



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 481 OF 2007**

**JAMES GICHURU NDUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Nairobi*

*(Lesiit, J) dated 26<sup>th</sup> July, 2006*

**in**

**H. C. CR. A. NO. 172 OF 2005)**

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**JUDGMENT OF THE COURT**

At about 10.00 am on 24<sup>th</sup> July, 2003, **James Gichuru Ndungu**, the appellant, a mechanic, walked into a bar in Kagwe Market in Kiambu district known as the Star Bar. There he found other mechanics who had assembled for a meeting to discuss their work-related issues. At some point, he wanted to make a contribution but was not allowed to do so. He became angry, and there was some altercation between him and the two complainants, Parmenus Gathuru Chege, PW 1, (Chege) and James Maina Ngige, PW 2, (Maina). Thereafter the appellant left the meeting. At about 6.00 pm on the same day, the appellant walked into another bar called Cool Breeze Bar in the same area. He met Chege, apologized for what had happened the same morning, and offered Chege some beer. He then inquired about Maina, pleading with Chege to call Maina over for a beer. A short while later, Maina arrived and got seated with the group, which included the appellant and Chege. Soon thereafter, the appellant left the bar, returning some 15 minutes later, carrying something in his hands folded behind his back. He came close to Chege, and suddenly unleashed the liquid contents of the jar he was carrying onto Chege's face and body, and his face began to burn, one eye closed, and the skin began to peel. According to Chege's evidence, the substance was acid. The appellant then turned to Maina, and splashed the same onto Maina, also severely burning him. Maina also screamed for help, and eventually both Chege and Maina were taken to hospital, while the appellant was arrested and charged with two counts of causing grievous harm contrary to **section 234** of the Penal Code. After a trial before the Senior Resident Magistrate's Court at Githunguri he was found guilty and sentenced to 35 years imprisonment on each count with the sentences running

concurrently.

After his conviction and sentence, the appellant appealed to the superior court only against sentence. At the hearing of his appeal before the superior court, he chose to present written submissions. The first line of those submissions read:

***“Your Lordship, I the appellant herein do appeal against the sentence only.”***

Indeed, the record shows as is indicated by the first line in the judgment of the superior court that the appeal was against sentence only. After hearing the appeal on sentence, the learned Judge of the superior court dismissed the same, noting that the trial court had exercised its discretion according to law.

The appellant now comes before this Court on a second appeal, and he drew up the memorandum of appeal in person citing the following three grounds of appeal:

- “1. That the learned High Court Judge erred in law in upholding the conviction and failed to appreciate that the evidence before the court did not support such decision.***
- 2. That the learned High Court Judge further erred in law in upholding the conviction and doing nothing about the sentence after taking a (sic) judicial notice that it was a long sentence.***
- 3. That the learned High Court Judge also erred in law in confirming the trial Courts decision whereas the prosecution did not prove its case beyond all shadow of doubt.”***

Subsequently, on 23<sup>rd</sup> October, 2009 he filed a supplementary memorandum of appeal through his counsel, Mr. Martin O. Obuo, in which he cited the following three grounds of appeal:

- “1. THAT the learned Judge erred in law in failing to find that the alleged substance used in the alleged attack was not taken for analysis to establish its identity and whether it was capable for inflicting harm as alleged.***
- 2. THAT failure to call the government chemical analyst without any explanation from the prosecution was fatal to its case.***
- 3. THAT the learned Judge erred in law in not finding that the trial court did not comply with the mandatory provisions of section 211 of the Criminal Procedure Code.”***

Mr. Obuo, learned counsel for the appellant, conceded before us that indeed the appellant’s appeal before the superior court was against sentence only, and not conviction. The appellant abandoned his appeal against conviction before the superior court, and cannot now raise grounds to challenge conviction. And in so far as his appeal against sentence is concerned, as correctly submitted by the learned State Counsel, Mr. Victor Mule, the appeal does not lie to this Court under **section 361** of the Criminal Procedure Code. The learned counsel for the appellant conceded that there is nothing unlawful about the sentence imposed on the appellant, only that it is harsh and excessive. However, we must point out that the appropriate sentence to be meted out in any particular case is basically an exercise in discretion by a trial court. An appellate court is only entitled to interfere with the exercise of such discretion where it is shown that in coming to the sentence, the trial court took into account an irrelevant factor or failed to take into account a relevant factor or failed to appreciate the nature of the evidence or that looked at dispassionately, the sentence is harsh and excessive, as the appellant has asserted in this appeal.

For our part, we are satisfied that both the courts below took into account all the relevant factors and the appellant did not tell us anything to the contrary. It may well be that if we or any of us had been in the Judge’s position, we might have given a slightly lesser sentence than that given by the Magistrate and confirmed by the Judge but that is not the basis on which the Court can interfere.

In our view, the sentence imposed by the trial court and confirmed by the superior court was lawful and there is nothing this Court can do about it. We also think it was merited in all the circumstances of the case. This appeal accordingly fails and we order that it be and is hereby dismissed.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of February, 2010.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**