**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 172 of 2005**

**(From original conviction (s) and Sentence(s) in Criminal case No. 907 of 2004 of the Senior Resident Magistrate's Court at Githunguri (Lucy Mutai – S.R.M.)**

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

**VERSUS**

**REPUBLIC…….....……..…....RESPONDENT**

**J U D G M E N T**

**JAMES GICHURU NDUNGU** is appealing against sentence only. He had been convicted in two counts of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code**. He was found guilty and convicted which conviction he did not wish to challenge. The Appellant was subsequently sentenced to 35 years imprisonment on each count with the sentences running concurrently.

When this appeal came up for hearing, **Mrs. Gakobo** learned counsel for the State conceded to the appeal citing defectiveness in the proceedings. Counsel submitted that on 23.7.04 the trial court indicated the coram of the court was "Coram as before". Counsel submitted that the same rendered the proceedings a nullity as there was no way of determining whether the prosecutor was qualified under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**.

I have perused the record of the proceedings. On 7.7.04 and 9.7.04 the Coram of the court was indicated as follows: -

"***Before Lucy Mutai SRM***

***Prosecutor IP Nduati***

***Court clerk Kimemia***

***Accused present".***

Immediately thereafter on 23.7.04 the coram of the court was indicated as learned counsel submitted, as follows: -

"***23.7.04***

***Coram as before***

***Accused".***

In the recently decided case of the Court of Appeal, **NASORO MOHAMED MWABUJA vs. REPUBLIC CA No. 155 of 2004** (Mombasa) while dealing with a similar issue, it was held as follows: -

"***We consider that the use of the phrase, "coram as before" in the judge's or magistrate's note of proceedings must, unless there is an express contrary indication, mean that the appearance are the same as in the immediate preceeding entry. Where there is a record of the prosecutor being a named Inspector of Police and it is followed by an unbroken chain of one or more occasions where the phrase is used, the natural meaning of the use of the phrase is that on each occasion the initially named prosecutor was present.***

***It is only if there is a break in the chain of use of the phrase that it can validly be claimed that there is no evidence of the presence of the previously stated qualified officers."***

Using the rule applied in the **Nasoro case, Supra**, I find that on the two previous dates immediately preceeding the 23rd July 2004 when the hearing of the case commenced, the complete Coram of the court was indicated. It can safely be assumed that what the learned trial magistrate meant with 'Coram as before' on 23.7.04 was the Coram of 9.7.04 and that of 7.7.04 which was as I indicated earlier. In the circumstances and following the Nasoro case, I find that the proceedings were not defective.

The Appellant was found guilty of committing grievous harm to two men the Complainants in this case. The doctor's findings were that the injuries were very grave. In fact both Complainants were admitted in hospital for one year following the injuries they suffered during this attack. The Appellant burnt both Complainants using acid, according to the evidence adduced by the prosecution. The burns were still visible one year later. The wounds were unsightly looking at the P3 forms of both Complainants, exhibit 3 and 4. It affected both Complainants' faces, arms, legs and trunks. The first Complainant lost an eye as a result of the injuries.

The Appellant says he was drunk at the time and did not know what he was doing. However, the evidence adduced in court is clear that the Appellant meticulously planned the attack to the extent of acquiring the acid in advance of the attack. His action was deliberate and calculated.

The learned trial magistrate took into consideration the Appellant's mitigation and the fact that he was a first offender. The trial court also considered injuries suffered by the Complainants saying they were traumatic to both of them. That court had the opportunity to see for itself the injuries suffered by the Complainants and to consider the manner in which the attack was carried out. The learned trial magistrate found the Appellant's act "beastly and without mercy". I see no grounds to disagree with the trial magistrate's finding of fact. In any event I am satisfied on my part that the Appellant is not remorseful for what he did.

Even though the sentence imposed by the learned trial magistrate is long, I do not find it harsh in the circumstances of the case. I decline to disturb the sentence.

The upshot of this appeal is that the same has no merit and is accordingly dismissed.

Dated at Nairobi this 26th day of July 2006.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant – present

Mrs. Gakobo - State Counsel

Huka – Court clerk.

…….

**LESIIT, J.**

**JUDGE**