

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Civil Appeal 1093 of 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 15222 of 2002 of the Chief Magistrate's Court at Makadara (Ms. Oyaro - R.M)

JACKLINE JEMUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was sentenced to serve 3 years imprisonment for the offence of **PREPARATION TO COMMIT A FELONY** contrary to **Section 308(2)** of the **Penal Code** and one year imprisonment in each of counts 2 and 3 for **BEING IN POSSESSION OF FIREARM AND AMMUNITION** respectively without a **FIREARMS AMMO** contrary to **Section 4(2) (b)** of the **Firearms Act**.

When the appeal came up for hearing, I noted that the Appellant's apparent age seemed to be 18 years. On inquiry, the Appellant confirmed that two years ago when the sentence was meted out to her, she was 17 years of age. From the record of the trial court, the issue of the Appellant's age was not canvassed or even considered. That was a serious omission on the side of the trial court.

The Appellant was challenging both the conviction and sentence. On the conviction the Appellant submitted that even though she admits that the firearm and ammo were recovered in the house where she lived with a friend one **MBINYA**, they were not hers. She also challenges the sentence for being excessive.

MRS. KAGIRI, learned counsel for the State conceded to the appeal. She submitted that the State conceded to the appeal because the trial was a nullity on account of prosecution by an unqualified police officer.

I perused the record of the trial court and confirmed that indeed the trial was conducted by one police constable **MARUGU**, on behalf of the prosecution. He was unqualified to conduct the prosecution of the case and acted in contravention of **Section 85(2)** as read with *Section 88* of the **Criminal Procedure Code**. The trial was a nullity and consequently I quash the conviction and set aside the sentence.

MRS. KAGIRI has not sought a retrial. The counsel submitted that considering the evidence adduced before the trial court, together with the fact that the Appellant was a very young person and that she has been in custody for the last three years, an order for retrial would prejudice the Appellant.

I agree with the learned counsels submitted. The Appellant has been in incarceration for the last 3 years since being charged in court. She was below age for imprisonment and the sentence was manifestly harsh, excessive and also illegal. Even though the evidence against the Appellant from the record is over whelming, the period she has been under incarceration in the circumstances of the case and of the Appellant are sufficient punishment for what the Appellant did. I find that the interests of justice do not require a retrial and that to order for the same would unjustly prejudice the Appellant.

I will therefore order that the Appellant be set at liberty unless she is otherwise lawfully held.

Dated at Nairobi this 13th day of July 2005.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

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LESIT, J.

JUDGE