

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 366 of 2003

FREDRICK NDORIA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from both conviction and sentence of the Chief Magistrate's Court at Nyeri in

Criminal Case Number 477 of 2003 by Kaburu Bauni – C.M.)

J U D G M E N T

Fredrick Ndoria Kamau hereinafter referred to as the Appellant was tried and convicted by the Chief Magistrate Nyeri for the offence of Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. He was placed on probation for a period of 12 months.

Notwithstanding the leniency of the sentence, the Appellant has appealed against his conviction and sentence. His grounds of appeal includes the fact that the case against him was partly prosecuted by an unqualified person, that the evidence adduced against him was insufficient to sustain his conviction, and that the trial magistrate erred in accepting the evidence of his wife.

The particulars of the charge against the Appellant alleged that He assaulted Lydia Wangui Gicheru (*complainant*). It is evident from the record of proceedings of the Lower Court that the case against the Appellant was partly prosecuted by one Senior Sgt. Kigera a person who was not competent to prosecute as per Section 85 (2) of the Criminal Procedure Code. The trial was therefore a nullity and the Appellant's conviction cannot stand.

I have further considered the evidence that was adduced before the trial magistrate. I find that there was no evidence that Anastasia Wambui Murimi (P.W.4) was a wife of the Appellant. The fact that they may have lived together and sired a child does not necessarily prove that she was his wife. I find that the trial Magistrate who saw and assessed the demeanour of the witnesses chose to believe the Complainant's version of the events and I have no reason to depart from his finding. I have also confirmed that the trial magistrate duly signed his original judgment and the allegation that the judgment was not signed is not correct.

I concur with the learned Principal State Counsel that this would have been an appropriate case for a retrial were it not for the fact that the judgment has been served.

I do therefore allow the appeal, quash the conviction and set aside the sentence imposed.

These shall be the orders of this court.

Dated, signed and delivered this 29th day of May of 2006.

H. M. OKWENGU

JUDGE