



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 60 OF 2015**

MWATSAHU JIRA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original Conviction and Sentence in Criminal Case No. 121 of 2015 of the Senior Resident Magistrate's Court at Mariakani – Hon. Gacheru - RM)*

**JUDGMENT**

The appellant was Convicted and Sentenced to four (4) years imprisonment for the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars being that:-

***“On the 15th day of November, 2014 at Mwashanga village Mwatate – Kinango sub county he unlawfully did grievous harm to Hamisi Mwatsau Mgandi”.***

The Accused pleaded guilty to the charges and he was Convicted and Sentenced to four (4) years imprisonment.

The appeal is conceded. A perusal of the record shows that after the facts were read over to the Accused and he stated that they were true. The trial magistrate proceeded to call for a probation report. That probation report was favourable for probation placement. This Court does not have the benefit of perusing the probation report as the original file has not been availed. However, it is noted that the Accused had been remanded at Likoni Children's home. The Court must have taken the Accused as a child of tender years to so do. So as to ensure that justice was done. It would have been prudent to call for an age assessment before Sentencing.

On the issue of the plea itself. Part of the facts were that upon assaulting the Complainant the Accused ran away and was arrested on 27th February, 2015. The Accused stated that he did not run away. Running away after an offence is committed, presupposes an element of guilt.

This he denied and the learned trial magistrate should not have proceeded to Sentence the Accused to four (4) years without proper Conviction.

The appeal succeeds and its allowed. Mr. Masila for the Director of Public Prosecution has urged this Court to order for a retrial. The appellant was Sentenced on 18th March, 2015. An application for bond was made on 28th April, 2015 and granted on the same day.

He served Sentence of close to four (4) months which is a short term. This Court cannot call for a probation report as that would amount to legitimizing the Conviction which was not there in the first place. The Sentence is quashed and set aside.

I find a retrial would be proper. It is ordered that this case be re-tried by a Court of competent jurisdiction.

Mention on 21st July, 2015 before the Chief Magistrate Mombasa for plea and further direction. Production order to issue.

Ruling delivered dated and signed this **13th** day of **July, 2015**.

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**M. MUYA**

**JUDGE**

**13TH JULY, 2015**

***In open Court in the presence of:-***

Learned Counsel for the prosecution Mr. Masila

Learned Counsel for the Appellant Mr. Gakuhi

Court Assistant

**M. MUYA – JUDGE**