REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 940 OF 2003

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.
25 OF 2003 OF THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT GITHUNGURI

SIMON WANYOIKE NJOROGE…….....……..…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT

The appellant, **SIMON WANYOIKE NJOROGE**, was convicted for **HOUSE BREAKING**, contrary to section 304(1), and **STEALING**, contrary to section 279(b) of the Penal Code. He was jailed for 3 years.

In this appeal, he challenged both his conviction and sentence.

When his appeal came up for hearing, learned State Counsel, Mrs Toigat, notified the court that the respondent was conceding the appeal. The basic reason for the said concession was the fact that the prosecution had been conducted by an unqualified public prosecutor.

The learned State Counsel also pointed out that the respondent would not be seeking a retrial. In her considered view the evidence tendered by the prosecution was basically all hearsay.

Having perused the record of the proceedings, I noted that the entire case was prosecuted by CPL Ongeri. By virtue of his rank, the said CPL Ongeri did not have the requisite qualifications as stipulated in S. 85(2) of the Criminal Procedure Code, as being the minimum qualifications for appointment as a public prosecutors. When tackling the issue of unqualified public prosecutors the Court of Appeal held, in **ROY RICHARD ELIREMA & ANOTHER VERSUS REPUBLIC CRIMINAL APPEAL NO. 67 OF 2002 (AT MOMBASA),** that any proceedings which were prosecuted (either in part or wholly) by an unqualified prosecutor would be rendered void. As that is a decision of the Court of Appeal, it is binding on this court. Therefore, borrowing a leaf from that decision, I do now declare the trial of the appellant herein, a nullity. I also proceed to quash the conviction and set aside the sentence that had been meted out to the appellant.

The charge sheet shows that the appellant was said to have broken into the house of PW1, Jane Wanjiku Gachuka, who happened to be the appellant's older sister. He is said to have stolen a water pump, bicycle and speaker, all valued at Kshs 30,000/=

PW1 testified that she had given the appellant some work to do, at her house.

When she went back to her house the following day, PW1 found some items missing. She testified that some children told her that they had seen the appellant riding the bicycle which was allegedly stolen from her house. Clearly, that evidence was hearsay. Also the items were never recovered. In the circumstances, I find it hard to link the appellant to the breaking into PW1's house and/or stealing there from.

PW2, John Kiiru Wanyoro, said that he sells at a Kiosk. He said that he saw the appellant with a bicycle which had no pressure. The appellant was riding fast. He said that PW1 asked him if he had seen someone riding a bicycle without pressure. According to PW2, the complainant came to him after about half an hour, and that she was from her home.

That would be very surprising indeed as PW1 had testified that she only came back to her house on the following day.

PW3, Daniel Nyangao Mothenya, was an employee of PW1. He said that the appellant had been to PW1's house a day before her goods were stolen. However, he did not see the appellant steal or carting away the stolen items His testimony was that it was someone who told "them" that the appellant passed with the bicycle. That evidence was no more than hearsay.

Considering that the evidence on record is so very scanty, it is little wonder that the appellant was not arrested for about one month, even though he was the complainant's brother, and lived within the same area generally.

In his defence, the appellant had said that he had beaten the complainant for having made him quarrel with his mother. He said that he was surprised to see an assault, being turned into the offence of Breaking into PW1's house and stealing there from.

Given the hearsay prosecution evidence, and the appellant's defence, I hold the considered view that if a retrial were to be held, a conviction was not likely to be the result. Also, the appellant has been in jail since October 2003, a period of 14 months now. When it is borne in mind that the maximum period which the appellant could be in custody is 36 months, and that he could be in jail for no more than 24 months (if he gets remission), I hold the view that a retrial would be prejudicial to the appellant.

In conclusion, I am satisfied that justice does not demand a retrial. If anything, justice demands that the appellant be set at liberty. I therefore direct that the appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 2nd day of December 2004

FRED A. OCHIENG

AG. JUDGE

Appellant in person Present

Mr. Odero – Court clerk