

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Appeal 67 of 2004

**(From Original Conviction and Sentence in Criminal Case No. 278 of 2003 of the
Principal Magistrate's Court at Kericho – S.M. Githinji - S.R.M)**

DAVID CHEPKWONY CHERUIYOT APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant, David Chepkwony Cheruiyot was charged before the Senior Resident Magistrate's court at Kericho with the offence of **stock theft contrary to Section 278 of the Penal Code**.

After a full trial, the appellant was found guilty, convicted and fined Kshs.6,000/- and in default to serve eight (8) months imprisonment. The appellant being dissatisfied with the conviction and sentence has appealed to this court and raised several grounds of appeal.

During the hearing of this appeal, Mr Koech, the learned Senior State Counsel conceded that the records of the lower court clearly show that the prosecution was conducted by an unqualified prosecutor. Thus the conviction and sentence is null and void. The records of the lower court clearly show that the prosecution of this case was undertaken by Police Constable Ihaji on 14th May 2003, 19th May 2003 and 6th June 2003 when all the prosecution witnesses gave evidence.

The issue regarding the conduct of prosecution by a police officer below the rank of assistant inspector was settled by the Court of Appeal in several decisions. See the case of **Elirema & Another VS Republic 2003 KLR** page 537 where the Court of Appeal heard that:

*"Public prosecutors however, must meet the requirements set out in **Section 85 of the Criminal Procedure Code**...."*

*"The provisions of **Section 85 (2) of the Criminal Procedure Code** are that; to be appointed a public prosecutor, one must be either an advocate of the High Court or a person employed in the Public Service. In the case of a person employed in the Public Service that person ought to be a police officer not below the rank of an assistant inspector of police."*

In view of this fundamental flaw in the prosecution of the case by Police Constable Ihaji, the trial of the appellant must be declared a nullity.

The appeal herein is allowed with the result that the conviction recorded is quashed and the sentence set aside.

It is so ordered.

Judgment read and signed on 12th May 2006.

MARTHA KOOME

JUDGE