



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: HANCOX & APALOO, JJ.A. & MASIME Ag. J.A.)

CRIMINAL APPEAL NO. 243 OF 1986

BETWEEN

MICHAEL OUMA ADONGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

at Kisumu (Omolo J) dated 10th October, 1986

In

Criminal Appeal No. 326 of 1985)

JUDGMENT OF THE COURT

The appellant (originally the second accused) was convicted after trial by the learned senior resident magistrate at Kisumu of burglary and stealing in a dwelling house contrary to sections 304(2) and 279(b) of the Penal Code. He was awarded four years' imprisonment concurrently on each limb of the charge, but consecutively to any other terms of imprisonment which he might then be serving (and it certainly appeared from the record that he was serving other terms of imprisonment). He was also given five strokes corporal punishment on each limb of the charge. His co-accused, who had pleaded guilty to the charge, and was called as a defence witness at the trial, was awarded eighteen months' imprisonment, plus a total of six strokes corporal punishment.

Surprisingly the learned first appellate judge, no doubt impressed by the difference in the two sets of sentences, reduced the custodial sentence in respect of the appellant to two and a half years' imprisonment, but that presupposes that this appellant had received too much and the first accused too little, whereas it was probably the other way about.

That, however, is not a matter which is within our jurisdiction on this appeal. It does, however, serve to emphasize that that which one view, might be regarded as disparity in sentencing, would, on another, be regarded as differential treatment.

The appellant, in appealing against his conviction and the dismissal of his first appeal, took several points

in his memorandum of appeal, most of which he reiterated in his submissions before us. They may be classified under six main headings.

1. "That the identification of him by the second and third prosecution witnesses as carrying one of the bundles of stolen clothing, tied in a bed sheet, was defective, and should, at the least, have been supported by a properly held identification parade.

2. There was a conspiracy between these two witnesses and the police falsely to accuse him of this crime, motivated in part by a grudge which is said to have existed by Andrea PW 2 when they worked in a stone quarry in or about 1980.

3. That there was a discrepancy in Inspector Namman Okello's evidence, in as much as he first said that he found an identity card on the appellant (which enabled him to connect him with this offence) and then said he found no property on the appellant during his personal search.

4. This led to the fourth point, taken in court, which was that he was arrested by Inspector Okello for the robbery of a woman (a charge not before the court in this case) which was somehow transposed, so that the appellant found himself charge with the instant offence.

5. That the magistrate wrongly rejected the appellant's alibi because of the appellant's grandmother's sister's denial that he had spent the night of 26 and 27 May with her, when in reality she was a confused elderly lady who had obviously forgotten the facts.

6. That the trial magistrate wrongly held that the supportive evidence of the first accused was "all lies told to cover him up".

The point that this appellant had wrongly been named as Michael Okech Okumu, who was the real suspect in this case, taken in the first petition of appeal, was not pursued before this court.

Of the foregoing points, one and five were rejected by Omolo J, and none of the others have, in our view, any substance. The appellant sought to establish an alibi and failed, the identification of him was perfectly satisfactory and the magistrate rightly rejected the evidence of the first accused. We do not detect any discrepancy in Inspector Okello's evidence of the first accused. We do not detect any discrepancy in Inspector Okello's evidence, and the appellant failed to show any antecedent enmity between himself and ANDREA. Even if he had done so, one other reliable witness saw him in broad daylight with a quantity of the stolen property on the day following the burglary.

We agree with Mr Murgor that the evidence really was overwhelming against the appellant, that he was rightly convicted and his first appeal rightly dismissed.

There is no substance in the present appeal which is, accordingly, also dismissed.

Order accordingly.

Dated and delivered at Kisumu this 2nd day of December, 1987.

A.R.W. HANCOX

.....
JUDGE

OF

APPEAL

F.K. APALOO

.....
JUDGE

OF

APPEAL

J.R.O. MASIME

.....
AG.

JUDGE

OF

APPEAL

I certify that this is a

true

copy

of

the

original.

DEPUTY REGISTRAR