

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 36 OF 2001
(From Original Conviction and Sentence in Criminal
Case No. 1422 of 1998 of the Chief Magistrate's
Court at Nakuru – H. M. Okwengu (Mrs))

PATRICK NGESA OGEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellant Patrick Ngesa Ogema was charged with another with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on the night of the 31st July and 1st of August 1998 at Full Gospel Church, Ronda Estate within Nakuru Municipality jointly with others not before Court while armed with dangerous weapons namely simis, swords and iron bars robbed Julius Obuti Okinda of two horn speakers, keyboard, amplifier, wall clock, five microphones, electrical cables, two water buckets, two hundred plates, two hundred spoons, four kettles, three hundred cups all valued at Kshs. 160,000/= the property of Full Gospel Church Ronda Estate and at or immediately before or immediately after the time of such robbery fatally wounded Julius Obuti Okinda. After a full trial the Appellant and his co-accused Chrisantus Khisa Wambati were convicted as charged. They were sentenced to death as is mandatorily provided by the law. They were aggrieved. They appealed to this Court against conviction and sentence. Before the Appeal was heard, Chrisantus Khisa Wambati died in prison custody. His Appeal was marked as abated by this Court. The only Appeal that remained and was therefore heard is that of the Appellant.

In his Petition of Appeal, the Appellant faults the decision of the trial Magistrate in convicting him on the grounds that the trial Magistrate erred in admitting the extra-judicial statement which had been obtained from him involuntarily. He further faults the trial Magistrate for upholding the evidence of PW 4, 5 and 6 when the said evidence did not connect him to the crime. The Appellant further faulted the trial Magistrate for finding that the goods which were robbed from the Complainant were found in possession of the Appellant while there was no proof that the Appellant was connected with the said recovered goods. The Appellant was further aggrieved by the decision of the trial Magistrate and complained that he did not consider his defence before arriving at the decision convicting him and finally the Appellant faulted the trial Magistrate for convicting him on the evidence of the Prosecution that was insufficient to convict him.

At the hearing of this Appeal, Mr. Gumo Learned Assistant Deputy Public Prosecutor supported the conviction and the sentence imposed by the trial Magistrate. He urged this Court to uphold the same and dismiss the Appeal filed by the Appellant. The Appellant submitted that his Appeal should be allowed in view of the reasons raised in his Petition of Appeal.

The facts of this case are straightforward. On the 1st of August 1998 at about 5.00 a.m. PW 1 Evans Thuku a Church Elder of the Full Gospel Church at Ronda Estate Nakuru was informed by one Francis Kimani that he had found the gate and the office of the Church open. The door of the office and the store had been broken into. PW 1 looked for PW 3 Joseph Mwangi, a fellow Church Elder to accompany him to the church. At the church they confirmed what PW 1 had been told. They saw the Church office door had been broken into. The store had likewise been broken into. Several items were found to have been stolen including an amplifier, keyboard, two speakers, wall clock, five microphones, extension cables, four electric kettles and several assorted utensils including plates, sufurias and cups. PW 1 also saw smoke bellowing from the ventilation shaft at the store. PW 1 and PW 3 reported what they had seen to the Police. When the Police arrived, they opened one of the stores where the smoke was emanating from.

They found the watchman who used to guard the Church tied on both hands and legs. He was lying prostrate and had been put on a mat and set on fire. He had been burnt to death. His name was Richard Oputi Okinda. Later PW 1 and PW 3 were called to the Police where they were able to identify several items which had been stolen from the church, including two speakers, three microphones with cables and three water glasses. PW 1 and PW 3 could not identify who had stolen the items from the Church. PW 2 Joseph Mugoya a technician dealing with wiring and electronics at the Church was able to positively identify the two speakers, wall clock, three microphones, one ear phone and assorted cables which were recovered by the Police as belonging to the Church. PW 4 Alice Nafula a resident of Free Area Nakuru, testified how on the 10th of August 1998 she was at her house when the deceased, whose Appeal was abated when he died in prison, brought to her some luggage. The deceased asked her to keep for him the luggage until the following day. Later the Police came and took the luggage. In the luggage was found a speaker and several cables which were later identified as belonging to the church. PW 5 Police Constable James Muragi gave testimony how on the 13th of August 1998 acting on information he went to Kiratina Estate where he had been told that the items stolen from the Church could be found. He searched the house of the Appellant and was able to recover three microphones and one wall clock. The three microphones and the wall clock were later identified as having been stolen from the Church. PW 6 Inspector Mulei took the charge and cautionary statement from the Appellant on the 14th of August 1998. The Appellant gave a detailed statement confessing to the robbery. The statement was retracted by the Appellant, but was however admitted by the Court after a trial-within-a-trial. PW 7 Corporal Joseph Wambua produced the post-mortem report of the watchman who had been killed in the robbery. The cause of death of the watchman was found to be cardio pulmonary arrest due to severe burns. When the Appellant was put on his defence, he narrated the circumstances of his arrest. He denied involvement in the robbery.

The High Court as the first Appellate Court is mandated to look afresh at the evidence adduced before the trial Magistrate's Court, evaluate the same and reach its own independent conclusion. In reaching its decision the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified before the said trial Magistrate's Court and therefore could not be expected to give its opinion on the demeanour of the said witnesses. The High Court also has to consider the grounds put forward by the Appellant in his Appeal. (See **Okeno –versus- Republic [1972] E. A. 32**). In the instant case, the evidence that was relied on to convict the Appellant was the evidence of the recovery of stolen items which were found in possession of the Appellant and the evidence of the retracted statement which the Appellant confessed to the robbery. PW 6 Police Constable James Muragi testified that he received information that the items which had been stolen from the Church were in a house in Kiratina Estate. PW 6 went to the house. The house belonged to the Appellant. A search was undertaken therein. Three microphones and a wall clock were recovered. These items were later identified as belonging to the Church by PW 1 and PW 2. They had been stolen therefrom. The recovery of the said items at the house of the Appellant was made on the 13th of August 1998, thirteen days after the robbery at the church. PW 6 Inspector Mulei testified how he took a charge and cautionary statement from the Appellant. The statement though retracted was admitted in evidence by the trial Magistrate. The Appellant had alleged that the said statement had been taken from him involuntarily but the trial Court found no evidence that the said statement was obtained unlawfully. We have read the said statement which was admitted in evidence by the trial Court. The statement is so detailed on all material respects that we are satisfied that it fairly relates to the events that led to the robbery and the death of the watchman at the church. The sequence of events as explained by the Appellant in the statement cannot be anything but the truth. We are aware that this Court ought not to rely on the sole evidence of a retracted statement to convict the Appellant. In the instant case, some of the stolen items were recovered from the house of the Appellant not long after the robbery incident. In the absence of an explanation this Court can draw an inference that the Appellant was in possession of the said items having stolen the same from the Church. In his Submission before Court, the Appellant stated that the stolen items were found in his deceased brother's house. The Appellant had been charged with his brother whose appeal abated with his death in prison. The Appellant submitted that he did not know anything about the said items and blamed his deceased brother who he said was responsible for the said items. The Appellant denied involvement in the said robbery.

We have re-evaluated the evidence on record. We have also considered the Submissions made by the

Appellant and the State. We are of the opinion that the Prosecution proved its case against the Appellant beyond reasonable doubt. The retracted statement by the Appellant which was admitted in evidence clearly explained the circumstances of the robbery. The statement has a ring of truth in it. The explanation given in the said statement could not have been contrived. We are aware that a retracted statement cannot form a basis for convicting an accused person in the absence of any other evidence unless the Court can be satisfied that it is the truth. In the instant case, the Appellant was found with the stolen items not long after the same had been stolen from the church. We infer that, there being no other explanations, the said items were found in possession of the Appellant because he had stolen the same from the Church. The doctrine of recent possession applies in this case. The Appellant was involved in the robbery where the watchman was brutally murdered.

We have considered the defence that the Appellant had offered and the Submissions that he made before Court. There is nothing in the said defence that exonerates the Appellant from the said crime. Neither does his Submissions before Court explain away the evidence adduced by the Prosecution. It is our opinion that the Appellant has now found it convenient to blame his deceased brother for the items which were recovered in his house. It is convenient because a dead person cannot be found to be criminally liable. We do not find any merit in the said Submissions.

In the upshot, we find no merit in the Appeal filed by the Appellant. The same is dismissed. The conviction and the sentence imposed by the trial Magistrate is hereby confirmed.

DATED at NAKURU this 18th day of May 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE