



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 462 OF 2001**

(From Original Conviction and Sentence in Criminal Case No. 2870 of 2001  
of the Resident Magistrate's Court at Mombasa – A.W. Ngugi – R.M.)

**DAVID KIMANTH BIRIVU ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The Appellant was charged and convicted for the offence of Robbery with violence contrary to Section 296 (1) of the Penal Code and sentenced to 5 years imprisonment and 3 strokes of the cane. He has preferred an appeal against both Sentence and Conviction and has raised 7 grounds which he argued together.

At the start of his trial he was first charged with stealing from the person Contrary to Section 279 (a) of the Penal Code but after the evidence of the first witness, the prosecution said the evidence pointed to an offence of Robbery with violence and asked to be allowed to substitute the charge. This was allowed and the Appellant pleaded not guilty to the substituted charge. The evidence against him was that on the material date Joseph Kyuro (PW1) was walking along an alley at 4.00 p.m. when he was accosted by 2 people. One held him and had a knife. They took from him a walkman and Kshs.200/=. PW1 screamed and a passerby, PW2 came to his rescue and his attackers ran away. He however recognized one of them as the appellant and informed PW2 that he knew the appellant as he had seen him at Kongowea market where PW1 trades in tomatoes. They both reported the incidence to the police and again PW1 said he recognized one of the assailants. He was given a note to assist him get the appellant arrested. On the 3.9.01 PW1 spotted the appellant at Mwembe Tayari and reported to the police who arrested him and handed him over to Makupa Police Station. PW2, corroborated the evidence of PW1 and so did PW3, PC. F. Mwamazi who said PW1 said he knew one of the people who had attacked him. The appellant submitted that he was charged with 2 different charges but the record is clear the first charge was substituted. He was present when the prosecutor read for him and he pleaded to the substituted charge.

In his defence, the Appellant did not deny he was known to PW1 but alleged there was a grudge as he PW1 owed him money.

The appellant was identified by recognition and the offence took place during the day at 4.00 p.m. In her judgement the trial court did consider his defence and said this was nothing but an after thought for he never put the questions regarding any grudge or money owed to PW1.

I have gone through the evidence and find the evidence adduced was safe to warrant a Conviction. As for the sentence, the same is not excessive but taking into account that he is a first offender and the value of goods stolen, I will reduce the sentence to one of 3 years and 2 strokes of the cane. The appeal shall succeed to that extent only.

Dated and Delivered at Mombasa this 4th day of April, 2003.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**