



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 318 OF 2002

YUDA NZALU.....
APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.319 OF 2002

JAMES MUTEMA GATONYA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

A N D

CRIMINAL APPEAL NO.320 OF 2002

CHARLES MBITHI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.3170 of 2002 of the Chief Magistrate's Court at Mombasa –F.Vanani, R.M.)

R U L I N G

The Appellant was charged and tried with other 2 persons for the offence of Stealing a Motor Vehicle. The other 2 were sentenced only to 2 years imprisonment. Were it not that this Appellant was found to have been convicted on other offences he would have served the same sentence. However, the trial gave him 5 years and strokes of the cane saying that the Appellant was an “old hand in crime.”

The enhancement of sentence by 3 years on that ground is a matter of review by an Appellate Court. For myself I would say that the Trial Magistrate was not justified in enhancing the sentence by the 3 years.

The Appellant has served 20 months and was in custody as from 25/9/2001.

In the circumstances to place the Appellant to a retrial is prejudicial to him. The other Appellants have already been released – one in Cr. Appeal 318/2002 on Presidential Amnesty, the other in Cr. Appeal 319/2002 after completion of normal term. They have not pursued their appeals. The appeals are therefore dismissed.

One of the principles of punishment is that there should be equality in sentencing for the same offence.

I therefore do not order a retrial in this case.

The State having conceded the appeal the Appellant shall be set at liberty forthwith unless he is otherwise being lawfully held.

I do not order a retrial in this case.

Dated at Mombasa this 8th day of March, 2004.

JOYCE KHAMINWA

J U D G E