

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 293 OF 2002

**(Being an appeal against Conviction and Sentence in Criminal Case
No. 193 of 2001 by the District Magistrate's Court at Taveta, G.M.
Gogwe – D.M.)**

**YOHANA MUSEMBI NDUNGUI APPELLANT
- VERSUS -
REPUBLIC RESPONDENT**

J U D G E M E N T

The appellant was having a beer together with the complainant PW2 and PW3 and others on 7.4.2001 at around 8.30 p.m. at Njukini village Taita Taveta. After a while, a quarrel started between the 2nd accused Kilingo Ndungu and the complainant. The appellant then intervened and asked them not to fight and thereafter the complainant walked out and so did the appellant. The evidence before the trial court is contradictory in that complaint says the Appellant followed and started to beat him outside and was stopped by others while, PW III says they only heard him screaming calling the Appellant's name saying he had broken his leg.

PW1, the Doctor did confirm the leg was actually broken. The complainant knew the appellant well and he even called his name as he screamed after injury to his leg.

I have also considered that there is in evidence that some other persons in the crowd wanted to beat him and that they were all from the bar. And although it is not clear how drunk all these persons were, the evidence is that the Complainant was drunk. He even said the 2nd accused pushed him to the ground wanting to beat him. In the circumstances, it is not very clear who among the many persons who tried to bit or did beat him caused the injury. There is a possibility that the injury was caused by the other persons but there is no doubt the appellant was amongst them.

Taking into account that they were all drunk and the fight involved others apart from the appellant I will reduce the sentence to one of 2 years and 1 stroke. However I see no reason to interfere with the conviction for the offence of Grievous Harm Contrary to Section 234 of the Penal Code.

The end result is therefore that the appellant's Sentence is reduced to 2 years and 1 stroke.

Dated and Delivered at Mombasa this 2nd day of May, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE