IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MKUYE, J.A., KAIRO, J.A. And, MAKUNGU, J.A.)

CRIMINAL APPEAL NO 255 OF 2021

MGAMBO SAANANE..... 1ST APPELLANT

BAHATI JOHN.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kilekamajenga, J.)

dated the 13th day of May, 2021

in

Criminal Case Session No. 87 of 2017

JUDGMENT OF THE COURT

15th & 26th March, 2024

KAIRO, J.A.:

The appellants were jointly charged with the offence of an attempt to murder contrary to section 211 (1) (2) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). In the particulars of offence, the prosecution side alleged that on 19th day of April, 2013 at about 00.00hrs at Lusese Village within Biharamulo District in Kagera Region, the appellants did unlawfully attempt to cause death of one Rajabu Antony (the victim).

As it were, after the charge was read over and explained to them at the trial, they all denied the allegations and thus, the matter went to a full hearing.

The prosecution side relied on five witnesses and two exhibits; a sketch map of the scene of incidence and PF3 which were admitted as Exhibits P1 and P2 respectively to prove its case. On the other hand, the appellants were the only defence witnesses and tendered one document admitted as Exhibit D1.

At the end of the trial, the High Court found both of them guilty. Consequently, it convicted and sentenced them to serve a jail term of ten years.

They were both aggrieved hence decided to lodge this appeal to protest their innocence armed with nine grounds of appeal which can be rephrased as follows:

1. *That, the charge sheet prepared and laid at the appellants' door from which resulted to the trial was fatally defective for being contrary to the requirement of the law.*
2. *That, the Hon. trial court prejudiced the appellants by amending the charge without addressing them on it.*
3. *That, the trial judge erred in law and fact to convict the appellants and sentence them to a harsh conviction of ten years without hearing their mitigation.*
4. *That, the evidence adduced in court by two principal witnesses PWI and PW2 was contradictory to each other, hence unreliable.*
5. *That, the appellants were not properly identified at the crime scene.*

6. *That, the evidence adduced by the doctor (PW5) was totally incredible and was a pack of lies aiming to incriminate the appellants.*
7. *That, the statement of the victim (RAJAB ANTHONY) recorded by D.C DICK had a lot of conjectures and speculations. Besides, it varied with his evidence adduced at the trial.*
8. *That, the sketch map tendered in court at the trial revealed the dirty game and the fabrication made against the appellants for it indicated the remains of biood, yet it was drawn three months after the incidence.*
9. *That, prosecution's case was not proved beyond reasonable doubt.*

When the appeal was called on for hearing, Mr. Joseph Bitakwate, learned advocate represented both appellants while Messrs. Grey Uhagile and Amani Kyando together with Misses. Edna Makala and Alice Mutungi, all learned State Attorneys appeared for the respondent, Republic.

At the onset, Mr. Uhagile informed the Court that, the respondent was supporting the appeal on the grounds raised by the appellants.

When invited to amplify the grounds of appeal, Mr. Bitakwate abandoned grounds number 1,2 and 3 and further addressed grounds number 4,6,7,8 and 9 collectively but ground number 5 was discussed separately.

Mr. Bitakwate started by explaining the long cherished legal principle that in criminal cases, like the one at hand, the prosecution has a duty to

prove the case beyond reasonable doubt as was decided in the case of **Hassan Rashid Gomela vs Republic**, Criminal Appeal No. 217 of 2018 (unreported), among many others.

Starting with ground number 5, Mr. Bitakwate's complaint is on poor identification of the appellants which formed the basis of the trial court's conviction. It was his contention that, the evidence of PW1 (the victim) and that of PW2 (the victim's wife) was contradictory to each other. Elaborating, he submitted that, PW1 testified to have identified the 1st appellant when he entered into his room. Further, that he identified the 2nd appellant when he entered in the sitting room (page 95 lines 20-22 of the record of appeal). Regarding the intensity of light, PW1 testified that there was a 5 watts solar bulb at the sitting room and that it was easy to identify them more so, as they were living in the same village (page 97 of the record of appeal).

Another evidence on visual identification is that of PW2. According to her, she identified the appellants after peeping through the window and managed to recognize them as they were neighbours. Mr. Bitakwate contended that the two witnesses' testimonies contradicted each other when it comes to stating how the assailants' dressed. He went on to argue that, while PW1 testified that the 1st appellant dressed a black jacket and

the 2nd appellant had put on a long-sleeved T-shirt with strips, PW2 on her part testified not to have seen anybody wearing a T-shirt.

The learned counsel further argued that, though both witnesses testified to have identified the appellants at the scene as they were familiar to them, being their neighbours, none of them described the attires the assailants put on or their physical appearances. When cross examined by the advocate for the 2nd appellant on that aspect, PW1 stated that the 1st appellant had put on a black jacket but did not explain his appearance. As for PW2, apart from failing to give their descriptions, she further denied to have seen a person wearing a T- shirt at the scene. The learned counsel argued that, it is not enough to rely on the familiarity of the witness and the assailant before the incidence, but on top of that, the credibility of the witness is also of essence. He cited the case of **Sprain Mtungilei vs The Republic**, Criminal Appeal No. 197 of 2020, which referred the case of **Anael Sambo vs The Republic**, Criminal Appeal No. 274 of 2007 (both unreported) to back up his argument.

Mr. Bitakwate went on to argue that, the record shows that PW1 had mentioned Kipala and Felecian Raulent to be among the first persons to be at the scene on the fateful date. Further to that, PW1 also testified that he had mentioned the names of the appellants to be his assailants to the OCS of Runazi police post when he was taken there after the incidence. (page

96 of the record of appeal). However, the prosecution never called them to testify so as to corroborate PW1's testimony. Further to that, PW4 who arrived immediately at the scene testified to have been informed that the victim was attacked by unknown people (page 114 of the record of appeal).

Submitting on the credibility of the prosecution witnesses Mr. Bitakwate submitted that, PW1 named the appellants to be among the people who invaded him. However, the appellants were not arraigned immediately until on 24th April, 2013, that is five days later and there was no explanation from the prosecution why the appellants were not arraigned immediately after the incidence (page 135 of the record of appeal). He argued further that unexplained delay in arresting the suspects raises doubt on the credibility of the witness, equally on the identification alleged to have been made. He referred us to the case of **Majaliwa Ihemo vs The Republic**, Criminal Appeal No. 197 of 2020 and **Hatibu s/o Mohamed Maulid @ Kausha @ Said s/o Mohamed @ Mwanawatabu Kausha vs The Republic**, Criminal Appeal No. 26 of 2018 (both unreported), to fortify his argument. Basing on the above explained circumstances, Mr. Bitakwate concluded that, it was doubtful that there was positive visual identification of the appellants to incriminate them.

Addressing grounds number 4,6,7,8 and 9 collectively, Mr. Bitakwate faults the trial court for convicting the appellants basing on weak and insufficient evidence due to several defects detected, which again raise doubts. Explaining them, he started with the sketch map of the scene of incidence appearing at page 150 of the record of appeal. He submitted also that, the document was drawn on 3rd July, 2013, that is 74 days from the incidence date (19th April, 2013). According to the drawer, marks A and B shows the blood of the victim. He argued that it is incredible for the drawer to observe some blood at the scene of crime after 74 days.

Another defect revolves around information that led to the arrest of the appellants. He elaborated that, although the facts given by the prosecution suggest that, the appellants were arrested following the investigation which was conducted, PW1 testified that they were arraigned following the information he gave. He also contended that, PW2 stated to have mentioned other people at the police when cross examined (page 103 of the record of appeal), yet the trial court at page 188 of the record of appeal remarked that, the consistency and immediate naming of the accused showed credence in PW1's evidence. Mr. Bitakwate faulted the said remarks arguing that, the same is inconsistent with the evidence on record. He therefore concluded that, with those defects, the case cannot be said to have been proved beyond reasonable doubt. On that account,

he prayed the Court to quash the conviction, set aside the sentence meted out against the appellants and order for their immediate release from custody.

In his reply, Mr. Kyando reiterated the Republic stance to support the appeal. He conceded to what was submitted by Mr. Bitakwate without reservation and brought to light more issues that justified the prayers by the appellants' counsel.

In addition to the defects pointed out by the counsel for the appellants, Mr. Kyando submitted that the respondent Republic has also observed the following defects/ irregularity in the PF3 admitted as Exhibit P2 appearing at page 151 of the record of appeal. He went on explaining them to be that; **one,** though the incidence occurred on 19th April, 2013, the PF3 was issued on 12th August, 2014, that is more than a year after the incidence; **two,** the said document was then filled on 17th November, 2015, that is two years later from the incident date; **three,** that the testimonies of PW1 and PW2 denote that the PF3 was issued at Runazi Police Post while Exhibit P2 in the record of appeal shows that it was issued at Biharamulo Police Station, to which in his argument added to the contradiction existing in the prosecution evidence.

In his further submission, Mr. Kyando also faulted the statement of PW1 admitted at the trial court as Exhibit D1. He elaborated that, the said

statement shows to have been conclusively taken on 20th April, 2013. However, the contents therein include the events occurred after 20th April, 2013, to which he argued to be absurd and impact negatively on the credence of PW1. He explored the Court to disregard the document.

As a conclusion, Mr. Kyando submitted that the defects pointed out by both counsel for the parties, together with the stated contradictions of the witnesses' evidence coupled with improper identification of the appellants at the scene of crime raise a lot of unanswered questions on the part of the prosecution's evidence. As such, he said, the case was not proved to the required standard. It was his conclusion that, the appeal has merit, thus, it be allowed and the appellant be set free.

Having heard the submissions from the parties, the main issue for our determination is whether the prosecution has proved its case beyond reasonable doubt. Both the learned State Attorney and the appellant's counsels answered negatively to the issue.

In its findings, the trial court ruled out that, the identification of the appellants was watertight. It is imperative to note that, this is the main evidence upon which the trial court based its conviction together with the credibility of the prosecution witnesses. However, our scrutiny to the record of appeal, with respect, suggests otherwise. We shall demonstrate.

In the case at hand, both PW1 and PW2 testified that, they managed to make positive identification of the appellants to be the attackers of PW1 by the aid of 5 watts solar bulbs and the fact that the appellants were known to PW1 and PW2 before the incident being neighbors. However, neither PW1 nor PW2 described the physical appearance of the attackers to the persons who came to their rescue on the fateful night. In our view, describing their appearance was equally important so as to dispel every possibility of error in the identification more so, in the circumstance as the one at hand where the witnesses testified to be familiar with the appellants, and according to PW1, the incident took about 10-15 minutes. In the absence of the required description, we get difficulties in believing the witnesses. The importance of describing the assailants' appearances was emphasized in **Ambwene Lusajo vs Republic,** Criminal Appeal No. 461 of 2018 (unreported) into which we observed as follows:

> *"A witness who alleges to have identified a suspect at the scene of crime is required to give a detailed description of such a suspect to a person to whom he first reported the matter to him or her before such suspect is arrested. The description should be on attire worn by the suspect, his appearance, height, colour and/or any special mark on the body of such a suspect"*

That apart, we also observed some contradictions in the evidence of PW1 and PW2 as regards the attire put on by the assailants. While PW1 testified that the 1st appellant wore a black jacket and the 2nd appellant had put on a long-sleeved T. shirt with strips, PW2 on her part failed to state their attire. As if that was not enough, she categorically stated that, she did not see any person with a T. shirt at the scene. Further to that, when PW2 was cross examined by Mr. Matete during the trial, she stated that she named other people at the police because according to her long time has lapsed (page 103 of the record of appeal). To say the least, this is disturbing. We presume the time lapse after the incident to the time when she gave her statement at the police was shorter and the memory was still fresh than the time lapse from when the incident occurred to the time she testified in court. We are aware of the frailty of the human memory. Nevertheless, the reason for mentioning other names at the police when the memory was still fresh, in our view, goes against logic and common sense. As such, it adds-up to doubts whether the identification at the scene of crime was watertight. As it goes, doubts in criminal proceedings are resolved in favour of the accused who are the appellants in this case [see: **Friday Mbwiga @ Kameta vs Republic**, Criminal Appeal No. 514 of 2017 (unreported)]. We are therefore in concurrence

with both Messrs. Bitakwate and Kyando in their conclusion that the appellants were not identified properly.

Another disturbing issue is the delay to arrest the assailants. It was the testimony of PW1 that he mentioned the assailants, the appellants inclusive to Kipala and Felecian Raulent who were among the early people who came to their rescue on the fateful night. PW1 further testified that, he told the OCS of Runazi Police Post that his attackers were the appellants, among others (page 96 of the record of appeal). There is also unchallenged evidence by DW1 and DW2 that, they were arrested on 24th April, 2013 at their homes (pages 135 and 138 of the record of appeal). That is five days later and no explanation was offered by the prosecution. In our view, an unexplained delay in arresting the appellants in the circumstances while their names were mentioned to the police and there is no information suggesting that they were not at the village after the incident, raises eyebrows and leaves a lot to be desired as rightly submitted by Mr. Bitakwate. We have taken a similar stance in an akin scenario in **Hatibu s/o Mohamed Maulid @ Kausha @ Said s/o Mohamed @ Mwanawatabu Kausha** (supra). As if that is not enough, the prosecution did not call Kipala or Felecian Raulent or the OCS of Runazi Police Post to court to testify and corroborate PW1's evidence. Failure to call such material witnesses attracts adverse inference on the

part of the prosecution to which we accordingly draw. In **Allan Duller vs The Republic**, Criminal Appeal No. 367 of 2019 (unreported), the Court observed:

> *"The principle of adverse inference finds its basis on an assumption that the evidence which could be, and is not, if produced, be unfavouable to the person who holds it"*

See also: **Adam Angetile vs The Republic**, Criminal Appeal No. 402 of 2020 (unreported).

