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| Case Number: | Criminal Appeal 66 of 1984 |
| Date Delivered: | 07 Dec 1984 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Kisumu |
| Case Action: | Judgment |
| Judge: | Zakayo Richard Chesoni, James Onyiego Nyarangi, Harold Grant Platt |
| Citation: | Jackson Oluoch & another v Republic [1984] eKLR |
| Advocates: | Mr Ndegwa for the Appellant Mr Bwonwonga for the Respondent |
| Case Summary: | **Jackson Oluoch & Another v Republic**<br><br>**Court of Appeal, at Kisumu**<br><br>**December 7, 1984**<br><br>**Chesoni, Nyarangi & Platt Ag JJA**<br><br>**Criminal Appeal No 66 of 1984**<br><br>*(Appeal from the High Court at Kisumu, Schofield J)*<br><br>***Criminal law** - robbery - ingredients of the offence - how offencedifferentiated from robbery with violence - Penal Code section 296(1).*<br><br>***Evidence** - identification parades - conduct of - procedure at - suggestionto witness that person to be identified present on the parade - whetheridentification parade properly made - dock identification - whether dockidentification valuable where identifying witness not involved in anyprevious identification parade - identification evidence of single witnessto be tested with the* |

*greatest care.*

***Evidence*** *- witness - evidence of single witness - when evidence of singlewitness to be treated with great care.*

***Sentencing*** *- punishment - offence of shop breaking and committing felony- order of post-imprisonment police supervision of convicted person -convicted person a first offender - whether sentence proper - CriminalProcedure Code (cap 75) section 344A.*

The two appellants were convicted and sentenced by the magistrate's courton three counts of robbery and one count of shop breaking and committinga felony contrary to the Penal Code sections 296(1) and 306(a) respectively.After their appeals to the High Court were dismissed, they made secondappeals to the Court of Appeal where their cases depended entirely onwhether or not there had been sufficient evidence of their identification.The evidence showed that the appellants had been identified as the personswho had committed the offences charged in an identification parade by awitness who had previously known them. Another witness who had beenthe victim of a recent robbery attended the identification parade at whichhe stated that he had been told "to identify the people who robbed [him]".Two other witnesses did not attend the identification parade but identifiedthe appellants in the dock during the hearing of the case.The trial magistrate and the High Court judge had made concurrent findingsthat the identification parade had been properly conducted and that theappellants had been positively identified.

**Held:**

1. In an identification parade, it is dangerous to suggest to an identifyingwitness that the person to be identified is believed to be present on theparade. The value of the parade as evidence in this case was considerablydepreciated by that fact.
2. A dock identification of an accused person by a witness where therehad been no identification parade conducted earlier, and at which thewitness is present, is almost

worthless.

3. A fact may be proved by a single witness but when such evidence is inrespect of identification it must be tested with the greatest care.
4. The two concurrent findings made by the trial magistrate and the judgethat the identification parade was properly conducted and that theappellants were positively identified were based on a misdirection whichconstituted an error of law concerning a vital aspect of the prosecutioncase.
5. An order for police supervision after jail does not automatically followfor a person convicted of shopbreaking and committing a felony wherethe person is a first offender.
6. (*Obiter*) It is not the degree of actual violence that differentiates theoffence of robbery and robbery with violence. Robbery with violenceis committed in any of the following circumstances:

a) The offender is armed with any dangerous and offensive weapon orinstrument; or
b) The offender is in company with one or more other person or persons;or
c) At or immediately before or immediately after the time of the robbery,the offender wounds, beats, strikes, or uses other personal violence toany person. The ingredients of the offence of robbery under section296(1) of the Penal Code are:

i) stealing anything, and
ii) at or immediately before or immediately after thetime of stealing,
iii) using or threatening to use actual violence to anyperson or property in order to obtain or retain the thingstolen or to prevent or to overcome resistance to its beingstolen or retained.

*Appeal allowed.*

**Cases**

1. *R v Mwango s/o Manaa* (1936) 3 EACA 29
2. *Rex v Lulatikwa s/o Kabaile alias Rutahaba s/o Kasase* (1941) 8 EACA 46

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| | 3. *Kiarie v Republic* Criminal Appeal No 93 of 83; [1984] KLR 739<br>4. *Roria v Republic* [1967] EA 583<br>5. *Abdallah bin Wendo & Sheh bin Mwambere v Reginam* (1953) 20 EACA166<br>6. *Benjamin Mugo Mwangi & another v R* Criminal Appeal No 100 of1984; [1984] KLR 595<br><br>**Statutes**<br><br>1. Criminal Procedure Code (cap 75) sections 179 (2), 344(A)<br>2. Penal Code (cap 63) sections 296 (1), (2); 306(a)<br><br>**Advocates**<br><br>1. *Mr Ndegwa* for the Appellant<br>2. *Mr Bwonwonga* for the Respondent |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Kisumu |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal allowed. |
| History County: | Kisumu |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Chesoni, Nyarangi & Platt Ag JJA)**

**CRIMINAL APPEAL NO 66 OF 1984**

**JACKSON OLUOCH .....APPELLANT**

**JAMES ONGERE ABWOR.....RESPONDENT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the High Court at Kisumu, Schofield J)*

**JUDGMENT**

The two appellants Jackson Oluoch and James Ongere Abwor were onMay 27, 1983 each convicted by the senior resident magistrate of Kisiion three counts of robbery contrary to section 296(1) of the Penal Codeand one of shop breaking and committing a felony contrary to section306(a) of the Penal Code (cap 63) and each was sentenced to five years'imprisonment to run concurrently and the strokes to be cumulative, and,each appellant was ordered to be subjected to Police Supervision for 5years after release from prison. Their appeals to the High Court, Kisumu(Schofield J) were dismissed. Each has appealed to this court.

The grounds of appeal of Jackson Oluoch are:

1. That he voluntarily gave a sworn statement before the court of law toback his plea against charge. His wife also gave reliable evidence tosupport his alibis.

2. That the members of the prosecution staff totally failed to produce therelevant exhibits before the court of law for material proof of evidencein favour of his involvement in the alleged felony.

3. That the state did not call a qualified fingerprint specialist from thecriminal record office to produce a photostat copy of finger impressionto prove his connection with alleged home-made pistol at the scene.

4. That the firearm technician testified that the home-made pistol wascapable of firing but absolutely failed to prove a true nature of robberywith violence involving a victim of the bullet.

5. That the state also failed to call a pathologist to produce reliable medicaldocument for proof of evidence supporting the prosecution involvingthe victim of robbery at the scene of the alleged incident.

6. That the learned magistrate committed a grave error by basing hisjudgement on a proofless operation of identification which was fakelyconducted contrary to law by the relevant authorities concerned.

7. That the honourable judge of the High Court was critically responsiblefor perversion of justice and

execution of judgement based on fallaciousfactors operating contrary to principles of law and identification parade.

8. That there was some amount of incredibilities to believe PW 3 Onyangoand PW 5 Owino for their identification because they had already seenhim before the date of the identification parade. That he had complainedbefore and after the parade and it was recorded in the identificationform by the parade officer. That PW 4 Abich Got and PW 7 MichaelOmondi only made a dock identification which was unsafe.

That the sentence was harsh and excessive.

His prayer to this court is that the conviction should be quashed, thesentence set aside and he be set free.

James Onere Abwor appealed on the following grounds:

1. That he voluntarily gave a sworn statement before the court of law toback his plea against charge. His wife also gave reliable evidence tosupport his alibis.

2. That the members of the prosecution staff totally failed to produce therelevant exhibits before the court of law for material proof of evidencein favour of his involvement in the alleged felony.

3. That the state did not call a qualified fingerprint specialist from theCriminal Record Office to produce a photostat of finger impression toprove his connection with the alleged home-made pistol at the scene.

4. That the firearm technician testified that the home-made pistol wascapable of firing but absolutely failed to prove a true nature of robberywith violence involving a victim of the bullet.

5. That the state also failed to call a pathologist to produce a reliablemedical document for proof of evidence supporting the prosecutioninvolving the victim of robbery at the scene of the alleged incident.

6. That the learned magistrate committed a grave error by basing hisjudgement on a proofless operation of identification which was fakelyconducted contrary to law by the relevant authorities concerned.

7. That the honourable judge of the High Court was critically responsiblefor perversion of justice and execution of judgement based on fallaciousfactors operating contrary to principles of law and the identificationparade

8. That there was some amount of incredibilities to believe PW 3 Onyangoand PW 5 Owino for their identification, because they had already seenhim before the date of the identification parade. That he had complainedbefore and after the parade and it was recorded down in the identificationform by the parade officer. That PW 4 Abich Got and PW 7 MichaelOmondi only made a dock identification which was unsafe.That the sentence was harsh and excessive.

His prayer to this court is similar to that of Jackson Oluoch.

Jackson Oluoch referred to his grounds of appeal and argued that thepolice officer who arrested him had known him before, that the descriptionof some of the persons who took part in the robbery which was given byPW 3 Cypriano Onyango and PW 5 James Nyakwe Asembo did not matchhis physical appearance and that of the appellant, Aboo, that PW 12, PCMomanyi, who knew the appellants, went to Migori township to enquireand make arrests on the information he had been furnished with and yethe had to rely on an informer to arrest the appellants.

The appellant complained that he and the second appellant were convictedwithout the informer giving evidence although the trial court wanted theinformer to testify. The second appellant took the court through his groundof appeal and said the pressure lamps whose light was said to havefacilitated their identification should have been reproduced in court. Thisappellant said also that the learned Senior State Counsel did not supportthe convictions before the High Court. The learned Principal State CounselMr Bwonwonga supported convictions, readily acknowledged that thecrucial issue was identification and conceded that as Cypriano Onyangohad previously known both appellants, the identification parade wasunnecessary and its result had no evidential value. Mr Bwonwonga arguedthat the evidence on identification of the sole witness Cypriano Onyangosufficed and that the description which was given by Cypriano Onyangoto PC Momanyi substantially fitted that of the appellants. Mr Bwonwongaregarded PC Momanyi's evidence as contradictory, retailed theidentification by PW 4 David Abichi and PW 7 Michael Omondi, asamounting to dock identification and submitted that there is a concurrentfinding on identification which is based on the evidence of CyprianoOnyango, David Abichi and Michael Omondi.

This is a second appeal and so only issues of law fall to be decided. Weagree with the learned Principal State Counsel that the case against theappellants depends entirely on whether or not there was sufficient evidenceof identification. The identification parade was unnecessary becauseCypriano Onyango knew the appellants. Besides, PW 5, one of theidentifying witnesses was, according to his evidence, told: "to identifythe people who robbed me on August 6, 1982" the witness couldreasonably take that to mean that persons who robbed him were at theparade and that therefore all he had to do was to pick them. The value ofthe parade as evidence was therefore considerably depreciated. *R vMwango s/o Manaa* [1936] 3 EACA 29. It is dangerous to suggest to anidentifying witness that the person to be identified is believed to be presenton the parade *Rex v Lulatikwa s/o Kabaile alias Rutahba s/o Kasese* [1941]8 EACA 46.

The dock identification did not enhance the case of the prosecutionbecause, without an earlier identification parade, such identification isalmost worthless. *Owen Kimotho Kiarie v Republic* Cr Appeal No 93 of1983 (unreported). The two witnesses PW 4 and PW 7 who identified theappellants in the dock did not attend the material identification parade.The learned senior resident magistrate and judge made concurrent findingsthat the identification parade was properly conducted and that the twoappellants were positively identified. The two concurrent findings werebased on the misdirection which we have already discussed. Themisdirection constituted an error of law concerning a vital aspect of theprosecution case.

Mr Bwonwonga argued and submitted that the Senior Resident Magistrateand the judge made concurrent findings on identification which aresupportable solely on the evidence of PW 3 Cypriano Onyango. It is tritelaw that a fact may be proved by a single witness but when such evidenceis in respect of identification it must be tested with the greatest care: *Roriav Republic* [1967] EA 583, *Abdallah bin Wendo & Another v R* [1953] 20EACA 166 and *Benjamin Mugo Mwangi & Another v Republic* Cr AppealNo 100 of 1984 (unreported).

Cypriano Onyango, gave a description of some of the eight to ten peoplewho entered his bar. He said:

“When the attackers came in I regarded them as armyor policemen and I was not frightened. I saw the faceof the accused. He has a brown face. He is himself ashort boy. The other man was black, thin, tall and waswearing a jacket. The third man was much more elderly(the underlining is ours)”.

Cypriano gave a description of three of the dozen or so persons who hadraided his shop to PC Momanyi. The description was as follows:

“PW 3 said one was tall, fat and fair in complexion.The other was short, fat and fair in complexion. Thethird was short and brown (the underlining is yet againours).”

