

imprisonment. The learned Principal Magistrate further ordered that the recovered items be destroyed at the expiry of fourteen days (14).

The appellant was dissatisfied with both his conviction and sentence and has appealed to this court through M/s **Buluma** and Company Advocates on the main grounds that the facts as stated by the prosecutor did not support the charge; that the procedure adopted in recording the appellant's plea was defective and that the sentence was manifestly excessive.

When the appeal came up before me for hearing on 6th October, 2011, **Mr. Oluoch**, learned Senior Deputy Prosecution counsel, did not support the appellant's conviction and sentence.

I have considered the record and re-evaluated the proceedings before the learned Principal Magistrate. Having done so, I find and hold that the facts as stated by the prosecution did not indeed disclose any offence under the Copy rights Act No. 12 of 2001. The facts stated that the appellant was found playing Bongo Mix Kidum songs without authority. The prosecution did not suggest that the appellant did not have the said CDs for domestic or private use. Merely playing the songs would not constitute an offence under the said Act.

The record further shows that when the appellant appeared before the learned Principal Magistrate on 22nd November, 2010, he was not reminded of the charge which had been read to him before by Hon. **K.D Kuto**, (D.M. II Prof.). The learned Principal Magistrate merely proceeded to receive the facts which were stated by the prosecutor. In my view, he committed a procedural flaw especially as he had himself not taken the appellant's plea initially.

On sentence, I have no hesitation in finding that the same was manifestly excessive in the circumstances. I say so, because, the learned Magistrate imposed the maximum sentence the Act permits under the section. It is elementary that the maximum sentence is only appropriate for the worst offenders. I do not think that the appellant was such an offender. In the premises, if the plea had been unequivocal, I would have interfered with the sentence. However, I have found that the facts stated by the prosecutor did not disclose any offence. The conviction of the appellant was unsafe. The same cannot be upheld. The conviction is quashed and the sentence imposed upon him set aside. If the appellant paid the fine, the same should be refunded to him. If he is serving the default sentence, I order that, he be released from prison forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT ELDORET THIS
3RD DAY OF NOVEMBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the Presence of:

- (1) **Mr. Kiboi** holding brief for **Mr. Buluma** for the appellant and
- (2) **Mr. Chirchir** for the State

**F. AZANGALALA
JUDGE
3/11/2011**