IN THE COURT OF APPEAL

AT KISUMU

(Coram: Omolo, Shah & Waki JJ A)

CRIMINAL APPEAL NO 18 OF 2002

JUMA & ANOTHER……..…..… APPELLANTS

VERSUS

REPUBLIC…….……..….RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu

(Tanui & Gacheche, JJ) dated 17th June, 2002)

JUDGMENT

Mr Musau, learned counsel for the republic concedes that the convictions recorded against the two appellants by the trial magistrate and subsequently confirmed by the High Court (Tanui & Gacheche JJ) are not supportable.

We think Mr Musau is right in conceding the appeals.

The robbery, the subject matter of the charge, was committed against the complainant (PW1), late at night. The complainant did not know the people who had been involved in the robbery. The learned judges of the High

Court thought, wrongly, that the complainant had known the appellants before and was thus able to recognize them during the robbery. With respect to the learned judges, PW1 was purporting to have identified the appellants by the aid of a lamp which was on in the house. The issue was one of identification not recognition so that when the judges say in their judgment that:-

“Upon review of the evidence that was produced before the trial court, we find that it was not a case of identification, but more so of recognition”, they clearly misapprehended the recorded evidence. If PW1 had known the two appellants before, there would have been no need for the elaborate identification parades which were subsequently conducted by the police.

We do not know whether the judges would have come to the same conclusion had they taken the position that the matter was one of identification rather than recognition. We cannot resolve that issue on the appeal. Nor did the issue of recoveries carry the matter any further. As far as we can see the only thing which was said to have been found with the appellants was a cut padlock. The evidence of Sabina Onditi Abiero (PW2) and who was one of the wives of the complainant and in whose house the padlock had been, said:

"I later saw one cut padlock which was placed on the bed".

She did not say what she meant when she said this and it is possible to say the robbers cut the padlock and left it on the bed contrary to the evidence of the police witnesses that the padlock was found with the appellants when they were arrested. Neither the magistrate, nor the learned judges of the High Court dealt with this matter and we do not know how they would have resolved it, had they dealt with the same. At this stage, we can only resolve it in favour of the appellants.

The evidence of identification parades was equally shaky. The appellants insisted throughout the case that the witnesses had seen them at Nyamasaria Police Station before the identification parades at Kisumu Police Station.

One of the wives of the complainant in the end admitted that she had seen the appellants at Nyamasaria. We ourselves have come to the conclusion that the convictions are unsafe.

We accordingly allow the appeals, quash the conviction recorded against each appellant, set aside the sentence of death and order that they be released from prison forthwith unless they or any of them be held for some other lawful cause. Those shall be our orders in the two appeals.

Dated and delivered at Kisumu this 16th day of June, 2003

R.S.C OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR