



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 202 OF 2012**

**JOSPHAT MWANGI MAINA.....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case Number 552 of 2011 in the Principal Magistrate's court at Wang'uru – HON. B.M OCHOI (SRM))***

**JUDGMENT**

**JOSPHAT MWANGI MAINA** the appellant herein was charged with Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** before the subordinate court that tried him for the offence but found him guilty of a lesser offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code** and convicted him and sentencing him to serve 7 years in prison. The Appellant being aggrieved has appealed to this court. The state is not opposed to the appeal and has indicated that the appellant was wrongly convicted.

The brief facts of the case shows that there was a robbery with violence on 13<sup>th</sup> January 2011 involving motor vehicle registration NO. KBM 533 H Isuzu Tanker. Abdi Salam Billow Isaack, the complainant in the case was robbed of the vehicle which was loaded with 10,000 liters of diesel. The vehicle was driven to a place called Kibingoti market at around 1 am which then was 14<sup>th</sup> July 2010 where the lorry was driven to a business premise of one **Lucy Nyambura** (PW4) by suspects still at large with the company of the appellant. The diesel was siphoned to 8 drums provided by PW4 and the suspects left. PW 4 was later arrested after the diesel was traced to her compound and charged in court though the charges were later dropped by the state when the appellant was arrested. The appellant stated on his defence state that he was asked to take the suspects to PW4 premises and had nothing to do with the diesel or the offence committed. The trial court after evaluating the evidence adduced convicted him nevertheless of lesser offence of handling stolen property.

The appellant has listed eight grounds of appeal which I do not wish to enumerate but suffice to point out that his main ground in that he was convicted wrongly without sufficient proof of handling stolen property and that his defence was not considered.

I have gone through the record and do find that the trial magistrate was right in not convicting the accused with the offence that he was charged with. The evidence tendered did not connect him in anyway with the offence. On the conviction of the appellant for the lesser charge of handling stolen property under **Section 322** of **Penal Code**. I find that though a court can invoke **Section 179** of **Criminal procedure Code**, a court must be satisfied that the lesser offence, has been established and proved beyond reasonable doubt. It does not mean that because an accused was involved in a lesser offence than the one he was

charged with, the standard of proof is any lesser. The standard of proof remains the same and all the necessary ingredients of the offence must be established and proved. The offence of handling stolen property is created by **Section 322(1) of the Penal Code** which provides.

***“ A person handles stolen goods if (otherwise than in the cause of 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 necessary ingredients to be established are;

1. Being found with the actual possession of stolen goods and/or having participated in its disposal.
2. Being dishonest in the manner on which the goods came to his possession and /or retention /disposing the goods.

This court finds that the two elements of possessions and the dishonesty behavior by the appellant was not established nor proven. Mr Sitati for the state has admitted as much and this court finds that the trial magistrate fell into error when he made assumptions of guilt on the intention of the appellant when directing the suspects to the premises of PW4. This court agrees with the appellant that the learned trial magistrate erred by drawing inference that the appellant must have been part of the group that robbed the complainants when, there was no material placed before the court to draw such an inference. The case against the appellant was not proved at all and the offence for which he was convicted was not established and proved to the required standard in law.

Consequently I will allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. I direct that he be released forthwith unless lawfully held.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2014** in the presence of

The Appellant

Mr Sitati for state

Mbogo Court Clerk