



**REPUBLIC OF KENYA**

**H.C.CR. A 276/03 Page**

**IN THE HIGH COURT OF KENYA AT**

**MACHAKOS**

**APPELLATE SIDE**

**HIGH COURT CRIMINAL APPEAL 276 OF 2003**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No 94 of 2000 of the District Magistrate's Court at Makueni J.K. Kiia(DM I) on 19/6/03)  
NDOLO KASOLOI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

The appellant Ndolo Kasoloi was convicted of the offence of stock theft Contrary to Section 278 of the Penal Code by the District Magistrate I Makueni on 19/6/03. He was sentenced to serve four years imprisonment with two strokes of the cane. He faced an alternative charge of handling stolen goods Contrary to Section 322 (2) of the Penal Code but there was no finding on the alternative charge as the appellant pleaded guilty to the main charge.

The State Counsel conceded the appeal on grounds that the prosecution was conducted by Corporal Kyumbu who was an unqualified prosecutor and should, therefore, be nullified and the court do order a retrial. The other reason that the state counsel urges a retrial is that the pleas was not unequivocal, it was not properly taken as it was concluded on the same day; that the appellant was sentenced to four years on 19/6/03 which is only over a year which is less than half the sentence meted.

The appellant vehemently opposed a retrial claiming to have served a substantial part of his sentence; he has been ailing with Tuber Culosis and other diseases.

There is doubt that the prosecutor present when the plea was taken was one Corporal Kyumbu who is an unqualified prosecutor in terms of Section 85 and Section 88 (2) of the Criminal Procedure Code. It is now trite, in light of the now celebrated case of **ROY ELIREMA versus REPUBLIC Criminal Appeal 67/03** , that prosecution being an unqualified prosecutor renders the proceedings a nullity. I hereby declare the proceedings before the lower court a nullity quash the conviction and set aside the sentence.

I have also scanned the record and do agree with the learned state counsel that the plea was not properly taken. On 18/6/03, the appellant pleaded guilty to the offence. Facts were not available. It was put off to 19/6/03 for taking of plea. The charge was not read to appellant. No plea of guilty was ever entered and further, the language in which the charge was read was never recorded. The plea was unequivocal and it is defective. The state counsel urged this court to order a retrial. Principles upon which a retrial will be ordered are: where the lower court proceedings are defective or illegal; if a retrial will not prejudice the appellant; where the evidence on record is likely to result in a conviction; where the witnesses can readily be available.

The lower court proceedings have been declared a nullity. They were defective and this is a case where a retrial can be ordered. The appellant appeared before the lower court on 4/6/03. He pleaded guilty and was sentenced on 19/6/03. So far he has been in prison for about one year, 6 months. It is less than half the sentence of 4 years which was meted on him.

This case did not go to full hearing. This offence was, however, committed in Makueni District within the local jurisdiction of Makueni court. The witnesses are likely to be found if a retrial is ordered.

The charge which the appellant faced carried a maximum sentence of 14 years imprisonment. It is a very serious charge and in my view it is only fair that the ends of justice be met by the court ordering a retrial so that justice is seen to be done. The court hereby orders a retrial to be held at Makueni Resident Magistrate's Court and the court hear this case on a priority basis. Mention before Makueni Resident Magistrate's Court on 23/12/04 for plea.

Dated at Machakos this 20th day of December 2004

**R.V. WENDOH**

**JUDGE**