



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Masime JA, Gicheru & Kwach AG JJ A)

CRIMINAL APPEAL NO 52 OF 1989

BETWEEN

JOSHUA ONYANGO OSIWA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court at Kisumu (Mukele, CA) dated 2nd November 1988

in

Criminal Appeal No 86 of 1987)

JUDGMENT

June 23, 1989, the following Judgment of the court was delivered.

This appellant Joshua Onyango Osiwa was convicted of the offence of robbery contrary to section 296(1) of the Penal Code by the Resident Magistrate's court at Siaya after a trial. He was sentenced to serve four years in jail and to receive four strokes of corporal punishment, he was further ordered to be under police supervision for five years after his release. The convict appealed against his conviction and sentence to the High Court which dismissed that appeal. He has now appealed to this court.

At his trial the appellant put up a defence of alibi and in cross-examination of the prosecution witnesses raised the issue of his identification. The complainant PW2 Joseck Owino Isiche's evidence on identification of the appellant can be summarized as follows. As he rode his bicycle from Nyangweso to Nyawara he met two people standing on the road. He rang the bicycle bell but they refused to give way. One of the two then put a stick between the bicycle spokes and he swerved into the ditch, then he saw about six people one of who shouted 'cut him with a *panga*'; he abandoned the bicycle and ran and as he did so looked behind and saw "them" taking the bicycle. Later he told the police that he could identify two of the gangsters who he knew by appearance only. As far as this appellant was concerned he had seen him about seven times earlier. It was he who had shouted that he should be cut, the witness was sure that he saw the appellant.

The appellant was not arrested until after six months and was not arrested because of information from the complainant. And no identification parade was held to enable the complainant identify the appellant

before the trial. (PW 4) Cpl Jeremiah Lagat who arrested the appellant stated that he did not call the complainant to identify the appellant because he had gone on transfer. We reiterate what we said yesterday that where the only evidence against an accused is as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favourable and free from the possibility of error before it can safely make it the basis of a conviction: (see Kisumu Criminal Appeal No 20/89 *Cleophas Otieno Wamunga v Republic*).

There is one further point in regard to the identification of the appellant. PW4 Cpl Jeremiah Lagat arrested the appellant because the convict in Maseno Criminal Case No 80/86 Caleb Nyaoke Chama allegedly implicated the appellant in a statement to him (PW 4). The record shows that the trial of the appellant was adjourned on three occasions to enable the production of the said convict to testify. When the convict was eventually produced the prosecution declined to call him or offer him to the defence for cross-examination. The result is that the prosecution failed to link the appellant with the offence charged. That failure would suffice to dispose of this appeal but one other matter remains to comment on.

The appellant put forward a defence of alibi but the trial magistrate totally disregarded it; this was noted by the High Court which then erroneously shifted the burden of proof to the appellant. As this is a matter that is covered by authority we reiterate that an accused who pleads alibi as a defence assumes no burden to prove it. See *Leonard Aniseth v Republic* [1963] EA 206, *Ssentale v Uganda* [1968] EA 365.

For all the above reasons we allow this appeal, quash the conviction of the appellant, set aside the sentence and the order of police supervision and order that unless he is otherwise lawfully held he shall be set at liberty forthwith.

Dated and Delivered at Kisumu this 23rd day of June, 1989.

J.R.O. MASIME

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JUDGE OF APPEAL

J.E. GICHERU

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AG. JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR