

UGANDA / JUDGMENT

Rushashio v Muthonga

(Criminal Case No. 146 of 1948)

[1948] EACA 57 (1 January 1948)

[1948] EACA 57

COURT

East African Court of Appeal

BEFORE

Modera J

CASE / FILE NUMBER

Criminal Case No. 146 of 1948

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

ORIGINAL CRIMINAL

Before MODERA, AG. J.

REX, Prosécutur

 $\mathbf{v}$

.. KARIOKI s/o RUSHASHIO, Accused No. 1,

and

GICHIMU s/o MUTHONGA, Accused No. 2

Criminal Case No. 146 of 1948

Criminal law—Wounding with intent, section 226 (1), Penal Code—Abduction in order to murder, section 252, Penal Code—Abduction in order to subject to grievous harm, section 254, Penal Code—Evidence-Identification in Court—Identification parade.

The accused were jointly charged on three counts contrary to section 226 (1), section 252 and section 254 respectively of the Penal Code. The case for the Crown depended mainly on the identification of the two accused as persons who acted in concert with others in the commission of the offences charged. The facts are fully set out in the judgment below.

Held (26-8-48).—That although none of the Crown witnesses identified accused No. 1 at the identification parade, but only in Court, the evidence of identification was, in all the circumstances sufficient to establish beyond all reasonable doubt that he was one of the group present at the relevant time and a participant in the crime.

Rex v. Kipwenei Arap Masonik and others 12 K. L. R. 153 referred to.

Holland, Crown Counsel, for the Crown.

Both accused in person, unrepresented.

JUDGMENT.—In this case the two accused, Karioki Rushashio and Gichimu Muthonga, are each charged on three counts: the first charge is framed under section 226 of the Penal Code; the second and third, which Counsel for the prosecution has agreed are alternative, are framed under section 252 and section 254 respectively.

The Crown seeks to prove that the two accused each acted in concert with others in the commission of the offences with which they have been charged.

It is stated by Stephen Mwenja (Prosecution Witness No. 1) that on. 20th December, 1947, a body of armed men, who were acting under the orders of a leader named Reuben Kithiko, arrived outside an eating-house where he was taking food. Stephen goes on to say that after conversation with the leader the men, on orders, broke into two groups and entered the eating-house with a view to seizing Stephen. He managed to escape, but not before he had been cut on the shoulder with a *semi* or some such weapon. He was pursued to another neighbouring house and whilst endeavouring to close the doors on his pursuers he was cut severely on his right wrist, as a result of which wound he has lost the use of his right hand. Stephen was then made the prisoner of this gang of men. The injuries which Stephen received form the subject of the first charge against the accused, and I will first of all address myself to this charge. Were the two accused amongst the body of the men which attacked and injured Stephen?

The only evidence of identification on this charge is that of Stephen himself; he identifies accused No.1 as having been in the front row of the attackers at the eating-house and he states that accused No. 1 was also at the second house where he received the serious injury to his right wrist. He does not identify accused No. 2, and he was unable to identify accused No. 1 at an identification parade held at the prison, Nairobi, on 22nd January, 1948, when both

$\delta\Lambda^{\prime}$

accused No. 1 and accused No. 2 were on parade along with 110 other men. No other witness has spoken to the presence of either of the accused at these houses where injuries were inflicted on Stephen, but I am asked to infer that, because of subsequent happenings in which it is alleged that both accused were concerned, they must have been present whilst the incidents of the first charge were being enacted. Inference is one thing and proof is another, and I think it highly dangerous in any criminal case to draw inference against an accused person. The inference is great, but bearing in mind that the only evidence is that of Stephen and that he can only speak of

one accused, whom he failed to identify on the parade, I feel constrained to give the benefit of the doubt to accused No. 1 and I find both accused not guilty of the charge under section 226 of the Penal Code. They are accordingly acquitted on the charge.

Now what transpired afterwards? As I have already stated, Stephen was made a prisoner and was marched off under escort of two, with the leader and other armed men behind. The procession thus formed was starting off towards Gatundu when a lorry passed owned by a friend of Stephen and in which he, the owner, was travelling. The lorry paused, the friend said he was going to make a report and the lorry moved on. Shortly afterwards the lorry returned down the road upon which the procession was moving bearing a posse of police. The lorry was halted, its occupants alighted and the procession was halted.

