



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 246 OF 2010

[From Original Conviction and Sentence in Criminal Case No. 543 of 2009 of the Principal Magistrate's Court at Kwale: **Ogembo D.O. – P.M.**]

KENGO NYAWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **KENGO NYAWA** has filed this appeal against his conviction and sentence by the learned Principal Magistrate at Kwale Law Courts. The Appellant had been arraigned before the lower court on 8th April 2010 on a charge of **ASSAULT CAUSING GREVIOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE**. The particulars of the offence were that

“On the 15th March 2010 at Banga Location in Kinango District within Coast Province unlawfully did grievous harm to NYONDO NYAWA by hitting him on the head with a blunt object”

The Appellant pleaded guilty to the charge. As required by law the facts were read out. The Appellant maintained his plea of guilty by stating

“The facts are correct”

He was thereafter convicted and sentenced to serve five (5) years imprisonment. It is against this conviction and sentence that the Appellant now appeals. **MR. ONSERIO** State Counsel opposed the appeal.

I have perused the written submissions filed by the Appellant. In them he does not seem to take much issue with his conviction. He rather pleads for leniency expressing his regret for the incident which he asserts arose from a quarrel with his brother. Having perused the lower court proceedings I find that the Appellant's plea of guilty was properly recorded. The charge was read out in Kiswahili a language which the Appellant understood. He gave clear and unequivocal responses to both plea and facts. In mitigation the Appellant stated

“I am sorry I was annoyed”

The fact that he apologized for his actions amounts to an overt admission of guilt. I am satisfied that the Appellant's conviction was sound and I do hereby confirm the same.

The State have conceded the appeal with respect to sentence. In view of the fact that this was a dispute between brothers and the Appellant pleaded guilty thereby saving the court from having to conduct an unnecessary trial. I feel that the trial court should have exercised greater leniency. Notwithstanding the gravity of the injuries to the complainant a five (5) year prison term was in my view excessive. I therefore set aside this five (5) year sentence and substitute a term of two (2) years imprisonment to run from the date of first conviction in the lower court. The appeal against sentence succeeds.

Dated and Delivered at Mombasa this 14th day of December 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

14/12/2010