REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 412 of 2002
(From original conviction (s) and Sentence(s) in Criminal Case No. 1650 of 2001of the
Chief Magistrate's Court at Nairobi (Injene Indeche –S.P.M.)

SHEM ODONGO…….……..……..APPELLANT

VERSUS

REPUBLIC…… …….....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 413 of 2002

(From original conviction (s) and Sentence(s) in Criminal Case No. 1650 of 2001of the

Chief Magistrate's Court at Nairobi (Injene Indeche –S.P.M.)

AUSTINE OKINYI OTIENO…….……..……..APPELLANT

VERSUS

REPUBLIC…… …….....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 414 of 2002

(From original conviction (s) and Sentence(s) in Criminal Case No. 1650 of 2001of the

Chief Magistrate's Court at Nairobi (Injene Indeche –S.P.M.)

TOM OCHIENG OUMA…….……..……..APPELLANT

VERSUS

REPUBLIC…… …….....RESPONDENT

J U D G M E N T

The Appellants **SHEM ODONGO** (1st Appellant) **AUSTINE OKINYI OTIENO** (2nd Appellant) and **TOM OCHIENG OUMA** (3rd Appellant) were the 2nd accused, 3rd accused and 1st accused respectively in the trial court. All of them were jointly charged with three counts of **robbery with**

violence contrary to **Section 296(2)** of the **Penal Code.** The trial court, after hearing the case, observed that the third count was a duplication of the 1st count but did not make any orders concerning that count. The Appellants were all sentenced to death. They were dissatisfied by the courts finding and therefore lodged this appeal.

The brief facts of the case was that **JAPHETH PW1** and **STEPHEN, PW3** were each in their respective houses in the early morning of 15th July 2001. They were each attacked and robbed of their property **JAPHETH** was robbed of a TV set make vidiocon, **STEPHEN** was robbed of cash Kshs.1350/-. The 1st and 3rd Appellants were arrested the same morning with a TV make vidiocon. They led to the 2nd Appellant who was also arrested. Complainants, **JAPHETH** and **STEPHEN** identified the recovered TV set, exhibit 2, as theirs. All the 3 Appellants made confession that were similar in all characteristics. The 1st Appellant's confession was recorded by PW7 **IP GIKANDI**. The 2nd Appellant's was recorded by PW6 **CIP MUTIE.** The 3rd Appellant's statement was recorded by PW5 **IP KAMIDI.** In their statements each Appellant confessed to having planned a robbery in a house in NGEI II Estate where they robbed the owner of a vidiocon TV set. Each Appellant confessed that they used a toy pistol in the robbery. The 2nd and 3rd Appellant confessed that one **SHEITH** gave them the toy pistol.

The Appellants retracted their confession, exhibit 4, 5 and 6. They also denied the offence in their sworn defences in court.

The Appellants raised similar grounds of appeal. The first ground challenged their conviction on basis of identification. The learned counsel for State, MR. MAKURA submitted that the conviction was safe on the basis that the 2nd and 3rd Appellants were arrested four hours after the offence while in possession of a TV set, exhibit 2, which JAPHETH identified as his.

That the 3rd Appellant also had a toy pistol in his possession. MR. MAKURA submitted that the Complainants identified the Appellants positively.

The other grounds of appeal raised by the Appellants were that the learned trial magistrate erred in relying on circumstantial evidence. The circumstantial evidence challenged was the alleged recovery of the items on the 2nd and 3rd Appellants and the invocation of the doctrine of recent possession yet, as far as the Appellants were concerned, the TV set was not properly identified. The Appellants also challenged the basis of the admission of the statements under inquiry, the basis of their defences being rejected and the soundness of the convictions entered against the Appellants.

We have re-evaluated the evidence adduced before the trial court and have considered the oral and written submission by the Appellants and the learned state counsel's submission in response. We have also perused the judgment of the trial magistrate which we must say was elaborate and well argued.

