



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 9 OF 2015**

**BETWEEN**

**KENNEDY ODHIAMBO OTIENO .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Kehancha Court Criminal case No. 274 of 2014 delivered on 12<sup>th</sup> May, 2014 by Hon. C. M. Kamau – Ag. SRM)*

**JUDGMENT**

1. **Kennedy Odhiambo Otieno**, the appellant, pleaded guilty to the offence of being in possession of explosives contrary to **section 89 (1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and was sentenced to 7 years imprisonment. He was found in possession of two (2) feet Det code, Explo-get, super power 90 booster, two electrical detonators number 33, and a dry cell. It was alleged in the charge that he had possession of these items in circumstances which raised a reasonable presumption that the explosives were intended to be used in a manner prejudicial to public order.

3. In mitigation he stated that he engages in digging wells and that he was going to use the same to blast rocks which proved to be hard.

4. The learned Magistrate did not consider the fact that the accused in mitigation raised a plausible defence to namely that he used the explosives in digging wells. **Section 89 (1)** of the *Penal Code* does not preclude such a defence as it provides;

*89(1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years. [Emphasis mine]*

4. As the mitigation raised a plausible defence, the plea was equivocal hence the conviction and sentence are set aside. The appellant shall be retried and shall remain in custody in order to plead before the Kehancha Principal Magistrates Court on **15<sup>th</sup> May 2015**.

**DATED and DELIVERED at MIGORI this 14<sup>th</sup> day of May 2015.**

**D. S. MAJANJA**

**JUDGE**