



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 311 OF 2003**  
**(From Original Conviction and Sentence in Criminal Case No.77 of 2003 of the Resident**

**Magistrate's Court at Kaloleni –C. Obulutsa, Esq –R.M.)**

**KARUKU DUME..... APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO.310 OF 2003**

**RAMADHANI NJANA TSUMA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

Before: Khaminwa, J.

Chege –Court Clerk

Ms Mwaniki –State Counsel

Mr. Nyaga –for Appellant

Ms Mwaniki

I apply for the Appeal (1) 310  
(2) 311

to be consolidated. They arose from one trial.

Mr. Nyaga: No objection.  
Court  
Consolidation order is granted as prayed.

JOYCE KHAMINWA, J.

Mr. Nyaga

I wish to argue only ground No.(1) in the Petition. The matters were prosecuted by Police Constable - Pc. Mukonesi and contrary to Section 85 Criminal Procedure Code. The proceedings are a nullity. I ask the court to allow appeal. The Appellants have already served 5 months of jail term and they have been released on Presidential Amnesty. Ms Mwaniki.

I concede appeal. The Prosecutor was unauthorized. Sentenced to 12 months imprisonment. Offence of serious nature. The Appellant has served only 5 months. COURT

The Appellants are already released under Presidential Amnesty. This court cannot override the Presidential Order on exercise of his mercy. Again, the trial in the lower court was prosecuted by a Police Constable who was not an authorized prosecutor under Section 85 Criminal Procedure Code which makes the trial a nullity. It can not be said that the Appellants have not suffered punishment. They were arrested on 27/1/03 and in Cr.A.310/03 was released on 23/12/03 and in Cr. A.311/03 on 22/12/03.

In the circumstances no retrial can be ordered as it would be unjust to the Appellant.

The appeal is therefore allowed.

**Dated at Mombasa this 9th day of February, 2004.**

**JOYCE KHAMINWA**

**JUDGE**