



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**Criminal Appeal 217 & 218 of 2006**

*(From Original Conviction and Sentence in Criminal Case No. 244 of 2006 of the Resident Magistrate's Court at Kaloleni: Andayi – Ag. S.R.M.)*

**MULOKA MUNDALU KALAMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 218 OF 2006**

**NJOHA MBEJA SAIDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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**JUDGEMENT**

The Appellants were, with one BENSON MUTHOKA MUSYA, arraigned before the Resident Magistrate at Kaloleni for two offences of store breaking and committing a felony contrary to section 306(a) of the Penal Code. The first Appellant also faced an alternative charge to count 1 of handling stolen property contrary to section 322(2) of the Penal Code while the second Appellant with the said Benson Muthoka Musya faced an alternative charge to count 2 also of handling stolen.

The record shows that the first Appellant pleaded guilty to count 2 and the second Appellant to count 1. Their confederate pleaded not guilty to the one alternative count of handling that he faced. The Appellants were then sentenced to five years imprisonment each and the case was set down for hearing of count 1 against the second Appellant, count 2 against the first Appellant and for the alternative charge of handling against the said Benson Muthoka Musya.

When the case went before the trial court for hearing the prosecutor told court that he could not trace the complainant in respect of count 1 and was allowed to withdraw it. The complainant in count 2 also withdrew the complaint and the charge was accordingly withdrawn. The Appellants' confederate was set free but the Appellants remained in prison for the offences they had been convicted which were withdrawn. They have now appealed against those convictions and the sentence of five years imprisonment imposed on each of them.

The learned state counsel Mr. Monda has quite correctly conceded these appeals. The charges having been withdrawn the substratum of the Appellants' conviction was destroyed. The Appellants' convictions cannot therefore stand. In the circumstances I allow this Appeal, quash the conviction and set aside the sentences. The Appellants shall be set free forthwith unless otherwise lawfully held.

**DATED** and delivered this 16<sup>th</sup> day of October, 2007.

**D. K. MARAGA**

JUDGE