IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And, KENTE, J.A.)

CRIMINAL APPEAL NO. 289 OF 2019

1. BYAMTONZI JOHN @ BUYOYA
2. ISAYA VENANT @ KAKURU ..... **APPELLANTS**

VERSUS

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

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

(Mkasimwongwa, J.)

dated the 7th day of June, 2019
in
Criminal Sessions Case No. 71 of 2014

JUDGMENT OF THE COURT

11th & 18th August, 2021

KEREFU, J.A.:

The appellants, BYAMTOZI JOHN @ BUYOYA and ISAYA VENANT @ KAKURU were arraigned before the High Court of Tanzania sitting at Karagwe for the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2019] (the Penal Code) in Criminal Sessions Case No. 71 of 2014. The information laid by the prosecution alleged that, on 6th August, 2011 at Kishayo Village within Karagwe District in Kagera Region, the appellants murdered one Apolo Elias (the deceased). The appellants pleaded not guilty to

the charge. However, after a full trial, they were convicted and each was sentenced to suffer death by hanging.

The brief facts of the case that led to the appellants' arraignment, conviction and sentence as obtained from the record of appeal are not complicated. According to Juliana Nshekanabo (PW1), on 6th August, 2011 she conducted a send-off party to bid farewell to her daughter one Pelagia Nshekanabo who was about to get married. PW1 testified that the said party took place at her compound where soft drinks and *Lubisi,* a local beer were served and music was played. In the said party there were about 150 invitees who were provided with invitation cards. PW1 said that the deceased and the appellants were among the attendees in the party though they were not among those who were officially invited. PW1 stated further that the party started at around 12:00 noon to 15:00 hours when it was officially closed and she entered into their house together with her daughter while leaving the music being played outside.

PW1 went on to state that, at around 05:00 hours when she was collecting her daughter's items, she heard a person crying outside, she went out and found three young men lying down, near the door of her house, bleeding. PW1 went to the hamlet chairperson

one Joanitha Isaya (PW2) to report the matter as she was not sure as to whether the said young men were still alive or dead. Upon arriving at the scene, PW2 inspected the said persons and found that one was already dead but the other two, Mwemezi Philibert (PW5) and Arnord were still alive but unconscious. PW1 added that when PW5 regained his conscious, he told them that when they were on their way back home, the appellants and another person by the name of Victor attacked and stabbed them with knives. Hence, they decided to come back to PW1's house.

In his testimony, PW5 supported what was narrated by PW1 and he added that he also attended the send-off party at PW1's house where he met his friends Anord and the deceased. That, at around 04:00 hours, they decided to leave the place and go back home but ten (10) paces away from PW1's house they met the appellants with two other people Victor and Magezi who attacked and stabbed them with knives. PW5 stated further that, he managed to identify the appellants with the aid of electricity tube lights from the electricity power generator. That, the appellants were not strangers to him as he had lived with them in the same village for five (5) years.

PW2 reported the matter to police who responded and took the victims to the hospital. An autopsy on the deceased's body was conducted by Merdard Makoka, the clinical officer who concluded that the cause of death was excessive internal bleeding and damage of the internal organs. A post mortem report to that effect was produced by Jaspar Ntongani Mtongani (PW4) and admitted in evidence as exhibit P2. The case was investigated by WP. 3635 D/CPL Zuhura (PW3) who drew the sketch map of the scene of crime (exhibit P1).

In his their respective defence testimonies, the appellants denied any involvement in the alleged offence and they also denied to have attended the said send-off party as, they said, they were not even aware of the existence of that celebration. The first appellant added that he was arrested on 15th April, 2013 and interrogated on a theft incident. That, he stayed in the police custody up to 17th April, 2013 when he was interrogated on the murder incident which took place at Kishao Village on 5th August, 2011. On his part, the second appellant also stated that he was arrested on 15th April, 2013 on theft incident as he was suspected of stealing properties of one Stanilaus

Gervas but later, on 17th April, 2013 he was interrogated on a murder incident that took place in 2011.

