

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CRIMINAL APPEAL NO. E003 OF 2025

MARTIN KIHONGE NDUTA.....
.....APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal against the judgment delivered by Hon CA Okello PM sitting at Ruiru delivered on 24th January 2025 arising from Ruiru Criminal case no. E1882 of 2021)

JUDGEMENT

1. This is an Appeal arising from the judgement in Ruiru Cr. Case No. E1882 of 2021 delivered on 24th January 2025.
2. The memorandum of appeal dated 6th February 2025 was lodged on grounds that the learned magistrate erred in law and fact in trying the appellant on a defective charge sheet, for an offence not reported or booked in any police station and convicting the appellant on mere suspicion of committing an offence. The Appellant also faulted the trial court for shifting the burden of proof and for disregarding the appellant's defence hence arriving at the wrong decision. Lastly, the Appellant complains that the sentence was excessive, unfair and reflected a biasness considering the full circumstances of the case.
3. The appellant had been charged with the offence of *stealing by servant* contrary to **Section 281 of the Penal Code**. And an alternative count of *handling suspected stolen goods* contrary to **Section 323 of the Penal Code**.

4. PW1 testified that he is a security manager at Redland Roses. It was his testimony that on 22nd July 2021 he was in the office when his colleague *Reuben Saina* reported to him that he had lost the company phone in the premises. He requested him to review the CCTV footage to ascertain the person who might have picked the phone. He reviewed the CCTV footage and identified that the phone was picked by people working in maintenance, and their supervisor identified the person as *Nevon*. When *Nevon* was asked, he said that *Boaz* snatched the phone from him, *Boaz* on the other hand alleged that he had given the phone to his friend to take to the fundi. Both *Nevon* and *Boaz* were employees of the company with contracts. They were both arrested and escorted to Ruiru Police Station. The following day he learnt that the phone had been recovered from native electronics. On cross examination he said that he did not see the appellant on the CCTV footage, and he is not an employee of the company.
5. PW2 testified that on 19th July 2021 he learnt that his phone was missing as he was unable to trace it. He reported the same to PW1 and asked him to review the CCTV footage to enable him retrieve his phone. He later learnt that the phone had been recovered. He confirmed that he did not see the accused on the CCTV and neither is he an employee of the company. The phone had been taken to the appellant's shop by *Omondi's friend*.
6. PW3 NO.74717 Justus Mbuni, a police officer at Ruiru Police station testified that he was the investigating officer. He recorded witness statements. In the course of the investigation, he arrested *Evans Nyachwaya* who informed him that he had taken the phone to the appellant's shop. On visiting the shop, the appellant was found with several phones which he alleged he had been contracted to repair. He was however unable to disclose the owners of the said phones. They recovered six phones

and laptops as exhibits. However, nobody had ever come to claim the phones or laptops.

7. The appellant gave sworn defence alleging that he is a phone assessor dealer and engages in the business of repairing phones. He has no capacity of knowing whether the phones brought to him for repair are stolen or not. He said that the laptop seized by the police belonged to him. One of the accused who had pleaded guilty to stealing the phone is the one who had brought it to him for repair. He had not informed him that the phone was stolen property.
8. The appellant was found guilty of *having suspected stolen property* contrary to **section 323 of the Penal Code** and sentenced to six (6) months imprisonment and in default to pay a fine of Kshs. 50,000.00.
9. The court directed that the appeal be canvassed through written submissions.
10. The appellant submitted that the prosecution had failed to discharge the burden of proof to the required standard. The goods allegedly suspected to be stolen property had no nexus with the main alleged charge of stealing. The circumstances under which the items were recovered from the appellant's repair shop were suspect. Therefore, the appellant prayed that the appeal be allowed.
11. The Respondent submitted that the prosecution discharged the burden of proof and there was no reason for disturbing the finding of the trial court. Therefore, the Respondent urged that the appeal be dismissed and the finding of the trial court on both conviction and sentence be upheld.
12. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before

the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court as was held in **Okeno v Republic [1972] EA 32.**

13. I have considered the charges herein and the evidence adduced. I have taken into account that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have considered the submissions made and case law cited. The two issues that commend themselves for determination are: whether the appeal has merit and should be allowed. whether or not the charge sheet was defective.

14. The provision for the charge of handling stolen property under the **Penal Code** is **Section 323** which provides that:

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanor.”

15. On the other hand, the **Criminal Procedure Code** under **Section 26** stipulates as follows:

1. “A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—
a. any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or

b. any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or

c. any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

16. The conditions precedent to a finding of guilty under the above charges were set out in the case of ***Kiondo Hamisi v Republic(1963) E.A 209*** where the court stated that the prosecution must establish:

- i. That the accused was, in fact, detained in the exercise of powers conferred by the relevant section of the Criminal Procedure Code;***
- ii. That at the time when he was detained, the accused was in the course of a journey;***
- iii. That at the time when he was detained, the accused had in his possession a particular thing;***
- iv. That the thing was of such a nature, or the circumstances were such that it might reasonably be suspected of having been stolen or unlawfully obtained; and***
- v. That the accused refused to give an account to the court of how he came by the thing, or gave an account which was improbable as to be reasonable, or gave an account which was rebutted by the prosecution.***

17. The same principle was espoused in the case of ***Charo v. R. [1982] KLR.***

18. The facts of this case are that the appellant, who is involved in the business of repairing phones and laptops,

received a phone from *Evans Nyachweya*, who had brought it for repair. PW3 testified that upon arresting the said *Evans Nyachweya*, he directed them to the appellant's shop where they found several phones that had been brought for repair, including the phone under investigation. Consequently, PW3 proceeded to arrest the appellant and the six mobile phones in his possession as he was unable to disclose their owners.

19. Based on the above legal proviso and case law, the prosecution ought to have proved that the Appellant had knowledge that the items were stolen. In the instant case PW3 stated that the explanation given by the appellant was not satisfactory but failed to go a step further to demonstrate why he believed that the appellant had such knowledge. The court went ahead and convicted the Appellant determining that:

“I find that the accused did not give satisfactory account of how he came by the items as per the attached list. I find that the prosecution has proved its case against the accused person as regards the Count of Having Suspected Stolen goods contrary to Section 323 of the Penal Code”

20. I find that the appellant had reasonably demonstrated that he came to be in possession of the phone by virtue of him being a phone assessor dealer engaging in the business of repairing phones. The allegation that he was flashing phones has not been supported by evidence as the flashing tools if any, have not been produced before this honourable court. The appellant's submission that he had no means of ascertaining that the mobile phone was stolen property is both satisfactory and credible in the circumstances of this case and was not displaced by the Prosecution evidence.

21. I therefore find that the prosecution failed to prove that the applicant was aware that the mobile phone handed

over to him by *Evans Nyachweya* was indeed stolen property. The trial court therefore erred in convicting the appellant under **Section 323 of the Penal Code** as read with **section 26 of the Criminal Procedure Code**.

22. I also find that the main charge of stealing by servant contrary to **Section 281 of the Penal Code** was unfounded since the appellant was not an employee of Redlands Roses.

23. The upshot of the matter is that the appeal succeeds. I note from the record that the Appellant was arraigned on 2nd August 2021, was convicted and sentenced on 24th January 2025 to pay a fine of Kshs. 50,000 and in default 6 months imprisonment.

24. ***Final orders: This Appeal succeeds. The appellant is hereby set at liberty forthwith unless lawfully held.***

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF NOVEMBER, 2025.

**HON. T. W. Ouya
JUDGE**

For Appellant.....Ms Waithera

For Respondent.....Kagama HB Ms Torosi for the state

COURT ASSISTANT.....Brian