

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSTAFA, J.A., OMAR, J.A. And MAPIGANO, Ag. J.A.)

CRIMINAL APPEAL NO. 100 OF 1986

MWITA S/O BUGOCHA. APPELLANT

VERSUS

THE REPUBLIC. RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Musoma)
(Munyera, J.) dated the 26th day
of November, 1986

in

Criminal Sessions Case No. 36 of 1985

JUDGEMENT OF THE COURT

MUSTAFA, J.A.:

P.W.1 Maswi has two homesteads and four wives. On the night of 16th April, 1984 P.W.1 was with one of his wives in one homestead, and his two other wives were in another. The homesteads are near each other.

At about midnight P.W.1 was awakened by one of his wives (P.W.4) from the other homestead who shouted that burglars had broken in there. P.W.1 picked up a spear and rushed to the scene and outside one of the huts in his other homestead he said he saw the appellant Mwita, a co-villager whom he knew. The appellant was carrying a torch and a rungu. P.W.1 raised an alarm and the appellant ran off to a nearby hill. P.W.1 was positive he had identified the appellant as there was bright moonlight that night. He saw one of his wives, the deceased, lying there injured and found out later that she was dead. She had, according to the post mortem report, died of haemorrhage due to two penetrating wounds, caused by a bullet, crushing the left side of the lung which resulted in a lot of blood gathering in the chest cavity, and the heart was also damaged.

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The Chairman of the village and the balozi did not answer the alarm raised by P.W.1 that night. He said the appellant also did not attend in answer to the alarm.

P.W.3, a son of P.W.1, was in the homestead of the deceased on the material night. He suddenly heard gun fire and peeped out through the holes in the unplastered wall of his hut. He alleged that he saw the appellant whom he knew as a co-villager standing near the door of the house P.W.3 was sleeping in. The appellant was carrying a rungu and a torch. He said that there was bright moonlight and he could see the appellant clearly.

Then he saw his father P.W.1 arriving at the scene and raising an alarm, and it was then discovered that his mother, the deceased, had been shot and was dead. He stated that cash and clothing had been stolen from the house.

P.W.4, a co-wife of the deceased, also testified. She and the deceased heard cries and shouts from the children in the other huts and both she and the deceased ventured out of the hut they shared. P.W.4 alleged she saw two men, one the appellant with a torch and a "big nut", and the other man, one she called Sese Chacha, with something in his hand she could not recognise, both co-villagers. P.W.4 then ran off to alert P.W.1 about an attack by burglars. P.W.1 ran to the burgled homestead, followed by P.W.4. When P.W.4 arrived back at her homestead she saw the deceased already dead on the ground and both the appellant and Sese Chacha had disappeared. P.W.4 also stated as she was on her way to alert P.W.1, she heard a rattle of gun fire behind her and she surmised that the deceased must have been shot then.

She stated that the appellant did not turn up when the alarm was sounded, not even on the following morning.

The appellant testified. He stated that on the material night he was in the village and heard a rattle of gun shot. He went to his balozi D.W.2 Chacha Sese, and informed him and asked him to go with him to the scene. He alleged the balozi D.W.2 advised him not to go that night. He stated that on that night

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there were clouds, and that it was a dark night. He went to the scene of the incident with his balozi D.W.2 the following morning. He then saw the body of the deceased and he did not know who had killed the deceased.

D.W.2 testified. He confirmed that the appellant reported to him on the material night about an alarm being raised. D.W.2 had heard gun fire that night. He stated that the appellant was among several people who asked him to go with ~~the~~^{answer} to the alarm that night. D.W.2 refused to go, but advised the appellant to go on his own to answer the alarm.

D.W.2 went to the scene the following morning and saw the appellant there. He said that while there he heard P.W.1 urging people who had gathered there that morning to arrest the appellant, but nobody did so. It would seem that the appellant was arrested during the same week. There was no evidence given at the trial as to arrest, who arrested the appellant, where and when. It is elementary that evidence of arrest of an accused, with the necessary particulars, should always be given.

In his judgment the trial judge (Munyera, J.) referred briefly to the evidence of the witnesses called by the prosecution. He believed the evidence of P.W.1 and P.W.3. As regards P.W.4, he stated that after scrutinising the police statement P.W.4 had given, he was satisfied that P.W.4 had not mentioned the appellant in her statement to the police. He then apparently totally discounted the evidence of P.W.4. The judge then considered whether P.W.1 and P.W.3 could have been mistaken about the identify of the man they alleged they had seen on the material night. He then said

"They said there was bright moonlight that night but the defence argued it was a dark night and raining".

The judge then dealt with the failure of the appellant to answer the alarm that night. He said although the balozi D.W.2 had advised the appellant to go and answer the alarm, the appellant did not do so. He also referred to the

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fact that the appellant had said he had gone to the scene the following morning, but "all the prosecution witnesses said he did not appear there". He said he agreed with the prosecution that the appellant "never attended the alarm. That being the case he had something to fear, he would have been immediately pointed as the killer". It is not clear whether the judge meant answering the alarm when it was sounded after midnight or visiting the scene the following morning.

He then stated that he believed that the appellant was the man P.W.1 and P.W.3 had seen on the material night and he convicted the appellant of murder as charged.

There are a number of unsatisfactory features in the judgment. According to the evidence adduced ^{by} the prosecution, the appellant was armed with a rungu and a torch and he could not possibly have killed the deceased by firing a bullet at her. There was some evidence by P.W.4, whose evidence apparently was totally rejected by the judge, that she had seen another person Sese Chacha, with the appellant, who had something she could not identify or recognise. According to P.W.5, a daughter of P.W.1, that night she suddenly found two men in the house she was in, and she saw the two men flashing torches and beating her and the others up, and taking away clothes and a radio. It would therefore, seem that this Sese Chacha must have been the one armed with a gun. If any one had shot and killed the deceased it would have been this other man i.e. Sese Chacha, not the appellant. Perhaps the appellant could have been convicted on the basis of section 23 of the Penal Code as a person with a common intention with the killer, but apparently the judge never considered that matter.

Again the judge had totally failed to consider the case put forward by the appellant. It was in evidence that the village Chairman and the balozi did not answer the alarm on the material night. The trial judge did not direct his mind to the evidence of D.W.2 that the appellant had gone to D.W.2 and had asked D.W.2 to accompany him to answer the alarm. The judge had relied heavily on the failure of the appellant to answer the alarm on the material night to convict the appellant of the offence charged.

The appellant, in his evidence in chief, had stated that on the material night there were clouds and the night was dark. The appellant was not cross-examined on that. The judge in his judgment had stated that the witnesses P.W.1 and P.W.3 had stated it was a moonlit night and the appellant that it was a dark night. He however never resolved the issue; he did not make a finding whether it was a dark or moonlit night. He left the issue open and unresolved.

In our view the question whether it was moonlit or dark on that night was crucial. If it was dark then P.W.1 and P.W.3 could have been mistaken. We are unable to resolve that issue at this stage, and we will have to give the benefit of the doubt to the appellant.

It would seem that the judge had found that the appellant did not attend at the scene even on the morning following the killing. He ignored D.W.2's evidence to the effect that D.W.2 had seen the appellant there and that P.W.1 had allegedly urged the people at the scene to arrest the appellant, but without success.

We are not convinced that the judge was right in totally rejecting the evidence given by P.W.4 for the reason he gave. However, in view of the unsatisfactory nature of the judgment, which has a number of material gaps, we do not think we can safely uphold the conviction. We therefore allow the appeal, quash the conviction, set aside the sentence of death imposed and order that the appellant be set free forthwith unless otherwise lawfully detained.

DATED AT MWANZA this 11th day of August, 1987.

A. MUSTAFA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

D. P. MAPIGANO
Ag. JUSTICE OF APPEAL

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

(J. H. MSOFFE)

DEPUTY REGISTRAR.