

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL APPEAL NO.371 OF 2003

(From original Conviction and Sentence in Criminal Case Number 4072 of 2001 in the Chief Magistrate's Court at Nyeri by J.B.A. Olukoye –R.M.)

DAVID MWANGI WANJOHI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

David Mwangi Wanjohi (hereinafter referred to as the Appellant) was tried and convicted by the Resident Magistrate Nyeri of 6 counts of Burglary and Stealing Contrary to Section 304(2) and 279(b) of the Penal Code. He was sentenced to serve concurrent terms of 5 years imprisonment and 2 strokes on each limb of the charges. Being dissatisfied the appellant has filed this appeal. It is evident from the proceedings of the trial in the lower court, that the prosecution was conducted by one Sergeant Njage.

This was a person not qualified to prosecute the case in terms of Section 85(2) of the Criminal Procedure Code. The appellants' trial was therefore a nullity and his conviction cannot stand.

Learned State Counsel has urged this court to consider an order for a retrial. Although the evidence which was adduced against the Appellant would prima facie be sufficient to establish the case against him, the appellant was sentenced to serve 5 years imprisonment on 30th April 2003. He has therefore been in prison for a period of 2 years and 3 months. In the circumstances of this case it would not be fair to subject him to a retrial. I do therefore allow this appeal quash the conviction and set aside the sentence. The appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 5th day of August 2005.

H. M. OKWENGU

JUDGE