



REPUBLIC OF KENYA  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**Criminal Appeal 201 of 2009**

BETWEEN

DOUGLAS OMBACHI AKORA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii (Musinga J.) dated 28<sup>th</sup> July, 2008

in

H.C.C.R.A. NO. 77 OF 2007)  
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**JUDGMENT OF THE COURT**

The appellant **Douglas Ombachi Akora** was charged with the offence of grievous harm contrary to **Section 234** of the Penal Code. After a full trial, the Chief Magistrate's Court at Kisii convicted and sentenced him to 30 years imprisonment. Aggrieved by the said conviction and sentence, he appealed to the superior court and on 28<sup>th</sup> July, 2008 the superior court affirmed both the conviction and sentence.

The appellant has now come to this Court by way of a second appeal.

The background facts were that the complainant **Nyakundi Mose** and another person were having a meal at Barcelona Hotel in Marani, Kisii Central District when the appellant entered the hotel and as he washed his hands and wringing them, water spilt into the complainant's food. When the complainant raised the matter of the spilt water with the appellant, he left the hotel briefly and as the complainant and the other person were leaving the hotel the appellant hurled a stone towards the complainant which in turn ruptured the complainant's left eye and as a result, the complainant lost sight of the eye.

During the hearing of the appeal before us, the appellant was in person. Miss. Oundo, the learned Senior State Counsel appeared for the State. The appellant relied on two sets of grounds of appeal dated 19<sup>th</sup> June, 2009 and 19<sup>th</sup> February, 2010 respectively. The grounds raised in the earlier memorandum of appeal were the same as those raised in the later memorandum of appeal although there was one additional ground in the later memorandum of appeal concerning alleged contravention of **Section 72 (3) (b)** of the Constitution. To avoid the overlap, we will only set out the grounds in the later memorandum of appeal. The grounds raised are:

- “1. THAT the learned trial judge and magistrate erred in (sic) facts and law by convicting me without observing that my constitutional right as enshrined under section 72 (3) (b) was violated;**

2. **THAT the first appellate court erred in fact and law when it failed to consider the period the doctor examined the complainant and the date the alleged crime was committed;**
3. **THAT the first appellate court erred in (sic) facts and law when it failed to observe that the case before it was a case of a stranger and an identification parade was necessary.**
4. **THAT the first appellate court erred in law when it failed to observe that the arresting officer did not come to court and clarify the reason why I was arrested.**
5. **THAT the imposed sentence is quite harsh”.**

Out of the five grounds as set out above, as the second appellate court, only two grounds fall within our mandate, namely grounds five (5) and (1) and we propose to deal with them in the same order. As regards all the other grounds, the two courts having made concurrent findings of fact, they all fall outside our ambit. The reasons for this Court not to interfere with the concurrent findings of fact by the two lower courts, were eloquently expressed by Chesoni, Ag. J.A. (as he then was) in the case of **Stephen Muriungi & Another vs. R.** [1982 – 88] 1 KAR 360 in these words:

**“We would agree with the views expressed in the English case of MARTIN V. GLYINED DISTRIBUTION LTD. (t/a MBS FASTENINGS) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of both mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable trial could have reached that conclusion, which would be the same as holding the decision is bad in law”.**

Again, on ground five (5), we must be quick to add that the ground as worded falls outside our ambit because the appellant’s contention does not challenge the legality of the sentence.

Thus, **Section 361 (1) (a)** states:

**“A party to an appeal from a subordinate court may subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –**

**(a) on a matter of fact, and severity of sentence is a matter of fact”.**

**Section 234** of the Penal Code under which the appellant was charged, states:

**“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”.**

On our part, although as contended by the appellant, the sentence of 30 years could be said to be harsh but at the same time it is, in our opinion, lawful and for this reason as our fidelity is to the law, we cannot interfere with the sentence. In this regard, we note that the sentence was based on a victim’s impact report availed to the trial court.

Concerning ground one (1) on the alleged contravention of **Section 72 (3) (b)**, we note that the alleged violation was properly raised in the constitutional court, namely the superior court, and after making the necessary inquiry under **Section 84** of the Constitution, the court dismissed the allegation. Before reaching its decision it had made an admirable analysis of the facts relied on to support the alleged contravention and for this reason, we have nothing useful to add and consequently, we affirm the superior court’s finding on the point.

In the result, we find no merit in this appeal and the same is hereby dismissed.

It is so ordered.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of March, 2010.**

**R. S. C. OMOLO**  
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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**  
.....  
**JUDGE OF APPEAL**

**J. G. NYAMU**  
.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR