IN THE COURT OF APPEAL

AT KISUMU

(Coram: Miller , Potter JJ A & Simpson Ag JA)

CRIMINAL APPEAL NO. 35 OF 1980

BETWEEN

JOSEPH ONDU OKUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the decision of Scriven J in the High Court, Kisumu, on 27th June 1980 in Criminal Appeal No 45 of 1980)

JUDGMENT OF THE COURT

The appellant was convicted by the Resident Magistrate's Court of robbery, contrary to section 296(1) of the Penal Code, on a charge consisting of two counts affecting two victims in the same incident. His appeal to the High Court, Kisumu, was dismissed.

The grounds of appeal in this second appeal are as follows: (1) the High Court judge erred in law in not finding that the trial magistrate had misdirected himself on the onus of proof; (2) the High Court judge erred in law in not giving the benefit of the doubt whether or not the prosecution had discharged the burden of disproving the appellant's alibi in view of the magistrate's finding that it was difficult to find flaw in the appellant's alibi; (3) the High Court judge misdirected himself in law in not holding that the identification parade was not held according to the Judges' Rules regarding the conducting of such parades; (4) the High Court judge erred in law in not finding that the trial magistrate erred in taking into account the appellant's exercise of his statutory right under section 211 of the Criminal Procedure Code to make an unsworn statement; (5) the High Court judge having found that the trial magistrate used offensive language to the appellant's advocate and further having found the same to be "quite an unacceptable judicial approach" erred in law in not giving the benefit to the appellant; and (6) the High Court judge erred in law in not complying with section 169 of the Criminal Procedure Code.

Mr Owino first argued ground (6). In support of this ground he submitted that the judgment of the High Court was inadequate to satisfy the section. But this section does not apply to judgments on appeal. The duty of a court of first appeal is laid down in *Misana v The Republic* [1967] EA 334, which case was recently applied by this Court in Kisumu in *Mosee v The Republic* [1980] page 112, *ante*. In the present case, however, upon examination of the record of proceedings in the Magistrate's Court, it is clear that the important point for determination was whether the appellant was satisfactorily identified by the victims of the robbery; and the above judgment gives in broad outline the reasons for the judge's agreeing with the magistrate's finding that the appellant was properly identified. It cannot therefore be said that *Mosee v The Republic* and *Misana v The Republic* were not followed.

Under grounds (1) and (2) Mr Owino, in reliance on certain passages in the judgment of the magistrate, suggested that the magistrate had misdirected himself with respect to the burden of proof in disproving an alibi. He referred us to *Ssentale v Uganda* [1968] EA 365. After careful consideration of his judgment we are satisfied that the magistrate in no way indicated that any burden rested on the appellant with respect to his alibi. We also consider that the issue of alibi was adequately dealt with by the judge. This is a case where the alibi was disproved by the strength of the prosecution's evidence of identification.

Under ground (3) Mr Owino attacked the conduct of the identification parade. He first complained of the evidence of the complainant, ie of her saying "some were short, some were tall." The police inspector, who conducted the parade, said "There were eight members of the parade of similar height and age as the accused". He was not cross-examined on this point. We see no merit in this submission. Secondly, he complained that the complainant had said "I had to identify someone", and another witness said that he told her that the police wanted her to identify someone.

The inspector, on the other hand, said that he told the complainant that a member of the gang might or might not be on the parade. He does not appear to have been cross-examined on that point. If the inspector's evidence is accepted, and we see no reason why it should not be, rule 12 of the "Instruction for Identification Parades" was complied with. We do not see how an identification parade can be rendered unfair by anything said of this kind prior to the parade by a person who had no responsibility for the parade and was not a police officer. Moreover, it does not surprise us that ordinary people should refer to a parade as being held for the purpose of identifying "a suspect who is on the parade" as opposed to "a suspect who may or may not be on the parade".

Under ground (4) Mr Owino submitted that the magistrate erred in saying8 that the appellant had taken advantage of his right to give an unsworn statement and thus avoid cross-examination. He relied upon *Lubogo v Uganda* [1967] EA 440. It is made clear in that case that it is open to the judge to comment on the fact that an accused person has not given sworn evidence, but he should be cautious in doing so, and this consideration should never be used to bolster a weak prosecution case. In this case we do not consider that the magistrate's comment was indiscreet, or that this was a weak case. Ground (5) was not pursued.

We accordingly order that this appeal be dismissed.

Appeal dismissed.

Dated and delivered at Kisumu this 1st day of December 1980.

C.H.EMILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

SIMPSON

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR