

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 32 OF 1980

B E T W E E N

MWITA s/o KIABAROTI O NYAKIHENGU : : : : : APPELLANT

A N D

THE REPUBLIC : : : : : RESPONDENT

(Appeal from the Conviction and Sentence
of the High Court of Tanzania at Musoma)
(Mfalila, J.) dated the 17th day of
December, 1979,

in

CRIMINAL SESSIONS CASE NO. 81 OF 1979

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

The appellant, MWITA s/o KIABAROTI alias NYAKIHENGU, was charged and convicted by the High Court of the order of JOSEPH NYAMHANGA MARWA and sentenced to death.

The learned trial judge in his judgment, after reviewing the evidence deposed, was of the view that the question of guilt or otherwise of the accused, now the appellant, depended on whether one believed the witnesses of the prosecution or not - particularly the identification evidence of the two widows of the deceased MARWA. The learned trial judge was clearly of the view that the identification evidence was of a weak kind - insufficient of itself to found the basis of a conviction. He thought, in the circumstances of the case, that something more was required to support beyond doubt the identification of the appellant as the one who fatally assaulted the deceased MARWA. He found support for the widows' identification evidence in the evidence of the accused's words including insults and threats alleged to have been spoken or made by him from the sanctuary of his home.

If one accepts that the accused made the alleged insults and threats in the night, which the learned trial judge seems to have done, we think when this evidence is considered with the other evidence adduced by the prosecution, such as the act of the accused of going to the scene of crime the following morning, retrieving the spear blade and confessing that he had used it to spear the deceased - there can be no doubt left as to the identity of the appellant as the killer of the deceased MARWA.

However, Mr. V. N. Desai, learned counsel for the appellant, in a spirited short submission contended that the view reached by the learned trial judge on the crucial issue of identification was erroneous because in the words used in the first ground of appeal the judge "did not examine the evidence of identification critically in view of the fact that the night in question did not favour correct identification.". With respect, we do not agree. We think the learned trial judge properly dealt with this matter and was perfectly entitled, on the evidence on record, to hold that the appellant was correctly identified as the killer of the deceased.

With regard to the second ground of appeal, that is, the question whether in view of the unanimous opinion of the assessors on the issue of credibility the learned trial judge should have held their opinions logically tenable and acted accordingly, we think that as properly submitted by Mr. Mwanyika, learned counsel for the Republic, the learned trial judge was quite entitled, on the evidence, to reject the assessors' view of the matter.

- 3 -

But that as it may, we are satisfied, on the evidence,
that the conviction of the appellant for murder was proper.
We accordingly dismiss this appeal.

DATED at MWANZA this 10th day of October, 1980.

F. L. NYALALI

CHIEF JUSTICE

Y. M. M. MWAKASENDO

JUSTICE OF APPEAL

L. M. MAKAME

JUSTICE OF APPEAL

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

(A. BAHATI)

DEPUTY REGISTRAR