IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 55 OF 1979

B E T W E E N

WAZIRI AMANI : APPELLANT

A N D

THE REPUBLIC : RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Arusha) (Mnzavas, J.) dated the 25th September, 1979,

in

CRIMINAL SESSIONS CASE NO. 46 OF 1978

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

WAZIRI AMANI is appealing to this Court against his conviction and sentence of death passed by the High Court for the murder of one DAUDI s/o MEKASI. Messrs Kapoor and Mlawa appeared as counsel for the appellant and respondent Republic, respectively.

Mr. Kapoor, making his submissions on behalf of the appellant, has attacked the findings of the learned trial judge on two main grounds. His first submission relates to the issue of the identification of the appellant as the assailant of the deceased. According to Mr. Kapoor the trial judge erred in accepting the evidence of P.W.1 and P.W.2 as sufficiently cogent and qualitatively good so as to found an unimpeachable identification of the appellant as the deceased's assailant. His other submission relates to the unsatisfactory post-mortem report which the prosecution tendered in evidence at the trial. We will deal with Mr. Kapoor's submissions in the order they are set out supra.

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Since the incidents leading to the deceased's death took place at night, and since it may well be thought, as Mr. Kapoor presumably did, that the conditions prevailing at the time of commission of the offence were so unfavourable as to make any fair and correct identification of the assailant of the deceased impossible, we wish to deal with Mr. Kapoor's complaint in this connection by first looking at the facts found established at the trial before turning to discuss the law relating to this important question.

The facts in this case are rather scanty and simple. They are these. The 26th day of December, 1975, was for most peasants of Mwangalile village, Kahe, Moshi District, a day of festivities marking a very special event in the Christian Calendar, the Christian rite of baptism. SIMON MASAI (P.W.1) had on this special day laid a special party to celebrate the baptism of his son. To this party SIMON invited his relatives and friends among whom were his uncle, the deceased DAUD MEKASI, LOSINA MASAI (P.W.2 and Simon's sister), JUDICA DAUD (P.W.3 and wife of the deceased). The appellant WAZIRI AMANI who is Simon's brother-in-law, although uninvited, came to the party at 7.30 p.m. We are told that as soon as he arrived he asked those he found in Simon's house "what are you doing?" to which the deceased answered saying that they were celebrating the baptism of Simon's son. Whereupon, as it is alleged, the appellant said "what reply are you giving me" and then leaving the room to sit outside the house added: "Your reply has made me feverish". Half an hour later, so we are informed, the deceased went outside Simon's house to attend a call of nature and as he was about to re-enter the room, he was accosted by the appellant who, holding the deceased by his collar, asked him "what were you saying? I will show you." Then the appellant was seen stabbing the deceased with a knife on the left side of the chest and shortly

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The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. (See R. v. Eria Sebwato (1960) E.A. 174; Lejzor Teper v. The Queen (1952) A.C. 480; Abdalla Bin Wendo and Another v. R. (1953) 20 E.A.C.A. 166; R. v. Kabogo wa Nagungu (1948) 23 K.L.R. (1) 50; Mugo v. R. (1966) E.A. 124 (K)).

Now, the extent to which the possibility of the danger of an affront to justice occuring in this type of case depends entirely on the manner and care with which the trial judge approaches his task of analysis and examination of evidence. If the judge does his job properly and before accepting any evidence of identification he does through a process of examining closely the circumstances in which the identification of each witness came to be made, the dangers of convicting on such evidence are greatly lessened. Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions such as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but

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after threatening those present "You will see me tonight" the appellant ran away and disappeared into the night. He was not seen again until June 1977 when he was apprehended by the police and charged with the murder of the deceased. This in brief is Simon's account of the events leading to the deceased's killing by the appellant.

The other material witnesses to the tragedy are LOSINA MASAI (P.W.2) and MEJOLOI MEDUKENYA (P.W.6). Their accounts of the events which took place on the fateful night of the 26th December, 1975, are, apart from minor variations of detail, more or less similar to the narrative of events given by SIMON. However, Counsel for the appellant has vigorously attacked their recollection of the events and contended that as the described events occurred at night the conditions then existing could not by any means be said to be ideal for a proper and correct identification of the person who perpetrated the murder. Before deciding whether Counsel is right in this submission we pause here to consider the principles of law to which a trial court must have regard whenever a case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken.

It is trite to observe that in this case it is agreed by all that the present appeal raises an important problem relating to evidence of identification of the killer of the deceased DAUD MEKASI. Such evidence, as this Court is fully aware, is notoriously subject to error and has often led to a miscarriage of justice. Hence the necessity for the trial court to warn itself of the special need for caution before convicting in reliance on the correctness of the identification of an accused. How then is the trial court to be guided in resolving this problem?

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a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity. If at the end of his examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could, in those circumstances, safely convict on the evidence of identification. On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as a visual identification made in a poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit.

