IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MZIRAY, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 551 OF 2015

1. CHACHA JEREMIAH MURIMI
2. METHEW JEREMIAH DAUD
3. PASCHAL LIGOYE MASHIKU ..... **APPELLANTS**
4. ALEX JOSEPH@ BUGWEMA
SILOLA LYANGALO

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania sitting at Mwanza)

(Makaramba, J.)

dated the 16th day of October, 2015
in
Criminal Sessions case No. 231 of 2014

JUDGMENT OF THE COURT

27th March, & 5th 2019

MZIRAY, J.A.:

Before the High Court of Tanzania sitting at Mwanza in Criminal Sessions Case No. 231 of 2014, the four appellants were prosecuted with and convicted of the offence of murder contrary to section 196 of the Penal

Code, Cap. 16 of the Revised Edition, 2002. They were each sentenced to suffer death by hanging. Aggrieved, they are now before this Court appealing against both convictions and sentences.

It was alleged that on 26th day of June, 2009 at Ibanda village, within Nyamagana District in the City and Region of Mwanza, the appellants jointly and together murdered one Aron s/o Nongo, a person with albinism.

The fact that led to the appellants' conviction was as follows. On the night of 26.6.2009, the deceased with his wife, Maria Mazuri Mafula (PW1) having had their dinner, retired to sleep. Shortly, they heard dogs barking outside. The deceased suspected that something was wrong. He took a stick and went to the sitting room to see what was happening. While there, the door to their house was forcefully opened by some people using a big stone commonly known as "*Fatuma*". Five men armed with machetes and axes stormed in. They got hold of the deceased and dragged him outside the house. PW1 remained in the house watching the incident through a meshed window. She saw three of the killers mercilessly cutting the deceased with machetes. PW1 with the aid of what she described as bright moonlight identified the second appellant among the killers. When the

incident was reported to police, PW1 mentioned and described him. Following this report, investigation commenced immediately. While investigation was in progress, on 17.7.2009, the police got information that there were people selling human body parts of a person with albinism. Following the information, a trap was set and Inspector David (PW6), a police decoy pretended to be a dealer and buyer of human body parts. On 18.7.2009, PW6 met with the first and second appellants on which and upon bargain, the two agreed to sell him human body parts for a bargained rate of 200 million shillings. They also agreed that the business deal be effected on 19.7.2009 at Kijereshi in Igoma area. On the agreed date, they met as planned. The first and second appellants were accompanied by the fourth appellant who had a bicycle which carried the human bone. It was on that particular point in time when the first, second and fourth appellants were arrested with the human bone. When interrogated the first, second and fourth appellants confessed to have killed the deceased and that the bone they were selling was from the body of the deceased Aron Nongo. The first appellant however revealed that they were not alone in the deal. He said that the other persons involved were at their witchdoctor's house

at Mahina Village waiting for their share in the deal. Following such information, PW6 led the team of investigators to the witchdoctor's house at Mahina Village where the third appellant was also arrested in connection with the offence. The bone was taken to the Chief Government Chemist who confirmed that it was of the deceased, Aron Nongo. The appellants were subsequently charged and prosecuted with the offence of murder.

In their defence, the appellants under oath denied any involvement in the alleged murder. They refuted the prosecution evidence implicating them that they murdered the deceased. In addition to that, the first and second appellants stated that they could not be involved in the alleged murder because on the material date, that is, on 26.6.2009, they were not within the locality of Ibanda village. They claimed that they were on an errand to Kolotambe village, in Tarime District where they had gone to attend the burial ceremony of their grandmother and that they returned to Mwanza on 10.7.2009. However, they admitted to have been arrested on 19.7.2009.

Having scrutinized the evidence adduced both in support and against the charge, the trial judge was satisfied that the case against the

appellants was proved beyond reasonable doubt. The appellants were convicted and sentenced to death.

They have now come to this Court to challenge their convictions and sentences.

In this appeal, advocates Anthony Nasimire, appeared for the first appellant, Cosmas Tuthuru, for the second appellant, Innocent Kisigiro, for the third appellant and Geofrey Kange, for the fourth appellant, whereas the respondent/Republic was represented by Mr. Emily Kiria, learned Principal State Attorney.

The appellants lodged separate memoranda of appeal. The gist of the complaints in their respective memoranda of appeals can be deduced to form five major complaints as follows: -

1. *That, non-compliance with the provisions of Section 299 of the Criminal Procedure Act (the CPA) occasioned a failure of justice.*

2. *That, the cautioned statements by the appellants admitted in court were recorded out of the prescribed time.*
3. *That, the certificate of seizure had problem as was not procured according to law.*
4. *That, the prosecution failed to establish chain of custody of the exhibits submitted to the Chief Government Chemist and subsequently tendered in the trial court as evidence.*
5. *That, the case against the appellants was not proved beyond reasonable doubt.*

The submissions of the learned advocates on the first complaint are similar in all material aspects. So, we propose to combine and deal with their arguments jointly. It was submitted in support of the first ground of appeal that the trial commenced before Sumari, J. and that she recorded the evidence of PW1, PW2 and PW3, thereafter, the case was transferred to Makaramba, J. who heard the remaining evidence and concluded the case. The learned counsel submitted that although Makaramba, J. after

taking over the trial addressed the accused persons in terms of section 299(1) and (2) of the CPA, however, he did not inform the appellants their right to recall witnesses. He did not either consider or address them if they were willing and ready to proceed from where his predecessor ceased jurisdiction, nor gave them reasons for the change of judges. They said, the takeover of the case by Makaramba, J. which was partly heard by Sumari, J. without assigning any reason was highly irregular and was not in accordance with the spirit of the provisions of section 299 of the CPA. They went on further to submit that under the circumstances, Makaramba, J. had no jurisdiction to entertain the matter. To justify their argument, they cited the recent unreported case of **Petro Manhyakuwalwa v. R,** Criminal Appeal No. 561 0f 2015 (unreported). They advised us in the circumstances to nullify the whole proceedings conducted by Makaramba, J. as well as the judgment that flowed therefrom.

On the issue of cautioned statements, the appellants' counsel were at per that the said statements were irregularly received. Their submissions were similar in material particulars on this point. They said that the appellants' cautioned statements were not recorded within four

hours from the time of the arrest contrary to section 50 and 51 of the CPA. They submitted that while the first and second appellants were arrested on 19.7.2009, their cautioned statements were recorded on 20.7.2009. The same happened to the fourth appellant who was arrested on 19.7.2009 and his cautioned statement recorded on 21.7.2009.

In the light of the foregoing shortcomings, the learned counsel for the appellants urged us to expunge the cautioned statements from the record. In this regard, they cited to us the decisions of this Court in **Emmanuel Malahya V. R,** Criminal Appeal No. 212 of 2004 and **Daniel Petro V. R,** Criminal Appeal No. 522 of 2015 (both unreported).

Arguing the third ground, Mr. Nasimire and Mr. Kisigiro, submitted that the seizure certificate (Exh. P7) tendered had problems. The same was not signed and does not show the time when it was prepared. Apart from that, it is in evidence that the search was conducted at the witchdoctor's house and the certificate of seizure was filled at police station. This according to the learned counsel contravened section 38 (3) of the CPA. In their considered view, the certificate of seizure ought to have been signed at the place where the search was conducted. Since the certificate

of seizure was not signed at the place where the search was conducted the said certificate cannot be accorded weight, they argued.

On the fourth ground of appeal, Mr. Tuthuru and Mr. Kisigiro, learned counsel vehemently submitted that the chain of custody of the exhibits P14, P15 and P16 was inconsistent hence questionable. They argued that those exhibits, apart from being not accompanied with Police Form No. 145 as per Police Governance Orders (PGO), the same was not consistent and documented. They argued that the movement of the exhibits ought to have been clearly shown by documenting each stage in the investigation. They thus argued that failure to document the change of hands of the exhibits created doubt as to whether the tendered exhibits were actually the ones allegedly found in possession of the appellants. The learned counsel relied on **Malumbo v. DPP,** [2011] E.A 280 and **Philimon Jumanne Agala v. Republic**, Criminal Appeal No. 187 of 2015 (unreported) to buttress the position that the chain of custody must be clearly shown so as to establish that the exhibits are not tampered with. They thus prayed that the said exhibits P14, P15 and P16 be accorded no weight on reason that the chain of custody was inconsistent.

Amplifying the fifth ground of appeal, counsel for the appellants emphatically stated that taking the evidence as a whole the prosecution did not prove the case against the appellants beyond reasonable doubt. They pointed out that the evidence of identification adduced at the trial court was not sufficient enough to prove that the second appellant was correctly identified at the scene of crime. They contended that the evidence of visual identification given by PW1 was not convincing for two reasons; firstly, the incident happened at night on which the conditions at the scene of crime were not ideal for a correct identification; and secondly, that PW1 did not offer adequate description of the person she alleged to have identified. It is on that basis that the learned counsel held the view that such evidence was wanting and urged the Court to allow this ground. They also discredited the evidence of PW 6 contending that the same was weak and mis-joint. They stated that his testimony at any rate cannot link the appellants with the offence. They further submitted that it is doubtful as testified by PW6 that there was negotiation deal made at Hangaya Guest House between him with the first and second appellants because

there was no witness from the said guest house who was summoned to testify in support of the same.

On the basis of the pointed shortcomings in the proceedings and on the weakness of evidence adduced before the trial Court, the learned counsel prayed for the appellants' convictions to be quashed, the sentences imposed be set aside and the appellants be released from jail.

On his part, Mr. Kiria, learned Principal State Attorney, did not support the appeal. He submitted that there was no substance in any of the grounds of complaint and prayed for the dismissal of the appeal. In response to the first complaint, he submitted that the trial judge at page 50 of the record explained the right of the appellants to recall witnesses but the appellants opted for the judge to proceed with the case without recalling those witnesses. He argued that the trial judge was in the right track when he addressed the appellants in terms of section 299(1) and (2) of the CPA which defeats the appellants' allegations that their rights were deprived. The learned Principal State Attorney distinguished the case of **Petro Manhyakuwalwa** (supra) by stating that the circumstances pertaining to this case was quite different from the cited case. He said that

the cited case originated from the Resident Magistrates Court while the present one commenced at the High Court. He added that in **Manhyakuwalwa's** case (supra) the provision of section 299 of the CPA was not cited at all while in the present case the said provision was specifically mentioned and addressed.

In response to the second ground, the learned Principal State Attorney submitted that though the cautioned statements were recorded out of time not in compliance with the provision of section 50 of the CPA, nevertheless, the same were admitted for obvious reasons. He stressed that investigation in this case was a bit complicated and that the matter itself was of high public interest.

Arguing the issue of certificate of seizure and chain of custody jointly, Mr. Kiria submitted that it is in evidence that when the first, third and fourth appellants met with PW6 to conclude the deal at that particular place and on the date planned, the fourth appellant had a bicycle which carried the bone (Exh P6). It was at that point in time when the exhibits were seized and the first, third and fourth appellants were arrested. Seizure certificate was also prepared to that effect and signed. PW14

explained that he was the one who took the exhibits to the Government Chemist at Mwanza and thereafter to Dar es Salaam for DNA analysis. The handling of blood sample from the body of the deceased was also explained by PW5. He said that he handed the sample to PW4 who was at the RCO's office. The sample was subsequently handed to PW15 who took them to the Government Chemist. It was stated that it was PW14 who collected the results from the Government Chemist in Dar es Salaam after the analysis. Mr. Kiria submitted that since the seizure certificate was prepared and signed at the place the exhibits were seized, then, failure to indicate time in the seizure certificate as to when the exhibits were seized was not fatal. The omission did not remove the truth that the first, second and fourth appellants were apprehended with the exhibits. He also submitted that there is no requirement that paper trail must be there in handling and transmitting the exhibits. What is most important is the truthfulness and carefulness in handling and transmitting the same to ensure that the exhibits reach the intended destination without being tampered.

On the issue of identification, the learned Principal State Attorney submitted that the second appellant was properly identified by PW1. He stressed that PW1 explained how her deceased husband was killed. She explained that by the aid of a bright moonlight she managed to identify the second appellant. She described him that he was black and short and the second appellant visited them prior to the incident. She immediately mentioned and described him to the police. The identification in the identification parade reaffirmed that the person she identified at the scene was none other than the second appellant. On the basis of the foregoing evidence, he argued that under the circumstances, there could be no room for mistaken identity.

