



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 63 of 2009

ELIJAH ODHIAMBO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(From original conviction and sentence in the Senior Resident Magistrate's Court, Ndhiwa,
Criminal Case No.80 of 2006 by Z.J.NYAKUNDI(SRM))**

JUDGMENT

The appellant was convicted on own plea of guilty by the Senior Resident magistrate, Ndhiwa, of grievous harm contrary to *section 234 of the Penal Code*. The particulars of the charge were that on 31/12/2005 at South Kabuocho Location in Homa Bay District within Nyanza province he jointly with another not before the court unlawfully did grievous harm to Samwel Odera Anyim. He was sentenced to 5 years imprisonment, and now appeals against the conviction and sentence.

The facts narrated to the appellant, and which he accepted to be correct, were that on 31/12/2005 the complainant, a village elder, was in company of Assistant chief of Kobita and they had gone to solve a dispute in the home of Ogambe. When they arrived the appellant picked a panga and threatened to cut the Assistant Chief. The complainant intervened by getting hold of the appellant. However, the appellant overpowered the complainant and cut him on the right eye. He was taken to hospital where he was admitted for 7 days before discharge. Report was made to Ndhiwa police which issued the complainant with P3 which was completed. The P3 form was produced in court and showed the eyeball was removed. He suffered grievous harm. The appellant was convicted, and court was informed he was serving a jail term of 2 years in Criminal Case no. 96 of 2009. He mitigated by saying he was taking care of his mother. The court took into consideration all these and sentenced him to serve 5 years in jail, and ordered the term to be concurrent with the sentence he was serving.

The record shows the proceedings were interpreted to the appellant in his mother language (Luo). I am satisfied the plea was unequivocal as required by the provisions of *section 207 of the Criminal Procedure Code* and amplified by the Court of Appeal in *Adan.V.Republic [1973] EA 445*.

Regarding sentence, it should be noted that the trial court was exercising its discretion which should not be interfered with unless it is shown that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. (See *Wanjema .V. Republic [1971]EA.493*). The appellant, without provocation, used a vicious weapon and seriously wounded the complainant, a village elder, who had come to solve a

dispute. The complainant's eye had to be removed as a result. The appellant had a previous conviction. The maximum penalty for the offence is life imprisonment. He was let off lightly. The court correctly ordered the 5 years to be concurrent to the sentence he was already serving.

I agree with Mr. Kemo for the State that the appeal lacks merits as the appellant was correctly convicted and sentenced.

The appeal is dismissed.

Dated, signed and delivered at Kisii this 11th Day of November, 2009

A.O.MUCHELULE

JUDGE

11/11/2009

11/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Mutai for State

Appellant-present

COURT: Judgment in open court.

A.O.MCUHELULE

JUDGE

11/11/2009