



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Appeal 767 of 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 6067 of 2002 of the Chief Magistrate’s Court at Thika (Mary Kiptoo – S.R.M))

WAKO GINDA ROBAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 768 of 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 6067 of 2002 of the Chief Magistrate’s Court at Thika (Mary Kiptoo – S.R.M))

DAUDI ADEN MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 769 of 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 6067 of 2002 of the Chief Magistrate’s Court at Thika (Mary Kiptoo – S.R.M))

GAMAS ALAKE TUYAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants herein **WAKO GINDA ROBAS** (hereinafter referred to as the 1st Appellant) **DAUDI ADEN MBURU** (2nd Appellant) **GAMAS ALAKE TUYA** (3rd Appellant) were convicted for the offence of **HANLDING STOLEN GOODS** contrary to Section 322(2) of the **Penal Code**. Each was sentenced to serve four years imprisonment. They were aggrieved by the conviction and sentence and

therefore each lodged his appeal.

The facts of the prosecution case were that the Complainant was sleeping in his house with his brother PW3, when thugs struck. The thugs broke into the house in the dark. They cut both the Complainant, who was PW1, and his brother PW3 on various parts of the body. The Complainant was more severely hurt suffering lacerations on the head and hands as confirmed by the Clinical Officer, PW2. Both the Complainant and PW3 escaped from the thugs and went different directions. The Complainant ended up in the house of **MICHAEL OMONDI**, PW5 who opened the window to allow him in. PW4, ROSE, a neighbour of the Complainant who heard the commotion and the Complainant's cry for help went out of her house and called other neighbours with whom they took the Complainant to the police and later to hospital. PW6, PC JUMA said that on receiving the Complainant's report he and other officers went out to patrol the area. He says that they came across a large crowd in which the 1st and 3rd Appellant were seated on the group with various items. On arresting the two and two others who were then coaccused in the lower court, they led him to the 2nd Appellant and another also a co-accused in lower court. That he recovered a mattress and arrested the 2nd Appellant and his co-accused. Later he charged all the Appellants for this offence. All the Appellants denied the charge in their defence.

The Appellants challenged their convictions on three main grounds. **MR. MAKURA** learned counsel for the State opposed the appeal. In their first ground, the Appellant's challenged the conviction for the offence of **HANDLING STOLEN GOODS** on the grounds that the evidence adduced could not sustain the conviction. **MR. MAKURA** submitted that the evidence was sufficient to base a conviction. The counsel submitted that the Appellants were found with items which the Complainant identified were stolen from him. That the said identification of the items was sufficient since the Appellants were found in possession of the items by members of public.

The counsel for the State has generalized the evidence adduced. The evidence of PW6 was that he found the 1st and 3rd Appellants being detained by members of public. The members of public were not called as witnesses, not even a single one. It is therefore not clear under what circumstances the 1st and 3rd Appellants were detained by the members of Public. In addition, PW6 said that he found certain goods produced as evidence in court on the road near the two Appellants and their two co-accused. There is no evidence adduced which the Court can use to test whether indeed the Appellants were in possession of the exhibits or not. Since none of the members of public was called to say how they found the 1st and 3rd Appellants in relation to the recovered goods, the prosecution cannot be said to have discharged its burden of proving possession on the standard required. The evidence before court was purely that of speculation and therefore insufficient to sustain any conviction for any criminal offence charged.

As for the 2nd Appellant, PW6 said that the second accused in the lower court led him to where the 2nd Appellant and the 6th Accused in the lower court were sleeping. PW6 said that he recovered the mattress on which they were sleeping. That the 2nd accused, the 2nd Appellant and the 6th accused in lower court led him to where the bicycle was.

The recovered items were exhibits 1 to 10. The bicycle was exhibit 1 and apart from it, none of the other exhibits were identified by any mark or symbol. All the Complainant said was that the exhibits were his. As for the bicycle, the Appellant said he could identify it by the mark cycle on it. The mark was not described by the trial court and therefore there is insufficient proof that they belonged to the Complainant and there was no likelihood of mistake or error in their identification.

For the mattress, there was only a general claim by the Complainant while for the bicycle, the alleged mark of work "**Cycle**" was not proved to have been unique or exclusive to the Complainant. In the circumstances, I find that the evidence adduced against the Appellants before Court was insufficient to sustain the charge of **HANDLING STOLEN GOODS**.

The Appellants challenged the manner in which their defences were treated. They contented that the rejection of their defences was unjustified.

Counsel for the State submitted that the trial magistrate considered the Appellants' defences at page J3

and rejected it correctly for being unreasonable.

The 1st Appellant in his defence before trial court said that he was alone walking from the Mosque when a group of people manhandled him. The 2nd Appellant in his defence said that he was going home from his work when he was arrested for allegedly being with others arrested earlier by the same group. The 3rd Appellant on his part said he was going to the Mosque for prayers when he was arrested by a group.

I have perused the judgment of the trial court. In the entire judgment, nowhere does the learned trial magistrate narrate the Appellants' defence and neither is their defence considered or analyzed in any way. Under **Section 169** of the **Criminal Procedure** Code a trial court must not only consider the defences advanced by accused persons but must also analyze the defence as against the rest of the evidence before the Court. In failing to include in the judgment what the Appellants said in their defences, the learned trial magistrate contravened the provision of Section 169(1) of the Criminal Procedure Code, in that the defence raised by the Appellants should have formed part of the points for determination, the decision arrived at and the reasons for such a decision.

The Appellants' contention that their defences were not considered was not without merit. Considering their defences, it is clear that each was apprehended by a crowd of people and also separately. That defence was very strong given the fact that those who arrested the Appellants were not witnesses. The Appellants' defences clearly shows that their defence was that they did not have the exhibits alleged to have been in their possession and for which they were convicted. Since the prosecution brought no evidence to prove possession, the Appellants' defences were unchallenged, unshaken. Had the learned trial magistrate dully considered their defences, I am convinced that she could have acquitted them for the offences charged.

The last ground raised by the Appellants was the sentence. I see no point of going into that ground, on considering the appeal. I am satisfied that the conviction entered herein was wholly unsafe and should not be allowed to stand.

The appeals by all three Appellants are allowed. The convictions are quashed and the sentences set aside. The Appellants should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 13th day of July 2005.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

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LESIT, J.

JUDGE