



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL MISC. APPL. NO.21 OF 2004**

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira in Criminal Case No.899 of 2003 – P. M. MULWA ESQ., D.M.II PROF)

**EVANS ATERA NYARIKI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

This case has come before me for an application for revision. The applicant who was the accused in Nyamira R.M. ccr.no.899/2003 was charged with the offence of assault c/s.251 Penal Code in that on 13/11/2003 at Kegogi sub-location he unlawfully assaulted OMWENGA HEZEKIA occasioning him actual bodily harm. The applicant pleaded not guilty and full hearing proceeded before MULWA D.M. The applicant was put on his defence and he chose to remain silent. The learned magistrate wrote his judgment and found the applicant guilty as charged. He was convicted. When asked to mitigate the applicant told the court:

“I am sometimes sick. My head at times is unstable and I do not know what I am doing. Sometimes I am well and my father takes me for treatment.”

The learned magistrate then ordered applicant to be examined for his mental status. This was done and the doctor concluded the applicant has a mental problem and cannot be able to stand trial. There after the magistrate having concluded that the applicant was insane ordered that he be detained in a Mental Hospital. In the application and affidavit it was deponed that applicant is still at G. K. Prisons Kisii. The court did not indicate the hospital he was to be detained. The applicant never raised a defence of insanity. If he did and the court was convinced he insane when he committed the offence it would have returned a verdict of guilty but insane. However the court when it tried the applicant it was not aware that he was insane. In the case of KAPLOTWA s/o TARINO VS R. (1957) E.A. 533 the court held that in such a situation the conviction should be quashed and a retrial ordered. I therefore quash the conviction of the applicant.

There is the issue of retrial. I note that the applicant was convicted way back in Dec.2003 and he had been in prison since that time. It will not be fair and just to subject him to a further trial. I note he was on bond when the trial was going on. In mitigation he said his father used to take him to hospital. I will therefore order that he be released forthwith into the custody of his father who is to continue ensuring that he attends treatment. It is so ordered.

Signed, dated and delivered on 20th May 2004

**KABURU BAUNI**

**JUDGE.**

**20/5/04**

