



IN THE COURT OF APPEAL

AT NAKURU

(Coram:Nyarangi, Platt & Gachuhi JJA)

CRIMINAL APPEAL NO. 13 OF 1986

BETWEEN

NJIHIA.....APPELANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Bennet J)

JUDGMENT

Perhaps the less said about this appeal the better. The appellant's conviction is quashed and sentence set aside. He is serving another sentence at present.

The appellant's first appeal was summarily rejected. It ought not to have been. See section 352(2) of the Criminal Procedure Code provides that when an appeal is brought on the ground that the conviction is against the weight of the evidence or that the sentence is excessive, and "there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced", the appeal may be summarily rejected. There are, therefore, two thresholds; the first depends upon the nature of the petition, but the second and more important, depends upon the judge's careful scrutiny of the record. Even if the petition of appeal to the High Court might possibly be thought to comply with the first test, the second test could never be compiled with, if the record disclosed a serious question relating to the identity of the appellant. It was at least this issue which the appellant intended to indicate in those grounds of his appeal when he denied committing the offence of robbery; and certainly the issue of identity was one which lay within the judge's responsibility to ensure was not one which could raise a reasonable doubt whether the conviction was right.

The appellant had been charged and convicted of robbery contrary to section 296(2) of the Penal Code and sentenced to 14 years imprisonment together with 18 strokes of corporal punishment and a statutory reporting order. His conviction depended upon two strands of evidence; first, the identification by the sole evidence of the complainant, and secondly the appellant's possession of a stolen car two days after the incident in the area of Nairobi. There was evidence which led to the assumption that he complainant had been robbed in the above car near Thomson's Falls, while he was being given a lift home two days earlier.

The difficulty in the case is that the police identification parade was improperly carried out. Although the trial magistrate held that the parade had been conducted in accordance with Police Force Orders, that was

not so, because three suspects had been mixed with eleven others. Mathematically that is too low a ratio (something like one to nearly five) to exclude the chance of random guesswork.

Police Force Orders require a ratio of one to eight as the minimum; and indeed in many parades the ratio is between one to ten and one to twelve. It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

In this case, the question which the trial magistrate and the judge had to concentrate upon, was simply whether the identification of this appellant in court, after his identifications of the appellant on the improperly conducted, could be relied upon. That follows upon, the fact that the appellant was a sole identifying witness, in circumstances where the chance of identification at night in the car were different. It is proper in the circumstances to warn oneself of the danger of relying upon such evidence or look for corroboration if possible. No such warning was employed by the trial magistrate. (see *Abdulah Bin Wendo Vs Republic* (1953) 20 EACA 166, *Roria vs Republic* [1967] EA 583). The result was that the evidence of identification was highly suspect, proceeding from misdirection's and non directions, so that not only could the first appellate Court not dismiss the first appeal summarily, the trial magistrate had to consider the facts in the evidence, and explain why, he still could safely rely upon it. He did not adequately face up to this task, because he did not see the issues clearly. It is not good enough simply to say that there was sufficient light on that occasion.

The second aspect of the case, is whether the appellant's possession of the stolen car on March 18, 1971, leads to the inevitable conclusion that he was one of those in that car on March 16, 1971. It is obvious that he may or may not. It depends upon whether he was identified in the car.

The argument now becomes circuitous. If the identification requires support, and if the appellant's presence in the car relies on his identification, there is no certainty in any of the evidence. It is certainly not a case when this court, dealing with issues of law, can say that the charge was proved beyond reasonable doubt. Nor was it permissible under section 57(1) of the Evidence Act (cap 80) to give evidence that the appellant had been convicted of the theft of the car. It proved nothing and was highly prejudicial.

In these circumstances, the appeal must be allowed and the appellant's conviction quashed, and sentence set aside. There is no point in remitting the record to the High Court to re-hear the first appeal.

Dated and Delivered in Nakuru this 23rd day of September,1986

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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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