

UGANDA / JUDGMENT

Rashidi v Rex (Criminal Appeal No. 193 of 1951) [1951] EACA 298 (1 January 1951)

[1951] EACA 298

COURT

East African Court of Appeal

BEFORE

Hearne CJ, Nihill P, Worley VP

CASE / FILE NUMBER

Criminal Appeal No. 193 of 1951

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL, President, SIR NEWNHAM WORLEY, Vice-President, and SIR HECTOR HEARNE, C. J. (Kenya)

MOHAMED s/o RASHIDI, Appellant (Original Accused)

REX, Respondent (Original Prosecutor)

Criminal Appeal No. 193 of 1951

(Appeal from the decision of H. M. High Court of Tanganyika—Miles, Ag. J.)

Criminal procedure—Method of comparing footprints—Method of proving plan.

The appellant was convicted of murder before the High Court of Tanganyika. During the trial the investigating Police Officer gave evidence that he placed a witness's naked feet in certain footprints and they fitted absolutely perfectly. The prosecution also proved a plan of the scene.

In allowing the appeal the Court of Appeal drew attention to the proper method of comparison of footprints and feet as is set out in *Wills on Circumstantial Evidence*. The Appeal Court also held that where a plan was prepared as the result of a witness's statement to the Police during the investigation, the prosecution should prove that the person who made the plan accompanied the witness, that the witness pointed out a certain place as the spot where the witness stood or where some event occurred and that that place is marked on the plan in some way which enables it to be identified: further, the witness, if available, should corroborate the fact of having pointed out the place to the person who made the plan.

Appeal allowed.

Case cited: Rex v. Maganga bin Isike (1935) 2 E. A. C. A. 89.

Innis, S. G. (Tanganyika), for the Crown.

Appellant absent, unrepresented.

JUDGMENT (delivered 8-11-1951).—The appellant was convicted by the High. Court of Tanganyika of the murder of Kassian s/o Lihaki and sentenced to death.

The appellant paid a visit to the deceased in his house on the evening of the day on which the latter met his death. In his evidence he admitted that he did but he denied, as the prosecution witnesses Benedict and Khadija alleged, that a quarrel had taken place between him and the deceased. The appellant and the deceased left the house together and then Khadija, the wife of the deceased, also left telling Benedict, described as a turn-boy in the house of the deceased, that she intended spending the night elsewhere. After her departure the deceased returned with two women, Biesha d/o Mbaya and Mtemesi d/o Zara. "Pombewas drunk and before they had started to take food" there was a call of "Hodi" outside and the voice of a man was heard asking for a woman named binti. Zamani. This woman lived in the deceased's house. The deceased went outside and was seen walking about 40 yards away from the house behind another man.

"Conversation between the two went on for a long time while they were walking away" and then Benedict was despatched by Biesha to see what was happening. He saw a man "on top of the deceased" on the ground and when he tried to interfere he was himself wounded by this man with a knife in the thigh. His assailant ran away. The deceased was seen to have been wounded and he died, according to the medical evidence, of a penetrating wound of the heart.

There can be no doubt that the person who had asked for binti Zamani was the person who was seen walking in front of the deceased away from his house, who was later seen by Benedict on top of the deceased and who had caused the death of the deceased. The question is whether the evidence established that that person was the appellant. Benedict said that he identified him when he was on top of the deceased. Biesha said that she had seen him and heard his voice when he was outside the deceased's house, while Mtemesi claimed to have identified him only by his voice.

Dealing with the evidence of Benedict the learned trial Judge said: "Benedict says that at first he did not recognize the man but that when he seized him and the man turned his face he saw that he was the same person whom he had seen previously that day. This witness's evidence is subject to the criticism that he is now far more positive on the question of identification than he was at the preliminary inquiry when he merely gave a description of the man's dress. His deposition was not put in but in the interests of the accused it is only right to refer to it. It is fair to say that at the lower Court he did not say in so many words that he was unable to recognize the man but the whole tenor of the evidence is that he was only able to describe his dress. I do not, however, regard this as a reason for rejecting his evidence in toto, and I consider that he was speaking the truth on everything but this". This appears to mean that the Judge did not accept the evidence of Benedict given at the trial that he identified the deceased's assailant as the appellant.

The trial Judge noted that while at the inquiry Biesha did not suggest that she was able to recognize the person who had asked for binti Zamani as the appellant "otherwise than by his voice", at the trial she said that "she was able to see the accused's face while she was at the window". It does not appear that the Judge, by reason of this serious discrepancy, drew any inference adverse to her credibility as a witness. He said that "he had no reason to doubt" that Biesha as well as Mtemesi, the latter of whom had consistently said she had not seen the appellant, "recognized his voice as the voice of the person outside the house". It will be necessary to return to the evidence of these two witnesses.

It is a matter of speculation whether the Judge, rejecting as he appears to have done the evidence of alleged identification by Benedict, would have convicted the appellant on the evidence of these two witnesses alone. But it is clear from what he said that he was most impressed by the evidence of Khadija and particularly by that portion of her evidence where she said that she heard the appellant, when he arrived at the deceased's house, asking for binti Zamani.

Khadija's evidence was that when she left her husband's house she intended going to Mruga's house (Benedict said that she mentioned she was going to Nduo's house) but decided to go to the appellant's house: that she was given accommodation by the appellant in his house: and followed him when he left his house: that when she was under a mango tree about 95 yards from the deceased's house she heard the appellant say, "I want binti Zamani": and finally, that after she had changed her position she witnessed a fight between the appellant and the deceased at a distance which she indicated in the witness-box and which the Judge estimated to be 120 yards.

The Judge held that she was "a thoroughly reliable witness" and also that the footprints found by Assistant Superintendent Stafford on a native path in a cultivation bordering the main road linking the deceased's house and the appellant's house, "afforded some corroboration of her evidence".

The method adopted in this case of comparison of footprints alleged to be those made by Khadija's bare feet, as well as some alleged to have been made by the appellant's shoes, was not satisfactory. Mr. Stafford placed Khadija's feet in the footprints and "found that they fitted exactly". He also fitted into prints, made by shoes, a pair of shoes found in the appellant's house which the appellant admitted having worn on the day in question. They also "fitted exactly". It was pointed out by this Court in *Rex v. Maganga bin Isike* (1935) (2 E. A. C. A. 89) that this method of comparison is useless because it necessarily obliterates any small differences if such exist, particularly where the footprint is in soft earth. We think it worth while to repeat part of the passage cited in that case from *Wills on Circumstantial Evidence* (new 7th edition, 235):-

"The proper method of comparison is to make the impressions of the shoes (or foot) by the side and at a sufficient distance from those in question. Where the character of the soil and the interval of time permit such a thing, the most satisfactory mode of proof is to dig out and preserve the original footprints; where that cannot be done casts in plaster of paris should be taken. Where neither of these methods is adopted and the identification is sought to be established merely by the police evidence, juries are apt to pay very little attention to it."

In addition the Judge does not appear to have considered that the house of Ndua to which Khadija told Benedict she was going or the house of Mruga to which she said in her evidence she intended to go, may have been reached by the path on which her footprints are supposed to have been found. Again, if she eventually went direct to the appellant's house, and not either to Ndua's or Mruga's in the first place, she may have used the path for the purpose of going there. The weight given to the footprints appears to be without warrant in law as well as in fact.

Now while the Judge regarded Khadija as a reliable witness and had the advantage of seeing her in the witness-box, this Court will not abdicate its right to disagree with a finding of the Judge based upon her evidence, if it is apparent that he has failed to take account of material circumstances or probabilities inconsistent with his finding.

In the instant case there are important points affecting the credibility of the witness Khadija which the learned Judge appears to have overlooked. The first is the discrepancy between her story as told in her deposition and as told at the trial. Her deposition was not put in evidence at the trial nor was she cross-examined upon it, but this Court has frequently said that it will look at the deposition if the interest of the appellant seems to require it, and the learned trial Judge very properly adopted the same course with other witnesses. In her deposition Khadija is recorded as having said that when the deceased and the appellant came towards the tree where she was standing she ran back to another tree and continued to watch the two people coming. She then said: —

"I saw them stand still. They were accused and Kasian. I heard accused ask Kasian why he had turned accused out of his (Kasian's) house. I heard the sound of blows. I did not see what was happening. I heard the voice of Kasian saying 'you are hurting me'. When I had heard the sound of blows I went back and hid at the corner of a house. It was then that I heard Kasian saying he was being hurt. Then I heard accused saying that Kasian would cry more. I heard someone coming running from Kasian's house. I then ran away because I thought the fight would get worse."

