REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 255 OF 2008

JULIUS M'MARIO M'MAUTA ……..…….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

An appeal against the judgment of the Hon. Mr. S.M. Mwendwa R.M. in the Senior Principal Magistrate's Court at Maua in Criminal Case No. 2224 of 2006 delivered on 19th December 2008)

JUDGMENT

The appellant was convicted of malicious damage to property contrary to Section 339 (1) of the Penal Code. He was sentenced to 3 months imprisonment. Mr. Ogoti for the appellant challenges the conviction on the grounds the case was ordered to start *de novo* after the trial magistrate was transferred; that by the time the prosecution closed its case, the case had not started *de novo.*

Mr. Mungai for the state opposed the appeal and stated that there was no clear record whether the case started *de novo* or not but urged that since property was destroyed the appeal should be disallowed.

I have considered the appeal. The record of the case shows that one D. Morara, he and PW1 and 2 on 12th March 2007, the same magistrate ordered the case to start *de novo* on 9th July 2007 on grounds he had been transferred from the station. The matter was taken over initially by Mr. Ochoi who put a witness on the dock, had him sworn and recorded him as PW1. That person did not however give any evidence as it was realized that exhibits were not in court. He was stepped down. The case was next taken over by S.M. Mwendwa who after several failed hearing dates due to absence of witnesses between 25th July 2008 and 15th December 2008 refused to grant any further adjournment and the prosecution closed their case. The learned trial magistrate then placed the appellant to his defence on 18th December 2008 and proceeded to hear the defence case.

It is clear from the record of proceedings that after the order to have the case heard *de novo*, no prosecution witness was called. The term *de novo* means that the case was to begin afresh from the beginning. *Black's Law Dictionary, Eight Edition* defines trial *de novo* thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."

After the learned trial magistrate declared that the case was to be heard *de novo*, it meant that the prosecution was to begin its case from the beginning. Since no evidence was called by the prosecution after the order for hearing *de novo* was made, the prosecution could not have established a *prima face* case on whose basis the appellant was called to answer the charge. The learned trial magistrate misdirected himself for finding a *prima facie* case was established without calling of any evidence. The learned trial magistrate also misdirected himself when he entered a conviction as the only evidence before him was that by the appellant. The appellant could not have adduced evidence against him. Infact, his defence was that he deemed the charge in the circumstances the entire trial was botched. The conviction entered against the appellant was unsafe and cannot be allowed to stand.

I allow the appeal and quash the conviction. Even though the sentence was not challenged, it cannot stand without a conviction. I therefore set aside the sentence as well. Those are my orders.

Dated at Meru this 8th December 2011.

LESIIT J.
JUDGE