



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE  
Criminal Appeal 93 of 2004**

**PAUL NGEI KIVUVA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH  
Criminal Appeal 94 of 2004**

**JULIUS MWAKIO MWAMBURI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH  
Criminal Appeal 96 of 2004**

**NICHOLAS MUSAU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being appeals from Original Criminal Conviction and sentence in Criminal Case No. 532 of 2002 of the District Magistrate's Court at Taveta – T.L. Ole Tanchu, DM II Prof)**

**Coram: Before Hon. Justice Mwera  
Present all in person – Appellant 1/Accused  
Appellant 2/Accused  
Appellant 3/Accused  
Ademba for the Respondent/State  
Court clerk – Kazungu**

**R U L I N G**

The three (3) appeals were consolidated and dealt with together. They arose from the conviction and sentence pronounced on 9-4-2003. The appellants were charged with others for the offence under S.306 (a) Penal Code in that on the night of 24th/25th August 2002 at an unknown time in Taveta Township,

Taita-Taveta with others not before court, they broke into the chemist's shop of Patrick Kioko and stole from there a fax machine, printer, cash register, an assortment of drugs and cash Sh.240,000/- all valued at Sh.1.2m. This was Count 1.

Paul Ngei (CR. A. 93/04) was accused 3 in the lower court while his mates, Julius Mwakio (CR. A. 94/04) and Nicholas Musau (CR.A. 96/04) were accused Nos.5 and 7 respectively. Julius faced an alternative charge contrary to section 322 (2) Penal Code alone, of handling stolen property. He was also alone in count 2, being in possession of charms contrary to section 5 of the Witchcraft Act (Cap. 67). On the charge of chemist's shop breaking, the 3 appellants were convicted and sentenced. They got 7 years imprisonment plus 4 strokes each. And Julius got 8 months for possessing charms of witchcraft. He did not appeal against this. Sentences were ordered to run concurrently.

When the appeals came up for hearing it was noted that the prosecution in the lower court had been conducted by P.C. Nibiswa contrary to section 85(2) Penal Code, that officer not being of a rank of assistant inspector or above as required by the law. The learned State Counsel conceded the appeals on his ground but pressed for a retrial. He told the court that the offence was a serious one and the stolen goods were never recovered. That the appellants had not served so much as half the prison term imposed and that a retrial was warranted. That the witnesses would be availed.

Each of the appellants opposed a retrial on the basis that they had been imprisoned since June 2003 and a retrial would prejudice them. Julius (appellant 2) added that he could only face a retrial if it was his fault. And that here a mistrial took place in the lower court and not otherwise.

One of the main grounds on which a retrial should be ordered should be that the evidence on record is of such a nature that the retrial would probably end in a conviction. That witnesses will avail. Of course, the seriousness of the offence is not overlooked and so is any possibility of the accused being prejudiced e.g. by the prosecution using the retrial to fill in any gaps in its case. The court took time to peruse the evidence on record and the fairly long judgement of the learned trial magistrate. He did this analyzing the evidence in the light of the charges before arriving at his decision. He similarly took care to hand down the sentences.

From all the foregoing, and having in mind the appellants' submissions on a retrial, this court is minded to order one. The evidence in the lower court, and it was submitted that the witnesses would avail, is such that a conviction is probable. The court did not feel that the prosecution would use the retrial to close the gaps in its case. The gravity of the offence is also taken into regard.

Accordingly the appellants shall remain in custody while the prosecution makes early arrangements for a retrial to be conducted by a competent public prosecutor. Order: Appeals are allowed but a retrial to follow. The proceedings leading to the conviction and sentence of Julius on possession of charms are found to be a nullity and quashed.

Orders accordingly.

**Delivered on 25th July 2005.**

**J.W. MWERA**

**JUDGE**