

TANZANIA / JUDGMENT

19760817 TZHC Tabora

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA AT TAORA APELATE JURISDICTION S '• -- r' - '• -••• -'•-•
HIGIT'COIJRT CRIMINAL APPEAL NOA O' 11976 Original Criminal Case No.403 of 1975 of the
Dist*iet court of Nzega district at Nzega. Befoe- E. K. Kwilabya, Esq., District Magistrate. t.William
Maanga

2. Buhula Moya) (Original Accused) versus

- The Republic Respondent. (Original Posecutor) CHARGE Robbery c/s 285 & 286 of the Penal Code. JIJDGEMENT: •0 SS.A: .J . . •• .: ' ' S , . J.. ' . 5 The two appe&lants and two others were c,)arged in the district court, Nzega, with the offence of robbery. Before the trial commenced one othem who appeared as the fourth accuse&l. jumped bail and absconded. Prosecution against him was then ubsequently withdrawn. The two appellants and the other person underwent the rigours of a full trial' which ended in their convictions,before. they were, each, sentenced to the statutory minimum of seven years imprisonment. The appellants sire now appealing and their appeals are consolidated. On gtounds of expediency I shall refer to. the appellants as they appeared at the trial,. i.e. secondand third accused persons. The other person, the first accused, has not appealed.. . . . The complainant in the case, one ERASTO JOHNSON (.PWI). gave •ed,enc,e to the effect that on the.night of llth.April, 19.75,he was awakendd from sleep in his house cum shop at:about 1.00 a.m. by a terrible bang or noise at his door. .It later transpired that a group of thugs had let go aboilder,. commonly nick-named "Fatuma", against the door of his house which then gav.e way.- The complaLnant got up and raised an alarm but he was Qrder.ed to shut upy a person whom he could then not, see .but identified the voice to,be thatof .,e second..accused. There was,a lamp on in the' ;roornwhere.the.../complainant was but the, - 2 complainant was but the bang t: the door and the order to shut up sent him and his wife and a two year old child (the last two did not tesUfy) scampering out of the builidng,. through the back door. According to the complainant when he was outside the house he saw and identified the second and third accused in theful moon which was on on the material night. The domplainant said that he .'" , idéntTfid'the econd and third ccused be ause' düting the day i.e. 10/4/75 1 at about 3.00 p.m. these to accued perons entered his shop and got themselves seated. He, the coinplainan: ti asked them . , if they wanted to buy anY - hi ng. They answered in the negative and added that thèS'were waiting fb±a bus. Thereafter, the wd accused (2nd and 3rd) en 4 away. When heorlplainal1tt saw the again in the, moonlight both had small guns

The complainant ran to a place where he thought he had hidden himself. The second and third accused went to the place whereupon the second accused punched him. The third accused then got hold of him by the hand and led him back to his house. The three of them, i.e. the complainant and the two accused (2nd and 3rd) entered the house together. Meanwhile the accused were demanding money from him. The complainant was taken into the shop where there was a lamp on. According to the complainant, in addition to the lamp both accused in the shop they found the first and fourth accused. Each one of them had a scotch light. The complainant was made to sit down. The fourth accused then pulled out a wrist watch from his, i.e., the

