



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL No. 24 OF 2011**

**CONSOLIDATED WITH CRIMINAL CASE No. 25 OF 2011**

***LESIT. J.***

**JAMES KARIUKI NDEGE.....1<sup>ST</sup> APPELLANT**

**MARTIN MAWIRA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellants **JAMES KARIUKI NDEGE**, hereinafter the 1<sup>st</sup> Appellant and **MARTIN MAWIRA**, the 2<sup>nd</sup> Appellant were convicted of grievous harm contrary to section 234 of the Penal Code. Each was sentenced to 10 years imprisonment.

2. The Appellants were aggrieved by the sentence and therefore filed these appeals. I have consolidated both appeals as they arise from the same trial. They each raised similar grounds of appeal namely:

- i. **That they were first offenders.**
- ii. **That each were under the influence of alcohol on day they committed the offence.**
- iii. **They each seek to be set free where sentence reduced as they have reformed.**
- iv. **The two Appellants urged their children were suffering.**

3. In his submissions during the appeal, the 1<sup>st</sup> Appellant urged the court to reduce the sentence because his children were suffering. The 2<sup>nd</sup> Appellant on his part also urged the court to check on his sentence so that he could go and care for his family.

4. Mr. Edwin Mulochi, Prosecution Counsel represented the State which is the Respondent in this appeal. The learned Counsel opposed the appeal and urged that since the offence attracted life imprisonment upon conviction, the Appellants who had gotten away with only 10 years imprisonment had received a lenient sentence.

5. I have considered the Appellants appeal against sentence. Each Appellant was found guilty of causing grievous harm to the complainant. I did consider the circumstances of the sentence as that is relevant to the issue at hand. The complainant's evidence shows that the Appellants stopped him and demanded for

the money he was carrying. On resisting the Appellants first cut him on the ribs, then on his face. The injury on the face caused the complainant to lose consciousness. By the time the complainant woke up in the hospital, he had lost one eye and Kshs.45,000/=.

6. The Appellants were charged with grievous harm under S.234 of the Penal Code which is a minor and cognate offence to Robbery with violence under S. 296(2) of the Penal Code. However the prosecution should have charged the Appellants with robbery as the complainant's complaint was of both assault and theft. The complainant's evidence supported the robbery charge.

7. This court has no jurisdiction to enhance the charge against the Appellants from grievous harm to robbery with violence. Under section 179 of the Criminal Procedure Code the court can only substitute the charge to a lesser one. That section provides:

**179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

8. For the injury caused to the complainant, 10 years imprisonment is a lenient sentence. The Appellants personal circumstances and the impact of their incarceration to their families, though part of the considerations to be had when considering a suitable sentence, must be looked at against the offence committed. For loss of an eye, a permanent damage which is irreparable, Appellants personal inconveniences and difficulties to their family is a small matter especially bearing in mind the Complainants wife has been changed for life.

9. I find that the learned trial magistrate took all these factors into consideration before passing sentence. I see no reason to disturb the sentence. The sentence was fair in all the circumstances of the case.

**10. I have come to the conclusion that the Appellants appeal has no merit. The same is dismissed and their sentences upheld.**

**DATED AND DELIVERED AT MERU THIS 17<sup>TH</sup> JULY, 2014.**

**LESIT, J,**

**JUDGE**