

REPUBLIC OF KENYA

Njuguna v Republic

High Court, at Nairobi May 17, 1985

Cockar J

Criminal Appeal No 57 of 1985

(Appeal from the Ag Resident Magistrate's Court at Kibera, J A Mbogo Esq)

Advocates

Appellant absent, not wishing to be present and unrepresented

S K M Wandaka for respondent

May 17, 1985, Cockar J delivered the following Judgment.

The appellant was charged on two counts with the offence of robbery contrary to section 296(1) of the Penal Code, both offences to have been committed on the same night in the same house. Arriving there from he was charged in the alternative on three further counts of handling stolen goods contrary to section 322(2) of the Penal Code. He was convicted on the two counts of robbery. It is not disputed that on the night in question a gang of robbers armed with simis broke into the house of the first complainant in which he and his family and the second complainant and his family were at the time dining and robbed the inmates of the goods mentioned in the charge sheet. The robbers not only threatened to use violence during the robbery but also used actual violence on the wife of the second complainant PW 1 in order to remove a gold ring from her finger and on PW 1 when he attempted to prevent them from cutting his wife's finger. About 11 days later on November 11, 1984 the appellant was seen wearing one of the jackets belonging to PW 1 which was stolen in the night of robbery.

PW 1 said that on seeing him in Tom Mboya street the appellant who was wearing his stolen jacket started trying to cross the road to go to Tusker. He followed and caught the appellant in the middle of the road. After agreeing to accompany PW 1 to Central Police Station the appellant tried to lead PW 1 towards Tusker which PW 1 knew was the wrong direction. However, with the help of a doctor he took the appellant to Central Police Station.

There is further evidence from the 2nd complainant PW 1 and the two policemen Senior Sergeant Christopher PW 3 and Police Constable Nassir Abdi PW 4 how eventually the appellant took them to his parents' house in Ngong. This house was searched in the presence of the appellant and the second jacket belonging to PW 1, a briefcase belonging to the 1st complainant PW 2 and labour cards which belonged to the company where PW 2 was employed were recovered from under the bed.

Both the complainant and the two policemen were emphatic that the appellant did not produce any receipt relating to any of the items to them.

In his unsworn statement in court the appellant said that he sold clothes and had gone to Namanga from Nairobi on 22nd and had come back on 3rd On November 5, 1984 when PW 1 told him in Tom Mboya Street that he was wearing his jacket he told PW 1 that they should go to the police. At central police station he told the police that he had bought the jacket for the wholesalers. At his house at Nnumberi the police found nothing but the clothes that he sold. He took the police to Nairobi South 'B' where he lived. The police found nothing there. On November 6, 1984 the Karen OCS told him he would be charged with robbery. He then saw the brief case being brought by the 2nd complainant. On being asked the appellant denied that the brief case was his but he accepted the jacket as his. When he said he had a receipt for the

jacket the OCS told him to show the receipt and his trade licence in court.

The appellant had produced in court a cash sale receipt as exhibit D 1.

The appellant made no mention about the visit by police and PW 1 to his parents' house in Ngong to which place he had led them. That is where the second jacket (red) was recovered together with the brief case. He did not suggest during his cross-examination of PW 1 or either of the two policemen that he had not led them to his father's house in Ngong or that nothing was recovered from that house. Nor did he put it to the 2nd complainant PW 1 that the brief case had been brought by him to Karen police station. Considering all the evidence relating to facts leading to the recovery of the brief case, the labour cards and the second jacket I see no reason to doubt the overwhelming prosecution evidence on this matter. I am satisfied that it was the appellant who led PW 1 and the police party to his parents' house in Ngong and that the said three items were recovered from there. The briefcase bore the initials of the 1st complainant PW 2 and the labour cards belonged to his company. I am satisfied that they were properly identified as being the 1st complainants' property stolen that night.

As to the two jackets PW 1 identified both from the same trade marks they bore. He said they were both of the same type but different colour and he had bought both in Seychelles on the same day about a month before he came on his visit to Kenya. He pointed out the small cut on the left arm of the blue/red jacket (Exh 2) and the mark 'crocodile' on the right sleeve of the red jacket (Exh 4).

The appellant had claimed only one jacket that is the blue/red one which he was wearing as his own. As far as the second jacket that is the red one is concerned I have no doubt in mind that the complainant had properly identified it as his own that was stolen that night. As regards the first jacket that is the blue/red one (Exh 2) the appellant produced a receipt dated March 31, 1984 of a firm whole-salers in respect of a number of items purported to have been sold. It shows also sale of 2 jackets. However, there is nothing shown thereon to indicate the types or makes or any identifying marks of the jackets that were sold. All the three prosecution witnesses concerned had said that the appellant had not shown them any receipt in respect of this jacket. I do not see any reason to doubt the identification of this jacket by the 2nd complainant PW 1. It is more than a mere coincidence that the appellant should have been wearing, a few days after the robbery this jacket, of a similar type and quality as the other jacket which was not disputed belonged to PW 1. I am satisfied that the trial magistrate had very properly rejected the appellants' defence and had found the appellant guilty as charged on both counts. Convictions on both grounds are safe.

The learned state counsel who supported the conviction has applied for enhancement of sentence notice whereof was filed on April 30, 1985. His grounds for enhancement of sentence were that property stolen was worth over Kshs 70,000 and only 2 jackets and a brief case were recovered. The gang were armed with simis and used violence. They were slashing at the finger of PW 1's wife in order to remove the ring and when PW 1 tried to prevent that his own finger got cut.

The appellant did not say anything as regards sentence. I have given careful consideration to the sentence imposed by the trial magistrate. Being mindful of all the circumstances pertaining to this robbery I am satisfied that sentence imposed by the lower court is inadequate and far too lenient. To my mind a sentence of 3 ½ years imprisonment with strokes would have been adequate.

Appeals against convictions on both counts of robbery are dismissed.

The sentence of 2 years imprisonment with 4 strokes on each count – the prison sentence to run concurrently is set aside and a sentence of 3 ½ years imprisonment with 4 strokes on each of the two counts is substituted and is to run from the date of sentence in the lower court. The prison sentence shall be concurrent. The supervision order remains unchanged.