IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN & NYARANGI JJ A, GACHUHI AG JA)

CRIMINAL APPEAL NO 145 OF 1985

BETWEEN

NJOROGE..................................... APPELLANT

AND

REPUBLIC.................................RESPONDENT

JUDGMENT

(Appeal from a conviction of the High Court at Nairobi (Simpson & Muli JJ) in Criminal Appeal No 1049 of 1971, dated 24th December 1971)

October 7, 1985, the following Judgment of the Court was delivered.

Under leave granted to this appellant as a special case this is a second appeal to this court nearly fourteen years after conviction and sentence on the 7th October, 1971 of the appellant by the Senior Resident Magistrate Nairobi, for the offence of robbery with violence, contrary to section 296(2) of the Penal Code.

Amazingly the appellant waited until March 1985 to apply to a single Judge of this court to be allowed to file his appeal out of time. The single Judge properly decided to refer the application to the full court because of the unusual passage of time. This court acceded to the application for extension of time to file the notice of appeal and the appeal itself. The doors of this court as a result were swung open for this forlon appellant who had urged that his liberty was at stake.

The appellant was sentenced to twenty years imprisonment the sentence to run consecutively with another sentence of nineteen years imprisonment passed upon him for a similar offence previously, making it an aggregate of 39 years.

The appellant’s appeal to the High Court was dismissed (Simpson & Muli JJ) save that, being of the opinion that the aggregate of 39 years was manifestly excessive, the High Court ordered ten years of the two sentences imposed upon the appellant to run concurrently that is, the aggregate was reduced from 39 to 29 years.

Mr Samwel Wanjoki Kihara was the owner of Peugeot 404 motor vehicle registration Number KLL 43. He had just finished washing it on the 8th February, 1971 at about 7.30 p.m at Kenatco Petrol Station, Nairobi. Three men approached him and asked to be taken to Thika as they had an accident in which a passenger had died. Although not a taxi runner, Samwel, feeling compassionate, agreed to transport the

three men as requested by them. The three men entered his car. On the way they asked him to stop at Makadara which he did. They got out and entered to stop again when they reached Mboya hall in Jogoo Road. The men led Samwel out of his car, took him into a bush about 1/2 mile away and tied him up. The men were joined by others there. Samwel was not able to identify any of them. They left Samwel there guarded by some of them who searched him at about 3 a.m and took Sh 1,700/- from him; they left him there still tied up. He managed to free himself and reported the incident to the police; he stated that one of the men had a pistol which he had loaded when they had stopped in Jogoo Road.

Samwel's car registration number KLL 43 was found abandoned in Kisumu on the 9th February, 1971. It was dusted and examined for fingerprints; photographs of finger prints including a palm print on the bonnet of the car were taken.

The appellant was arrested on the 26th February, 1971 near Kitwamba Police Station in Muranga District. He was found in possession of a pistol.

The evidence of the Gazetted Government Finger Print Officer, which the Magistrate accepted, was that a portion of a palm print found on the bonnet of the Peugeot 404 Registration number KLL 43, which was found abandoned at Kisumu, was identical with the appellant's palm print. There was no other evidence of any other kind whatever against the appellant.

The appellant's grounds of complaint are (1) that there was not sufficient evidence to uphold his conviction (2) that he gave a plausible explanation of the presence of his palm print Samwel's vehicle (3) that the conviction could not be upheld the learned judges of the High Court having themselves observed that the negative of the photographs of the finger or palm impression should be produced *in situ* as well as the enlargement thereof; that as the negatives were not produced, that it was a fatal omission, and therefore, the palm print was not properly proved in court; and (4) the learned judges applied wrong principles of sentencing. Grounds 1,2, and 3 are a direct challenge to the decision of the learned Senior Resident Magistrate to reject the sworn evidence of the appellant in his own defence that he parked his own taxi car registration mark KDH 553 at the same Kenatco Petrol Station, that he also there helped to repair punctures and that while there he could touch many cars. Thus the appellant was seeking to offer an explanation as to how his palm impression could have got on the outside of the bonnet of the complainant's car. In addition, he also told the court that he returned to the Petrol Station that evening where he went to sleep in his car till the next morning.

This is a second appeal. We are therefore concerned only with issues of law because a second appeal can only be entertained on a point of law: *R v Kalla* (1941) 8 EACA 66.

