



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 141 OF 2002

ALEX MWANGI NJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 144 OF 2002

(ORG. D.M.'S KIGUMO CRIMINAL CASE NO. 1353/01)

KAMANDE GACHIE KIEMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The learned State Counsel Mr. Obuo concedes the appeal No. 141/02 by **ALEX MWANGI NJAU** and I find no reason to take a different line.

That being the position, the appeal of Alex Mwangi Njau is hereby allowed. His conviction quashed and the sentence set aside.

He be set at liberty forthwith unless lawfully detained in some other cause.

With regard to the Appellant in **Criminal Appeal No. 144/02 KAMANDE GACHIE KIEMBE**, there was sufficient evidence against him to sustain the conviction. He was arrested on the spot around midnight and never disappeared from custody until charged, prosecuted, convicted and sentenced. A simi stacked into his pair of long trousers was recovered from him. He had a torch recovered from him. Three arrows recovered from the place where the arresting police officers found the Appellant and other people who managed to escape. Nearby there was a spike placed in the middle of the road.

Having been arrested in those circumstances, there was no problem with regard to identification of this Appellant as there was no need for an identification parade.

Kamande Gachie Kiembe was therefore properly convicted and his appeal against conviction is hereby dismissed.

As to the sentence of four years imprisonment with hard labour plus three strokes of the cane, it would appear to me that the learned trial magistrate and the learned State Counsel, Mr. Obuo, are not up to date.

The two appear to be using Section 308(1) of the Penal Code as it was after the amendment in Act No. 22 of 1987 and before the amendment in Act No. 11 of 1993. While the former amendment removed the then existing mandatory minimum sentence, the latter amendment restored the mandatory minimum sentence putting it at seven years imprisonment. The maximum sentence was put at fifteen years imprisonment.

It follows that when on 7th January, 2002 the learned trial magistrate sentenced the Appellant to four years imprisonment and during the hearing of this appeal on 22nd October, 2003 the learned State Counsel was telling me that I had the option to reduce that sentence, the sentences the two had in mind were unlawful.

The trial magistrate having imposed an unlawful sentence of four years imprisonment with hard labour plus three strokes of the cane, I am entitled to alter that sentence to impose a lawful sentence and since the lawful sentence imposes a mandatory minimum sentence of seven years imprisonment, I will not be altering the magistrate's sentence downwards. The alteration has to be upward.

Accordingly, the appeal against sentence is hereby also dismissed and the sentence of four years imprisonment with hard labour plus three strokes of the cane imposed by the learned trial magistrate hereby set aside and substituted with the sentence of seven(7) years imprisonment.

Dated this 27th day of October, 2003.

J. M. KHAMONI

JUDGE