



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.15 OF 2015

ELIUD GITARI KABUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 450 of 2013 of the Senior Resident Magistrate's Court at Isiolo by Hon. R.G Mundia – Resident Magistrate)

JUDGMENT

The appellant, **ELIUD GITARI KABUGA**, was convicted for the offence of handling stolen goods contrary to section 322(2) of the Penal Code.

The particulars of the offence were that on 20th June 2013 at Bula Pesa estate, in Isiolo township of Isiolo County, otherwise than in the course of stealing, dishonestly undertook to remove one mobile phone make forme valued at Kshs.4000/= and three discovery batteries valued at Kshs.2250/= all valued at Kshs. 62250/= the property of **CAROLINE MUREITHI** knowing or having reasons to believe them to be stolen or unlawfully obtained.

The appellant was sentenced to serve seven years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by convicting him without evidence that the phones had been stolen.
2. That the learned trial magistrate erred in law and in fact by convicting him without evidence that he would have knowledge that the items were stolen or unlawfully obtained.
3. That the learned trial magistrate erred in law and in fact by failing to appreciate that a material witness was not called.

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

The facts of the prosecution case briefly were as follows:

The complainant's shop was burgled and some mobile phones and their accessories were stolen from therein. After about a month or thereabouts, a mobile phone was tracked. The person who was found with it claimed he had been sold the item by the appellant. He led police officers to the barber shop of the

appellant where other recoveries were made. The complainant identified the phone and some batteries recovered from the appellant's shop as hers.

The appellant denied any involvement in the offence and blamed his fate on one Ekiru.

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 322 of the Penal Code provides as follows:

A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he

dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

The ingredients of the offence are (a) handling stolen goods (b) with knowledge or having reasons to believe the goods are stolen or (c) dishonestly receives or retains the goods or undertakes to or assists in their retention, disposal or realization by or for the benefit of another person, or if he arranges to do so.

Corporal Joseph Regine (P.W3) was the investigating officer. He informed the court that after the complainant had reported of the burglary and theft from her shop, he asked her to supply him with the IMEI serial numbers of the stolen handsets, which she did. He sent the numbers to Safaricom to trace the active phones. This is what led him to arrest Juma Ekiru. He had a forme Q200. Ekiru led them to the shop of the appellant as the seller. In the barber shop of the appellant, they recovered some three batteries that the complainant identified to be hers. She also identified the phone recovered from Ekiru.

Had the prosecution solely relied on the purported allegation made against the appellant by Ekiru, then the conviction would not have been safe. They however adduced evidence of the recovery of other items from the barber shop of the appellant. The latter did not offer any explanation as to how the items found their way to his premises. The learned trial magistrate was therefore entitled to make a finding that he knew or ought to have known the items were stolen or unlawfully obtained.

The failure to call Ekiru would have been fatal to the prosecution case had the appellant attributed the other recovered items to him. This was not the case.

In a nutshell, the appeal on conviction is dismissed.

Section 322(2) of the Penal Code provides the following sentence:

A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

The sentence cannot be said to be harsh in the circumstances of this case. I will not disturb it. The appeal on sentence is also dismissed.

DATED at MERU this 26th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE