

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 35 Of 2003

(From Original conviction (s) and Sentence (s) in Criminal Case No. 314 of 2002 of the Principal Magistrate's Court at Kitui M.N. Gicheru on 6/1/03)

MUSAU NZOMO APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was convicted of handling stolen property, the handling being alleged to have taken place during the robbery. He was sentenced to 7 years imprisonment. He has served almost 3 years. His appeal on conviction and sentence was rightly conceded by Mr O'Mirera, for the state because the trial was conducted by an unqualified person under Section 85 (2) of the Criminal Procedure Code. But Mr O'Mirera, seeks a retrial. He asserts that he has adequate evidence for a likely conviction and witnesses are still available. He believes the appellant has little to lose nor would he be prejudiced even though he has served 3 years and has only about less than 2 years (with remission) to serve.

I have considered the argument. There is no doubt that the conviction of handling arises from serious circumstances of robbery. I am anxious that the appellant has served more than half the actual sentence. It will in my view be difficult to justify a retrial which will open up a fresh sentence after he has served about 3 years. I appreciate the seriousness of the offence and the fact that there is adequate evidence to possibly convict him, but it will not in my view, be fair and/or just to expose him for a fresh punishment, however much I do hate the circumstances under which the offence was committed. I, therefore, refuse a retrial. The appellant's appeal is accordingly allowed. The conviction on handling stolen property is quashed and the sentence of seven years is set aside. The appellant is ordered set free forthwith unless otherwise lawfully held in prison. It is so ordered.

Dated and delivered at Machakos this 8th day of November 2005.

D.A ONYANCHA

JUDGE