



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 204 of 2005**

**REPUBLIC ..... APPELLANT**

**VERSUS**

**MISHECK MUYURI ..... RESPONDENT**

***(An appeal from the decree and order of Mr. D. Morara, in Maua Criminal Case No.4480/04)***

**JUDGMENT**

The State has appealed against the decision of the lower court at Maua (Morara, RM) dismissing the case against the respondent under Section 202 of the Criminal Procedure Code.

On 8<sup>th</sup> December, 2004 the respondent was arraigned before the lower court charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code.

It was alleged that on 12<sup>th</sup> July, 2004 the respondent unlawfully assaulted Reuben Murungi thereby occasioning him actual bodily harm. The respondent denied the charge and his trial was scheduled for 15<sup>th</sup> June, 2005.

On that day it was adjourned to 20<sup>th</sup> July, 2005 on the grounds that counsel for the respondent was absent. Two witnesses in attendance. Counsel for the respondent was once again absent on 20.7.05 and the court ordered that it would be the final adjournment. A fresh date of 19<sup>th</sup> August, 2005 was fixed, when once again the hearing was adjourned to 28<sup>th</sup> October, 2005 as the case could not be reached. Two witnesses were in court.

On 28<sup>th</sup> October, 2005 according to the record, the respondent was in court but witnesses were not present. The court proceeded to dismiss the case under Section 202 of the Criminal Procedure Code. Two grounds of appeal have been raised. The appellant argues that the trial magistrate erred in dismissing the case without inquiring whether the witnesses were available.

Secondly it was submitted that the trial magistrate misdirected himself as to the applicability of Section 202 of the Criminal Procedure Code. Regarding the first ground it was contended that it is not clear from the record whether the witnesses were present or not as the court was not addressed on this issue. Learned counsel for the appellant, however did not address me on the second ground, but only urged the court to order a retrial.

Counsel for the respondent opposed the appeal arguing that the record speaks for itself and the respondent cannot be blamed for the order made by the court.

I have duly considered these submissions and note that the appellant's main complaint is that the court failed to adjourn or ascertain whether or not the witnesses were in attendance.

From 18<sup>th</sup> December, 2004 when the respondent's plea was recorded to 28<sup>th</sup> October, 2005, when the case was dismissed, for a period of nearly 10 months the case was adjourned for various reasons. Two adjournments were obtained by the respondent on account of his counsel's absence.

Once the case was adjourned as it could no be reached. The law recognizes the fact that, due to unforeseen eventualities the court may be compelled to adjourn the hearing of a case. Section 205(1) of the Criminal Procedure Code provides;

*“(1). The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present.....”*

There is, therefore, legal basis for adjournment of criminal trials. However in granting an adjournment the court must not do so as a matter of course. There must be sound justification for granting an adjournment in a criminal case as the suspect is entitled, under Section 77 of the Constitution, to a fair and speedy trial. Indeed section 72(5) of the Constitution provides that

*“(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial”*

Due to the above Constitutional safeguard, the courts must strive to avoid lengthy and unnecessary adjournments. Indeed the court is vested with powers by the supreme law in cases of delay to set the suspect free.

In Ngui V R (1985) KLR 268 at page 272 the Court of Appeal expressed itself thus:-

*“We feel strongly, however that in all such cases lengthy adjournments should be avoided and that the trial should continue from day to day until completed.....”*

The respondent having waited for his trial for nearly ten months was entitled to be released. I find that the court below properly directed itself in dismissing the case and in effect acquitting the respondent under Section 202 of the CPC. The only quarrel the appellant has with the decision is that the record does not reflect who informed the court that witnesses were not present.

It is apparent that the court record is sketchy in that it is not clear who prompted the court to record,

“Order

No witness. Case dismissed under Section 202 CPC”

The source of the fact that the witnesses were not in court is not disclosed. That, I think, is poor record keeping. The record in any trial must, as it were, speak for itself. Anybody looking at it need not import matters to fill in the gaps. However, I have noted that this is a common approach by many courts – where the court omits to record what is said by either the advocate or prosecution but proceeds instead to record its order. In this particular case I personally find that no prejudice was caused to the appellant unless it can be shown that indeed the witnesses were present.

No affidavit has been filed to state this. The court dismissed the case only after noting that there were no witnesses. This means that even the complainant was not present in which case Section 202 of the CPC applied. See also the definition of a complainant in Section 2 of the Criminal Procedure Code. I find no merit in this appeal which I hereby dismiss.

Dated and delivered at Meru this 26<sup>TH</sup> day of JULY, 2007

*W. OUKO*

JUDGE