



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT**

**MACHAKOS**

**APPELLATE SIDE**

**Criminal Appeal 240 of 2003**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No 935 of 2002 of  
the Resident Magistrate's Court at Yatta M Maundu on 14/7/02**

**JOSEPH MUTISYA MUTUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

This appeal arises out of the Judgment of Resident Magistrate's Court at Yatta, in Criminal Case 935/02, and dated 14/7/03. The appellant was charged with four counts of uttering a document with intent to defraud Contrary to Section 357 (b) of the Penal Code and 10 counts of stealing Contrary to Section 275 of the Penal Code. He was acquitted of all counts under Section 210 Criminal Procedure Code save for counts 6, 8, 11, 12 and 13 for which he was placed on his defence. The magistrate found him guilty of the two offences of stealing on counts 11 and 13. He was sentenced to serve three years on each count and sentences were to run concurrently. He was acquitted of all the other charges. In his Memorandum of Appeal, the appellant alleged that the prosecution had not proved their case; that he was not arrested in possession of any documents; that the trial magistrate was biased in his sentence and that the sentence was harsh and excessive. The appellant did not attend court as he did not wish to be present at the hearing.

The learned state counsel, Mr O'Mirera, conceded to the appeal as the prosecution in the lower court proceedings was conducted by Sergeant Kanyonda, who was not a qualified prosecutor and the proceedings in the lower court were therefore a nullity. He urged the court to order a retrial because the offence is serious and that the appellant was charged with 14 counts and that since he has only served 2 years, it is in the interests of justice that he be retried.

It is apparent from the proceedings before the lower court that Sergeant Kanyonda, was the prosecutor when the plea was taken and he went on to prosecute the case when it came up for hearing. Sergeant Kanyonda, is not a qualified prosecutor within the provisions of Section 85 (2) of the Criminal Procedure Code and 88 Criminal Procedure Code which provide that a court prosecutor will be appointed by the Attorney General from police officers of the rank of acting Inspectors of Police and above or Advocates of the High Court. Sergeant Kanyonda, does not fall under any of the above categories. Sergeant Kanyonda, was unqualified to prosecute and his prosecution of the case in the lower court renders these proceedings a nullity. As held in *ELIREMA* versus *REPUBLIC Criminal App. 67/02*, such proceedings

are rendered null and void and I hereby declare the lower court proceedings null and void. The conviction is, therefore, quashed and sentence is set aside.

Can this court order a retrial? A retrial will generally be ordered if the lower court proceedings are defective or illegal as was the present case.

A retrial will not be ordered if it will prejudice or cause injustice to the appellant. The court has also got to consider the admissible evidence on record and whether it is likely to result in a conviction in the event a retrial is ordered.

From the learned state counsel's submission, it is apparent that he did not notice that the accused was only convicted of two counts of stealing on counts 11 and 13. He was acquitted of the other 12 counts.

The appellant was convicted on 14/7/03. So far he has served just over 2 years out of the 3 years sentence meted. He has less than one year to go.

I have seen the evidence on record in regard to the two counts for which appellant was convicted and I do agree that it might result in a conviction. But the appellant having served more than 2/3 of the sentence, in my view, it would be unjust and prejudicial to the appellant if a retrial were to be ordered. For that reason, the court declines to order a retrial and orders the appellant set at liberty

forthwith unless otherwise lawfully held.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 29th day of September 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**