Wamunga v Republic (Criminal Appeal 20 of 1989)
[1989] KECA 47 (KLR) (22 June 1989) (Judgment)

Cleophas Otieno Wamunga v Republic[1989]eKLR

Neutral citation: [1989] KECA 47 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 20 OF 1989

JRO MASIME, JE GICHERU & RO KWACH, JJA

JUNE 22, 1989

BETWEEN

CLEOPHAS OTIENO WAMUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of High Court at Kisumu, Mukele CA, dated 15 June 1988 in High Court Criminal Case No 561 of 1986)

Identification of an accused in a parade under torchlight at night is not reliable enough to sustain a conviction

The Court of Appeal in Wamunga v Republic overturned the appellant's robbery conviction, citing unreliable identification evidence. The appellant was identified under torchlight at night, and his arrest was delayed by five days despite claims of recognition. The prosecution failed to call key witnesses, including the Administration Policeman who allegedly received an early report. The court, applying R v Turnbull, found that the trial court did not adequately scrutinize the identification evidence. It held that recognition could still be mistaken under poor conditions. The appeal was allowed, the conviction quashed, and the appellant was ordered to be released.

Reported by John Ribia

Criminal Law *- identification parade - complainant claiming to have identified the appellant under torchlight - whether the identification of an accused in a parade under torchlight at night was reliable enough to sustain a conviction - whether the absence of corroborative evidence in a case of identification via parade affected the strength of the prosecution's case.*

Law of Evidence *- recognition - recognition vis-a-vis identification - whether recognition evidence was always more reliable than identification of a stranger.*

Law of Evidence *- identification - appellant allegedly identified as one of the attackers and reported to the police - delay of five days in arrest - whether a delay of 5 days in arresting an accused affected the credibility of identification evidence from an identification parade.*

Criminal Law *- burden of proof - failure by prosecution to call crucial witnesses to the stand - fairness - whether the prosecution's failure to call crucial witnesses affected the fairness of the trial.*

Brief facts

The appellant and five others were arrested and charged with nine counts of robbery. At the conclusion of the trial all but one of the accused were convicted. All the five appealed to the High Court and two of the appeals were allowed and the other three including the appellant were partially dismissed. The appellant appealed to the Court of Appeal on the dismissed counts contending that the evidence on which he was convicted was unreliable. He argued that the offence having taken place at night and the only available form of lighting being torches his identification as one of the assailants was unreliable. Besides, despite the fact that the complainant and some of the prosecution witnesses alleged that the appellant was a neighbour and a report of his involvement in the robbery was made to the authorities, he was not arrested until some five days later.

Issues

i. Whether the identification of the appellant under torchlight at night was reliable enough to sustain a conviction.
ii. Whether recognition evidence was always more reliable than identification of a stranger.
iii. Whether a delay of 5 days in arresting an accused affected the credibility of identification evidence from an identification parade.
iv. Whether the prosecution's failure to call crucial witnesses affected the fairness of the trial.
v. Whether the trial court and the first appellate court applied the correct legal principles in evaluating identification evidence.
vi. Whether the absence of corroborative evidence in a case of identification via parade affected the strength of the prosecution's case.

Held

1. Where the only evidence against a defendant was evidence of identification or recognition, a trial court was enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it could safely make it the basis of a conviction.
2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends were sometimes made.
3. The robbery in the present case was committed at night and the only form of lighting were torches carried and flashed by the robbers, all the victims were woken up from sleep in their respective houses.
4. If the appellant had been seen among the robbers and reported as alleged it is not unlikely that he would have remained at large for another five days before being arrested.
5. The identification evidence upon which the appellant's conviction on counts 1 and 2 was based had not been shown to have been free from the possibility of error. There was therefore no evidence upon which that conviction could be supervised.

Appeal allowed.

Editorial notes

Penal Code section 296(1) deleted in part by act no 5 of 2003.

Citations

Case Law

East Africa

1. *R v Turnbull & others* [1976] 3 All ER 549; [1976] 3 WLR 445; [1977] QB 224; (1976) 63 Cr App R 132
2. *Abdallah bin Wendo & another v Reginam* (1953) 20 EACA 166

Statutes

East Africa

Penal Code (cap 63) section 296(1)

JUDGMENT

1. June 22, 1989, the following Judgment of the Court was delivered. Cleophas Otieno Wamunga, the appellant in this appeal (hereinafter called the appellant) was one of six defendants who appeared before the Acting Resident Magistrate at Maseno on an indictment containing 9 counts of robbery contrary to section 296(1) of the Penal Code. At the conclusion of the trial one defendant was acquitted but the other five were found guilty and convicted on all counts. They received terms of 10 years imprisonment on each count plus 5 strokes of the cane followed by 5 years of police supervision.

2. All the 5 defendants convicted at the trial appealed to the High Court and the appeals of two of them were allowed by the learned Commissioner of Assize. The appeals of the other three, among them the appellant, were dismissed except in relation to counts 4,6,8 and 9. The prison term on each count was reduced to 4 years on each of the remaining counts but supersvision order made by the trial magistrate was not disturbed. The appellant now appeals to this Court against conviction on counts 1,2,3,5 and 7.

3. Since the appeals to the High Court were consolidated and heard together, we inquired at the commencement of this appeal whether the other two defendants had also appealed so that the appeals could be dealt with together but we were told they had not.

4. The robberies for which the appellant was convicted took place at Lundha sub-location, North Gem Location in Siaya District on the night of 7th and 8th September, 1986. The complainant in count one was a polygamist called Wilfred Indakwa, a fairly successful businessman in the area. The complainants in counts 2 and 3 were two of his four wives. The complainant in count 5, Anatalian Atieno Wambani (P.W.5), was not only robbed but was also assaulted and ordered by her attackers to undress in her house and then marched naked into a nearby bush where she was raped by the three gangsters.

5. The complainant in count 7 was Mary Akinyi Ochieng (P.W.4) who was attacked in her house where she was sleeping with her three little children. Although in the charge sheet it is stated that she was robbed at Lundha sub-location, according to her evidence the robbery occurred at Mahadhi village in the neighbouring Malanga sub-location also in North Gem, Siaya District.

6. The accounts given by various witnesses as to the date of robbery varied with some saying it was on 7.8.86 and others saying it was on 8.9.86, but the correct date which was 7th/8th September, 1986 is not in dispute and nothing turns on this in this appeal but we mention it because the discrepancy is apparent on the face of the record so to speak.

7. The conviction of the appellant on the 5 counts was based entirely on evidence of identification by two witnesses which the appellant has challenged on the grounds set out in his petition of appeal. In essence his main complaint is that the trial magistrate failed to analyse this evidence in the face of other evidence by other witnesses indicating that the appellant was not present at the scene of the robberies.

8. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstance s of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

2. Recognition may be more reliable than identification of a stranger but Wilfred Indakwa Ogwel (RW.l) is one of the witnesses who identified the appellant as one of the robbers. His evidence was that as he was being led from Iris junior wife's house to the house of the senior wife, he saw Apeles Omonge (RW.3) his third wife and three neighbours namely Charles Odundo, Teresia Ochido and Alfred Udhandha Ochido sitting outside and guarded by another group of gangsters. The gang ransacked the senior wife's house where they took cash. They then left the home taking along Indakwa, Iris wives, two workers, Lilian Adhiambo and the 3 neighbours as they headed for Malanga sub-location across the river. The hostages were released in batches and Indakwa was the last one to be released. He told the Court that he identified the appellant as:-

9. The person who told others not to fulfil their duty as they had given me sufficient punishment was Otieno Wamunga. He was close to me and I saw him in their spotlight flashes as he spoke and f heard Iris voice well too as he was a man I had interacted with quite often as he came from the same sub-location I hailed ...

10. At day break I reported the matter to Malanga Grief's Camp. I was questioned as to whether I knew my attackers, I told them I knew four of them, one of whom was my neighbour. I knew the one who was my neighbour by name and appearance and voice and the other three by appearance only."

11. In cross-examination by the appellant Indakwa admitted that he used to visit the appellant's home but had not gone back since the death of the appellant's father. He also said he made a report to the Administration Police at the Grief's camp.

12. If Indakwa's account of events is to be believed and particularly the claim that he saw the appellant among the robbers, then a number of logical assumptions have to be made. The first of these is that if he was attacked and robbed by a gang one of whose members was Iris neighbour and a person he knew pretty well, the first tiring he would have done immediately he was released, would have been to make a prompt report to the authorities so that the neighbour could be arrested at once and Iris house searched to recover the booty. He did not offer a reasonable explanation for Iris failure to report to the Assistant Grief or to the Chief.

13. The Administration Policeman to whom he claimed to have made a report was not called as a witness and does not feature in the proceedings. This Administration Policeman formed Indakwa's first link with the forces of law and order after the event and whose testimony we would have thought was not only crucial but absolutely obligatory.

14. Indakwa says he made a report to the Administration Policeman early in the morning on 8th September, 1986. If that is true, then why did it take 5 days before the appellant, a neighbour who had attacked and robbed him and whom he knew so well, was arrested and put into custody in connection with the robbery?

15. The other assumption to be made is that being a neighbour, the appellant was equally known to the other persons living in the neighbourhood including Indakwa's two wives Apeles Omonge and Gaudensia Atieno and of course Charles Odundo, Teresia Ochido and her son Alfred Udhandha Ochido. But none of these 5 who also spent a considerable length of time in captivity by the gangsters

said they saw the appellant among the robbers. Obviously if they had seen the appellant they would have said so.

16. The first suspect to be arrested in connection with the robbery was Benson Amukoa Oyumbu from Bunyore in Western Province. He was arrested by the Police on 9th September, 1986 only a day after the robbery. The Police caught up with him within 24 hours in Kakamega District to answer for a robbery he was alleged to have committed at Lundha sub-location in North Gem Siaya District. The question we have to ask ourselves, and in our view the question which the trial and first Appellate Courts should have asked themselves, but failed to do so, is why did it take FIVE days before the appellant who lived in the neighbourhood was arrested? The only plausible explanation is that his involvement in the robbery was not immediately known contrary to the assertions of Indakwa and the maid, Lilian Adhiambo Wagude (PW 13). A careful reading of the evidence of this witness shows clearly that the first time she identified the appellant as one of the robbers was on 14th September, 1986 when she attended an identification parade at Yala Police Station. She did not refer to the appellant by name in her evidence relating to events prior to that date.

17. Among the persons held captive were Indakwa's two Ugandan workers identified only as Harun and Joseph. These two were not called as witnesses.

18. If Indakwa recognised the appellant and made a report both to the Administration Police and the Kenya Police at Yala Police Station then how does this square with the answer given by P.C Julius Kirema (P.W. 15) in answer to a question put to him by one of the defendants that:

> I am not obliged to disclose the name of the person who gave me your names as he is my informer."

19. This answer logically implies that he got the information from a source other than Indakwa or Lilian Adhiambo Wagude. Otherwise nothing would have been simpler than to say that these witnesses had identified them as their attackers.

19. Apeles Omonge (PW 3) the complainant in count 3 did not at any time in the course of her evidence claim that she had recognised the appellant as one of the robbers. She identified two of the robbers (not the appellant) but she only pointed at the appellant in the dock as someone she knew and who came from her village. She told the Court:

> I know all those accused in the dock except one. One of them (points at accused 4) is a fellow resident of the same sub-location. He is Cleophas Otieno. The fifth accused is called Odhiambo and is a neighbour at home. I am sorry I do not know accused 2 and 6. Except for accused 1 and 3, I do not remember seeing the others that night."

20. This appellant was accused 4 at the trial and this witness stated unequivocally that she did not see him on the night of the robbery. There was consequently no evidence to sustain the appellant's conviction on count 3.

21. The complainant in count 5 was Anatalian Atieno Wambani (PW. 5). One feels deep sympathy for this witness because, of all the victims that night, she went through a harrowing and most traumatic experience. She was assaulted, robbed, stripped naked, marched into a nearby bush and raped in turns by 3 of the robbers. In her evidence she made no mention at all of the appellant not even a passing reference. Here again we cannot discover why the appellant was convicted on count 5 because there was absolutely no evidence upon which a conviction could be based.

22. The appellant was also convicted on count 7 relating to the robbery of Mary Akinyi Ochieng (P.W.4). This witness identified another defendant (accused 6) as the person who attacked and robbed her not this appellant. It follows that the appellant's conviction for the robbery of this witness is not sustainable on the evidence accepted by the trial Court.

23. We now turn to the more troublesome part of this appeal namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (P.W.1) and Lilian AdhiamboWagude (P.W. 13). Both these witnesses testified that they recognised the appellant among the robbers who attacked and robbed them. We have already recounted the material parts of this evidence and there is no need to recite it again. What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:

24. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

25. This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v R 20 EACA 166 at page 168 thus:

> 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 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."

26. The robbery in the present case was committed at night and the only form of lighting were torches carried and flashed by the robbers. All the victims were woken up from sleep in their respective houses. Out of a total of 9 witnesses (Indakwa, his two wives, a maid, two servants and 3 neighbours) all of whom spent an appreciable length of time in the presence of the robbers at Indakwa's home, only Indakwa and the maid claimed to have recognised the appellant as being one of the robbers. The appellant was their neighbour and they both knew him well. They both claim to have made a report to an Administratino Policeman at the Chief's camp early in the morning on 8th September, 1986 to whom they gave the particulars of the robbers. The appellant was not arrested until 13th September, 1986. If the appellant had been seen among the robbers and reported as alleged it is most unlikely that he would have remained at large for another 5 days before being arrested. If his name was given to the Adminstation Policeman, it would have greatly assisted the prosecution's case if this Officer had been called to testify as much. Both Indakwa and the maid said in evidence that they also gave the appellant's name to the Police at Yala Police Station. If they did, then how does one explain the answer given by one of the police witnesses that he got the names of the robbers from his informer?

27. These omissions in the evidence in our view greatly erode the probative value of the evidence of these two witnesses. Neither the trial Magistrate, nor the Commissioner of Assize who heard the appeal, directed his mind to this serious weakness in the evidence of these witnesses. Their failure to do so was a material misdirection and we doubt whether they would have come to the same conclusion if they had taken all these matters into account.

28. The conclusion we have come to is that the identification evidence upon which the appellant's conviction on counts 1 and 2 was based, has not been shown to have been free from the possibility of error. The end result is that there is no evidence upon which the conviction can be sustained.

29. For these reasons, we allow the appellant's appeal, set aside his convictions and sentences on all the counts and order his immediate release unless he is otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JUNE, 1989.

J.R.O. MASIME

JUDGE OF APPEAL

J.E. GICHERU

AG. JUDGE OF APPEAL

R.O. KWACH

AG. JUDGE OF APPEAL

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

Deputy Registrar