



IN THE COURT OF APPEAL

AT MOMBASA

(Coram:Madan Ag CJ, Nyarangi JA & Gachuhi Ag JA)

CRIMINAL APPEAL NO. 91 OF 1985

BETWEEN

OUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

The appellant was convicted together with a co-accused named Murutu of the offence of stealing goods in transit, contrary to section 279(c) of the Penal Code. They both appealed to the High Court against their convictions. The two appeals were summarily rejected by the same judge of the High Court.

Murutu appealed again to this court. His appeal was remitted for hearing by the High Court as it ought not to have been summarily rejected under section 352(2) of Criminal Procedure Code.

Murutu's appeal was heard in due course. The judge who had originally rejected it summarily allowed the appeal, quashed Murutu's conviction and set aside the sentence.

The convictions of both the appellant and Murutu depended upon their identification by one Ambrose Isaac Ombok (PW 4) a single identifying witness.

One of the appellant's ground of appeal to the High Court was that his identification by Ambrose was questionable. This was a substantial ground of law which took it out of the ambit of section 352(2) of the Criminal Procedure Code, learned state counsel concedes that the appellant's appeal ought not to have been summarily rejected. We agree. If that were all, we would normally remit the appeal for hearing by the High Court.

There is more here. First, Ambrose who had been kept in police cells as a suspect himself before he was taken to an identification parade said in his evidence that the police told him if he identified someone he would be allowed to go home. Thereafter he identified Murutu.

The trial magistrate remarked in his judgment :-

“He (Ambrose) said that the police told him at one point after he had identified the first accused (ie appellant) that if he identified the rest he would be let go. If they did this it was very wrong – such

underhand practices are not, however unknown with the police. I wish they would stop.”

We too wish such under desirable practices which are both illegal and dishonourable must stop. They bring into disrepute the administration of justice, the rule of law, and the police force itself whose members perpetrate these unethical methods to obtain evidence to fix up guilt of suspects who are in their custody.

The trial magistrate further said “that police witnesses most of them are never satisfied that they have given satisfactory evidence until they have laced it with a lie or two and I have never met a person who is better at forgetting things than them.”

It is regrettable that this is our experience also. The police seem to think that once they pick up someone as a suspect their sole duty is to prove him guilty howsoever and by whatsoever means whether he is guilty or not. More often they refuse to listen, therefore fail to investigate, the protestations of innocence by the suspect with the result that the suspect presumption of guilty by the police carries him into a trial in court.

The magistrate’s remarks convey to us, learned principal state counsel also agrees, that he did not feel altogether happy about the prosecution evidence against the appellant and Murutu. Yet he proceeded to convict them both. That was wrong, forgetting that the benefit of the doubt always goes to the accused.

The learned judge on Murutu’s appeal said that the court at the time of evaluating the prosecution evidence must have in mind the accused’s defence (which was alibi in Murutu’s case, and wrong identification in the case of the appellant), and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true, that that did not appear to have been done in this case.

In considering whether Ambrose could be relied upon, the learned judge on first appeal said that the only inference that could be drawn was that picking out Murutu appeared to be the price Ambrose paid for his own freedom. In our view Ambrose was the rotten apple in the barrel of the prosecution evidence. We are unable to say safely that he honestly identified this appellant. If he could act dishonestly in the case of Mr Murutu he could also have been acting as an opportunist in the case of the appellant.

Principal learned state counsel agrees, and we appreciate both his correct and forthright approach, that all in all this is an unsafe conviction.

Acting under the provisions of section 3(2) of the Appellate Jurisdiction Act (cap 9) we allow this appeal. The appellant’s conviction is quashed, and the sentence set aside. He is to be set at liberty in respect of this charge.

Dated and Delivered in Nairobi this 25th day of January 1986.

C.B.MADAN

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR