

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 167 OF 2003

**(From original conviction and sentence of the Principal
Magistrate's Court at Nyahururu in Criminal Case No. 2348 of
2001 – C. N. Sifuna)**

PETER MWANGI GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Peter Mwangi Githinji, was jointly charged with others (*who were however acquitted by the trial magistrate's court*) with the offence of stealing stock contrary to **Section 278 of the Penal Code**. The particulars of the offence were that on the 4th of October 2001 at ADC Mutara Farm, Laikipia District, the appellant jointly with others not before court stole fifteen head of cattle valued at Kshs 450,000/= the property of David Kinuthia. He was alternatively charged with handling stolen property contrary to **Section 322(2) of the Penal Code**. The particulars of the charge were that on the 19th of October 2001 at Ol Kalou Trading Centre, Nyandarua District jointly with others not before court, otherwise than in the course of stealing, dishonestly received or retained eleven head of cattle knowing or having reason to believe them to be stolen or unlawfully obtained goods. The appellant pleaded not guilty to both charges. After a full trial, he was found guilty of the alternative charge of being found with possession of stolen property. He was sentenced to serve four years imprisonment with hard labour. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

At the hearing of the appeal, Mr Koech, Learned State Counsel conceded to the appeal on the ground that Sergeant Maina, the police officer who prosecuted the criminal case facing the appellant before the trial magistrate was not authorized in law to prosecute such cases. He submitted that although there was overwhelming evidence adduced against the appellant in the vitiated trial, the State was not insisting that the appellant be retried in view of the period that the appellant had already served in prison. On his part, the appellant welcomed the concession by the State of the appeal. He urged this court to order that he be released. I have perused the proceedings of the trial magistrate.

I have noted that the criminal case facing the appellant was prosecuted by 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 criminal cases in the said 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 criminal case before a magistrate's court, the proceedings thereto will be a nullity. I hereby declare the proceedings of the trial magistrate in this case to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

Mr Koech Learned Counsel for the State is not insisting that the appellant be retried in view of the period that the appellant has served in prison. I agree with him. The appellant was convicted and sentence to a custodial term on the 2nd of April 2003. The appellant has therefore served two and a half years of the sentence imposed by the trial magistrate in the vitiated trial. The appellant has served nearly two thirds of the term of imprisonment imposed. It would not serve the ends of justice to subject the appellant to a retrial after he has served two thirds of the sentence imposed in the vitiated trial. The appellant has paid his just debts to the society. I will therefore order that the appellant be discharged. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 12th day of October 2005.

L. KIMARU

JUDGE