



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**  
**CRIMINAL APPEAL NO.18 OF 2008**  
**LESIIT, J**

**JULIUS KANAKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From Original Conviction & Sentence of Chuka Senior Principal Magistrate's Case No. 1256 of 2007; P. Ngare SRM)**

**JUDGMENT**

The appellant was charged with one charge of grievous harm contrary to Section 234 of Penal Code. The offence was alleged to have been committed on 7th September 2007. The appellant pleaded guilty to the charge and was sentenced to 6 years imprisonment. He now appeals against the sentence only.

The appellant has raised five grounds of appeal as follows;

1. "I committed the offence due to provocation by complainant since by the time he came at my home I had previous lost my child through natural death;
2. The complainant had come to my home to quarrel me by the time I was arranging the burial of my child;
3. I therefore beg court to reduce the sentence since it was too severe;
4. The offence was supposed to be assault not grievous harm since the complainant lied to the court by saying that I had cut him with a panga but in fact I had hit him with a stick.
5. I and the complainant were having land complaints and so there was hatred of long, long time since the land case was in court."

The learned State Counsel did not oppose the appeal but left it to the court to decide. I have considered the grounds raised by the appellant in his appeal. They are in line with his brief statement before the lower court during mitigation before sentence. In the lower court the appellant had told the learned trial magistrate that there was a land problem between him and complainant. The appellant must have been trying to explain the motive of the attack. The appellant was raising the defence of provocation but that defence is only available to a person charged with murder Contrary to Section 203 of the Penal Code.

While provocation is not a defence, it does have impact on the sentence meted out. The learned trial magistrate did not consider provocation as a mitigating factor. In fact the learned trial magistrate did not consider the appellant's mitigation at all. This is what the learned trial magistrate stated:

"I have carefully considered the plea by accused and also that he is a first offender. I order that he serves six years imprisonment."

It is a grave error on the part of a court to fail to consider mitigating factors raised by an accused person

before it. Those mitigating factors are important because they guide the court to determine the attitude the accused has towards the offence; whether he is remorseful; whether he has reformed; whether there were other relevant factors which diminish the severity of the act or omission done leading to the offence. I have considered the mitigation by the appellant and find he raised provocation as a mitigating factor in his grounds of appeal. The circumstances in which prosecution was pleaded come out more clearly. The appellant states that he was in mourning for his dead child and that in the midst of the burial arrangements the complainant went to quarrel with. Those circumstances help to demonstrate that the appellant was in a depressed state of mind at the time of the attack.

The appellant has served three years and 2 months out of the six years imprisonment. He has served more than half the period. I will allow his appeal against sentence, set aside the sentence of six years imprisonment and reduce it to the period already served. The appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Meru this 9th December 2010.

**LESIT,  
JUDGE**

**J**