PC Momanyi knew the appellants well and accepted that CyprianoOnyango had fairly described the appellants. Cypriano had seen theappellants prior to the night of the incident.

It is obvious from the sets of descriptions that PW 3 and PW 12 werenarrating appearances of different persons. On that evidence, it is notpossible to tell if PW 12 arrested the persons whose appearances wheregiven by PW 3 or by the informer. Mr Bwonwonga appreciated thedifficulty which emerged from the apparent contradictions and boldlyinvited us to ignore the evidence of PW 12, PC Momanyi. But even if wewere to go along with Mr Bwonwonga’s suggestion, we would still beleft with the reasonable doubt whether PW 12, PC Momanyi arrested thepersons who were described by PW 3 Cypriano Onyango or some otherdifferent pair.

The Senior Resident Magistrate and the judge considered the evidence ofPW 12, PC Momanyi, as if that evidence disclosed just one descriptionon which the arrest was made. That was an erroneous appreciation of therelevant evidence and a misdirection which prejudiced the appellants.Having considered and tested as required the testimony of CyprianoOnyango on identification, and bearing in mind the other evidence,circumstantial or direct pointing to guilt, we cannot safely say that theevidence of identification is free from the possibility of error. The SeniorResident Magistrate corrected himself on the issue of identification buterred, as did the judge, in concluding that the evidence which was adducedeven if correctly directed himself on the issue of identification but erredas did the judge, in concluding that the evidence which was adduced evenif correctly applied to the tests, proved identification beyond reasonabledoubt.

There are two other matters raised by the appeal upon which we wish tocomment. First, the record shows that the judge did not specifically dealwith the various matters to which Mr Ndegwa, State Counsel, mentionedin conceding the appeal. For instance, Mr Ndegwa had said that theidentification parade forms did not correspond with the evidence and thatdescriptions which were given to the arresting officer were different fromthose of the appellants. We think that the judge should have considered,Mr Ndegwa’s submissions together with the record and the SeniorMagistrate’s findings plus the appellant’s arguments before reaching hisown conclusion.

That is the normal and fair approach. Secondly, the Senior ResidentMagistrate invoked section 179(2) of the Criminal Procedure Code (cap75) to convict the appellants on counts i, ii and iv of the minor chargeunder section 296 (1) of the Penal Code, (cap 63) for the reasons that thegangsters acted with restraint and decency, did not use their gun, and thatsuch beating as PW 2, PW 5 and PW 7 were subjected to wasn’t seriousto justify the charge.

Under section 296 (2) of the Penal Code robbery with violence iscommitted in any of the following circumstances:

1. The offender is armed with any dangerous or offensive weapon orinstrument, or

2. the offender is in company with one or more other person or persons or

3. at or immediately before or immediately after the time of the robbery,the offender wounds, beats, strikes or uses other personal violence toany person.

The ingredients of the offences of robbery under section 296(1) of thePenal Code are:

a) stealing anything and
b) at or immediately before or immediately after the time of stealing,
c) using or threatening to use actual violence to any person or property inorder to obtain or retain the thing stolen or to prevent or overcomeresistance to its being stolen or retained.

So, it is not the degree of actual violence used that differentiates the twooffences as the senior resident magistrate stated.

The learned judge did not deal with the appeal against conviction andsentence on count 3 nor did Mr Ndegwa address the High Court on thatcount, but as the appeal turns on the appellants' identification for all thecharges the conviction on that count is equally unsafe.

We observe that in sentencing the appellants the Resident Magistrate madethe police supervision order to apply to the sentence on count 3 of theshop breaking and committing a felony. They were first offenders and sothe police supervision order was not automatic for the offence under section306(a) of the Penal Code (cap 63), see section 344A of the CriminalProcedure Code (cap 75). To that extent the sentence on count 3 wasillegal.

The upshot of what we have said is that the two appeals are allowed,convictions quashed, sentences and the reporting order set aside and theappellants shall be set at liberty unless otherwise lawfully held.

**Dated and delivered at Kisumu this 7th day of December, 1984.**

***Z.R CHESONI***

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***AG. JUDGE OF APPEAL***

***J.O NYARANGI***

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***AG. JUDGE OF APPEAL***

***H.G PLATT***

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***AG. JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**