



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.129 OF 1999**

(Being an Appeal from Original Conviction and Sentence in Criminal Case  
No.1740 of 1998 of the Chief Magistrate's Court at Mombasa - M.  
Mugambi – RM)

JASHON OLUOCH NYANGESO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The appellant was charge with another for stealing motor vehicle parts to wit 2 batteries on count 1 and being in possession of stolen goods as listed in count II.

Both were convicted and the other accused was put on probation. The appellant was sentenced to 5 years imprisonment.

The appellant is appealing against conviction and sentence.

Of the first count the complainant PW.1 said she had taken her motor vehicle to a mechanic in Diani for a repair of van belt. This was done. When she started the vehicle it did not start and she checked and found the battery was not in the vehicle. She had another battery which was also missing. She reported the matter to the police and later she was called by police to identify some batteries recovered by the police. She identified both batteries as hers. In answer to this the accused person said he was given the battery by one Obare who had traveled to Kisumu and had not returned to Diani. The other charge was being in possession of suspected stolen property contrary to Section 323 Penal Code. Section 323 states as follows:

*“Any person who has been detained as a result of exercise of powers conferred by Section 26 of the Criminal Procedure Code 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 misdemeanor”*

The powers under Section 26 Criminal Procedure Code was exercised by PW.1 No.31739 Insp. Isaac Ibrahim. He gave evidence how he found the items and how he requested the accused to go home and bring documents and receipts. After 2 weeks the accused came back to police station but without any such documents to show that he had goods belonging to him. This is an attempt to comply with Section 325. However the accused insisted that the goods belonged to him.

In cross examination PW.1 said –

*“The battery was found in clinic of 2 nd accused. He is associated with Obera. The battery was stolen by Obera who is still at large”*

The second accused never took the police to where Obera was residing and therefore Obera was not brought before the court.

I have read the record of proceedings which is very difficult to understand because of the way typing is done and the original handwriting is illegible. I am convinced that the charge of theft is proved beyond reasonable doubt.

Regarding the offence of being in possession of items listed in the charge sheet the evidence is that the claim of the accused that the items belonged to them could be true. No one claimed them. They were able to show some documents and it was said that second accused was an electrician and was in the process of carrying out repairs.

I am also concerned by the sentence given by trial magistrate. Sentence of theft is imprisonment for 3 years and for being in possession is a fine or imprisonment for 6 months.

It is not clear for which offence the sentence of 5 years is given.

In the circumstances I find that the offence of theft is proved. The accused was never able to point out Obera whom he says he was keeping the batteries. I do not find the offence of being in possession proved beyond reasonable doubt. The upshot is therefore that conviction for offence of theft is upheld. Sentence of 5 years is set aside and substituted with one of 2 years.

The conviction for the offence on count 2 is quashed and sentence set aside.

**Dated at Mombasa this 1st Day of October, 2001.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**