Our further scrutiny to the record of appeal has made us to note some inconsistencies in prosecution evidence as demonstrated below:

One, on identification; whereby PW1 stated to have identified and mentioned the assailants to the people who came to their rescue and to the OCS of Runazi Police Post. PW2 on her part stated to have recognized the appellants at the scene of crime after peeping through the window but mentioned other people at the police. Again, PW4 who also went at the scene of crime on the fateful night testified to have been told by Zakaria who was also at he crime scene that PW1 was attacked by unknown people (page 114 line 11 of the record of appeal). **Two,** on the attire of the assailants, PW1 testified that the 1st appellant dressed a black jacket while the 2nd appellant had put on a long sleeved T.shirt with stripes.

However, PW2 denied to have seen a person dressed in T.shirt at the crime scene.

Three, on the place where the PF3 was issued, PW1 and PW2 are in consensus that the same was issued at Runazi Police Post. However, the PF3 (Exhibit P2 at page 151 of the record of appeal) indicates that it was issued at Biharamulo Police Station. It is settled law that, the Court has a duty to determine whether the inconsistencies in a particular case are only minor or they go to the root of the matter [See: **Mohamed Said Matula vs Republic** (1995) T.L.R. 3]. Without hesitation, we state in this case that, the pointed-out inconsistencies go to the root of the matter as they touch the aspect of identification, which was the basis of conviction. Besides, the pointed-out inconsistences dented the credibility of the key witnesses of the prosecution and hence, their evidence could not have been acted upon to convict the appellants.

As regards the defects pointed out in Exhibits P1, P2 and D1, which are a sketch map of the scene of crime, PF3 and statement of the victim, respectively, as pointed out by Mr. Bitakwate and Mr. Kyando, we wish to state that, we wholly agree with their submissions without reservation and we do not wish to repeat them. However, we shall give some analysis and insight as to how they adversely affected the standard of proof of the prosecution case.

Starting with Exhibit P1 which was drawn after the lapse of 74 days, but showed the blood of the victim at the scene of crime, suffice to state that the said evidence is simply unbelievable. We are of the firm view that, no blood can still be spotted at the scene of incident after the lapse of all those days.

Coming to Exhibit P2 which was issued on 12th August 2014, almost a year after the incidence, but filled the victim's particulars concerning his health after the attack on 17th November, 2015, that is a year since taken to the hospital for treatment and two years since issued. The time lapse raises doubts whether the contents in the PF3 are authentic, having in mind that human recollection fade with the passage of time.

As regards Exhibit D1, the record shows that it was recorded on 20th April, 2013. Surprisingly, it also included the events/ incidents which occurred after the recording date, the fact which has made us to have reservation on the documents.

All of the above defects raise a lot of unanswered questions as such, raise doubts in the evidence of the prosecution, which doubts as earlier alluded, should be resolved in favour of the appellant.

For what we have endeavored to discuss, we are in accord with both counsel that the case was not proved beyond reasonable doubt, thus the appeal is merited and we allow it. We further quash the

conviction and set aside the sentence imposed on the appellants and order the immediate release of the appellants from prison, unless any of them is being held for other lawful cause.

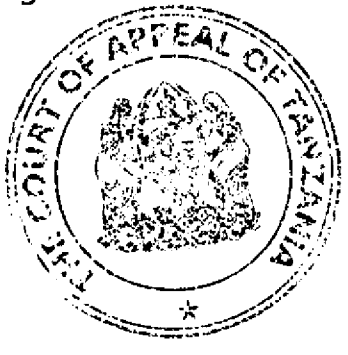
DATED at **BUKOBA** this 22nd day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 26nd day of March, 2024 in the presence of Mr. Joseph Bitakwate, learned counsel for the Appellant and Ms. Alice Mutungi, learned State Attorney for the respondent / Republic via video link from Bukoba High Court, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL