



**No.309**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 253 OF 2011**

**BETWEEN**

**SAMMY NYAMOHANGA MWITA.....**  
**.....APPELLANT**  
**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kehancha Senior Resident Magistrate's Criminal Case Number 265 of 2011 dated 31<sup>st</sup> day of October, 2011).*

**JUDGMENT**

1. The appellant herein, **Sammy Nyamohanga Mwita** was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that he unlawfully assaulted **Wankuru Matinde Nyamohanga** causing him actual bodily harm on the 4<sup>th</sup> day of July, 2011. The offence was allegedly committed at Mabera Trading Centre in Kuria West District within Nyanza Province. The appellant pleaded not guilty to the charge.

2. The appellant was also charged in the second count with malicious damage to property contrary to section 339(1) of the Penal Code, it being alleged that on the 4<sup>th</sup> day of July, 2011, he unlawfully and willfully damaged 4 window panes valued at kshs.1000/- belonging to **Joseph Ikaari**. This second count was later withdrawn under **Section 204** of the Criminal Procedure Code following an application by the complainant **Joseph Ikaari** who indicated that he had been compensated in full.

3. After the appellant pleaded not guilty to the charge of assault, the prosecution called four witnesses to support its claims against him. PW1 was **Matinde Wankuru, (Wankuru)** who was the complainant in the case. He stated that on 4<sup>th</sup> July, 2011 at about 10.00p.m, he was on night duty at Makutano Bar where he worked as care taker. He was in the company of **Nancy Kerubo, PW2**, and two others who did not testify. The appellant then appeared at the gate to the bar and indicated to **Wankuru** that he wanted a room for the night. The appellant was carrying a bag. After he was

informed about the cost of the room, he went into the bar and took some spirits cocktailed with sodas.

4. At about midnight, the appellant said he wanted to go and sleep. **PW2, Nancy Kerubo (Kerubo)** who worked as manager and counter keeper at the bar led the appellant towards room number 1. **Wankuru** also followed, but turned shortly afterwards to go and close the main gate towards the back exit. Shortly

thereafter a blackout hit the bar and **Kerubo** had to start the generator. She solicited the help of **Wankuru**.

5. Just around that time the appellant loudly demanded that he wanted a woman for the night, but both **Wankuru** and **Kerubo** informed him that it was not possible for them to meet his demand. After **Kerubo** retired to her room, which was room number 3, the appellant informed **Wankuru** that he did not want to spend the night at the hotel, so he asked to leave. At the same time **Wankuru** discovered that his panga, which he had put down on the ground as he went to assist **Kerubo** start the generator was not there. Before **Wankuru** could ask for it, the appellant emerged from his room holding the panga in his right hand, went to where **Wankuru** was standing and grabbed his collar and dragged him towards the step to room number 1 and told him that if **Wankuru** did not avail him a woman for the night, he (**appellant**) would kill him.

6. Again **Wankuru** informed the appellant that it was too late for him to find a woman for him. The appellant was enraged by what he heard **Wankuru** say and the appellant aimed to cut **Wankuru** on the head. As he tried to shield his head from the panga aimed at him, **Wankuru** was cut on the right hand but he was also cut on the head. The trial court took note of the wounds on both the right hand and the head.

7. Sensing more danger, **Wankuru** screamed for help. **Kerubo** and her two workmates namely Naomi and Rose ran to **Wankuru's** rescue. The three of them grabbed the appellant in order to free **Wankuru** who had been pinned to the wall by the appellant. **Kerubo** bit the appellant hard on the right hand and that forced the appellant to let go the panga. The appellant was then overpowered, pushed into room number 1 and locked up there. **Kerubo** and her workmates helped take **Wankuru** to Bugumbe Health Centre for first aid. He was later referred to Isebania Sub-District Hospital where he was attended to by a clinical officer named Oliver. At the Health Centre, it was established that **Wankuru** had suffered three (3) deep cuts on the head and one deep cut on the right hand. The cuts were sutured. Both the treatment notes from Bugumbe Health Centre and the PW3 form were produced as exhibits in the case. **Joseph Sagwe, PW4**, a clinical officer Gucha District Hospital testified about **Wankuru's** injuries.

8. The matter was subsequently reported to the police at Isebania Police Station. The case was investigated by PW3, No.65438 Police constable **Leonard Kimichir**. On the 5<sup>th</sup> July, 2011, **PC. Kimichir** carried out investigations at Makutano Bar where he saw blood stains on the door step of room number one into which the appellant had been booked. **PC. Kimichir** also saw **Wankuru** and noted the injuries sustained by **Wankuru**. **PC. Kimichir** later re-arrested the appellant, a former Administration Police Officer and subsequently charged him with the offence. **PC. Kimichir** also recovered the panga that had been used in the attack. The appellant had been arrested by Administration Police officers from Maberu Administration Camp.

