



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CRIMINAL APPEAL NO. 79 OF 1981

BETWEEN

JOHN ANDITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA The appellant was convicted by the Resident Magistrate, Nairobi, of burglary contrary to Section 304(2), and stealing from a dwelling house contrary to Section 279(b), of the Penal Code. His appeal to the High Court was dismissed. He appealed again, to us.

We allowed the appeal, quashed the convictions and set aside the sentences. We now give the reasons for our judgment.

The house of Peterson Njoroge was broken into on the night of January, 21, 1981, and a good deal of his property worth about Kshs 6,000 stolen therefrom.

A neighbour, Willibroda deposed that she saw the appellant by the street lights coming out of Njoroge's house with a suitcase at 7.30 pm. When Willibroda spoke to him and asked him what he was doing, he pushed the gate which hit her. The appellant then dropped the suitcase and ran off. The suitcase contained several articles, the property of Njoroge which he identified.

Willibroda deposed that she saw the appellant again with another man coming towards her house at lunch time the next day. She recognised the appellant as the man she met the previous evening carrying Njoroge's suitcase. She saw the appellant pick up an electric iron (described in the record as an iron box) which was lying hidden in grass in front of the complainant's house and wrap it in paper which he had in his hand. Willibroda pointed out the appellant to Njoroge who was repairing his door at the time. The appellant's friend ran off. Njoroge took the appellant and the electric iron which belonged to him to the police station.

Mr Ogutu for the appellant made it his main ground of appeal that the evidence of identification was unsatisfactory in that it was the evidence of a single eye-witness at night, and that neither court below warned itself of the dangers inherent on convicting on the uncorroborated evidence of a single witness in circumstances unfavourable to accurate identification. Mr Ogutu also submitted that evidence relating to the appellant picking up an electric iron out of the grass in front of the complainant's house was irrelevant, as any passer-by would have stopped to pick up an electric iron which he happened to notice

was lying in the grass. We saw some merit in this submission, and thought that this appeal should be decided solely on the evidence relating to the events of the night of January 21.

The appellant was convicted on the evidence of a single identifying witness Willibroda. We once again set out, as a general guidance, the following passage from *Abdala Wendo* [1953], 20 EACA 166 at p 168:

“Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In the present case Willibroda impressed the magistrate as a witness of truth whose evidence could be relied on. We do not quarrel with his assessment of her honesty but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the magistrate erred in our view. It was night time. Willibroda saw the appellant only by street lights. On the facts the conviction could not stand. *Roria* [1967], EACA 583; *Kamau* [1975] EACA 139.

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

Dated and Delivered at Nairobi this 20th day of November 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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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