IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NYARANGI, GACHUHI, & APALOO, JJ. A.)

CRIMINAL APPEAL NO. 2 OF 1987

BETWEEN

SHADRACK MWANTHI MASAKU

DAVID MUTULU MUISU ....APPELLANTS

AND

REPUBLIC ....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos, (Abdullah, J.) dated 26th November, 1986

In

Criminal Appeal No. 359 & 360 of 1986)

JUDGMENT OF THE COURT

On the 27th October , 1984, the complainant D A Lowes and two friends went to a place called Lukenya near Athi River on a rock climbing expedition. They parked their car under a tree and were having lunch when 4 persons appeared. The time was about 2.20 pm. Those persons robbed them of a wrist watch, a pair climbing shoes, one blue bag and rack sack containing cash Kshs 3000/-.

They gave the robbers chase and in the process, the one who had the rack sack dropped it. The bag was retrieved together with cash. The gangsters made good their escape. So the rest of the items were not recovered. Two days afterwards, that is on October 29, Lowes and his two companions were summoned to the Athi River Police Station. There were on parade, about 15 persons. Lowes identified the 1st appellant as one of the gangsters who robbed them of the items mentioned on October 27. His companions failed to identify any of the robbers.

On October 28, 1984, Mr Philip M Matheka and his wife were returning to Nairobi from Masii. When they reached a place called Mto Mawe, they stopped as Mrs Matheka excused herself into the nearby bush. Matheka parked his car and faced her as she was returning. Three persons suddenly emerged from behind and confronted them. It was broad daylight. The time was bout 12.30 pm.

The persons who were thieves, demanded that they raise up their hands. They complied. Mrs Matheka was relieved of her jacket by one of the robbers. Another turned to Mr Matheka and helped himself to Kshs 800 which he had in his pocket. He also removed his shoes and wrist watch. The third person busied

himself with removing other belongings of the Matheka's from their car including their clothes. That person tried but failed to remove the cassette from the car. The gangsters then escaped with their car keys.

The Matheka's walked to the nearby street and were given a lift to the Athi River Police Station where they lodged a complaint. They returned shortly afterwards accompanied by the two policemen in plain clothes. While they were in the process of showing the polices how the thieves tampered with the car, three persons suddenly appeared. They were accosted by the police. The Matheka's identified the 1st and 2nd appellants as two of the persons who robbed them a short while before. All were apprehended. On October 30, 1984, all three were charged with robbing Mr Matheka and his wife of the cash and other items they removed from their persons. All the three accused made unsworn statements and protested their innocence. The only real issue for the learned magistrate's determination was the identity of the robbers on October 27 and 28. After reviewing the evidence, the learned trial judge was of the opinion that the evidence of identification was reliable and could safely be relied on. He accordingly dismissed the appeal.

The only question debated before us on this second appeal, was the selfsame issues of the reliability of the identification. With respect of count one, it was contended by counsel for the appellants, that the 1st appellant was only identified by one witness whereas they were allegedly 3 eye witnesses. It was said as only one witness identified him in circumstances in which identification was difficult, the conviction was unsafe. It is correct only one of the three victims of the robbery was able to identify the 1st appellant. But we do not accept that there was anything in the evidence which made identification difficult. It was broad daylight and the time was around 2.00 pm. There was no suggestion that there was anything in the weather which would have made identification difficult.

Furthermore, the 1st appellant was identified by the witness just two days after the robbery, when the witness preserved a recollection of the appellant's fact. Both courts below found nothing in the evidence which made the evidence of the sole identifying witness, suspect or unreliable. We cannot accept that there is any rule of law that where three persons were robbed and only one was able to identify the robbers, his evidence was to be distrusted because the two others were unable to identify him. Were there such a rule, it would offer the greatest temptation for perjury as all eye-witness would conspire to assert the identity of a person of whom some may be unsure. On ground one, we find no reason to differ from the conclusion of the two courts below.

On count 2, it is said, the conviction was unsafe because the prosecution failed to produce the fishing rod which the third prosecution witness admitted seeing. On the question of the fishing rod, all the witnesses except Mrs Matheka denied a fishing rod. The learned judge thought on appeal that the witness may have been mistaken. But the issue of importance was whether Matheka and his wife correctly identified both the appellant as two of the three persons who had robbed them.

On this, the evidence appears cogent. The identification were made just about 2 hours of the robbery and in broad daylight. There is no basis for thinking that there was any problem of identification or was there any reason for holding that both husband and wife were mistaken as to the identity of the persons who had robbed them a few hours previously.

The only fault we found with the both judgments, was that both courts treated the evidence of the Matheka's was corroboration the evidence of the sole identifying witness of the robbery a day before. We do not think that the person who committed the robbery the day before, would necessarily be the same person who committed the same crime next day. The parties may well be different. And had the circumstances of identification been unfavourable in the robbery charged in the first court, we would have felt it right to interfere with the conviction. But as the evidence of identification on the first court by the sole witness as itself cogent, we do not consider that this error affected the result.

We think therefore that the convictions on counts 2 and 3 were, like that on count 1, well warranted. Accordingly, no good ground exists for interfering with the convictions on any of the three counts. The appeals therefore fail and each is dismissed.

Dated and delivered at Nairobi this 25th day of November, 1987.

J.O. NYARANGI

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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

I certify that this is a

true copy of the original.
DEPUTY REGISTRAR