REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal Case 120 of 2006

SAMUEL NYONDO WAMBUA …….……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

_ Samuel Nyondo Wambua, the appellant herein with Charles Moseti Itembe were jointly tried on a charge of trafficking in narcotic drugs contrary to Section 4(a) of the Nacortic Drugs and Psychotropic Substance Control Act No. 4 of 1994. They also faced an alternative count of being in possession of narcotic drugs contrary to Section 3(1) of the narcotic drugs and Psychotropic substance Control Act No. 4 of 1994.

At the end of the trial, Charles Moseti was acquitted and the appellant was convicted and sentenced to serve 3 years imprisonment. Being aggrieved he now appeals to this court to upset the aforesaid decision.

When the appeal came up for hearing, the appeal was conceded on one main ground that the convicting magistrate did not comply with Section 200 of the Criminal Procedure Code when she took over the case midstream. I have perused at the proceedings and it is clear that Mrs. Mdivo, the learned Resident Magistrate took over the case from F. Vanani Senior Resident Magistrate on 17.8.2005 without explaining to the appellant the importance of Section 200 of the Criminal Procedure Code. Such an omission renders the whole trial fatal. Consequently, I agree that this appeal was properly conceded. The remaining issue which was ably argued before this court is whether or not this court should make an order to retrial.

It is the submission of Mr. Monda, Learned State Counsel that an order for retrial should be made because there is sufficient evidence to sustain a conviction. The learned State Counsel was of the view that the appellant will not be prejudiced in any way. On his part Mr. Obura, learned advocate for the appellant was of the view that an order from retrial should not be made because the appellant will be prejudiced, in that he has substantially served the sentence. The learned Counsel argued that this may result to the appellant suffering double jeopardy in that the order on sentence is likely to be corrected at a fresh trial.

I have considered both the rivaling submissions. To begin with, Section 200(4) of the criminal procedure Code empowers this court to order for a re-trial in the event that the provisions of Section 200 are not complied with. The court of Appeal considered the factors to be taken into account before making an order for retrial. In the case of Mwangi –vs- Republic [1983] K.L.R. P.522 in which the aforesaid held

Interalia that:

"A retrial should not be ordered unless the appellate court is of opinion that on proper consideration of the admissible or potentially admissible evidence, a conviction might result."

I have re-examined the recorded evidence and I do not think that the Prosecution's case has some gaps, which are likely to be filled when the case is ordered for retrial. The appellant has only served 7 months out of the ordered 36 months. I do not think he would be prejudiced in anyway.

The end result of this appeal is that the appeal is allowed with the result that the conviction and sentence are hereby quashed and set aside respectively. I direct that the appellant should be forthwith taken before the Chief Magistrate's Court for arrangements to be made for the re-trial without any delay.

Dated and delivered at Mombasa this 13th Day of December 2006.

J.K. SERGON

J U D G E

In open court in the presence of the appellant and counsel and Miss Mwaniki the State Counsel.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL CASE NO. 120 OF 2006

(Arising from CM CR. CASE NO. 2300 OF 2003)

SAMUEL NYONDO WAMBUA …….…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

COURT ORDER

Let this case be mentioned before a competent duty magistrate other than Mrs. Mdivo Resident Magistrate on 18th December 2006.

Dated at Mombasa this 14th day of December 2006.

J.K. SERGON

J U D G E