IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 497 OF 2015

1. SUDY MASHAWA @ KASALA
2. GERALD KIKAMBA .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sambo, J.)

dated the 26th day of August, 2015
in
Criminal Session No. 10 of 2013

JUDGMENT OF THE COURT

26th September & 10th October, 2017

MUSSA, J.A.:

In the High Court of Tanzania, at Sumbawanga, the appellants stood arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. The particulars on the information alleged that on the 24th January 2012, at Muze village, within Sumbawanga District, the appellants murdered a certain Maxwed John.

Upon the information being read over and explained, both appellants refuted the prosecution accusation, whereupon the case proceeded to a preliminary hearing. During the preliminary hearing, the prosecution tendered a post-mortem report, a sketch plan and a vehicle inspection report which were admitted as, respectively, exhibits P1, P2, and P3, without objection from the defence.

Thereafter, the trial commenced but, midway, in the course of the testimony of the first prosecution witness, the trial court sub-merged into a trial-within-trial to determine the admissibility of an Identification Parade Register (henceforth simply referred to as "the register"), in the wake of an objection from the defence. The mini-trial involved two prosecution witnesses and a single defence witness at the end of which the register was ruled admissible and tendered as exhibit "A".

Upon resumption of the main trial, the prosecution featured four witnesses, as against the respective sole testimonies of the appellants in defence. At the end of the trial, the three assessors who sat with the trial Judge (Sambo, J.) returned an unanimous guilt verdict, just as the learned Judge concurred and, accordingly, convicted the appellants and

handed down a death sentence. Dissatisfied, the appellants are presently aggrieved upon a memorandum of appeal which enlists six points of grievance: -

> *"(1). That, His Lordship Trial Judge erred in Law and in Facts to rely on the contradictory evidence of the Prosecution's witnesses to convict and sentence the first and the second Appellants.*
>
> *(2). That, the Trial Court erred in Law and Facts to convict and consequently sentence the Appellants on the bases (sic) that the Appellants were properly identified by the PW2, PW3 and PW4 to have killed the deceased person one Maxwell (sic) John while there was no evidence to that effect.*
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> *(3). That, the Learned Trial Judge extremely grossly erred in Law and Facts to allow a trial within a trial to be conducted in respect of admissibility of the identification Parade Register i.e. PF 186, Exhibit "A" which consequently had a negative effect to the first accused's Defence (hereby referred to as the first Appellant).*

(4). That, the Honourable Trial Court erred in Law and Fact to rely on the PW2's evidence was cemented by the Evidence emanates from the Identification Parade which was improperly conducted.

(5). That, the Honourable Trial Court erred in Law and facts to rely on the Prosecution's evidence that there was death of the deceased Maxwell (sic) S/O John while neither the Doctor examined the body of the deceased person nor any other person(s) [witness (es)] were called in Court to properly tender the sound Medical Report on Post-mortem Examination, Exhibit – P1.

(6). That, the Learned Trial Judge, horribly erred in law and fact to allow the Court Assessors to cross examine the Accused persons [herein referred to as the Appellants] during the proceedings at the trial."

When the appeal was placed before us for hearing, the appellants were represented by Mr. Leonard Magwayega, learned Advocate, whereas the respondent Republic had the services of Mr. Francis Rogers and Ms. Mwajabu Tengeneza, learned State Attorneys. As it turned out,

the Republic resisted the first appellant's appeal but, before we reflect on the rival learned arguments, it is necessary for us to unveil the factual background of the case, albeit briefly.

From the featured witnesses and documentary exhibits, the case for the prosecution was to the effect that, on the fateful day, during the morning hours, the deceased, a young boy aged between 13 and 15, was, among others, traveling from Sumbawanga Municipality, Rukwa Region, to Majiyamoto locality in Katavi Region. More particularly, the deceased was in the company of his mother, namely, Flora Raphael Chiwanga (PW2) and, along with others, they were aboard a Land cruiser hardtop which was being driven by Rodrick Joseph Telemka (PW4).

As they reached Muze hills, both PW2 and PW4 saw two men ahead of them, one of whom was wielding a sub-machine gun (SMG). Just then, the armed man released a gunshot, which pierced through the motor vehicle's wind screen, injuring PW2 on her shoulder and fatally hitting the deceased on his head. The deceased died instantaneously. Soon after, the two bandits fired four more gunshots and, they then

besieged the motor vehicle and ordered all passengers to disembark as well as surrender whatever valuables and money they had in possession. More particularly, PW2 surrendered to them a sum of Shs. 46,000/= in Cash and her Huawei mobile phone, whereas PW4 was dispossessed of a sum of shs. 50,000/=, in cash. According to PW4, as PW2 surrendered her valuables, she boldly challenged the attackers to just as well kill her as his son was already dead.

In the middle of this exercise, another motor vehicle arrived and stopped at the scene. It was a Toyota Land cruiser hard top which was being driven by Louis Sokoni (PW3) and the motor vehicle was just as well commuting passengers from majiyamoto to Sumbawanga Municipality. As he arrived there, PW2 caught a glimpse of the bandits before they cleared themselves from the scene. By that time, it was already 7.30 a.m.

Speaking of the identity of the culprits, PW2 claimed to have recognized the first appellant as the person who wielded and released the fatal gunshot. Elaborating, the witness told the trial court that she particularly recognized him at the time when the first appellant was

ordering them to disembark from the car and surrender their valuables. Additionally, PW2 stated that he knew the first appellant previously on account of having seen him at Majiyamoto. As regards the first appellant's physical appearance and complexion, PW2 claimed that the appellant is tall and black. She further testified that, at the scene, the first appellant was clad on a khaki pair of trousers and that he was not wearing a shirt just as he did not hide his face with a mask. As regards the other culprit, PW2 simply said that he was wearing a green shirt but she did not recognize him.

On his part, PW3 claimed to have recognized the first appellant whom he knew quite well as he was a commuter transport ticket tout ("mpiga debe") based at Majiyamoto. The witness recognized the first appellant in his *alias* name: "Kasala". PW3 also claimed to have recognized the second appellant in the name of "Jeradi" and confirmed PW2's detail to the effect that the first appellant was clad in a Khaki pair of trousers and that he was not wearing a shirt. The other witness (PW4), did not recognize any of the culprits but, at the end of the episode, he drove the ill-fated motor vehicle straight to Sumbawanga police station where the officer Commanding Criminal Investigations in

the District (OC-CID), namely, Superintendent Emmanuel Kalinga (PW1), assigned to himself the investigations of the matter. It is, perhaps, noteworthy that upon arrival at the police station around 9.00 a.m. or so, PW2 promptly named and implicated the first appellant to the superintendent. In her account, she additionally told PW1 that they were invaded by four bandits.

On the morrow of the occurrence, around 12.00 noon, the deceased body was presented before a certain Dr. Makungu at the mortuary of the Regional Hospital, Rukwa. The deceased's body was identified to the medical officer by his relatives, namely, John Matanga and Steven Chiywango in the presence of two police officers: Nos. D4942 Detective Corporal Sebastian and F 6772 Detective Constable Paul. Upon a postmortem examination, the deceased was found with a gunshot wound which penetrated through the right parietal side of the head and crossed over to the left pariental side through the brain tissue. According to the medical officer, the operating cause of death was a severe haemorrhagic shock resulting from the gunshot wound. He compiled an autopsy reported which, as already intimated, was tendered into evidence at the preliminary hearing as exhibit P1.

On his part, on the 26th January 2012, PW1 arrested the first appellant and, on the following day, he conducted an identification parade in which the first appellant was featured as a suspect. The sole identifying witness was PW2 and, as it turned out, she positively identified the suspect. The results of the parade were posted into the register but, as PW1 was about to tender it as an exhibit, Mr. Kampakasa, who was advocating for the appellants during the trial, raised on objection as to its admissibility on account that the first appellant did not, in the first place, attend the alleged parade. Thereafter, as we have hinted upon, the court sub-merged into a trial-within-trial at the end of which the register was positively adjudged admissible. That concludes the prosecution version which was unveiled by its witnesses during the trial.

In reply, both appellants were upbeat in their complete disassociation from the prosecution accusation. More particularly, the first appellant told the trial court that he resides at Majiyamoto where he operates for gain as a lorry attendant. He further testified that he travelled to Sumbawanga Municipality with effect from the 19th January 2012 and remained there throughout, up until when he was

apprehended on the 26th January, 2012. The first appellant said he knew the second appellant for over eight years on account of being his mate at the Majiyamoto locality. Thus, his defence was, so to speak, in the nature of an *alibi*.

