REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 258 OF 2004

(From original conviction and sentence of the Resident

Magistrate's Court at Sotik in Criminal Case No. 245 of 1998)

PHILIP KIPNGENO SITIENEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Phillip Kipngeno Sitienei, was charged with the offence of failing to prevent a felony contrary to **Section 392 of the Penal Code.** The particulars of the charge were that on the night of the 19th and the 20th of April 1998 at Akshar General Enterprises, Sotik in Bomet District, the appellant being a watchman neglected to prevent a felony, namely shop breaking. The appellant pleaded not guilty to the charge. After a full trial, the appellant was duly convicted as charged. He was sentenced to serve two years imprisonment. The appellant was aggrieved by the said conviction and sentence and has appealed to this court.

At the hearing of appeal, Mr Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the appellant had been prosecuted by an incompetent prosecutor. He was however not asking that the appellant to be retried after considering all the circumstances of the case. Mr Rono, Learned Counsel for the appellant did not have anything useful to add in view of the developments. I have perused the record of the lower court from which his appeal arose. The prosecution of the criminal case facing the appellant was by Corporal Sambu. 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 in a magistrate court as provided by **Section 85(2) and Section 88 of the Criminal Procedure Code. In Eliremah & Anor – vs- 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 shall be a nullity. In the circumstances therefore the proceedings of the lower court from which this appeal arose are hereby declared to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

Mr Gumo, is not insisting that the appellant be retried. I have considered the evidence that was adduced against the appellant in the vitiated trial. I have also considered the fact that the appellant had already served eight months of the two year sentence imposed. I do agree with Mr Gumo that the appellant should not be retried. It would not serve the ends of justice if the appellant is re-tried after serving over a third of the sentence imposed in the vitiated trial. In the circumstances of this case, the appellant is hereby ordered discharged. He is set at liberty unless otherwise lawfully held.

DATED at KERICHO this 8th day of June 2005.

L. KIMARU

JUDGE