

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 282 & 283 OF 2001

GABRIEL GAITHO KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JOHN CHEGE GAITHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Gabriel Gaitho Kamau (hereinafter referred to as the Appellant was jointly tried with his son John Chege Gaitho by the District Magistrate Kigumo for the offence of grievous harm contrary to section 234 of the Penal Code. They were both convicted and each sentenced to 4 years imprisonment plus 3 strokes of the cane. Being dissatisfied each appealed against conviction and sentence. At the hearing of the appeals however John Chege Gaitho appears to have developed cold feet and therefore withdrew his appeal. I have considered the proceedings and judgment of the trial magistrate but do find that the same cannot stand for the following reasons.

First the appellant was tried and convicted of the offence of causing grievous harm contrary to section 234 of the Penal Code. However, the evidence of the clinical officer John Kimani (P.W.1) who examined the complainant and filed his P3 form testified that he assessed the complainant's injury as "harm." There was therefore no evidence that the Appellant caused grievous harm to the complainant. Secondly, it is evident that the hearing of the case commenced on 19th April 2001 when P.W.1 testified. The complainant subsequently testified on 22nd May 2001.

However by this time the appellant had neither been arrested nor charged. In fact the appellant was arrested following an order made by the court on 22nd May 2001. On 28th May 2001, a new charge was substituted charging the Appellant and John Chege Gaitho jointly. The matter then came up for further hearing on 18th June 2001 when the hearing continued. That is to say that the Appellant did not have the benefit of hearing the evidence of the clinical officer and the complainant. This was highly irregular and prejudicial to the appellant. It also amounted to denial of a fair hearing.

For these reasons the appellants conviction was not safe. Accordingly I do allow his appeal, quash the appellant's conviction and set aside the sentence imposed on him. The appellant shall be set free unless otherwise lawfully held. Although John Chege Gaitho withdrew his appeal I find that his conviction for the offence of causing grievous harm contrary to section d234 of the Penal Code was irregular as there was clear evidence that the complainant suffered harm and not grievous harm.

In exercise of revisionary powers under section I do quash the conviction in respect of grievous harm and substitute a conviction against John Chege Gaitho for the offence of Assault contrary to section 251 of the Penal Code. In consequence thereof, I revise the sentence imposed on John Chege Gaitho to the period already served and order that John Chege Gaitho be set free unless otherwise lawfully detained.

Dated this 21st day of June 2005

H. M. OKWENGU

JUDGE