The learned Principal State Attorney concluded by stating that the appeal was without merit and should be dismissed.

We have dispassionately considered the rival arguments by the parties to this appeal in the light of the record of appeal, the grounds of appeal as well as the substance of the oral submissions in the hearing of the appeal. We should now be in a position to confront the grounds for determination as appearing in the grounds of appeal raised. We start our

determination of the contending matters in the appeal by addressing the first ground that, in the course of trial, there was non-compliance with the provisions of Section 299 of the CPA which occasioned failure of justice. This ground should not detain us. A close look at the record of appeal and as rightly submitted by the learned Principal State Attorney, the trial judge at page 50 considered and addressed the appellants in terms of section 299 (1) and (2) of the CPA. He also expressed to them their right to recall witnesses but the appellants opted and acceded for the judge to proceed with the case. That being the case, we are satisfied that section 299 of the CPA was fully complied with by the trial judge. Even assuming that the successor judge failed to explain to the appellants their rights in terms of S. 299 of the CPA, still we think that there was no injustice occasioned in view of the introduction of Section 3A in the Appellate Jurisdiction Act Cap. 141 (AJA) which was brought vide the written Laws (Miscellaneous Amendments) Act No. 8 of 2018. In **Charles Bode v. R.,** Criminal Appeal No. 46 of 2016 (unreported) the Court stated that:-

> *"Nonetheless with the introduction of section 3A in the Appellate Jurisdiction Act Cap. 141 R.E. Act No. 8 of 2018*

whereby the Court is required to basically focus on substantive justice, the question which we had to ask ourselves here, is whether the failure on the successor Judge to explain to the appellant about his rights occasioned him any injustice. Regard being had to the fact that, the appellant was throughout the trial of this case represented by a learned counsel, we entertain no doubt as it was for the learned State Attorney that, no injustice at all was occasioned."

That said, we dismiss this ground of appeal.

Next for consideration is the issue of cautioned statements. The learned counsel for the appellants complained that the cautioned statements were taken in contravention of section 50 of the CPA, in that the same were taken long after 4 hours had lapsed. We have carefully followed and considered the argument. However, the nature of the matter being of high public interest and taking into account the complications in its investigation and having looked at the cautioned statements in issue, which contains information relevant to the fact in issue, there is no way,

the way they are, can be said that the ommission to comply with the provisions of section 50 of the CPA and lack of certificate amounted to an irregularity which goes to the root of the matter so as to invalidate the cautioned statements in question. What was contravened was procedural matter which does not affect the weight attached to the substance in the cautioned statements. Also we looked as whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellants. In **Nyerere Nyague v.R.,** Criminal Appeal No. 67 of 2010 (unreported), this Court was faced with similar predicament but after being satisfied that the trial court in admitting the cautioned statement of the accused took into consideration and was satisfied that the investigation of the case was complicated, the benefit of public interest and that the rights and freedom of the accused was not unduly prejudiced, the Court had this to say:-

> *"It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question."*

Relying on the above authority we think that the complaint pertaining to this ground is of no merit, the same is dismissed.

The other ground for determination is the complaint which hinges on the issue of identification. Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the

accused to the next person he saw? Did that/those other person/s give evidence to confirm it. (See **WAZIRI AMANI V R.** (1980) TLR 250; **RAYMOND FRANCIS V R.** (1994) TLR. 100; **AUGUSTINO MIHAYO V R.** (1993) TLR. 117; **MARWA WANGAI AND ANOTHER VS R.**, Criminal Appeal No. 6 of 1995, and **SHAMIR s/o JOHN V R.,** Criminal Appeal No. 166 of 2004 (both unreported). Finally, even in cases where witnesses have claimed to have recognised the accused, mistakes are sometimes made, although by any degree, evidence of recognition may be more reliable that identification of a stranger. (See **ISSA s/o NGARA @ SHUKA v R.,** Criminal Appeal No. 37 of 2005, and **MAGWISHA MZEE SHIJA PAULO V R.,** Criminal Appeal No. 465 and 467 of 2007 (both unreported).

In the present case, PW1 said that she was able to identify the second appellant; first by recognition, as she knew him prior to the incident; second by aid of bright moonlight on the fateful night, and lastly by the fact that the second appellant was carrying machete with which he used to cut the deceased, and by description of his physical appearance.

Additionally, in the identification parade the second appellant was unhesitantly identified by PW1.

In assessing her demeanour, the trial court was impressed by PW1 as honest and truthful witness. In cross examination, the witness did not shake. She was consistent that she only recognised the second appellant as one among those who killed the deceased. She also identified him in the identification parade. In the circumstances, we are satisfied that the second appellant was positively identified. For that reason, we are constrained to concur with the trial court and Mr. Kiria, learned Principal State Attorney that the quality of the identification was impeccable, and was not shaken by the second appellant's defence. In addition to the above, the second appellant was mentioned and described as the culprit to the police at the very earliest opportunity. The ability of PW1 to mention and describe the second appellant at the earliest possible moment is an assurance of her reliability. We have this principle in a number of decisions. One such case is **Minani Evarist v. Republic**, Criminal Appeal No. 124 of 2007 (unreported) in which, referring to our earlier unreported

decision of **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001, we observed:

> *"... the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."*

We took the same position in our earlier decisions of **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. In **Marwa Wangiti Mwita** (supra), this Court observed thus:

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".*

This position of the law was restated in **Jaribu Abdallah** (supra) where the Court observed:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The*

conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor".

[See also: **Mafuru Manyama & Two Others v. Republic**, Criminal Appeal No. 256 of 2007, **Kenedy Ivan v. Republic** Criminal Appeal No. 178 of 2007, **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 and **Yohana Dionizi & Shija Simon v. Republic**, Criminal Appeals No. 114 and 115 of 2009 (all unreported).

On the basis of the evidence adduced, we are of the firm view that the second appellant's complaint to this effect is therefore misplaced and we dismiss it.

We now move to discuss the issue of chain of custody. In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence. There should be assurance that the exhibit seized from the suspect is the same

which has been analyzed by the Chief Government Chemist. The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit. The chances of tampering in the Government Laboratory analysis should also be eliminated. Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in court after being satisfied that there was no meddling or tampering done in the whole process.

In establishing chain of custody we are convinced that the most accurate method is on documentation as stated in **Paulo Maduka and Others vs. R.,** Criminal Appeal No. 110 of 2007 and followed in **Makoye Samwel @ Kashinje** and **Kashindye Bundala**, Criminal Appeal No. 32 OF 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands

easily and therefore not easy to tamper with, the principle laid down in **Paulo Maduka** (*supra*) would be relaxed. In the case of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported), the appellant challenged the chain of custody of a motor cycle. In differentiating the chain of custody in respect of exhibits which can change hands easily and those which cannot, this Court stated at pp. 18-19 of the typed judgment:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

We fully subscribe to the position we took in **Joseph Leonard Manyota** (supra).

In this case, the trial Judge in our view subjected the evidence of PW6, PW9, PW14 and PW15 to a critical evaluation and came to the conclusion that there was a careful handling of the exhibits from the time the exhibits were seized to the time when taken to the Chief Government Chemist for analysis and subsequently tendered in court. There is nothing to suggest that in between they were intercepted and tampered with. On that basis, the exhibits tendered were therefore appositely received in evidence. As such therefore, this ground of appeal must fail.

On the complaints in respect of the certificate of seizure to the effect that it was not procured according to law. We agree with the submission of the learned Principal State Attorney that since the said certificate was prepared and signed at the place where the exhibit was seized, then failure to indicate time in the certificate of seizure as to when the exhibit was seized was not fatal as it did not prejudice the appellants. As rightly submitted, the omission did not remove the truth that the first, second and fourth appellants were arrested in possession of a bone of a human being at the scene of the crime which was later diagnosed to be from the deceased body.

That said and for the foregoing reasons, we do not find any basis for which to fault the findings of the trial court on all substantive matters considered herein. The appeal is patently wanting in merit. Accordingly, it is dismissed in its entirety.

It is so ordered.

DATED at MWANZA this 4th day of April, 2019.

M.S MBAROUK
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL