

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 900 OF 2002

*(from original conviction and sentence in Criminal Case
No. 7831 of 2001 of the Chief Magistrate's Court at
Makadara)*

JANET MURAA ONYARI APPELLANT
VERSUS
REPUBLIC RESPONDENT

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 902 OF 2002

ALICE SIRINGI YATOO APPELLANT
VERSUS
REPUBLIC RESPONDENT

J U D G M E N T

It is clear from the trial record from the Court below that the prosecution was undertaken by a Police Constable Marubu. This is in contravention of the express provisions of Section 85 (2) of the Criminal Procedure Code. The Court of Appeal has also held in 2 recent decisions that such a trial is a nullity ab initio. The Court therefore has no alternative but to allow this Appeal.

I have been concerned with whether or not to order for a re-trial in the circumstances of this case. The Appellants as rightly pointed out by the Learned State Counsel have about 5 months to go on their prison terms. If I were to order for a retrial, the Appellants might end up spending more time in custody. Consequently, the justice of this case militates against an order for a re-trial.

Consequently, I allow the Appeal quash the conviction and set aside the sentence. In the result the Appellants and each one of them shall forthwith be released from prison unless otherwise lawfully held.

Dated and delivered this 9th day of February, 2004

M. S. A. MAKHANDIA
Ag. JUDGE