IN THE COURT OF APPEAL

AT KISUMU

(Coram: Platt, Gachuhi & Apaloo JJA)

CRIMINAL APPEAL NO 133 OF 1986

BETWEEN

OMAR..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Kisumu, Trevelyan & Scriven JJ)

March 11, 1988, **Platt, Gachuhi & Apaloo JJA** delivered the following Judgment.

Although charged with three offences of capital robbery, the appellant was acquitted by the High Court (Trevelyan and Scriven JJ) on counts 1 and 2, on which he was held to have confessed his guilt; but convicted on the third count, on which it was held that had not confessed guilt.

That third count concerned the invasion of the house of Simon Kibitok (alias Murreh) at about 4.00 am on 7 April 1978, during which Simon gave up the Shs 20/- he had, while threatened by six men. Before they left he sustained a gun-shot wound in his leg. Simon and his wife, Rosebella, (PW17 and 24 respectively) described the events of that awful morning, and later on pointed out this appellant (the sixth accused at the trial) at an identification parade. Simon alleged that it was the appellant who had first asked him for money, as the robbers took Simon all round his house, probably in search of gold. Rosebella did not apparently hear this; at any rate she did not relate this. The money offered, Shs 10/-, was at first refused by the accused Aizack (No 4). Then husband and wife were pushed out of the house by the intruders, for an inspection of the granary. At this juncture, Rosebella says she went to her cows and escaped. Simon relates that she came back to the house and then escaped. After returning to the house, Shs 20/- was accepted by Aizack; but Simon was shot in the leg by Aizack, no doubt, for good measure. The intruders escaped.

James arap Murgor (PW18), an employee of Simon, confirmed the general outline of the robbery; but did not notice nor identify the appellant.

The identification of this appellant depended upon the evidence of Simon and Rosebella. Apart from the discrepancy in the sequence of the events, there is the discrepancy that these witnesses alleged that they could identify all the six accused in court. But that was not the position at the identification parade, held very well by Inspector Mibei (PW23). Simon identified five, and Rosebella four. They were not above a little exaggeration, it would seem. Clearly the more accurate description of what they had seen, was the

result of the identification parade. But the indulgent lower courts allowed Rosebella to put her failure down to her confusion. Her confusion was of no value to the prosecution. The danger of auto-suggestion is so great in dock identification, that identification in this case was proved simply in accordance with the parade. That the High Court accepted, and rightly so (see *Njoroge v Republic* (1987) 1 KAR 1134).

Simon was consistent in saying that it was the appellant who had asked him for money, when he saw the appellant at the parade. Equally the appellant has been consistent throughout the trial in saying that the witnesses saw him at Webuye and Eldoret police stations before the parade.

Inspector Mibei, in his evidence, claimed that the appellant had complained that Simon had seen him at the police station. The note on the identification parade form (exhibit 19) states:

> 'That lady was there and she saw me there at Webuye Police Station. We were there sitting in one vehicle from Webuye to Eldoret. She was there and saw me at Eldoret.'

This was part of the prosecution case. It was perhaps an embarrassment. It was never referred to again.

But it has surfaced in ground 3 of the memorandum of appeal. The appellant argued that three people had seen him at Webuye and Eldoret police stations. The grounds of appeal are all somewhat exaggerated. There is no need to mention three people – only two recognized him. It is difficult to see how the last allegation in this ground could be true, that the witnesses, according to the appellant, agreed in the High Court that they had seen the appellant before the parade. What happened in the High Court was that the appellant alleged that the answers to questions he had asked of the witnesses at the trial had not been recorded, whereby the witnesses had agreed that they had seen him at the police station named. Nevertheless, the main point is that the allegation was made to Inspector Mibei, and he noted it down, as the statement of the appellant at the time of the parade.

The High Court queried the propriety of exhibiting the parade forms. But this was the record of what the appellant said. When the appellant came to give his unworn statement in defence, he said that on 10 April he had been picked out at the identification parade, because the witnesses had seen him earlier. It was a clear issue after that, whether Simon and Rosebella had seen him at the police stations. The appellant also set out the itinerary of his travels. He started his journey from Mbale, Uganda on 7 April and slept that night at Kakamega. The next day, 8 April he was arrested at a road block and taken to Webuye Police Station. On that day he was taken in a vehicle to Eldoret to sign a statement. Teh next morning, April 9 he was taken back to Webuye police station. He saw a man with a bandaged leg, who was with his wife. It was alleged that the appellant had beaten the man. He then says, "we were brought to Eldoret and again taken to Webuye". On 11 April he was at Kakamega police station. The parade was on 14 April at Kisumu.

The trial court found the allegation false. The magistrate ruled:

> "I do not accept the allegation of Abdul accused 6 that the witnesses picked him out because they had seen him earlier implying that the parades were improper!"

The learned magistrate held the parades proper. As we have been at pains to point out, Inspector Mibei carried out his parade very well, and quite in accordance with the rules. But all that effort was set at naught, if the witnesses had seen the appellant at the police stations before hand.

Therefore, it is of interest to ascertain upon what evidence for the prosecution the allegation had been disproved.

There is none. The prosecution showed that the appellant was arrested and taken to Webuye on 8 April. He was at Eldoret for his statements to be recorded at 2 pm on 9 April and on 11 April in the morning. He was at Kakamega for a medical examination on 11 April. He was at Kisumu on 14 April for the identification parade. There is thus evidence that the appellant was sent from one station to another very much as he says.

There is no evidence upon which the appellant/s allegation can be faulted.

We would observe that it would have been very easy to rebut the allegation. It came out in Inspector Mibei's evidence half way through the prosecution before Rosebella gave evidence. It was not raised and therefore not denied by her. Simon was not recalled. The officers who had dealt with the appellant came after Inspector Mibei. They never rebutted the point. There was no possibility of calling further evidence after the defence, because it could have been dealt with in the normal course of prosecution. There was no surprise. The inference is that it was tacitly admitted.

The High Court allowed the point to escape its attention. Of course, it claimed to have examined the record. It was a matter put directly to the High Court by the appellant in argument. Unfortunately, it turned out to be one of those grounds of appeal about which 'nothing further' need to be said. With the greatest respect, that was a serious non-direction about an issue going to the root of the parade. It is not in doubt that the High Court did not rely on court identification, because Wani (the third accused), who was not identified at all on any parade, was acquitted. The magistrate was influenced by the identification in court. But the High Court only relied on the parade. The High Court was certainly right in taking that particular course.

Thus, the parade being the foundation of the identification of the appellant, if it failed, there was no other evidence of identification. The defence must stand uncontroverted, and the parade rendered useless.

The appellant's next point is that his statements by themselves would not afford sufficient evidence upon which to convict the appellant. In a very forthright analysis of the appellant's statements, the High Court concluded, quite rightly, that the appellant did not admit robbing Simon Kibitok. He had been left out and was sitting in the car, while the others intruded into Simon's house. This point overruled the magistrate's analysis concluding that it was a confession. On the analysis of the High Court, the statements, though not confessions, served to disprove the appellant's alibi; but together with the evidence of Simon, the statements could be seen to be false in part. The appellant was not only present but had participated in robbing Simon. Hence, once the identification parade afforded no evidence, then there was no evidence to illustrate the falsehood of the statement in part. It follows that all that the evidence amounted to was a denial of participation.

Consequently, the appeal must be allowed, the last and only conviction of the appellant on count 3 quashed, and the sentence is set aside. The appellant is to be set at liberty forthwith unless held for any other lawful cause.

Dated and delivered at Kisumu this 11th day of March , 1988

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL