



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

**Criminal Appeal 77 of 2007**

**DOUGLAS OMBACHI AKORA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence in the Chief Magistrate's Court Kisii Criminal  
Case No.2206 of 2006 by C. G. MBOGO Esq., SPM)**

**JUDGMENT**

The appellant was charged with grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 11<sup>th</sup> day of October 2006 at Igemo sub location in Kisii Central District the appellant unlawfully did grievous harm to George Nyakundi Mose. After a full trial the appellant was convicted and sentenced to 30 years' imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. He raised two grounds in his petition of appeal. They are as follows:

*“1. The conviction was not supported by the*

*evidence adduced by the witnesses which*

*evidence was inconsistent and full of*

*contradictions*

*2. The sentence meted against the appellant*

*of 30 years' imprisonment is excessive and*

*unjust.”*

The facts of the case briefly stated were as follows:

On 11<sup>th</sup> October 2006 at about 3 p.m. George Nyakundi Mose, PW2, Frank Wako and Lawrence Mogeni Wako, PW3, were having a meal at Barcelona Hotel in Marani. The appellant entered the hotel and proceeded to wash his hands. In the process of wringing his hands, he shook them in such a manner that water spilt into the food which PW2 and his friends were eating. When PW2 asked the appellant why he had done so the appellant responded in a rude and uncaring manner. After the meal as PW2 was going out of the hotel he met the appellant at the door. The appellant was holding a stone and he threw the same

at PW2. The stone landed on PW2's left eye and he fell down. He was taken to Kisii General Hospital where he was treated for two days then transferred to Getembe Hospital for one week. He was discharged and after one-week stay at home he was re-admitted at Kisii General Hospital for further treatment.

The evidence of PW2 was corroborated in all material aspects by PW3. Jackson Murauni, PW1, a Registered Clinical Officer, examined the complainant on 4<sup>th</sup> December, 2006 and filled a P3 form which he produced before the trial court. He testified that the complainant's left eye bow was ruptured and as a result the complainant had lost sight of that eye.

Edwin Wawire, PW4, a police officer stationed at Rioma Police Station testified that the complainant reported the incident on the same day and thereafter the appellant was arrested by administration police officers from Mosochi.

In his unsworn defence, the appellant stated as follows:

*"I come from Bonyagatanyi village in*

*Igemo sub-location in Mwangichana Location*

*I am a hawker. I do recall on 02/12/06 I was*

*in Nyakoe when I was arrested by some*

*people who took me to Mosochi. That is all."*

The learned trial magistrate found the prosecution evidence credible and dismissed the appellant's defence since it was a mere denial. He proceeded to convict the appellant but before he passed sentence he ordered the complainant to file victim's impact statement. The same was filed and upon considering the same the learned trial magistrate sentenced the appellant to 30 years' imprisonment.

Mr. Ondari for the appellant, argued that the sentence was excessive, considering that the appellant was a first offender. He further submitted that the appellant was arrested on 3<sup>rd</sup> of December 2006 but was not arraigned in court until the 6<sup>th</sup> of December 2006. Counsel urged court to find that the appellant's constitutional rights as provided under section 72(3) of the Constitution had been violated and proceed to acquit the appellant.

Mr. Kemo, Senior Principal State Counsel agreed that the sentence that was passed by the trial court was rather harsh. As regards the alleged breach of the appellant's constitutional rights, Mr. Kemo stated that the appellant was arrested on a Sunday and the delay in arraigning him before a court was for only two days, which was not inordinate. He urged the court to dismiss that ground.

I have carefully considered the record of Appeal as well as the submissions, which were made by both counsels. From the evidence on record I am satisfied that the appellant's conviction was safe. PW2 and PW3 told the court how the appellant assaulted PW2. It is clear the appellant intentionally assaulted PW2. The appellant in his defence did not adduce any evidence to challenge the evidence of PW2 and PW3. Medical evidence that was produced before the trial court showed that the complainant's left eye was completely ruptured. That is permanent deformity.

The maximum sentence for grievous harm is life imprisonment.

Regarding the constitutional issue that was raised by the appellant's counsel, the appellant was arrested on 3<sup>rd</sup> December 2006, which was on a Sunday. The complainant's P3 form was filled by PW1 on 4<sup>th</sup> December 2006. It is not clear when the same was returned to the police. The police could not arraign the appellant in court before the P3 form filled and returned to them. Assuming that the P3 form was returned to on 5<sup>th</sup> December 2006 the appellant could only have been taken to court either on that

same day or on the following day, 6<sup>th</sup> December 2006 as was done.

Either way there was a delay for one or two days. It is not every delay in arraigning an accused person before court that would amount to breach of his constitutional right as provided under section 72(3) of the Constitution. As long as there are reasonable circumstances to justify that delay the court will not find that there was such breach. I must be appreciated that the police had to have the P3 form delivered from Rioma Police station to Kisii District Hospital a distance covering many kilometers. At times means of transport may not be easily available. In the public hospitals there is usually congestion and it may take a while before an assault victim is examined and a P3 form filled. In my view therefore I do not think there was unreasonable delay on the part of the police in arraigning the appellant in a court of law.

All in all, I find this appeal lacking in merits and I dismiss the same.

**DATED, SIGNED and DELIVERED at KISII this 28<sup>th</sup> day of July, 2008.**

**D. MUSINGA**

JUDGE

Delivered in open court in the presence of:

Mr. Mogire HB for Mr. Onderi for `the Appellant.

Mr. Kemo, Senior Principal State Counsel for the Republic.

**D. MUSINGA**

JUDGE.