

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

CORAM: MAKAME, J.A.; KISANGA, J.A. And OMAR, J.A.

CRIMINAL APPEAL NO. 75 OF 1985

JUMA HASSANI. APPELLANT

VERSUS

THE REPUBLIC. RESPONDENT

(Appeal from the conviction of the High Court
of Tanzania at Tanga) (Chua, J.) dated the
14th day of June, 1985

in

Criminal Sessions Case No. 18 of 1983

JUDGMENT OF THE COURT

OMAR, J.A.:

Appellant Juma Hassani was charged and convicted of two counts of attempted murder and one count of robbery with violence. He was sentenced to 16 years imprisonment on each of the counts of attempted murder and 15 years imprisonment on the count of robbery. Appellant was jointly charged with two other persons Clement Mhando and John Elieza Mbwambo. Clement Mhando escaped from prison where he was serving sentence for another offence of illegal possession of a pistol. John Elieza was acquitted under section 278 (1) of the Criminal Procedure Code as there was no evidence to connect him with any of the offences charged.

P.W.1 Uledi Sultan stated that on the morning of 8/2/82 he was at his shop at old Korogwe when a person came to his shop and asked him if he had many cartons of cigarettes to sell. P.W.1 told him he had only two cartons. Then this person asked him if he was going to buy more cartons and P.W.1 replied that he was not, whereupon this customer left without buying any cigarettes.

A little while later as P.W.1 was waiting for the driver of the hired vehicle to take him to the bank where he intended to deposit Shs. 52,000/- which would enable him to get a paying in Slip from the bank with which to buy cigarettes, he saw the driver P.W.2 Oswald Ladislaus Kombo coming towards him to be followed by two people behind him. P.W.1 got into the vehicle and sat in front near the driver's seat while P.W.2 jumped into the driver's seat and before P.W.2 could move the vehicle P.W.1 saw the same man who was at the shop earlier in the day, wanting to forcefully open the door. P.W.1 prevented him from doing so and held on to the door of the vehicle from inside. A struggle for the door ensued whereupon the man shot P.W.1 with a pistol on the head and when P.W.1 still held on to the door, the man shot him again on the shoulder and he opened the door, snatched the bag of money and ran away with it. A month later P.W.1 identified his assailant at the identification parade as no other than the present appellant.

After the shooting of P.W.1 in the vehicle there was general shooting outside by another person who may have been a colleague of the appellant. That shooting was intended to facilitate the getaway. P.W.2, Oswald Kombo, the driver, in his evidence corroborated the testimony of P.W.1 he said "As soon as I entered (the vehicle) a person was opening the door near the passenger seat and a shot was fired. Sparks came to where I was. I jumped out and cried out. When I had jumped out P.W.1 fell in a trance. The person who fired took the bag and started running. The person ran towards Ruvu river and disappeared. I saw the person well.

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I marked him. it is the first accused (now the appellant). The other person was seen after he was arrested". This piece of evidence was the subject of severe attack by Mr. Mramba, the learned Counsel for the appellant. He said that this was a blatant lie in view of the witness's earlier statement at the Police Station. In his first statement at the Police Station P.W.2 Oswald said "when I reached my vehicle and was about to open the door to get in I heard shots and I did not know where it was fired from. I heard the second shot and fire passed my face near the left eye. I lay down and people started running and I ran too. At that time I saw the person who had fired telling an Arab who was driving the Bedford lorry to leave the lorry then I saw the same man running towards the direction of the market and to Ruvu river". In his additional statement P.W.2 said "I could not see the face of our assailant who shot at us and injured Uledi". Mr. Mramba argued that in view of this prevarication, P.W.2's evidence would appear to be tutored. But it must be remembered that in the first statement to the police P.W.2 said that he saw the assailant when he was telling the Arab to get off the Bedford lorry and when he was cross-examined by Mr. Semzaba he said

"What I said initially (to the Police) is correct. The second additional statement is not correct, I was shocked by the shot. I was locked up by the Police".

