



**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL 385 OF 2003**  
**(From original conviction and sentence of the Senior Resident**  
**Magistrate’s Court at Narok in Criminal Case No. 369 of 2003**  
**– P. Okile)**

**JOSEPH OPIYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Joseph Opiyo, was charged with the offence of house breaking and stealing contrary to **Section 304(1)** as read with **Section 279(b) of the Penal Code**. The particulars of the offence were that on various dates between the 13th and the 20th of June 2003 at Oloobokishi area, Narok District, the appellant broke into and entered the house of Florence Smith and stole therefrom various household, electronic goods and personal clothing belonging to the said Florence Smith valued at Kshs 200,000/=. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentence to serve seven years and three years respectively in respect of each limb of the offence. The said sentences were ordered to run concurrently. The appellant was aggrieved by this 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 in the trial magistrate’s court had been prosecuted by a police officer who was not authorized in law to prosecute such cases. He however submitted that the appellant ought to be retried in view of the overwhelming evidence that was adduced by the prosecution which established his guilt in the vitiated trial. He submitted that when the appellant was arrested, he was found in possession of some of the properties that were stolen from the house of the complainant. On his part the appellant urged this court to discharge him. He submitted that he had been in prison for a period of two years and two months and had therefore been sufficiently punished for the offence which he had been charged and convicted in the vitiated trial. He submitted that this court ought therefore to consider that fact and order that he be released from prison.

I have perused the proceeding of the trial magistrate in respect of which this appeal arose. I have noted that the criminal case facing the appellant was prosecuted by Police Constable Ihaji. 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 **Sections 85(2) and 88 of the Criminal Procedure Code**. In **Eliremah & Anor –vs- Republic [2003] KLR 537** the Court of Appeal held that where such a police officer prosecutes a case before a Magistrate’s Court, the proceedings thereto will be a nullity. I hereby declare the said proceedings of the trial magistrate to be a nullity and as a consequence of which the appeal is allowed, the conviction quashed and the sentences imposed set aside.

Mr Koech, Learned State Counsel has made persuasive submissions to have the appellant retried. He states that there is overwhelming evidence to sustain a conviction, if this court were to order that the appellant be retried. On his part, the appellant does not, naturally, wish to be retried. He has urged this court to order that he be discharged in view of the fact that he has served a substantial part of the sentence imposed by the trial magistrate in the vitiated trial. The principles which this court ought to consider in determining whether or not retrial should be ordered were set out in the case of case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal held at page 6 that;

***“In the case of Ahmed Sumar v Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:***

***“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered”.***

***The court continued at the same page paragraph H and stated: “We are also referred to the judgment in Pascal Clement Braganza v R [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person”.***

***There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice required it.”***

In the present case, while appreciating the argument advanced by the State in support of their case that the appellant ought to be retried in view of the overwhelming evidence adduced in the vitiated trial, the fact that the appellant has already served two years and two months of the sentence that was imposed by the trial magistrate in the vitiated trial has to be put into consideration. It is a principle of Criminal Law that an accused person should not be subjected to a situation where he may be sentenced to serve a harsher sentence than was ordered in the vitiated trial which has been set aside. In the circumstances of this case, this court is of the view that to subject the appellant to a retrial after serving two years and two months of the sentence imposed in the vitiated trial (*about a third of the imprisonment term*) would amount to a miscarriage of justice to the appellant.

In the circumstances therefore the appellant is hereby ordered discharged. He is set at liberty and ordered released from prison unless otherwise lawfully held.

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

**L. KIMARU**

**JUDGE**