

TANZANIA / JUDGMENT

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J JO t. / 0' IN THE HIGH COURT OF TANZANIA (AT MBEYA DC CRIMINAL APPEAL NO. 65 OF 2008 (Original Criminal Case lo. 151 0 2008 from the District Court Of Mbarali District at Rujewa) OSCAR ANYOSISYE APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

21.9. 06 - 30.20.09 MSUYA, J. The three appellants, namely Oscar Anyosisye, Athman Mohamed Mrisho and Julius Mwangomale were jointly and together charged and convicted for the offences of conspiracy c/. 384 of the Penal Code and Attempted Armed robbery c/s. 287 of the Penal Code in the district court of Mbarali at Rujewa. They were each sentenced to thirty (30) years imprisonment and had to suffer twelve (12) strokes. Aggrieved as adduced in the district Court by the seven witnesses called was that, on the 5th day of July 2008, at night hours PW.1 Assistant Inspector Ramadhani, was informed that there were bandits planning to rob Pw.6 Mungo Masele. Accompanied by PW.2 E.8265 DC Roman, and other police officers, they went to the house of PW.6, and asked him and his family to leave the house. PW.6 and his family obeyed and went into hiding. PW.1 and PW.2 hid near the house to trap the bandits. At around 00.30 hours a motor vehicle Reg. No. t.353 APC went to the house of PW.6. Four people got out of the car two of them were identified accused appellant Julius Mwangomale and Oscar Anyosisye, as they did not have marks on their faces. PW.1 was about ten steps from the house and PW.2 was at a distance of seven steps from the house. The appellants and their colleagues broke the house started to shoot. The Police Officers responded and in the process the appellant Julius Mwangomale was injured by a bullet on his leg. The bandits escaped and could not be arrested when they were chased by PW.1 and PW.2. PW.1 had to communicate with other police stations to assist by blocking the road. Following the communication PW.3 D/Sgt. Mashaka of Igurusi Police Station received information on 617/2008 at around 06.00 hours about a hidden motor vehicle at Utengule Bar close to Kasebwa bar. He visited the place and found the car reported Reg. No. 353 APC, Toyota Silver in colour. On searching in the car he found blood stains on the back seat. He also observed some blood stains on the ground, followed up the stains to a point where he met the appellant Julius Mwangomale having bullet wound,. The witness said Julius Mwangomale was found about 100 meters away from the parked motor vehicle Reg., NO. 353 APC, Toyota silver in colour. PW.4 F.3837 D/CP. Oscar testified on how they arrested Oscar Anyosisye who led them to where the firearm was hidden but could not be found at the airport area. PW.5. cC 4816 S/Sgt. Abel was the investigator of the case. After interrogating the appellants he said, he decided to charge them

with the offence of Attempted Armed robbery. He tendered 12 bullet shells found at the scene of crime. PW.6 Mungo Masele testified on how he was requested by police to evacuate his family from the house. He witnessed a silver saloon car coming to his house, bullet shots and found his door broken and four bullet holes at his roof. PW.7 Juma Masika witnessed when the appellant Oscar Anyosisye was showing PW.4 and other police officers where the bullet was hidden but it could not be found. Only a mark was left. In their defence all the appellants denied to have committed the offence charged with. In convicting the appellants the trial magistrate was convinced that PW.5 Mungo Masele's house was invaded by robbers who used firearms, that they came to that area with a motor vehicle Reg. T.353 APC, Toyota Saloon car silver in colour, that the said motor vehicle got break down at Igurusi village, the appellant Julius Mwangomale was hurt at the scene of crime and was left at Igurusi, that the appellant Oscar Anyosisye took police officers to the Airport Area where the said firearm was kept, the caution statements of the appellants and as such found the appellants Julius Mwangomale, Oscar Anyosisye and Athman Mohamed Mrisho guilty as charged. Dissatisfied with the decision they Oscar Anyosisye filed 8 grounds of appeal, Athuman Moahmed Mrisho, 4 grounds of appeal and Julius Mwangomale, 5 grounds of appeal. Going through the grounds of appeal by the three appellants they are centered on the issue of identification, admission of a caution statement without conducting an enquiry to ascertain its voluntariness and that not all the witnesses mentioned in the Preliminary Hearing were not called. 3 4., On the issue of identification the learned State Attorney argued that though the * 3rd 1 " appellant and the appellant's vehicle came at the house of PW.6 Mungo Masele at around 06.00 hours night and their vehicle's lights put off. PW.1 and PW.2 did identify the appellant's correctly as they were about seven (7) steps from the scene of the crime. So she said the issue of identification should not be considered. The witnesses PW.1 A/Inspector Ramadhani stated that he positioned himself and those police officers 10 walking steps from the house, PW.2 told the trial court "I was about 7 walking steps in a bush watching, I saw those people two of them with long coats and masks on their heads and two of them did not put masks". He said to have identified the 2 nd and the 6th accused, that is the 1st and 3rd appellants in this appeal. Now the issue arising is whether the identifications were proper. PW.1 A/Insp. Ramadhani did not identify any of the appellants. PW.2 E. 8265 Roman is the one who stated that he was about 7 walking steps from the house of PW.6 and could identify the appellant Oscar Anyosisye and Julius Mwangomale. In re-examination this witness said "I did identify the 6h accused 2nd by his face, black in colour and the accused is black taller than the accused", aided by the light of the car. The question is that identification was sufficient to justify conviction? The crime was committed at night 00.30 hours. Referring to the case of Amani Waziri v. R. (1980) TLR. 250 the Court of Appeal on discussing the evidence of visual identification held:- "(I) Evidence of visual identification is of the weakest kind and most unreliable; 4 (ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight". Despite the fact that PW.2 testified that the car lights were on and PW.1 also said that they were on it is surprising that PW.1 could not identify any of the appellants but PW.2 did. This shakes the credibility the prosecution testimony on identification as both PW.1 and PW.2 were at the scene. Furthermore PW.2 did not even mention the colour of the clothes they were dressing that time, it is not proper to just say "I

did identify the 6th accused (Oscar Anyosisye) the appellant 2nd and Accused (Julius Mwangomale) the appellant by his face and colour and that was taller than the other. How many black people and tall people are in Mbeya region? In view of the above I am satisfied that the identification or conditions for identification were not favourable. As regards the caution statement I have gone through the proceedings one of the appellants objected when statements were tendered in court. Records show that they all said that they had no objection. So the fact that the appellants objected it is an afterthought, it cannot be entertained at this stage. On the ground that not all witnesses mentioned out the Preliminary Hearing were called, the choice of who to call as a witness lies on the prosecution. They may list 5 witnesses at the Preliminary Hearing and later on discover that it is not necessary to call all of them. What is important for them is to prove their case beyond all reasonable doubt as provided for other the law of evidence. In the final analysis I find out the appellants were improperly convicted. Therefore the conviction is quashed and sentence set aside. 5 The appeal is allowed. The three appellants should immediately be released from remand custody unless held for another lawful cause. U.H. MSUYA, JUDGE 30.10.2009 Date: 30/10/2009 Coram: Hon. U. H. Msuya, J. 1st Appellant: Present 2nd Appellant: Present 3rd Appellant: Present For the Republic: Miss Mwakilasa, State Attorney. CC: Mrs. Flora Mponzi. Order: Judgment delivered on the 30th day of October, 2009 in the presence of the learned State Attorney Ms. Mwakilasa and the Appellants in person. U.H. MSUYA, J'(-. JUDGE 3010200' ti ' ! .. vs.. .ed. I certify this is a true copy of the original judgment ' ,../ DISTRICT n.

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