

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

Criminal Appeal 257 of 2003

**(From the Conviction and sentence of J. K. Kiia, D.M.I in Makueni
Senior Resident Magistrate's Court. Cr. C. No. 22 of 1999)**

MATHIAS MUSAU SUVI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant, Mathias Musau Suvi, was charged with two counts of the offence of grievous harm contrary to Section 234 of the Penal Code, one count of assault causing actual bodily harm contrary to section 251 of the Penal Code; and a fourth count of Malicious damage to property contrary to section 339 (1) of the Penal Code. He was convicted in respect of all the four counts and sentenced to six years imprisonment in respect of each of the first and second grievous harm offences. He was also given two years for the third count of assault and was discharged in respect of the 4th count of malicious damage. The appellant was given strokes of the cane in addition to the sentences in count one to three. The sentences were to run concurrently.

The State Counsel, on the hearing of this appeal, conceded the appeal on the ground that the prosecutor who conducted the prosecution at the lower court, was not qualified as provided under Section 85 of the Criminal Procedure Code. He however as well asked for a retrial because he argued that the witnesses who had given evidence are still available and the offences are serious.

This court has perused the record and is satisfied that the offences are serious and taking the State Counsel's word, the court accepts that prosecution witnesses are available. The court notes however that the appellant has so far served about 2½ years of the maximum concurrent sentence of 6 years. That means that he has served a substantial part of the sentence. A retrial in my view, would open a further risk if the appellant to be sentenced to another period in prison. That will amount to punishing him twice, somehow. That will not be in the interest of justice. The court's decision therefore is to refuse a retrial.

The end result is that the appellant's appeal must be allowed. The convictions in respect to all the counts are quashed and the sentences thereon are hereby set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held in prison.

It is so ordered.

Dated and delivered at Machakos this 19th day of December, 2005.

D. A. ONYANCHA

JUDGE