

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 85 OF 2004

(From original conviction and sentence in criminal case No.
2085 of 2003 of the S.R.M.'s Court at Molo –KAGENDOR.M.)

SAMUEL KIPKORIR KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Samuel Kipkorir Korir, was charged with another with three counts of stealing stock contrary to **Section 278 of the Penal Code**. He was alternatively charged with two counts of handling stolen property contrary to **Section 322(2) of the Penal Code**. The particulars of the said offences were that between the 14th of April and 29th of August 2003, the appellant stole a bull and two cows belonging respectively to Mathew Kipyegon Sang, Johana Kipkemoi Mitei and Richard K. Ngeno residents of Kongoi Farm, Kuresoi, Nakuru District. He was alternatively charged with handling the said stolen livestock. When the appellant was arraigned before the lower court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted on the first count of stealing stock and sentenced to serve three years imprisonment. He was also convicted on the alternative charges in count two and three for the offences of handling stolen property. The appellant was sentenced to serve one year imprisonment on each of the two counts in the alternative charge. All the sentences were ordered to run consecutively. Being aggrieved by the said conviction and sentence, the appellant has appealed to this court against both conviction and sentence.

At the hearing of the this appeal, Mr Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the appellant had been prosecuted by a Police Officer who was not competent to conduct such cases in a magistrate's court. He however urged the court to order that the appellant be retried. I have perused the record of the lower court. I have noted that part of the proceedings were prosecuted by Police Constable Njagi. He is a police officer of a rank lower than that of an Assistant Inspector of Police. He was not authorised to prosecute criminal cases before a magistrate's court as provided by **Sections 85(2) and 88 of the Criminal Procedure Code**. The Court of Appeal in **Eliremah & Anor –versus- Republic [2003] KLR 537** held that where such an incompetent police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto will be a nullity. I do declare the proceedings in this case to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentences imposed set aside.

Mr Gumo has urged this court to order that the appellant be retried in view of the charges that faced him in the vitiated trial. The principles that the court should consider before ordering retrial are now well settled. Before retrial is ordered, the court must, *inter alia*, satisfy itself that there was sufficient evidence in the vitiated trial which could sustain a conviction if a new trial is ordered. The court will not order retrial for the purposes of enabling the prosecution fill gaps in its case. The court will not order a re-trial if the appellant has served a substantial part of his sentence. The court will order a retrial if it appears to it that the ends of justice would be served. In the instance case, the evidence adduced against the appellant in the lower court raises doubt if the appellant could be convicted if a retrial is ordered. Further, the appellant was convicted on the 19th of March 2004. He has served one year and nearly two months of the said sentence imposed. It would not serve the ends of justice if a retrial is ordered in this case. If indeed the appellant committed the said offences, he has been sufficiently punished. He has repaid his just debts

to the society.

He is therefore ordered discharged. He is acquitted. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE