

M'Murungi v Republic

Court of Appeal, at Nakuru September 25, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Criminal Appeal No 155 of 1984

(Appeal from an order of the High Court of Kenya at Nakuru, Masime J)

Criminal law - robbery with violence contrary to section 296(1) of the Penal Code.

Evidence – identification – what constitutes proper identification.

The appellants were convicted of the offence of robbery with violence contrary to section 296 (1) of the Penal Code and each sentenced to 5 years imprisonment together with 5 strokes of corporal punishment. The main question at the trial was one of identification of the appellants. The appellants insisted for several reasons that their identification was unsound.

Their appeal to the High Court was summarily rejected.

Held:

1. There was misdirection as to the identify of the 2nd appellant hence the learned judge on the first appeal should have considered the aspect of the case because it meant the 2nd appellants identification was by a single witness bringing in the necessity for a direction order ***Abdalla Bin Wendo v Republic*** [1953] 20 E A C A 166 and ***Roria v Republic*** [1967] E A 583.
2. Identification inevitably raises a matter of law whether the evidence supported the conviction hence it is not generally a matter suitable for summary rejection.

Appeal allowed summary rejection set aside and rehearing of the first appeal ordered.

September 25, 1985, **Hancox, Nyarangi JJA & Platt Ag JA** delivered the following Judgment. The appellants Moses Gichingiri and Peter M'Murungi were convicted on May 30, 1980 of robbing with violence contrary to section 296 (1) of the Penal Code, and each sentenced to 5 years imprisonment, together with strokes of corporal punishment or a police supervision order.

The main question at the trial was the identity of the Appellants. In the case of the appellant Moses, he was recognised by the complainant Mrs Rahab Wanjiru Kibiku, and her squatter Joseph Mungai. In the case of the Appellant Peter, he was recognised by the complainant, but Joseph was not certain if he had seen this Appellant. Unfortunately the complainant's servant Simon Wambugu, who has not known either appellant previously, did not say whether or not he could identify them. There was no other evidence, apart from the difficult circumstances in which the Appellants were allegedly seen during the raid.

On first appeal, the High Court summarily dismissed the appeals of each appellant. Both insisted for several reasons that their identification had been unsound. In the case of the second Appellant Peter, the warning in the case of identification by a single witness was not recorded (see *R/A v R* (1967) E A 583 at page 584.

There was apparently a misdirection as to the identity of this Appellant, as much as the magistrate recorded that "PW 1 and PW3" (Mrs Rahab and Joseph Mungai) identified the 2nd Appellant and remarked on "this clarity of mind". In fact the record show that PW3, the squatter, not only did not

identify the 2nd Appellant but, when cross-examined by the latter said “I’m not certain if I and you”. The learned Judge on the first appeal should have considered this aspect of the case; because it meant as we have said that the identification of the 2nd appellant was by a single witness, bringing in the necessity for a direction under *Abdalla bin Wendo v R* (1953) 20 EACA 166 and *RORIA v Rep* (Supra).

On second appeal to this Court the appellant’s appeals have been consolidated. The meaning of each Appellant’s grounds of appeal is that the learned judge did not consider the question of their identification. It has been held that identification inevitably raises a matter of law whether the evidence supported the conviction. It is not generally a matter which is suitable for summary rejection, and in this case it was certainly not a suitable manner of concluding the first appeal of the second appellant or in these circumstances, the first appellant either.

Consequently, we set aside the summary dismissal of the first appeal of each appellant, and we remit the record to the High Court to hear and determine the appeals of these appellants to it. We hope that this appeal can be heard speedily before the appeals are rendered worthless.