IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MNZAVAS, J.A., KALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 145 OF 1994

BETWEEN

LAUDEN MWAKITALU MWAKITWANGE. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Tukuyu)

(Mkude, J.)

dated the 18th day of May, 1994

in

Criminal Sessions Case No. 25 of 1992

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

This is an appeal against the conviction and sentence of the High Court (Mkude, J.) sitting at Tukuyu, Mbeya. The appellant was charged with and convicted of the offence of attempted murder contrary to Section 211 of the Penal Code. He was sentenced to ten (10) years imprisonment.

The incident took place on Christmas Day, 25th December, 1991 at Mpumbuli Village, Rungwe District Mbeya Region. The undisputed facts were that in celebrating Christmas, the appellant together with Jacob Mwakitwange Mwandimbile; (hereinafter referred to in this judgment as Jacob), Paul Chagonja (PW.1) and Henry Andalwisye (PW.2) among others from within the village of Mpumbuli had gathered at the house of Joshua John Mwakilasa (PW.3) where there was disco music and food. At the end of the celebrations at about 10.00 p.m., the guests left for their respective homes. In the same direction went PW.2 followed by the appellant who was in the company of Jacob Mwakitwange Mwandimbile who, at the trial was also charged with the appellant. On the way PW.2 was suddenly given a blow on the head from behind. He fell down and thereafter was stabbed by the appellant with a knife three times on the stomach and once on the chest. The appellant and Jacob Mwakitwange Mwandimbile ran away. PW.2 went back to the house of Joshua John

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Mwakilasa (PW.3) where he reported to have been attacked by the appellant and Jacob. PW.2 was taken to hospital where he was admitted for a month. The matter was reported to the police and the appellant was arrested from his home the same night. He was charged together with Jacob for the offence of attempted murder.

Before the trial court the appellant and Jacob raised the defence of alibi. They denied visiting the house of Joshua John Mwakilasa PW.3. They claimed to have been at the house of Abraham Mwandimbile (DW.2) on 25.12.1991 from 1.00 p.m. to 10.00 p.m. After considering the defence raised, the learned trial judge rejected the defence of alibi. He held that the appellant and his co-accused had been identified sufficiently by PW.2 and PW.3 to have been at the house of PW.3 and that PW.2 identified them at the time of the attack. The appellant was therefore convicted as charged and was sentenced to ten years imprisonment. As regards Jacob, the co-accused the trial court held that though he was present at the time when PW.2 was attacked, he did not take part in the attack. He was acquitted. The appellant is appealing against the conviction and sentence.

Mr. Mwangole, learned Counsel for the appellant has raised two grounds of appeal, namely:

(i) That the learned trial judge erred in law and facts in holding that the appellant was positively identified by PW.2.

(ii) That the sentence was manifestly excessive in the circumstances of the case.

At the hearing of this appeal, Mr. Mwangole argued rather forcefully that PW.2 and PW.3 could not recognise the appellant as the assailant of PW.2 because it was a dark night. That as PW.2 was struck abruptly from behind and there was no talking, Mr. Mwangole argued, it was possible that PW.2 mistook the identity of the appellant. He said, it was

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therefore unsafe to base a conviction on such evidence in a criminal charge when the circumstances were not favourable for conclusive identification. Secondly, Mr. Mwangole submitted that the appellant being a young man of 22 years, a sentence of 10 years imprisonment was, in his view, manifestly excessive. He prayed for its reduction.

For the respondent, Republic Mr. Mulokozi, learned State Attorney appeared. He supported the conviction on the ground that the appellant was sufficiently identified by PW.2 and PW.3. He stated that though it was night time, it was a normal dark night in which it was possible to identify a familiar person. It was his line of argument that PW.2 and PW.3 were familiar to the appellant with whom they lived in the village. Furthermore, Mr. Mulokozi submitted that as PW.2 had left the house of PW.3 followed by the appellant and Jacob, he (PW.2) knew that the appellant and Jacob who were behind him after the celebrations at PW.3's house. Mr. Mulokozi also stressed that the fact that the appellant was found by PW.1 Paul Chagonja, the police officer hiding under the bed is a telling factor of a guilty mind.

We have anxiously considered these submissions. On the question of identification, with respect, we are unable to accept Mr. Mwangole's submission that there was mistaken identity of the appellant. We agree that there is conflict between the evidence of PW.1 and PW.2 regarding the darkness of the night that day. On record, one says it was not so dark as not to be able to see clearly without a torch, the other says it was so dark that it was not possible to see clearly. Both were prosecution witnesses and so, their evidence is suspect to doubt. However, it is our view that this was not the only evidence. For it is clear from the record that after the celebrations at the house of PW.3, PW.2 and the appellant together with Jacob were the only ones who left in that direction. There is no evidence to show that they were joined by any other person on the way until the time of the attack.

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In such circumstances, it is our view that PW.2 quite clearly knew that the attackers were the appellant and his companion, Jacob, the co-accused who was acquitted. Further, it is also in evidence that as the appellant was attacking PW.2, Jacob, the co-accused was heard by PW.2 telling the appellant "leave him". The appellant and Jacob being familiar to PW.2, we agree that PW.2 was in a position to recognise the voice of Jacob who had been with PW.2 and the appellant at PW.3's house feasting together. As such, the stabbing having taking place at close proximity, we agree with Mr. Mulokozi that PW.2 was in a position to recognise the appellant as the assailant.

There is also the evidence of Paul Chagonja (PW.1) the investigating officer. From his evidence, he stated that when the incident was reported to the Police Station the same night, he visited the appellant's house. There, he found the appellant's house door closed, upon knocking, appellant's wife said, the appellant was not around, he was out. That upon his insistence and searching with a torch, the appellant was found hiding under the bed. As to why the appellant was hiding, Mr. Mwangole in a rather unusual manner, explained that it was due to fear of the police and that the appellant was not hiding but was putting on rubber shoes. With respect, Mr. Mwangole's explanation is far fetched. If the appellant was innocent, why should he hide under the bed at that time. Furthermore, as regards his wife, if there was nothing suspicious against her husband, the appellant, why should she tell PW.1 that the husband was not in the house. At any rate, at that time no communication had been made to the appellant and his wife about PW.2's stabbing. So, it is difficult to understand why the husband and wife were making the effort to hide from the law enforcing agent (PW.1). This, we are convinced, is yet another piece of evidence which links the appellant with the attack on PW.2.

On the evidence as a whole, we are in agreement with Mr. Mulokozi learned State Attorney that there was sufficient evidence upon which the learned trial judge found that the appellant was sufficiently

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identified. We do not agree with Mr. Mwangole's submission that there was mistaken identity. We reject the ground on insufficient identification as baseless.

As for sentence, it is our view that this ground has no merit at all. The fact that the appellant is a young man is not sufficient ground to warrant this Court's interference with the trial Court's discretionary powers on sentence. As correctly stated by the learned trial judge, this was a brutal attack on PW.2 whose intestines hang outside the stomach. PW.2 was lucky for the injuries he received could have led to his death. Having regard to the fact that the offence carries a maximum of life imprisonment, we are not convinced that a sentence of ten (10) years imprisonment can in any way be said to be so manifestly excessive as to warrant this Court's interference. This ground also fails.

For the foregoing reasons, the appeal is dismissed in its entirety.

DATED at MBEYA this 28th day of October, 1996.

N.S. MNZAVAS
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR