REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 785 OF 1982

CHEGE …….....……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant was convicted by the learned district magistrate of the 1st class at Nairobi of conveying suspected stolen property contrary to section 323 of the Penal Code and sentenced to two years' imprisonment. He now appeals against that conviction and sentence on the three grounds of appeal relating to conviction and the one ground of appeal relating to sentence set out in the grounds of appeal. State counsel does not support the conviction. The accused was charged under section 323 of the Penal Code which reads as follows:

"Any person who has been detained as a result of the exercise of the 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 a misdemeanour."

Section 26 of the Criminal Procedure Code which is referred to in section 323 of the Penal Code reads as follows:

"Section 26(1) A police officer, or other person authorized in writing in that behalf by the commissioner of police may stop, search and detain …(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained."

In the present case the charge sets out … (a) that the accused was detained by two police officers as a result of the powers conferred to them under section 26 of the Criminal Procedure Code (b) That a velvet coat, a pair of sandals, a blouse, a water jug, a pair of stockings and two head caps were found being conveyed by him and (c) that the police suspected these items to have been set out that that suspicion was reasonable. When this charge was read to the accused he replied "I admit the offence" the prosecutor then stated that the facts in this case were "as per Criminal Case 1898/82." No other facts are given and there is no note on the file to state whether the accused was present when the facts in that case were read out to the court. There is therefore nothing on the record to show that the accused knew of the allegations which were made against him apart from those which were set out in the charge. Although one appreciates that at the time of this hearing so soon after the events of August 1, 1982 the courts were over burdened with charges similar to this one arising from the looting which took place, nevertheless this file read in isolation does not show that even the semblance of justice was done to this accused. Each case is required to be considered on its own merits and the practice of referring for convenience to other files should be discontinued forthwith.

I suspect that on this ground alone it would be proper to quash this conviction. However, there are further matters of procedure which have not been followed in the court below. In the case of *Koech v Republic* [1968] EA at page 109 it was pointed out that under section 323 of the Penal Code the offence with which an accused is charged was not that he had in possession or was conveying in any manner anything which

might be reasonably suspected of having been stolen or unlawfully obtained but that if he admitted to those facts and failed to give an account to the satisfaction of the court of how he came by the same, then and only then would he be guilty of an offence. When the appellant said that when the charge was read to him that he admitted the offence all he was admitting was that he had been detained by the police officers under section 26 of the Criminal Procedure Code and that he was found conveying these items which were suspected to have been stolen or unlawfully obtained. He has not admitted that that suspicion was reasonable. He has not been asked, as he should have been under the authority of the *Koech* case whether he had an account of his possession of the goods. In his grounds of appeal he obviously has something to say. It is not for the learned district magistrate or for me to jump to any conclusion as to whether what he says is true or not. Such decisions can only be made on the hearing of evidence. The district magistrate in this case should clearly therefore have treated this as a not guilty plea and proceeded to hear evidence. Clearly the conviction cannot stand. It is quashed and the sentence is set aside. I have considered whether I should order a retrial in this matter. For similar reasons to those set out in the *Koech* case I am of the view it would not be proper to do so.

Dated and Delivered at Nairobi this 28th January, 1983

D.C. PORTER

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Ag JUDGE