

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 274 of 2003

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 120 of 2003 of the
Resident Magistrate's Court at Tawa P.N Murigori on 3/6/03)**

NICHOLAS KYALO NDIVO APPELLANT
VERSUS
REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was convicted of the offences of house breaking and theft from therein. He was sentenced to 5 years imprisonment in each limb to run concurrently. He was also to receive 5 canes but it is not clear in relation to which offence. He appealed against the conviction and sentence.

The state rightly conceded both convictions because the prosecution was conducted by a police corporal. It seeks a retrial.

I have considered the issue of retrial. The appellant has served 2 years of the five years. If there will be remission he has only less than 1 ½ years to serve. The value stolen property is less than 3,000/=. In my view, the sentence served is substantial, indeed more than half the sentence to be actually served taking remission into account. The interest of justice therefore will not be served in a retrial. Under these circumstances it is the decision of the court that a retrial is inappropriate and is rejected. The appellant's appeal is allowed. The conviction on both offences is each quashed. The sentence of 5 years strokes of a cane on each limb is set aside. The appellant shall be set at liberty forthwith unless being lawfully held in prison. It is so ordered.

Dated and delivered at Machakos this 7th day of November 2005.

D.A. ONYANCHA
JUDGE