

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.376 OF 2002

**(From Original conviction and sentence in Criminal Case No.248 of
2002 of the Chief Magistrate's Court, Mombasa)**

**JOAKIM ANAEL SAID APPELLANT
VERSUS
REPUBLIC RESPONDENT**

J U D G M E N T

JOAKIM ANAEL SAID (appellant) and HAMAD BAKARI were convicted of offence of Grievous Harm contrary to Section 234 Penal Code, in that on the 6th April 2002 at about 7.30 p.m. at Kimondia Village in Taita Taveta District unlawfully did grievous harm to Hamisi Fredrick.

The appellant was sentenced to serve three years imprisonment and to receive three strokes of the cane while Hamad Bakari, who was aged 16 years, was placed on three years probation with effect from the 2nd October 2002.

The appellant has now appealed against conviction, and one of the grounds which he has raised is that the criminal proceedings in the lower court were a nullity as the prosecution was conducted before the trial magistrate by an unauthorised public prosecutor, Senior Sergeant Kalombi, contrary to Section 85(2) of the Criminal Procedure Code.

Mr. Margaret Mwangi, learned Principal State Counsel, has conceded this point and has gone further to apply for a retrial which the appellant does not object.

For the above reasons this appeal is allowed, the conviction of the appellant and Hamad Bakari is quashed, the sentence of three years imprisonment and three strokes of the cane passed against the appellant, and three years probation passed against Hamad Bakari are hereby set aside.

I order a retrial to be conducted before a different magistrate but of competent jurisdiction for the same offence of Grievous Harm contrary to Section 234 Penal Code.

For this purpose I order that the appellant be released from prison and is now committed into the custody of the police at Central Police Station Mombasa. He is to be charged before the Senior Principal Magistrate Mr. Mushelle on the 3rd September 2003.

Hamad Bakari, who is serving a probation term, is to be recharged jointly with the appellant.

It is so ordered.

Dated and delivered this 2nd September 2003.

A.G.A. ETYANG

JUDGE