

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CRIMINAL APPEAL NO. 1320 OF 2002

**(From original conviction and sentence in criminal case number 3497
of 2000 of the Senior Principal Magistrate's Court at Kibera)**

CHARLES ONYANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with three counts of causing actual bodily harm contrary to section 251 of the Penal Code. He was sentenced to a fine of 40,000/- in counts one and two and in default he would serve imprisonment for 2 years in respect of each count. In respect to the third count, he was given a fine of Kshs.20,000/- and in default he would serve imprisonment for a period of 12 months. He appealed against both the conviction and sentence. When he was given the opportunity to argue his appeal, he decided to drop the appeal on the conviction and wanted to argue the appeal on sentence only.

That is when the State Counsel, Mr. Monda, indicated that he cannot support the sentence on count one and two in relation to the period of imprisonment to be served in view of the provisions of section 28(2) of the Penal Code.

I have examined the record and the said section 28(2) of the Penal Code. I note that the proper imprisonment sentence which the trial magistrate should have imposed in respect of each of the three counts is 12 months if there would be a default in payment of the fines he imposed of Kshs.40,000/- in respect to counts one and two and 20,000/- in respect of count three. The trial magistrate therefore imposed illegal sentence of two years in respect to counts one and two. This is what Mr. Monda pointed out and invited the court to interfere with. I am in full agreement with the views of Mr. Monda. I will therefore reduce the prison sentences to counts one and two to 12 months respectively.

Since the three sentences were concurrent, the appellant would under the circumstances serve one current period of 12 months in respect of all the three counts from the date of sentencing, which is 5.5.2002. This means that he has served a period of 9 months and 7 days. Considering that he was to be considered for remission of a third of the full sentence of 12 months, he should have served only 8 months and be available for remission.

It is the order of the court therefore that the appellant be forthwith released from prison unless lawfully held there. It is so ordered.

Dated and delivered at Nairobi on the 13th February 2003

D.A. ONYANCHA

JUDGE.