IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MAKANJI, J.A., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 6 OF 1995

BETWEEN

1. MARWA WANGITI MWITA
2. BONIFACE MASIKU MGENDI . . . . . APPELLANTS

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Masanche, J.)

dated the 5th day of December, 1994

in

Criminal Sessions Case No. 181 of 1991

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The appellants, Marwa Wangiti Mwita and Boniface Masiku Mgendi, were convicted of murder at a trial holden by the High Court at Musoma. They were then first and fourth accused respectively, the second and third accused were acquitted. The information had alleged that on 18.9.88, at Kewanja village in Tarime district, the four murdered one Masha Jeremiah. The murder took place at the home of PW1 who was celebrating a marriage, and the deceased, a resident of Geita, was an invited guest at the celebrations. Around 7.30 p.m. on the said day, a gang of armed robbers descended upon the premises and made away with various articles after firing a shot. The shot found the deceased who died from severe internal bleeding.

At the trial, PW1 and his brother PW2, claimed to have identified the appellants among the gang and said they were the ones who had guns. PW1 said that he knew the first appellant by face and name and that the

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second appellant, whose name he did not know, used to move about with the first appellant. PW2 said that he did not know the appellants' names but he identified them by their faces as they used to frequent his kiosk. There was a lamp in the house, a humble outfit of a bedroom and a sitting room only. The two witnesses said that they were in the bedroom and their guests in the sitting room when dogs barked outside. PW2 went out to inquire only to come face to face with a gang of four or more, one of whom ordered him back into the house at gunpoint. This was said to have been the second appellant. Another gunman stood in the doorway and ordered everyone to lie down. He was said to have been the first appellant. Then followed the plunder and the gunshot. It seems the incident was reported to the police with promptitude.

The prosecution evidence regarding the appellants' arrest was either inconsistent, contradictory or non-existent and the trial judge conveniently avoided going into details. We propose to do the same, seeing, as we do, that it will occasion no harm, and mention only some related aspects. First, the first appellant attempted to run away when he saw the police; second, going by PW5, the second appellant was not at home when the police arrived there. Third, when the first appellant's house was searched, a piece of khanga (per PW1) or table cloths (per PW5) were found. Neither of this was tendered in evidence. The search at the second appellant's house unearthed a camera (Exh. P3). In their defences the first appellant stated that he was at home throughout on the material day, and called his father to support him, while the second appellant stated that he left for Shinyanga on 14.9.88 and returned on 1.10.88, and produced documents to that effect. He found his two wives arrested and was in turn arrested when he went to the police station to inquire into this. The trial judge convicted the first appellant on the evidence of identification as well as the act of attempting to run away; he convicted the second appellant on the

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evidence of identification only. He rejected the alibis for non-compliance with section 194 (4) of the Criminal Procedure Act, 1985.

Before us, Mr. Galati Mwantembe appeared for the appellants and attacked the evidence of identification. He observed in the main that the appellants were never at any time named by PW1 or PW2. He submitted also that the appellants' alibis were improperly rejected in view of the provisions of subsection (6) of section 194. Mr. Mwantembe also levelled criticism on the evidence of possession of articles considered relevant to the case but we think that was unnecessary wince the trial judge did not base his decision on that evidence. Mr. Kabonde for the Republic resisted the appeal on all the grounds.

We think the most important question in this appeal is whether the appellants were identified at the scene of crime. After anxious consideration of the evidence, we think there is merit in Mr. Mwantembe's criticism. It was not in dispute that neither appellant was mentioned by PW1 or PW2 before their arrest, even though PW1 knew the first appellant well. The appellants' arrest apparently came in the wake of some suspicious articles being found at their homes; in fact we note that at one stage as many as 22 persons were charged with the murder before the District Court. The evidence of PW5 Assistant Inspector Reuben also leaves no doubt that the search was a general rather than a specific operation and the hint on suspicious homes came from villagers rather than PW1, despite the latter's presence. PW5 related the operation thus:

> On 28.9.88, I remember I was in Tarime. I was told to go to Serengeti where it was said that some articles stolen in the course of murder were seen ... I went to Serengeti and reported to the O.C.D. the late Mtabirwa.

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> On 29.9.88, we went with him to Gesarya village. Later we arrived in the village, we got the Chairman. Then we were tipped about the houses that had the stolen articles. We were tipped by the villagers.
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> ... At the house of Masiku Mgendi we got a camera and at the house of Marwa Wangiti we got table clothes (sic). All this time we were with the complainant.

The witness reiterated five times in cross-examination that the exercise "was an operation," so much so that he could not recall the number of houses searched and many police officers were involved. We think the failure of PW1 in particular to name at least the first appellant before or during the operation was not consistent with identification of any of the bandits. It is indeed doubtful to what extent he allowed himself to observe the invaders considering that when PW2 was driven back into the bedroom, PW1 had disappeared: he had apparently dived flat onto the sitting room floor. The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. The factors set out in Waziri Amani v.R. [1980] T.L.R. 250, to which the learned judge referred, are not intended to be exhaustive in determining credible identification. We are unable, on our part, to hold that identification was in this case proved beyond reasonable doubt in the absence of any report against the appellants.

The remaining matters may be disposed of briefly. There was the aspect of the first appellant's running away when he saw the police. The trial judge first observed, and correctly so, that not all flight was necessarily a manifestation of guilty but some people run away from

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policemen just to avoid bother. He held, however, that it was such a manifestation in this case as the first appellant was the only person to run away. It is apparent that this observation was incorrect either as regards the occasion of the first appellant's arrest or in the context of the operation generally. The impression one gets is that of flight all around in the course of the operation. Earlier in his judgment the learned judge himself observed: "Apparently when these searches were made by the police, the accused had fled. Their homes, that is to say, were searched in their absence." And as regards the first appellant's arrest, PW5 said: "We then went to Marwa Wangiti. The men ran away. They had fled. We then arrested their wives." This is indeed reflected in the fact that of the thirteen suspects in the initial information filed before the High Court, six were women. And to underscore the perception of the police as a bother, these innocent women were kept in custody for more than six years before they were discharged, untried, without so much as a word of apology. It is therefore clear to us that the conduct of the first appellant was neither peculiar nor, apparently, was it without justification.

Finally, we agree with Mr. Mwantembe that it was improper for the trial judge to tell the assessors to reject the alibis, and for himself subsequently to reject them, merely for non-compliance with subsection (4) of section 194 of the Criminal Procedure Act. The absence of notice required by the provision does not mandate or authorise the outright rejection of an alibi but in assistance with subsection (6), but, the omission may affect the weight to be placed on it. We cannot be certain that had the learned judge approached the subject on that understanding he would, for instance, have necessarily found unimpressive the second appellant's medical certificate and receipts evidencing his presence at Shinyanga at the material time. After all, he was only required to raise a reasonable doubt. Besides, the act of taking himself to the

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police station was not, to our minds, consistent with guilt.

For these reasons, we think the guilt of the appellants was not proved beyond reasonable doubt. We allow the appeal, quash the convictions and sentence of death and direc their release from custody.

DATED at DAR ES SALAAM this 12th day of June, 2000.

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

N.J.M.LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR