



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 117 of 2009**

**(Being an appeal from original conviction and sentence of the RM's court at
Kehancha in criminal case No. 69 of 2009 – J.R. Ndururi, RM)**

BETWEEN

DAVID GISIRI RIOBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with stealing stock contrary to **section 278** of the **Penal Code** and as an alternative charge, handling stolen stock contrary to **section 322 (2)** of the **Penal Code**.

Regarding the main count, it was alleged that on the 27th day of December, 2008 at Kegonga in Kuria East District within Nyanza Province he stole 3 heads of cattle valued at Kshs.90,000/= the property on **Ghati Mwita Nyangine**.

In the alternative charge, he was alleged to have dishonestly handled the 3 animals knowing or having reasons to believe them to be stolen property.

When the charges were read to him, the record shows that the appellant responded as hereunder:

**“Main charge – I bought the 3 animals.
Alternative charge – Not true”
A plea of “Not guilty” was entered.**

It is not clear whether that was in respect of the main count and the alternative one. The appellant was granted a bond of Kshs. 50,000/= with one surety of a similar amount. When the hearing came up on 22nd January, 2009, the appellant requested that the charge be read to him again.

The record shows that the charge was read over again in Kiswahili language but it is not clear which one, and the appellant responded:

“It is true.”

The prosecutor read out facts that indicated that on the night of 27th and 28th December, 2008 the complainant's three animals were stolen and when the complainant tracked the foot-prints he managed to recover one of the animals. The appellant was found in possession of the other two. He escaped to an unknown place but was arrested on 7th January, 2009.

The appellant admitted that the facts were correct and the trial court convicted him on his plea of guilty. He was sentenced to four years' imprisonment.

One of the grounds that was raised in the petition of appeal is that the learned trial magistrate erred in law in convicting the appellant

without specifying the offence for which and the section of the Penal Code upon which the appellant was convicted contrary to the mandatory provisions of **section 169 (1) and (2) of the Criminal Procedure Code.**

Mr. Kemo, Senior Principal Prosecution Counsel, did not oppose the appeal. He conceded that the learned trial magistrate violated the aforesaid section of the Criminal Procedure Code. He however prayed for a retrial.

Mr. Osoro for the appellant opposed the retrial saying that the appeal touched on fundamentals of the law and urged the court to acquit the appellant.

Section 169 (2) of the Criminal Procedure Code requires that in the case of a conviction the judgment should specify the offence for which and the section of the Penal Code or other law under which an accused person is convicted and the punishment to which he is sentenced. It is not in dispute that the trial magistrate did not do so.

Should a retrial be ordered? It is trite law that a re-trial will not be ordered where the conviction is set aside or vitiated by a mistake of the trial court for which the prosecution is not to blame. It will be prejudicial to the appellant to order a retrial. I have also considered the fact that the appellant has already served more than one year in prison.

Consequently, this appeal succeeds and the conviction of the appellant by the trial court is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 15th day of March, 2010.

D. MUSINGA
JUDGE.