



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 480 OF 2010**

*(From the original Conviction and Sentence in the Criminal Case No. 409 of 2010 of the Chief Magistrate’s Court at Mombasa: H.B. Yator – R.M.)*

**MARCEL MWASINGO ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **MARCEL MWASINGO** has filed this appeal against his conviction on a charge of **ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE**, by the learned Resident Magistrate sitting at Mombasa Law Courts. The particulars of the charge were that:

***“On the 5<sup>th</sup> day of October 2009 at Kwahola Village Changanwe Location in Mombasa District within the Coast Province, jointly with others not before court unlawfully [assaulted] DOMINIC MAYAKA thereby occasioning him actual bodily harm”***

The Appellant entered a plea of **‘not guilty’** to the charge. The prosecution led by **INSPECTOR AYUO** called a total of three (3) witnesses in support of their case. The complainant **‘Dominic Mayaka’** told the court that on the material day the Appellant who was his friend began to beat him up demanding his chain. **PW1** reported the matter to police. The Appellant was then arrested and charged.

On 15<sup>th</sup> November 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of assault and thereafter sentenced him to serve two (2) years imprisonment. It is against that conviction and sentence that the Appellant now appeals. **MR. SANGORO** Advocate appeared for the Appellant at the hearing of the appeal. **MR. ONSERIO**, who appeared for the Respondent State conceded the appeal. I have myself carefully perused the record of the trial before the lower court and I am in agreement with the decision of the learned State Counsel to concede this appeal. In a case of assault a key ingredient is proof that the complainant actually sustained an injury. No such proof was tendered in this court. Despite the complainant having testified that he was issued with a P3 form by the police, no P3 form was produced in this case as an exhibit. Likewise no medical evidence was adduced, no doctor was called to testify as to what if any injuries the complainant may have sustained. This is a fatal omission in the prosecution case. The complainant himself did not bother to describe to the court the type of injuries which he sustained. Indeed from his testimony **PW1** was more aggrieved by the loss of his gold chain, than by any assault. The lack of medical evidence raises a doubt as to whether such an assault did actually occur. The benefit of such doubt must be settled in favour of the Appellant. On the whole I find that the prosecution failed to prove the charge of Assault against the Appellant beyond a reasonable doubt. The learned trial magistrate erred in rendering a

conviction on the basis of such scanty evidence. I do allow this appeal. The Appellant's conviction by the lower court is hereby quashed and his 2 year sentence I also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 28<sup>th</sup> day of June 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Mulandi holding brief for Mr. Sangoro for Accused

Mr. Muteti for State