REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: KWACH, OWUOR & O'KUBASU)
CRIMINAL APPEAL NO. 41 OF 2000
BETWEEN

JOSHUA OCHIENG RAGWE..... APPELLANT
AND
REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (Mr. Justice Wambilyangah) dated 26th February, 1999
in
H.C.CRM. APPEAL NO. 41 OF 1998)
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JUDGMENT OF THE COURT

The appellant, Joshua Ochieng' Ragwel, was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to 4 years imprisonment with three strokes of the cane, by the learned Principal Magistrate at Kisumu. The appellant was also ordered to be under police supervision for 5 years upon completion of the prison sentence. His appeal to the High Court was dismissed. The summary of the evidence against the appellant was that on 5th March, 1997 between 6.00 p.m and 6.30 p.m the complainant, Edward Oraro Kowido, (PW 1) was sitting in his car, registration number KAH 871J, waiting to pick his children at Milimani Primary School. Then a slim and dark man armed with a gun came to the complainant's driver's window and peeped into the car. The intruder put his hands on the ignition key of the complainant's car. There was a struggle and a short young man pointed a gun at the complainant who was ordered out of the car. The intruders entered the car and drove away. When the car had gone about 50 metres it stopped and a man ran after it and entered. According to the complainant this man had a baggy shirt and black trousers. The complainant recognized this man as the appellant. This incident was reported to the police and as a result the vehicle in question was recovered abandoned in Rachuonyo District. This vehicle had a different registration number as the rear number plate had been interfered with by the use of cellotapes. Inside the car the police recovered the ID and employment cards of the complainant. The police lifted two finger marks from the inner top part of the rear nearside glass window and on the central part of the rear glass window but the results of the finger prints were never received from Nairobi. As a result of the above, the appellant was arrested, charged and consequently convicted and sentenced.

The evidence connecting the appellant with the offence was that of identification by the complainant. In Abdala bin Wendo and Another v. R (1953) 20 E.A.CA.166 at P. 168 it was said:-

"Subject to certain well -known 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 of a single witness 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 id entification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

In his evidence before the lower court the complainant is recorded to have said:-

"When the car was about 50 metres away it stopped and a man who was black ran after it and entered the back seat. He had a baggy shirt and black trousers.

I noticed him to be someone I know as Joshua Ochieng' Alias Madeku".

It would appear the complainant saw the appellant run after the vehicle and then jumped into the back seat. It was not clear to us whether the appellant was at the scene of the incident or he merely joined the group after the incident in which the complainant lost his car. There was evidence to the effect that police lifted fingerprints from the car and that the results of the finger prints were never produced during the trial. In our view the evidence of fingerprints was vital in this case. In Bukenya and Others v. Uganda [1972] E.A 549 at P. 551 it was stated inter alia:

"Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general la w of evidence to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasona bly exhaustive enquiries had been made to trace them, but without success.

In this appeal there has been no explanation as to what happened to the evidence relating to fingerprints which were chemically lifted from the complainant's vehicle.

We have anxiously considered the evidence on record and making our own independent examination of the same we are unable to say that the appellant's conviction was safe. We are not satisfied that the evidence of identification was free from possibility of error. Again, the evidence relating to fingerprints was not produced before the trial court. Mr. Gacivih for the State had difficulties in supporting the appellant's conviction and in our view this was understandable.

The upshot of the foregoing is that we allow this appeal, quash the appellant's conviction and set aside the sentence imposed. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 15th day of June, 2000.

R. O. KWACH

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.
DEPUTY REGISTRAR