

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 77 OF 2000

(From original conviction and sentence of the Senior Resident
Magistrate's Court at Molo in Criminal Case No. 2428 of 1998
– J. KIARIE

JAMES NJUGUNA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, James Njuguna Kamau, was charged with the offence of theft of motor vehicle spare parts contrary to **Section 279(c) of the Penal Code**. The particulars of the offence were that on the night of the 4th and 5th of November 1998 at Kabianga sub-location, Molo, Nakuru District, the appellant jointly with others not before court stole a gear box and a hydraulic system valued at Kshs 250,000/= from a tractor registration number KLJ 701, the property of Wesley Rotich. When the appellant was arraigned before court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged. He was sentenced to serve seven years imprisonment with seven strokes of the cane. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

At the hearing of the appeal, Mr Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the appellant had been prosecuted by an unqualified police prosecutor. The proceedings were therefore a nullity. He further submitted that since the appellant had served a substantial part of the sentence imposed by the magistrate in the vitiated trial, he would not be insisting that the appellant be retried. The appellant welcomed the development.

I have perused the proceedings in respect of which the appellant was convicted. I have noted that the appellant was prosecuted by Police Constable Njagi. He is a police officer of a rank lower than that of an Assistant Inspector of Police. He was thus not authorised to prosecute criminal cases before a magistrate's court as provided by **Section 85(2) and 88 of the Criminal Procedure Code. In Eliremah & Anor - versus- Republic** [2003] KLR 537 the Court of Appeal held that where such a police officer prosecutes a case before a magistrate's court, the proceedings thereto will be a nullity. In the premises therefore I do declare the proceeding of the lower court in respect of which the appellant was convicted to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

On the issue of retrial, Mr Gumo acknowledges that the appellant has served a substantial imprisonment term of the custodial sentence imposed in the vitiated trial. It would be therefore unfair and unjust to subject the appellant to a retrial. I agree with Mr Gumo. The appellant has been in prison since the 28th of February 2000. He is remaining with about two years of the sentence which was imposed in the vitiated trial. It would not serve the ends of justice if the appellant is subjected to a retrial after serving five years in prison on account of the trial which this court has ruled to be a nullity.

The appellant is consequently ordered discharged. He is set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 26th day of May 2005.

L. KIMARU

JUDGE