



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Criminal Appeal 14 & 15 of 2004**

*(Appeals against both conviction and sentence of the Resident Magistrate's Court  
at Hamisi in Criminal Case No. 467 of 2003 (W. K. KAHINDI ESQ., DMII PROF)*

**1. NICHOLAS SHIRAO**

**2. CALORI MUYONGA.....APPELLANTS**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

NICHOLAS SHILAHU, the first appellant (appeal No.15/04) and CALORI MUYONGA, the second appellant (appeal No.14/04) were jointly charged before the District Magistrate II, at Hamisi W. K. Kahindi Esq., in Hamisi RM. Criminal Case No.467 of 2003 with the offence of Kitchen breaking and committing a felony C/S 306(a) of the Penal Code with an alternative charge of handling stolen goods C/S 322 (2) of the Penal Code. They were each jailed for 3 years following their own pleas of guilty.

The prosecution was led by one P.C. Kemboi. The trial magistrate did not have the power to authorize the said prosecutor, who was below the rank of an Assistant Inspector, to prosecute. It was a misdirection on his part to allow him to prosecute. Section 88(1) of the Criminal Procedure Code does not give a trial magistrate power to authorize an unqualified person to prosecute. The trial was a nullity. The conviction is quashed and sentence set aside. Unless otherwise lawfully held, the appellants shall be released and set free.

*Dated at Kakamega this 3<sup>rd</sup> day of June, 2005.*

**G. B. M. KARIUKI**

**J U D G E**