



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO. 117 OF 1984

BETWEEN

NJENGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The short point remaining for our consideration on this second appeal is whether the failure of the learned Senior Resident Magistrate at Nyeri, (Mr Ombonya), who took over the station from Mr Omondi-Tunya after the evidence of the complainant only had been given, to inform the appellant and his co-accused of their right to have that witness resummoned and reheard under section 200(3) of the Criminal Procedure Code, occasioned a failure of justice.

The charge was one of robbery contrary to section 296(1) Penal Code, committed in the house where the complainant and her children were asleep at about 2 am on the June 27 1983. The prosecution case depends on visual identification and recognition of the appellant by the complainant and David Gitau Muhia (PW 3), who was called after the succeeding magistrate resumed the trial. On the basis of his acceptance of the prosecution evidence, the magistrate rejected the evidence of the appellant and his co-accused, and of their respective witnesses, holding that the purported alibis did not in any event cover the time of the robbery. The first appeal was summarily rejected under section 352(2) Criminal Procedure Code.

In a case depending on visual recognition, where the principal witness is heard by one magistrate and the second identifying witness by another, we think it essential that the requirements of subsection (3) should be observed, as it is for the protection of an accused person. In *Jason Akumu Yongo v Republic* Criminal Appeal 1 of 1983, we quashed a conviction where the particulars of the charge were altered and there was no compliance with the second provision to section 214(1) of the Criminal Procedure Code, because we could not be sure that the non-compliance with that which we regarded as an essential requirement has not occasioned a failure of justice.

We take a similar view in this case. We cannot be sure that if the second magistrate had seen and heard both identifying witnesses, he would necessarily have convicted. We cannot say that the failure caused no prejudice to the appellant. The first appeal should not have been summarily rejected.

In consequence, we allow the appeal. We have considered the exercise of our powers to remit the case to the subordinate court for a retrial under subsection (2) of section 361 of the Criminal Procedure Code,

bearing in mind the principles and authorities we enumerated recently in this regard in *George Karanja Mwangi and others v Republic*, Criminal Appeal 132 of 1983, and in *Mohamed Rafiq v Republic*, Criminal Appeal 56 of 1983.

However, after listening to Mr Bali-Sharma's submission on behalf of the appellant in relation to the alibi and the quality of the identification, we have decided not to do so. Miss Mbarire, for the Republic, does not support the conviction, or the summary rejection of the first appeal. The conviction is therefore quashed, the sentence set aside and the appellant is directed to be set at liberty.

Dated and Delivered at Nairobi this 16th day of November 1984.

A.R.W.HANCOX

.....

JUDGE OF APPEAL

AG.. Z.R.CHESONI

.....

JUDGE OF APPEAL

AG. J.O.NYARANGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR