



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT**  
**MACHAKOS**  
**APPELLATE SIDE**

**Criminal Appeal 56 of 2004**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No 295 of 2004 of**

**NZIOKA MUSAU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

Nzioka Musau was charged before Makindu Resident Magistrate's Court in Criminal Case 295/04 for the offence of stealing stock contrary to section 278 of the Penal Code. On 15/3/04 when he appeared before the magistrate, he pleaded guilty to the offence, was convicted and sentenced to serve 7 years in jail. The appellant is aggrieved by both conviction and sentence and he appealed against both. The appellant cited six grounds in his petition of appeal which can be summed up as follows:-

1. That the sentence was harsh
2. That the appellant's mitigation was not considered.
3. That he was ignorant of the court procedure and consequences of the plea.

He pleaded with the court to set aside the sentence and sentence him to non custodial sentence.

The learned State Counsel concealed to the appeal for reasons that the plea was not properly taken as the charge was read to the appellant at a different time and facts taken later without the charge being read to the appellant. He urged the court to order a retrial since the appellant was only sentenced to seven years imprisonment on 15/7/04 about a year ago and he faces a sentence of 7 years and that he has not served a substantial part of the sentence and the appellant will not suffer any prejudice. The appellant had no objection to a retrial being ordered in this matter.

In the case of MANJI versus REPUBLIC 1966 E.A. 343, the Court of Appeal held that a retrial will generally be ordered if the proceedings in the lower court are defective or illegal and where the accused will not suffer any prejudice.

I have seen the record of appeal and especially the proceedings relating to the taking of plea. I have noted the defective the state counsel pointed out. The appellant was arraigned before the Makindu court on 15/3/04. Initially the appellant was absent. The matter was placed aside for mention later. Later on the same day the plea was taken to which the appellant pleaded guilty, facts were taken and appellant was convicted. The plea was taken in one continuous trial section. It was however partially taken then deferred. I have however looked at the facts and they do not disclose any offence as against the appellant. Somebody else was arrested with the head of the goat that had been stolen. There is no link between the appellant and the goat's head that was recovered. The plea was indeed unequivocal and hence defective. The court therefore quashes the conviction and sets aside the sentence.

The plea was defective and that is a good reason for which the court can order a retrial. The appellant was sentenced to 7 years imprisonment on 15/3/04 – a year ago. He has not served a substantial part of his sentence. The offence with which appellant was charged was serious. The subject goat had already been slaughtered. It is only fair that the matter be heard so that justice is done to both parties. The appellant does not oppose an order for retrial and he would not be prejudiced by this order of retrial. The case did

not proceed to hearing and indeed the appellant was complaining that he was not given a chance to be heard. This is the time he can be heard. Only a head of the goat was recovered. I believe the exhibit cannot be availed in the event of a retrial. However the police may have taken photographs which might assist in the retrial. For the above reasons, I do find that this is a good case for ordering a retrial. The appellant will be produced before Resident Magistrate's Court, Makindu on 16/5/05 for further orders. This being a retrial the case be given a hearing date on priority basis.

Dated at Machakos this 10th day of May 2005

**R.V. WENDOH**

**JUDGE**