IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Nyarangi JJA & Platt Ag JA)

CRIMINAL APPEAL NO. 14 OF 1985

Between

ANWAR KIPNGETICH .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, O'Kubasu J)

JUDGMENT OF THE COURT

November 12, 1985, **Kneller, Nyarangi JJA & Platt Ag JA** delivered the following Judgment.

Anwar Kipngetich appeals against the dismissal by the High Court (O'Kubasu J) of his appeal from decision of the R M Makadara to convict him of the offence of robbery contrary to section 296 (1) of the Penal Code. The grounds of appeal are briefly that the judge erred in confirming the conviction when the RM in his judgment had evaluated the evidence for the prosecution in isolation and failed to consider the unsworn statement, also that the judge erred in dismissing the appeal when the RM had misdirected himself by convicting on circumstantial evidence without holding that the inculpatory facts were incompatible with the innocence of the appellant and erred further in confirming the conviction despite the apparent misdirection on the part of the Resident Magistrate in shifting the burdens of proof to the appellant. The urging and submission on the last ground of appeal was that the sentence is unlawful.

The facts alleged by the prosecution at the trial were briefly as follows: On January 13, 1984 at about 8.45 am V F Shah (PW 1) was in the shop owned by his employers Common Textiles when three men entered and enquired about the prices of clothes in the shop while a customer purchased some clothes and left. Three other men entered the shop, making a total of 6. The men then closed the shop and successfully ordered PW 1 and his employee Zakaria (PW 2) to lie on the floor and to close their eyes. One of the gang next to Shah and Zakaria to ensure they didn't loose. All the same PW 1 was able to see one of the men take money at the counter as the other took rolls of cloth. PW 1 was hit with a *panga*. By the time PW 1 regained consciousness, the six were all gone. PW 1 was forced to surrender his car keys and his watch before they left. They took PW 1's car, 12 to 15 rolls of cloth, two scissors, a ladies' watch, keys to the store, other small articles plus about Shs 8,000 cash all totalling Shs 45,000. Later that day PW 1 was called by the police, whom the complainant had telephoned when he got up, and informed that his vehicle had been recovered. At the police station PW 1 found his scissors and two of the 12 or so rolls which had been stolen. PW 2's tale tallied with that of PW 1.

The rest of the prosecution evidence was given by five police officers, the first of whom, P C Edward

(PW 3), said that on January 13, 1984 about 2.00 pm he and other officers went on duty in a Peugeot Pick-up to Jogoo Road and while there at a junction they saw a Morris Mini being driven by the appellant who owned a Mazda car and whom PW 3 had known for nearly four years. There were several rolls of material in the Morris mini. On their way back to Jogoo Police Station, PW 3 and the others received a radio call from their control room that a Morris mini registration mark KPT 226 had been forcibly taken from a shop at Jogoo road. PW 3 and his workmates went round, found the Morris mini empty and without anyone in it in a nearby street, informed their controller as a result of which PW 4 and other police officers came to the scene between 3.00 pm and 4.00 pm were given the appellant's name and location of his shop resulting in subsequent arrest of the appellant at the Gorofani estate.

Before the arrest, the police officers who included PW 5 and PW 6 had been informed that the appellant had changed into a Mazda vehicle registration mark KQX 055 ie his car. The appellant's vehicle registration mark KQX 055 was found locked and abandoned near a petrol station in the neighbourhood and was towed to Jogoo Police Station by another officer. While inside the Police cells at the Jogoo Police Station, two police officers Cpl Mwaura (PW 5) and IP Wambua (PW 6) asked the appellant for the keys to his car. The appellant refused to oblige, whereupon in the Appellant's presence the two policemen forced open the boot of Appellant's vehicle by the use of screw–driver wherein they recovered two rolls of textile material and one pair of scissors.

Arguing the first ground of appeal, Mr Odero for the appellant referred to the judgment of the High Court and made the point that there is no mention of the appellant's unsworn statement in the judgment and that the prosecution evidence was considered to the exclusion of the defence. He said the omission to consider the defence is an incurable error of law.

Grounds 2 and 3 were argued together. The contention on behalf of the Appellant was that the prosecution relied on circumstantial evidence which the magistrate and the judge accepted without considering if there were inculpatory facts, and, if so, whether the facts were uncompatible with the innocence of the appellant and incapable of explanation upon any other reasonable basis than that of guilt. As a corollary to the above submission, it was argued that it did not occur to the magistrate and the judge to consider if the prosecution had proved its case as by law required, that the evidence as a whole supported the appellant's case that the rolls were planted, that the facts did not support recent possession and that the judgment of the High Court is inadequate in several material particulars.

