



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Criminal Appeal 435 of 2003**

**(From original conviction and sentence of the Senior Principal Magistrate's Court at**

**Naivasha in Criminal Case No. 1072 of 2003 – [S.R. Wewa] DM II (Prof)**

**SOLOMON WAINAINA NJAGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Solomon Wainaina Njagi was charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code**. The particulars of the offence were that on the 13<sup>th</sup> of April 2003 at Naivasha Selfservice in Nakuru District the appellant jointly with another, being a servant to Simon Mukuha stole from the said Simon Mukuha one jack plane and rabbit plane valued at Kshs 6,300/=. The appellant pleaded not guilty to the charge. After a full trial he was found guilty as charged but was discharged under **Section 35(1) of the Criminal Procedure Code** on condition that he would not commit another offence for a period of twelve months. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

The appellant raised twelve grounds of appeal challenging the decision of the trial magistrate in convicting him. However at the hearing of the appeal, Mr. Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the criminal case before the trial magistrate had been prosecuted by an incompetent prosecutor. Mr P. K. Njuguna learned counsel for the appellant prior to the conceding of the appeal by the State, had submitted that the trial in which the appellant was convicted was a nullity in view of the fact that the criminal case had been prosecuted by an incompetent police prosecutor.

I have perused the proceedings of the trial magistrate in respect of which this appeal arose. I have noted that the police officer, who prosecuted the criminal case facing the appellant, was Corporal Chitira. He is a police officer of a rank lower than that of an Assistant Inspector of Police. He was thus not authorized to prosecute criminal cases as provided by **Section 85(2) and 88 of the Criminal Procedure Code**. The Court of Appeal in the case **Eliremah & Anor –vs- Republic [2003] KLR 537** held that where such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto will be a nullity. I am bound by the decision of the Court of Appeal and therefore declare the proceedings of the trial magistrate herein to be a nullity as a consequence of which the conviction of the appellant is quashed and the sentence imposed set aside.

The issue that is left for the determination of this court is whether or not to order the retrial of the appellant. Mr. P. K. Njuguna learned counsel for the appellant made an impassioned submission urging this court to find that the appellant was innocent and that the charge against him for the offence of theft by servant had not been proved by the prosecution to the required standard of proof beyond reasonable doubt. Mr. Gumo for the State did not insist that the appellant be retried. I have carefully considered the submissions made by the appellant. I have also evaluated the evidence that was adduced by the prosecution witnesses and that offered by the appellant in his defence. I am inclined to agree with counsel for the appellant that the charge against the appellant was brought by the complainant to camouflage the fact that he had dismissed the appellant from employment for no apparent reason. The evidence adduced by the prosecution proved that it was another person who stole the said items from the complainant's premises and not the appellant.

The principles to be considered by this court in considering whether or not to order a retrial were restated by the Court of Appeal in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004 (Eldoret)** when it held that:

***“In the case of Ahmed Sumar v Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:***

***“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered”.***

The court continued at the same page paragraph H and stated:

***“We are also referred to the judgment in Pascal Clement Braganza v. R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person”.***

***There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”***

In the instant case it would therefore not serve the ends of justice if a retrial is ordered for the sole purpose of going through the trial process which would ultimately not achieve the objective of the conviction of the appellant. My assessment of the potentially admissible evidence to be adduced by the prosecution and which was adduced in the vitiated trial is that the said evidence cannot sustain the conviction of the appellant on the charge of theft by servant.

In the premises therefore the only order that commend itself to me in this appeal is to discharge the appellant. The appellant is consequently discharged and acquitted of the charge of theft which had been brought against him. It is so ordered.

**DATED at NAKURU this 12<sup>th</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**