



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Omolo, Akiwumi & Tunoi JJ A )**

**CRIMINAL APPEAL NO. 148 OF 1990**

**BETWEEN**

**1. EVANS ONGOCHI ODONGO.....1ST APPELLANT**

**2. CHARLES ONYANGO.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a conviction and sentence, judgment, order, or as the case may be of the High Court of Kenya at Nairobi (Mr Justice Schofield J and Gicheru J dated 1st July, 1987 in KSM HCCRA No 57 & 58 of 1985)**

**JUDGMENT**

Evans Ongochi Odongo, the 1st appellant, and Charles Onyango, the 2nd appellant, together with one Edward Kenyatta Owuor, Edward, were jointly charged and tried before the Senior Resident Magistrate of Kisumu on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. Edward was acquitted under section 210 Criminal Procedure Code as the learned trial magistrate found no sufficient evidence to place him on his defence. The two appellants were after the full trial, found guilty and convicted as charged. Each was sentenced to death as is the mandatory provision of the law under which they were charged. They appealed to the High Court against their conviction. That Court (Schofield and Gicheru JJ – as they were ) heard their appeals on 26th May 1987 and in a reserved judgment dated 1st July, 1987, their appeals were dismissed. The appellants now appeal to this Court a second time and that being so, only matters of law fall for our consideration.

Both courts below found and held that the shop of one Jamnadas Sodha along Angawa Avenue in Kisumu was attacked and various shop goods stolen therefrom during the morning of 16th August, 1984. During that attack, Jamnadas Sodha was strangled to death. Alfred Nguse Tongure (PW1) was employed in that shop as a salesman. He had worked for the deceased Sodha for some 17 years and he knew Sodha's handwriting very well. Sodha himself and nobody else issued receipts to his customers who wanted them. The robbery in the shop took place at about 9.30 am on that day, PW1 was not in the shop. At around 10.00 am these two appellants were found in the vehicle of Philip Ochieng (PW3) when that vehicle was stopped by the police at a road block on the Kisumu/Kakamega Road. Various shop goods which were positively identified by PW1 as having come from the shop of the deceased were found in the vehicle. PW3 explained how the items had come to be in this vehicle. The 1st appellant had approached him (PW3) at the OTC bus park where he (PW3) usually parked his taxi. The 1st appellant then hired his vehicle for Kshs 100/- so that he could take the 1st appellant and his wife to Kiboswa. They then drove in

PW3's vehicle to a place called Usaid Estate. At that estate, the 1st appellant took PW3 near some house where they found a Toyota vehicle parked outside. Two people came out of that vehicle and according to PW3, one of those two people was the 2nd appellant. They then loaded three suitcases removed from the Toyota vehicle into PW3's vehicle. PW3 swore that even the 2nd appellant participated in the loading. After loading the three suitcases and a brief – case into PW3's vehicle, the three men got in and PW3 drove towards Nyawita. Somewhere on the way, the 3rd man got out and went away and PW3 remained with the two appellants until the police stopped them at the road block. When questioned about the items in the vehicle, the 1st appellant said he had bought them from the shop of Sodha and he produced two receipts from that shop; it was found that the items could not tally as there were more items in the vehicle than in the receipts. The two appellants were then detained and subsequently charged. There was also the evidence of Shadrack Ogonda (PW2) another taxi operator whose place of business was near to Sodha's shop along Angawa Avenue. He said these two appellants and a third person got into his vehicle along Angawa Avenue and he dropped them somewhere near New Nyanza General Hospital. But as Mr Maosa for the 1st appellant correctly pointed out to us, the evidence of this witness was weakened by the fact that no identification parades were held for him so that he could identify the appellants as the persons who had got into his vehicle along Angawa Avenue. PW2 did not know the appellants before and unlike PW3, the appellants were not arrested in his presence. He should have been called upon to identify the appellants in a parade. He was not and his identification of them in the Court of the magistrate remained no more than a dock-identification. The evidence of PW2 was considerably weakened by that fact. There was also the evidence of one Fredrick Onyango Owino (PW16) upon which the learned trial magistrate placed a great deal of importance. He freely admitted having participated in the robbery in Sodha's shop. He subsequently pleaded guilty to a charge of robbery under section 296 (1) of the Penal Code and was sentenced to 10 years imprisonment. He then turned state witness and expressly implicated these two appellants in the same robbery. This witness was clearly an unqualified accomplice and the learned trial magistrate was fully alive to that issue. Apart from warning himself of the dangers of relying on his evidence, the magistrate also found corroboration of PW16's evidence on the fact that the two appellants were in possession of Sodha's property

barely one hour after the robbery. On the issue of corroboration and warning, we would set the record straight as follows. When considering the evidence of an accomplice, the first duty of a Court is to decide whether that evidence is credible. If such evidence is not at all credible, then the issue of warning oneself before acting on it, or looking for corroboration for it cannot and does not arise for a lie cannot be corroborated. Nor can one act on a lie on the pretext that one has warned oneself on the dangers of acting upon such lie. It is only when it has been found as a fact that the evidence of an accomplice or any other evidence requiring corroboration is credible that one starts to look for corroboration – see *Geoffrey Nguku – vs- Republic* [1982 – 1988] 1 KAR 818. If the evidence given by the accomplice is credible and there is corroboration for it, then the question of a Court warning itself before acting on such evidence does not arise. The need for the Court to warn itself arises only on those rare occasions when the Court is prepared to base a conviction solely on the uncorroborated evidence of an accomplice.

In this case, the magistrate clearly believed PW16 and then found corroboration for his evidence in the fact that the two appellants were in possession of the items stolen from the shop barely one hour after the theft. The High Court confirmed this finalizing. Were the two Courts wrong in so concluding? On the recorded evidence, we think that that was the only conclusion open to them to reach. The 1st appellant claimed he bought all the items from Edward who was acquitted and who had been employed in Sodha's shop. He also produced two receipts in support of his claim. That evidence could not have been true. The evidence of PW1 was that the 1st appellant had himself been employed in the same shop. He had worked in the shop for only 3 days but being an employee in the same shop, Edward could not have sold the things to him in the manner he alleged. The receipts he (1st appellant) produced were all false and had been stolen from the receipt – book in Sodha's shop. The 1st appellant called his previous employer (DW10) to come and say that that employer had paid to him Kshs 4,290/= and that he (1st appellant) used that money to buy the items from Edward. DW1 flatly denied having paid the 1st appellant that money and he said he had only paid to him Kshs 560/= in all. Then there was the evidence of PW3 that when the 1st appellant was in his vehicle, he instructed PW3 to avoid places where they were likely to come upon the police. All these matters were accepted by the two lower courts as they were entitled to do. In our view, taken together with the evidence of PW2 and PW16, they proved beyond any reasonable

doubt that the 1st appellant was involved in the robbery in Sodha's shop.

And what was the case against the 2nd appellant? He was of course

implicated by PW16 but on top of that there was the evidence of PW3, that the 2nd appellant loaded the items in the vehicle at Usaid Estate and that he did so with the 1st appellant and another person. The contention of the 2nd appellant was that he did so with the 1st appellant and another person. The contention of the 2nd appellant was that he got into PW3's vehicle at Kondele and not at the Usaid Estate as PW3 stated and that he met the 1st appellant only after he ( 2nd appellant ) had thus boarded the vehicle. Both courts below repelled that contention as false and for our part, we can find no reason whatsoever to make us depart from that concurrent finding of fact. All these matters which the two courts below accepted clearly showed that the 2nd appellant was a full participant in the robbery at Sodha's shop during which the latter lost his life. Nothing that was addressed to us by either Mr Maosa or Mr Mogikoyo for the 2nd appellant has convinced us that the appellants were wrongly convicted. Like the two courts below, we are satisfied that the prosecution proved its charge against each of these appellants beyond any reasonable doubts and that being our view of the matter, we order that their appeals against conviction be and are hereby dismissed. The sentence imposed on each of them was the only lawful one and we have nothing to do with it.

**Dated and Delivered at Nairobi this 11th day of November 1994.**

**R.S.C.OMOLO**

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**JUDGE OF APPEAL**

**A.M.AKIWUMI**

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**JUDGE OF APPEAL**

**P.K.TUNOI**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**