REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 169 of 2006

OMAR SAID OMAR *alias*

AHMED ALI MOHAMED..……..…... APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An Appeal from the Judgement of Senior Principal Magistrate Mrs. R.A. Mutoka dated 4th April, 2006 in Criminal Case No. 1274 of 2005 at Nairobi Law Courts)

JUDGEMENT

1. FIVE CRIMINAL CHARGES

Omar Said Omar Ahmed alias Ahmed Ali Mohamed was charged, in the first count, with the offence of being in possession of firearms contrary to s.89(1) of the Penal Code (Cap. 63, Laws of Kenya).

The particulars in the first count were that the appellant jointly with others not before the Court, on 11th August, 2003 in the Ziwani area, in Mombasa District within Coast Province, had in their possession, without reasonable excuse, five light anti-tank weapons, serial Nos. EE057, HED 51201, AE 263205, BE 33-2706 and BE 33-0149 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

To the first count, there was an alternative charge: being in possession of a firearm without a firearm certificate contrary to s.4(1) as read with s.4(3) of the Firearms Act (Cap. 114, Laws of Kenya). And the particulars were that the appellant, jointly with others not before the Court, was found, on 11th August, 2003 in the Ziwani area of Mombasa District aforesaid, in possession of five light anti-tank weapons, of the serial numbers aforementioned, without a firearm certificate.

The appellant was charged in a second count, with an offence identical to that in count 1, though the particulars were different: that he, on the same date and in the same area, had in his possession, without any reasonable excuse, one hand grenade, S.No. 93PL – 61, an explosive, in circumstances which raised the reasonable presumption that the said explosive was intended to be used in a manner prejudicial to public order.

There was an alternative charge to this count: being in possession of ammunition without a firearm certificate contrary to s.4(1) as read with s.4(3) of the Firearms Act. And the particulars were that at the same place and on even date, the appellant jointly with others not before the Court, was found in possession of the explosive aforementioned, without reasonable excuse, and without a firearm certificate.

The appellant was charged, in count 3, with the offence of being in possession of ammunition without a firearm certificate contrary to s.4(1) as read with s.4(3) of the Firearms Act. The particulars were that the appellant, jointly with others not before the Court, was found on the date and place aforementioned, in possession of 177 rounds of ammunition of 762 mm. calibre, without a firearm certificate.

In count 4 the appellant was charged with the offence of making a document without authority contrary to s.357(a) of the Penal Code. The particulars were that the appellant, on or before 29th August, 2000 at Mombasa, with intent to deceive, and without lawful authority, made a certain document, namely a national identity card, S.No. 23869938 in the name of Ahmed Ali Mohammed purporting to be a national identity card issued by the National Registration Bureau.

The appellant faced a fifth charge, of uttering a false document contrary to s.353 of the Penal Code. The particulars were that the appellant, on or about 26th June, 2003 at Mombasa, knowingly and fraudulently, uttered a certain forged identity card (of the serial number aforementioned) to *Justus Mwadime* purporting to be a photocopy of a genuine identity card issued by the National Registration Bureau.

2. FINDINGS AND ORDERS OF THE TRIAL COURT

After hearing 16 prosecution witnesses, a number of them on first testimony and then on recall, and the unsworn defence statement, and after considering the submissions of counsel on both sides, the learned Magistrate conducted an analysis of the evidence, which led her to the findings that –

(i) charges in counts 1, 2 and 3 had been proved beyond reasonable doubt;

(ii) the charge in count 5 was not proved – and consequently, acquittal ordered on this count.

The learned Magistrate found that:

"Given the fact that the accused person concealed his identity when he rented his flat, and [taking into account] the circumstances surrounding his arrest and the recovery of the firearms from his house, I must reach the conclusion that he was in possession of the firearms in equal measure as *Faisal* [who killed himself in a self-detonated explosion] and the third, unknown tenant. It is not conceivable that these firearms were ferried into that flat after the arrest of the accused, because PW2, PW3 and PW5 have stated that it [the flat] only had three tenants who ceased living [therein] all at once. So even though on 11th August, 2003 the accused person was not in actual possession of the weapons and ammunition, he certainly was in constructive possession of the same, and I find that the prosecution has proved possession as set out in counts 1, 2 and 3 [of the charge]".

On the three charges, the trial Court convicted the appellant, and imposed sentence after taking into account the mitigation statement, as well as the fact that he had remained in custody since *August, 2003.* The sentence imposed was eight years' imprisonment for each count, to run concurrently.

3. APPEAL AGAINST CONVICTION AND SENTENCE

In the amended petition of appeal dated 12th October, 2007 and filed on 29th October, 2007 the appellant stated, in summary, as follows:

(i) That the charges as stated in the charge sheet, for counts 1, 2 and 3 were defective; the evidence did not support these charges; proof-beyond-reasonable-doubt was not achieved;

(ii) That there were discrepancies of dates and places, in relation to the alleged commission of the offence;

(iii) That the appellant had been under arrest well before the commission of the offence – and he was thus wrongly associated with the offence;

(iv) That there had been a violation of the appellant's trial rights under s.72(3) of the Constitution – because he was arrested on *1st August, 2003* but charged only two years later, on *16th October, 2005;*

(v) That nothing mentioned in the charge sheet had been found in the possession of the appellant.

(vi) That on 1st September, 2005 the *coram* was not properly entered on the Court record.

(vii) That when the presiding Magistrate took over the case she had not complied with the terms of s.200(3) of the Criminal Procedure Code (Cap.75, Laws of Kenya) which required that the appellant be informed of his rights;

(viii) That the trial Court erred, by not granting the appellant reasonably affordable bail terms;

(ix) That the trial Court convicted "on very poor evidence on identification";

(x) That the trial Court had relied on contradictory evidence, to reach conviction;

(xi) That the identification parade, the evidence from which the trial Court accepted, was flawed;

(xii) That the trial Court failed to find that the appellant's identification card was not found in the area where the firearms the subject of the charges, were found;

(xiii) That the trial Court erred by convicting merely on the basis of suspicion;

(xiv) That the trial Court failed to find that the key witness had seen the appellant some four-to-five days before 11th August, 2003 when the *locus in quo* was raided by the Police;

(xv) That key witnesses, PW2, PW3, PW4, PW5 and PW8 had given descriptions of suspects which did not coincide with the appellant's appearance;

(xvi) That there was no proper inventory of physical evidence that provided circumstances consistent with identification of the appellant as a suspect.

Learned appellant's counsel, *Ms. Odembo* contended that the charge sheet was defective, because it had mixed up two Mombasa locations in its reference – Ziwani, and Sparki; and the evidence tendered supported recovery of firearms at Sparki and not Ziwani.

Ms. Odembo urged that the appellant had been held in custody from *1st August, 2003* and was only arraigned in Court on *10th June, 2005;* and there was no explanation on the record for the two-year delay in charging him. On this basis, learned counsel submitted that the trial was a nullity from the beginning.

In this regard counsel relied on the provisions of s.72(3) of the Constitution, and cited the Court of Appeal decision in *Gerald Macharia Githuku v. Republic,* Crim. App. No.119 of 2004. She submitted that the prosecution were in breach of s.72(3) of the Constitution, and so the trial should be declared a nullity.

Ms. Odembo urged that the charges relating to fire-arm certificate could not stand: because the explosives and ammunition referred to in these charges, were not produced in Court as exhibits.

Counsel urged that the arresting officer, who said he arrested the appellant on *1st August, 2003* had said "he arrested the accused with nothing in his possession." And so, counsel urged, the charge could not stand; and this was so, particularly, because the date of storming the *locus in quo,* when the firearms were recovered, was in the future – on *11th August, 2003*. Counsel referred to this date as the crucial date, "the date of commission of the offence, according to the charge sheet." Since the appellant had been arrested earlier, *Ms. Odembo* urged, "he was not in possession."

Learned counsel contested the trial Court's proceedings also, on the basis that the record of *coram* was improper; although it was recorded that *Mr. Okello* was representing the State, his designation was not shown, and so he could well have been an unqualified prosecutor, in the terms of the law.

Ms. Odembo next took on the issue of language used in Court. She stated that in the proceedings, on a certain date, 13th June, 2005 it was not recorded what l*anguage* was used in Court; and she urged that on this account, the trial proceedings be nullified. Counsel called in aid the Court of Appeal's decision, *Jackson Leskei v. Republic*, Criminal Appeal No. 313 of 2005, and cited the following passage in that case:

"*In the matter before us, while, by inference, we think that the appellant was possibly allowed the services of an interpreter, in [the] absence of a note to that effect, we entertain a doubt that that was so. It is a matter which has caused us much anxiety, more so considering that the appellant has a sentence of death hanging over his head. This and several other cases we have handled before, show the grave danger inherent in the failure by the trial Court to record the essential details in proceedings before it: the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk, and the language or languages of the proceedings; the language used by each witness; that judgement was pronounced; the date thereof, and in whose presence, etcetera. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect an otherwise sound conviction."*

Counsel submitted that the *coram* details were incomplete, on 27th June, 2005 – and she urged that the appeal be allowed, on that account. *Coram*, she urged, was incomplete on that occasion because the rank of *Mr. Okello* the prosecutor, was not shown on the record.

Counsel then contested an aspect of the prosecution evidence: PW2 who lived at Sparki had said he was a neighbour of the appellant. But the explosives which are the subject of the charge were said to have been found at Ziwani. This, counsel urged, went to cast doubts on the claim that the appellant had been found in possession of the firearms.

Counsel submitted that PW2 was not a truthful witness; because he had said that several days (4-5 days) prior to the storming of the *locus in quo* on 11th August, 2003, he had seen three neighbours including the appellant – yet the appellant had been arrested on *1st August, 2003* and transferred to Nairobi, several hundred kilometres away.

The words of PW2 as recorded in the proceedings may be set out here:

"I am Hassan Ali Ahmed. I am a transporter. I live at Sparki Majengo Ya Simba area in Mombasa... [On]... 11th August, 2003, a Sunday night leading to Monday morning – at about 2.00 a.m., I was [awakened] by the door bell... I looked out and saw two army officers. My mother opened, and the army officers [entered] and searched our house. We then went upstairs, and they knocked on the first door and it was opened. They went to the 2nd door on the same floor and knocked... but no one opened. They broke the door and entered, and so did I. I saw a computer and a sofa set in that flat. I saw the three-seater being turned upside down and, from under it, I saw these [he identifies anti-tank missiles] ...The occupants of that house moved into it one month after we [moved into our flat]. We moved in on 15th July, 2005. I never saw the occupants move in, but I saw three people who lived in there. Later after two days from the storming-in, Police officers showed me many photographs. I was able to identify this man...This photograph bears the picture of one of them..I saw him leave the flat twice..I never talked to them. I never saw any person other than the three enter that flat."

Of PW2, certain questions were asked in cross-examination. His response, in part, was as follows:

"Police asked me the appearance of [those] people, and I told them they looked like Arabs. I told the Police their apparent ages were between 20 – 25 and 24 – 30 years. The flat was on the top floor. I lived on 1st floor..I told the Police that sometimes they wore caps, and always looked down; they never talked

to anyone but the deceased [Feisal] greeted me one. I did not know their names. The last time I saw them was about 4 – 5 days before the Police stormed their house. I saw two – one was the deceased, and the other is not in Court. I told the Police that on *5th August, 2003* I saw the three. It was about 5.00 pm...I was at the balcony and I saw them leave their house and disappear."

It was *Ms. Odembo's* submission that PW2 had not identified the appellant herein as one of the three suspects who were his neighbours at the apartment-block.

Ms. Odembo also submitted that whereas the criminal case was at first presided over by Chief Magistrate *Mr. A. Muchelule*, it subsequently came before Senior Principal Magistrate *Mrs. R.A. Mutoka,* but without information being given to the appellant herein, as required by s.200(3) of the Criminal Procedure Code. Counsel submitted that, before *Mrs. Mutoka,* the charges should have been read afresh to the appellant herein, before PW1 took the witness stand.

Learned counsel urged that it was by mistaken identity, that the appellant had been arrested and charged. She urged that this is a typical case in which *visual identification* was mistaken; and she relied on the Court of Appeal decision in *Joseph Ngumbao Nzavo v. Republic* (1991) 2 K.A.R. 212 where the following holdings are set out:

"*Before accepting visual identification as a basis of conviction the Court had a duty to warn itself of the inherent dangers of such evidence.*

"*A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential."*

Counsel urged that PW3, though she lived in the same apartment-block as the three suspects, had seen them only once; and so she could not be a reliable identifying witness.

Counsel submitted that another neighbour of the appellant, PW5 (*Veronica Kamau*) had also not been able to identify the appellant herein. The relevant words of this witness are as follows:

"In early July [2003] the flat next to us was occupied. I never saw them when they moved in but towards the end of July, the watchman called me to go downstairs saying the landlord wanted to see all tenants...The landlord sent the watchman to call the occupants of the flat next to mine. I saw a young man come to the 1st floor flat, and that is when I saw him. I next saw him in August when he was on TV and I saw he was injured and was struggling, and I recognised him... I was shown two photographs and was able to identify one young man who I saw at the 1st floor...."

Identification Parade

Ms. Odembo questioned the propriety of the identification parade at which the appellant was identified, from the standpoint of compliance with the Police Force Standing Orders on identification parades. She urged that the identification parade which was conducted by PW13 on 22nd August, 2003 was in respect of a *murder charge* – not a charge in respect of *possession of firearms*. The parade, counsel urged, was flawed, because the appellant was not physically touched by the identifying witnesses.

PW13 gave testimony on the manner in which the parade was conducted:

"For security [reasons] the witnesses were kept in the offices [where I was]. The identification parade members and the suspect [were] outside. When you are in that office, you can see outside but those outside cannot see inside. The barrier is glass..After I filled [in] the forms the suspect was brought to where the other parade members were. I lined up the parade members and asked the suspect where he wanted to stand. The parade members were 7. He chose to stand between no. 4 and no.5. I then communicated with the investigating officer to bring out a witness, *Veronica Kamau*. She was not able to

identify the suspect....I asked for the 2nd witness, one *Kassim Salma*, and he was able to identify the suspect. I was *communicating with the witness on phone, asking if he or she could pick out anyone, and the witness would say the number or position of the suspect. I went and told the suspect that he was identified, and he made no comment*. I then called for the 3rd witness, *Abdalla Ali*, but he was unable to identify the suspect. I called for witness no.4, and told him to look through the line of men and see if he could identify the suspect..He identified the suspect. I asked for witness no.5 – one *Lucy Kamau*...[She] did not identify the suspect..."

The questionable aspects of the identification parade, foreshadowed by learned counsel *Ms. Odembo*, became more obvious during cross-examination. The following answer given by the parade officer (PW13) may be noted:

"...at part A [of the form] *the offence is indicated as murder. The investigating officer told me the same*... I asked the suspect if he was ready to participate in the identification parade...and he said yes. *If he had refused, I would not have forced him.* ...I talked to the accused about the identification parade. I had *seven members of the parade. I never selected them. It is the investigating officer who did so. It is my duty as parade officer to do so,* but they were properly chosen and they looked alike...*In some circumstances an identification parade can be conducted by phone*. *I never dated the certificate* but at the top it is recorded that it was on 22nd August, 2003... *The investigating officer did not participate in the parade. He was in the room with the witnesses.* If [he] was pointing out the suspect to the witnesses, then all the witnesses could have identified him... *For security reasons the witnesses could not touch the suspect...The witnesses never told me that they feared for [their safety]."*

By para.6 of the Identification Parade Standing Orders it is provided that: the accused or suspect is to be informed of the *reason for the parade; the responsible Police officer is not to conduct the parade; witnesses are not to see the accused or suspect, before the parade; there are to be at least eight parade members – of striking similarity to the suspect; witnesses are not to communicate with one another,* pending completion of the parade*; unauthorised persons are to be excluded from the parade;* the witness "*actually touches the person he [or she] identifies"*; "a careful note must be made after such witness leaves the parade, to record whether he identified the accused/suspect, and in what circumstances"; "the parade must be conducted *with scrupulous fairness, otherwise the value of the identifications as evidence will be lessened or nullified."*

Counsel drew the Court's attention to the Court of Appeal decision in *David Mwita Wanja & Two Others v. Republic*, Crim. App. No. 117 of 2005, in which the following passage, in relation to identification-parade procedures, appears:

"*The purpose for, and the manner in which, identification parades ought to be conducted have been the subject-matter of many decisions of this Court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in [the] Police Force Standing Orders*."

Mrs. Odembo submitted that the identification parade conducted by PW13 was a nullity for, *inter alia*, having *seven parade members*, rather than a minimum of eight. Counsel noted that it was remarkable that even *close neighbours* of the appellant, during the parade, failed to identify him. Counsel noted that the witnesses who appeared at the parade had previously been *shown photographs* of the persons they were to identify; and when they identified, they did so by *informal indications at some distance from the yard where the parade members stood.*

Trial Rights under ss.72(3) & 77 of the Constitution

Learned counsel urged that the appellant's trial-rights under s.77(1) of the Constitution (which relate to fair trial within reasonable time) had been violated, as it took two years to lay the charge – and this was not a reasonable length of time. Counsel urged that there had been no basis in the first place, for bringing

the charge, as an Investigating Officer, Senior Assistant Commissioner of Police, *Obadia Kariuki Kimani* (PW1) had stated on cross-examination, on 30th August, 2005, that:

"*Accused was arrested as a suspicious character who could be involved in the terrorist attack at Kikambala."*

Counsel urged that there was no direct evidence to link the appellant to the offence; for the witness had not called as a witness the person who gave him the information implicating the appellant and which he had relied upon.

Learned counsel submitted that there was no evidence on record linking the appellant to the offences charged.

4. CONTESTING THE APPEAL: THE POSITION OF THE STATE

(a) Technical and Procedural Matters

Learned respondent's counsel, *Ms. Nyamosi*, however, contested the appeal, and expressed her support for both conviction and sentence. She, first, remarked that the technical objections on the recording of *coram*, cannot stand, because the dates in reference were only mention-dates, purely concerned with administrative issues, and not involving a hearing of any matter of merit. And on the question of the rank of the prosecutor, counsel drew the Court's attention to the record on p.12 of the typed proceedings, which described *Mr. Okello* by his designation, as State Counsel – an officer eminently qualified to conduct prosecutions.

On the question of language used in Court, learned counsel urged that there was nothing irregular in the proceedings, as it was shown that Kiswahili/English were used in Court; and besides the appellant herein had been represented all along by an advocate, *Mr. Ngaira.*

As to the correctness of the charge sheet, especially in relation to the location of the *locus in quo*, counsel urged that it was plain from the evidence, especially that of PW5, that both Sparki and Ziwani in Mombasa were located in one general area; and the fact that the trial Court had visited the scene, strongly suggested that alternating reference to Sparki and Ziwani, would have caused no prejudice to the appellant. Should such minor differences be seen as significant, counsel urged, then they may be *cured* by virtue of s.382 of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

On the question whether the appellant was arrested on *1st August, 2003*, more than a week before the *locus in quo* was stormed by the Police on *11th August, 2003*, *Ms. Nyamosi* suggested that there could be a confusion of dates – though she urged that any such confusion did not prejudice the appellant, for the appellant did understand what the witnesses were testifying about.

On the question whether there had been compliance, in the conduct of proceedings, with s.200(3) of the Criminal Procedure Code, counsel submitted that there was no irregularity – especially for the reason that Senior Principal Magistrate *Mrs. Mutoka* had taken all the evidence, from PW1 to PW16; she also heard the defence case; and she wrote and delivered judgement; "at no point did any other Magistrate take over from her, and so s.200(3) was not relevant."

On the foregoing technical and procedural points, learned counsel *Ms. Nyamosi* has effectively addressed several of the grounds of appeal, and the position she has urged, as I find and hold, is to be sustained. In effect then, the appeal must stand or fall on the several issues of merit which learned counsel *Ms. Odembo* raised.

(b) Questions of Merit

Identification Parade

Ms. Nyamosi conceded that the identification parade, at which witnesses are said to have identified the appellant herein as a suspect, was *flawed* – because the parade members were seven and not eight.

Counsel went on to urge, however, that such a defect in the trial was severable, and would leave the proceedings, the judgement, the conviction and sentence still standing, and to be upheld. In *Ms. Nyamosi's* words:

"...there was no need for an identification parade to be conducted. There is evidence from witnesses who recognised the appellant. The evidence of identification on an identification parade was not necessary."

Is it for Certain the Appellant was in Possession of Firearms?

Learned counsel urged that there was evidence on record, showing that firearms and ammunition were recovered – and that this was clear and consistent evidence from Police officers who went to the scene; this evidence was confirmed by the scenes-of-crime officer (PW11); PW11 took photographs of things recovered from the house which the appellant was said to have rented; the prosecution proved that the firearms and ammunition were, indeed, recovered.

Counsel submitted that the prosecution only needed to further prove that the items aforementioned were *in the possession* of the appellant; and it was proved that they were in the *constructive possession* of the appellant; they were recovered from the house where the appellant had been living.

Counsel focussed this submission especially on the testimony of *Justus Mwadime* (PW14). The evidence of this witness may, therefore, be considered in some detail.

PW14, *Justus Mwanyolo Mwadime* is in the real property business, and runs a firm by the name Justhand Properties. PW14 frequently gets property-leasing contracts from *Kassim Ali* (PW8), a landlord. One of PW8's blocks of apartments is located at Sparki, in the Mwembe Tayari area of Mombasa.

