REPUBLIC OF KENYA

Kiragu v Republic

Court of Appeal, at Nairobi **September 19, 1985**

Madan, Kneller JJA & Platt Ag JA

Criminal Appeal No 179 of 1984

(Appeal from the High Court at Nairobi, Abdullah & Aluoch JJ)

Evidence – identification - by a single witness – when such evidence can support conviction.

The appellants were convicted by the trial court of the offence of robbery with violence contrary to section 296(1) of the Penal Code. Their conviction was grounded on identification by a single witness. The first appeal to the High Court was dismissed.

Held:

1. It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this court has to satisfy itself that in all the circumstances of the case it is safe to act upon it (Abdalla bin Wendo & Another v R [1953] 20 EACA 166 followed).

2. The magistrate and the learned judges of the High Court having regard to all the circumstances for identification wrongly interpreted it as being favourable to providing positive identification.

3. (Obiter) When trying to prove the guilt of a citizen for a criminal offence the court cannot allow strict standards of proof to be lowered neither will the court forget that the benefit of doubt still goes to the accused.

Appeal allowed.

Cases

1. Abdala bin Wendo & Another v R [1953] 20 EACA 166

2. Roria v R [1967] EA 583

Statutes

Penal Code (cap 63) section 291(1)

September 19, 1985, **Madan, Kneller JJA & Platt Ag JA** delivered the following Judgment. We allowed this appeal on September 17, 1985.

We are now stating the Six accused went on trial for the offence of robbery with violence, contrary to section 296(1) of the Penal Code. The sixth accused John Macharia pleaded guilty. The first and the third accused (appellant) were convicted. The remaining three accused were acquitted.

The appellant's appeal to the High Court was dismissed. He has appealed again.

On the night of August 9, 1983 Mrs Ziporah Wanjiku Mwangi was asleep at Gikoi in a room adjacent to her shop at Kanjiku Trading Centre. She heard the gate of her compound opening at about 1.00 am, followed by a bang on her door. She screamed. People entered her room by breaking the door. There was no light in the room. The intruders flashed their torch lights. They hit her, snatched her torch light from her, put her on the bed and poured paraffin over her. The intruders left. Mrs Mwangi followed them screaming. They disappeared. She later discovered that she had been robbed of property worth Kshs 14,200. She was unable to identify anyone.

Mrs Mwangi's daughter Rose Mary was also sleeping behind the shop in a separate room. She too was woken up like her mother by the noise made by the robbers who hit and broke the door and entered her bedroom. There was no light in the room. The robbers flashed their torches. Rose Mary sat on the bed. She was told to go back to sleep. She did not cover herself could "see a bit", she said, as there was enough light from their flashes. She saw the appellant who she said, was brown, short and fat. She had not seen or known him before. She saw one of the robbers giving him things, and at the same time flashing a torch light on his face. They remained in her room for about 20 minutes. On August 11, she identified the appellant at an identification parade. She was looking for a brown, short and fat man and also for a young boy as we point out later. She could not recognize any other features of the appellant.

The sixth accused John Macharia was a witness for the prosecution. He gave his evidence after he was convicted on his pleas but before sentence. He testified that they robbed Mrs Mwangi as described by her; that he, the second accused and the appellant picked up a radio. They broke into Rose Mary's room. They then drove away and took the articles taken by them from Mrs Mwangi's house to the shop of the appellant's brother Mwangi Kariuki.

As a result of a report made to Assistant Chief Eliud Mwangi by Mwangi Kiragu v Republic

Kariuki, John Macharia was arrested by the assistant chief on September at the house shop of Mwangi Kariuki while he was in actual possession of a weighing machine and two stones which had been stolen from Mrs Wanjiku Mwangi's house together with other articles. John Macharia claimed the weighing machine was his. The assistant chief asked the appellant, who had been sent by Mwangi Kariuki to fetch him, to assist him to arrest John Macharia which the appellant did.

John Macharia agreed that Mwangi Kariuki caused him to be arrested. He was not happy with him or the appellant. He denied he was framing the appellant because his brother caused him to be arrested. The appellant made an unsworn statement in court. He said he was at home from the 7th to 9th August; that he was arrested when he went out to Kanyoni market to buy some cigarettes. He denied the charge. He also said John Macharia had mentioned his name because he assisted the chief to arrest him as he had information that John Macharia had the weighing machine which had annoyed him.

The appellant's conviction was based upon his identification by Rose Mary, and the evidence of John Macharia which, being the evidence of a co-accused, was considered by both the magistrate and the learned judges of the High Court on first appeal to require corroboration.

The magistrate said of Rose Mary in his judgment:

> ***"I am aware that there was no light in the room. I also warn myself that I may be relying on the evidence of a single witness and that too at night when she did not know him (appellant) and may have been frightened by the sudden entry of the intruders. Bearing all the above in mind I am satisfied that PW2 (Rose Mary) had the opportunity to see the accused (appellant) through the flashes of the torch lights. The***

accused remained some twenty minutes in the room and she also remembers one of them giving things to the accused. Above all she defines the colour and stature of the accused. I have no doubts left in my mind that the combination of all the facts concerning the accused became fixed in her mind and later she picked him up on the identification parade. I find no cause for PW2 to falsely implicate the accused in the offence. I am greatly impressed with her demeanour, on the stand she spoke the truth.

I make a few comments about (John Macharia) a coaccused. I am aware that (this) witness was unhappy with the accused for the reasons that the accused let him down or caused his arrest but from his demeanour on the stand I find that he spoke the truth. The fact that the accused assisted (the chief) in arresting (him) does not, in my view, reduce the weight of the evidence against the accused III (appellant). He may have done so for various reasons. I have also considered the defence of accused III and I reject (it)'

On first appeal the learned judges of the High Court said that the circumstances favoured positive identification by Rose Mary, and the appellant was properly identified by her; that the evidence of John Macharia was admissible but he being a co-accused it required corroboration as a matter of law: that the required corroboration was provided by the evidence of rose Mary who properly identified the appellant. They said that on their own evaluation of the evidence in the case, they did not believe the appellant, and he was properly convicted. The appeal to this court is on two grounds. We take up the second ground first. It is that the learned judges of the High Court erred in up-holding the appellant's conviction on the evidence of a single identifying witness without first making a finding that the evidence could safely be accepted as free from the possibility of error. Secondly (first ground) that evidence requiring corroboration cannot be corroborated by evidence which itself needs corroboration.

We revert shortly to the judgment of High Court. The learned judges also said:

"***In fact, what we have in this case is not just the evidence of PW2 alone (ie identification by a single witness). We have the evidence of (John Macharia), which we have ruled admissible. This makes this case go a step further than Roria's case, quoted by Mr Macharia (appellant's advocate), which talked of conviction of a single witness only".***

It is trite law that subject to certain well-known exceptions a fact may be proved by the testimony of a single witness ***(Abdala bin Wendo and Another v Republic,*** [1953] 20 EACA 166; however, in the exercise of its ***Kiragu v Republic*** duty, this court has to satisfy itself that in all the circumstances of this case, it is safe to act upon the single witness Rose Mary's identification of the appellant. If not so satisfied then, in addition to the unsatisfactory identification by a single witness, the corroboration of John Macharia's evidence would also fall off.

In the circumstances of this case the appellant's identification is poised for tilting on a very sharp dividing line, one temptingly suggesting that Rose Mary's identification of the appellant was satisfactory, and it provided corroboration of John Macharia's evidence; the other, at the same time, rouses a nagging disquiet in the mind that it would be unsafe to allow the appellant's conviction to stand. Extreme care is needed to tilt on the right side of the dividing line.

In many respects the circumstances of the identification by a single witness in this case are very similar to the circumstances in Roria [1967] EA 583 refereed to by the learned judges. In that case the trial judge said in his judgment;

"Samaji w/o Lekerei (Single identifying witness) impressed me as a witness of truth. I think it strengthens her evidence that she identified the third accused who was a stranger to her. I can see no reason why she should do it falsely. In my view therefore the possibility of mistake is excluded. I also think she was speaking the truth when she said that the third accused speared her husband. Is it strange then that the third

accused made an impression upon her mind?”

In the present case the magistrate found Rose Mary an honest witness, as the trial judge in Roria . Like the former Court of Appeal in Roria, we do not quarrel with his assessment of her honesty by the magistrate but a witness may be honest yet mistaken; in excluding the possibility of a mistake on her part, with respect, the magistrate, as well as the learned judges of the High Court, erred in our view. The passages which we have quoted from the judgments of the magistrate and the High Court contain a ***non sequiture*** having regard to all the circumstances for identification by Rose Mary were wrongly interpreted as being favourable providing positive identification.

Rose Mary was rudely woken up from her sleep by the noise made by the robbers who hit and broke the door and entered her bedroom which had no light. As she got up and sat on her bed she was told to go back to sleep. She said she did not cover herself fully. She must have been lying flat on her bed and could “see a bit” only, in the flash lights of the robbers. She was then shocked. She saw the appellant as a brown, short fat man. She did not know and had never seen him before. The magistrate point doubt that she must have been also frightened by the sudden entry of the intruders. She was screaming for about five minutes after the robbers left. At the identification parade she only looked for a brown, short and fat man. Notwithstanding that she could not recognize any other features of the appellant and notwithstanding the magistrate’s finding upon which he relied, that the combination of all the facts concerning the appellant became fixed in her mind, but at the identification parade she remembered the appellant as a young boy. The magistrate was deeply impressed with her demeanour on the stand, and that she spoke the truth. That was not in issue and is not an augmenting factor in this case. It may be relevant in some cases. By concentrating on Rose Mary’s honesty that she had no reason to implicate the appellant in the offence the magistrate was led to overlook that she could yet be mistaken as, in our view, the circumstances for identification were not favourable. When trying to prove the guilt of a citizen for a criminal offence we cannot allow our strict standards of proof to be lowered, neither must we forget that the benefit of the doubt still goes to the accused.

So concerned were the two lower courts below with Rose Mary’s honesty as a witness that they both did not consider the alibi put forward by the appellant. There was no burden upon him to prove it.

John Macharia was admittedly a biased witness because the appellant and his brother caused him to be arrested for this offence. The magistrate said that the appellant may have assisted the chief to arrest John Macharia “for various reasons”. The court should state the reason specifically for dismissing a point of evidence which is in favour of an accused person instead of consigning it to discredit under the jumble of “various reasons”, so that an upper court is able to decide whether the reason is substantive or superfluous.

One important aspect which was over looked by both the lower courts is that if the appellant was involved in the commission of the offence with John Macharia he was hardly likely to arrange for John Macharia to be arrested knowing, even with an ordinary standard of intelligence, that such betrayal could come home to roost. It also did not help that John Macharia had not yet been sentenced when he gave his evidence.

For all these reasons we considered this conviction unsafe, quashed it, and set aside the sentence, the appellant to be set at liberty in respect of this charge.