



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

**Criminal Appeal 99 of 2004**

**JOSEPH NDWIGA IRERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of stock theft contrary to section 278 Penal Code alternatively he was charged with the offence on handling stolen property contrary to section 322 (2) of the Penal Code there is a fatal defect in the trial. The Trial Magistrate who commenced the trial did not continue and on 23.7.2004 the trial was continued by another Magistrate.

The provisions of section 200 CPC were not complied with. The appellant was not informed of his rights to recall witnesses. The section is in mandatory terms and failure to comply is fatal to conviction. The state concedes this issue and asks for retrial because there is sufficient evidence to secure a conviction. The appellant himself says he was in possession of the cow but did not know it was stolen. The accused has been in custody since 24/7/2003. The bull was recovered from him. He had contended that he had purchased the bull from the market. The trial Magistrate found no other evidence to support his contention. He alleged he had a receipt but was not able to produce the same. The Trial Magistrate in his judgment said “***I find his evidence that the bull was bought from persons whose identities he did not know to be unbelievable***”. This is speculation on the part of the Magistrate in view of the fact that he said he bought the bull from a market place where many strangers take their goods to sell. On the whole I find the evidence and explanation given by the accused to weaken the prosecution case.

I therefore find the trial was defective for non compliance with section 200 CPC.

I do allow the appeal on the ground that it is conceded by State Counsel. However I do not order retrial the accused was sentenced to 7 years imprisonment on 11.8.2004 he has already served 2 years and was in custody since 2003. The prosecution evidence does not prove beyond reasonable doubt it would be unfair to put the appellant through another period of trial. Also the bull/cow was recovered. I allow the appeal. I do not order retrial.

I therefore order that the Appellant shall be set at liberty forthwith

Dated this 21<sup>st</sup> September, 2006.

**J. N. KHAMINWA**

**JUDGE**