



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 797 OF 2003**

From Original Conviction And Sentence In Criminal Case No. 42

Of 2003 Of The Resident Magistrate's Court At Githunguri

**JOHN NJAU WAWERU**  
**AMOS GACHOMBA WAWERU**  
**SAMUEL KARANU WAWERU**

**PETER WANYOIKE WAWERU.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were charged with Assault causing actual bodily harm, contrary to section 251 of the Penal Code. The said offences were said to have been committed on 25th December 2002, and the record shows that the appellants were arrested on 13.1.03.

Following a full trial, the appellants were all convicted as charged. The trial Court then sentenced the first 3 appellants to imprisonment for 3 years, whilst the 4th Appellant was sentenced to a fine of shs 20,000/=, in default of which he was to be jailed for 3 years.

The appellants then appealed against conviction and sentence. When the appeals came up for hearing, learned State Counsel, Mr. Olengo conceded the appeal. He was right to do so because the prosecution had been conducted by an unqualified public prosecutor, one CPL Ongeru. By conducting the prosecution, the unqualified prosecutor rendered the entire trial a nullity. Consequently, I now have no option but to quash the conviction and set aside the sentence.

When I asked the respondent if they were seeking a retrial, Counsel answered in the negative. He submitted that as the appellants had already served about a – half of the sentence, it would be against the interests of justice to have them face a retrial. I accept as reasonable, the stance taken by the learned State Counsel. In the circumstances, I do now direct that the appellants, who are in custody, be set at liberty unless they are otherwise lawfully held.

However, before I conclude this judgment, I am obliged to ask counsel for the appellants, Mr. Gathii Advocate, to impress it upon his clients that they were set free on a technicality.

The fact that they live in the same neighborhood as the complainants, will pose a challenge. However, it is imperative that all the parties seek to maintain peace. I have deemed it necessary to make these remarks, because in my reading of the evidence, and also from the observation of the learned trial Magistrate, the appellants did not appear remorseful for their actions.

**FRED A. OCHIENG**  
**AG.JUDGE**

**FURTHER ORDERS**

If the 4th appellant did pay the fine, the same should now be refunded to him.

**FRED A. OCHIENG**

**AG. JUDGE**

In the presence of

Mr. Olengo for State

Gathii for Appellants

Mr. Odero Court clerk