



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 19 OF 1981

BETWEEN

ACHIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of robbery, contrary to Section 296(1) of the Penal Code, by a Resident Magistrate at Kisumu, and sentenced to 31/2 years imprisonment and four strokes of corporal punishment. He appealed to the High Court at Kisumu, where his appeal was summarily rejected. Mr Owino, for the appellant, made it his first ground of appeal, on a second appeal to this Court, that the first appeal should not have been summarily rejected, as it raised several points of law, such a misdirection as to the onus of proof by the learned magistrate, and a complaint that the evidence of witnesses described as accomplices had been relied on without corroboration. As we have pointed out in earlier appeals at this session, it is physically impossible for a single judge at Kisumu to hear the large and ever increasing number of criminal appeals filed in the local Registry, and it is not surprising that an occasional appeal is summarily rejected which does not fall precisely within the provisions of Section 352(2) of the Criminal Procedure code; and the instant appeal is, we think, one of these. There is, however, no point in sending this appeal back to the High Court for hearing, as there is no judge in residence at the moment and apparently no prospect of one in the near future. In the interests of the appellant we will undertake the task ourselves.

The background of this case is that on March 28, 1980, a lorry laden with such items as cases of kimbo, omo in small and giant sizes, cowboy and blue band, which together with the lorry were said to be worth over Kshs 200,000, left Kisumu at about 6 am for Webuye and Kakamega where the goods were to be delivered to customers who had ordered them.

The lorry was first filled up with petrol and had only traveled a short distance from Kisumu towards Kakamega when, according to the driver (PW 1) and a clerk (PW 3), both of whom were employed by the owner of the lorry and were sitting on the front seat, as it was going slowly up a steep hill, it was held up and forced to stop by two armed men, one holding a gun and the other a pistol. They were joined by three other men, one of whom was armed with a panga.

The driver and the clerk, and a turn-boy who was not called as a witness, were dragged out of the car and

bundled into the back of the lorry, which was then driven off. After a while the lorry was stopped, the three men were ordered out, they were blindfolded and their hands tied behind their backs and loaded into a car which drove off, apparently along a rough road, and taken to a spot in a sugar cane plantation, where they were told to lie down and keep quiet, under threat of being shot, and covered with dried sugar cane plants and grass.

There they were discovered by a watchman employed on the sugar estate (PW 5) and some women who had seen a motor vehicle driving out of the sugar cane. PW 5 saw two men, one armed with a gun and the other with a revolver. He was ordered to lie down. He noticed the legs of a man lying down, covered in vegetation. Then the women started to scream, raising an alarm. PW 5 was able to escape. He later saw some men emerge from the sugar cane, with their hands tied behind their backs, asking to be taken to the police. In our view the evidence of PW 5 strongly corroborates the evidence of PW 1 and PW 3 as to the circumstances of their capture by robbers, and as to the arms carried by the robbers, and removes from our minds any suspicion that PW 1 and PW 3 were in any way implicated, or willing participants, in the robbery. We see no merit in the grounds of appeal to the effect that PW 1 and PW 3 were accomplices and that they should have been treated as such by the learned magistrate. The empty lorry was subsequently found abandoned between Kisumu and Ahero.

Mr Owino is on stronger ground when he attacks the learned magistrate's judgment. Not only does it omit any reference to the burden of proof in criminal cases, but the magistrate started off by examining the defence case, and finding part of it to be untrue, before embarking on an examination of the prosecution case, thus laying himself open to the criticism that he may have thought that some sort of onus lay on the appellant. It is wrong to look separately at the case for the defence and that for the prosecution. The evidence must be looked on as a whole, and it is not appropriate to make findings until the whole of the evidence has been evaluated, see *Okethi Olale v Republic* [1965] EA 555. However, reading the judgment as a whole, we do not think that the learned magistrate, after his final examination of the evidence as a whole, can be said to have misdirected himself as to where the onus of proof lay. His final conclusion is stated as follows:

"For the above reasons I am convinced and satisfied that the accused has been properly identified as one of the persons in the group who robbed the lorry with its contents and he has been properly charged ... and I find him guilty and convict him."

After careful consideration, we think that the undoubted defects in the early part of the judgment have been cured by the magistrate's subsequent approach to the case as a whole, and that no failure of justice has been occasioned.

We agree with learned Senior State Counsel, Mr Mugu, that the vital issue in this appeal is the question of identification. As to this we are satisfied that, when the lorry was held up, there was sufficient daylight to make visual identification possible. PW 1 identified the appellant in court, and had picked him out at an identification parade held on June 17, 1980. PW 3 also identified him in court, and according to the officer who held the identification parade, also picked him out at the parade. For some strange reason, PW 3 was not asked about the parade when he gave evidence. This was probably an oversight on the part of the prosecutor, a police officer. Be that as it may, PW 1's evidence of identification was fully corroborated by PW 3's evidence. The evidence of identification was accepted as reliable by the learned magistrate, and some assurance is lent to its reliability by the fact that, when the appellant was arrested, two giant packets of Omo and five tins of cowboy were found in his house. Admittedly these items are readily available, but it is not without significance that similar goods were being carried on the hijacked lorry.

Mr Owino has said all that could be urged on behalf of the appellant, but we are nevertheless left with no reasonable doubt in our minds that the appellant was properly convicted, on good and reliable evidence, and we order that this appeal be dismissed.

Dated and Delivered at Kisumu this 22nd day of June 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR