IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 47 OF 1981

BETWEEN

JOSEPH OBANGE OKITO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

This is a second appeal. The first appeal was summarily rejected by the High Court under Section 352(2) of the Criminal Procedure Code.

The appellant was convicted by the Resident Magistrate, Kisumu, of stealing Kshs 15,390 by servant, contrary to Section 281 of the Penal Code. He was sentenced to 21/2 years imprisonment.

This is the third second appeal before us this morning arising from a summary rejection of the first appeal. In the first two of those three appeals - *Obiri*, Criminal Appeal No 58 of 1981 (Kisumu); *Wambura* Criminal Appeal No 53 of 1981 (Kisumu) - we stated the practice to be followed before an appeal is summarily rejected by the High Court.

The appellant was a travelling salesman employed by Endesha Limited, Kisumu. His job was to sell his firm's goods which he carried in a van, to traders at different places. On November 27, 1980, he set off on his journey with the driver of the van with goods which had been issued to him by the firm. He returned to Kisumu on December 2, dropping the driver on the way at about 7.30 pm at the latter's own request. The appellant then went to have a drink in a bar near Kisumu at about 8 pm. He parked the van about 35 yards away from the bar. In his sworn testimony in court the appellant claimed that he left the proceeds of sale of goods - cheques and invoice book in the glove compartment, and the cash and cash sale book in his briefcase which was lying on the front seat of the van. There was a watchman there. He came out of the bar after about thirty minutes later to check the van. The watchman was not there. The glass of the pilot window of the van was smashed and the door open. His brief case and coat were missing as also the cheques from the glove compartment. He found the invoice book and a pocket calculator lying on the floor of the van. He reported to the owner of the bar who came, out, saw the van, and advised the appellant to make a report to the police which the appellant did over the telephone. The police arrived. He drove the van to the police station. They searched his house but found nothing. He also made a report of the loss to his branch manager. He was arrested, prosecuted and convicted. The only direct prosecution evidence against the appellant was about the amount of the loss, and that he failed to bank cash daily in accordance with the regulations of his firm a copy of which was given to him. The magistrate said in his judgment that a copy of the firm's regulations may not have been served upon the appellant. However, on

his admission the appellant had sold goods to the value which he had in his possession and which he could have banked according to his firm's method of banking the money; it was odd that the appellant should need a soda at 8 pm when he was a short distance from home in Kisumu town. The magistrate said he found it hard to believe that in the wake of country wide knowledge that thefts from motor vehicles were prevalent, the appellant kept the brief case full of money on the front seat in an unattended van to take a short break in the bar. The magistrate said the appellant had faked the theft.

The learned judge who summarily rejected the appeal stated it was proper and fair to the appellant to set out the reasons for summary rejection of the appeal at rather greater length than usual on summary rejection, which he did, thereby defeating the object of Section 352(2). With respect, it would have been a far more practical judicial deed if he had heard the appeal in open court instead. The appellant would have had the satisfaction of having been granted a hearing by the court. The learned judge would have put himself to no greater inconvenience that he did by writing out his reasons for summarily rejecting the appeal in his Chambers. It may be odd, even unexplainable conduct on occasions, but people do split up their belongings and they do leave them in unattended vehicles which, possibly, is one of the main reasons for thefts from vehicles. When the magistrate said that the appellant left the unattended van 35 yards away from the main entrance of the bar, particularly at 8 pm when it was fairly dark, he over-looked the evidence of the owner of the bar who said that he could see the van from the front door of the bar, and that there was light.

The learned judge said, without it being established by evidence, that glass outside the van suggested a break-out rather than a break-in. Like the magistrate the learned judge also said the very fact of going to a bar for thirty minutes at least was capable of raising suspicions. It is common knowledge that gents walk into a pub for a quick half bitters before catching the evening underground home.

The learned judge shifted the onus onto the appellant when he said that the watchman on duty was not called, and no attempt to trace him or to ask for an adjournment to do so was made. The police had been told about the watchman. The owner of the bar confirmed that he had a watchman at the door who left on December 14, and he was on duty that day looking after parked vehicles. The police did not give evidence of any investigations carried out by them.

The whole incident of the theft happened within about thirty minutes, for a part of which time the appellant was sitting in the bar having his drink. Neither the magistrate, nor the learned judge, considered that the evidence against the appellant was circumstantial. They did not consider whether, nor did they decide, it was compatible only with the guilt of the appellant, and unexplainable upon any other innocent hypothesis. We are unable to say that had they done so, in particular in view of recognition of prevalence of thefts from vehicles, and that the appellant's visit to the bar could be merely a conjunction of coincidence, the magistrate would still have convicted, and the learned judge upheld the conviction, of the appellant.

State counsel did not support the conviction.

For these reasons, we allow this appeal, quash the appellant's conviction and set aside the sentence. He is to be set at liberty.

As **Miller** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 30th day of November 1981.

C.B.MADAN

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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 atrue copy of the

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DEPUTY REGISTRAR