



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 130 OF 2000**

(From Original Conviction and Sentence in Criminal Case No. 32 of 1998 of the Resident Magistrate’s Court at Makueni: J. K. Kiia Esq. on 17.8.2000)

**ROSEMARY MWIKALI MUTISO ::::::::::::::::::::**  
**APPELLANT**

**VERSUS**

**REPUBLIC :::::::::::::::::::: RESPONDENT**

Coram: J. W. Mwera J.

Appellant not wishing to be present

Orinda State Counsel for Respondent

C.C. Muli

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**JUDGEMENT**

The appellant was charged under S.234 Penal Code in that on 21.2.98 at Wote Market Makueni, she unlawfully did grievous harm to Bernard Mukavi Mutua.

After trial the Learned Trial Magistrate found the appellant guilty and ordered her to serve 3 years imprisonment with effect from 17.8.2000.

In her petition of appeal the appellant said that her sworn defence was not considered and that the complainant was her husband of two children. That the two lived at the appellant’s “hotel” business premises and that they had been drinking until 4 a.m. when the fracas arose. That he fell down and hurt himself when the appellant was insisting that they go home. She also said, as she put it in her mitigation in the lower court, that she was the sole breadwinner for herself and the 2 children because the complainant had another wife.

The Learned State Counsel went over the lower court proceedings and was of the view that the conviction was proper on evidence of several eye witnesses. As for the sentence he also found it lawful save to add that this court should look at the fact that the offence was committed in the atmosphere of drunkenness. The appellant was represented in the lower court.

This court has reviewed the lower court record. The complainant (P.W.1) was about to be escorted home by a colleague who had a motor vehicle at 4 a.m. after drinking with others including the appellant. As they waited outside the appellant caught P.W.1 by the collar, took out her shoe and hit the complainant on the head; he passed out. He only came to at M.P. Shah Hospital Nairobi. That the complainant and the appellant 20 knew each other for long as they were friends. They had not disagreed and the assault was unprovoked. That even if the appellant danced with another man at Maisha Kamili Bar, P.W.1 did not in any way assault her on this account. That evidence was supported by that of Josephine Mutindi (P.W.2) who was present. She found the appellant beating P.W.1 with a shoe for the reason that she could not bear his abuses and shame before people. P.W.1 was pushed, he hit a nearby wall and fell. He was carried away to hospital. According to P.W.2, initially the appellant and P.W.1 who were friends disagreed over a lady friend the former had come with to the bar but that was resolved.

Jeremiah Malui (P.W.3) also witnessed the assault when it was in progress. P.W.2 told P.W.3 that the appellant had assaulted P.W.1 who lay on the ground unable to walk. He was unconscious.

And David Mwaniki (P.W.4) who was at this place and knew the complainant and the appellant saw the latter assaulting the former with a shoe while she held him by the shirt. He was firm that the complainant did not fall against the wall and injure himself due to drunkenness.

A P.3 form produced by Dr. Mwangi Thigiti (P.W.6) on behalf of Dr. Nzioka, stated that the complainant had been unconscious for 2 days after the assault could not see in the left eye. He had a swollen left side of head and the left upper and lower limbs were weak due to an injured right middle cerebral artery. This was certified grievous harm. The complainant had to be moved to two or so other hospitals after Makueni for the specialised treatment he required.

In the defence which was fairly long the appellant claimed that she was a friend of the complainant for long. They had a child together. That on the night in issue she traced P.W.1 to a bar, he had asked her to come and have a drink, and they drunk and danced. She danced with some men as he himself had done with women. That the complainant pulled her to go out of the hall and he kicked her. That this was between some two adjacent buildings and P.W.1 hit his hand and head on one of them. He was injured. She denied assaulting P.W.1.

The Learned Trial Magistrate reviewed all this and came to a conclusion, as this court does, that it was the appellant who assaulted P.W.1 causing her the harm as set out in the charge. He did not hit himself on the wall. That evidence was consistent and cogent, the conviction was on proper evidence.

The sentence was pronounced after the Learned Trial Magistrate went over mitigation including the relationship between P.W.1 and the appellant. He was also alive to the fact that the two had been drinking. But he the Learned Trial Magistrate did not lose sight of the serious injuries suffered and that the attack was merciless. The Learned Trial Magistrate weighed and meted out what he called a "sentence nearly equivalent to her acts," as a first offender. He handed down 3 years imprisonment and this court sees no reason to interfere with it. Maximum term would be life in prison.

In sum the entire appeal is dismissed.

Judgement accordingly.

Delivered on 13th February 2001.

**J. W. MWERA**

**JUDGE**