



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO.78 OF 2016**

**1. LUCKY MWENDA**

**2. JOHN GIKUNDI.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*( From the original conviction and sentence in criminal case*

*No. 424 of 2015 of the Chief Magistrate's Court a Isiolo*

*by Hon. J. M Irura – Senior Resident Magistrate)*

**JUDGMENT**

**LUCKY MWENDA** and **JOHN GIKUNDI**, the appellants, were convicted for the offence of having suspected stolen goods contrary to section 323 of the Penal Code.

The particulars of the offence were that on 23<sup>rd</sup> September 2015 at Kulamawe area, in Isiolo County jointly having been detained by No.68412 P.C Hassan Liban as a result of powers conferred by section 36 of the criminal Procedure Code, the appellants had in their possession a motor cycle registration No. KMDK 587 V make Dayun, reasonably suspected to have been stolen or unlawfully obtained.

The appellants were sentenced to serve 4 years imprisonment. The appeal is against both conviction and sentence.

The appellants were represented by Mr. Kevin Nyenyire, learned counsel. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by failing to consider the ingredients of the offence.
2. That the learned trial magistrate erred in law and in fact by convicting the appellants where there was no claimant of the subject motor cycle.
3. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the appellants.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

Police officers went to arrest the appellants for another offence. They were found in possession of a motor cycle which was suspected to have been stolen or unlawfully obtained.

Both appellants denied possession of the motor cycle.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

Section 323 of the Penal Code provides as follows:

***Any person who has been detained as a result of the exercise of the powers***

***conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.***

The ingredients of the offence are; (a) the suspect must have been detained for an offence of or suspected to be in possession of some stolen property, (b) that he fails to give an account to the satisfaction of the court.

There need not be a claimant of the suspected stolen item.

**P.C Hassan Liban Hassan** (P.W1) testified that when they went to a scene of assault and the two appellants were allegedly involved, they were informed that the 1st appellant went to the scene riding motor cycle KMDK 587 V, make Dayun. They later learnt that the registration number was for Captain motor cycle. The first appellant claimed ownership.

The investigating officer of the case was **P.C Samson Muritu**(P.W2) testified that the second appellant claimed ownership of the motor cycle and that he had given it to the first appellant.

The appellants kept changing their version in respect of ownership of the motor cycle. A search conducted at the KRA offices revealed that motor cycle KMDK 587 V was Captain in make and blue in colour. The one produced in court was Dayun black in colour . The appellants did not avail any document of ownership or otherwise.

The appellants at the trial denied possession. The learned trial magistrate was justified to make a finding that they did not offer any account to the satisfaction of the court. The conviction cannot be faulted.

The upshot of the foregoing is that the appeal lacks merit. The same is dismissed.

**DATED** at MERU this 27<sup>th</sup> day of **April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**