

TANZANIA / JUDGMENT

19800624 TZHC Dar es Salaam2

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- I c IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM d . '1 PELLATE JURISDICTION HIGH COURTCRIMINAL APPEAL NO. 208 OF 1979 ORIGINAL CRIMINAL CASE NO. 964 OF 1978 OF THE DISTRICT COURT OF DAR ES SALAM'I DISTRXCT AT KISUTU Before K. A. Kassim, Esq.,*,....., Senior Magistrate' JACOB MREMA 000 0•0 00 00•000b000eO•000000.00.O...600Ø,* APPELLANT versus THE REPUBLIC • , , , , , • . . RESPONDENT Charge: Grievous harm contrary to Section 225 of the Penal Code. JUDGMENT/ ORDER BIRON, J, — The appellant was convicted of causing grievous harm and he was sentenced to imprisonment for seven years. He is now appealing. The complainant (P.W.1) testified to the effect that at about 7 o'clock in the evening of the 2nd of February, 1975 as he was driving along Msasani Mikoroshoni he saw some men ahead of him. He had his headlights on, and as the men did not move, he sounded his horn, but the men refused to move. He accordingly stopped and the men complained that he was sounding his horn unnecessarily. Then all of a sudden one of the men, the appellant, turned to him and called him an Arab catarnite. He duly returned the insult. The appellant thereupon ran to some nearby shops and as he was running back the complainant who had apparently got out of the vehicle and was about to return into the vehicle when the appellant reached him and pulled the front door and started struggling with him and struck him with his fist in the face. As the two men struggled they both fell down with the complainant on top when suddenly the appellant drew a knife and stabbed the complainant six times causing him to lose consciousness. He did not recover consciousness until he found himself lying in the Muhimbili Medical Centre.. The complainant was detained in hospital for about four or five months. As he did not know the appellant, he obviously could not give the police the name of his assailant. It was not until more than a year later that he saw and recognised the appellant at Msasani. He immediately went to the police station and reported that he had seen his assailant and accompanied by P.C. Emanuel (P.L.2), he went to the shopping centre at Msasani where he pointed out the appellant to the police officer. -2- Corporal. Emanuel (P.W.2) in his evidence testified that after the complainant had pointed out the appellant to him and he introduced himself to him, he saw the appellant pass something sharp which appeared to him to look like a chisel, to a companion who was with him. The constable duly arrested the appellant although he did not seize the object passed by the appellant to his companion. The only witness to the assault was Ali Salim (P.W.3) who described himself as a motor mechanic. He testified that he well knew both the complainant

and the appellant by appearance. At the time of the assault on the appellant he was near the scene at a 'Genge (stall)' drinking coffee. A short distance away he saw and heard a group of men arguing. Then he saw the appellant leave the group of men and approach a man who was about five paces away from him together with two other men, and saw the appellant receive from this other man an object which he did not see properly. He then saw the appellant go back to the group of men where they were arguing. In the meantime the man's (he who had passed the object to the appellant) two companions said 'Let us go away so that we should not be witnesses,' and they left. When the appellant returned to the group of men he had, left, he heard the sounds of an argument and then heard the complainant cry out, 'Mtume nimepigwa kisu,' which roughly translated is a cry to the Prophet. Mohanimad that he had been stabbed with a knife." He then saw the appellant who was holding a knife run into a smati footpath and disappear. He telephoned 999. , The police arrived shortly afterwards and took the complainant away. Some time later apparently more than a year later, he was called to the Oyster Bay Police Station, where he picked out the appellant from amongst about thirty men. The appellant in his defence denied the whole incident, and asserted that he neither knew the complainant nor the witness Ali Salum. The learned magistrate after duly directing himself that the issue was one of identification, was satisfied that the appellant had been properly identified by the complainant and the witness Ali Salum, and he accordingly convicted the appellant as charged. In his petition of appeal the appellant naturally raises this issue of identification 'and cites several cases relevant to the question of identification. 3 .. - It must be stressed at once that the question & identification presents considerable difficulty, and it must be borne in mind that there have been many cases where innocent people have been convicted because of mistaken identification. It therefore behoves a Court to be extremely careful and cautious in its approach to dealing with such issue. In this case the complainant who was insulted and then attacked by the appellant and then struggled with him for some considerable time, had ample opportunity of observing and remembering the appellant, as he had every reason to, and there was sufficient light for him to do so. The only eye witness to the assault Ali Salum (P.W.3) 1 stated that he knew both the complainant and the appellant well by sight as they all lived in the same district. There is no question of his lying, and he could not be mistaken for, as noted, he knew both men well if only by sight, and he had ample opportunity of observing the appellant as he came near him more than once, and there was ample light for him clearly to see and recognise the appellant. And as he himself remarked, he could not pursue the appellant, as he had a large knife and would doubtless have used it on him, as he had already done on the complainant nearly killing him, if he had pursued him. It is also of significance that constable Emanuel (P.W.2) who arrested the appellant, stated that after he had introduced himself to him, he saw the appellant pass an instrument which looked like a chisel to his companion. It is a pity that the constable did not have sufficient intelligence to seize this instrument, which was obviously an offensive weapon. Therefore, as noted, very mindful of the inherent danger of mistaken identity, I am perfectly satisfied as was the learned magistrate, that the appellant was properly identified as the complainant's assailant. With regard to the sentence imposed on the appellant that of imprisonment for

seven years, it is more than richly deserved, as the injuries inflicted, by the appellant for no reason at all were extremely serious and could well have proved fatal, as they were multiple stab wounds which penetrated to the lungs, and the complainant had to have a blood transfusion of six pints. But unfortunately the learned magistrate overlooked the fact that his jurisdiction ' ; limited in a case of this nature, to the imposition of imprisonment for a maximum term of five years. -4- However, after the learned magistrate had passed sentence he realised that he had exceeded his jurisdiction, and he accordingly forwarded the proceedings to this Court for appropriate action. The most appropriate action for this Court to take is to treat the transmission of the proceedings as a committal to the High Court for sentence in accordance with Section 5(a) of the Criminal procedure Code. Apart from that this Court can in its ' appellate jurisdiction impose the sentence the magistrate considered appropriate. Accordingly the sentence imposed by the magistrate is set aside as ultra vires, and there is substituted therefore a sentence of imprisonment for seven years, which as noted is the same sentence as that imposed by: the learned magistrate. Delivered in Court at Dar es Salaam this twenty-fourth day of June, 1980. (PHILIP. BIRON) JUDGE

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