IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MROSO, J.A., NSEKELA, J.A. And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 252 OF 2005

ALEX KAPINGA
ANTHONY NDUNGURU
AGATHONY NDUNGURU } ..... **APPELLANTS**
JANUARY HYERA

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Songea)

(Manento, J.)

dated the 7th day of November, 2003
in
Criminal Sessions No. 1 of 2002

JUDGMENT OF THE COURT

17 & 31 August, 2006

NSEKELA, J.A.:

The four appellants, namely Alex Kapinga, Anthony Ndunguru, Agathony Ndunguru and January Hyera, were jointly charged with three other persons in the High Court at Songea on information for the offence of murder contrary to section 196 of the Penal Code. The appellants were the 1st, 5th, 6th and 7th accused persons. The remaining three, namely the 2nd, Alex Ngapasa, the 3rd, January Ngapasa and the 4th, Christopher Kapinga were acquitted by the High Court and there is no cross-appeal against their acquittal. For the

purposes of clarity, we shall refer to them in the order of appearances in the court below where they appeared as follows:-

1st accused ..... Alex s/o Kapinga

2nd accused ..... Alex s/o Ngapasa

3rd accused ..... January s/o Ngapasa

4th accused ..... Christopher s/o Kapinga

5th accused ..... Anthony s/o Ndunguru

6th accused ..... Agathony s/o Ndunguru

7th accused ..... January s/o Hyera

The 1st, 5th, 6th and 7th accused persons were aggrieved by their convictions and sentences, hence this appeal to this Court. Mr. Mushokorwa, learned advocate, appeared for the four accused persons (now appellants) whereas Mr. Boniface, learned Senior State Attorney, represented the respondent Republic. Three grounds of appeal were preferred in the memorandum of appeal on behalf of the appellants. In the first ground of appeal, the appellants challenged the evidence of identification by PW1, PW2 and PW5. The second ground of complaint related to the alleged material discrepancies in

the testimony of the said witnesses and lastly the appellants claimed that the prosecution did not prove its case beyond all reasonable doubt.

The case for the prosecution revolved around three key witnesses, PW1 Denis Kapinga; PW2 Amani Kapinga and PW5 Rehema Kowelo. The first two were sons of the deceased Sixbert s/o Kapinga, while the third was a very close relative. All of them were staying in the deceased's compound in different houses. There was a big bang on the main door of the deceased's house and they woke up. It is important to explain in a nutshell what each one of them saw or encountered after the bandits broke into the deceased's house.

PW1 testified that when he woke up, he saw all the seven accused persons enter the house. The door to his room was partly open and when he attempted to open it, he met the 5th accused person who beat him up and ordered that he retreat inside. Then he saw the 1st accused forcibly opening the door to the deceased's bedroom and then together with the 4th, 6th and 7th accused persons,

they dragged the deceased out of his bedroom and put him in a sofa-set on the sitting room where the deceased was severely beaten and then thrown outside. The identification of the accused persons was through lantern lamps and bright moonlight outside. PW2, on hearing a bang to the door opened it thinking that something has gone wrong in the cowshed. He saw seven people, the accused persons. The 5th and 7th, carrying axes, approached him and forced him back into his room and was locked inside. The remaining accused persons were in the courtyard. Somehow PW2 managed to open a window and escaped from the room. He reported the incident to PW3, one Christian Ndomba, a ten cell leader. PW3 together with PW2 then went to the deceased's house. The deceased was found naked outside in the banana shamba. We should add here that the source of light for identification was the same, the lantern lamps and bright moonlight. The deceased was found with several cut wounds all over his body. The deceased was apparently conscious and told PW3 that the 1st accused person had attacked him. The deceased was then taken to Mbuyula Government Hospital where he died in March, 2000. We now come to PW5 who,

after opening the door, encountered the 5th accused person and about ten other people armed with pangas, and clubs. She claimed to have identified the 1st, 2nd, 3rd, 4th and 7th accused persons. All of them were carrying either pangas or clubs or bill hooks. PW5 also saw three other people whom she could not identify. The source of light which facilitated the identification of the accused persons was the same, light from the lantern lamps. PW5 then saw the 1st accused person forcibly open the door leading to the deceased's bedroom. The 4th, 6th and 7th accused persons then dragged the deceased out of the bedroom and made him lie on a sofa-set and started beating him. On the 6.11.99 PW4 Ex. E 442 D/C Omari visited the scene after the incident had been reported to him by PW2 and PW3.

There is no doubt that the crucial question that the learned judge had to decide was whether or not the accused persons were properly identified as the bandits who broke into the deceased's house and killed him. Mr. Mushokorwa, learned advocate for the appellants, submitted to the effect that the learned judge failed to appreciate the unfavourable conditions for the identification of the

accused persons. He submitted that the incident happened at night when it was dark (11.00 p.m.) and the identifying witnesses, PW1, PW2 and PW5 were asleep at the time and they woke up on hearing a bang on the main door to the deceased's house. He added that these witnesses were young and undoubtedly shocked and confused by what was unfolding before them. This rendered their evidence of identification unreliable to act upon. Mr. Boniface, learned Senior State Attorney, declined to support the convictions and sentences meted out to the appellants basically on two grounds. First, that the learned judge did not appreciate the discrepancies in the evidence of PW1, PW2 and PW5 and its effect on the identification of the accused persons and secondly, the learned judge did not address his mind to the non-disclosure of the names of the bandits soon after the incident.

