

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 765 OF 1982

KIMANZI APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the learned district magistrate at Nairobi for conveying stolen property contrary to section 323 of the Penal Code (cap 63). The charge read as follows:

On August 2, 1982 at Nairobi within Nairobi Area having been detained by PC Otieno and Makokha as a result of the powers conferred to them under section 26 of the Criminal Procedure Code was found conveying twenty empty cassettes, and one electric plug suspected to have been stolen or unlawfully obtained.

The charge did not specify that the suspicion that the property was stolen or unlawfully obtained was reasonable. This is particularly important in such cases since in the case of *Koech v Republic* [1968] EA at page 109 the whole procedure of putting a charge under section 323 of the Penal Code to the accused has been clearly outlined by the then Chief Justice Sir John Ainley. The point which he makes very clear under section 323 of the Penal Code is that even though the accused admits all the assertions which are set out in the charge and assuming for the time being that the charge is properly drawn he must still be asked whether he has any explanation for his possession of the property. The reason for this is because he commits no offence until he fails to give an account to the satisfaction of the court of how he came by this suspected stolen property. If the court has failed to ask him to give such explanation he cannot be convicted of the offence. Therefore the appellant's apparent plea of guilty is no plea of guilty and he should not have been convicted. It would be wrong, I think, in the circumstances to order this matter to go for retrial for similar reasons as those set out at the end of the judgment in *Koech v Republic* above cited even bearing in mind that he is on bail.

The conviction will therefore be quashed and the sentence set aside.

Dated and Delivered at Nairobi this 26th January, 1983

D.C. PORTER

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Ag JUDGE