On his part, the second appellant confirmed the detail about being a resident of Majiyamoto. His account was also in the nature of an *alibi* to the effect that, on the fateful day, he was throughout at Majiyamoto locality and did not, at any particular moment, visit the scene of the alleged incident. As he wound up his testimony, the second appellant also acknowledged acquaintance with the first appellant for the past six years although, he said, he had never spoken to him. With the foregoing telling from the second appellant, so much for the respective accounts of the appellants.

On the whole of the evidence, the trial judge was satisfied that the circumstances at the scene were conducive for an unmistaken identification, just as he was satisfied that PW2 and PW3 told a credible tale and were coherent in their telling of it. In the upshot and, as we

have already indicated, the appellants were found guilty, convicted and sentenced to suffer death.

Reflecting on the memorandum of appeal, we should express at once that the 5th ground need not unnecessarily detain us as it is wholly bereft of merit. We have already expressed that on the 25th January, 2012 the deceased's body was presented before a medical officer who, upon examination, attributed his death to a severe haemorrhagic shock secondary to a gunshot wound. As he was arguing the ground of appeal, Mr. Magwayega insistently complained that the medical officer was not called as a witness but, when we reminded him that the post-mortem report was adduced by the prosecution at the preliminary hearing without demur from the defence, the learned counsel for the appellant readily realized that he was ploughing sands and abandoned the quest.

Addressing the remaining grounds of appeal, we propose to begin with the 6th ground of appeal which Mr. Magwayega seemingly predicated his complaint on the fact that the assessor's questions were preceded with the abbreviation: "**XD**". It is noteworthy, in this regard,

that is, indeed, a notorious practice of presiding officers to precede the examination by a party who called him with the abbreviation: "**XD**", that is, in lieu of "examined-in-chief". The examination of a witness by the adverse party is abbreviated: "**XXD**", for "cross-examined"; and finally, the examination of a witness, by the calling party, subsequent to the cross-examination is abbreviated: "**RXD**", for "re-examined".

As we have already indicated, in the matter at hand, the questions were abbreviated with "**XD**". Thus, in effect, the presiding Judge allowed the assessors to "*examine*" the witnesses as distinguished from subjecting them to *cross-examination*. It would have been neater and indeed, more appropriate in all cases tried with the aid of assessors if the latter's involvement is preceded with the sub-title: "**Assessors Questions**", in lieu of the abbreviation: "**XD**". Such a sub-title will augur well with the statutory mandate of the assessors "*to put any questions to the witness,*" as stipulated under the provisions of section 177 of the Evidence Act, Chapter 6 of the Revised Laws. In sum, to the extent that the record clearly indicates that the trial Judge did not go so far as to allow the assessors to cross-examine the witnesses, ground No. 6 is wanting in merits. We further note that, in the judgment, the

presiding Judge severally used the expression "assessors cross examination" in reference to their questions; but since, as we, have noted, according to the record, there was no such cross-examination, we take such reference as an unfortunate slip of the pen.

Advancing further, the learned counsel for the appellant consolidated his argument with respect to the first and second grounds of appeal. The gist of the complaint is that the evidence of the prosecution witnesses was fraught by contradictions to the extent of rendering them unworthy of belief. In this regard Mr. Magwayega, more particularly, deplored PW2's account that she saw two attackers at the scene which, he said, was contradicted by PW1 who said that PW2 informed him that they were confronted by four bandits.

Granted that, indeed, there was this contradiction which is discernible from the testimony of PW1 but, we should note that the trial Judge actually addressed the issue and, having found that PW2 consistently testified that there were only two attackers, the trial court defused the discrepancy as invalid. On our part, we have found no cause to vary this finding, the more so as the general flow of the

evidence from all the witnesses who were at the scene was to the effect that the perpetrators of the robbery were only two. In any event, PW2 was not impeached on the alleged derogation by way of cross-examination at the time of her testimony.

Still on the 1st and 2nd grounds of appeal, the learned counsel for the appellant criticized the trial court for finding that the conditions at the scene were conducive for an unmistaken identification of the culprit. In his submission, Mr. Magwayega urged that, on the contrary, the conditions at the scene were horrifying with a stream of gunshots. As for PW2, he said, it was particularly an intense as well as a traumatic moment for her as she had the misfortune of having to witness her son's demise. In the circumstances, counsel concluded, the conditions at the scene were barely favourable for a correct identification.

To this submission, Mr. Rogers countered that both the identifying witnesses, that is, PW2 and PW3, previously knew the first appellant, in particular, just as they spent quite some time to recognize him at close range. The learned State Attorney further submitted that the type of identification relied upon is that of recognition by a witness who knows

the culprit which is more reliable than that of a stranger. To buttress the latter contention, Mr. Rogers referred us to the unreported Criminal Appeal No. 110 of 2014 – **Jumapili Msyete V. The Republic.**

As regards the alleged horrifying situation at the scene, the learned State Attorney countered that however horrifying the situation was, at the scene, it is quite evident that PW2 surpassed fear and remained alert in her recognition of the first appellant. In this regard, Mr. Rogers referred us to a case of **Hassan Kanenyera and Others V. The Republic** [1992] TLR 100.

But, as regards the second appellant, Mr. Rogers conceded that the evidence implicating him falls short as his implication was by the mere mention of his name "Jeradi" by PW3 who did not even elaborate on how, if at all, the second appellant became known to him. This being the only evidence, the learned State Attorney declined to support his conviction and advised us to set the second appellant at liberty. We entirely subscribe but we defer our appropriate order with respect to the second appellant to a later stage of our judgment.

Having heard counsel from either side on the reliability of the evidence of visual identification by PW2 and PW3, we should express at once that there is a lot of merit in the submissions of Mr. Rogers. To begin with, both PW2 and PW3 previously knew the first appellant and, thus, there was evidence of visual recognition as distinguished from visual identification. As correctly formulated by the learned State Attorney, evidence of recognition by a familiar witness is more reliable than that of a stranger although, even in recognition cases, mistakes by a witness cannot be overruled (see the unreported Criminal Appeal No. 37 of 2009 – **Issa Mgara @ Shuka V The Republic**; and Criminal Appeals Nos. 465 & 467 of 2007 – **Magwisha Mzee and Another V. The Republic**).

To add to the foregoing, the incident occurred around 7.30 a.m., that is, in broad daylight and as correctly submitted by Mr. Rogers, both PW2 and PW3 spent quite some time to recognize the first appellant. It was, indeed, a tragic moment for PW2 who witnessed the demise of her son at the scene but, as was remarked in **Hassan Kanenyera** *(supra)*:-

> *"However horrifying a situation is, there is a watershed mark and, if that is reached, then a*

victim overcomes his or her fear and measures up to the occasion".

We believe, after the fatal attack on her son, PW2 was just as alert in her mind and this is evident from her challenge on the perpetrators to proceed and kill her as her son was already dead. All said, so much for the 1st and 2nd grounds of appeal which we answer in the negative.

In the 3rd and 4th grounds of appeal, the trial court is being criticized for two things: **First**, by conducting the trial-within-trial with respect to the admissibility of the register and; **second**, for reliance on the identification parade to convict and sentence the first appellant. We propose to first address the second grievance which need not detain us a bit as it is, with respect, wholly misconceived. To demonstrate our stance, we need only, extract a portion of the trial court's judgment: -

"...the identification parade conducted by PW1 in respect of the 1st accused, who was known to the said PW2, was as good as nothing in the instant case. It ought not to have been conducted. But, the court based its decision on the identification of the 1st accused by the PW2

at the scene of crime and not the useless identification parade, exhibit "A"."

From the foregoing extract, it is beyond question that the learned judge discounted and, if we may add, rightly so, the entire evidence with respect to the identification parade and, thus, in ground No. 4, the learned counsel of the appellants was, obviously, holding the wrong end of the stick. To revert to the first grievance, counsel from either side expressed misgivings about the approach adopted by the presiding Judge of conducting a trial-within-trial with respect to the admissibility of the register. Both were of the view that the mini-trial on the admissibility of the register was an unprecedented novelty. On our part, having accepted the trial court's decision to discount the entire evidence relating to the identification parade, we need not venture into comments on the propriety or otherwise of the mini-trial which will obviously be *obiter*. Such comments should await a legitimate occasion.

In sum, on the totality of the evidence we are fully satisfied that the conviction and sentence imposed upon the first appellant was fully deserved and cannot be faulted. In the result, his appeal is dismissed in it's entirely.

As regards the second appellant, as we have already intimated, his appeal is meritorious and, accordingly the same is allowed with an order quashing the conviction and setting aside the sentence imposed upon him. In fine, the second appellant should be released from prison custody forthwith unless if he is detained there for some other lawful cause.

It is so ordered.

DATED at **MBEYA** this 9th day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL