REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 73 OF 2011

JULIUS OMALLA OTIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence from the Senior Resident Magistrate's court at Bondo Court Criminal no. 518 of 2010)

J U D G M E N T

The appellant was charged with the offence of grevious harm contrary to section 234 of the penal code.

The particulars of the offence are that on the 7th day of November 2010 at Nyagande village in Kawino North sub location in Kadibo division, Kisumu East district within Nyanza province unlawfully did grievous harm to **Joshua Otieno**.

The appellant was convicted and sentenced to 4 years imprisonment. He has filed five grounds of appeal namely:-

1. That I did not plead guilty to the charge against me but has now appealed against the sentence not the conviction.

2. **That I have two housewives with nine children who are still young and I was the only support to the whole entire family.**

3. **That one of my sons is currently in form three at Kisumu Boys' High School and will automatically drop out of school since no-one will pay his school fees due to my incarceration.**

4. **That I promise to be a good law abiding citizen in future.**

5. **That I am requesting this honourable court for a non custodial sentence, lesser sentence or to be set free since I have already learnt to obey the law.**

The grounds of appeal together with the hand written submissions are to say the least mitigation against the sentence.

The brief facts of this case are that on 1-1-2010 at around 10 a.m. the complainant was going to the farm. He met the appellant who was armed with a panga. According to the complainant he had given the appellant Kshs. 1,200/= to do some work at the farm. With no apparent reason he attacked the complainant causing him serious injuries.

PW1 Joshua Otieno was rescued by **PW2 Pamela Akumu** and **PW3 Salome Achieng.** He was unconscious by the time he was being rushed to the dispensary. He was admitted for two days.

The appellant was later arrested and charged with the current offence. He gave his sworn evidence. He said that the complainant had taken his son's bicycle and he had never brought it back. According to him it was the complainant who attacked him.

The court did not believe his testimony. He was convicted and sentenced as earlier on alluded.

The appellant's mitigation and appeal is that he has learnt his lesson. The state counsel, **Mr. Gumo** opposed this line of mitigation. He argued that considering the circumstances of the case and the injuries sustained by the complainant, four years imprisonment was not excessive.

I have gone through the evidence and in particular the nature of the injuries sustained by the complainant. I do agree with the respondent that the appellant attacked the complainant without any provocation.

The maximum sentence for the nature of this charge is life imprisonment. I do not find this four years imprisonment to be such excessive. The appellant took the law into his hands. He is lucky that the complainant did not loose his life.

For the foregoing reasons, I shall dismiss the appeal.

Dated, signed and delivered at Kisumu this 21st day of May, 2012.

H.K. CHEMITEI

JUDGE

In the presence of:

……..……..for the state

…….for the appellant

HCK/va