

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 289 OF 2003

(From Original Conviction and Sentence in Criminal Case)

No. 2687 of 2001 of the Principal Magistrate's court at
Kericho – R. Ngetich

MATHEW KIPKEMOI CHEMUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Mathew Kipkemboi Chemuta was charged with two counts of stealing **contrary to Section 281 of the Penal Code**. The particulars of the offence were that on diverse dates between the 30th of April 2001 and the 17th of August 2001 the Appellant stole cement and cash from East African Portland Cement Company Ltd. his employer all amounting to Kshs. 256,740/=. After a full trial the Appellant was convicted as charged and sentenced to serve three years imprisonment. The Appellant was aggrieved by the said conviction and sentence. He has appealed to this Court against the said conviction and sentence.

At the hearing of this Appeal, Mr. Gumo Learned Counsel for the State conceded to the Appeal filed by the Appellant on the sole ground that the proceedings before the trial Magistrate were prosecuted by an incompetent prosecutor contrary to the express provisions of **Section 85(2) and Section 88 of the Criminal Procedure Code**. Mr. Gumo was not however asking that the Appellant be retried in view of the insufficient evidence which fell far short of the required standard. Miss Mathenge Counsel for the Appellant was not opposed to the conceding of the Appeal by the State.

I have perused the proceedings before the trial Magistrate. I have noted that the Criminal Case against the Appellant was prosecuted by Corporal Kipsang. He is a Police Officer of a rank lower than that of an Assistant Inspector of Police. This was contrary to the Provisions of Section 85(a) and 88 of the Criminal Procedure Code. The Court of Appeal in **Roy Richard Eliremah & Anor –versus- Republic Cr. App. No. 67/2002 (Mombasa) (unreported) and in Sylvester Keli Kakumi –versus- Republic Cr. App. No. 142/2002 (Mombasa) (unreported)** held that where such a Police Officer prosecutes a Criminal Case before a Magistrate's Court, the proceedings thereto will be a nullity. I am bound by the decision of the Court of Appeal, I hereby declare the proceedings before the trial Magistrate is a nullity as a consequence of which the appeal filed by the Appellant is allowed, his conviction quashed and the sentence imposed set aside.

Mr. Gumo, Learned State Counsel does not wish to have the Appellant retried in view of the insufficient evidence adduced by the Prosecution against the Appellant in the Lower Court. I have re-evaluated the said evidence and I am of the same opinion as Mr. Gumo. It will serve no useful purpose if a retrial is ordered. The Appellant is therefore discharged. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 10th day of May 2004.

L. KIMARU

AG. JUDGE