IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAW & MILLER JJ A & SIMPSON AG JA)

CRIMINAL APPEAL NO 55 OF 1980

BETWEEN

KINYANJUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the judgment of the High Court at Nairobi (Hancox & Sachdera JJ) in Criminal Appeal No 642 of 1978 dated 7th December, 1978)

July 21, 1981, the following Judgment of the Court was delivered.

On 18th July, 1977 at about 9.10 a.m a gang of four men entered a shop called Sunlight Watch Co in Tubman Road, Nairobi belonging to Nassir Sheikh. One produced a gun, another a *panga*. Ordering the proprietor, his assistant and a customer to lie down they removed 163 watches from a glass show-case and ran out of the shop to a waiting car. The proprietor was kicked as he lay on the floor, the assistant was struck on the head with a gun-butt and the customer was shot in the shoulder when he tried to prevent the escape of the man with the gun. At 11.30 a.m Insp Mbuthia lifted 18 finger and palm prints which he described as fresh including one which was found on top of the show-case. A year later the appellant having been arrested in connection with another offence had his finger and palmprints taken and as a result of comparison of these with the print lifted from the top of the show-case he was charged with robbing Nassir Sheikh of 163 watches on 18th July, 1977, contrary to section 296(2) of the Penal Code. He was convicted and sentenced to death. His appeal to the High Court was dismissed. He now appeals to this Court.

The conviction is based solely on finger-print evidence. The appellant having cross-examined the police witnesses suggesting that the fingerprints used for comparison had not been obtained from the Sunlight Watch Co shop gave evidence on oath to the effect that he had visited the shop the previous day, 17th July, with his Ugandan girl-friend to choose a watch for her but finding none suitable they went to another shop. He had touched the counter, he said and the finger-prints were his.

Nassir Sheikh said he had cleaned all the finger-prints from the counter that morning before he opened the shop and there had been only one customer, the European who was there when the gang entered. He explained that he wiped the counter clean every morning and at intervals throughout the day to ensure that customers could see the watches under the glass top. If the appellant had been in the shop the previous day his finger-prints could not have remained there. At an identification parade held after his arrest none

of the 3 persons in the shop picked out the appellant although he has quite a distinctive appearance and if he was one of the robbers one would have expected him to have been recognised.

The European customer said he had attended 4 parades. No evidence of these parades was called as it should have been by the prosecution. Crossexamined by the appellant Nassir Sheikh said –

> "After the parade I was called by the Police Officer who was investigating the case. He asked me if I knew you, and I said I did not know you. You claimed you had come to my shop with another Asian."

The learned magistrate did not believe the accused's story of visiting the shop the previous day as a customer.

Mr Hayanga who appeared before us for the appellant criticised as a misdirection the statement of the magistrate that "it is established law that it is the accused to explain how his finger-prints came to be found at a scene of crime." This of course is not correct. The appellant had only to raise a reasonable doubt as to how his finger-prints came to be on the glass show-case. It is clear that the appellant's evidence raised no such doubt. He said –

> "I have no doubts in my mind that the accused's story is false" and again.
>
> "… his explanation is pure lies which I have rejected with no difficulties at all".

Our main concern however relates to the adequacy of the finger-print evidence. Inspector Mbuthia produced a photographic print showing what appears to be a palm-print with one part emphasized by a square. The witness said it was a finger-print he lifted. The expert who compared the prints said it was the left palm. There is no photograph of the surface on which the palm-print was made nor was the negative produced. The palmprint might have been made anywhere. Links in the chain of evidence are thus missing.

The appellant had a previous conviction. His finger-prints must have been in the records. The question therefore arises. Why was the appellant not traced earlier and arrested on suspicion?

When he was arrested on 24th May, 1978 on suspicion of involvement in another case his finger prints were taken and Sgt Muchira took them to Criminal Records Office for comparison to see if the appellant was suspected of any offence. These finger-prints according to the evidence showed that the appellant was connected with the Sunlight Watch Shop robbery. They were not produced. The appellant was re-arrested on 7th June, 1978, and on 21st June, 1978 Cpl Murura took the finger-prints of the appellant again at Kamiti Prison. These were produced. The form states that they were taken by Insp Njuguna. He said he wrote his name on the form because they were taken under his instructions and Cpl Murura confirmed that Insp Njuguna filled in the form. Cross-examined by the appellant Cpl Murura said

> "I took your finger-prints at Kamiti Prison. Before you were taken to Kamiti I had taken your finger-prints…As to how many finger prints are required for identification be answered by an expert."

The appellant was obviously suspicious about the number of finger-prints. He had earlier asked Sgt Muchira,

> "I put it to you that you took my finger prints first then sent them to IP Mbuthia PW1 to develop and pretend that he got them from the Sunlight Watch shop so as to fix me."

The sergeant replied "it is not true that I am the one who supplied Mbuthia with the finger-prints we developed."

We do not suggest that there is any truth in the appellant's allegation but we do consider that if a person is

to be charged with an offence and particularly a capital offence – on the basis of finger-print evidence alone that evidence must leave no loop-holes, no room for doubt. Perhaps the inconsistencies and the reason for more than one set of finger-prints for comparison could have been explained but no satisfactory explanation was offered.

Neither the learned magistrate nor the learned Judges of the High Court appear to have examined with care the exhibits and the evidence relating thereto. We think that had the Judges of the High Court observed the discrepancies and taken into account their own observations on the failure of the police to lead evidence of unsuccessful identification parades they might well have come to a different conclusion. Where finger-print evidence is the only basis for a conviction as here it is unsafe to convict unless the circumstances point to the guilt of the accused to the exclusion of any other reasonable hypothesis. One of the circumstances attending this case is the failure on the part of 3 eye-witnesses to identify the appellant. We do not think that this aspect of the case received the consideration it merited in the courts below. It is in our opinion unsafe to allow the conviction to stand.

The appeal is allowed, conviction quashed and sentence set aside.

July 21, 1981

LAW & MILLER JJ A & SIMPSON AG JA