



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 105 OF 1993**

**JOSEPH ODHIAMBO OYENGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case No 139 of 1992 of the Chief Magistrate's Court at Kisumu C O Ong'udi, Esq C M)**

**JUDGMENT**

Appellant was charged with another with the offence of robbery contrary to section 296 (1) of the Penal Code. The co-accused died before the conclusion of the trial. Appellant was eventually convicted and sentenced to three and a half years imprisonment with 2 strokes of the cane. He was also ordered to be under police supervision for 5 years after completion of the sentence. The learned state counsel supports the conviction and sentence.

Appellant was convicted on the basis that he was identified at the time of robbery and later at an identification parade and also on the basis that some of the stolen items were recovered in his house. Appellant's defence was that he did not take part in the robbery and that the properties recovered in his house were taken there in his absence by his co-accused whom he caused to be arrested.

The learned magistrate considered the prosecution evidence. He found as a fact that the robbers were in the complainant's house which had light for a period of roughly two hours and that PW1 and PW2 had sufficient time to mark their appearance. He concluded that the conditions for identification were favourable and that PW1 and PW2 cannot be mistaken.

I have evaluated the evidence of PW1 and PW2 who were husband and wife. Although PW3 does not say that there was light in the house both described the role the appellant (2nd accused at the trial) played in the course of the robbery and I find the account given by both witnesses consistent. As the two witnesses have stated the four robbers stayed in the house for a long period searched the house and perused documents of ownership (ie permits). Both PW1 and PW2 do not say that the four robbers had any other source of light other than the light from the tin lamp inside the house which fact makes the evidence of PW1 credible that there was a tin lamp.

An identification parade was held about 20 days after the robbery and PW1 was able to identify the appellant.

The appellant accepted that some of the stolen goods were recovered from his house. The prosecution evidence is that the owner of the house ran away on seeing the police. A television and radio cassette belonging to the complainant were recovered in that house.

The evidence shows that it is the first accused (deceased) who led police to the second accused's house (appellant's) where the TV and radio cassette were recovered. The date of recovery is not clear from the evidence but it is clear that it was after first accused was arrested on 12th June, 1992. The appellant claimed that he was away from 2nd June, 1992 to 14th June, 1992. The witness whom he called to support his evidence that it was the first accused who took the stolen things to his house and already been

convicted on his own plea of guilty for the same offence of robbing the complainant. That witness did not say when the first accused took the goods to appellant's house. The learned magistrate considered the evidence of appellant's witness and disbelieved it. He was a neighbour of the appellant and did not give a reasonable explanation as to why he allowed the first accused who was not known to him to keep the goods in the appellant's house instead of his own house. The conduct of the appellant was also considered by the learned magistrate. He did not find his conduct of failing to report to police about goods having been taken to his house by somebody else innocent. Further I fail to comprehend the appellant's defence that goods were taken to his house during his absence between 2nd and 14th June, 1992 when at the same time he maintains that he caused second accused to be arrested on 12th June, 1992. On the whole the evidence of the appellant that the TV and radio cassette were taken to his house in his absence is not credible and was not supported by any credible evidence. The evidence of PW1 and PW2 that they identified appellant at the time of the robbery is supported by the evidence that some of their stolen goods were recovered in the house of the appellant. The learned state counsel supported the conviction and sentence.

From the foregoing, I am satisfied that the appellant was properly convicted.

Sentence is not harsh and manifestly excessive. Consequently, I dismiss the appeal in its entirety.

**Dated and Delivered at Kisumu this 14th day of June 1994.**

**E.M.GITHINJI**

**JUDGE**