



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 8 OF 1986**

**SAMWEL OWINO OKELLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Samwel Owino Okello, was convicted of three counts of robbery contrary to section 296(1) of the Penal Code, by an Ag Resident Magistrate, Makadara, Nairobi, and was sentenced to concurrent sentences of 6 years imprisonment. He was also ordered to suffer three strokes of the cane on each count. His appeal attacks the convictions and the sentences.

On June 24, 1985 at about 12.30 pm Isaack Maina Kabuagi (PW 1), the Managing Director of Kabuagi Petrol Station and Standard Equipment Ltd, had collected from the former business, a total sum of Kshs 83,000 for banking purposes. He divided the money into three portions, giving his son James Kariuki Maina (PW 6) Kshs 21,655.30; his employee Patrick Khisa Marombo (PW 2) Kshs 29,617.30, while retaining Kshs 31,580.80. PW 1 drove from Kabuagi Petrol Station, to Standard Equipment Ltd, from where he intended to get a security guard to accompany him with the two men with him, to the bank. As they were ready to drive off from Standard Equipment Ltd Compound, they were suddenly descended upon by a gang of three men who were armed with a pistol or what appeared like a pistol, were ordered out of Motor Vehicle KQS 146, and were stripped of all the money. The gangsters escaped in that car. Police were contacted who arrived soon after the gangsters had escaped.

Gerison Albert Herman Otieno Yongo (PW 7), a resident of Dandora Phase VI Estate, and an employee of Standard Equipment Ltd, was at the scene of the robbery when it happened. He testified that he was able to identify the appellant as one of the three men who robbed PW 1, PW 2 and PW 6. On June 25, 1985 he allegedly saw the appellant at Dandora with two other men. He played sleuth by trailing the men who boarded a vehicle to City Center, and another to Kabete and back to Dandora. At Dandora, he said he saw the appellant enter a certain house which he noted and later led the police there from where the appellant was arrested.

Jane Nkatha (PW 5) testified that she had seen the appellant with two other people near the scene of the robbery minutes before it occurred. However she did not witness the robbery. She picked the appellant in an identification parade which was conducted on June 26, 1985. Her evidence is however, of no probative value having not witnessed the robbery.

The crux of submissions by Mr Onyango Otieno, for the appellant was identification. The trial magistrate relied on the testimony of the three complainants and that of PW 7 to convict the appellant. The offences

were committed in broad daylight.

However, the circumstances under which they were committed were such that their identification of the appellant required to be tested. The only way this would have been done was by the holding of an identification parade with the appellant as the suspect and the complainants as the identifying witnesses. The police did not consider this appropriate. Instead they made PW 5 the identifying witness. As I said earlier her testimony has no probative value.

The failure of the police to present the three complainants as identifying witnesses in the parade conducted on June 26, 1985 weakened the complainants' evidence of identification. The dock identification by the three complainants, of the appellant, did not suffice, the robberies complained of having been sudden and also having taken a very short time as not to have provided the victims ample opportunity of observing their assailants.

Both PW 2 and PW 3 testified that they could clearly remember the person who confronted PW 1. With due respect to them that could not have been possible considering the fact that they were also victims of other robberies at the time PW 1 was being robbed.

PW 1's evidence is suspicious considering his conduct and the fact that part of it was contradicted by other evidence adduced. He testified that he became aware of the appellant's arrest 4 or 5 days after the robberies. Yet he on June 26, 1985 approached PW 5 with a request that she be an identifying witness in an identification parade the police had intended to conduct. It is not clear how he knew PW 5 had some information which would connect the appellant to the commission of the three robberies.

The evidence of PW 7 was crucial in the prosecution case. He was not one of the victims of the robbery. He was about 20 ft away while the robberies were in progress. He observed the gangsters in the course of the robberies and was quite able to see the clothes they had on. Later the same day played detective by trailing the appellant from Dandora to Kabete, and the appellant and another back. From the information he supplied the appellant was arrested and a toy gun recovered in his house. His evidence was clearly significant. However, there are lapses in the conduct of the trial which totally rendered nugatory PW 7's testimony.

The appellant was represented by counsel when the hearing of his case commenced on September 27, 1985. Evidence of three prosecution witnesses was taken before the case was adjourned. At the resumed hearing of the case on December 10, 1985, the appellant's counsel did not attend; nor did he send any message as to the reason for his failure to appear to defend the appellant. The trial magistrate was not impressed by that conduct, in my view, with justification.

However, the step he took next was not consonant with the provisions of the Constitution (section 77 of the Constitution of Kenya). He ordered that the appellant conducts his own defence without first asking him whether or not he could or was prepared to do so. The case therefore proceeded with the appellant conducting his own defence.

This was clearly an error on the part of the trial magistrate. A court ought not and must not hurry to conclude a case without due regard to the rights of an accused or without any due consideration as to what the ends of justice demand. In the circumstances of this case it is now not possible to ascertain the extent of prejudice caused on the appellant by the failure of the court to inform him of his rights or at least to comply with the requirements of natural justice. For that reason I am not satisfied the appellant's convictions are safe.

Accordingly I will quash them, set aside the sentences passed on him, and order his immediate release unless otherwise held under other lawful warrant. Order accordingly.

**Dated and Delivered in Nairobi this 28th day of October 1986.**

**S.E.O.BOSIRE**

**JUDGE**