- The first accused demanded money. The complainant refused to give him whereupon the first accused got hold of him by the neck. At that stage the second accused reminded him that they had been to the shop during the day and he, i.e. the complainant
- was telling that the first accused who, oddly enough, was apparently
- - '... I was trying to appeal to the complainant's emotions addressed him in a friendly manner, saying, 'Don't you know how old I am? Can you offer me a cigarette?' The third accused then predicted his gain at the complainant and threatened to kill him because of his failure to give them money. Frightened as he was the complainant then took out cash shs.35/- from his pocket and handed it over to the first accused. Thereafter, the second accused took out a handgun and pointed his revolver at the complainant. To save his life the complainant opened his box and took out cash shs.2500/- which he then handed over to the second accused. The third accused then started to collect articles from the shop. The third accused collected a half a dozen light bulbs and dry
- '...'. The first accused took the hand of the second accused and pointed it at the complainant. The second accused continued to collect articles from the shop. Eventually the third accused pointed his gun at the complainant while the other accused persons collected their loot out of the shop. The third accused remained for more than ten minutes. Meanwhile the complainant tried to get up but he was ordered to sit down by the third accused. Ultimately the third accused too left and went away. This gave the complainant an opportunity to get up and raise an alarm. The complainant's relation one HANZA ABDIJIJI (PW1) who slept in the same building but apparently in a different room testified that he too was awakened by the door giving way to the sound of a big stone. He then heard the complainant raise an alarm. There was a lamp on () in the room and it seems before Hamza got up from the bed he saw the third accused with a panga in his hand followed by the second accused. They then entered the room - the first accused who also had a small gun and a pang entered the room. All the accused demanded money from Hamza but he told them that he had none. According to Hamza he shared the room and the bed with another person who did "If not give evidence at the trial. It appears when the said person realised that the building was invaded by savages he decided to seek refuge under the bed. He must have done this hurriedly as a result his legs were still conspicuous when the accused entered the room. The first accused who spotted out

the legs pulled ieprson oit and demadd nonéy 4romhim. He had none. The accused t thenpoke arnd aund sdme meat iri the cupboard which ty he then ate Threaftthr, the thid cüsed pulled hini,i.e 0, Hamz, out of 'bed and toll im

- c / to show the' Wftere the money was kept. It a-ppear the, 1third. acdused id not purèue tth . ccording tq Ha za th second and third accused the .eft the oon. The first accused remained behind rding Hamza and the, otheiperson. Later, Harpza..heard the accused say f ierls , " .the owner's, rwhile they were outside The first accused then olowed his companions. Thereafter, Hamzasaw the accused enter th main house with the comprainant under their grip. He also heard them demanding money from the complainant ahd his wife. Hamza said that he did not know what happened to PWI, while in.-.the house. However, later, after the? accused ha&gone it,ws observed that several things including a adio and camera, Were missing., ftr the invaders had gonee th complainant raised analarmnd ,l his neighbours including a leader of ten houses RPPBAEL MAGAHE (PW4), and ELIAS MUSA (Pw6) and two others left on the same night to report the matter to the police. They arived r at Sungwizi Police station at 5.00 p.m. and reported th e matter to,a police constable, Chacha (PW2). According to Chachà PW4 and PW6 told him that they knew thid accused q.but it is riot clear whether hey kr'w him by face or by name. Both PW4 and PW6, howeVer, 'never made any iention of this. Nevertheless at about 7.ODp.m. - Chacha, 'W4 and PW6 went to the house of third acused. They fouq him with his thother atid Chacha arrested him. Chacha also seized his, 3rd accuse's clo.s which were in a basket. Thereafter, he, Chacha, asked the third accuSed where the second accused was. It
- : , , -, 0 0 -Lj a 4 4 is not known why Chacha did so because he.doe hot evensay thtJe did so on information received. Neverthesess, accordihg1to Chccha, the third accused told him that he, second accused,wsa the bmbe club. It seems Chacha did not do anything until the following day when he proceeded to the house of tht second accused. The latter, was not there. Thereafter, Chacha proceeded to the pombe club at Ikinga where he ound the second accused. It is not known wheor Chacha already knew the second accused or. whethei someone identified the second accused to him. •Chacha then arrested the second accused and took. him together with his personal belongings which, according to Chaqha,, were not connected with this case and cash shs.10/— to the police stt.ion. Cacha, teld tbe trial court that the. first accused Ws also present at th pombe club and he, hrs€ accused, left with other persons while he, chach, ws'.rresting the second accused. Later, however, the first and'lourth accused wee arrested by Chacha in a bus. Several of the stolen articles were found on them. Eventually, the accusd were charged with the offence charged. 'l?he secohd accused in his s orn statement in defence said that ont/4/15 he and 3rd accused went and auctioned two bulls. The;eafter he pLent part of 'friie proeeds in buying a radio and some articles of cldthing. He nd third accused lso drank some pombe befor-ç they, parted. Event' üellPW2, Chacha, a2rested hi and took him to the police station. The second csed denied visiting the complainant's vJ.119ge The third accused eiter5ted the second accuSed's story. The larned tzil magistrate accepted the evidence of. the coThplainant and PW) without reservation and he was, therefore, satisfiec that the identification of both 2nd and 3rd accused had

sufficiently - been established. The defence of alibi raised by the accused was accordingly rejected. There can be no doubt that the conviction of both second and third accused was based purely on their identification by the complainant and Hamza (PW7). It is true law that where the evidence implicating the accused is entirely based on identification, such evidence must be "absolutely watertight to justify conviction". (vide *rv. ..ebwato* 1960 E.A. 170; *Emmanuel umbotele v.R.* (1971) ,H.C.D. 141). In the instant case the complainant told the trial court that he identified the 2nd and 3rd accused because both of them had been to his shop earlier, during the day. He talked to them and they told him that they were waiting for a bus. In the night he identified the second accused by his voice when he shouted 't him to shut up and later identified both 2nd and 3rd accused in the moonlight and finally he, the complainant, identified both 2nd and 3rd accused in the shop with the help of a fuel lamp and spotlights which the accused had. This account taken out of context sounds impressive enough. Nevertheless the court still has a duty to scrutinise the same and satisfy itself, beyond doubt, that the identification of the accused was absolute. '3 4. a 5 - One' point which comes out distinctly from the evidence of the complainant is that both second and third accused were strangers in their eye. There is no evidence to suggest that the accused or any one of them were or was known to the complainant - or Hamza or both. In the circumstances it would have been appropriate for the complainant and Hamza, who also claimed to have seen the second and third accused during the day to give their description. This was not done. This is, however, not the end of the story. As aforesaid the complainant said that when one of the invaders shouted to him to shut up he identified the voice to be that of the second accused. This, on the evidence on record, sounds inconceivable. One wonders what time the complainant had with second accused in order to be conversant with his voice & different pitches. All there is in evidence is that when asked 2nd and 3rd accused told him that they were waiting for a bus and that was all. As a matter of fact it was not disclosed as to who actually said so among the accused. If I may go further, the complainant again said that he identified 2nd and 3rd accused outside the house in the moonlight. He, however, did not say how far away he was then from the accused persons. Even in broad day light vision has its limits. If I may go yet further it was said by both the complainant and Hamza that there were lamps in their rooms and the accused also had spot lights which apparently were switched on. It is, however, not known in what direction the rays of the, said spotlights were directed. If they were directed at the complainant and Hamza then certainly they would not have been in a position to see and identify the handler. To crown it all the complainant and Hamza contradicted each other as to what the accused did and at what stage. The learned Magistrate who tried the case never considered all these factors. If he did it is not possible for me to say that he would have arrived at the same conclusion on the identification of the 2nd and 3rd accused as he did. As I pointed out earlier nothing else connected these two accused with the offence apart from their identification by the complainant and Hamza. The matter is made more complicated because it is not even known what made Chacha (PW2) to go for 2nd and 3rd accused. There is absolutely no evidence that the names of these accused were mentioned to him nor that their descriptions were given to him. So for all these reasons and in all the

circumstances of the case it is my considered opinion that it is unsafe to support the convictions of the second and third accused on the bare assertions of the complainant and Hamza that they had recognised them. Suffice it to say, therefore, that there is merit in these appeals which, accordingly succeed. The convictions are quashed and sentences are set aside. Both second and third accused should be set at liberty forthwith unless they are shown otherwise held in custody.

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