

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
Criminal Appeal 136 of 2003

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 145 OF
2003 OF THE RESIDENT MAGISTRATE'S COURT AT WUNDANYI – A. NGUGI, RM)**

EDWARD NYANGE MWAKIOAPPELLANT
- Versus -
REPUBLICRESPONDENT

JUDGEMENT

The Appellant was on his own plea of guilty to a charge of being in possession of cannabis contrary to section 3 (1) as read with section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 convicted and sentenced to five years imprisonment. He has appealed against the sentence.

When the appeal came before me for hearing on 18th July 2005 Mr. Ademba, learned state counsel, conceded it on the ground that part of the prosecution case was conducted by PC Mwadogo contrary to section 85(2) of the Criminal Procedure Code. He however asked for a retrial arguing that the offence with which the appellant was charged was serious and that the Appellant had not served two thirds of the imprisonment term.

On his part the Appellant opposed the retrial on the ground that he has been in prison for long and that he has suffered enough. He further stated that he has reformed as he is now a saved man.

Section 85(2) requires that all public prosecutors should be Advocates of the High Court or Police officers of the rank of Assistant Inspector of police and above. A police Constable is below that rank. In the circumstances, I allow this appeal quash the conviction and set aside the sentence.

As regards the plea for a retrial, I note that the Appellant was charged with a serious offence of being in possession of drugs which carries a heavy sentence. The appellant has served near half of the imprisonment term of five years handed down to him. I think he has suffered enough and he appears to me as having reformed. In the circumstances, I do not think it is in the interest of justice to order a retrial. I therefore order that the Appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered this 19th day of July 2005.

D. K. MARAGA

JUDGE