At the end of the trial, the trial court found that the prosecution case was proved beyond reasonable doubt, that it was the appellants who with malice aforethought killed the deceased. Thus, the appellants were found guilty, convicted and sentenced as indicated above.

Dissatisfied, the appellants are now before us challenging the High Court finding, conviction and sentence. We shall not recite the grounds of appeal for a reason to be detailed at a later stage of this judgment. Suffice to say that, the appellants filed a substantive memorandum of appeal on 15th July, 2019 which comprised seven grounds which was subsequently followed by a supplementary memorandum of appeal also comprising seven grounds. Later, when Mr. Lameck John Erasto, learned counsel was assigned by the Court the dock brief to represent the appellants in this appeal, he lodged another supplementary memorandum of appeal on 5th August, 2021 with two grounds to make a total of sixteen (16) grounds.

When the appeal was placed before us for hearing, the appellants were represented by Mr. Lameck John Erasto, learned

counsel whereas Messrs. Shomari Haruna and Amani Kilua, both learned State Attorneys, joined forces to represent the respondent Republic.

Upon taking the floor and before advancing his arguments in support of the appeal, Mr. Erasto prayed to abandon several grounds in the memoranda of appeal and argued only the second ground contained in the supplementary memorandum of appeal lodged on 5th August, 2021 and the third and fourth grounds contained in the substantive memorandum of appeal. The said grounds raise the following areas of complaint; **First,** that, the visual identification of the appellants was not watertight to eliminate the possibility of mistaken identity; **second,** that, the learned trial Judge erred in law in convicting the appellants by relying on the evidence of PW4 which was taken contrary to sections 289 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA); and **third,** that the post mortem report (exhibit P2) was un-procedurally admitted in evidence.

Starting with the first ground, Mr. Erasto argued that the visual identification of appellants by PW5 which was relied upon by the trial court to convict the appellants was not watertight. In elaboration, he contended that, although PW5, the only prosecution's eye witness at

the scene of crime, testified that he managed to identify the appellants with the aid of electricity tube lights from the electricity power generator, he did not explain its intensity and the time the incident took place to enable him identify the culprits. To clarify further on this point, Mr. Erasto referred us to pages 41 and 43 of the record of appeal and argued that, much as PW5 seemed to suggest that he was able to identify the appellants through the said light, he failed to describe the colour of their attire. To bolster his proposition, Mr. Erasto referred us to the case of **Waziri Amani v. Republic** [1980] TLR 250.

In addition, Mr. Erasto contended that the fact that PW5 said he knew the appellants prior to the incident was not sufficient to sustain the appellants' conviction. That, PW5 was expected to give further descriptions on how he managed to identify the appellants to avoid any possibility of mistaken identity. On this point, Mr. Erasto cited the cases of **Raymond Francis v. Republic** [1994] T.L.R. 100 and **Masota Jumanne v. Republic**, Criminal Appeal No. 137 of 2016 (unreported) and insisted that since the visual identification evidence adduced by PW5 was not watertight therefore, the same

could not be used by the trial court to ground the appellants' conviction.

With regard to the second ground, Mr. Erasto faulted the learned trial Judge to convict the appellants basing on the evidence adduced by PW4 on account that, the said witness was not among the witnesses listed by the prosecution that would testify in this case and the substance of his statement was not read out during committal proceedings. For that reason, Mr. Erasto contended that PW4 was not a competent witness to testify during the trial because the respondent had not complied with the requirements of section 289 (1) of the CPA which requires a notice to add a witness to be availed and the substance of his evidence to be brought to the attention of the accused. It was the argument of Mr. Erasto that, since that was not done, it was not proper for the trial court to receive the evidence of PW4 and subsequently act on it to convict the appellants. He thus urged us to expunge the said evidence from the record.

The submission of Mr. Erasto on the third ground hinged on what he submitted in respect of the second ground above. He argued that, since the post mortem report (exhibit P2) was tendered by PW4

who's evidence was illegally procured, the same should be also expunged from the record. He was positive that the said omission had weakened the prosecution's case as the remaining evidence on record is insufficient to sustain the appellants conviction. On the basis of his submission, Mr. Erasto urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellants and release them from prison.

In response, Mr. Haruna expressed his stance at the outset that he was supporting the appeal as he was in agreement with what was submitted by his learned friend in all fours. He insisted that the evidence of PW5 who was the only prosecution's eye witness at the scene of crime did not meet the conditions on visual identification stipulated in the cases of **Waziri Amani** (supra) and **Raymond Francis** (supra). He added that apart from not describing the intensity of the light which assisted him to identify the appellants, PW5 did not also explain the distance at which he observed the incident and the size of the area illuminated by the tube lights powered from the said generator which was said to be inside PW1's house. He argued further that PW5 did not state the time of the incident and the time he had the appellants under observation. As

such, Mr. Haruna emphasized that the evidence of visual identification given by PW5 cannot be said to have been absolutely watertight. He then concluded that, since the testimony of PW5, the only prosecution eye witness, was weak on the visual identification of the appellants, the remaining evidence on record could not have any weight to corroborate it. On that basis, Mr. Haruna also urged us to allow the appeal, quash the conviction and set aside the sentence imposed against the appellants and set them free.

In his brief rejoinder, Mr. Erasto did not have much to say other than supporting what was submitted by his learned friend.

We have considered the submissions made by the parties in the light of the record of appeal before us and the grounds of complaints. The main issue for our determination is the sufficiency or otherwise of the evidence of identification acted upon by the trial court to convict the appellants. We shall therefore consider the grounds of appeal in the manner they have been argued by the counsel for the parties.

Before doing so, it is crucial to state that, this being the first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it

together and subjecting it to a critical scrutiny and, if warranted to arrive at its own conclusion of fact. See **D.R. Pandya v. Republic** [1957] EA 336.

Starting with the first ground on the visual identification, we wish to point out at the outset that, we agree with both learned counsel for the parties that, it is trite law that for evidence of visual identification to be acted upon by the court to ground a conviction, the same must be watertight to eliminate all possibilities of mistaken identity. In the case of **Waziri Amani** (supra), the Court gave the word of caution at pages 251 – 252, that: -

> *"...evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that 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.****" [Emphasis added].*

Then, at page 252, the Court went on to state the following conditions to be considered in establishing favorable conditions for identification:-

"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 as the following posed and resolved by him: the time 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].*

Now, in the case at hand, it is on record that in convicting the appellants, the trial court relied mostly on the evidence of PW5 the only prosecution eye witness at the scene of crime. This can be evidenced at page 94 of the record, where the trial Judge concluded that: -

> *"Applying the principles enunciated in* ***Waziri Amani v. Republic*** *(supra) to the evidence available one may be satisfied, as I do, that all possibilities of mistaken identity are eliminated and that the evidence before the court is absolutely watertight hence told that PW5 did properly identify the two accused persons at the scene of crime. Certainly, going by the testimony of PW5 the latter did not see the first person actually stabbing the deceased."*

In their submissions before us, both counsel for the parties, faulted the trial Judge for grounding conviction of the appellants on the evidence of PW5 as they argued that he did not describe the intensity of the light which assisted him to identify the appellants. To verify this point, we have revisited the evidence of PW5 found at pages 40 to 43 of the record of appeal, where PW5 stated that: -

> *"I identified them from the light shining from the electricity tube lights lit from the electricity power generator. The four persons were my co-residents and that I lived with them at the village for five years."*

