

REPUBLIC OF KENYA

Mwangi v Republic

High Court, at Nairobi August 16, 1985

Schofield J

Criminal Appeal No 1704 of 1984

(Appeal from the Ag Resident Magistrate's Court at Nairobi, M Ang'awa, Miss)

Advocates

Appellant absent, not wishing to be present and unrepresented

Miss W Ngugi for respondent

August 16, 1985, Schofield J delivered the following Judgment.

Naftali Mwangi Gichuhi appeals against his conviction by a learned senior resident magistrate Nairobi on three charges of robbery, contrary to section 296(1) of the Penal Code. The three charges arose out of a robbery which took place at the premises of Bruce Limited in Nairobi's industrial area on the night of the March 28, 1983. The appellant was charged and acquitted of a further offence of robbery alleged by committed on the night of the September 30, 1983 at the premises of Johnson's Wax Limited.

Two night watchmen at Bruce Limited PW (2) mutual Wetho and PW (3) Francis Kilonzo testified as to an attack by a gang of robbers on the night of the March 28, 1983, and of the theft by those robbers of their personal items. They could not identify any of the robbers. PW (4) Edward Mungai a cashier with Bruce Limited testified that when he arrived for work on the morning of the 29th 1983, he found the office door was broken, the safe opened and the cash box Kshs 6,000 missing.

PW 11 Inspector Joseph Muthui is a scenes of crime officer who went to Bruce Limited premises on the March 29, 1983. He examined the premises and some vehicles on the compound which had been tampered with. He lifted 12 finger print impressions from various places and sent them to the Fingerprint Bureau.

On the April 15, 1984 the appellant was arrested in connection with other matters. His finger and palm prints were taken to P C Sisa PW (9). These fingerprints were sent to PW 1 Nehemiah Nyangia who is a gazetted fingerprint examiner. He compared these with the photographic print sent to him earlier and found the impressions were made by the same person.

The appellant, unsworn, stated that he had been employed as a painter on a casual basis at the premises of Bruce Limited "last year" presumably meaning in 1983. He touched wall and furniture in the course of his work.

The learned magistrate based his conviction on the evidence that the appellant's fingerprints were found in the premises of Bruce Limited the day after the robbery. He disbelieved the appellant's explanation for his fingerprints being found there.

The evidence of the fingerprint expert when related to the documentary exhibits is some what confusing. It appears that when called on the first occasion the expert gave evidence about one only of the 12 fingerprints impression lifted by Inspector Muthui corresponding with the appellant's. The expert was later recalled and testified as to another such impression so corresponding, but it seems to me that such evidence related to the fourth count of robbery of the premises of Johnson's Wax Limited, of which the

appellant was acquitted. But the evidence is confusing, and the learned magistrate who must have had a gasp of the trial and the evidence before him found that three corresponding impressions were produced to court.

Be that as it may, the learned magistrate proceeded to evaluate the evidence on the basis that all 12 impressions lifted by Inspector Muthui were positively identified to be those of the appellant. That was a misdirection. At most three such impressions and to my mind only one such impression, were found to match. We are not told by Inspector Muthui or the fingerprint examiner where such marching impression or impressions were lifted from. It was therefore wrong of the learned magistrate to draw conclusion that the appellant's fingerprints were found on the torch recovered from the office or the vehicles outside. We do not know where the marching impressions were lifted from. Only one employee of Bruce Limited was called to testify, that was the cashier. The learned magistrate noted that the defence did not put to this witness that the office was painted the year previously. But was it not for the prosecution to call evidence that the appellant had no right to be in the premises at any time? If the prosecution had asked of the witness whether he had seen the appellant previously at the premises or, better still had called a personal or other senior officer to testify that the appellant had never been an employee or customer of theirs, then it would have been fair to draw an adverse inference from the lack of cross examination. But it is improper for the prosecutor to delay upon mere proof of an accused's presence at the premises which were robbed at some time prior to the robbery and then expect the accused to explain away his presence there. That is a shifting of the burden of proof. For these reasons I consider that the convictions on all three counts are unsafe. The convictions are quashed, the sentence imposed upon them are set aside and the appellant may be released unless held for any other reasonable cause.