



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 110 of 2007**

**DAVID GITHAE MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

DAVID GITAI MBURU the Appellant was charged with two counts of breaking into a building and committing a felony contrary to Section 306A of the Penal Code. In the alternative he was also charged with handling stolen property contrary to Section 322(2) of the Penal Code. He pleaded not guilty to the charges but upon trial before the Resident Magistrate at Nyahururu, he was acquitted of the main counts but convicted on the alternative charge of handling stolen property and sentenced to two years imprisonment. He has appealed against both the conviction and sentence.

In his short submissions before me, the Appellant stated, as he did before the trial court, that he was arrested from a video shop at Nyahururu and that the house in which the stolen goods were found was not his. On his part, Mr. Mugambi for the Republic submitted that the Appellant on seeing police approach the house where the stolen goods were found ran away but after a chase he was arrested by members of the public and later rearrested by PW3. He therefore finds no merit in this appeal and urged me to dismiss it.

There is no dispute that PW1's office was broken into twice and several items stolen therefrom. On both occasions nobody saw the Appellant break and/or steal from that building. There is also no dispute that some of the stolen items were recovered from some dwelling house in Nyahururu Town. The contention in this appeal is whether or not that house belonged to the Appellant.

The evidence that links the Appellant with that house is that of PW3. He testified that on a tip-off he went to a house in Nyahururu Town and as he approached it he saw three people who on seeing him ran away to different directions. He unsuccessfully chased one of them as members of the public who had given him the tip-off also chased the others. Members of the public were able to arrest one of those people who is the Appellant.

In his defence, the Appellant stated that he was arrested in a video shop in Nyahururu Town and was nowhere near the house where the stolen goods were found.

The chase was between 7.00 p.m. and 8.00 p.m. on 23<sup>rd</sup> October 2006. In cross examination PW3 admitted that the Appellant was chased by members of the public into a video shop at Nyahururu Town where he was arrested. None of those people who chased and arrested the Appellant was called as a witness. There is no evidence that the Appellant was the only person in the video shop.

Having considered the evidence on record as a whole I find that there is doubt as to whether or not the Appellant was among the people who were chased from the house where the stolen goods were found. Nothing was found in that house to link him with it. In the circumstances I allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 4<sup>th</sup> day of July 2008.

**D. K. MARAGA**

**JUDGE**