

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 429 OF 2003
(From original conviction and sentence of the Principal
Magistrate's Court at Nyahururu in Criminal Case No. 1798 of
2003 – L. K. Mutai)

DAVID MWANGI KABIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, David Mwangi Kabira, was charged with offence of stealing stock contrary to **Section 278 of the Penal Code**. The particulars of the offence were that on the 19th of May 2003 at Kahuka village Laikipia District, the appellant jointly with another stole twenty eight sheep and four goats all valued at Kshs 70,000/= the property of Christine Tamurei. The appellant was alternatively charged with handling stolen property contrary to **Section 322(2) of the Penal code**. The particulars of the offence were that on the 19th of May 2003 at Kambi ya Simba village, Laikipia District the appellant jointly with another, otherwise than in the course of stealing, dishonestly received or retained twenty sheep and three goats valued at Kshs 65,000/= knowing or having reasons to believe them to be stolen or unlawfully obtained. The appellant pleaded not guilty to both counts. After a full trial, the appellant was found guilty of the alternative charge of handling stolen property. The appellant was sentenced to serve three and half years in prison. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

At the hearing of the appeal, Mr Gumo the Assistant Deputy Public Prosecutor conceded to the appeal. He submitted that the criminal case facing the appellant was prosecuted by Sergeant Maina, who is a police officer not authorized in law to prosecute criminal cases in a magistrates court. He however submitted that the appellant should be retried. On his part the appellant submitted that he started serving his sentence on the 5th of September 2003. He submitted that he had therefore served two years and two months of the said sentence imposed in the vitiated trial. He urged this court in the circumstances to discharge him.

I have perused the proceedings of the trial magistrate in respect of which this appeal arose. I have noted that the police officer who prosecuted part of the criminal case facing the appellant was a Sergeant Maina. He is a police officer of a rank lower than that of an Assistant Inspector of police. He was thus not authorized to prosecute a criminal case before a magistrate's court in accordance with the provisions of **Sections 85(2) and 88 of the Penal Code**. In **Eliremah & Anor -vs- Republic [2003]KLR 537** the Court of Appeal held that where such a police officer prosecutes a criminal case in a magistrate's court, the proceedings thereto will be a nullity. I hereby declare the proceedings of the trial magistrate to be a nullity as a consequence of which the appeal is allowed the conviction quashed and the sentence imposed set aside.

Having carefully considered the facts of this case, I decline to order that the appellant to be retried. This is due to the fact that the appellant has already served nearly two thirds of the imprisonment term imposed by the trial magistrate in the vitiated trial. It would amount to a miscarriage of justice if this court were to order the appellant to be retried after he has served such a length of time in prison. If the appellant were to be retried, he would in effect be subjected to double jeopardy;- there is a likelihood that he may be convicted and ordered to serve a harsher sentence than the one he has already served as a consequence of the vitiated trial. The ends of justice will not be served if the appellant is retried. In the circumstances therefore I order the appellant to be discharged. He is set at liberty and ordered released

from prison unless otherwise lawfully held.

DATED at NAKURU this 26th day of October 2005.

L. KIMARU

JUDGE