

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 140 of 2004

***(Appeal against both conviction and sentence of the Chief Magistrate's court at Kakamega
in Criminal Case No.480 of 2004 (F. M. KOMBO ESQ., RM)***

ABDALLA INDIMULI

ISAACAPPELLANT

V E R S U S

REPUBLICRESPONDENT

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J U D G E M E N T

The Appellant, ABDALLA INDIMULI ISAAC, was charged jointly with another person with the offence of stealing contrary to section 275 of the Penal Code in Kakamega SRM Criminal Case No. 480 of 2004 in which he was found guilty, convicted and sentenced to a term of imprisonment of seven years by F. M. Kombo Esq., Resident Magistrate on the alternative count of handling stolen property c/s 322(2) of the Penal Code.

The 2nd accused absconded before he made his defence and the case against him was withdrawn under section 87(a) of the Criminal Procedure Code.

The charge against the appellant and his co-accused was that the appellant and the 2nd accused, Edward Nduati Kalinga,

“on the 15th day of February 2004 at Masingo slums, Municipality Location in Kakamega District within Western Province jointly stole Twenty Eveready Batteries and a Bicycle make Ralley all valued at Kshs.4000/= the property of REUBEN MUKAKA IMBULI.”

The alternative count of handling stolen goods c/s 322(2) of the Penal Code against the Appellant and his co-accused was as follows:-

“on the 16th day of February 2004 at Masingo slums, Municipality Location in Kakamega District, within Western Province, otherwise than in the cause of stealing jointly and dishonestly retained a bicycle make ralley knowing or having reasons to believe it to be stolen goods or unlawfully obtained.”

The stolen goods was a bicycle. The only evidence adduced was by PW1, Reuben Mukaka Imbuni, the complainant. No one saw the appellant steal the bicycle. The person who alleged that he had seen the complainant's bicycle was not called to testify. The complainant did not see the appellant in possession of the bicycle. There was no evidence to prove that the bicycle the appellant directed the 2nd accused to show the complainant was the bicycle which the 2nd accused showed the complainant. The appellant was not present when the 2nd accused gave the complainant who had posed as a buyer the bicycle. There was no evidence that the room from where the stolen bicycle was collected by the 2nd accused belonged to the Appellant or that the Appellant was in control of it. A trap had been laid and when the police surfaced, they only found the complainant, the Appellant's 2nd accused and the bicycle. They arrested the 2nd accused on the spot. No evidence was adduced to show where, when and under what circumstances the appellant was arrested. The lady who was alleged to have been with the appellant and the Appellant's co-accused was not called to give evidence.

The appellant in his unsworn statement testified that a group of 8 boys at 10 p.m. on 19-2-04 forcibly took him from his house to the police station where he found the 2nd accused person. He denied the offence and knowledge of the theft of the complainant's bicycle.

The trial magistrate in his judgement found that the appellant did not rebut the evidence of the complainant and concluded that the appellant was arranging for the disposal of the bicycle by purporting to negotiate its price. This was a misdirection. The burden of proving the appellant guilty reposed on the prosecution. That burden never shifts. The trial magistrate shifted it by requiring the appellant to show that he was not guilty. It was up to the prosecution to prove the guilt of the appellant beyond any reasonable doubt and the appellant did not have to say anything to show his innocence.

On the testimony before the court, the culpability of the appellant was not established as required by law. It was a misdirection on the part of the trial magistrate to find as he did that the ingredients that constitute the offence of handling stolen goods c/s 322(2) of the Penal Code had been proved. There was not a scintilla of evidence that the Appellant was in actual or constructive possession or control of the stolen bicycle.

In short, the offence on which the appellant was convicted was not proved and the conviction was erroneous. I quash it and set the sentence aside. Unless otherwise lawfully held, the appellant shall be released and set free.

Dated at Kakamega this 27th day of July, 2005.

G. B. M. KARIUKI

J U D G E