



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 51 of 2004

(From original conviction and sentence in Criminal Case No. 3116 of 2004 of the Senior Resident Magistrate's Court at Molo – KAGENDO R.M.)

EVANS KIKWAI RONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Evans Kikwai Rono, was charged with various offences under the Penal Code. He was charged with two counts of theft contrary to **Section 275**. The particulars of the charges were that on the 7th and 12th of November 2003 at Kedowa Market, Kericho District, the appellant stole various personal items belonging to Enos Otieno and Soi Julius Kimeli. The said personal items were valued at Kshs 5,000/= and 3,500/= respectively. The appellant was alternatively charged with two counts of handling stolen property contrary to **Section 322(2)**. The particulars of the said charges were that on the 12th of November 2003 at Londiani Township, the appellant otherwise than in the course of stealing, dishonestly handled properties which were later established to belong to Enos Otieno and Soi Julius Kimeli. The appellant pleaded not guilty to all counts that faced him. After a full trial, the appellant was convicted on the two main charges of stealing under **Section 275 of the Penal Code**. He was sentenced to serve three years imprisonment on each count. The sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

At the hearing of the appeal, Mr Koech Learned State Counsel conceded to the appeal on the sole ground that the Criminal Case facing the appellant at the trial magistrate's court had been prosecuted by an incompetent police prosecutor. He was however not insisting that the appellant be retried. In response thereto, the appellant who was acting in person, submitted that he had already served nineteen months of the sentence imposed. He was only remaining with four months to complete his sentence. He urged the court to order that he be discharged and therefore released from prison.

I have perused the proceedings of the said trial magistrate. I have noted that the criminal case facing the appellant was prosecuted by Police Constable Njagi. He is a Police officer of a rank lower than that of an assistant Inspector of Police. He was thus not authorized to prosecute criminal cases before a magistrate's court as provided by **Section 85(2) and 88 of the Criminal Procedure Code**. The Court of Appeal held in Eliremah & Anor –vs- Republic [2003]KLR 537 that where such a Police Officer prosecutes a case before a magistrate's court, the proceedings thereto will be a nullity. I therefore declare the proceedings of the trial magistrate's court in respect of which this appeal arose to be a nullity and as a consequence of which the appeal is hereby allowed the conviction quashed and the sentences imposed set aside.

The appellant has substantially served the sentence imposed by the trial magistrate in the vitiated trial. It would not serve the ends of justice for the appellant to be retried. As was stated by the Court of Appeal in Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported) retrial would only be ordered where the circumstances of the case calls for it and the interest of justice so demands. The State is not insisting that the appellant be retried. It would be unjust to subject the appellant to a retrial in the circumstances appertaining to this case. He is consequently ordered discharged. He is set at liberty unless otherwise lawfully held.

**DATED at NAKURU this 21st day of September 2005.**

**L. KIMARU**

**JUDGE**