



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BOMET**  
**CRIMINAL APPEAL NO. 62 OF 2016**

**PETER KIPKIRUI MAIGA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Being an appeal for the original conviction and sentence in criminal case no 421 of 2012 PMs court –  
Bomet Hon Karanja SRM)

**JUDGMENT**

Peter Kipkirui Maiga herein after referred to as the appellant was convicted and sentenced to five years imprisonment for the offence of handling stolen goods contrary to section 322 (1) and 322 (2) of the penal code.

The appellant was charged with another not before this court with an offence of robbery contrary to section 296 (1) of the penal code.

The particulars in that main charge were that on the 27<sup>th</sup> day of April 2012 at Kembu market – Bomet county jointly robbed JOHN KONES of two mobile phones make Nokia C200 and 2710 and cash Ksh.4,000/= and immediately before or immediately after such time robbery threatened to use actual violence to the said John Kones.

This matter proceeded to hearing and the second Accused was acquitted under section 210 of the CPC for a no case to answer. The appellant was placed in his defence and found guilty of the lesser offence of handling stolen goods.

Being dissatisfied with the conviction and sentence in the lower court the appellant has now lodged this appeal.

This is the first appellate court. It is incumbent upon it to consider and re-evaluate the record of proceedings in the lower court so as to arrive on its own conclusions bearing in mind that it did not have the opportunity to test the demeanor of the witnesses.

Okeno -V- R 1972 EKLR

The prosecution in this case called Three witnesses with the defence calling two.

**Brief facts of this case**

The complainant was walking home at about 10:00 pm when he was attacked by a group of youngmen who ransacked his pockets and made away with his two phones make Nokia costing Ksh.4,000/= and some medicinal drugs.

He testified to the effect that he was not able to clearly identify the attackers. He went and reported the matter at a nearby police administration camp.

Two weeks later he was called by phone by the chief of Chemaner location who informed him that he had arrested some youths who had broken into a school and they had recovered from them a cellphone which they suspected was his. The chief later informed him that the phone was at Kapkimolwa where he identified one of the phones as his. It was alleged that it was the appellant who was found with the said phone by the chief.

The chief testified as PW2 and informed the court that there had been a break in at a nearby secondary school called Kamirai

Investigations commenced and the appellant and another were mentioned by a watchman as possible suspects

The appellant was found at a local Hotel taking tea. Upon arrest and search he was found in possession of a Nokia C200. One Samoei who works at Egerton college informed the chief that Kones had been attacked previously and his mobile phones taken among other items.

At page 4 of her judgment the learned trial magistrate correctly observed that the only link between the Accused person and the offence of robbery was a phone recovered from the Accused. She proceeded to find that the Accused person had failed to give a reasonable explanation as to how he came into possession of the Nokia C200 which had been stolen from the complainant two weeks before the arrest.

The appellant did admit to have had possession of the Nokia in question. The learned trial magistrate should have gone further to examine the circumstances surrounding the alleged recovery of the stolen item.

PW2 who is the chief of the area testifies to have found the appellant at a Hotel taking tea. At the time of arrest the chief was in the company of the Assistant chief and three Administration police officers.

Apart from the chief (PW2) no other witness testified on the circumstances surrounding the arrest and recovery of the Nokia phone from the Appellant. When the chief testified was called in court he testified that upon recovering the phone he took it for safe keeping for the Accused.

It is noted that when the Complainant testified during examination in chief the Nokia C200 was not shown to him for identification purposes as it was alleged that it was in the police exhibit store and the officer who had the keys was away. Subsequently, an application was made by the prosecution for the complainant to produce the original receipts for the phone as the police had taken copies. This application was rejected with an order that the sellers of the phones be called as witness. They were never called and the prosecution closed its case.

The upshot is that the complainant was not given the opportunity of identifying the Nokia C200 as his. He was not given the opportunity to produce the original receipt for the said phone. The prosecution therefore did not prove ownership of the alleged recovered phone. Flowing from that finding it cannot be said that the Nokia C200 was a stolen property and that the appellant handled it.

The prosecution did prove a case of robbery contrary to section 296 (1) of the penal code nor did they prove the lesser offence of handling stolen property contrary to section 322 (1) of the penal code.

The conviction was not safe. The appeal has merit and its accordingly allowed.

The conviction is quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open court this 15<sup>th</sup> day of December 2016 in the presence of learned counsel for the prosecution Mrs Gitahi, learned counsel for the defence Mr Koech. Court assistant Mercy/Rotich

**M. MUYA**

**JUDGE**

**15.12.2016**