



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 199 of 2005**

*(From Original Conviction and Sentence in Criminal Case No.1280 of 2003 of the Senior Residents Magistrate's Court at Gatundu, M. Mburu (Mrs.)- SRM).*

**FRANCIS NJUGUNA KABERI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**FRANCIS NJUGUNA KABERI**, hereinafter referred to as the Appellant was charged before the Senior Resident Magistrate's Court with two counts, one having or conveying suspected stolen property contrary to Section 323 of the Penal Code and secondly, preparation to commit a felony contrary to Section 308 (2) of the Penal Code. Following a full trial in which the Prosecution called 4 witnesses, the Appellant was eventually convicted on the first count but acquitted on the second count. Upon conviction the Appellant was sentenced to two (two) years imprisonment. This was on 6<sup>th</sup> June, 2005. The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal.

When the Appeal came upon for hearing before me, the Appellant intimated that his Appeal was only on sentence. The Appellant submitted that he was convicted and sentenced to 2 years imprisonment for the offence of conveying suspected stolen property, yet nobody identified the suspected stolen property. The Appellant further submitted that the sentence imposed was excessive and harsh on the circumstances.

Mrs. Kagiri, Learned State Counsel did not oppose the Appeal. Indeed she conceded to the same. Counsel submitted that upon perusing the record, she had noted that the suspected property conveyed by the Appellant were never identified though, they were produced in Court. In particular the owner of the Kencell sim card though available was never called as a witness. To that extent the Learned Counsel found it difficult to support the conviction.

I agree with the position taken by the Learned State Counsel. None of the items recovered from the house of the Appellant and which was suspected to have been stolen by the Appellant were ever claimed or identified by any witness for having been stolen from them. The Police officers who arrested the Appellant decided to search the Appellant's house merely because they found on him a master key. On searching the house, they recovered a mobile phone battery for Erickson T10 phone, Remote Control for Sharp T. V. coloured, a camera from box and electrical microphone. None of these items were reported to have been stolen from any person. These are common items that are found all over the place. I cannot understand now the mere fact that the Appellant had them in possession raised suspicion in the mind of the Police officers that they may have been stolen on that the Appellant was conveying them. I do not think that the circumstances under which the Appellant was arrested could remotely suggest that he was conveying them.

In his defence, the Appellant stated that he was a hawker. This was a reasonable explanation as how he came by the items. The Appellant also put forward the defence that there was a personal grudge between him and the investigating officer and that is why he was framed with this case. This defence is not without merit considering how the Appellant was treated upon arrest. Further PW1 who was the investigating officer in this case clearly confirms that there had in the past had a run in with the Appellant. He stated:-

***“.....I knew accused before as he has been arrested by us three time in the recent past...”***

This statement coupled with the fact that none of the witnesses ever identified any of the items or claimed their ownership, makes the conviction of the appellants unsafe. Indeed, there was a person who claimed ownership of the sim card but he too was never called to testify for no apparent reason. Is it possible that perhaps this person never existed in the first place? That possibility cannot be ruled out.

For these reasons, I would allow the Appeal, quash the conviction of the Appellant and set aside the sentence imposed. The Appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 27<sup>th</sup> day of September, 2006.

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**MAKHANDIA**

**JUDGE**