Passing on the last ground of appeal, Mr Odero argued that the magistrate did not state the appellant's antecedents there is no note of his previous record or lack of it, that the value of the property, which is an extraneous matter, was wrongly taken into account, that there was no evidence that the particular offence was common and that as a result the sentence is an illegal one.

Learned State Counsel Miss Ngugi supported the conviction and agreed that the judge did not consider the defence of the appellant but submitted the error is not fatal. Replying to grounds 2 and 3 Miss Ngugi did not dispute that the conviction was based on circumstantial evidence. She yet thought that the evidence as a whole points irresistably to the guilt of the appellant who was identified during broad daylight by PW 3 who knew him well. Miss Ngugi disagreed with Mr Odero's submission that there are errors of law as regards sentence. She said failure to consider mitigation is here a curable irregularity under section 382 of the Criminal Procedure Code.

We remind ourselves that this is a second appeal and therefore that only issues of law fall to be considered.

The tasks of a first appellate court on first appeal from a conviction was declared by the decision of the predecessor of this court in *Pandya V R C* [1957] E A 336 at page 337 where the matter was put as follows:

> "On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate 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 materials 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 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 the 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 in approaching its tasks, applied or failed to apply such principles" ... see also *Shantilal M Ruwala v R* [1957] E A 570.

The judge upheld the conviction solely on alleged recent possession as if there was no necessity to deal with matters and issues outside the submissions of learned Principal State Counsel. The judge appears to have overlooked that the evidence against the appellant was purely circumstantial and therefore erred in failing to see if there were inculpatory facts incompatible with the innocence of the appellant and not capable of explanation on any other hypothesis than that of the appellant's guilt: *Rex v Kipkering Arap Koske & Kimure Arap Matatu* (1949) 16 EACA 135 page 136, *Musoke v R*, [1958] EA 715 at page 918 letter H. The judge did not, as he was duty bound, rehear the case as regards that important plank of the defence case. Thus the judge accepted the prosecution's case and proceeded to dismiss the appeal.

That is worse than commission of the error of looking separately at the case for the prosecution and the case for defence. See *Okethi Okale and Others v R* [1965] EA at page 559, letters F-G. The appellant put forward a defence in his unsworn statement and the judge should have considered it, having due regard to the evidence as a whole: *Wibiro alias Musa v R* [1960] EA 184. For a reason which will emerge later we do not propose to enter upon a detailed discussion of the evidence.

The most substantial criticism of the judgment appealed against is that it is silent about the prosecution evidence of the episode along Jogoo Road. The judge omitted to reconsider and to re-evaluate the evidence that the appellant was seen driving a Morris Mini which had allegedly been recently forcibly taken from a shop at Jogoo Road, in which there were several rolls of cloth and which was later found abandoned and empty. Also the evidence before the magistrate that the appellant was reported to have changed into his Mazda was not weighed and decided upon. There were findings on credibility of the various witnesses. So, on this second appeal, it is a question of law if the judge applied the correct principles. We have not the slightest doubt that the judge failed in his task. The appeal was not heard properly.

In *R v Vashanjee L Dossani* [1946], 13 EACA 150 the Court of Appeal for Eastern Africa said, and we agree, that

> "An order for a re-trial is the proper order to be made when the accused has had a satisfactory trial" see also *Braganza v R* [1957] E A 152 *Pyrall M Bassan v R*, [1960] EA 854 and *George Karanja Mwangi & others v R* Criminal Appeal No 132 of 1983 (unreported)

A re-trial may also be ordered if it is in the interest of Justice and if no injustice is likely to be caused to the appellant.

Ahmed Ali D Sumaar V Republic [1964] EA 481, *Horace Kiti Makupe v R* Criminal Appeal 93 of 1983 (unreported) and *Mohamed Rafiq v R* Criminal Appeal No 56 of 1983 (unreported). All this applies to the hearing of an appeal and not only a re-trial.

Our conclusion in conformity with the decisions to which we have referred with approval, is that if ever there was an appeal which called for an order for a rehearing the instant one provides a prime example. Accordingly, the judgment of the High Court is set aside and it is ordered that this appeal shall be listed before a different judge of the High Court for hearing according to law. The appellant shall in the meantime remain in custody.

Those are the orders of this court.

DATED and delivered at Nairobi this 12th day of November , 1985.

A.A KNELLER

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

.....

Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR