REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 98 OF 2002

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 777 of 2002 – P. Biwott DM II)

HAMZA KIPROTICH OSMAN……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, Hamza Kiprotich Osman, was charged with two counts of stealing contrary to **Section 275 of the Penal code**. The particulars of the said offences were that on the 5th and 6th of April 2002 at Rongai, the Appellant stole a bicycle and leather shoes from Joseph Lowoi Aluku and Shaukat AliButt respectively. The Appellant was alternatively charged with handling stolen goods contrary to **Section 322(2) of the Penal Code.** The particulars of the offence were that on the 5th of April 2002 at Rongai Police Station other than in the course of stealing, the Appellant dishonestly retained a pair of leather shoes knowing or having reason to believe them to be stolen property. The Appellant pleaded guilty to the three counts facing him. He was consequently convicted and sentenced to serve two years imprisonment on each of the three counts. The Appellant was further ordered to receive four strokes of the cane. The sentences imposed were ordered to run consecutively. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

In his Petition of Appeal the Appellant faulted the trial magistrate for meting out a harsh sentence on him. The Appellant was further aggrieved that the sentences imposed were ordered to run consecutively instead of concurrently. At the hearing of the Appeal, Mr Koech Learned Counsel for the Appellant conceded to the Appeal on the ground that the prosecution before the trial magistrate was conducted by a Police Officer who was not competent in law to Prosecute cases. Mr Koech further submitted that the plea taken by the Appellant was not unequivocal as the Appellant was not asked to confirm if the facts stated by the Prosecutor after he had admitted the charge were correct. Learned State Counsel therefore submitted that the Appeal ought to be allowed. The Appellant agreed with the submissions by the State and did not have anything to add.

I have perused the proceedings before the trial magistrate in the instant Appeal. The case was prosecuted by Police Constable Njagi who is a Police Officer of a rank lower than that of an Assistant Inspector of Police. According to **Section 85(2) and 88 of the Criminal Procedure Code,** the said Police Officer was not competent or authorised to prosecute a criminal case before a Magistrate's Court. In *Roy Richard Eliremah & Anor –versus - Republic Cr. Appeal No. 67/2002 (Mombasa) (unreported) and Silvester Keli Kakumi –versus - Republic Cr. Appeal N o. 142/2002 (Mombasa) (unreported)* it was held that where such an incompetent Police Officer prosecutes a 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 do declare the proceedings before the trial magistrate from which this Appeal arose to be a nullity as a consequence of which I allow the appeal, quash the conviction and set aside the sentence imposed.

The issue left for determination by this Court is whether in the circumstances of this case a retrial should be ordered. Mr Koech has submitted that the plea taken by the Appellant was equivocal. I have perused the proceedings and note that the Appellant was not asked by the trial magistrate Court whether the facts stated the Prosecution were correct after he had admitted the offence. The Appellant was required to confirm the facts stated by the Prosecution in support of the charge. He was not asked to do so. The subsequent conviction of the Appellant was therefore unlawful.

This Court further observes that the Appellant was convicted on three counts which basically arose from the same transaction. The Appellant in the first place should not have been convicted on the alternative charge of handling stolen property when he had been convicted on the main charge of stealing. The Appellant should not have been sentenced to serve the imposed sentences consecutively. The said sentences imposed should have been ordered to run concurrently unless a compelling reason was given to support the decision of the trial Court to order that the sentences run consecutively. Normally offences arising out of similar circumstances should attract sentences which run concurrently instead of consecutively (*See Mule –versus - Republic [1983] K.L.R. 246 and Odero –versus - Republic [1984] K.L.R. 621)*. In the circumstances of this case the order made by the Court that the sentences run consecutively instead of concurrently did not have any basis in law.

For the reasons stated above, the Appellant is ordered discharged. He shall be set at liberty unless otherwise lawfully held.

DATED at NAKURU this 12th day of November 2004.

L. KIMARU

AG. JUDGE