



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII Revision**  
**Case 139 of 2009**

EUNICE NYABOKE OMBUNA ).....APPELLANTS

DEBORAH

MOKEIRA OMENYO )

-VERSUS-

REPUBLIC.....RESPONDENT

*(Being from original conviction and sentence in the Chief Magistrate's court*

*at Kisii Criminal Case No. 1413 of 2009 by C.A. OKORE DMII (PROF)*

**REVISION**

Following trial, the accused were convicted by the District Magistrate II (Prof) at Kisii of assault causing actual bodily harm contrary to *section 251 of the Penal Code* and each sentenced to serve one year in jail. The particulars of the charge were that on 16/7/2009 at Geterere village in Kisii Central District within Nyanza Province they jointly assaulted Damaris Moraa Ombuna and occasioned her actual bodily harm.

The evidence before the trial court revealed that the complainant and the accused are both married in the same home, to different brothers. There is dispute over land amongst them. On 16/7/2009 the accused attacked the complainant who was in the shamba with Charles Ombuna (PW3) and assaulted her. She suffered nail scratches, human bites and was also hit using the blunt side of a jembe. PW3 (Exhibit 1) shows the injuries amounted to harm.

In mitigation, each accused asked for pardon. She was a first offender. The magistrate observed that the offence was serious and called for deterrent sentence.

Under *section 251 of the Penal Code* the offence the accused were jointly convicted of is a misdemeanor. It is not a serious offence. The accused and the complainant were related by marriage. They are in a permanent relationship. The dispute that led to the assault related to family land. A crime committed as a result of a domestic quarrel will not usually attract a term in prison because it has been argued that since the parties are in permanent relationship, imprisoning the offender may also in effect punish the complainant, or that imprisonment may not help such a relationship but instead complicate in further. (See *Juma .V.Republic [1972] EA 437*).

The accused were first offenders who had pleaded guilty to a misdemeanor and ought not to have been asked to serve imprisonment. (See *Nilsson.V.Republic.[1970]EA 599*). There is a wide range of non-custodial sentences that the court should have considered. Imprisonment should always be the last option, and not the first, unless the offence was particularly grave, aggravated or widespread in the particular area.

Under *sections 362 and 364 of the Criminal Procedure Code* the sentence of one year jail is revised and set aside. In its place, each

accused shall pay a fine of Kshs. 5000/= in default 3 months in jail.

Dated, signed and delivered at Kisii this 25th day of November, 2009.

**A.O.MUCHELULE**

**JUDGE**