



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 5 OF 2014**

**MUSA GAWAYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from conviction and sentence of Busia CM Criminal Case no. 2088 of 2013 by Hon. M. Munyekenye Senior Resident Magistrate)*

**JUDGMENT**

1. Although this Appeal is against Sentence only, the State Counsel is of the view that the conviction of the Appellant on the Primary charge is not on firm ground. I agree.

2. At Trial, the Appellant was arraigned on a Charge Sheet with three offences. In Count 1, the Appellant was charged with Burglary contrary to Section 304(2) and Stealing Contrary to section 279(b) of the Penal Code. As an alternative to this charge, the Appellant faced the charge of Handling Stolen Property contrary to Section 322(2) of the Penal Code. A further Count which is not relevant to this Appeal was a charge of Being unlawfully present in Kenya contrary to Section 53(1)(j) of the Kenya Citizenship and Immigration Act.

3. The Particulars of the Offence that gave rise to this appeal are:-

**“that Musa Gawaya on the night of 29<sup>th</sup> and 30<sup>th</sup> October 2013 at Samaki Estate, Busia Township within Busia County, Jointly with others not before Court broke and entered into a building namely dwelling house of George Onyango Yugi with intent to steal therein and did steal from therein two mountain bicycles and one automatic padlock all valued at Kshs. 15,200/- the property of the said George Onyango Yugi.”**

4. On 4<sup>th</sup> July 2013, George Onyango Yugi (PW1) bought a bicycle Make Dragon and serial No. G8907432. About three months later, the bicycle went missing from his house at Burumba Estate, Samaki. He later got information from George Okoth Okumu (PW2) that someone had attempted to sell the said bicycle to him.

5. PW2 who trades in second hand bicycles was on 6<sup>th</sup> December 2013 visited by a person with a bicycle proposing to sell it to him. On inspecting the bicycle, PW2 noticed that the writing of the Make of the bicycle had been scratched off. He left the person in the shop and informed PW1 that a bicycle resembling the missing one had been brought to him. PW1 came to PW2's place of business and identified the bicycle. The person who had brought the bicycle was present and was arrested by members of the public who then took him to Busia Police Station. Sgt Charles Ouma (PW3) received the arrested

person and re-arrested him. That person is the Appellant.

6. In his Defence, at Trial, the Appellant accepts that he was found in possession of the stolen bicycle but explained that it was brought to him by a neighbour who runs a bar in Uganda. That the neighbour asked him to look for a buyer. It was this that took him to PW2. He denied the charges.

7. The Trial Court rejected the explanation by the Appellant and held as follows:

**“The evidence on record also shows that the accused was found with one of the bicycles trying to sell the same. The bicycle was positively identified by the complainant. The receipt of purchase was produced in court and the frame number marked the frame number on the bicycle. The accused having failed to explain well on how he came into possession of the same, I find that the prosecution proved beyond reasonable doubt that the accused with intent to steal, broke into the complainant’s dwelling house and did steal from therein two mountain bicycles one of which was found on him on 6<sup>th</sup> December 2013.”**

8. I agree with the State Counsel that whilst the Trial Court could not be faulted for rejecting the Appellant’s explanation, that finding by the Trial court should have led to a conviction on the alternative charge and not the Primary charge. The stolen item was a bicycle. The bicycle was found with the Appellant some 38 days after the alleged burglary. For the doctrine of Recent Possession to apply, the Prosecution needed to establish that given the nature of the item and the circumstances of the case, the 38 days was in fact recent. The Trial Court could only properly reach that conclusion if the Prosecution had led evidence to prove that. Looking at the proceedings no such evidence was led.

9. On the other hand, the Appellant was found with a stolen item and was not able to offer an explanation in rebuttal. The Appellant was guilty of the alternative charge of Handling Stolen Goods under the provisions of Section 322(1) of the Penal Code.

10. Under the provisions of Section 354 of the Criminal Procedure Code, a High Court sitting as an Appellate Court may reverse and alter the finding of a Trial Court. This Court does hereby quash the conviction of the Appellant in respect to Burglary and find him guilty of the Offence of Handling Stolen Property Contrary to Section 322(2) of the Penal Code.

11. A person found guilty under those provisions is liable to imprisonment for a term not exceeding fourteen (14) years. At the time of committing the offence, the Appellant was also unlawfully present in Kenya. He pleaded guilty to a charge of being unlawfully present in Kenya contrary to Section 53(1)(j) of the Kenya Citizenship and Immigration Act and was fined a sum of Kshs. 2000/- in default six (6) months imprisonment. It is therefore true that at the time of this conviction, the Appellant is already a convict for another offence. But given that the two offences were committed on the same day, it may be fair to treat the Appellant as a first offender for purposes of considering the proper sentence to be imposed on him.

12. Although, the Appellant was granted bond of Kshs. 100,000/- with one Kenyan Surety, going by the original record of the Court, there is no indication that the Appellant met the terms of the bond. As a consequence the Appellant remained in remand from the date of plea upto the end of Trial. The result is that the Appellant has been incarcerated since 9<sup>th</sup> December 2013, about 2 years 5 months now. That, in my view, is sufficient punishment for him. I therefore sentence the Appellant to the period already served. The Appellant shall therefore be set free unless held for some other lawful reason. The order of repatriation made by the Trial Court shall be complied with.

Dated, signed and delivered at Busia this 16<sup>th</sup> day of May. 2016.

**F. TUIYOTT**

**JUDGE**

In the presence of :-

Orwasa -C/Assistant

Appellant in person

Owiti- for the State