

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.150 OF 2000

(Being an appeal From Original Conviction and Sentence in Criminal Case No.3278 of 1999 of the Chief Magistrate's Court at Mombasa –A.W. Ngugi, RM)

**KEVIN OCHIENG APPELLANT
VERSUS
REPUBLIC RESPONDENT**

JUDGMENT

In this appeal the appellant was not called to present his appeal. The State Counsel rose to inform the court that the he did not support conviction and sentence on the grounds that evidence of identification was not free from error. The source of light was not indicated. It was at night. He referred to the judgment of Trial Magistrate on page 19 of the record where it is written

“After consideration of evidence before this court this court is in doubt that the complainant was assaulted”

I have perused the record and I believe what State Counsel states. The incident occurred at night (4.45 a.m.) and the complainant had been in a bar drinking. It was also on the street, his wife was also drunk. The circumstances of identification were not satisfactory and no identification parade was held. In the circumstances I allow the appeal, set aside conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated at Mombasa this 2nd Day of October, 2001.

**J. KHAMINWA
COMMISSIONER OF ASSIZE**

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