At the trial, however, she said in examination-in-chief, that it was after she had moved from the second tree and was kneeling down on the veranda of "a certain house" that she heard the noise of slapping and heard the deceased saying "You have hurt me". She indicated from the witness-box the distance which then separated her from the two men which was estimated by the Judge

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to be about 120 yards. In cross-examination, however, she claimed to have seen the struggle: her answers on this point were as follows: -

"When I was on the veranda I saw them struggling. First I heard slaps." I heard deceased say 'you have injured me'. I saw accused falling down. Accused said 'you will still cry'. When deceased fell down accused was sitting on the top of deceased. I cannot make out on which part of deceased's body he was sitting. I could not make out from this distance if he was kneeling or not. I know the one who was wearing the red clothes was underneath and the one wearing the white clothes was

on top. I don't know what the man in white did with his legs. They were under a small tree near a house belonging to a woman called Maneno, nine paces (indicated) from the house. It was on the other side of the road from me. It was on the other side of the road from accused and deceased's house. I saw the dead body on the same side of the road as the house of deceased and accused. After deceased was struck accused ran away."

It is clear that the learned trial Judge accepted this part of her evidence for he says in his judgment: \$-\$

"Then she changed her position and stood finally outside the house of Maneno from where she witnessed the fight between the accused and deceased."

But if the witness was, as she indicated at the trial at a distance of 120 yards from the spot where the deceased was stabbed, it was very material to consider whether she could actually have heard and seen what she claimed to have heard and seen. It was night time and the moon in its first quarter was shining fitfully through clouds. Assistant Superintendent of Police Stafford, who made a test of visibility the following night under similar conditions estimated the maximum distance at which he could discern a human figure as 75 yards. It would seem, therefore, very improbable that Khadija's evidence as to having seen the fight was true and that at the trial she was improving her story just as Benedict and Biesha had done.

It seems to us that the learned trial Judge did not address his mind to this point because he had unfortunately seriously misdirected himself as to Khadija's position at the material time. It appears from the judgment that he mistakenly thought that Khadija witnessed the struggle from Maneno's house, which, according to Khadija, was about nine paces away from where the two men were. The excerpts of the evidence quoted above show that this was an error and it is one which may have very seriously affected his judgment.

We think it very probable that the cause of this error was the lack of precision in the proof of the plan of the scene made by A. S. P. Stafford (exhibit D) and we think it pertinent to remark on the method which ought to be followed in proving such plans. The plan purported to show the relative positions of the houses of deceased and appellant, two mango trees, the places where bloodstains were seen, et cetera, and the approximate distances between them. It also purported to show by a dotted line the route taken by Khadija when following the appellant to the deceased's house and back to the appellant's house. Mr. Stafford gave evidence that he asked Khadija to point out her movements on the night when deceased was killed and drew the plan of the scene.

Khadija said that she was taken to the scene by a European Police Officer "and (? showed) where I stood and passed in the shamba and went to the house of Mohamed (appellant). He measured everywhere I passed". The plan shows two mango trees marked F and G and a house marked H with the dotted line passing round one corner. Presumably these represent the three points at which

Khadija claimed to have stood and watched but this is nowhere stated in the evidence. (We note in passing that the house H is 95 paces from a point marked "B—body found" at which there was a large bloodstain.)

In proving a plan in a case of this sort, the prosecution should prove that the person who made the plan accompanied the witness, that the witness pointed out a certain place as the spot where the witness stood or where some event occurred and that that place is marked on the plan in some way which enables it to be identified: further, the witness, if available, should corroborate the fact of having pointed out the place to the person who made the plan. Had this course been followed in the present case we think it improbable that the learned trial Judge would have fallen into error as to Khadija's position.

Maneno's house does not appear on the plan, but this is understandable as it was not mentioned by Khadija until she was cross-examined at the trial. This house cannot, however, have been far away from the spot marked B as it is highly improbable that the deceased could have moved far, if at all, after being stabbed through the heart: Khadija's indication of the distance was estimated at nine paces.