From the above extract, it is clear that PW5, apart from stating that he managed to identify the appellants from the lights lit

from the electricity power generator, he did not describe the intensity of that light. Failure by an identifying witness to describe the intensity of light which aided him to make identification raised doubts on credibility of his evidence. In the case of **Hassan Said v. Republic,** Criminal Appeal No. 264 of 2015 (unreported), the Court observed as follows: -

> *"It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crimes. See* ***Waziri Amani v. Republic*** *(supra),* ***Richard Mawoko and Another v. Republic,*** *Criminal Appeal No. 318 of 2010 (CAT) at Mwanza and* ***Gwisu Nkonoli and 3 others v. Republic,*** *Criminal Appeal No. 359 of 2014 (CAT) at Dodoma (both unreported)."*

Again, in the case of **Mgara Shuka v. Republic,** Criminal Appeal No. 37 of 2005 (unreported), the Court acknowledged the fact that light has different intensities and thus underscored the need for

the identifying witness to describe the intensity of such light. The Court stated that: -

> *"In our settled mind, we believe that* ***it is not sufficient to make bare assertions that there was light at the scene of crime.*** *It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from pressure lamp or fluorescent tube.* ***Hence, the overriding need to give in sufficient details of the intensity of the light and the size of the area illuminated.*** '[Emphasis added].

Therefore, description of intensity of light was a vital requirement in this case in which, identification was not only made at night-time but the source of the said light came from tube lights powered by a generator which was said to be at PW1's house. Worse still, PW5 did not even state the distance from where the said generator was placed and the size of the area allegedly illuminated by that light. PW5 did not also explain the distance he was when observing the incident and the time spent for that incident. All these were important aspects to be explained by PW5 to ensure that there

was a favorable condition which enabled him to properly identify the appellants.

It is clear therefore that, although PW5 contended that he had known the appellants before the date of the incident, under the circumstances in which the identification was made, it cannot be said with certainty that the possibility of a mistaken identity was eliminated as held in the case of **Shamir s/o John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported), that: -

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of those relative and friends are sometimes made."*

We are further fortified with our earlier decision in **Mabula Makoye and Another v. Republic,** Criminal Appeal No. 227 of 2017 in which we quoted the case of **Boniface Siwingwa v. Republic,** Criminal Appeal No. 421 of 2007 (unreported) where being faced with an akin situation we stated that: -

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the*

considered opinion that ***where it is shown, as in this case that conditions for identification are not conducive, then, familiarity alone is not enough to rely to ground a conviction.*** *The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken." [Emphasis added].*

Applying the above authorities in the instant case, we hasten to remark that we also agree with both counsel for the parties that, although PW5 in his evidence alleged to know the appellants before the incident, that alone did not eliminate the possibility of mistaken identity.

On the basis of the reasons stated above, we are of the settled view that, had the trial court properly scrutinized the evidence of PW5 which was the only evidence of identification of the appellants, it would have found that such evidence was not watertight. In the circumstances, we agree with both learned counsel that the appellants' conviction was based on insufficient evidence of visual identification. As such, we find merit in the first ground of appeal.

Since the findings on this ground suffice to dispose of the appeal, the need for considering the other remaining grounds of appeal does not arise.

In the event we allow the appeal. The conviction of the appellants is hereby quashed and the sentence imposed on them is hereby set aside. Consequently, we order for immediate release of the appellants from prison unless they are being held for some other lawful causes.

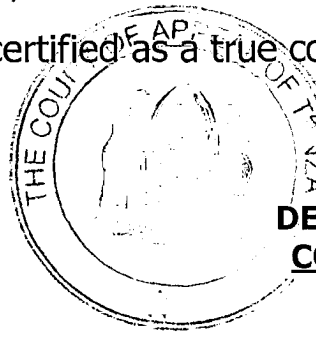
DATED at **BUKOBA** this 17th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of August, 2021, in the Presence of appellants in person, represented by Mr. Lameck John Erasto, learned Counsel for the Appellants, and Ms. Happness Makungu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL