IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A and KIHWELO, J.A.)

CRIMINAL APPEAL NO. 443 OF 2018

HELENIKO NDIMKI@KALEJI.....1ST APPELLANT

KUZENZA MARCO.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

(District Registry) at Mwanza

(Siyani, J.)

dated the 19th of November, 2018

in

Criminal Sessions Case No. 39 of 2014

JUDGMENT OF THE COURT

4th & 8th July, 2022

MUGASHA, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Mwanza Registry in which Heleniko Ndimki @ Kaleji and Kuzenza Marco, the appellants, were charged and convicted of the offence of murder contrary to section 196 of the Penal Code [Cap 16 RE 2002]. In the charge laid against them, it was alleged by the prosecution that, on 3/4/2012 during night time, at Lumeja village within Magu

District in Mwanza Region, the appellants did murder one Solahyiwa d/o Ndimki (the deceased). They both denied the charge following which, in order to establish its case, the prosecution paraded a total of four (4) witnesses and tendered documentary evidence namely; the postmortem examination report of the deceased (exhibit P1) and a sketch map of the scene of crime (exhibit P2). The appellants were the only witnesses for the defence side.

The facts underlying the present appeal are briefly as follows: On the fateful day, the deceased together with her grandchildren were having dinner at their residence. While there, it was alleged that, the 1st appellant surfaced and upon being invited, he joined those who were having dinner. Shortly thereafter, came the deceased's neighbour, the 2nd appellant accompanied by another person and they were both invited to join the dining group. Then, suddenly the 2nd appellant unleashed a machete from his waist and attacked the deceased cutting her on shoulders and the neck. On seeing her grandmother being hacked, PW1 escaped to nearby shrubs. While there, she observed the continued attacks on the deceased and heard the 1st appellant urging his fellows to leave as they had finished their work. What PW1 recounted

was cemented by Esther Mabirika (PW2) who also happened to be at the scene of crime when the bandits attacked the deceased.

After the bandits left, PW1 rushed to a neighbour one Mwalimu Milembe and narrated what had befallen the deceased in the hands of the appellants. They reverted to the scene of crime only to find the deceased lying down dead which was also witnessed by one Malongo Misalaba (PW3) who had rushed to the scene of crime upon being told about the incident by Tobias Ngusa. According to PW3, the deceased's grandchildren mentioned the appellants to be the culprits.

The incident was reported to the police and according to the investigator, No. E. 1302 D/CPL Sandu (PW4), who recalled to have visited the scene of crime, he found the deceased's body with cut wounds on several parts of the body. He told the trial court that, the circumstances surrounding the occurrence of the killing incident were narrated to him by PW1 and PW2 who also mentioned the appellants to be the culprits. Subsequently, on 16/4/2012, the 1st appellant was arrested while on the way from his parent's homestead and later, the 2nd appellant was also arrested. The deceased's body was examined and according to the autopsy report, (Exhibit P2) his death was caused by

hemorrhagic shock, severe multiple cut wounds and brain concussion. Subsequently, the relatives were permitted to bury their loved one.

On the other hand, the appellants denied each and every detail of the prosecution accusations. Besides, they denied knowing each other they both recounted to have rushed to the scene of crime heeding to an alarm from the deceased's house and found her dead. According to the 1st appellant, the deceased was his aunt. Moreover, they contended to have attended the burial of the deceased and later, were arraigned in court facing the charge of murder.

After a full trial, the learned trial Judge summed up the evidence to the assessors who all returned a unanimous verdict of guilty. Upon being satisfied that the prosecution account was true, as the earlier stated, the appellants were convicted and sentenced to suffer death by hanging. Aggrieved, the appellants preferred an appeal to the Court fronting seven grounds of complaint in a joint Memorandum of Appeal. Subsequently, through their advocate, they filed another Memorandum of Appeal dated 27/6/2022 comprising five grounds as hereunder:

1. That, the proceedings and judgment of the trial court are null and void for failure of the trial Judge to append his

signature at the end of the testimony of every witness as indicated in the appeal records.

2. That, the trial Judge failed to appreciate that there were contradictions and inconsistencies in the testimony of PW1 and PW2 regarding recognition and identification of the appellants at the scene of crime and any doubts should have been resolved in favour of the appellants.

3. That, the witnesses PW1 and PW2 being the witnesses with their own interest to serve, their testimony needed corroboration by other independent witness.

4. That, the delay to arrest the appellants proved their innocence that they did not participate in the crime alleged in the information against them.

5. That, the appellants were incriminated in the offence charged on strong suspicious grounds by the prosecution witnesses.