The basis of convicting the 3rd Appellant was two fold; the fact that he had the TV set exhibit 2, in his possession, four hours after the robbery, and his confession in his retracted statement under inquiry. The learned trial magistrate found that the confession by the 3rd Appellant was corroborated by his possession of the TV set which, the learned trial magistrate held, clearly showed that the 3rd Appellant was one of the robbers. The trial magistrate found that the TV set was identified by **JAPHETH** as his against its receipt, exhibit 1.

We have considered the evidence of **JAPHETH** and the basis of claiming that the TV, exhibit 2 was his. The witness was recorded to have stated as follows: -

> ***"The TV they took is valued at 4700/- the make is videocon. This is the cash sale receipt (MFI-1) This is the TV set (MFI -2)…"***

Considering this evidence, all the Complainant, **JAPHETH,** did was to point out the TV set and receipt exhibit 2 and 1 respectively in court without showing any nexus between the two exhibits. It is not sufficient for a Complainant to point out exhibits in court and by mere statement claim ownership. There should be evidence adduced which positively identifies the exhibit as theirs. In this case, the least the

Complainant could have done is to check the receipts exhibit 1 and the TV set exhibit 2 to see if they serial numbers on both tallied. Merely producing a receipt for a model of a TV set similar to the recovered one is not sufficient proof.

The Complainants, **JAPHETH** and **STEPHEN** were clear that they could not identify the Appellants as the ones who robbed them. STEPHEN was very emphatic he could identify those who robbed them but said that they were not in court. None of the Appellants were identified contrary to **MR. MAKURA's** submission that they were. In fact the trial court did not find that any Complainant identified any Appellant. In light of the insufficiency of the identification of the TV set exhibit 2 as belonging to **JAPHETH** and therefore as the one stolen from his house on the morning in question, the learned trial magistrate's finding that the 3rd Appellant was in recent possession of a stolen TV set was a misdirection. It was also a misdirection to find that the 3rd Appellant retracted statement was corroborated by possession of the TV set.

The basis of convicting the 1st Appellant was purely the retracted confessions by all three Appellants. The learned trial magistrate found that since the 2nd and 3rd Appellants led police to the 1st Appellant's house where he was arrested, that provided the nexus between the 1st Appellant and his co-appellants as did their confessions. The learned trial magistrate found that the retracted statements were truthful considering all the evidence adduced including the fact that the robbery took place in the Complainant's homes just in similar circumstances as those alluded to in the Appellants statements. In the circumstances the learned trial magistrate concluded, the retracted confessions contained only the truth.

The 2nd Appellant was also convicted on the learned trial court's finding that his retracted statement told the truth of what happened in the Complainant's home. The learned trial magistrate also found that having been arrested in company of the 3rd Appellant who had possession of the stolen TV set he too was in possession of the stolen TV set.

MR. MAKURA submitted that the arrest, recovery of stolen TV and the identification of the Appellants by the Complainants were sufficient to sustain a conviction. We have commented on the issue of the TV set and the insufficiency of its identification by **JAPHETH** as his stolen set. We have also mentioned that none of the Appellants were identified by any of the Complainants in this case. The only issue not touched on is that of arrest. Could the arrest of the Appellants be sufficient to sustain a conviction? We think not. The 2nd and 3rd Appellants were together when arrested. It was four hours after the robbery. Even though they confessed that they robbed someone that morning even if their statements were to be found to be true, no evidence was adduced to establish a nexus between the Appellants and the Complainants PW1 and PW3. Their confessions are neither here nor there. The confessions stand on their own since the TV set recovered was not positively identified by **JAPHETH** as his. It could have been any one else's TV set similar to the one **JAPHETH** lost. The receipt could also have been for another TV set other than the one in court. Likewise the robbery confessed to could have been against other people. The evidence before court, the inculpatory facts contained in the confessions and the circumstances of the offence, the Appellants' arrest and recovery of the TV set all do not point irresistibly at the Appellants and neither are the facts incapable of explanation upon any other hypothesis other than that of guilt.

We find that having taken all facts into consideration, with great circumspection and exercising caution, we find that the conviction against the Appellants in both counts 1 and 2 were unsafe. We find merit in this appeal and allow it. Consequently we quash the convictions and set aside the sentences. We also discharge the Appellants of the third court. We direct that the Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 22nd day of September 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE