

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.115 OF 2001

(From Original Conviction and Sentence in Criminal Case No.2320 of 2000 of the Chief Magistrate's Court at Mombasa – H. Njiru, Esq., R.M.)

SIMON MALUKI.....APPELLANT

= V E R S U S =

REPUBLIC.....RESPONDENT

J U D G E M E N T

The only issue worth considering in this Appeal is the sentence as I find no merits in the Appeal against conviction.

The Appellant was the first of two persons charged with the offence of preparation to commit a felony contrary to Section 308(2) of the Penal Code. The two were caught red-handed in an ambush laid by the Police at Kilindini Port after scampering a perimeter fence and entering the Imported Motor Vehicles Shed of the said Port. It was at about 1.30 a.m. on 7.7.00.

The Appellant and his co-Accused had used two ladders to climb over the fence but were spotted by the KPA Security Officer manning the Watchtower (PW.3) who radioed his colleague on the ground PW.2. They alerted the Police who arranged an ambush outside the perimeter wall. Once the Appellant and his co-Accused were inside the shed they cut some ropes tying a canvas on a lorry intending to steal from it. They were then surprised by the guards and the Appellant managed to climb over the fence only to fall in the hands of the Police who lay in ambush. The co-Accused dislocated his leg as he tried to climb over the fence and was arrested inside the shed by KPA Security.

The evidence of the Police and the Security Officers was consistent and was found by the Learned Trial Magistrate to be credible and reliable. I have no reasons to differ from that assessment as the Magistrate saw and heard the witnesses in the witness box. The story manufactured by the Appellant on Appeal that he had disagreed with one of the witnesses and was therefore framed in the charge is certainly a hollow afterthought. The witness was only a Police Officer summoned by KPA Security Guards who saw the Appellant at the scene. Nothing is said by the Appellant about any enmity with those guards or why they should frame him.

The Appeal on conviction is dismissed.

As for sentence, the Appellant was sentenced to serve 3 years imprisonment while the co-Accused was sentenced to serve 2 years. As correctly pointed out by Learned State Counsel Ms Kwena, no reasons were given for such disparity in sentencing. In the event I allow the Appeal on sentence which is quashed. I substitute therefor a term of imprisonment of 2 years to run from the date of conviction by the lower court. To that extent only the Appeal succeeds.

Dated this 26th day of July, 2001.

P.N. WAKI

J U D G E