Mr Kirundi for the appellant argued the first three grounds together and submitted that the trial court and the High Court erred in admitting and relying on the palm impression without the negative thereof *in situ* being produced which deprived the appellant of the evidence: He also submitted that the High Court as the first appellate court misdirected itself in not independently re-evaluating the whole evidence, and in particular in not making its own independent finding on the appellant's contention in his appeal to that court that he had offered a plausible explanation as to how his palm impression could have got on to the bonnet of the complainant's car. Miss Mbarire for the Republic contended that the Judges must have reconsidered the entire evidence even though there is no independent finding as to how the appellant came to touch the complainant's car. Therefore the second ground of appeal raises a substantial issue of law.

The first ground of appeal that there was not sufficient evidence to sustain the conviction is a matter of law, though whether the evidence is sufficient (when there is some evidence) is a matter of fact: See *R v T Mohamed Ali Hasham* (1941) 8 EACA 93 and *R v Taibai Mohamedbhai*, (1943) 10 EACA 60.

As regards the third ground of appeal the omission to produce the negatives was an irregularity, nevertheless the expert evidence about the palm impression was admissible. The fourth ground is against the severity of sentence and so we will not touch it.

Before proceeding further we would point out that a remarkable feature, nay, an astounding feature of this case was that save for a portion of appellant's palm found on the bonnet of Samwel's car, no other print of anyone was found in any other part of the car, whether inside or outside, notwithstanding that three men, including the appellant, entered Samwel's car at the Petrol Station, and after stopping at Makadara, they stopped again near Mboya Hall in Jogoo road on the way where they got out of the car, also pulled Samwel out with them and took him into the bush. One of the men took out a pistol and started loading it. Some of the men left Samwel behind in the bush as already related. The appellant therefore entered the car at the petrol station and he got out of it in Jogoo Road. The appellant entered and got out of the car at least twice, and possibly three times if he was not one of the men left behind to guard Samwel in the bush.

The first appellate Court stated, correctly, that the evidence connecting the appellant with the alleged robbery was that of a palm print on the bonnet of the complainant's car. The learned Judges proceeded as follows:-

> "The learned magistrate properly considered the appellant's evidence that he could have touched the car at the petrol station before it was driven off and rejected this as a result of the complainant's evidence that he had just finished washing it. We have examined the record and we are satisfied that the appellant was properly convicted."

Does that amount to a re-evaluation of the evidence? Is it an independent decision? The task of an appellate Court on a first appeal from a conviction was discussed and settled by the decisions of the predecessor of this court in *Pandya v R* [1957] EA 336 and in *Shantilal M Ruwala v R* [1957] EA The totality of the two decisions is that,

> "On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on a manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

The learned Judges have not given their own views of the appellant's explanation in respect of his palm impression. The appellant's case in this respect was not reheard nor reconsidered. The judgment of the High Court did no more than to repeat the stages by which the learned Senior Resident Magistrate had arrived at the decision to reject the appellant's case. There is not the exhaustive scrutiny which was necessary of the whole evidence including the surrounding circumstances pertaining to the petrol station where both vehicles were, at times, parked. This common sharing of parking space at the petrol station which was the hook of fact on which the appellant sought to urge the plausibility of the explanation he offered under oath, was not considered and decided upon by the first appellate court. With the greatest respect to the two experienced Judges, it was a fatal error. We are unable to-day to surmise what their view on this crucial issue would have been. In the result, we allow the appeal, quash the conviction, set aside the sentence of imprisonment and corporal punishment as regards this case.

Finally, we would refer to a submission relating to sentence made by Mr Kirundi. He directly asked for the appeal to be allowed. He was also indirectly arguing for the appellant's acquittal when he made his academic submission that if an appeal is allowed, and there are two or more sentences running consecutively then the consecutive portions of the sentences also be cut off or reduced from all other sentence; therefore in the event of the appeal being allowed the ten years portion of the nineteen years

sentence should be reduced accordingly. No. When two sentences are ordered to run consecutively, they run parallel without affecting the length of each other. If one falls off by court upon appeal or otherwise, the other sentence remains alive, and it must still run its full length.

If Mr Kirundi's argument is right then two sentences of, say two years each, which have been ordered to run consecutively, would both come to an end in the event of one of them being set aside. That is not the law. The law is otherwise as we have stated it.

October 7, 1985

MADAN & NYARANGI JJ A, GACHUHI AG JA