REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. E194 OF 2023

BEN KARANJA NJOROGE............ ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Appeal from the judgment and sentence in Criminal Case No. 1810 of 2016 in the Chief Magistrates Court at Milimani by C. M. Njagi, Principal Magistrate, dated 23rd June 2023]

JUDGMENT

1. The appellant was *acquitted* on two counts of *conspiracy to commit a felony* contrary to section 393 of the **Penal Code** and *stealing by servant* contrary to
2. to serve probation for 24 months.
3. Being aggrieved, he section 281 of the Code.
4. The learned trial magistrate however substituted the charge under section 179 of the **Criminal Procedure Code** and *convicted* him of the offence of *handling stolen property* contrary to section 322 (2) of the **Penal Code**. He was sentenced has filed a petition of appeal dated 5th July 2023 raising eight grounds.
5. The principal ground in this appeal, as I see it, is whether the

substituted charge was cognate and lesser. Paraphrased, whether the learned trial magistrate erred by invoking section 179 of the **Criminal Procedure Code**.

6. The appeal is contested by the Republic through grounds of opposition dated 28th May 2024.
7. Learned counsel for the appellant lodged submissions dated 25th November 2025 together with a bundle of authorities. The republic replied through submissions dated 18th February 2026.
8. On 19th February 2026, I heard further arguments from both learned counsel for the appellant and the republic.
9. I take the following view of the matter. This is a first appeal to the High Court. I have thus examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.
10. Upon a re-evaluation of the evidence of the *nine* witnesses lined up by the prosecution and the defence put forth by the appellant (DW1), I *concur* fully with the learned trial magistrate that there was *no* proof to the required standard on

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the two counts of *conspiracy to commit a felony* contrary to section 393 of the **Penal Code** and *stealing by servant* contrary to section 281 of the Code. Furthermore, there is no appeal or cross-appeal on the acquittal.

11. I will now turn to the crux of this appeal. Section 179 of the **Criminal Procedure Code** provides as follows-

    (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

    (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

12. The learned trial magistrate was alive of the matter and after reviewing some authorities, she correctly observed that *"an accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are*

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related or alike; of the same genus or species".

13. The trial court concluded that that whereas the appellant did not participate in the theft, he failed to explain the deposit of Kshs 4,852,100 made into his Family Bank account from the complainant's (Clarion Hotel) *Kopokopo* account. This was largely based on the forensic evidence of the auditor (PW9). In his *unsworn* defence, the appellant denied that any such sum was deposited into his account.

14. I have kept in mind that the appellant was not charged for the offence of *handling stolen property*. Rather, the trial court was invoking section 179 of the **Criminal Procedure Code** above.

15. The two offences for which the appellant was charged and the conviction now for *handling stolen property* fall in the genus of offences against property. I however readily find that the offence of *handling stolen property* was not a *minor* or *lesser* offence. Whereas the offences of *theft by servant* and *conspiracy to commit a felony* attracted a maximum sentence of 7 years imprisonment, *handling stolen property* was a graver offence attracting punishment of up to 14 years

imprisonment.

16. To properly invoke section 179 of the **Criminal Procedure Code**, the offence must be cognate and lesser. See generally ***SKW v Republic*** [2025] KECA 326 (KLR). That was *not* the case in the instant matter.

17. This conclusion is sufficient to dispose of the appeal and I need not make a finding on the remainder of the grounds of appeal.

18. The upshot is that the appeal is allowed. Both the conviction and sentence for the offence of *handling stolen property* contrary to section 322 (2) of the **Penal Code** be and are hereby *set aside*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 16th day of April 2026.

KANYI KIMONDO
JUDGE

Judgment read virtually on *Microsoft Teams* in the presence of-

Appellant.

Mr. Shammah holding brief for Mr. Mbugua for the appellant instructed by Mbugua Ng'ang'a & Company Advocates.

Ms. Awino for the republic instructed by the Office of the Director of Public Prosecutions.

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Mr. E. Ombuna, Court Assistant.

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