IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU & LAKHA JJ.A & BOSIRE AG. JA)

CRIMINAL APPEAL NO. 101 OF 1996

BETWEEN

LUTA JACOB SHIKUKU……..……..APPELLANT

AND

REPUBLIC……..…….RESPONDENT

(Appeal from a conviction, judgment, decree, order, or as the case may be) of the High Court of Kenya at Nakuru (Mr. Justice D.M. Rimita) dated 9th October 1996

IN

H.C.CR. A. NO. 179 OF 1995)

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JUDGMENT OF THE COURT

The appellant, Luta Jacob Shikuku, was convicted after a trial by the Senior Resident Magistrate , at Bungoma, of two counts, the first one of robbery with violence contrary to section 296(2) of the penal code, and the second of being unlawfully present in Kenya contrary to section 13 (2) of the immigration Act Cap 172 of the Laws of Kenya, and was thereafter sentenced in the first count to suffer death but no sentence was meted out in the second count. His first appeal to the High Court was dismissed by a bench of two Judges comprising Rimita and Ondeyo, JJ. This is his second appeal.

A joint judgment was pronounced by the first appellate court. The appellant now contends and it was his counsel's submission before us that since section 359 of the Criminal Procedure Code provides that appeals from subordinate courts to the High Court should as a general rule be heard by two Judges, he was entitled to two judgments so that he would get the full benefit of their respective opinions. It was counsel's further submission that looking at the two Judges' separately recorded proceedings they differ on what the appellant said before them suggesting that there was variance in their respective understanding of his case. Consequently he said, had separate judgments been written different opinions would have come out, possibly to the appellant's benefit.

We agree that S.359(1) of the Criminal Procedure Code is intended to confer to an appellant the benefit of two opinions in the consideration and determination of his appeal. We do not however, agree that the giving of a joint judgment denies him that benefit. It is clear from the provisions of sub-section (2) of that section that in the event that the two Judges hearing an appeal are equally divided in opinion the appeal must be reheard by a bench of three Judges. The two Judges in the decision appealed against appear to us

to have come to the same conclusion regarding the merits of the appellant's appeal. Each of them have, or so we think, contributed to the decision. Otherwise they would not have appended their respective signatures to it.

We also agree that in some minor aspects the recording proceedings by the two Judges as to what the appellant said before them is at variance. That is, however, of no moment because the Judges eventually came to the same conclusion regarding the merits of the appellant's appeal. We cannot discern any prejudice to him arising from that.

The foregoing disposes of the appellant's second ground of appeal. The remaining three grounds of appeal relate firstly, to the manner in which the Judges handled the appellant's appeal, and secondly, the treatment they gave to the evidence. Regarding the former, it was contended on behalf of the appellant that the Judges failed to analyze and fully evaluate the evidence before them and thereby denied him the benefit he is entitled to in a first appeal.

There is a line of authorities which sets out the duty of a first appellate court. In Peters .v. Sunday Post [1958] EA 424, the Court of Appeal for East Africa held that an appellate court has the jurisdiction to review thee evidence in order to determine whether the conclusions originally reached upon that evidence should stand, but that it is a jurisdiction which should be exercised with caution considering that unlike the trial court the appellate court did not have the opportunity of hearing and observing the witnesses as to assess their credibility.

Then there is the decision of Selle & Another .v. Associated Motor Boat Company Ltd. & Others [1968] EA 123. The same court held that a first appeal from the High Court to it was of a retrial and the court was not bound to follow the trial Judge's findings of fact if it appeared to it that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. The court is duty bound to reconsider the evidence, evaluate it itself and draw its own conclusions giving due allowance that it did not see nor hear the witnesses.

The holdings in the cases of Jared Ondanda Oguyo .v. R [1982-88] IKAR 1043 and Gabriel Kamau Njoroge .v. R. [1982-88] IKAR 1134, go further. A first appellate court must also attempt to resolve any conflict arising from the evidence.

In Okeno .V. R. (1972) EA 22, the Court of Appeal for East Africa also raised a further dimension. The first appellate court should consider and deal with any question of law raised in the appeal.

Mr. Ochieng-Odhiambo, who urged this appeal on behalf of thee appellant submitted before us that the learned Judges of the High Court failed to reconsider, evaluate and draw their own conclusions from the evidence originally given with the result that the appellant was prejudiced. In his view the Judges should have but did not demonstrate in their judgment what they considered before coming to thee conclusion that the appellant's appeal was unmeritorious.

The facts upon which the appeal is based are short. Alet Joab Ondeko (PW1), a sales representative with Kenya National Assurance Company Ltd, was on the night of 30th August, 1993, at 9.30 p.m. attacked, hit on the head and robbed of various items, among them an identity card and a Barclays bank pass book. The attack occurred as he walked home from a certain bar in Bungoma Town. He neither saw nor otherwise recognized his assailant or assailants. As a result of that attack he fell down and lost consciousness. He was later the same night taken to hospital where he was treated and discharged.

