



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Criminal Appeal 232 of 2008**

**RICHARD NYAGARA NYANGAI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted of grievous harm contrary to *section 234 of the Penal Code* by the Resident Magistrate Keroka and sentenced to five years in jail. The particulars of the charge were that on 30/7/2008 at Keroka Township in Masaba District within Nyanza province, he unlawfully grievously injured Maxwell Ogera (PW1). He was not satisfied with the conviction and sentence and preferred this appeal.

The brief facts of the case were that on 30/7/2008 at about 2 p.m the appellant was playing pool at Corner Bar at Keroka Township with Alfred Mayaka (PW2) when the complainant came. The appellant was not playing well, having lost previous rounds to PW2. The complainant made discourteous comment about the way the appellant was playing. A round of abuses ensued between the two as a result of which the appellant struck him with one stick on the mouth. The complainant fell down. The appellant struck him again. The complainant went to report to Keroka police station and went for treatment at Ram hospital. He was referred to Kisii Level 5 Hospital for further treatment. Medical evidence produced by clinical officer Jackson Morauri (PW4) of the Hospital confirmed the complainant lost two teeth in the upper jaw, had swollen upper jaw which was tender and had cut wound on the right upper jaw which had to be stitched. He suffered grievous harm.

To that evidence, the appellant made sworn defence denying he had assaulted the complainant, or at all. He testified that while he was playing with PW2, the complainant came to the place drunk and

staggering. He was bragging that he had money. The appellant concentrated on playing. The complainant was generally abusive. The appellant shot the black ball hard and behind him the complainant fell down. He fell on stump normally used to cut meat in the butchery. The complainant then claimed he had hit him. The appellant stated he had no quarrel with the complainant and that when the latter came being abusive he did not direct it to any particular person. The defence did not call witness.

This is a first appeal and the duty of this court is to re-evaluate the entire evidence and consider whether it was sufficient basis for a conviction. (See *Okeno .v. Republic*[1972]EA 32). This court should bear in mind that it neither saw nor heard the witnesses, and should make due allowance in this respect.

The appellant complained that the prosecution had not established his guilt beyond doubt, and that guilty intention on his part was not proved. My evaluation of the recorded evidence shows the trial court convicted the appellant on sound evidence. It was clear from what the complainant told court that he had been deliberately struck by the appellant following foul abuses between the two. PW2 and PW3 (Jackson Osano Ogara) were at the scene and their evidence confirmed the complainant's version. The court considered the defence version and correctly rejected it. The fact and extent of injury were confirmed by the medical evidence. The appeal against conviction is therefore rejected

Regarding sentence, the appellant alleged the sentence imposed was overly harsh and excessive. It is considered that the offence of grievous harm under *section 234 of the Penal Code* attracts a maximum penalty of imprisonment for life. It is a serious offence. The trial court was alive to this. In mitigation, the appellant stated he had a wife and children who solely depended on him. He sought to be forgiven. The trial court took that into consideration. It then considered the nature of the injuries suffered by the complainant and decided custodial treatment was deserved.

This court may interfere with the sentence only if it is shown that it was manifestly harsh or excessive. It may also interfere if the Court took into consideration an irrelevant factor or omitted to consider a relevant factor. (See *Wanjema .v. Republic* [1971] EA 494). My assessment is that the court considered all that there was to consider and was not influenced by any irrelevant thing. In this instance, a sentence of 5 years jail for the offence was neither harsh nor excessive.

The appeal against sentence is also dismissed.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Kemo for the State

Appellant-present

**COURT:** Judgment in open court.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**