



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

**AT NAIROBI  
CRIMINAL APPEAL NO.366 OF 2002  
(From Original Conviction Sentence in Criminal case No.158 of  
2002 of the Senior Resident Magistrate's Court at Limuru)**

**JOHN LUGUASA EBONDOWU..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

The appellant was originally charged with robbery contrary to section 296 (2) of the Penal Code on count one. On count two he was charged with breaking into a house and committing a felony contrary to section 306 (a) of the Penal Code.

After a trial the appellant would appear to have been acquitted of the robbery charge although no specific findings appears to have been on record about this acquittal by the learned trial magistrate in respect of count two I have noted that there was no finding as to whether the offence of house breaking was established. There is nothing on record to show whether or not the appellant was acquitted of this count or whether he was convicted. Similarly there is nothing on record to show that the appellant was convicted or acquitted of the charge in count one i.e. robbery contrary to section 296 (2) of the Penal Code.

It is disturbing to note that the appellant was convicted of a charge that was non existent as far as the charge sheet was concerned. According to the trial magistrate he found the appellant "guilty of an offence of being in possession of stolen items and now enter a conviction accordingly". Where on earth did the trial magistrate get this charge and under what section of the Penal Code was the charge based?. Did the trial magistrate substitute the offence of house breaking and stealing or robbery with violence with an offence of being in possession of stolen items and if so under what section of the Criminal Procedure Code? Since offence of possession of stolen goods was not preferred either on a substantive charge or as an alternative charge. I am unable to understand where the magistrate got the charge he convicted the appellant of. I am unable to agree with the state counsel that the charge has been proved and if it was which charge was proved?

I dismiss the conviction and set aside the sentence inflicted on the appellant. The appellant will be set at liberty unless he is lawfully held.

**Order accordingly.**

**R.M. MUTITU**

**JUDGE**

**10.4.2003**

**Delivered and dated in the presence of Miss Nyamosi for the state and in the presence of appellant.**

**R.M. MUTITU**

**JUDGE**

**10/4/2003**