IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUGASHA, J.A., FIKIRINI, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 607 OF 2020

KAKILA JOHN..... ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Kairo, J.)

dated the 27th day of August, 2020
in
Criminal Case. No. 16 of 2017

JUDGMENT OF THE COURT

28th November & 1st December, 2022.

MUGASHA, J.A.:

The appellant, Kakila John was charged with the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2022]. According to the information laid against the appellant by the prosecution, it was alleged that on 4/11/2015 at Nemba Village within Biharamulo District in Kagera Region, the appellant did murder Tatu Charles, the deceased. He denied the charges and after a full trial, he was convicted and sentenced to suffer a mandatory penalty of death. Unamused, the appellant has now appealed to this Court seeking to demonstrate his innocence.

At the trial, the prosecution paraded three (3) witnesses and tendered two documentary exhibits namely, the Post Mortem Examination report (exhibit P1) and the sketch map of the scene of crime (exhibit P2).

A factual account of the prosecution as gathered from oral and documentary evidence is to the effect that: The deceased, her daughter Siwema Magulu and other family members resided in the same homestead which had a kitchen and a main house. On the fateful day, the deceased, PW1 and other family members happened to be in the kitchen whereas the deceased's husband was in the main house. Suddenly, two bandits stormed into the main house and one of them began to assault the deceased's husband cutting him on the head and neck using a panga. The other bandit managed to access the kitchen and hacked the deceased on the head and neck using a panga.

As the deceased had carried a baby on her back, she could not stand the assault fell on top of Doly who was also cut with a panga. Having seen that the deceased had died, the assailants asked and PW1 obliged to remove the child from the deceased's back and picked another child who was lying on the floor. That is when PW1 was

opportuned to hear the appellant's voice. After they had accomplished an evil mission, the bandits ran away.

PW1 recalled that, at the scene of crime one of the assailants flashed a torch towards where the appellant stood proximate to her, which enabled her to recognize the appellant who was familiar as they resided in the same hamlet of Kitarago and she used to see him repairing her father's bicycle. PW1's account is flanked by PW2 Liberata Jacob Telesphory who went at the scene heeding to an alarm raised and found the lifeless body of the deceased on the floor and intimated to her about the appellant being among the bandits who mounted the attack against the deceased. Similarly, as the matter was reported to the police, PW4 who was assigned to investigate the incident recalled that, upon visiting the scene of crime, PW1 mentioned the appellant to have been involved in the killing incident. This facilitated the undelayed apprehension of the appellant who was subsequently arraigned in Court.

In his defence, the appellant denied each and every detail of the prosecution. On the fateful day, he claimed to have been attending a meeting at Chakitarago School between 8.00 a.m. and 03.00 p.m. and later went to till his farm where he stayed up to 6.00 pm. Then, around

8.00 p.m. he retired to sleep and around 11.00 p.m. he was arrested and his house was searched.

Believing the prosecution account to be true, as earlier stated, the trial court convicted the appellant upon being, satisfied that the evidence garnered from the prosecution was watertight having established that the appellant was properly identified at the scene of crime by PW1.

Before us the appellant has lodged a six-point memorandum of appeal as hereunder:

1. *That, the appellant's conviction was wrongly based on unfavourable visual identification/recognition and voice identification which were inconclusive for wanting positive proof and elementary factors.*

2. *That, light and its intensity marshalled and sponsored by torch and moon light were not sufficiently to enable proper identification made under tense circumstances.*

3. *That, the first felony report with the appellant's name was an afterthought, unlawful and suspiciously drawn from incredible partisan witnesses who had an interest to serve.*

4. *That, the appellant's strong defence and that of undiscredited ALIBI was wrongly and unfairly rejected*

unreasonably instead the trial court erred in believing that the prosecution witnesses were credible.

5. *That, no effort was deployed by the court to ensure the appellant's witnesses had testified to back up the defense case.*

6. *That, section 210 (3) of the criminal procedure Act Cap 20 was not complied thus had to prejudicial.*

Subsequently, on 10/11/2022, through the officer in charge of Ukonga Central prison, the appellant brought a supplementary memorandum of appeal containing two points of grievance as hereunder: -

1. *That, the trial court grossly erred in law to place reliance on invalid documentary exhibits, to wit; post mortem examination Report (Exhibit P.1) and sketch map (Exhibit P.2) which were not read out in court after admission as exhibits.*

2. *That, the trial court erred in law for none-compliance with section 291 (3) of the Criminal Procedure Act, (Cap. 20 R.E. 2022). Thereby subjected the appellant to an unfair trial, and cause miscarriage of justice to him.*

Yet through his advocate, another supplementary memorandum of appeal was filed comprising 2 grounds of complaint namely:

1. *That, the trial court grossly erred in law and fact to convict the appellant on the offence of murder based on un favourite weakest kind of evidence of visual and voice identification to ground the conviction on the offence of murder.*

2. *That, the trial Judge grossly erred in law and fact for failure to dismiss the information of murder against the appellant after the prosecution had failed to prove its case beyond reasonable doubt.*

At the hearing the appellant had the services of advocate Mathias Rweyemamu. The respondent Republic was represented by Mr. Nestory Nchiman and Ms Suzan Masule, learned Senior State Attorney and State Attorney, respectively.

Following a brief dialogue with the Court, on reflection and upon consulting the appellant, Mr. Rweyemamu abandoned the supplementary memorandum of appeal he had earlier filed, the complaint on the sketch map and noncompliance with the provisions of section 291 (3) of the Criminal Procedure Act [CAP 20 R.E.2022] in his supplementary memorandum and grounds 5 and 6 in the memorandum of appeal. In that regard at this juncture, the remaining grievance on the impugned decision comprise of **one**, the irregular reliance on the

postmortem report which was not read out after being admitted; and **two,** that the charge was not proved beyond reasonable doubt on account of unreliable evidence on visual identification and improper rejection of the defence of *alibi* by the High Court.

It was Mr. Rweyemamu's submission that, after the autopsy report was admitted in the evidence, it was not read out to the appellant which was irregular and as such, he urged us to expunge it from the record. This was conceded to by the learned Senior State Attorney who as well, implored on the Court to strike out the autopsy report. However, he was quick to point out that, the fact that the deceased died due to unnatural cause is well covered in the evidence of PW1 who witnessed her mother being hacked to death.

The complaint on the irregularity surrounding the autopsy report need not detain us because it is settled law that after a document is exhibited in evidence it shall be read out to the accused person. See: **MARWA WANGITI AND ANOTHER VS REPUBLIC** [2002] T.L.R 39. Omission to read out the autopsy report after admission, denied the appellant a fair trial as he was convicted on the basis of the evidence he was not aware of and as such, we accordingly expunge the autopsy report from the record. However, although the appellant's complaint is

merited, as correctly stated by the learned Senior State Attorney, the account marshalled by PW1, PW2 and PW4 suffices to cement that the deceased died due to unnatural cause on 4/1/2015.

We now turn to the evidence on visual identification. It was Mr. Rweyemamu's submission that, the appellant was not properly identified because PW1 mentioned the appellant having relied on what she was told by the PW2. He further contended that, the conditions were not favourable for positive identification due to the uncertainty surrounding unreliable source of light at the scene of crime considering that while PW1 mentioned a torch light, PW2 stated about the presence of moonlight. He added that, the intensity of light from the torch was not stated regardless of the prosecution witnesses capitalizing on stating the big size of the torch which rendered proper identification doubtful. It was further argued that, in the wake of terrifying situation, the duration of 10 minutes did not suffice to facilitate proper identification as demonstrated by PW1 who failed to describe the colour of attire of the appellant at the scene of crime.

Furthermore, it was submitted by Mr. Rweyemamu that the appellant's defence of alibi was not properly considered by the trial court as it shifted burden upon him having capitalized on the appellant's

failure to parade his wife as a witness. Ultimately, the learned advocate urged us to allow the appeal and set the appellant at liberty.

On the other hand, at the outset, the learned State Attorney intimated to us that she was not supporting the appeal arguing that the charge against the appellant was proved to the hilt. On this, she submitted that, the appellant was properly identified at the scene of crime by PW1. Submitting on the circumstances surrounding the occurrence of the killing, she contended that, aided by bright torchlight, in a duration of ten minutes PW1 managed to identify the appellant who was not a stranger as they resided in the same hamlet and used to see him on various occasions repairing her father's bicycle. It was further argued that, PW1's clear vision of the appellant was not obstructed as she stood proximate to the appellant who ordered her to take the baby from the deceased's back and pick another baby who was lying down. In this regard, Ms. Masule urged us to find the charge against the appellant proved to the hilt on account of PW1's reliable and credible account which deserves credence. To bolster her arguments, she referred us to cases of **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250 and **GOODLUCK KYANDO VS REPUBLIC** [2002] TLR 363.

