



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 152 of 2009

(From Original Conviction and Sentence in Criminal Case No.1199 of 2008 of the Senior Resident Magistrate's Court at Voi: P.N. Ndwiga - S.R.M)]

PETER NDII APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **PETER NDII** filed this appeal against his conviction and sentence in the lower court on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The appellant relied entirely upon his written submissions duly filed in court. **MR. ONDARI**, learned State Counsel conceded this appeal and having perused the lower court proceedings, it is not difficult to see why. The Appellant entered a plea of guilty to the charge. Whilst reading out the facts the learned court prosecutor made an application to amend the charges to conform with the facts. The trial magistrate failed to address this application – it was neither accepted nor denied. Despite this he proceeded to convict the Appellant. This trial was clearly a nullity as it is not clear what charges the Appellant was being convicted on. Was it the original charge or the amended charge? This conviction is unsound and cannot stand. I do hereby quash the same. The subsequent seven (7) year sentence is also set aside.

Mr. Ondari requested the court to order a retrial in the matter. Having been convicted in December 2008 the Appellant has spent over 18 months in prison on an invalid charge. The defect in procedure cannot be blamed on the prosecution. I note that the Appellant was not a first offender. I do hereby allow the prayer for a re-trial. Mention on 30th September 2010 before Senior Resident Magistrate, Voi Law Courts for fresh plea to be taken.

Dated and Delivered at Mombasa this 9th day of September 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

9.9.2010