We are left therefore with the position that the learned trial Judge may have thought that she was only that distance away, whereas if, in fact, she was at the house marked H she was about 100 yards away, and beyond the extreme range of visibility as estimated by Mr. Stafford.

This Court is always impressed with the necessity of paying strict attention to the principles that have been laid down by the highest authority as to the impropriety of an appellate tribunal reversing the Judge who has seen and heard the witnesses, except on some real ground; but as Lord Greene, M. R., pointed out in *Yuill v. Yuill* (1945), 1 All E. R. 183 at page 190, it is important that the Judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. In the same case, the learned Master of the Rolls pointed out (at page 189) that an impression as to the demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question.

This Court is entitled to say, however trustworthy Khadija may have appeared to the Judge, that if her evidence is that she heard a remark at a distance at which it is most unlikely she could have heard the remark, and that she saw a fight at a distance at which it was impossible for her to have seen the fight, her evidence can be given no weight in the determination of the appellant's guilt. If, for these reasons, as we feel we are entitled to do, we disregard the evidence of Khadija, we are left with the finding of the trial Judge that Biesha and Mtemesi recognized the voice of the appellant.

It is often an important consideration, when a witness claims in Court to have identified a particular person at a certain time, if it is proved by the evidence of a third party that at that time he or she had spontaneously claimed to have been able to identify that particular person. It was no doubt with this in view that when Benedict gave evidence he was apparently asked if either of the two women had said at the deceased's house that she recognized the voice of the appellant,

for he is recorded as having said that "before binti Mbaya (i.e. Biesha d/o Mbaya) went to the window she said 'that is Mohamed's voice'". If that evidence is true the Judge could well have been satisfied that, whether or not the voice heard by Biesha was in fact the voice of the appellant, she honestly believed at the time that it was: for if she had said that she had recognized the voice of the appellant, it is precisely what one would have expected her to

have done. But in cross-examination she admitted that in the lower Court she had said: "I did not tell anyone in the house the name of the person outside with the deceased". The Judge did not deal adequately with the evidence. He merely recorded his conviction that Biesha had spoken the truth and that he had no reason to doubt that she had spoken the truth. It seems to us that if he had given due weight to her complete **volte-face** that she had seen the appellant, and the fact that she had mentioned to no one in the deceased's house that she had recognized the voice of the appellant, he would inevitably have felt some doubt as to whether she was a reliable witness.

In regard to Mtemezi the Judge appears to have misdirected himself. While he was alive to the importance of a claim being made by a witness at the time of alleged identification of such identification, he appears to have thought that evidence could be given of this claim by the same witness; for in answer to the Judge himself Mtemezi said "at that time I said that is Mohamed's voice, the one who is arguing with Kassian". If this evidence, elicited by the Judge, was one of his reasons for believing Mtemezi, it is not a proper reason. To what extent he was influenced by this evidence it is impossible to say. Certainly no other witness says that at the time of the altercation outside deceased's house or at any time did Mtemezi claim to have identified the voice of the appellant: and if she had recognized his voice, one would have expected her to have said so. This important consideration appears to have been overlooked completely.

An important feature of the case is the absence of blood on any clothing proved to have belonged to the appellant. The Judge dismissed the matter, rather lightly and without full regard to the evidence we think, by saying "the absence of blood on the accused's clothing may well be accounted for by the fact that according to the medical evidence, the blood was drawn into the abdominal cavity". It is true that the medical witness said "there would not have been a spout of blood when the blow was struck to the heart as the blood was drawn into the abdominal cavity", but he added "some blood would have come out". In addition to this, it was pointed out by the learned Solicitor General of Tanganyika that there were other signs of violence involving injury to the deceased's skin which can safely be taken to have caused bleeding, and that the evidence was that the deceased's assailant dressed in white clothes was lying on top of him. It is remarkable that the appellant's clothes showed no blood stains and no signs of a struggle.

For the reasons we have given we are of the opinion that, on a detailed examination of the evidence, it cannot be said that the guilt of the appellant had been established with that high degree of certainty requisite in a criminal case, especially when the charge was one of murder. The appeal is allowed and the conviction of and sentence passed on the appellant are set aside.

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