



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 185 of 1999**

*(Being an Appeal from Original Conviction and Sentence in Criminal Case*

*no. 2642 of 1998 of the Chief Magistrate's Court Mombasa – J. Shinganga  
SRM)*

**BENARD MUMO MUTINDA ..... APPELLANT**

**V e r s u s**

**REPUBLIC OF KENYA ..... RESPONDENT**

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

The appellant was charged with another for the offence of Robbery with violence contrary to Section 296(2) of Penal Code. After trial only the appellant was found guilty. His co accused was acquitted under Section 215 CPC.

The prosecution case is that the complainant woke up at 4.00 a.m. on 6.8.98 after she was startled by stab on her left shoulder. She grabbed the hand holding the knife and struggled with the attacker for about 5 minutes. The attacker fled. She saw the attacker. He was the person she used to live with as her husband before they disagreed and separated. After the attacker fled the complainant woke up and found that some items were missing. The knife she was being stabbed with was still in her body the maid removed it. She did not see any other attacker in the house. She then reported to the police.

PW2 Mariam Galgalo is a neighbour of the complainant. She was visiting the toilet outside her home at this time. She saw the other accused first who first looked at her and fled. She also saw the Appellant enter the complainants house. She returned to her house then she heard complainant screaming. She went outside her house. She saw the appellant run from the house of the complainant. She did not see him carry anything from the complainant house. She said she is the one who removed the knife from the complainant right shoulder where it was still stuck. At the police station the complainant was given a P3 form which was completed and produced in court by the doctor who made it. The doctor was given a history of injuries as assault by a known person. The doctor found multiple superficial 3 cuts in the left shoulder caused by a sharp weapon and certified the degree of injury as harm.

Regarding the theft no other evidence was led. PW2 said clearly that when applicant came out of the inside of complainants house he was carrying nothing. The complainant did not see the appellant take anything.

Appellant admits that the complainant was his wife up to May, 1998. There was a lamp in the room of

the complainant and she struggled with him for about 5 minutes. In the circumstances that was sufficient time to be able to recognize appellant. PW2 said

she new the appellant and on that night there was bright moonlight. We, therefore, find that the appellant was correctly identified by both PW1 and PW2.

We also do not find any mention of a grudge between the appellant and the complainant. He said “complainant is my longterm wife” He did not mention of an existing grudge. The appellant was arrested when he says he walked into the police station and this does not turn on the offence. The complainant said that the appellant had written to her a letter that he would kill her but the letter was not shown to court. Any contradiction in evidence of the witness is not material and does not prejudice the appellant in any way.

After considering the proceedings and the judgment in this case we see evidence of assault only. There is no proof of theft. There is no evidence that the appellant had gone into the house of complainant with another person. The ingredients of the offence as charged are not proved.

In the circumstances we set aside conviction for robbery with violence as charged and thus set aside sentence. However, we find the appellant guilty of the offence of assault contrary to Section 251 Penal Code and sentence him to 2 ½ years imprisonment from the date of conviction which is 14th May, 1999.

**DATED this ...5th..... Day of .....November, 2001.**

**ONYANCHA**

**JUDGE**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**