

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSTAFA, J.A.; MAKAME, J.A. And KISANGA, J.A.)

CRIMINAL APPEAL NO.33 OF 1985

BETWEEN

ABUU SALUM SHOO APPELLANT

AND

THE REPUBLIC RESPONDENT

(Appeal from the conviction of The High
Court of Tanzania at Moshi) (L. J. R. Chua, J.)
dated the 2nd day of March, 1985

in

Criminal Sessions Case No. 61 of 1982

JUDGMENT OF THE COURT

MAKAME, J.A.:

The appellant and two other persons were charged with the murder of a person called Emmanuel Fabian. The appellant's co-accused were acquitted while the appellant was convicted for murder and sentenced to suffer death. He is appealing to this court and is represented by Mr. Jonathan, learned advocate. Resisting the appeal on behalf of the Republic is Mr. Mtingele, learned Senior State Attorney.

There was evidence by P.W.1 GEORGE PETRO that he, the deceased, and another person, a Mmasai, had stopped on the road at Weruweru in Hai District to fix a puncture of a motor vehicle in which they were travelling. While there, at about 7 p.m., they were set upon by a group of about eight people. The Mmasai managed to make good his escape but P.W.1 and the deceased were not so lucky. The appellant who wore a black coat and a 'sweater-like' cap which masked his face shot the deceased on the jaw with a pistol while a colleague of the appellant searched the deceased. The appellant relieved P.W.1 of his wrist watch, a pair of spectacles and Shs.5,220/= P.W.1 ran off and sought refuge at the house of one MAMBOLEO SAMBUO, P.W.2. As P.W.1 was relating the robbery to Sambuo the appellant arrived there and Sambuo advised P.W.1 to hide. P.W.1 did,

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and, peeping from inside there where he was, he could see the appellant who asked Sambuo whether he had seen a brown person. Sambuo told the appellant that that was not Sambuo's business. The appellant then left P.W.1 asked Sambuo who that person was and Sambuo told him the person was called Abuu. The following day P.W.1 went to make a report to the Police. He described the clothes the appellant had been wearing and when he went to Weruweru with the Police it was he who pointed out the appellant to the Police at a pombeshop. At the appellant's house were found the very clothes P.W.1 had described to the Police:

Sambuo's evidence materially supported P.W.1's about P.W.1 coming to Sambuo's house running and recounting the robbery. After a short while a man arrived, also running, wearing "a long coat which was blue, and a sweater-type cap covering the face except the eyes, nose and mouth" - in other words the same apparel P.W.1 described to the Police. Sambuo recognized that person as the appellant, his former tenant. The appellant asked him if he had seen a short brown man with a bald head. Sambuo said he had not, and when the appellant had left P.W.1 told P.W.2 that that person was one of the robbers. It was still twilight, the appellant was only about fifteen paces away. P.W.2 was able to recognize him as being the appellant, somebody he had known for some thirteen years.

In his evidence Det. Sgt. MAGORI P.W.3 said P.W.1 mentioned the appellant's name when he made the report to the Police and that the dark coat and cap they got at the appellant's house answered the description P.W.1 had given and were recognized by P.W.1.

There was, besides, a letter 'Exh.P.4' the learned trial judge was satisfied was written by the appellant from Remand Prison, addressed to his witness, D.W.1, NAMI YOHANI, also known as TONGA, a woman who was selling pombe at a pombe shop at Weruweru. In it the writer is imploring Tonga to testify to the Court to the effect that the appellant was at Tonga's stall at Ndovu Club on the material day drinking from 5 p.m. until a person came there to say there had been a robbery at Weruweru. The letter asked Tonga to coach two other women to say so. The letter went on:

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"Also tell Mamboleo (obviously P.W.2) not to say that I went to his place to ask him, rather he should say (that) I arrived at his place that day, Friday 6.2.81 at 4 p.m. to ask for pombe..... Also tell him to try to save me..... also he should remember the good turn I did him so that he might not be imprisoned, he should also show a human heart to me please..... My promise I gave him when he came to Prison tell him (that) his money is ready. On the same day I get down the dock he will take it right there at the Court... I am waiting for your efforts so that we may return home together that day".

That, in essential outline, was the evidence laid at the appellant's door. In his defence the appellant said that on the material day he got to Weruweru at 4 p.m. He was coming back from Machame where he had gone to attend the funeral of his paternal uncle who had been killed by robbers. From his house he went to Ndovu Bar close by, at about 4.30 p.m., and did not leave the place until about 7.30 p.m. when a person came to announce that there had been a robbery. He walked Tonga home and then went to his own house, which he did not at all leave the following day. It was not until 8th February 1981 that he was ^{arrested} by the Police. When his house was searched nothing was taken away; specifically he said no coat or cap was taken away. The woman Tonga and D.W.2 HAWA ABDALLA gave evidence which supported the appellant's alibi - that at the material time he was at the pub drinking. The appellant also called his wife, D.W.3 GERMANA ABUU, to say that the appellant did not leave their Machame home to go to Weruweru until 3 p.m. on the material day.

Mr. Jonathan is urging this court to fault the trial court's decision and he has made spirited submissions in support. Basically Mr. Jonathan argues that the identification of the appellant by P.W.1 and P.W.2 was unreliable, and that Exh.4, the alleged letter from remand prison, and upon which the trial relied to reject the appellant's alibi, should not have been admitted at all because, the argument goes, although D.W.1 admitted to have seen it, she did not read it and its source was unknown. For his part Mr. Mtingele submitted that the identification was sound and watertight and the alibi palpably false in view of the letter, Exh.4.

P.W.1 explained that when he first saw the gang of eight he thought they were innocent passers by so he paid no particular notice to them; not until they set upon him and his companions. He was confident enough to tell P.W.2 that the person who came asking for a brown man was one of the robbers and it is from P.W.2, a man the appellant himself admitted he knew well as he was once P.W.2's tenant, that P.W.1 got the appellant's name. P.W.3 Dt. Sgt. Magori supports P.W.1's evidence that when he made the report to the Police, P.W.1 not only gave the appellant's name but also described the clothes the appellant had been wearing. The totality of P.W.1's and P.W.2's testimonies established, in our view, that although it was dusk there was still enough light for the witnesses to see the appellant clearly. Like the learned trial judge, we are satisfied that the appellant was properly identified. Mr. Jonathan vigorously tried to persuade us that the evidence regarding the appellant's identity and the clothes he was wearing was built up after the appellant had been arrested, that was why the Prosecution could not produce a Report Book showing the name of the appellant and that was also why P.W.2's statement was not recorded until some two months after the alleged incident. We are satisfied that P.W.3 told the truth that in his report P.W.1 did mention the appellant's name and described what he was wearing and that P.W.3's first concern was to get hold of the appellant. P.W.1's evidence was corroborated by the recovery of the clothes, as the learned trial judge rightly held. We think it significant that in his evidence the appellant tried to steer clear of these clothes whereas in his statement to the Police he had said "ile Kaputi na Kofia ya kufunikia uso ni mali yangu ambavyo vilichukuliwa nyumbani kwangu na askari tarehe 8.2.81....". The learned trial judge also dealt with the appellant's allegation of grudges against him by P.W.2 and was satisfied that it was without substance. We note that in his submission to us Mr. Jonathan made an attempt to return to the matter but he eventually abandoned the effort:

We now wish to deal with the appellants alibi. Mr. Jonathan argues that the letter, Exh.P.4, should and not have been admitted. We do not think so. The letter
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purports to be signed by Abuu Salum which is the appellant's name, and D.W.1, the addressee, admitted to have received it, or, as she put it, she saw it. The trial court correctly received it, its evidential value being a different matter. The learned trial judge was impressed by the similarity between the evidence the letter suggested D.W.1 should give and what D.W.1 actually said in court and was satisfied that D.W.1 must have read the letter despite her denial. The letter concentrated on trying to establish an alibi and asking Sambuo to deny what he had already told the Police. The drift and content of the letter leave no doubt but that the author was the appellant and that he was seeking to put up a false alibi. The falsity of the alibi is further demonstrated by the fact that in Exh.P.2 the appellant had asserted that he was away from Weruweru until 7th February, that is a day after the incident, and also by the fact that in his evidence the appellant said that on hearing about the robbery Tonga asked him to wait for her, and he did, and thereafter he escorted her home, whereas D.W.2 said she ran off with the appellant. In the circumstances the trial court was entitled to hold that the appellant's alibi raised no doubt.

On the evidence we are satisfied that the appellant was properly convicted and we accordingly dismiss the appeal.

DATED at ARUSHA this 26th day of July, 1985.

A. MUSTAFA
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KIFANGA
JUSTICE OF APPEAL

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

(L. H. L. KYANDO)
REGISTERAR