All the prosecution witnesses as to these incidents agree that the body of the men were marching in formation under the orders of their leader Reuben. There is some discrepancy as to whether they were marching in three files or two files or one file, but it would seem to be clear that when halted they adopted the formation of one file or line. It is certain that Stephen with this escort was in front and that the leader Reuben and his other men were behind: it is also certain that upon the halting of the lorry and the body of men Stephen was released from the custody of the men and was taken charge of by the police and assisted into the lorry.

Then followed a conversation between Reuben (the leader) and the inspector in charge of the police—Inspector Peter (prosecution witness No. 3). Crown witnesses are substantially in agreement as to what was said and the Inspector, in view of the attitude adopted by Reuben and his men, very properly deemed it prudent to withdraw and to report the matter to superior police authority.

Now, were accused No. 1 and No. 2 among the body of men under the command of Reuben?

The evidence of identification is such that I deem it proper to analyse the testimony of each of the witnesses in this regard:-

Prosecution Witness No. 2, Sergeant Samuel Kyule, states that there were three lines or files which, when halted, formed one line across the road. He identifies accused No. 1 as being fourth in the middle file and accused No. 2 as being second in the left file. He says accused No. 2 was wearing a white skin. This witness at the identification parade identified accused No. 2.

According to Mr. Ward (prosecution witness No. 6), an ex-Superintendent of Kenya Police, who was present on the parade, this witness when identifying stated that accused No. 2 was picked out as one of the men in the procession with Reuben on the Gatundu Road when he was dressed in skin and had a semi or spear in his hands. Sergeant Kyule did not pick out accused No. 1 on the identification parade, but is confident that he saw both accused on the road on 20th December and also later in the day at some fight, about which fight no evidence has been led.

Prosecution Witness No. 3. Inspector Mwani, testifies to having seen both accused in the crowd, and that there were two lines, later formed into one. Both accused were in the same line or file, accused No. 1 being towards the back. Accused No. 2 was wearing a skin of white and red of various colours. This

witness only identified accused No. 2 on the identification parade and in so doing according to Mr. Ward (prosecution witness No. 6) picked out accused No. 2 as being present in the procession together with Reuben on the Gatundu Road when Stephen (prosecution witness No. 1) was present. He was armed with a panga. This witness states that he saw the two accused that day only on the road.

Prosecution Witness No. 4, Police Constable Kombo, says that there were about 13 in the crowd. When he first saw them they were in three lines and later they came into one line. This witness recognizes accused No. 2 as being in the crowd. He says that accused No. 2 was wearing a skin, the colour of which he cannot remember, but some of it was brown, that he was in the left file as he looked at the files and that he was in the front line. This witness later identified accused No. 2 in the ward of 42 patients, half of whom were in bed and half standing up, at the Native Civil Hospital on 3rd February, 1948. In so doing, according to Mr. Ward (prosecution witness No. 6), he said, "I think I saw this man on the Kiganjo-Gatundu Road in Reuben's crowd on 20th December, 1947". This young police constable gave his evidence extremely fairly and impressed me very much.

Prosecution Witness No. 5, Kibe Mboti, gave evidence as to what he saw on the Gatundu Road that day and as to his attendance at the identification parade on 22nd January, but this witness was uncertain in his memory and I cannot place much reliance on his testimony.

The discrepancies in regard to the positions in which accused No. 1 and accused No. 2 were marching or stood seemed, at first hearing, to have been of importance, but bearing in mind the tense atmosphere which obviously reigned at the time and the fact that, equally obviously, there was some movement there is evidence to that effect—among the members of this body after they had been ordered to halt, I do not regard these discrepancies as sufficient to warrant the rejection of the evidence of the members of the police party. I regard them rather as discrepancies which may be expected in the description of a scene of this nature.

The same comment is applicable to the testimony of these witnesses regarding the clothing and colours of the skins which the members of the body of men were wearing. That then is the evidence of the prosecution witnesses upon the all-important question of identification. Has identification of the two accused as being amongst the body of men who were with Reuben on the Kiganjo-Gatundu Road on 20th December, 1947, been established beyond reasonable doubt?

Now if failure to identify a suspected person upon an identification parade is of itself sufficient to ensure to that person ultimate acquittal of an offence with which he is charged then No. 1 accused would be entitled to be acquitted on all the charges preferred against him in this Court, for none of the Crown witnesses identified him in the parade at the exercise yard of Nairobi Prison on 22nd January, 1948. That is a fact to which I have given the gravest consideration in this

case and I have borne in mind the consideration given by this Court in its appellate jurisdiction in the case of *Rex v. Kipwenei arap Masonik and 20 Others* (Law Reports, Vol. XII, page 153) on the question of identification. The nature of the identification parade on 22nd January, 1948 was described by Mr. Ward (prosecution witness No. 6) as a very severe test. Indeed, it was a very severe test no less than 112 men being on parade all dressed in precisely similar manner in prison blankets draped from neck to feet. Further, I have taken into consideration that Stephen, admittedly an injured and wronged man who gave his evidence calmly and to my mind not in any way bitterly, has sworn to the identity of accused No. 1 at the eating-houses: whilst I gave this accused the benefit of the doubt in deciding the issue on the first charge I was induced to that decision because there was no corroboration of Stephen in that particular charge. But in the case of those charges with which I am now dealing the evidence of Sergeant Kyule (prosecution witness No. 2) and that of Inspector Peter (prosecution witness No. 3), neither of whose testimony am I prepared to reject and both of whom have sworn positively as to the presence of accused No. 1 on the Kiganjo-Gatundu Road that day, is corroborated by Stephen (prosecution witness No. 1) to the extent that accused No. 1 was among the body of the 13 men earlier in the proceedings at the eating-houses.

Again accused No. 1 did not elect to give sworn evidence, but in the course of his unsworn statement he did, as also did his co-accused, admit that he had accompanied Reuben and his party to the mountain to pray, and he has thus associated himself with Reuben and this fact is some corroboration of the witnesses on the question of identification: further there is the evidence of the apprehension of accused No. 1 which though not of great significance is at all events not inconsistent with the case as presented by the Crown.

The assessors have unanimously given their opinion that accused No. 1 was present at the eating-houses and on the Kiganjo road and they have added that in their view the accused, who have denied being present at either place, should and could have contrived to prove an alibi. I would here point out that it is not for an accused person to prove his innocence, and though the onus of establishing an alibi rests on those who assert it, the onus of proving the charge upon the whole of the evidence always remains with the Crown.

Reviewing all the evidence I am in agreement with the assessors on the question of identification for the reasons which I have stated and I am satisfied beyond reasonable doubt that accused No. 1, whatever may have been the position or positions he may have taken up in the formation was on the Kiganjo-Gatundu Road on 20th December, 1947, among the body of men under Reuben's command.

As to accused No. 2 the evidence of identification is much stronger than that in the case of accused No. 1 and though identification may have been easier owing to the fact that he was at both identification parades on his back, either on a stretcher or in bed, he was on each occasion placed amongst others who were similarly situated. I am satisfied that accused No. 2- whatever position or positions he may have taken up in the formation- was also on the Kiganjo-Gatundu Road on 20th December, 1947, amongst the body of men under Reuben's command.

In the result I am satisfied that the Crown has discharged the onus which the law imposes regarding the presence of both accused on 20th December, 1947. on the Kiganjo Road. That being so I have now to decide what is the nature of the offence which they have committed. I can find no reason to disbelieve Stephen regarding his account of what the leader stated at the eating-houses and at the time of his being taken into custody by his assailants: nor can I find any reasons to disbelieve the story told by the prosecution witnesses as to what took place on the Kiganjo Road. I am satisfied that all the men with Reuben on the Kiganjo-Gatundu Road knew the intentions of their leader, which intentions they adopted as their own. I am further satisfied that the concerted plan of these men including both accused was to abduct Stephen Mwenja-then already a maimed man-and, that they were in fact so abducting him in order that he might be murdered or so disposed of as to be put in danger of being murdered. Therefore I find both accused guilty of an offence under section 252 Penal Code and I convict each of them accordingly. The third charge under section 254 Penal Code is alternative to that under section 252 and I find both accused not guilty of the third charge.

(The accused, who had been in custody for eight months, were each sentenced to 12 months' imprisonment with hard labour.—*Editor*.)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/aa/judgment/eaca/1948/57/eng@1948-01-01>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/rushashio-v-muthonga-criminal-case-no-146-of-1948-1948-eaca-57-1-january-1948-unknown-topic-unknown-court-1948>

Prepared on 14 October 2026 · Esheria