IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJ A)

CRIMINAL APPEAL NO. 56 OF 1980

BETWEEN

JOSEPH WAIGURU WANG'OMBE .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against decision of Trevelyan and Chesoni JJ in the High Court, Nairobi, on 8th July 1980 in Criminal Appeal No 393 of 1979)

JUDGMENT OF THE COURT

We are now stating the reasons for the dismissal of this second appeal by us against conviction for robbery with violence, contrary to section 296(2) of the Penal Code.

The complainant, Joseph King'ori Githinji, had a kiosk at Gichiamwangi village. On the evening of 13th April 1979, an intruder armed with a pistol pushed his way into the complainant's bedroom and robbed him and his wife of Shs 1055 and the complainant's wrist watch (which had a cracked glass), threatening them with violence during the course of it. The robbery took about ten minutes. The complainant and his wife had not known the intruder previously.

The appellant was arrested two nights later in Njau's night club, Murang'a, where he had fired a pistol, and where also he had earlier given the complainant's watch to a woman named Lucy for favours to come later.

At the trial the appellant declared that he had no witness to call. He made an unsworn statement in Court during the course of which he said that he knew the complainant and his *kiosk* where he bought his things; that he lived at Murang'a where he was in Njau's night club on 13th April, and he did not leave Murang'a for any place. He also denied he had a pistol on 13th April but admitted that a pistol had been found in his possession when the police searched him in the night club on 15th April. He denied firing it. He also said the pistol was given to him loaded with five bullets by a friend who had only one solitary name, King'ori; and who asked him to deliver it at his house, the keys of which he also gave him and then left. He did not know King'ori's whereabouts.

The trial magistrate, and on appeal the judges of the High Court, made concurrent findings of fact that the appellant fired a pistol, also that he gave the complainant's watch to Lucy on 15th April in the night club.

Some days later the complainant and his wife separately identified the appellant at two identification

parades as having been the intruder who robbed them.

The appellant's appeal was argued before us by Mr Hayanga with his usual verve and vigour. We will deal with his arguments *seriatim*.

Mr Hayanga argued that the appellant's identification was not satisfactory: the evidence as to which was, first, by way of visual identification by the complainant and his wife and, secondly, by way of the two items of the gun and watch. Mr Hayanga said the appellant's visual identification was not such as to base a conviction upon it. He also criticised the following passage in the magistrate's judgment:

> I believe the two witnesses that they had opportunity to see the [appellant] when he entered the room and pointed the gun at them and ordered them to lie down.
>
> Their story is corroborated by the finding of the pistol on the [appellant] two days after the robbery at Murang'a and also by the fact that he gave a wrist watch which had been taken from the [complainant] to [Lucy].

While the magistrate was right in saying that the two witnesses had had an opportunity to see the appellant, we do not consider that the finding of a gun on the appellant's person in the night club corroborated the story of the complainant and his wife. The gun was not identified as the gun which was used by the robber on the evening of 13th April. However, the possession of the complainant's watch and the giving of it to Lucy by the appellant two days after its theft raised a strong presumption that it was stolen by the appellant, thus providing corroboration of the story of the complainant and his wife. In order to evaluate the evidence of the finding of the gun on the appellant's person we bring to mind the words of sections 7 and 11 of the Evidence Act, that is that facts are relevant which constitute the state of things which afforded an opportunity for their occurrence or transaction or if by themselves or in connexion with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Mr Hayanga, relying upon *R v Long* (1973) 57 Cr App Rep 871, 877, submitted that as in this case guilt turned upon visual identification by one or more witnesses, the two courts below failed to point out the circumstances in which such identification was made and the weaknesses in it; that a reference to the circumstances usually requires the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position he was in, his distance from the accused and the quality of the light.

We are satisfied that both the trial magistrate and the judges appreciated what the issues were and about what they had to be sure. They exercised their minds on these important matters. The circumstances for seeing the appellant, which enabled his identification later by the complainant and his wife, were favourable. There was light in the bedroom and enough time to see rum and what he did during the robbery. The complainant and his wife were in close proximity to the appellant in the bedroom.

Mr Hayanga next submitted that both courts below failed to consider the appellant's defence of alibi and they misdirected themselves on the principles applicable. Mr Hayanga further said it was a serious deficiency in the judgment of both lower courts that there was no reference in them to onus of proof, and the prosecution should have called evidence to relate what action the police took to check the alibi. Mr Hayanga further said that the treatment by the courts below gives the impression that they considered only a part of the defence under a presumption that the appellant's alibi was either not material or he had to prove it.

Mr Hayanga referred us to the judgment of Udo Udoma CJ in *Ssentale v Uganda* [1968] EA 365, 368, who said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion.

We understood Mr Hayanga to tell us that the police failed to investigate whether the alibi was true or not, also that the following passage in the judgment of the High Court indicates that the burden of proving the alibi was thrown upon the appellant:

> In so far as the alibi is concerned, all that the appellant said was that he was at the night club on the night of the robbery and "did not leave Murang'a for any place", ie he could not have gone to the complainant's premises because it [*sic*] is elsewhere. This needed to be weighed with the evidence of the prosecution particularly of the complainant and his wife, and his denial of Lucy, particularly with her evidence.

The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it.

In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) "the prescribed period" means the period of seven days from the end of the proceedings before the examining justices. Section 11 (1) applies where the defendant alone is to testify that he was elsewhere at the material time; see *R v Jackson and Robertson* [1973] Crim LR 356.

The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence.

To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!

Mr Hayanga's last submission was that the prosecution case against the appellant was not proved beyond reasonable doubt. The trial magistrate thought that it was, the two judges of the High Court thought that it was, and we also think that it was. If we had had an inkling to the contrary, we would have examined it; and, if required, we would have unhesitatingly acted otherwise than we did, probably without embarking upon a long dissertation of the other submissions made to us by Mr Hayanga. We firmly believe that no accused person must be deprived of his right to a fair trial.

Appeal dismissed.

Dated and delivered at Nairobi this 11th day of December 1980.

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 a true copy of the original

DEPUTY REGISTRAR