

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: HEKAME, J.A., RAMADANI, J.A., And MAPIGANO, Ag. J.A.)

CRIMINAL APPEAL NO. 159 OF 1990

BENSON KIBASO NYANKONDA @ OLEMBE PATROBA APIYO APPELLANT

VERSUS

THE REPUBLIC. RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Mwanza)

(SEKULE, J.)

dated the 26th day of October, 1990

in

Criminal Sessions Case No. 28 of 1990

JUDGMENT OF THE COURT

MAPIGANO, Ag. J.A.:

BENSON KIBASO NYANKONDA, also known as OLEMBE PATROBA APIYO, has appealed from the judgment of the High Court at Mwanza dated 26/10/90 in which the learned judge, Sekule, J., convicted him of the murder of ANOLD SWAI and condemned him to death. On his behalf Mr. Nasimire, learned advocate, filed two grounds of appeal but dropped one in the course of his address before us. The ground argued pertained exclusively to the proceedings that took place at an identification parade held at the Mwanza Central Police Station on 3/8/88. Mr. Mapunda, learned state attorney, appeared for the respondent Republic and he vigorously supported the judgment of the High Court and urged the dismissal of the appeal.

ANOLD SWAI died on or about 1/9/85 most probably in the environs of the Mwanza Municipality and his was a planned brutal

death. The deceased resided at Nyamanoro in the Municipality and he owned a ^{pougeon} car which he operated as a cab. His base was at the New Mwanza Hotel where he was last seen alive on Sunday 1/9/85 in the afternoon. He went missing until 4/9/85 when his corpse was discovered at Kisesa lying in a trench. His limbs were bound up and his car was missing and is yet to be recovered.

It is an irresistible inference that the deceased was robbed of the car by bandits and that he died at their hands in the course of the robbery. If the testimony of P.W.8 NUNGU MUGWETA NUNGU was true, as the High Court believed it was, the bandits drove off the car to Kenya via Msona.

The appellant was a suspect in the crime. So was one DAUDI SAMUEL NUNGU and one GEORGE OGVALO. He was traced and arrested at Bugando in the Municipality on 4/5/87 i.e. twenty months after the killing of the deceased. P.W.5 Inspector MADALA who effected his arrest said he had done so upon a tip from his informer. Mr. Nasinire who also defended the appellant at the trial would have had the High Court compel P.W.5 to expose his source, but the trial judge refused to do so. Before us Mr. Nasinire tried to fault the judge's refusal but he later came round to concede that the interests of justice demanded that the identity of such an informer be protected.

The prosecution started, methodically, by calling four witnesses who deposed, inter alia, to matters did not form part of the subject transaction but which were relevant under sections 9 and 10 of the Evidence Act, 1967. Those witnesses were the deceased's fellow cabmen. Two of them stated that they had been hired by three suspicious strangers and they described the features of those people. One, P.W.4 ELILOTA DANIEL KNEKA,

related how on 31/8/85 he took those strangers to Kisosa and back to town, how they wanted him to stop the car at a solitary valley on the way back and how and why he refused to stop. The other, P.W.3 GABRIEL SAMTAEI, claimed that one of those three people was in the court, but in anticipation or presentiment of an impending fingering at the man in the dock Mr. Nasimire raised an objection which was sustained by the trial judge.

With that the case against the appellant depended wholly on the correctness of his identification by P.W.8, which the defence alleged to be mistaken.

P.W.8 was a resident of Busegwe in Musoma District, and if believed his evidence fully tied the appellant to the murder of the deceased. He deposed to the suspect DAUDI SAMUELI NUNGU being his relation, to the said DAUDI being an experienced driver and to being a resident of Mabatini in the Mwanza Municipality. He also deposed to DAUDI having passed at his home in Busegwe in the first week of September, 1985, at midnight accompanied by the appellant and another man. He stated that the three men came in a car, and from his description of that car it is beyond doubt that it was the deceased's stolen cab. He stated that the appellant and the other men were complete strangers to him and that the two exchanged words in the Luo vernacular. He recalled that the appellant was sporting bushy side burns. He and his neighbour JAMES KIRARIO held a conversation with them around a table in the gleam of a lantern in the course of which a meal was served. He learned from DAUDI that the two strangers had hired him to drive them from Mwanza to

Nairobi. He said they left at 6 a.m.

The appellant denied any involvement in the murder of the deceased, as he denied each and every allegation of P.W.8 that touched him. He lodged an alibi, albeit belatedly, claiming that he was in Ukerewe, where he had lived with his wife for a number of years, at the time the murder was committed. He described himself as a businessman and a man of consequence in Ukerewe, but we cannot but get the impression that he was one with an adamant, puffed, but pretentious, sense of his own self. He maintained that in Ukerewe he was a member of the District Defence and Security Committee, which story only the credulous and ill-informed could buy. He boldly told the court that his colleagues in that committee could vouch for his alibi. But he added that he saw no point to call any of them as witness, even while his life was palpably at stake.

P.W.8 identified the appellant at the identification parade on which the appellant stood sporting bushy side burns. His neighbour JAMES KIRARIO was the only other witness called onto that parade, but unfortunately he died before he could testify. It is by no means clear why P.W.3 and P.W.4 were not called as witnesses at the parade. The appellant admitted that P.W.8 identified him without a moment's hesitation, but he contended that justice was not done in the identification proceedings.

The trial judge and the assessors were satisfied that P.W.8 had sufficient opportunity to identify the appellant at Busogwe, considering the time he had the appellant under observation at close distance under

a lantern illumination. They were also satisfied that the identification parade was conducted properly. As mentioned above, JAMES KIRARIO did not give evidence. The learned trial judge nevertheless stated, more than once, that "the identification of the accused by P.W.8 and JAMES KIRARIO at the parade as having been one of three people who passed at P.W.8's home with a taxi, ~~number~~ 504, with taxi side number "100" was reliable and could in my view be safely acted upon". We respectfully agree with Mr. Nasimiro that in relation to JAMES KIRARIO the judge's finding was unfortunate and clearly erroneous.

It is needful to underscore the point that identification parade proceedings are basically testing or investigatory and extra-judicial in nature. The outcome of such a parade has by itself no independent probative value. At the highest it can only corroborate the evidence given by the identifying witness in court under section 166 of the Evidence Act, or contradict the statement of the witness in court under section 164 (c) of that Act. If a witness is not called there is thus nothing to corroborate or contradict and, accordingly, there is no occasion for introducing the parade proceedings into evidence, let alone considering them. So in relation to JAMES KIRARIO the parade proceedings were inadmissible and should not have been taken into account at all. We are satisfied however that the flaw was just a speck in an otherwise well-reasoned judgment.

As we have observed at the outset, the appeal is wholly directed at the identification parade, that is, the manner in which the parade was conducted, and Mr. Nasinire has pointed out a number of shortcomings or circumstances which he said throw suspicion on the conduct of the police and the memory of P.W.8. Mr. Nasinire accordingly submitted that the identification of the appellant was not satisfactory and that the conviction was unsafe.

The propriety of the parade was also urged forcefully before the High Court and from the nature of the criticisms which were raised we pause to wonder why Mr. Nasinire did not move the court to view the locus. We have to keep in mind, however, that it is always obligatory on a court to subject the evidence relating to such parades to close and careful scrutiny.

That parade, memorandum or "register" of which was tendered as exhibit P.I, was composed of ten persons including the suspect i.e. the appellant. It was conducted by P.W.6 Inspector AZUBERI ELLIS, and P.W.7 Corporal SEABAN was in charge of the two witnesses before they were called onto the parade. P.W.8 was the first witness to be called and by all accounts the parade was held at the back of the Central Police Station.

The first criticism made by Mr. Nasinire was in respect of the memory of P.W.8. Mr. Nasinire wants us to consider whether an intervening period of thirty-five months had not dimmed the memory of this witness, and properly so. Indeed in our view the memory of the witness

should also be considered in relation to his evidence before the High Court.

In support Mr. Nasimire referred to P.W.8's admission that he had told the police that he was not certain if he could identify the two strangers who came to his home with DAUDI. Learned counsel had raised the same matter in his submissions in the High Court, but the judge appears to have accepted P.W.8's explanation that he was then "in fear of police".

This is what the judge stated:

"I am aware, the identification parade was held after a long time from the time P.W.8 hosted these guests. But having stayed with these guests for that long, and the unusual time they arrived at his home i.e. very late at night and the taxi as well as the presence of his relative, DAVID SAMUEL, I am of the considered opinion that those factors must have continued to facilitate their recollection of this event and those people i.e. the accused and his two colleagues. P.W.8's identification of the accused as well as that of JAMES KIRARIO was therefore not guess work but it was certain."

Those words carry some weight, except to the extent that they referred to JAMES KIRARIO. There is no question that P.W.8 was a witness with a retentive memory, just as there was no question about his honesty. His recall to details was generally good and we think that it was reasonably open to the trial judge to rely on his memory and identification.

The second criticism was in relation to the conflict that obtained in the prosecution case in regard to the place where the two identifying witnesses were located before they were called onto the parade. P.W.6 said it was in the office of the R.C.O.; P.W.8 said it was outside that office; while P.W.7 said it was in the Frauds Office.

The trial judge preferred the testimony of P.W.6 on this point. The judge was of the opinion that while

P.W.7 was not a liar it was likely that time had taken its toll on his memory and that his recollection was at fault. But as aforementioned, P.W.7 was the officer in charge of the two witnesses before the parade and he actually escorted them to the parade, and we therefore find some difficulty in concurring in the learned judge's preference of P.W.6's testimony over that of P.W.7. However all the three witnesses testified that there was a road and a building between that place and the parade ground and emphatically denied the suggestion that the identifying witnesses could see the parade from where they were positioned, which was the paramount consideration in the matter of location of the witnesses.

The third criticism was about the evidence of P.W.7 that P.W.6 had hinted to P.W.8 that "there was a person who was suspected to have committed murder" among the ten people lined up. This was not in harmony with the evidence of P.W.6, which the trial judge accepted, namely that all that he did was to ask the witnesses "to see whether there were any of the three people including one DAUDI who passed at their home with a vehicle and had some food". The evidence of P.W.8 was substantially similar. This is what he stated:

"The officer conducting the parade told me that I was to walk along the parade from left to right, looking at the people in the parade and if I were to see the people who came at my house I was to touch him at the shoulder. He did not tell me those people were in the parade. He told me to look and see whether they were there."

The witness then made a brief description of the people who were paraded.

Again we think, with respect, that the trial judge, who saw and heard the witnesses, was entitled to accept the word of P.W.6. What's more, it seems to us that even if we were to go by P.W.7's allegation we would say that P.W.6 was telling P.W.8 the obvious, because the idea and spectacle of holding such a parade without a suspect come across to us as pointless and indeed absurd. We would, therefore, hold that the hint in question did not occasion a failure of justice.

The fourth and last criticism was that the nine men who were lined up along with the appellant were markedly different in appearance and outlook. This criticism was founded on the appellant's allegation that he was literally set for an easy picking as he was the only person who was filthy, dishevelled and wearing side burns. The appellant thus attacks the trial judge's acceptance of the evidence of P.W.6 and P.W.8 that the nine people were similar to the appellant "in height and general appearance and condition".

P.W.6 stated that it had taken him about fifteen minutes to search for and get the nine people. Mr. Nasimiro's incredulity was about the time factor. He argued that it was highly unlikely that P.W.6 could have been able to get nine such people in a matter of fifteen minutes. Again that argument Mr. Mapunda made reference to the evidence of P.W.6 that many people pass by the police station on their way to and from the port, and this evidence was not controverted.

In the evaluation of the trial judge P.W.6 and P.W.8 were objective, impressive and reliable witnesses. Given that consideration, along with the facts that the cross-examination of these witnesses in regard to this aspect of the parade was almost flooding, and that the suggestion that the appellant was dirty, dishevelled and the only man with side burns was not put at all to the two witnesses, the judge dismissed the criticism. We have given the matter a careful and serious consideration and in principle we see no good reason for differing with the learned judge.

This appeal therefore fails and is dismissed.

DATED at MUANZA this 14th day of June, 1991.



L. M. MAKAME
JUSTICE OF APPEAL.

A. S. L. RAMDHEANI
JUSTICE OF APPEAL.

D. P. MAPIGANO
JUSTICE OF APPEAL.

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

DATED at MUANZA this 14th day of June, 1991.
(M. S. SHANGALI)
DEPUTY REGISTRAR.