mr. Kisera HB for Mr. Minda for the applicant

N/A for the state

**Court:** Ruling delivered in open court on 18<sup>th</sup> March, 2010.

**D. MUSINGA**  
**JUDGE.**