A common feature in the testimony of PW1, PW2 and PW5 is that each one identified the seven accused persons who broke into the house of the deceased on the 5.11.99. There were certain discrepancies as to what weapon each accused carried. At least each one of them had some sort of weapon. It is not in dispute that the

deceased was attacked by this gang of bandits, the appellants, according to the learned judge. The 2nd, 3rd and 4th accused persons were exonerated because they did not participate in the "killing operation of the deceased" as the learned judge put it, differentiating them from the alleged active participation by the appellants.

If the evidence of PW1, PW2 and PW5 is believed, as did the learned judge, with respect, we cannot see how the 2nd, 3rd and 4th accused persons were acquitted. On the face of it, it would be applying double standards based on the same evidence. It is evident to us that the learned judge did not evaluate the prosecution evidence in terms of section 23 of the Penal Code as explained by the judgment of this Court in **Mathias Mhyeni and Another v Republic** (1980) TLR 290. It is common knowledge that where a person is killed in the course of prosecuting a common unlawful purpose, each party to the killing is guilty of murder. In the case of **R v Tabulanyeka s/o Kirya and Others** (1943) 10 EACA 51, the Court of Appeal for Eastern Africa stated at page 52 as follows –

> "To constitute such common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attach -------"

We do not wish to say anything more on the acquittal of the 2nd, 3rd and 4th accused persons because there was no cross-appeal in that regard.

Section 196 of the Penal Code provides –

> "196. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

From the above provision, in order to succeed, the prosecution had to prove beyond all reasonable doubt that first, the death of the deceased was at the hands of the appellants; second, that the appellants acted wrongfully in injuring the deceased; and, thirdly,

that there was malice aforethought. The appellants are contesting that they caused the death of the deceased. The question is, who inflicted the fatal wounds as indicated in the post-mortem examination report, exhibit P1? The learned judge in the course of his judgment has this to say –

> "**From the onset, I would like to say that most of this case depends on the identity of the accused persons, the credibility of witnesses** and on the part of the accused persons, whether they managed to raise doubts in the prosecution case because at no one time do they have a duty of proving their innocence." (emphasis added)

We have had occasion to narrate the testimony of PW1, PW2 and PW5. In convicting the appellants, the learned judge was guided by the principle set out in the case of **Waziri Amani** v **Republic** (1980) TLR 250. The learned judge made references to the witnesses' opportunity to identify the accused persons, for instance how long they observed them; the state of the light from the lantern lamps and bright moonlight; the distance each witness had from the

appellants; that they had known them since childhood; had stayed in the same locality, Mkwaya Village and PW1 even claimed that he could identify them by their voices. Both the learned advocate for the appellants and the learned Senior State Attorney for the respondent Republic entertained serious doubts on the evidence of identification by PW1, PW2 and PW3. These witnesses were in different rooms; they were still adolescents; there were discrepancies as regards the weapons being carried by the bandits. It was also suggested that family animosity between the first appellant and the deceased could not be discounted.

The guidelines set forth in **Waziri Amani's** case referred to above were succinctly stated on page 252 as follows –

> "Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We

> would, for example, expect to find on record questions such as the following posed and resolved by him; the time the witness had the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. **These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity**." (emphasis added)

It is clear that the guidelines enunciated in **Waziri Amani's** case above were not meant to be exhaustive. The list of other factors to be taken into account was not closed. There is evidence to the effect that there were discrepancies in the number of bandits seen at the deceased's house. There were also discrepancies in the identification of who carried what weapon. The fact that there are discrepancies in a witness testimony does not straight away make

him or her unreliable witness and make the whole of his/her evidence unacceptable. In the instant case however, these discrepancies go to the identity of the accused persons and therefore cast a shadow of doubt on the prosecution case. There is another aspect in the evidence we have found rather discomforting. PW2, after escaping through a window and reporting the incident to PW3, a ten-cell leader, did not disclose the names of the bandits to PW3. When PW3 accompanied by PW2 went to the deceased's home, PW1 did not disclose as well the names of the bandits. PW1 and PW2 were sons of the deceased and it is rather surprising, to say the least, that at the first opportunity, PW1 and PW2 were unable to mention the names of the bandits to PW3, a ten-cell leader in the village. Equally surprising is the attitude of PW3 in not finding out from the witnesses who were the prime suspects. On the 6.11.1999, PW2 in the company of PW3, reported the incident to PW4, a police officer, but again no names of suspects were mentioned. Another intriguing fact is that the 5th, 6th and 7th accused persons were arrested on the 13.12.1999 while the incident happened on the 5.11.1999. If the evidence of identification was watertight, why should the accused

persons be arrested on different dates while they all belonged to the same area? There is no evidence that they had absconded from the village. These are additional factors that the learned judge should have taken into consideration and but did not do so.

The decision of the learned judge regarding the question of who attacked the deceased on the material night was wholly dependent on the credibility of PW1, PW2 and PW5. It is our considered view that the additional matters we have hopefully amply demonstrated, show that there is a cloud of doubt hanging over the prosecution case. We find it unsafe to uphold the convictions and sentence.

We accordingly allow the appeal, quash the convictions and set aside the sentence. The appellants are to be released forthwith unless otherwise lawfully detained in custody.

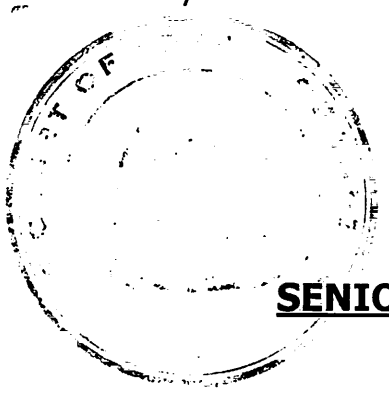
DATED at MBEYA this 31st day of August, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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



(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR