



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Madan Ag CJ, Nyarangi JA & Platt Ag JA)**

**CRIMINAL APPEAL 55 OF 1986**

**BETWEEN**

**MAGHENDA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

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

**JUDGMENT**

The appellant was convicted on a first count of robbery contrary to section 296(1) of the Penal Code (cap 63) and on a second count of being in possession of a firearm without a certificate contrary to section 4(1) of the Firearms Act (cap 114). He was sentenced to seven years imprisonment plus 20 strokes on the first count, and one year's imprisonment on the second count, the sentences of imprisonment to run concurrently.

The appellant's appeal to the High Court was dismissed summarily under section 352(2) of the Criminal Procedure Code (cap 75). This a second appeal.

We allowed his two applications for this appeal to be heard out of time, as well as in *forma pauperis*.

On September 30, 1983 Abdul Aziz withdrew Kshs 309,231/05 from his bank with a companion named Paresh Samond for wages for the employees of Inter-Fashions' Garment Factory at Changamwe. He drove back to the factory with the money in his Toyota Corolla, registration No KJZ 618. While he was waiting for *askaris* to open the gate for him a person who was near the car outside the gate on his right fired a gun in the air. The man also pulled Aziz and he fell down outside the car. There were two others with the first man. Paresh said in his evidence in court that the appellant punched him. The three men got into Aziz's car and drove off with the money. The theft of the vehicle worth Kshs 100,000 was also included in the first count.

The police later found the appellant sleeping with one Halima in her house. On being searched the sum of Ksh 3,300, and a pistol which was proved to be a firearm in terms of the Firearm Act (cap 114), in a trousers pocket were found in the house. The appellant had no certificate for the firearm.

At the close of the prosecution case the appellant's advocate told the court that the defence would be an

alibi.

The appellant made an unsworn statement in court. He said the sum of Kshs 3,300 found in the house belonged to his girlfriend. He was shown a gun later while he was in the hands of the police and asked if he knew anything about it. In other words the gun was planted on him. He said he was on duty when the purported robbery took place. He made no further mention of any alibi in his evidence.

Halima was called to testify for the prosecution. She was declared a hostile witness. The magistrate said that therefore her evidence could be safely disregarded for, being the appellant's girlfriend, it was but natural that she would testify as a defence witness. The first part of the magistrate's statement strictly was a misdirection. The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court.

The magistrate said that the appellant was identified at identification parades by Paresh and John Maina, a Tudor Security Service Guard who was on duty at the Inter-Fashions Factory at the relevant time.

The magistrate overlooked that Paresh told the police after the robbery that he wasn't sure whether he could recognize the persons. His identification of the appellant as the man who punched him therefore should have been ignored.

The magistrate said that the appellant was also satisfactorily identified by his voice by John Maina who asked the members of the parade to speak the words "toka inje". After the appellant spoke these words John Maina touched him on his shoulder. Identification by voice can be a sound and reliable method of identification. John Maina however did not say in his evidence that the appellant spoke these words "toka inje"- when the robbery was committed. Neither did John Maina say that he identified the appellant because of these words and relying on the sound thereof. It was the officer conducting the parade (Inspector Tiampati, PW 9) who said that John Maina asked the members of the parade to speak the words "toka inje". The magistrate followed a *non sequitur* when he said this type of identification is also peculiar in nature and must be taken as being correct, as nobody could possibly have coached this witness on how the appellant's voice sounds.

The appellant also disputed that the pistol was his. It was overlooked that there was no evidence the trousers belonged to the appellant.

The magistrate experienced in these matters made the disturbing comment that it is common for the police to plant items like rolls of bhang on suspects. Whether bhang, or whatever else, this highly unethical practice must cease as it besmirches the role of the police as the friends of the people.

For the reasons we have stated with which learned State Counsel agrees, the appellant's appeal to the High Court ought not to have been summarily rejected. For the same reasons we also allow the appeal, quash both convictions and set aside the sentences. The appellant is to be set at liberty in respect of these two convictions.

**Dated and Delivered in Mombasa this 14th day of July 1986**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**J.O.NYARANGI**

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**JUDGE OF APPEAL**

**H.G.PLATT**

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**JUDGE OF APPEAL**

I certify that this is a true copy  
of the original

**DEPUTY REGISTRAR**