There is evidence on record which the trial magistrate accepted that the appellant had earlier the same day obtained from one Albert Wanyama Kundu (PW2), a teacher and shopkeeper at Bungoma, dry battery cells for his own use. He did not pay for them. Later on 1st September, 1993, PW2 caused the appellant to acknowledge in writing in an exercise book that he owed the money for the batteries. He also promised he would pay the money the next day, but he did not do so. Nor did the appellant return to PW2'S shop to explain his failure to pay.

PW2 later met the appellant within Bungoma town. The latter was in the company of other people. The witness confronted him and demanded his money. The appellant is alleged to have panicked, put his hand into his pocket and took out a bundle of identity cards. From that bundle he pulled out one identity card and a Barclays bank pass book which he handed over to the witness. He asked the witness to take them as security for the payment by him of the money. As the witness tried to read the two documents the appellant found an opportunity and escaped. As he did so he was shouting "thief thief thief". PW2 pursued him for a short distance but gave it up. The appellant escaped out of sight.

When PW2 closely scrutinized the identity card and the bank pass book he noticed that they bore the names of PW1. He recalled that PW1 had mentioned to him earlier that those documents were among the items which had been stolen from him on the night he was violently robbed of various items. He decided to and informed PW1 that he had those items and gave the names of the appellant as the person from whom he got them. PW1 did not, however, know the appellant before. However, he was able to register his names, namely Joseph Baraza Lutta Shilenter, in his mind.

In the meantime the appellant was arrested in connection with an alleged offence of assault. He was detained at Bungoma Police Station. Coincidentally while he was still in police custody PW1 went there to inform the police that PW2 had in his possession some of the items which had been stolen from him on the night he was violently robbed. While there a certain young lady came there and inquired whether a person called Joseph Baraza Lutta Shilente was detained there. PW1 remembered that the names were similar to those PW2 had given him. The lady told PW1 that the man she was looking for was her husband, whereupon the witness went and called PW2 to go and identify the man. PW2 came and identified the appellant as the man who owed him money and from whom he had received PW1's identity card and Barclays Bank pass book. The appellant was thereafter charged with the offences earlier on mentioned.

In her judgment the trial magistrate after setting out the evidence found as fact that the appellant was the person or among the persons who attacked and robbed PW1 and that he had failed to demonstrate he was a Kenyan. She then proceeded to convict him of both counts herein first stated but only sentenced him on the first count.

The superior court Judges approached the matter in a rather perfunctory manner. After recounting the evidence on record they had this to say regarding the first count:-

> "We have evaluated the evidence on our own and like the learned trial magistrate we find that the prosecution witnesses did not make up the story.
>
> There is evidence to show that PW1 was attacked on 30th August, 1993, and robbed his property including an identity card. That the appellant was found in possession of the identity card within a week of such robbery. That the appellant's denial is displaced by the prosecution evidence.
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> We find that there was sufficient circumstantial evidence to support the learned magistrate's findings on the offence of robbery. In our view, the doctrine of recent possession also applied as the appellant did not give an account or attempts to give an account of how he came to be in possession of the identity card. The fact that the appellant ran away when he realised that he had given an identity card of a person probably known to PW2 showed that the appellant had a guilty mind.'

Both courts below did not demonstrate that they had actually fully evaluated the evidence adduced in support of the offences charged. Evaluation implies a careful consideration and assessment of the worth of the evidence relevant to the charge. We do not have the advantage of the two courts' view on the credibility of the witnesses and the weight they attached to their respective pieces of evidence. We are therefore of the view that counsel for the appellant, Mr. Ochieng-Odhiambo, was to some degree right when he expressed the view that the first appellate court did not demonstrate to the appellant that it had discharged its duty as a first appellate court in the matter.

The issue that then immediately presents itself is whether as a result of that omission the appellant was prejudiced. This issue can only properly be grappled with if the evidence on record is evaluated. There is no doubt that PW1 was violently attacked on the material date and robbed of various items. Both Joseph Malala Ngachi (PW3) and Jescan Lidoga (PW5) testified that they helped him from the locus in quo. Dr Ezekiel Orwenyo (PW6) gave evidence that PW1 sustained bodily injuries on the back of his head, which was consistent with the story PW1 had given.

There is also evidence on record that the appellant acknowledged in an exercise book that he owed PW2 some money. The appellant did not sign the book. That evidence in no way shows nor does it tend to show that the appellant robbed PW1. It however goes to show that PW2 had met the appellant before he identified him at Bungoma Police Station. That fact militated against conducting an identification parade which the appellant contended before the High Court should have been but was not held. PW2 testified that before he pointed out the appellant at the police station he had met him on three occasions previously.

The evidence of PW2 is crucial. He was not at the scene when PW1 was robbed. He however, testified on circumstances which connected or tended to connect the appellant to the alleged robbery. He testified that the appellant went to his shop, requested for and was given a set of dry batteries. He did not pay for them but went away with them saying he would make payment for them on the next day. He did not do so. The witness further testified that later the appellant gave him an identity card and bank pass book belonging to PW1. He gave a detailed account of the circumstances under which the appellant handed them over to him. Although the appellant in his defence denied having done so and contended that he had been framed, we are of the view that notwithstanding that the two courts below did not fully evaluate the evidence, there is material on record on which a finding that the appellant gave PW2 the documents belonging to PW1 could be based.

There was an issue raised concerning the failure of the first appellate court to comment on the appellant's submissions before it. True, the Judges on first appeal did not allude to the appellant's submissions before them. However, those submissions, apart from those concerning the second count, were not on issues which would materially affect his conviction. For instance, the appellant lamented that PW2's wife was not called as a witness. Even assuming her evidence was available it would carry neither the prosecution nor the defence case any further. She only happened to be present when the appellant is alleged to have acknowledged in writing that he owed PW2 some money.

There is also the complaint by the appellant that PW1 did not record his statement to the police soonest. The witness was asked that in cross-examination. He explained that he could not do so because he was still weak due to the injuries he had sustained during the robbery. There is no evidence to contradict that explanation.

An issue was raised by counsel for the appellant that the Judges of the High Court by holding, on firs appeal, that the evidence clearly showed the appellant had been found in possession of recently stolen property in effect thereby created a ground for upholding his conviction which ground had not been relied upon by the prosecution at the trial. The doctrine of recent possession is an issue of law. It is based on circumstantial evidence. As we stated earlier it is part of the duty of the court on first appeal to reconsider the evidence, evaluate it and draw its own conclusions on it. We think that when the two Judges held that the doctrine of recent possession applied they were in effect drawing necessary inferences from the evidence which was before them. They cannot, in our view be properly faulted on that.

Perhaps the more fundamental issue is whether the evidence on record show that the appellant was in recent possession of stolen property. There are concurrent findings of fact by both courts below albeit without full evaluation of the evidence, that the appellant handed over to PW2 an identity card and bank passbook belonging to PW1. PW1 clearly testified that those items were part of the items he lost during the robbery on the night of 30th August, 1993. PW2 testified that he received those items on 5th September, 1993, which was barely six days after the robbery. Considering the nature of the items, the period was short enough as to raise a rebuttable presumption that he was either the thief or a guilty receiver. The presumption could be rebutted by the appellant if he offered a reasonable explanation as to how he came in possession of the two items. He did not offer any. In those circumstances the

inescapable conclusion was that he either alone or jointly with others, robbed PW1 on the fateful night.

Having come to the above conclusion, the issue of the sufficiency or otherwise of the circumstantial evidence in support of the appellant's conviction has been answered. The appellant, in our view, was properly convicted on the first count and the failure on the part of the two courts below to fully analyze and evaluate the evidence in no way prejudiced him. It is an omission which is curable under the provisions of section 361 (5) as read with section 382 of the Criminal Procedure Code respectively.

Concerning the second count, the appellant did not make any statement in his defence concerning it. His counsel submitted before us that the trial magistrate fell into the error of omission by her failure to prompt the appellant to comment on it. We agree that it was desirable for the trial magistrate to do so. However, the evidence of police constable Akinya (PW4) and Sergeant John Muthuri (PW5) should have prompted the appellant to say something about his nationality. The two witnesses testified that they asked the appellant to say from where he hailed. To PW4 the appellant said he came from Busia, Uganda. To PW5, however, he answered that he came from Kabras, and then changed and said he came from Marachi, both of which are in Kenya. PW5 testified that the appellant, an adult, did not have an identity card with him which would have assisted in confirming his nationality. In those circumstances and considering the fact that the record of appeal shows that the trial magistrate did comply with the provisions of section 211 of the Criminal Procedure Code, which among other things requires the trial court to again explain the substance of the charge to the accused before calling upon him to put forward his defence if he so elects, we are of the view that the appellant was properly convicted on the second count of being unlawfully present in Kenya.

As we stated earlier the trial magistrate did not impose any sentence in the second count. She must have perhaps thought that having imposed a death sentence in the first count it was not necessary to impose any in the second count. It is our view that she should have imposed an appropriate sentence but ordered it to be suspended and to be served only if for any lawful reason the death sentence was not carried out. That is an error which this court has the power to correct. The maximum sentence provided under the relevant penal section is a fine of Kshs. 20,000/= or imprisonment for a term not exceeding one year or both. The appellant has been in custody since he was arrested in 1993. In the circumstances a fine or term of imprisonment will be undesirable. We order that he be discharged unconditionally under section 35(1) of the penal code.

In the result the appellant's appeal fails and is hereby dismissed.

Dated at Nairobi and delivered this 17th day of October 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR