



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Criminal Appeal 16 of 2004**

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 681 of 2003 of  
the Resident Magistrate's Court at Kangundo N.N. Njagi SRM 29/10/03)**

**JOHN MUEMA KAMOLA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

The appellant was convicted of handling stolen livestock, that is, a sheep. He was sentenced to seven years imprisonment. He appealed against the conviction and sentence. The state rightly conceded the appeal because the prosecution was conducted by a police constable contrary to the provisions of Section 85 (2) of the Criminal Procedure Code. For this reason, there is no dispute that the trial was a nullity and this appeal should be allowed on that ground alone.

Mr O'Mirera, sought a retrial. I have considered the facts of this case. The one sheep found in possession of the appellant was so found a year after the livestock of complainant were stolen. He gave a defence to the effect that he had bought the sheep from a given person who was called and testified, stating that he had not sold the sheep. In my view, even if the third party denied selling the sheep, the appellant's defence was not thereby nullified and make impossible. There is no way the alleged seller could accept selling the sheep to appellant because that could make him the thief or handler. It is my view, therefore, that the chances of securing a conviction on a retrial are minimal. In addition the appellant has served a substantial part of his sentence. It may not be fair and just to expose him to a fresh sentence.

Accordingly, the request for a retrial is refused as not in the interest of justice. The appeal is, therefore, allowed. The conviction is quashed and the sentence of 7 years imprisonment set aside. The appellant is ordered set at liberty from prison forthwith unless otherwise therein lawfully held. It is so ordered.

**Dated and delivered at Machakos this 8th day of November 2005.**

**D.A. ONYANCHA**  
**JUDGE**