REPUBLIC OF KENYA

HIGH COURT AT NYERI

CRIMINAL APPEAL 202, 203 & 204 OF 2001

PETER NDUATI WANGECHI…….....…….….APPELLANT

Versus

REPUBLIC…….....…….RESPONDENT

CRIMINAL APPEAL NO. 203 OF 2001

FRANCIS KIRAGU…….....……..……APPELLANT

Versus

REPUBLIC…….....…….…..RESPONDENT

CRIMINAL APPEAL NO. 204 OF 2001

SIMON NGUGI NJERI…….....……APPELLANT

Versus

REPUBLIC…….....……..…RESPONDENT

(Being Appeals Against conviction and sentence of P. J. D. Mwangulu, District Magistrate I, In The District Magistrate's Court Criminal Case No. 79 of 2001 – At Kigumo)

JUDGMENT

The above three appeals were consolidated for hearing as they all emanate from the same trial and the appellants may in this judgment be referred to as the First Appellant, Second Appellant and Third Appellant in the respective order in which their names appear on the first page of this judgment.

The three appellants were charged with store breaking and committing a felony contrary to *Section 306(a)* of the Penal Code particulars alleging that on the night of 6th and 7th February 2001 at Samar Village Crispus Mutitu's Farm in Maragua District the three appellants jointly with others not before court, broke and entered into a store from which they stole one wheel barrow, one sack of Mwitemania Beans, a half sack of Rose Coco beans, one spray pump make Hobra, one panga, a bow and four arrows, four window grills and five empty sacks all valued at Ksh.15300/- the property of George Macharia Kariuki.

Each appellant faced an alternative and separate count alleging the offence of handling stolen goods contrary to *Section 322(2)* of the Penal Code.

Against the First Appellant Peter Nduati Wangechi, it was alleged that on 12th February 2001 at Maragua Township, the Appellant, otherwise than in the course of stealing, dishonestly retained two window grills and a bow knowing or having reasons to believe them to be stolen goods.

Against the Second Appellant, Francis Kiragu, it was alleged that on 20th February 2001 at Maragua Township, the Appellant otherwise than in the cause of stealing, dishonestly retained three empty sacks knowing or having reasons to believe them to be stolen goods.

Against the Third Appellant, Simon Ngugi Njeri, it was alleged that on 11th February 2001 at Maragua Township, the Appellant otherwise than in the cause of stealing, dishonestly retained two nylon empty sacks knowing or having reasons to believe them to be stolen goods.

The trial magistrate, in his brief judgment dated 22nd May 2001 in which he said nothing about the substantive count, said:

"***In this case I find the accused persons were found in possession of beans stolen property. They had no good explanation. I find them guilty of the handling charges and I convict them C/S 322(2) of the Penal Code."***

In the first place, each appellant having been charged alone in the alternative count of handling stolen goods, it was incumbent upon the trial magistrate to consider each alternative count separately with a view to satisfying himself whether or not that count had been proved by the prosecution against the appellant named therein to make a decision respecting that particular count separately. That was not done and therefore the trial magistrate erred when he lumped all the three alternative counts and the three appellants all together and convicted them in the above quoted passage.

Secondly none of the alternative counts alleged the handling of "beans" yet each appellant was convicted on the ground that he handled "beans" as can be seen in the quotation above. That was another

error which should not have been made.

Thirdly, in a charge under *Section 322(2)* of the Penal Code, mere possession or mere handling of stolen property is not sufficient for conviction. The prosecution has to go further and prove that the accused person handled or was in possession of the stolen property dishonestly and knowing or having reasons to believe the property is stolen and indeed the charge clearly includes all those ingredients. Each has to be specifically proved as a matter of fact. There is no assumption and if any one of them is not proved, the charge is not proved and there should be no conviction. From the recorded evidence in the trial, there was no proof that any of the appellants, if indeed handled the goods attributed to him, he did handle the goods dishonestly and knew or had reason to believe the goods had been stolen.

The prosecution had to prove all that and there was no burden upon the appellants to give an explanation of the possession although they were free to do so. This is a different situation from the situation under *Section 323* of the Penal Code and the application of the two sections must not be confused.

From what I have been saying above therefore, the appellants were wrongfully convicted.

Accordingly, each appeal is hereby allowed. The conviction of each appellant is quashed and the sentence of each appellant hereby set aside.

Each appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 28th day of February 2005.

J. M. KHAMONI

JUDGE