9. At the close of the prosecution case, the appellant was called upon to answer the charge of assault. He gave an unsworn statement in which he said he was a police officer. He confirmed that he went to Makutano Bar for the night but stated that after he had paid for his drinks, **Wankuru** and **Kerubo** refused to give him his change, and instead attacked him, and stole some Kshs.5000/- which he was holding in the hand. In the scuffle that ensued he pushed **Wankuru** away and that the latter got cut with his own panga. The appellant stated that he used a piece of timber to defend himself. He averred that the evidence given by both **Wankuru** and **Kerubo** was made up in their attempt to make it appear that he attacked them. He also said that one of the ladies pulled his testicles in the process. In brief, the appellant stated that whatever he did was in self-defence. He referred to all the prosecution witnesses as thieves. He however told the court that he did go to hospital for treatment because he had been arrested on the spot.

10. After carefully considering all the evidence that was placed before it, the trial court found that the prosecution had proved its case beyond any reasonable doubt. The court found the appellant guilty as charged and convicted him accordingly under **Section 215** of the **Criminal Procedure Code**.

11. In mitigation, the appellant stated that he was a family man with many dependants. He also said he paid **Wankuru's** medical bills and that he had also bought them drinks. He complained that material witnesses were not called to testify. The appellant was sentenced to serve six(6) months

imprisonment.

12. The appellant was aggrieved by both the conviction and sentence. He filed his own appeal and record. The home-made grounds of appeal are not really grounds of appeal, but consist of evidence as to what happened, except for one ground in which he complains that the trial court fell into error by basing its findings on evidence that was not only contradictory but, uncorroborated. He prays that his appeal be allowed.

13. This is a first appeal. On a first appeal, this court is expected to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, remembering always that it does not have the advantage of seeing and hearing witnesses. See the cases of **Pandya –vs- R[1957] EA 336**, and **Okeno -vs- Republic[1972] EA 32**. This court is also required to weigh and consider the judgment of the trial court with a view to determining whether that court's findings can be supported.

14. I have carefully reconsidered and evaluated the evidence a fresh. I have also carefully weighed and considered the evidence of the trial court. I have also heard submissions from both the appellant and counsel for the respondent. All that the appellant asked the court to do is to give him a non-custodial sentence. Counsel for the respondent conceded to the appellant's appeal against sentence on grounds that a charge under Section 251 of the Penal Code is a misdemeanor and that upon conviction, the trial court had the discretion of giving the appellant the alternative of a non-custodial sentence or a fine. In counsel's view, the trial court did not properly exercise its discretion in sentencing the appellant to six (6) months imprisonment without the option of a fine.

15. The principles to be applied by an appellate court in determining whether or not to interfere with the sentence imposed by a trial court were laid down in such case of **Diego –vs- Republic [1985] KLR 621** and **Dismas –vs- Republic [1984] KLR 634**. In both cases, it was held that an appellate may interfere with sentence only if it is shown that the sentence is either harsh or excessive in the circumstances or if the trial court in passing sentence acted on wrong principles in exercising its discretion. Can it be said that the trial court in this case acted on wrong principles in exercising its discretion? And can it also be said that the sentence was either harsh or excessive in the circumstances?

16. A close look at the circumstances of this case has convinced this court that the answers to the two questions above are in the negative. The actions by the appellant were beastly to say the least and though he was a first offender, the trial court properly addressed its mind to the facts of the case before passing sentence. Further, a conviction of a charge under Section 251 of the Penal Code carried a maximum penalty of one(1) year imprisonment. The sentence passed by the appellant was therefore neither harsh nor excessive.

However, after considering the appellant's wanton behavior, I believe that he has learnt his lesson from the period already served in prison. It is only for this reason that I am prepared to interfere with the sentence of six months imprisonment by quashing it and in lieu thereof, I make an order sentencing the appellant to the term already served. The appellant is therefore to be released upon the rising of the court on this day of the judgment.

17. It is so ordered.

Dated and delivered at Kisii this 24<sup>th</sup> day of January, 2012.

**RUTH NEKOYE SITATI**  
**JUDGE.**

**In the presence of:-**

Present in person For Appellant

Mr. Gitonga (present) For Respondent

Mr. Bibu (present) - Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**