

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 299 OF 2003

**(From Original Conviction and Sentence in Criminal Case No. 204 of 2003
of the Resident Magistrate's Court at Wundanyi A. Ngugi, RM)**

KADEGE MWAGAFWA APPELLANT
- Versus -
REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charged with the offence of assault causing actual bodily harm. After trial before the Resident Magistrate at Wundanyi he was convicted and sentenced to serve three years imprisonment. He has only served 5 months.

Miss Mwaniki the State Counsel concedes that the trial was a nullity as the prosecution case was conducted by a police constable contrary to section 85(2) of Criminal Procedure Code but she is asking for a retrial. This is because the complainant is said to have suffered serious injuries.

As the State has conceded the appeal on conviction, I quash the conviction and set aside the sentence. On re-trial, I have considered the submission by the State Counsel that the complainant suffered serious injuries. I have also considered what the Appellant has stated in court that he has served five months imprisonment and that he has a family to look after. The interest of the complainant and the public at large have also been considered. The record shows that the Appellant was properly convicted.

In the circumstances I order that the accused be re-tried before another Magistrate at Wundanyi or Voi. I further order that Appeal to be mentioned before the Chief Magistrate on 23/3/2004 for directions as to which court the case should be referred for retrial.

DATED this 19th day of February 2004.

D.K. Maraga
Ag. JUDGE