

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 558 OF 1982

CONSOLIDATED WITH

CRIMINAL APPEAL NO 559 OF 1982

ABDU SHIVALE.....APPELLANT

ABDALLAH AZIZ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants Abdu Shivale son of Hussein and Abdallah Aziz son of Kimaite were originally jointly charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code (Cap 63). They were subsequently convicted of a lesser offence of robbery contrary to Section 296 subsection (1) of the Penal Code and sentenced each to a term of thirty six months' imprisonment and eighteen strokes of the cane. It is against this conviction and sentence that they are appealing.

The victim of the alleged robbery was a Doctor Satish Upadhya, who had on the material evening, February 8, 1982, gone to drop off his nurse at Eastleigh. He was driving his motor vehicle Volkswagen by make registration No KHF 858. He testified that just after stopping and opening the door to drop off the nurse, he all over sudden saw two people on each side of his car. His driver's door was opened for him and he was told to get out. An order which he obeyed, thereby letting in the four people who quickly drove off. Just before the gang drove off, one of them took his wrist watch and some Kshs 200 that he had on him. Although the incident happened very fast, he believed that one of the people was armed with a pistol, although no violence was used on him.

Inside his car, he had his doctor's bag containing the usual doctor's things like drugs and documents. The bag Exh 1 he later identified at Pangani Police Station a few days this incident.

On this night at about 9.00 pm in Kariobangi area was PW 2 Tadeo Ndabuninzi, a Kanu Youth Leader in the area on patrol with eighteen of his Youth Wingers. PW 3 and PW 4 were some of the members of his squad. According to these witnesses they met with five people, one of these five people was carrying a bag and another a brief case. Walking in front of this group was the first and second appellant with the bag Exh 1. PW 2 flashed his torch and asked the group what they were carrying. At this juncture, three of the people ran away while the first and second appellants were left behind. The second appellant then replied that they were carrying religious books which they were in the process of selling. On being asked to open the bag it was found not to contain religious books as the witness had been informed, but it instead PW 1's instruments and documents. None of these items belonged to any of the appellants. The two appellants were handed over to Inspector Oyaro. It is before this, while the witnesses were struggling to arrest the second appellant he dropped a bunch of keys which turned out to belong to PW 1 as well. A few days afterwards the witness found the complainant's car abandoned in the same Kariobangi area. The learned State Counsel upon these facts supported the appellant's conviction and sentence, plus the repatriation order made by the learned magistrate.

The only material issue raised in the appellant's petition of appeal in the discrepancy on record in the evidence of PW 2, PW 3 and PW 4 as to who was found with the bag Exh 1. The learned Senior Resident

Magistrate very ably addressed his mind to this issue and had this to say: "There is a slight discrepancy as to whether it was the first or second accused who had the bag. This is not material. The second accused told PW 2 that the bag was his and he is the one who struggled most when he was being arrested."

This court upon evaluation of the written word is satisfied that the learned Senior Resident Magistrate had overwhelming evidence upon which he founded the conviction of the appellants.

As for the appeal against sentences the learned state counsel has supported the imprisonment and sentence of thirty six (36) months and eighteen (18) strokes of the cane awarded to each appellant. I think the eighteen (18) strokes are excessive. The appeal of each of the appellants on sentence is dismissed save for the order of corporal punishment which is varied by awarding each appellant six strokes of the cane and that recommendation be made to the Minister concerned for the appellants who are clearly Ugandans to be repatriated to their own country concerned at the end of their imprisonment terms.

Order accordingly.

Dated and Delivered at Nairobi this 1st day of December 1982.

E.OWUOR

AG. JUDGE