



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**Criminal Appeal 17 & 18 of 2009**

1. JOHN OKITUI     ]  
2. MOSES EKEYA    ] .....APPELLANTS  
                          -VERSUS-  
REPUBLIC.....RESPONDENT

**J U D G E M E N T**

The appellants John Okitui and Moses Ekeya filed two separate appeals Nos. 17 and 18 both of 2009 which were consolidated. Both were convicted of the offence of grievous harm contrary to S. 234 of the Penal Code by Principal Magistrate Busia and sentenced to serve four (4) years imprisonment. The appeal is against sentence only.

M/s Nanzushi for the appellants submitted that the appellants are pleading with the court for leniency with each of them having different factors of mitigation. The counsel explained that the appellants are not arguing that the sentence is illegal or excessive. Their appeal to the court is for consideration of special and unique circumstances surrounding the offence, the family and health concerns of the appellants.

In respect of the first appellant the counsel said that he is a family man whose children stay with his mother. The 2<sup>nd</sup> appellant is sickly and on treatment for tuberculosis, a complication following his HIV positive status.

The complainant is a close relative to the appellants and the matter has promoted strained relations in the family. The accused persons are remorseful and praying for a non-custodial sentence in order to be able to start new life. The appellants committed offence in a drunken state.

The appellants in the lower court pleaded for leniency on the same grounds as herein regarding the issue of children and sickness. The two were not represented in the trial court and gave a very sketchy kind of mitigation which may not have impressed the court to exercise leniency on them. They pleaded guilty to the offence and admitted to facts of the case. It is not indicated in the facts how the complainant and appellants are related. The incident arose from a brawl in a bar. The appellants had incurred a bill of KShs. 1130/= which they refused to pay. It is likely that the appellants were drunk at the time they assaulted the complainant.

From the facts of the case in the lower court and the mitigation given on appeal which is consistent with that presented to the trial court, I am hereby convinced that these are factors which ought to be considered. The appeal succeeds as I hereby reduce the sentence imposed on the two accused to two years imprisonment.

**F.N. MUCHEMI**  
**J U D G E**

Judgement dated and delivered on the 3rd day of December, 2009

In the presence of the appellants and the state counsel Mr. Onderi.