REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 60 OF 1986

MBUVI …….COMPLAINANT

VERSUS

REPUBLIC…….……APPELLANT

JUDGMENT

October 13, 1987 **Torgbor J** delivered the following Judgment.

The appellant was convicted on two counts of assault caused actual bodily harm. There is no dispute about the injuries suffered by the two complainants. The dispute centers on the issue of the assault itself. In this appeal, Mr Ndunda has pointed out certain inconsistencies or contradictions in the prosecution evidence. On my assessment of the evidence I find that the alleged contraction refers to the different dates of assault stated by the two complainants I am satisfied on the evidence that the date given by the 2nd complainant is June 8, 1986 was erroneous as the evidence shows that she was describing the same incident described by the 1st complainant. I am satisfied therefore that the error in the dates of the assault is not material and not fatal to conviction.

Mr Ndunda also complains that the trial within a trial to test the voluntariness of the appellants confession was not properly conducted in that his client was not given an opportunity to testify before the court on the issue of voluntariness, the record shows this to be so and Mr Nyaga concedes the point. The result is that the appellant's retracted confession was not corroborated by other evidence and is unreliable. That leaves only the evidence of the 1st complainant himself as to the assault. Although he refers to another person, ie, the Hon, Kikuyu MP as being present on the scene, Mr Kikuyu did not testify. His failure to testify is regrettable. Is the evidence of the 1st complainant as to the assault believable? I think it is and I am satisfied therefore that it was the appellant who assaulted the 1st complainant and will uphold his conviction, on count one.

Mr Nyaga does not support the conviction on count two and on the evidence I will agree with him and acquit the appellant on count 2 and set aside the sentence thereto.

Bearing in mind the circumstances leading to the assault, namely the failure of the 1st complainant to pay a bill rendered for beer and vodka ordered by him thereby provoking the assault in question I am of the view that the sentence was excessive. The said sentence is therefore set aside and is substituted by such sentence as would result in the appellant's immediate release. Therefore unless the appellant is otherwise lawfully held he is to be released forthwith. No strokes to be administered. Order accordingly.

October 13, 1987

TORGBOR

JUDGE