

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.336 OF 2000

(Being an appeal from Original Conviction and Sentence in Criminal Case No.287 of 2000 of the Resident Magistrate's Court at Kaloleni – Mr. K. Muneeni, RM)

**PETER CHULE KITUKA APPELLANT
VERSUS
REPUBLIC RESPONDENT**

J U D G M E N T

The appellant was convicted of Burglary and Stealing contrary to Section 304 (2) read with S.279(b) of the Penal Code and sentenced to serve three years imprisonment and to receive three strokes of the cane. He has appealed to this court against both conviction and sentence.

The learned Principal State Counsel Mrs. Mwangi has drawn the attention of the court to the fact that the prosecution was conducted by Cpl. Kala contrary to the Provisions of Section 85(2) Criminal Procedure Code and therefore the trial was a nullity. I have perused the record of Criminal Proceedings before the trial magistrate and I confirm this to be so. I therefore declare the trial of the appellant to be a nullity and do hereby quash his conviction and set aside the sentence of three years imprisonment and three strokes of the cane.

Mrs. Mwangi has not applied for retrial. The appellant shall therefore be released from prison forthwith unless he is otherwise lawfully held.

It is so ordered.

**Dated and delivered this 25th August 2003.
A.G.A. ETYANG
JUDGE**