Pertaining to the defence of alibi, it was argued that its rejection by the High Court was justified on account of strong prosecution account on visual identification of the appellant at the scene of crime. Thus, Ms. Masule invited us to dismiss the appeal in its entirety.

In rejoinder, Mr. Rweyemamu maintained his earlier stance and urged the Court to allow the appeal.

Having considered the rival submissions of the parties and the record before us, the issue for our determination is whether the charge against the appellant was proved beyond reasonable doubt.

As earlier stated in grounds 1 and 2, the appellant is faulting the trial court on basing his conviction on weak and unreliable prosecution account on visual identification. It is a settled position of law that visual identification is of the weakest kind and as such, the courts are cautioned not to act on such evidence unless satisfied that all possibilities of mistaken identify are eliminated and evidence before it is absolutely watertight. This was emphasized in the case of **Waziri Amani** (supra) where the Court stated that in evidence relating to visual identification, factors to be taken into account include**: One,** the duration the identifying witness observed the accused; **two,** the proximity from the point of observation; **three,** the nature and

sufficiency of light at the scene of crime; and **four**; whether the accused is a stranger to the identifying witness. The rationale in listing factors is to ensure that a criminal case whose determination depends essentially on identification, evidence on conditions favouring positive identification is of utmost importance. See: **JOHN BALAGOMWA AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No. 56 of 2013 and **RAYMOND FRANCIS VS REPUBLIC** [1994] TLR 100.

We shall apply the stated principles in the factual situation of the present appeal and be accordingly guided in its determination. It is not in dispute that, the fateful incident occurred during night time in the dark. Therefore, the question to be addressed is whether at the scene of crime conditions were conducive to facilitate positive identification of the appellant. This takes us to re-evaluating the evidence adduced at the trial.

It is evident in the testimony of PW1 who was together with the deceased on the fateful day that at the scene of crime, there was sufficient light from the torch which illuminated not only inside the kitchen but in particular where the appellant stood which was half a pace apart which enabled PW1 to observe the appellant at very close range without being obstructed. Besides, thereat, PW1 who was familiar

with the appellant was opportuned to hear the voice and see the appellant after he commandeered her to remove the child from the deceased's back and pick another child who was on the floor. That apart, the appellant was not a stranger to the identifying witness because prior to the incident, he was known to her as they lived in the same hamlet Kitarago and she regularly saw him when repairing the bicycle of her father. Yet at the trial, PW1 gave terms of description of the appellant having stated the attire of the appellant that he wore a coat.

In the circumstances, having evaluated the evidence adduced at the trial, we are satisfied that, the appellant was recognized by PW1 who knew him. Such recognition is more satisfactory and more reliable than the identification of a stranger. Moreover, mentioning the appellant to PW2 and at the police on the fateful day was the earliest moment and it adds credence to the reliability and assurance of PW1's account on having seen the appellant hacking her mother to death. In the premises, we do not agree with Mr. Rweyemamu's proposition that PW1 relied on what she was told by PW2 to mention the appellant. Apparently, this is not backed by the record because at page 35 of the record of appeal, PW2 recounted as follows:

"On 4/11/2015 around 8.00 pm I was at my home. Around that time, I heard a female voice lamenting "you are killing me", I then heard a male voice. I thought it was a quarrel of husband and wife. I know Tatu Charles. She was my neighbour. She passed away. Around 8.20pm the daughter of the late Tatu Charles one Kulwa Magulu came, requesting for an assistance. She told me that they were invaded by two people who killed their mother and her twin was cut with a panga. ***She stated that she managed to identify one of them she mentioned by the name of Kakiia John but he didn't identify the other one."***

[Emphasis supplied]

Thus, it is crystal clear that, it is PW1 who named the appellant to PW2 as the one who killed the deceased. In the circumstances, we agree with the learned State Attorney that, the rejection of the appellant's defence of *alibi* was indeed justified in the wake of strong and credible account of PW1 who properly identified the appellant as the one who hacked the deceased to death on the fateful day. We thus find grounds 3 and 4 not merited.

In view of what we have endeavoured to discuss we do not find any cogent reason to vary the decision of the trial court and as such, we accordingly we dismiss the appeal in its entirety.

DATED at **BUKOBA** this 1st day of December, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgement delivered this 1st day of December, 2022 in presence of Mr. James Kabakama holding brief for Mr. Peter Matete, learned counsel for the Appellant and the Appellant present in person. Ms. Evaresta Kimaro, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL