

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO. 321 OF 2001

(Being an appeal against Sentence in Criminal Case No. 2774 of 2001 of the
Chief Magistrate's Court at Mombasa – F.N. Muchemi)

JUMA MWINGA MWAMBALE APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged with Defilement of an Imbecile Contrary to Section 146 of the Penal Code on Count 1 to which he pleaded not guilty on 29.8.01. Alternative charge of Indecent Assault on a Female Contrary to Section 144(1) of the Penal Code was never read to him. On Count II he also Pleaded not guilty to a charge of being in Possession of Narcotic Drugs Contrary to Section 3 (1) of the Narcotic Drug and Psychotropic Substances Control Act No.4/1994 as read with Section 2 b of the same Act. The Plea was taken by Senior Principal Magistrate Mr. J.S. Mushelle on 29.8.01.

On 30.8.01, he appeared before the Chief Magistrate F.N. Muchemi and without reading any charge to him, the Prosecutor went on to read the Particulars of the offence in respect of Count I and to which the appellant answered "The facts are true". The Court then proceeded to Convict him on his own Plea of guilty on the Alternative charge giving the reason that there was lack of corroborating medical evidence. He was then Sentenced to 5 years imprisonment. The case then did proceed to trial on Count 2 for which he was convicted and Sentenced to 3 months imprisonment. The Court then did not indicate how the Sentences were to run.

His Appeal is however against the Sentence of 5 years only. The State did concede the error by the Court in failing to read the Alternative charge to the appellant and prays for a retrial.

I have considered the submissions by the State and much as I agree that this is a matter that ought to go for retrial, I have also considered the fact that the Appellant has already served more than half the Sentence imposed upon him. This would mean, if the Trial is to start afresh and he is convicted or acquitted he will have suffered injustice either way. It is in view of this, that I will allow the appeal, quash the Conviction and set the Sentence aside. The Appellant shall be set free forthwith unless lawfully held. And that is the order of the order.

Dated and Delivered at Mombasa this 29th day of August, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE