

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 409 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 3461 of 2001
of the Chief Magistrate's Court at Mombasa H. Njiru ESQ., SRM)

SAMUEL MWONGERA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charge with the offences of having suspected stolen property contrary to section 323 of the Penal Code and unlawful possession of ammunitions without certificate contrary to section 4(2)(a) of the Firearms Act. After trial before the Senior Resident Magistrate's Court at Mombasa he was acquitted of count one of having suspected stolen property but convicted of count two and sentenced to serve three years imprisonment. He has appealed against both the conviction and sentence.

At the hearing of the appeal Miss. Mwaniki, learned state counsel, conceded that the appeal should be allowed as part of the prosecution case was conducted by corporal Mwamburi and police constable Chera contrary to section 85(2) of the Criminal Procedure Code. She however, sought a retrial arguing that the offence is a serious one and that there was ample evidence against the Appellant. She submitted that the state takes a serious view of the offence and that the Appellant will not suffer any prejudice.

In response the Appellant argued that he should not be retried. He has been in prison since the 16th September 2002 and that even without this appeal being allowed he will be released on or about 16th September 2004 because he is entitled and will received remission of one third of the jail term. He also submitted that he is suffering from TB and ulcers and has not been receiving proper treatment while in prison.

As part of the prosecution case was conducted by police officers below the rank of Assistant Inspector of police contrary to section 85(2) of the Criminal Procedure Code the trial of the Appellant before the Senior Resident Magistrate's Court was a nullity. I therefore allow this appeal, quash the conviction and set aside the sentence of three years imprisonment.

Before ordering a retrial an appellate court is supposed to consider several factors. These include the assessment of the evidence and find out if it may found a conviction. It is also supposed to consider whether or not it is in the interest of justice to order a retrial and whether a retrial will be prejudicial to the Appellant.

I have carefully considered the evidence that was tendered before the trial court. P.W.1 and P.W.2 who were members of a vigilante group stated that while on patrol at around 4.00 a.m. on 16th October 2001 they met appellant who appeared drunk. They ordered him to go and sleep. Shortly thereafter they arrested someone else who they arrested. Appellant demanded his release arguing that the two had no right or powers to arrest that person. There was some alteration and struggle to arrest the appellant during which the they noticed something bulging from Appellant's socks. That turned out to be 10 rounds of live

ammunition which were wrapped in a polythene paper bag. They arrested appellant and handed him to police. That evidence has bothered me as it did to the trial magistrate who however thought that the two witnesses were truthful. One would not expect someone having in his possession live ammunition without a certificate to risk arrest. The possibility of the ammunition having been planted on the appellant for interfering with the two witnesses in the performance of their duties and questioning their authority cannot be overruled. Be that as it may there are some other aspects of the evidence that I have considered. The first one is that part of the prosecution evidence which the trial court relied on to convict the Appellant was an alleged retracted confession recorded before Inspector Muteithia. Confessions not taken before court have since been outlawed by section 25A of the Evidence Act introduced by Act No. 5 of 2003. The second piece of evidence I have considered is that the arresting officer did not testify. A retrial will enable the prosecution to call him.

The Appellant was sentenced to serve three years imprisonment. He has already served more than half of that sentence and I am told with remission he is likely to be released on or about the 15th September 2004.

For these reasons and the fact that the appellant is sick. I have no doubt in my mind that a retrial will be highly prejudicial to the Appellant and I decline to order it. Consequently I order that the Appellant shall be set free forthwith unless otherwise lawfully held.

DATED this 22nd day of March 2004.

D.K. Maraga

Ag. **JUDGE**