

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 266 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in Criminal Case NO.333 OF 2003 – P. Okile – [R.M.]

JULIUS KIPLANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant, **Julius Kiplangat Tangus** was charged with two counts; the offence of Arson contrary to section 332 of the Penal Code and stealing stock contrary to section 278 of the penal code.

The particulars of the first offence were that on the 30th day of May 2003 at Marinwa Village Sogoo sub-location in Narok District within the Rift Valley Province, willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs.42,000/= the property of **Daniel Kibet Kaluchii**.

The particulars of the second count stated that on the 30th day of May, 2003 at Marinwa village Sogoo sub-location in Narok District within Rift Valley Province stole one bull and one donkey all valued at 28,000/= the property of Daniel Kibet Kaluchii.

The appellant pleaded guilty and was convicted on his plea of guilty and sentenced to imprisonment for ten (10) years in respect of the 1st count and seven (7) in respect of the second count with three (3) strokes of the cane and both sentences to run concurrently.

The appellant being aggrieved with the sentence appealed and pleaded with this court to consider reducing the sentence. Mr. Koech the learned Snr. State Counsel conceded to the appeal on the sole ground that the Police Officer who prosecuted the matter one **Police Constable Ihaji** was not qualified. He therefore submitted that the proceedings before the subordinate court were a nullity. In view of the time that the appellant has served since he was incarcerated, a period of 3 years that is adequate punishment and counsel for the state did not press for a retrial.

I have perused the proceedings of the subordinate court. It is clear the appellant was prosecuted by P.C. Ihaji who read the particulars of the offence on 3rd June, 2003. He is a Police Officer of rank lower than that of an Assistant Inspector of Police. He was thus not authorized to prosecute a Criminal case before a Magistrate's court as provided for under section 85(2) and 88 of the Criminal Procedure Code. It was held by the Court of appeal in the ***case of Eliremah & another –Vs- Republic 2003 KLR 537***. Where such a Police Officer prosecutes a case before a magistrate's court, the proceedings thereto will be a nullity. I therefore declare the proceedings in respect of which the appellant was convicted by the subordinate court to be a nullity as a consequence of which the conviction of the appellant is quashed and sentences imposed set aside. When the trial is a nullity the course of action would be a retrial. The principles to be considered by this court in determining whether or not to order a retrial are settled.

In the ***case of Pascal clement Pragana –VS- [1957] E.A. 152***. The court accepted the principle that “a retrial should not be ordered until the court was of the opinion that on a consideration of admissible or potentially admissible evidence a conviction would 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 interest of justice required it and should not be ordered where it is likely to cause an injustice to an accused person”

The appellant having served a term of three years out of the (10) ten years I consider that as adequate punishment consequently the appellant is discharged and ordered to be set at liberty unless otherwise lawfully held.

DATED at NAKURU this 27th day of July, 2006.

MARTHA KOOME

JUDGE