At the hearing, in appearance was advocate Cosmas Tuthuru for the appellants and Ms. Mwamini Fyeregete, learned Senior State Attorney for the respondent Republic.

Upon taking the floor, Mr. Tuthuru abandoned the initial Memorandum of Appeal together with the 1st, 3rd and 4th grounds in the subsequent Memorandum of Appeal. He then opted to argue together the remaining 2nd and 5th grounds of complaint. In the said grounds, the appellants are faulting the learned trial Judge to have convicted them relying on discrepant and contradictory prosecution evidence. Mr. Tuthuru challenged the conviction of the appellants arguing that, it was based on strong suspicion and unreliable prosecution account on visual identification. To clarify on the two points, he argued that since it is on record that at the scene of crime the source of light was a lantern lamp and a torch held by the 1st appellant, which presupposes, there was no sufficient light to enable positive identification of the appellants. Further, Mr. Tuthuru challenged the reliability of PW1's account who claimed to have identified the appellants from a distance of 12 meters when hiding in the shrubs which he said did obstruct her clear vision and it was not proximate to the scene of crime which rendered the conditions for proper identification not conducive. In this regard, it was Mr. Tuthuru's conclusion that, as the evidence on visual identification did not meet the prescribed criteria to eliminate the possibilities of mistaken identity, the appellants were not properly identified. To bolster his propositions, he

referred us to the case of **ANDREA ZABLONI AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 488 of 2016 (unreported)

In his brief submission on the 5th ground, it was Mr. Tuthuru submission that, in the event the appellants were not positively identified, their conviction was based on mere suspicion which is irregular under the law. Ultimately, Mr. Tuthuru contended that, in the wake of weak prosecution account, the charge of murder was not proved at the required standard and he urged us to allow the appeal and set the appellants at liberty.

On the other hand, Ms. Fyeregete opposed the appeal. She submitted that the conviction of the appellants is justified because the charge was proved to the hilt. She argued that the appellants were properly identified by PW1 and PW2 considering that: **one,** at the scene of crime there was light from the lantern lamp which aided them to see the appellants; **two,** the identifying witnesses were familiar to the appellants as the 1st appellant was their uncle and the 2nd appellant was their neighbour; **three,** prior to the killing incident they had dinner together with the appellants which facilitated PW1 and PW2 to observe them at a very close range; and **four,** having positively identified the

appellants, PW1 and PW2 mentioned them at the earliest moment to PW3 and the police.

She as well countered the appellants' counsel argument on existence of doubtful source of light arguing that, the torch held by the 1st appellant surfaced at a later stage, did not dispel the fact that the identifying witnesses had earlier on seen the appellants at the dinner. Finally, she submitted that, in the wake of the credible account of PW1 and PW2 who properly identified the appellants at the scene of crime, the prosecution did prove the charge at the required standard that, the appellants killed the deceased. To back up her stance she cited to us the case of **KENEDY IVAN VS REPUBLIC,** Criminal Appeal No. 178 of 2007 (unreported).

In rejoinder, apart from reiterating his earlier submission, Mr. Tuthuru argued that, the case of **IVAN KENNEDY VS REPUBLIC** (supra) cited by Ms. Fyeregete was not applicable in the case at hand.

Having carefully considered the rival contentions of the parties and the record before us, the determination of this appeal basically hinges on visual identification. Before we answer that question we must make it clear at the outset that, we appreciate that a trial judge is best placed to assess the credibility of a witness, but with respect, only as far as

demeanour is concerned. When it comes to coherence and consistency in the testimony of such a witness; an appellate court can assess the credibility of the witness. See: **SHABANI DAUDI v REPUBLIC,** Criminal Appeal No. 28 of 2001**; ABDALLAH MUSSA MOLLEL @ BANJOO v REPUBLIC,** Criminal Appeal No. 31 of 2008.

In the case at hand, it is not in dispute that, the killing incident occurred at night and as such parties locked horns on the propriety or otherwise of the prosecution evidence on visual identification. It is settled law that evidence of visual identification should only be relied upon when all possibilities of mistaken identification are eliminated and the court is satisfied that the evidence before it is absolutely water tight. In resolving the question whether identification is watertight the Court listed a number of circumstances that must be examined which include: **one,** the time the witness had the accused under observation, **two**, the distance at which he observed him, **three,** the conditions in which the observation occurred, for instance, whether it was day or night-time, for; **four** whether there was good or poor light at the scene; and **five,** further whether the witness knew or had seen the accused before. See: the cases of **WAZIRI AMANI VS. REPUBLIC** [1980] TLR 250, **RAYMOND FRANCIS VS. REPUBLIC** [1994] TLR 100, **AUGUSTINO**

MAHIYO VS REPUBLIC [1993] TLR 117 and **ALEX KAPINGA & 3 OTHERS VS. REPUBLIC**, Criminal Appeal No. 252 of 2005 (unreported) among others. In this regard, the Court has always reiterated that caution should be exercised before relying solely on the identification evidence. However, the Court has always cautioned that, the guidelines on visual identification were never meant to be exhaustive as such, each case has to be decided on its own facts. We shall be accordingly guided by the stated principles governing visual identification.

As this is a first appeal, we shall have to re-appraise and re-evaluate the evidence on record. See: **SALUM MHANDO v REPUBLIC** [1993] TLR 170 which takes us to revisiting the evidence of PW1 as reflected at page 27 of the record of appeal as hereunder:

> "I *used to live with my grandmother one Solahnyiwa Ndimki who is now deceased. I witnessed her death. It was around 20 hours' night. We were having dinner with our grandmother and my young sisters. As we were eating my uncle Helenico Ndimki entered. We welcomed him for dinner and he washed his hands and started to eat. Suddenly two people entered. One of them was Kuzenza Marco who was our neighbour living in the same village. We also welcomed them. One of them started to wash his hands but suddenly*

he took a panga which was in his waist under the black jacket and started to attack my grandmother. He attacked my grandmother with the panga on the shoulder and neck I witnessed the attack. It was Kuzenza Marco who had a panga and who attacked my grandmother ***I ran to the bushes of "minyaa" nearby...****There was lantern lamp there which assisted me to see clearly.* ***It was 12 meters from I hide (sic) to where my grandmother was attacked."***

Apparently, PW2 who was also at the scene of crime gave a similar account as reflected at page 32 of the record of appeal. When subjected to cross- examination the testimony of PW1 and PW2 was not shaken and the credibility of their evidence was not impeached.

Having re-evaluated the evidence of PW1 and PW2, it is glaring that at the scene of crime there was light from lantern lamp which enabled those who were having dinner to see those present and it aided the proper identification of the appellants who were not strangers to the identifying witnesses. Therefore, as correctly submitted by the learned Senior State Attorney, PW1 and PW2 had ample time to observe the appellants at a very close range and managed to see and described the attire of the appellants at the scene of crime. That apart, the 2nd appellant could easily be seen when he unleashed the machete from his

waist and used it to hack the deceased. In the premises, since PW1 escaped to hide in the shrubs after witnessing the deceased being hacked, her observation of what was going on from a distance of 12 meters, did not dispel the fact that she had earlier on identified the appellants at the dinner. That apart, the identifying witnesses mentioned the appellants to be the culprits at the earliest opportunity as supported by PW3 and PW4 who happened to be at the scene of crime after the killing incident. Mentioning the appellants at the earliest opportunity was significant because the ability of a witness to name a suspect at the earliest opportunity is an important assurance of reliability. See: **JARIBU ABDALLA VS REPUBLIC** [2003] TLR 71; **MARWA MWITA WANGITI AND ANOTHER VS REPUBLIC** [2002] TLR 30 and **SWALEHE KALONGA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 45 of 2001 (unreported).

In the circumstances, and to address Mr. Tuthuru's concern, we are satisfied that, although PW1 and PW2 were relatives, in the wake of their coherent and consistent account, their evidence on visual identification of the appellants was credible and reliable. See: **MUSTAFA RAMADHANI KIHIYO VS REPUBLIC** [2006] TLR 323 and

NDEGE KOA VS DIRECTOR OF PUBLIC PROSECUTIONS, Criminal Appeal No. 34 of 2008 (unreported).

All said and done, having re-evaluated the trial evidence, we are satisfied that the charge was proved to the hilt against the appellants and grounds 2 and 5 are not merited. Thus, we find no cogent reason to vary the decision of the trial court and as such, we accordingly, dismiss the appeal.

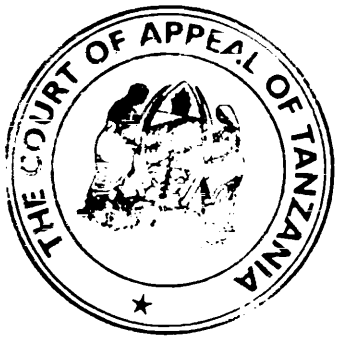
DATED at **MWANZA** this 6th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2022 in the presence of Mr. Nasimiri, learned advocate who holds brief for Mr. Cosmas Tuthuru, learned advocate for the appellants and Ms. Mwamini Y. Fyeregete learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL