



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL NO 248 OF 1994**

**ISAYA OPIYO ODIDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted in the court below of theft c/s. 275 of the Penal Code and was sentenced to 2 years of imprisonment. His appeal to this court is against conviction and sentence.

In ground 4, which is the only ground that was argued, the appellant complains that the learned trial magistrate erred in law in convicting and sentencing him to 2 years imprisonment without writing (any) judgement or pronouncing the same in accordance with the law. That, Mr. Ochillo, who argued the appeal for the appellant, submitted contravened the provisions of Ss. 168 and 169 of the Criminal Procedure Code which said sections make provisions for the contents and mode of delivering judgments.

On the face of it, the record of the court below as submitted by the lower court to the court appears to be proper and in accordance with the law in that after the close of the defence case on 24.8.94 the learned trial magistrate made an order to the effect that judgment would be delivered the same day the 24.8.94 at noon. There then follows a 4 page typed judgment which is dated the same day at the end of which sentence as aforesaid, is passed.

But then Mr. Ochillo produced photocopies of the learned trial magistrate's notes (taken immediately after judgment and sentence) which clearly show that the sentence was passed before the judgment was written. The last page of the learned trial magistrate's notes as contained in the photostat copy of the record shown to this court by Mr. Ochillo is so different from what appears in the record submitted by the lower court that there cannot be any doubt that the record particularly the part containing the judgment and sentence was doctored after the sentence had been passed. It is further clear that it was the learned trial magistrate himself who doctored the record. The handwriting is clearly his.

The learned trial magistrate's conduct was a serious breach of the court's procedures and a clear abuse of the powers conferred upon him. Learned State Counsel agree that there were irregularities during the trial at the court below.

The trial was clearly a nullity and the conviction should not be allowed to stand.

The appeal is allowed, conviction quashed and sentence set aside. In view of the fact that the appellant has already served about 6 months of the two years sentence imposed upon him by the learned trial magistrate, an order for retrial would not be appropriate. The appellant is to be set free forthwith unless he is otherwise lawfully held.

**Dated and delivered at Kisii this 15<sup>th</sup> February, 1995**

**T. MBALUTO**

**JUDGE**



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