



IN THE COURT OF APPEAL

AT KISUMU

(Coram:Hancox JA, Platt & Gachuhi Ag JJA)

CRIMINAL APPEAL NO. 148 OF 1985

BETWEEN

ANZAYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Kakamega, Aganyanya J)

JUDGMENT

The present appellant was charged with ten others, including his wife, who was then the third accused, with the offence of robbery contrary to section 296(1) of the Penal Code. Only he (as the ninth accused) and the first accused were convicted of this offence, while one other, the second accused Recho Amwinja Amwai, was convicted of dishonestly handling various items of clothing and beddings stolen during the robbery.

On the night of July 14, 1983 at about 11.30 pm Richard Litunya, the Member of Parliament for Butere Constituency, was at home with his family in Ekanguui Village, in West Kisa location, when a gang of many people armed with sticks descended on the house, and on the pretext of having been sent by the police, (some of them wore that which resembled police attire) gained entry, tied him up with telephone wire, ransacked the house and beat him and his family. They demanded shillings one million which they said had been given to him by the former Minister for Constitutional Affairs. In the process some members of the money gang threatened to cut the neck of the complainant's four year old daughter with a knife. Having failed to get the money the gang made off with a large number of household items, clothing and Kshs 5,280 in cash, taking the complainant and a watchman from nearby called Mzee with them, tying them to telephone post about three quarters of a mile away. The Mzee managed to free himself, freed the complainant also and they were able to telephone Yala Police Station.

When the police arrived at the scene they followed foot prints for some three kilometers and found numerous items of the stolen property near Marama North, and these were produced as Exhibits 6 to 68. On July 19 the Crime Branch Police from Butere searched several houses, though it is not stated in which areas, but which included a house said to belong to the third accused at the trial and her husband, the appellant. As the police approached the appellant was seen to run away. He was arrested 5 days later in Shiraha sub-location, lying in a sugar plantation, and he appeared to be drunk. When his house was searched on July 19, apparently in the presence of the wife, the police recovered two pairs of children's shoes which became Exhibit 77, and were apparently identified by the complainant as belonging to his 4 year old child, (not to his grandson, as stated by Senior Sergeant Musumba PW 8). They also recovered a

sandal and safari boots, which do not appear to have been specifically exhibited or identified.

The first accused was identified by the complainant's daughter Florah, and the appellant was identified by appearance by the complainant himself. The members of the gang had powerful torches, but the complainant was not subjected to an in-depth examination as to how he was able to see the appellant's features, though he did say the gang were referring to each other by military ranks such as Sergeant, Corporal and Brigadier, the appellant being the Brigadier. Though he said in his evidence that he heard the name "Musa" called, the complainant admitted to Mr Azangalala, who appeared at the trial and on this appeal on his behalf, that he omitted to mention this salient fact in his statement to the police. Moreover, no descriptive evidence either of the appellant or of the exhibits was given.

The appellant made an unsworn statement at his trial, in which he said that he arrived home from his work place on July 24, to find that his wife and household property had been taken to the police station. He reported there, introduced himself as the third accused's husband and showed them his work ticket and the receipts for the things (meaning those taken possession of the police). This was not, however, put in cross-examination to any of the police witnesses, and none of those documents were produced, as we would have expected, remembering that the appellant was professionally defended at the trial. An identification parade was held in respect of the first accused but not in respect of the appellant.

In the course of his defence the appellant stated that he had previously been convicted and had failed to report to the police (as presumably he had been ordered to do) for some three months. This point, however has not been taken in the appellant's memorandum of appeal, neither, in our view, could it be, as it did not form part of the prosecution case but was volunteered from the dock by the appellant. Neither did Mr Azangalala take the point that the appellant had, in a sense, set up an alibi in as much as he said that he came from his place of work on July 24, and thus implied that he had been away when the offence was committed and on the succeeding days.

Instead Mr Azangalala concentrated on the undoubted fact that the identification evidence consisted of a single witness during the night time. He also submitted that the prosecution evidence as to where the children's shoes, Exhibit 77, were found was contradictory. He referred us to the evidence of P C Thimbu, PW 10, who was in the party led by S T Musumba to search the various houses on July 19.

Whereas the sergeant said the shoes were found in the house of the appellant and the third accused, P C Thimbu maintained that the two pairs of children's shoes were found in the house of the 2nd accused, not that of the appellant. This was reiterated by P C Thimbu under cross-examination by Mr Azangalala.

Mr Azangalala also alleged in his memorandum of appeal that the magistrate had misdirected himself as regards the burden of proof and had failed specifically to state that he found the charge proved against the appellant beyond all reasonable doubt. We have carefully studied the judgment but we are satisfied that, taken as a whole, the judgment shows that the magistrate did not err as regards the burden of proof and that the only interpretation of his judgment is that he was satisfied beyond all reasonable doubt that the robbery charge had been proved.

We are well aware of the line of authorities in East Africa regarding the dangers of identification by a single witness, particularly at night, starting with *Abdullah bin Wendo v R* (1953) 20 EACA 166, and including *Roria v Republic* EA 583, and we have emphasized this ourselves quite recently.

However, in the instant case, there were two other pieces of circumstantial evidence connecting the appellant with the crime. The first is that the children's shoes, Exhibit 77, were said to have been found in the house where the appellant resided. Unfortunately no member of the complainant's family specifically swore that Exhibit 77 belonged to the child in question. Instead the complainant merely says "These shoes" belonged to the child, without saying which Exhibit they were, or having them marked for identification. Again Floridah, the complainant's wife, is recorded as identifying "each and every item" without the magistrate recording which items they were, while Florah states that at the police station- "We were shown some luggage from where we identified the two pairs of shoes (children's)"

None of this can be regarded as satisfactory and indicates a lack of care on the part of those prosecuting and trying the case to see that the exhibit evidence is properly tied up. Furthermore there was the discrepancy as to whose house the shoes were found, to which we have already referred.

All of this seems to have escaped the attention of the first appellate judge, who upheld the appellant's conviction and sentence of five years imprisonment.

After much anxious consideration we cannot say, from the context of the evidence as a whole, that the only pairs of children's shoes that were produced were unequivocally identified by the complainant, by his wife, or by his daughter, or that there they were proved to have been in the appellant's and his wife's house.

Even taking into account the appellant's flight at the approach of the police, together with the visual identification of him by the complainant on the night of the robbery we consider this fell short of the certainty that is required in the case of an identification by single witness. Learned principal state counsel on behalf of the republic conceded the appeal before us, and we agree.

We accordingly reverse the finding of the High Court and allow this appeal. The conviction is quashed, the sentence set aside and the appellant directed to be released unless otherwise lawfully held in custody.

Dated and Delivered in Kisumu this 18th day of March 1986.

A.R.W.HANCOX

.....

JUDGE OF APPEAL

H.G.PLATT

.....

JUDGE OF APPEAL

J.M.GACHUHI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR