



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CR. APPEAL NO. 27 OF 2003**

**BENARD LUKHALE MAKOKHA ... APPELLANT**

**VS**

**REPUBLIC ..... RESPONDENT**

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

The appellant and another were jointly tried with a charge of Burglary Contrary to Section 304 (2) (b) and stealing contrary to Section 279 (b) of the Penal Code. The particulars of the charge are that on the night of 30th Nov. 1999 and 1st December 1999 at Nabuyole village Chetambe Location in Bungoma District of the Western province, jointly broke and entered into the dwelling house of Tom Mafunga Liambila with intent to steal therein and did steal therein 6 blankets, 4 bed sheets, 2 mattresses, one radio cassette make international, used clothes all valued at Ksh.15,000/= the property of the said Tom Mafunga Liambila. The appellant also faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal code. The appellant was acquitted of the alternative charge but was convicted and sentenced to serve 7 years imprisonment with hard labour on the main charge. Being aggrieved he now prefers this appeal.

I have examined the record and the same reveals that the prosecution's case was conducted by one corporal Nyongesa. This is not allowed under S. 85 (2) of the Criminal Procedure Code. Consequently there was no competent trial hence I will not consider the merits or demerits of the evidence tendered before the trial court.

In view of the above finding I will allow the appeal. The conviction is quashed and sentence set aside. The appellant was convicted on 22.1.2002 which means he has served about 2 years 7 months. The offence is alleged to have taken place in the months of November and December 1999 about five years ago. The record also shows that the exhibits were released. I find that if I order for a re-trial a miscarriage of justice is likely to occur. I therefore make an order that the appellant be set free forthwith unless lawfully held for any other offence or purpose.

**JUDGMENT READ DATED AND**

**DELIVERED THIS 30th DAY OF July 2004**

**J.K. SERGON**

**JUDGE**