



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**CRIMINAL APPEAL 175 OF 2005**

**JAMES KABERIA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(An appeal from a judgment of the High Court of Kenya at Meru (Sitati, J.)  
dated 21<sup>st</sup> April, 2005**

**in**

**H.C.CR.A NO. 356 OF 2001)**

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**JUDGMENT OF THE COURT**

*James Kaberia*, the appellant herein, was tried before the Senior Resident Magistrate at Maua on a charge of attempted murder contrary to **section 220 (a)** of the **Penal Code** and the particulars contained in that charge were that on 2<sup>nd</sup> April, 2000 at about 5 p.m. at Gitura village in Meru North District of Eastern Province, the appellant unlawfully attempted to cause the death of **John Muirungi Mugwika** by chopping off his left hand palm and panga cuts on the head. There was an alternative charge of causing grievous bodily harm contrary to **section 34** of the **Penal Code**, but after the trial, the appellant was convicted on the main charge and the learned trial magistrate correctly made no findings on the alternative charge. Upon his conviction on the main count, the magistrate sentenced the appellant to life imprisonment.

The appellant appealed to the High Court against the conviction and sentence but by its judgment dated and delivered on 21<sup>st</sup> April, 2005, the High Court (Sitati, Ag. J as she then was) dismissed the appellant's appeal against the conviction and confirmed the sentence imposed by the magistrate. The appellant now appeals to this Court a second time and his home-made memorandum of appeal contains three grounds of appeal. Those grounds do not really raise any issue of law worth our consideration. The two courts below found, as a fact that the victim of the appellant's brutality was the Assistant Chief of the area and when he was attacked, he had gone to the appellant's home to effect an arrest for some offence in which the appellant had been implicated. The appellant came out of his house wielding a panga and there cannot be any doubt upon the recorded evidence that using the panga, the appellant chopped off the hand of the Assistant Chief and inflicted other panga cuts on the head causing a fracture of the skull. It is a wonder that the Assistant Chief survived the appellant's attack. These facts were established by the prosecution to the satisfaction of the trial magistrate and they were confirmed by the High Court. No

question of law arises or can arise on these issues, and before us, the appellant merely pleaded for mercy with regard to the sentence which he describes as harsh and excessive. The sentence was, however, lawful and that being so even if we thought it was harsh and excessive, we would not be entitled to intervene because of the provisions of **section 261 (1)** of the **Criminal Procedure Code** as that section provides that:

**“361 (1). A party to an appeal from a subordinate court may, subject to sub-section (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;**

OR

**(b) against sentence except where a sentence has been enhanced by the High Court, unless subordinate court had no power under section 7 to pass that sentence.”**

The High Court did not enhance the sentence imposed upon the appellant by the trial magistrate and the magistrate had jurisdiction to impose the sentence. Accordingly no question of law arises for our determination either with regard to the conviction or the sentence. In the event, the appeal wholly fails and we order that it be and is hereby dismissed.

*Dated at delivered at Nyeri this 4<sup>th</sup> day of August, 2006.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**