

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal 331 of 2003

GEORGE CHEGE KIMANI APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(Appeal from original Judgment and Conviction in Principal Magistrate's Court at
Kerugoya in Criminal Case No. 1851 of 2002 dated 28th February 2003 by Mr. W. N.
Njagi – P.M. – Kerugoya**

J U D G M E N T

George Chege Kimani, (hereinafter referred to as the Appellant) was tried before the Principal Magistrate Kerugoya for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. He was convicted of the lesser charge of Handling stolen goods contrary to section 322 (2) of the Penal Code. He was sentence to serve 5 years imprisonment. He has now appealed against his conviction and sentence contending inter alia that the offence of Handling stolen goods was not proved beyond reasonable doubt, that the trial magistrate convicted the appellant against the weight of the evidence adduced and that the trial magistrate totally disregarded the appellants defence.

The Principal State Counsel has conceded that the charge was at variance with the evidence on record and that there was a lot of doubt regarding the recovery of the power saw machine. He has also accepted that the contradictions regarding the evidence of P.W.1 and P.W.2 were never resolved. Needless to state that he does not support the appellant's conviction.

I have reconsidered and evaluated the evidence and do find that the complainant Douglas Mwangi Njuki who was named in the charge sheet as the owner of the power saw specifically stated that the power saw which was recovered and produced in court was not the one stolen from him.

Although one Charles Maina Njoroge (P.W.3) testified purporting to be the actual owner of the power saw which was stolen and identifying it as the one produced in court, the evidence of this witness was in sharp contradiction with that of the complainant and the contradictions were not resolved. The complainant having testified that the power saw produced in court was not the one stolen from him, there was no evidence upon which the court could conclude that the recovered power saw was stolen property. Proof of the theft was a necessary pre-requisite to prove a charge under section 322(2) of the Penal Code.

I concur with the learned counsels that the appellants conviction was not supported by any evidence.

Accordingly I do allow his appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set free unless otherwise lawfully held.

Dated signed and delivered this 30th day of November 2005

H. M. OKWENGU

JUDGE