With that, we may now pass on to consider whether the trial judge in this case was mistaken as contended by Mr. Kapoor, in accepting the identification evidence given by SIMON MASAI (P.W.1), LOSINA MASAI (P.W.2) and MEJOLOI MEDUKANYA (P.W.6). The learned trial judge in summing up the case to the assessors explained the issue of identity of the accused in these words:

> " The question you have to decide on the evidence is whether the three prosecution witnesses properly and without any doubt identified the person who attacked and killed the deceased on the material night as the accused in court. In deciding this most important question you have to take into account the fact that it was a dark night when the offence was committed. You have also to consider the evidence that there was light from a hurricane lamp outside where the stabbing took place and the evidence that the attack was committed about 2 paces from the door which was said to have been open at the time.
>
> It is not disputed that the accused was well-known to the witnesses before the incident. He is in fact brother-in-law of Simon, (P.W.1).
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> On the other hand, you have heard accused's defence of alibi. If you believe his defence that he was in fact in Same when the deceased was attacked and killed in Kahe then he certainly could not have been deceased's assailant.

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> If you accept the defence of alibi or even if you think it is possible that the accused was no where near the scene of crime the law requires you to resolve the doubt in favour of the accused and find him not guilty of the offence. On the other hand, if you are satisfied in your own minds that the three witnesses could not have been mistaken in their identity of the accused as the one who attacked and killed the deceased you will have to find that the killing was unlawful."

With respect, we can find no fault with this charge to the assessors and as it seems to us, nor did the assessors. The learned trial judge in a considered judgment dealt with the issue of identification as follows:

> " All the three witnesses told the court that they saw the accused when he arrived at the party, they heard his utterances and they saw him attacking the deceased with knife. When Simon, (P.W.1), was cross-examined by the learned defence counsel as to how he could identify the accused in darkness he said inter alia: 'It was a dark night but there were lamps outside the house where children were celebrating'. When asked as to how he could see the accused attacking the deceased outside while he was inside the house he replied: 'The door was open when the accused arrived. It was open all the time we were there. ..... He was stabbed two paces from the door'. Losina Masai, (P.W.2), also said (when cross-examined by the defence): '..... It was a dark night but there was a hurricane lamp burning outside the house'.
>
> There was no dispute that the accused is well-known to the three witnesses. He is in fact brother-in-law of Simon, (P.W.1). As clearly demonstrated in the evidence of the three witnesses soon after his arrival at the party he talked to the people at the party including the deceased. According to the evidence the stabbing took place about 2 paces outside the door of the house in which the witnesses were sitting. The door was wide open and there was a lamp burning outside where the attack took place.
>
> There is also the evidence that soon after the stabbing the accused retreated to five paces away and threatened to attack any person who dared to approach him.
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> This being the evidence I ..... agree with the opinion of the judges of fact that the three witnesses could not have failed to identify the accused as the person who, on the material night, attacked the deceased."

This analysis of identification evidence by the learned trial judge is, in our view, as good as one could expect to find in a case of this kind. We entirely agree with the learned trial judge that the evidence established by the prosecution left no doubts whatsoever

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as to the correct identity of the accused as the one who killed the deceased. And like the learned trial judge, we are of the firm view that the alibi put forward by the accused was a palpable lie, which he had advanced for the sole purpose of deceiving the court. In the result, we have no hesitation in rejecting Mr. Kapoor's first submission.

We now turn to consider Mr. Kapoor's second submission. This related to an apparent contradiction in the evidence of the doctor and that of the other witnesses for the prosecution who deposed as to the location of the fatal wound on the body of the deceased. The three eye-witnesses - SIMON, LOSINA and MEJOLOI - were quite emphatic that the deceased was stabbed on the left side of the chest. Their evidence finds strong support in the evidence of GEORGE MWAKAPOLA (P.W.8) the police investigating officer who went to Mwangalile Village on 27th December, 1975. George told the court that on arrival at the scene of crime he saw a dead body of an adult male African. He examined the body and noticed a wound on the deceased's chest. George accompanied the body of the deceased to K.C.M.C. Hospital at Moshi and was present when the body of the deceased was identified before a doctor attached to the Hospital by SIMON as that of DAUD MEKASI of Mwangalile Village, Kahe. We have carefully looked at both the post-mortem report and the testimony given by the doctor who performed the post-mortem examination and can find no basis for the doctor's dogmatic finding that the wound which caused the death of the deceased was located on the back, at the left hand side of the deceased's body. Although the learned trial judge endeavoured to rationalise the doctor's evidence, we do not think the doctor's explanation as to how he could have found the wound on the back of the deceased's body when everyone else saw it on the left hand side of the chest can easily be rationalised or accepted having regard to the strong evidence on this point deposed by the four

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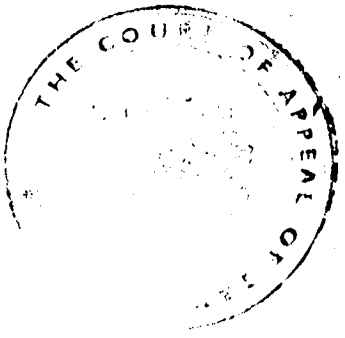
other witnesses for the prosecution whose credibility the trial court accepted without question.

On careful consideration of this aspect of the case, we are of the opinion that the doctor's evidence as to the location of the fatal wound is completely untenable in the circumstances of the ~~case.~~ We are in the event satisfied that the wound found on the deceased's body was as described by SIMON, LOSINA, MELOJOI and GEORGE located on the left hand side of the chest. It follows, therefore, that Mr. Kapoor's second submission also fails.

Accordingly, we dismiss this appeal. It is so ordered.

DATED at ARUSHA this 6th day of May, 1980.



F. L. NYALALI
CHIEF JUSTICE

Y. M. M. MWAKASENDO
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

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

(L.A.A. KYANDO)
DEPUTY REGISTRAR