

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Makame, J.A. and Kisanqa, J.A.)

CRIMINAL APPEAL NO. 5 OF 1981

B E T W E E N

PIUS JOSEPH & JONATHAN J. KAAYA . . . . . APPELLANTS

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction and sentence  
of the High Court of Tanzania at Arusha)  
(Mnzavas, J.) dated the 30th day of  
January, 1981,

in

Criminal Sessions Case No. 28 of 1977

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

During the night of 9th January, 1976, a gang of four people went into the house of P.W.1 Msele at Arusha under the guise of police officers allegedly in search of "Moshi", but in fact to rob. Two persons went into the room and two remained outside the room on guard. One of them was taking away a radio and as they were leaving one of the persons fired a shotgun and killed the deceased, a young son of P.W.1, aged about nine years.

Two persons were eventually arrested, charged and convicted of murder. Appellant 1 is Pius Joseph and Appellant 2 is Jonathan Kaaya.

The whole issue at the trial as in the appeal is identification. It was in evidence that there were koroboi lamps in the house burning that night, at least two large koroboi lamps. One witness P.W.6, Nyeiyo the wife of P.W.1, alleged that there was also a lantern in the room. There was bright moonlight. The intruders spent some time in the house, the two who went into the room searched it and then came out with a radio. Two stood on guard outside the room, one of them in possession of a shotgun. It was alleged that the one

in possession of the shotgun was Appellant 1. It would seem that both P.W.1 and P.W.6 were under the guard of Appellant 1 and another person and both would have had opportunities of seeing those two persons on guard. It is difficult to say how long the intruders were there; the trial judge estimated that they were there for 40 minutes. We however do not think it was that long, we think that the incident might have lasted 15 to 20 minutes.

A few days later P.W.1 saw a person riding a bicycle in Arusha and managed with the help of bystanders to arrest him. That was Appellant 1. On a description given by P.W.1, the police arrested Appellant 2, and on an identification parade P.W.1 picked Appellant 2 as a member of the gang.

P.W.1 made a statement to the police. In it he described the features of some of the gang members. He had described the one who had the gun as having thick black lips, light skinned, a wrinkled face and about medium build. P.W.6, the wife also made a statement to the police. She described the one with the gun as having thick black lips, of light complexion and somewhat short. In court P.W.1 said he had no difficulty in identifying Appellant 1 when he saw him on the bicycle. P.W.1 said he identified Appellant 1 because of his swollen cheek on the right side. He said he had told the police so. P.W.1 in court did not mention the lips and so on. However, in the statement to the police produced in court, there was no mention of the swollen cheek referred to by P.W.1. P.W.1 however, stated that the statement was not read back to him. However, at the trial, it was noticed that Appellant 1 had a swollen right cheek, thick black lips and was of a light complexion. He was short to medium in height. The thick black lips were certainly unusual. He appeared at the appeal, and we have had sight of his unusual lips.

P.W.1 and P.W.6 said that there was sufficient light for them to identify Appellant 1, especially as he was one of the two standing on guard. In fact P.W.6 was stopped when she tried to get out by Appellant 1, who demanded from P.W.6, "Where are you going, where are you going". The trial judge found that P.W.1 was a truthful witness. We ourselves believe that P.W.1 was truthful. He had had reasonable opportunities of seeing and identifying Appellant 1, the one with a gun; the lighting was adequate. Appellant 1 had unusual facial features which P.W.1 clearly had noted. We do not think that the omission of the swollen cheek description of Appellant 1 in P.W.1's police statement is of any material significance. But we are satisfied that P.W.1 had clearly and accurately noted the features of Appellant 1, and Appellant 1 did substantially answer the description given of him both by P.W.1 and P.W.6, in their statements to the police. P.W.1 was positive in his identification, and P.W.6 in court also had no difficulty at all in identifying Appellant 1. We ~~do not think~~ that either of them was mistaken, in view of the unusual physical characteristics of Appellant 1. Appellant 1 attempted to put forward a plea of alibi; it was obviously untrue and the trial judge quite rightly rejected it as untenable and false.

As regards Appellant 2, only P.W.1 identified him without hesitation at an identification parade. However, Appellant 2 had no special characteristics. In court P.W.6 at first failed to identify him, but later she did. Anyway, a dock identification is not a satisfactory identification. We can give very little weight to P.W.6's identification of Appellant 2 as one of the gang members. We think P.W.1's evidence of identification by itself would not be able to sustain a conviction; in this case a sole identification witness, in the circumstances, should be corroborated. We do not find any satisfactory corroborative evidence in respect of Appellant 2. In our view it would be unsafe to uphold his conviction.

However, as regards Appellant 1, we are satisfied that the trial judge was right to have convicted him of murder, as he was properly identified both by P.W.1 and P.W.6. He has unusual physical characteristics which greatly facilitate identification, and he was in proximate contact with P.W.1 and P.W.6 while he (Appellant 1) was on guard.

We allow the appeal of Appellant 2 Jonathan Kaaya, quash the conviction of murder and set aside the sentence of death passed on him and order that he be set at liberty forthwith unless otherwise lawfully detained.

We dismiss the appeal of Appellant 1 Pius Joseph.

DATED at DAR ES SALAAM this 6th day of August, 1981.

A. MUSTAFA  
JUSTICE OF APPEAL

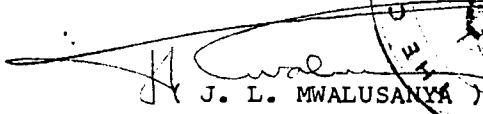
L. M. MAKAME  
JUSTICE OF APPEAL

This judgment is not signed by Kisanga, J.A. original.

A. MUSTAFA  
JUSTICE OF APPEAL

6.8.81

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

  
( J. L. MWALUSANYA )  
SENIOR DEPUTY REGISTRAR

