REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 51 OF 2013

NELSON MAINGI WAITHERA……..……APPELLANT

-VERSUS-

REPUBLIC…….……..……..RESPONDENT

(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrate's Court Criminal Case No. 280 'B' of 2007 (Hon. S.N. Mbungi) on 9th September, 2008)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to section **296(2)** of the **Penal Code**. According to the particulars of offence, on the 5th day of November, 2007 at Gakira Village in Murang'a district within central province with others not before court while armed with offensive weapon namely *rungus* and a panga, the appellant robbed Julius Kariuki of a mobile phone Motorola C117 valued at Kshs. 2500/- and Kshs. 2,800/- cash and at immediately before or immediately after the time of such robbery used actual violence to Julius Kariuki.

At the conclusion of the trial the learned magistrate acquitted the appellant of the offence with which he was charged but found him guilty of a lesser offence of handling stolen property contrary to **section 322(2)** of the Penal Code. He was sentenced to hang. The records show that the appellant was convicted by a magistrate different from the one who sentenced him. While he was convicted on 7th September, 2008 by Hon. S.N. Mbungi, he was sentenced by Hon. D.A. Orimba on 9th September, 2009.

Being dissatisfied with the sentence, the appellant appealed against the decision of the learned magistrate; in the petition of appeal which he filed in court on 18th September, 2008, the appellant sought to have the conviction quashed and the sentence set aside. His main grounds of appeal being that the sentence imposed by the learned magistrate was unlawful and that in any event he was convicted of an offence which was not stated in the charge sheet.

When the appellant's appeal came up for hearing on 3rd March, 2014, the appellant immediately took issue with the decision of the learned magistrate to sentence him to death when he had been convicted of the offence of handling stolen property contrary to **section 322(2)** of the **Penal Code**. He also contested the learned magistrate's finding that there was sufficient evidence by the prosecution that he had been found in possession of a cell phone stolen from the complainant. In his view, if this item had been found on his person he should have been booked with it when he was booked at Kirogo police post.

Counsel for the state, Mr Naulikha, conceded the appeal and submitted that apart from the unlawful sentence meted out against the appellant, there were numerous errors throughout the proceedings, the net effect of which was to cast doubt on the prosecution case; in the state counsel's view, the appellant should have been given the benefit of this doubt and acquitted accordingly.

We agree with both the appellant and the learned counsel for the state that the sentence meted out against the appellant was unlawful. The maximum sentence for the offence of handling stolen property under **section 322(2)** of the **Penal Code** is fourteen years imprisonment and not death, assuming the appellant was properly convicted of that offence.

Although the appellant was convicted of the offence of handling stolen property there was no proof

beyond reasonable doubt that the appellant was found in possession of the stolen property. The investigations officer who allegedly picked and arrested the appellant from a public service vehicle said that he recovered the cell phone from him; however, he said that he returned the phone, apparently to the owner. He gave no explanation as to why he did not book the phone at the same time he booked in the appellant after he had been arrested. There was no explanation as to why the phone should have been returned to the complainant when it ought to have been booked as an exhibit in the case against the appellant. Since it is not clear at what point in time it was returned to the investigations officer after he handed it over to the complainant, there is every possibility that by the time it was presented and admitted in evidence as an exhibit it had been tampered with. Evidence that it had particular marks which could be identified with the complainant was therefore doubtful.

Over and above the lack of evidence for the offence for which the appellant was convicted, it is apparent from the record that the appellant was never charged with the offence of handling stolen property as an alternative charge. It is appreciated that under **Section 179(2)** of the **Criminal Procedure Code,** when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of that minor offence although he was not charged with it. However, it is apparent from the record that no facts were established by the prosecution evidence to sustain a conviction on a lesser offence of handling stolen property rather than that of robbery with violence.

In the premises we are of the opinion that the appellant's appeal has merit. We therefore allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. The appellant shall accordingly be set at liberty unless he is lawfully held under a separate warrant.

Signed, dated and delivered in open court this 4th day of March, 2014

H.I. Ong'udi — **JUDGE**

Ngaah Jairus — **JUDGE**