

DANIEL OYOYA

ISAAC MALENJA TERE.....APPELLANTS

V E R S U S

REPUBLIC.....RESPONDENT

J U D G E M E N T

Isaac Malenje Tete, the 1st Appellant and Daniel Oyoya, the 2nd Appellant were the 1st and 2nd accused in Vihiga SRM Criminal Case No. 388 of 2001 in which they were on 14th April 2003 convicted of the offence of stealing stock contrary to section 276 of the Penal Code and sentenced to seven years imprisonment each and instead of hard labour to six strokes of the cane each as corporal punishment.

The particulars of the charge were that both appellants on 28-2-2001 at Emuana village in Emusire Sub-location in Vihiga District in Western Province with another not before the court stole one cow valued at Shs.12,000/= which was the property of Priscilla Indiega. They pleaded not guilty to the charge on 23-3—01 when Constable Momanyi appeared as Prosecutor. When the hearing commenced on 14/1/02, Sgt. Sirengo conducted the prosecution. On 21-3-02 when the court continued to hear the case, Police Constable Osur appeared as the prosecutor and he continued to appear until 9-7-02 when constable Mukavale took over the conduct of prosecution and continued to prosecute the case until 3-9-02 when Constable Osur took over again and continued to alternate with Constable Mukavale up to the date the hearing was concluded.

When the Appeals came up for hearing before me, Mr. Karuri, learned Counsel for the State, conceded the appeal and I think rightly, on the ground that the prosecution in the Lower Court was conducted by a person or by persons who were not in law authorized to prosecute.

I have duly perused the record of appeal and I have ascertained that all the prosecutors who conducted the prosecution were below the rank of an Assistant Inspector of Police. Section 85 (2) of the Criminal Procedure Code empowers the Attorney General to appoint by writing under his hand any advocate of the High Court or a person employed in the Public Service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purpose of any case. It is not conceivable that the Attorney General could have appointed, in violation of this section, any of the Prosecutors appearing in the trial court. In any case, if he did, such appointment would be null and void as he is not empowered to appoint a person who does not qualify to be an advocate of the High Court of Kenya or is not a person employed in the Public service of the rank of an Assistant Inspector or above. As the prosecution was not conducted in accordance with the law, the trial was a nullity. For this reason I quash the conviction and set aside the sentence. Unless otherwise lawfully held, the appellants shall be released and set free forthwith.

Delivered, dated and signed at Kakamega this 28th day of September, 2006.

G. B. M. KARIUKI

J U D G E