

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 16 OF 2015

BETWEEN

JACOB ORAO ODERO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 446 of 2014 at Senior Principal Magistrate's Court at Migori, Hon. L.K. Sindani, RM dated on 26th February 2015)

JUDGMENT

1. In the subordinate court the appellant faced a charge of housebreaking contrary to **section 304(1)(a)** and stealing contrary to **section 279(b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He was convicted and sentenced to 5 years imprisonment while his co-accused was acquitted.
2. The appellant now appeals on the grounds set out in the petition of appeal filed on 17th March 2015. The main grounds of appeal were that there were no eye witnesses to prove the fact that he had stolen from the complainant. That no investigation was done in the case and that the person from whom the exhibits were recovered was not called to give evidence. In addition to the petition of appeal, the appellant relied on supplementary ground which expanded on the grounds of appeal. Mr Kimando, learned counsel for the respondent, supported the judgment and submitted that the prosecution proved the case beyond reasonable doubt.
3. However, it is not necessary for me to decide the appeal on merits. On 5th February 2015, the appellant notified the trial court that he had filed an application in the High Court applying for a re-trial. The learned magistrate noted that no order no order for stay had been issued by the High Court and that because the accused had sought several adjournments in the past, the court would not grant any further adjournments. The appellant accordingly informed the court that he was not ready for defence. The court then closed the defence and reserved judgment for 26th February 2015.
4. The appellant had indeed filed *Migori HC Misc. App. No. 2 of 2015* on 30th January 2015 seeking orders for retrial on that basis that his rights to a fair trial under **Article 50** of the Constitution were being violated. The application was brought to my attention on 7th April 2015 and as the judgment had already been delivered and this appeal filed, I made the following order, "*As the applicant has filed an appeal to wit; Criminal Appeal No. 16 of 2014, the application is struck out.*"
5. It clear that the judgment was delivered before the application in the High Court could be dealt with. The accused was therefore prejudiced as he was entitled to be heard on his application in the High Court before he made his defence. Although the trial court was not at fault in proceeding in the manner it did, the accused who was unrepresented and in prison custody could not pursue his application in the High Court and his failure to pursue his defence was perhaps due to his belief that the High Court would deal with his application before he would be called upon to make his defence. There was also a failure of the High Court registry to ensure that the application was brought to the attention of the judge as soon as it was filed as it sought to stop the trial in the

subordinate court.

6. In the circumstances and in the interest of justice, I quash the conviction and sentence and direct that the appellant be retried before another magistrate other than Hon. L. K. Sindani, RM. The appellant shall be held in custody to enable him plead to the charge before the Chief Magistrates, Court Migori on **3rd June 2014**.

DATED and DELIVERED at MIGORI this 2nd day of June 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kimando, Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.