In June & July, 2003, PW8 asked PW14 to find a tenant for a two-bedroom apartment at the Sparki block of flats. After putting up advertisements, PW14 found a tenant for PW8, in June 2003; and he thereafter introduced the tenant to the landlord. PW14 negotiated the terms of tenancy, and the following day, the tenant paid the required rent. The tenant produced his *original identity card*, and PW14 photocopied it and returned the original to its owner. *The tenant was with PW14 for only five minutes*, and "that was the only time [PW14] saw him." PW14 had recorded a statement with the Police, in which he said he "*could not recall the names* of the tenant." Although PW14 thought the names of the tenant would be shown in the lease agreement, when he was recalled to testify, and he had a chance to view the original lease agreement, he now said:

"*It was not signed because I never met the tenant after our first meeting...*"

From such a state of the evidence, it is clear that PW14 *did not have very much information about the tenant,* even though learned counsel *Ms. Nyamosi* set store by his contribution to the testimonies.

It is, in my perception, a rather *feeble basis of identification*: but learned counsel relied upon it to build the "possession thesis", that –

"*Even if the appellant was not found with the items, he was the owner in possession of the house; he was constructively in possession.*"

From that foundation, counsel came to the conclusion that:

"*The judgement of the Magistrate properly evaluated the prosecution case with every detail; she took into account all anomalies; and she took into account the unsworn evidence by the appellant. She came to the right conclusion when she convicted.*"

5. FINAL ASSESSMENT

It falls to this Court to decide one crucial question: was the appellant rightly convicted for the several offences charged? I have already considered the *formal challenges* to the integrity of the trial; but I have found them adequately answered by learned counsel *Ms. Nyamosi*. If I find, *on the merits,* that the appellant was wrongly convicted, then I must acquit him.

On the merits, the main question is whether the prosecution proved their case *beyond reasonable doubt*. The Police investigators, apparently, did find dangerous explosives and firearms in a *certain house*, at Sparki in the Mombasa area. It was the duty of the Police to trace accurately the person who was *in possession* of the said firearms and explosives. The learned Magistrate held that the person in possession of the items was the appellant herein.

But, is that the true position? The answer depends on *identification*. Although counsel has contended that the appellant could be linked to the illicit items even through *recognition*, I do not believe it. None of the witnesses, including the property-agent who leased the flat that was the *locus in quo*, recognised the appellant as *the person he had dealt with*. "Neighbours" living in the same block of flats, had not at all *recognised* the three persons claimed to have been tenants in the said block of apartments.

After ruling out r*ecognition*, I must also rule out any possibility that a witness properly *identified* the appellant herein as a person connected with the illicit items. It has caused me anxiety that the Police officers involved in the investigation had laboured so much to give the appearance that the appellant herein had been identified as a suspect; and the charade that was the identification parade conducted by *Chief Inspector of Police Susan Njeri* (PW13) is particularly relevant on this point. It was an identification parade conducted *in breach* of the Police Standing Orders, and a parade that was grossly unfair to the appellant herein.

Clearly, no witness has squarely *linked* the appellant to the special ownership (of t*enanc*y) of the flat that was the *locus in quo*; and it follows that it would have been wrong, as a matter of fact, to apply the doctrine of *constructive possession,* to link the appellant to the firearms and explosives which were said to have been recovered.

The foregoing conclusion is, in my opinion, strengthened by the fact, as emerges from the evidence, that as at *1st August, 2003 the appellant had been arrested and carted off to Nairobi*; whereas the flat that was the *locus in quo* was being stormed by the Police about *eight days later.* If the identity of the true tenant of the said flat had not been established by evidence, the uncertainty, which must, as a *matter of law,* be taken in the subject's favour, is deepened by the failure to account for the goings-on at the said flat during the *eight days* since the appellant had been taken away from Mombasa.

The picture emerging from the quality of prosecution evidence, and from the restless motions of Police officers in their preoccupation with the appellant, is that of an over-zealousness which was not attended with professional-investigation methods. The burden of all this heavily fell on the appellant, who, consequently, did suffer *prejudice.*

No explanation was proffered for the interminable period of *two years,* during which the appellant was held before being arraigned in Court. It was a violation of his constitutional rights under s.72(3) and s.77 of the Constitution, just as learned counsel urged.

6. FINAL DETERMINATIONS AND ORDERS

The foregoing analysis of the evidence has led to conclusions on points of law and fact, which warrant certain declarations and orders:

(i) The appellant's appeal is allowed; conviction on all the three counts is set aside; sentence is quashed.

(ii) The appellant shall be set at liberty forthwith, unless he is otherwise lawfully held.

(iii) It is declared that the conduct of the Police authorities in connection with the arrest and detention of the appellant, was in violation of the appellant's rights as safeguarded in sections 72 and 77 of the Constitution of Kenya.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Ms. Odembo

For the Respondent: Ms. Nyamosi