



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 284 of 2005**

**(From Original Conviction and Sentence in Criminal Case No.872 of 2004 of the Senior Magistrate's Court at Garissa)**

**ELECK MAINA WANJIRU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

**ELECK MAINA WANJIRU** was for the offence of **Burglary and Stealing contrary to 304(2) and 279(b) of the Penal Code**. He was sentenced to 4 years imprisonment in the first limb and 8 years imprisonment in the second limb. He was dissatisfied with the conviction and sentence and so filed this appeal.

**MR. MAKURA**, learned State Counsel conceded to the appeal on a technicality that in light of the Court of Appeal Judgment of **SWAHIBU SIMIYU & ANOTHER –V- REPUBLIC CA. NO.243 OF 2005**, the proceedings before the lower court were defective on account of the failure by the trial court to indicate the language used in the proceedings.

I have perused the record of the proceedings and I have confirmed that indeed nowhere was the language used by the court or the witnesses who testified before it indicated. The Appellant's rights under **S.77** of the Constitution and under **S.198** of the Criminal Procedure Code were violated. As Court of Appeal held in cited case of **SIMIYU** supra, the proceedings were defective. I set aside both the conviction and sentence.

**MR. MAKURA** has urged this Court to order a retrial on basis the Appellant would not be prejudiced as he has been in person for only 2 years out of the 8 years sentence. Counsel also submitted that the state would avail all the witnesses.

The Appellant opposed an order of retrial arguing that the evidence against him was very weak and that the Court relied on hearsay evidence.

I have considered all the principles applicable when dealing with the issue of whether or not to order a retrial. The evidence against the Appellant was hearsay evidence, which if an order for retrial were made would not sustain a conviction. In such circumstances an Appellate Court is enjoined not to order a retrial.

See **MWANGI –V- REPUBLIC 1983 KLR 522** I decline to order a retrial. The Appellant should be

set at liberty unless he is otherwise lawfully held.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2006.**

L. LESIIT

JUDGE

Read Signed and Delivered in the presence of :-

Appellant present

Mrs Gakobo for State

Wambui Court Clerk

J. LESIIT

JUDGE