



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO 644 OF 1982**

**RUDIGER .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted by the First Class District Magistrate at Nairobi of assault causing actual bodily harm contrary to Section 251 of the Penal Code (Cap 63) and sentence to 21/2 years' imprisonment. He had appealed both against conviction and sentence but at the hearing of this appeal, Mr Lakha for the appellant limited his arguments against the sentence only.

He submitted that the sentence was based on erroneous view of the facts and was manifestly excessive. Thus in his notes on sentence the magistrate repeatedly emphasized that the appellant had assaulted the complainant for no reason at all, when in fact there is evidence that the appellant had been gravely provoked by the complainant by the manner in which the complainant had mishandled an African lady with who the appellant was dancing. Of course such provocations is no defence to the charge but it is a strong mitigating factor which the magistrate erred in ignoring totally.

The complainant and her companions had drunk wine with dinner and after that had been drinking at a night club for about three hours before coming to the place where the incident had occurred and that might well have been one of the reasons which led to a fracas between total strangers.

The injuries suffered by the complainant were classified as "harm" and no offensive weapon was used, the assault apparently having taken place at the spur of the moment.

Although the appellant was in the end, treated as a first offender, the prosecutor made a highly prejudicial statement to the magistrate that the appellant had four relevant previous convictions.

Mr Lakha had referred me to the case of Beard v R [1970] EA 448 a similar case in which a sentence of eighteen months' imprisonment for assault causing actual bodily harm was set aside and a conditional discharge substituted.

The learned Senior State Counsel agrees with Mr Lakha's submissions and is of the view that the sentence is manifestly excessive.

The appellant has been in custody for about three months and in my view he has suffered enough for his actions. In all the circumstances of the case I reduce the appellant's sentence to such an extent as to enable him to be discharged tomorrow and I so order.

**Dated and delivered at Nairobi this 27th day of September 1982**

**S.K SACHDEVA**

**JUDGE**

Cases

Statutes

Advocates

AA Lakha for Appellant

S Chana for Respondent