REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 158 of 2003

(From original conviction and sentence in Criminal Case No. 39 of 2002 of the Resident Magistrate's Court at Narok – S. K. Koros, Esq.)

KINAMPETI OLE TOGOM…….....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Criminal Case No. 39 of 2002 of the Resident Magistrate's Court at Narok. In that case, the appellant had been charged for the offence of burglary and stealing, contrary to Section 304 (2) and 279 (b) of the Penal Code. The facts of the prosecution case as stated in the charge sheet are as follows:

"***On the night of 1st and 2nd September, 2001 at Olopopongi Estate in Narok township in Narok District of the Rift Valley Province jointly with another not before Court broke and entered the dwelling house of Lucas Sirere Koikai with intent to steal therein and did steal therein one radio-cassette make National, camera, one small bicycle BMX, 6" mattress all valued at Kshs.20,000, the property of the said Lucas Sirere Koikai."***

The alternative charge against the appellant is that of handling stolen goods contrary to Section 322 (2) of the Penal Code. During the hearing of the appeal, the appellant took issue with the evidence of the PW3 which he termed as untruthful and contradictory. Besides the above, the appellant also pointed out the PW3 never specified the house in which he had recovered the exhibits. Apart from the above, the appellant also explained that he had been arrested by a police officer with whom he had been involved in an assault case. Lastly, the appellant concluded that he was **not** satisfied with the sentence and that was the reason why he had appealed.

On the other hand, the State through Mr. Koech, State Counsel has conceded to the appeal since the conviction was unsafe and that the case had been partly prosecuted by an unqualified prosecutor.

This Court has carefully perused the above together with the entire record of appeal. I do concur with the learned State Counsel that the case was partly prosecuted by P. C. Ihaji who was **not** qualified to do so. Section 85 of the Criminal Procedure Code, Cap. 75 states as follows:

(1) "The Attorney-General, by notice in the gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney-General, by writing under his hand may appoint any Advocate of the High Court or 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 purposes of any case…"

In this particular case, P.C. Ihaji was below the required rank. Besides the above, it is crystal clear that the appellant was sentenced to 5 years imprisonment on 16th April, 2003. That means that he has already served about 2 years in jail. Having looked at the entire proceedings, I am of the considered opinion that a re-trial would **not** be appropriate. The appellant has already been punished for the role that he had played in the commission of the offence. Since the proceedings were null and void, I hereby quash the conviction and set aside the sentence.

The appellant should be released forthwith unless held lawfully.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of the appellant and Mr. Gumo, Assistant Deputy Public Prosecutor.

MUGA APONDI

JUDGE

31ST MARCH, 2005