



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 204 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No.276 of 2009 of the Senior Resident Magistrate's Court at Mariakani: W.F. Andayi – S.R.M.)*

**DENIS MUTEMI NZAKYE ..... APPELLANT**

**=VERSUS=**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **DENIS MUTEMI NZAKYE** has filed this appeal to challenge his conviction and sentence by the learned Senior Resident Magistrate sitting at Kaloleni Law Courts. The Appellant had been arraigned before the lower court on 19<sup>th</sup> October 2009 and charged with **INTENTIONALLY ENDANGERING SAFETY OF PERSONS TRAVELLING BY RAILWAY CONTRARY TO SECTION 233(a) OF THE PENAL CODE**. The particulars of the offence were that:

*“On the 16<sup>th</sup> day of October 2009 at 22:36 hours [at] Maji ya Chumvi in Kaloleni District within Coast Province, jointly with others not before the court, with intent to injure or endanger the safety of persons traveling by railway, intentionally smeared black oil on the railway line so as to affect or endanger the free and safe use of the Railway or the safety of persons traveling thereby”*

When the charges were read out to the Appellant he entered a plea of ‘**guilty**’ saying:

*“It’s true”*

The facts were then read out by the prosecutor **CHIEF INSPECTOR MOHAMED** as required by law. The accused maintained his plea of guilty saying:

*“I wish to state that I smeared the oil on the railway. I was with somebody and when I saw the train approaching I smeared the oil then moved aside. As it passed, I began going towards it and they saw me and arrested me”*

In so saying the Appellant gave a blow by blow description of the role which he played in the incident. This was a clear and unequivocal plea of guilty. There can be no doubt that the accused understood the proceedings as he participated fully in the proceedings which is clear from the record. I am satisfied that the Appellant’s plea of guilty was lawfully and procedurally recorded. I have no hesitation in confirming his conviction.

The trial court imposed a sentence of 15 years imprisonment on the Appellant. In my view this sentence was both harsh and excessive. The Appellant was a certified first offender. He pleaded '*guilty*' thereby saving the court from an unnecessary trial. The offence was undoubtedly serious since if the Appellant had succeeded in his plans then great loss and/or injury could have occurred. However in the circumstances the trial court ought to have considered the option of a fine. I do set aside the 15 year sentence imposed by the trial court and instead substitute a term of three (3) years imprisonment to run from the date of first conviction by the trial court.

**Dated and Delivered in Mombasa this 13<sup>th</sup> day of April 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Onserio for State  
Appellant in person