



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 20 OF 2004**

**(From Original Conviction and Sentence in Criminal Case No. 1934 of 2002  
of the Senior Resident Magistrate's Court at Kwale Maindi .S. Esq., District  
Magistrate II (Prof.)**

**JULIUS OMANGA MAUNGA ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

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

The Appellant in this case was charged before the District Magistrate at Kwale with the offence of stealing by servant contrary to section 281 of the Penal Code. After trial he was convicted and sentenced to serve two years imprisonment. He appealed against both conviction and sentence. The prosecution case before the Kwale court was conducted by P.C. Yegon, a police officer of the rank below that of an assistant inspector contrary to section 85(2) of the Criminal Procedure Code. Mr. Monda, the State Counsel correctly conceded that the trial was a nullity. He however asked for a retrial.

In the circumstances I declare that the trial of the accused was a nullity. On the issue of retrial I am required to consider several factors before ordering or disallowing it. These factors include the nature of the offence, whether or not there was sufficient evidence before the trial magistrate to support a conviction or ordering a retrial is going to enable the prosecution to fill up the gaps in its case and the period the appellant has served. In general a retrial should not be ordered if it is going to be prejudicial to the Appellant.

I have perused the record together with the judgment of the trial magistrate. I am satisfied that there was ample evidence against the appellant and he was therefore properly convicted save for the fact that the prosecution case was conducted by an unqualified police officer. I have also considered the interest of the complainant. The Appellant was sentenced to serve two years imprisonment and has served less than two months.

Everyone is taken to intend the consequences of his acts or omissions. There is therefore no prejudice that will be caused to the appellant to undergo a retrial for an offence he is alleged to have committed. In the circumstances I quash the conviction of the appellant set aside the sentence of two years imprisonment imposed upon him and order that he be retried before another magistrate at Kwale or if there is none there in another court nearby.

I order that this case be mentioned before the Chief Magistrate Mombasa on the to allocate it to the court that should hear it afresh.

**DATED at Mombasa this 9th day of March 2004.**

**D.K. Maraga**

**Ag. JUDGE**