

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 359 OF 2002

ALI SHABAN APPELLANT

- V E R S U S -

REPUBLIC RESPONDENT

(From the Original Conviction and sentence in Criminal Case no. 898 of 2002 of the Chief Magistrate's Court at Mombasa)

J U D G M E N T

The appellants appeal has been conceded by State. The, State Counsel does not oppose the Petition of Appeal. Her main reasons is that the trial was before a Magistrate with no jurisdiction to try the offence charged (296 (1)). Also the prosecutor was a Corporal not authorized to prosecute cases under Section 85 of CPC. I, therefore, declare that trial a nullity. I also allow the appellant's appeal. The State now seeks a retrial.

I have heard submissions of both Counsel. The issue of complying with the procedural rules regarding trial and prosecution is set out in the CPC. The state should have placed the charge before the correct trial court. The State should have organized for the trial to be conducted by a prosecutor authorized under Section 85 CPC. These are omissions by the State Law Office. It is quite unjust to penalize the accused person for faults which are committed by the State Law Office. The accused has spent about 2 ½ years in custody during which period the trial proceeded. I do not think it is just to allow him to undergo a similar or longer period in jail awaiting a trial on similar grounds. Our Constitution guarantees liberty to all person and where the liberty of a person is denied on the ground that he is charged with a criminal offence, he shall be tried within a reasonably practicable period.

In the circumstances of this case it is my view that to order a retrial is against the human right to liberty granted by the Constitution. I reject the prayer for retrial. I, therefore, allow the appellant appeal and order that he be set free at once unless otherwise lawfully held.

Dated this 1st day of November, 2004.

J.KHAMINWA

JUDGE