This is as far as the discrepancy on identification can be detected, the rest of the witnesses who followed the chase and talked of subsequent events were very consistent. As soon as the appellant had left Uledi and was running away with a bag of money he was chased by P.W.3 Mwinjuma, the militiaman. Mwinjuma struggled with the appellant for half an hour before he, Mwinjuma

was overpowered and shot in the stomach and so the appellant managed to escape into Ruvu river but not before he had a good look at him. It was a half hour struggle which Mr. Mramba in his defence of the appellant ardently criticized. Mr. Mramba said if it was half hour struggle how come there was no assistance from the people around and that no witness deposed to have witnessed the struggle between Mwinjuma and the appellant. Whatever may be said of the struggle one thing is certain that Mwinjuma and Sgt. Xavier set out at the same time to chase the two culprits one was arrested by Sgt. Xavier and the other shot Mwinjuma and escaped. Mwinjuma may not have effected the arrest as he set out to do but he said he held him from behind in a grip and he Mwinjuma was thrown down and shot at and would have been shot again if he did not run away to save his life. Is it therefore unreasonable to believe Mwinjuma when he said that he saw the accused clearly and identified him at the identification parade a month later without hesitation. Mwinjuma also stated that he saw the bag which appellant was carrying and saw the notes which were red, he saw the pistol which he was shot with, it was small.

Appellant was arrested at his house in Tanga a month after the incident. He pleaded an alibi that in February 1982 he was not at all in Korogwe but in Tanga where he lived and worked at selling coconuts and fruits and also plying his taxi. On the 20/2/82 he was arrested in Tanga for the offence of passing through the road block in Korogwe without stopping. Eventually he found himself being brought to Korogwe and charged with these offences. The identification parade was held unfairly

for him. He was handcuffed at the parade and was shown to the identifying witness as before the parade began. This matter was taken up by learned Counsel for the appellant in this Court. The trial court dealt with it as a matter raised only by the accused in his defence and found it to be devoid of merit as the evidence of the officer in charge of the identification parade Inspector Selemani Kova was direct and showed extreme impartiality. P.W.5, Inspector Kova told the court that he informed the appellant that he could stand anywhere he pleased in the parade and that he could change his dress if he wished and after the first identifying witness had passed he could change position and dress if he wished ready for the second identifying witness. There is no suggestion anywhere in the evidence that P.W.5 was asked how the appellant could be expected to change his dress twice when he was handcuffed at the time. This to our mind would have been one of the questions put to P.W.5 if at all the question of handcuffs was upper most in the defence Counsel's mind. Since there was no remark on the part of the defence suggesting any impropriety in the identification parade and since the two identifying witnesses were those who were shot at vulnerable parts of their bodies by the appellant at a very close range their certainty in identifying their assailant who in both cases was locked in a struggle with his victims cannot be doubted. And considering the circumstances in which the offence was committed in broad day light and in a busy street where passersby had to rush for cover at the hail of bullets and the fact that subsequent chase of culprits who were never lost sight of was instant hazardous.

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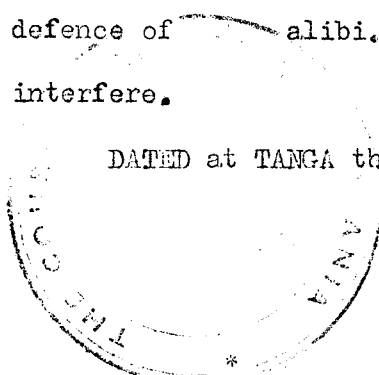
but clear leaves no room for doubt as to the veracity or credibility of the statements made by P.W.1 and P.W.3.

In the result we find that since the only point raised in the Memorandum of Appeal is that of identification, this appeal fails because the appellant to all intents and purposes could not have been more or better identified.

This appeal is hereby dismissed in its entirety.

We wish to remark that the charges against the appellant could have been better laid. We think that it would have been more appropriate to charge the appellant with either robbery with violence or with attempted murder, although the facts essentially disclose the offence of robbery with violence of an aggravated nature. We think, however, that in this particular case no miscarriage of justice was occasioned because the multiplicity of charges did not prejudice the appellant in his defence in any way especially in view of his defence of alibi. On that account we see no good reason to interfere.

DATED at TANGA this 11th day of September, 1986.

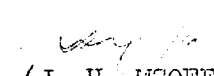


L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANCA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

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



(J. H. ISOFFE)
DEPUTY REGISTRAR