



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 101 OF 2009

MACHARIA MUREU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being appeal arising from the Judgment of L. Mbugua, Ag. Principal Magistrate, in the Senior
Principal Magistrate's Court*

in Criminal Case No. 91 of 2008 delivered on 23rd April 2008 at Karatina

J U D G M E N T

Macharia Mureu, the appellant herein, was tried on a charge of assault causing actual bodily harm contrary to Section 251 of the penal code. The particulars of the offence are that on the 22nd day of February 2008 in Nyeri District of Central Province, he unlawfully assaulted **C N R**, thereby occasioning her actual bodily harm. The appellant denied the offence. The prosecution tendered the evidence of five (5) witnesses while the appellant presented the evidence of four (4) witnesses in support of their respective positions. At the end of the trial, the appellant was convicted and sentenced to two (2) years imprisonment. The appellant was unhappy hence this appeal.

On appeal, the appellant put forward the following grounds in his petition:

- 1. That the learned trial magistrate erred in accepting to start the trial of the prosecution charge which had immense violation of our constitution particularly the following section 72 subsection 3 and (B) and 77 subsection 1.**
- 2. That is I was detained in Kiamariga police station for a space in consisting for a space of more than five (5) clear days.**
- 3. That the learned trial magistrate erred in both points of law and facts in finding a conviction upon a case that was compassed by material discrepancies.**
- 4. That the learned trial magistrate erred in both points of law and facts in finding a conviction in absent of resolving the conflicting doubts and inconsistencies on the part of I the appellant.**
- 5. That the learned trial magistrate erred in both points of law in rejecting my defence which remains true.**

The most serious challenge against the judgment of the trial court is the issue relating to the breach of the appellant's constitutional rights under Section 72(3)(b) of the constitution. The record shows that the appellant was arrested on 23rd February 2008 and kept in police custody upto 27th February 2008 when he was taken to court for plea. It is obvious that the appellant was held for three straight days beyond the 24 hours fixed by the constitution. **Miss Ngalyuka**, learned Senior State Counsel sought for leave to file a

replying affidavit to explain the causes of the delay. On 10th February 2010, she was given 10 days to do so. When the appeal came up for hearing on 4th May 2010, Miss Ngalyuka informed this court that she had secured no replying affidavit to explain what hindered the police from taking the appellant to court within period fixed by the constitution. In the case of **Albanus Mwanzia v/s Republic Cr. Appeal No. 120 of 2004** the court of appeal expressed itself in part as follows:-

“An unexplained violation of a constitutional right as enshrined by Section 72(3)(b) of the constitution will normally result in an acquittal irrespective of the nature of evidence adduced in support of the charge.”

In the appeal before this court no attempt has been made by the prosecution to explain why the police did not take the accused person to court. In the absence of such an explanation, I am convinced that the police intentionally held the appellant beyond the period fixed by the constitution. I am convinced the appellant’s constitutional rights were breached. In the circumstances I will not belabour to reconsider the evidence tendered to support the charge. I hereby allow the appeal. The conviction and sentence are hereby quashed and set aside respectively. The appellant is hereby ordered set free forthwith unless lawfully held.

Dated and delivered this 16th day of July, 2010

**J. K .SERGON
JUDGE**