IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 686 OF 2020

WOLDE KALER ..... 1ST APPELLANT
CHARLES ONGORO ..... 2ND APPELLANT
BWANA ONYANDO ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kahyoza, J.)

dated the 2nd day of November, 2020

in

Criminal Sessions Case No. 12 of 2020

.....

JUDGMENT OF THE COURT

3rd & 8th May, 2024

ISSA, J.A.:

The appellants, Wolde Kaler, Charles Ongoro, and Bwana Onyando were arraigned before the High Court sitting at Musoma (the trial court) for the offence of murder contrary to section 196 of the Penal Code, Cap. 16. The appellants were tried, convicted as charged and sentenced to death by hanging. Aggrieved with the conviction and sentence, the appellants appealed to the Court in Criminal Appeal No. 686 of 2020.

The appellants' arraignment before the trial court was a result of an accusation that, on 22nd January, 2019 at Panyakoo village within Rorya District in Mara Region, the appellants murdered Okumu s/o Watata @ Joshua Okech. The appellants pleaded not guilty to the charge. The prosecution fielded two witnesses to prove the charge: Yunice Akinyi Okumu (PW1) and George Obambo Orondo (PW2). It also tendered three exhibits: the post-mortem examination report (Exhibit P1), the sketch map of the scene of crime (Exhibit P2) and statement of PW1 (Exhibit P3).

The brief facts of the case were that, the appellants and the deceased were residents of Panyakoo village. On that fateful night of 22nd January, 2019 the residents of a neighbouring village of Tatwe suspected the deceased to have stolen from their village. They raised an alarm and on the same night they started their pursuit of their thief, the deceased. The pursuit led them to Panyakoo village where the residents responded to the alarm. The residents of the two villages gathered at the deceased's home in search of the deceased. As the deceased was not at home the villagers of Tatwe village resolved to leave but they took a bull belonged to the deceased. Some of the residents of Panyakoo village returned home while some waited for the deceased. When the deceased returned home he found himself surrounded by angry people. He was arrested and tied.

The villagers who made the arrest claimed to take him to the hamlet chairman, but the journey ended at Chirya River where the deceased met his death.

PW1 was the wife of the deceased who witnessed all the fracas that took place at her house from 3.00 am. She also witnessed her husband being tied down and taken to the river. PW2 was one among the people who responded to the alarm raised by Tatwe villagers. He together with one, Fred Charles made a follow-up and found a large number of people gathered at the deceased's house who was not at home at that time. After the Tatwe villagers left with a bull, other Panyakoo residents dispersed leaving few at the deceased's home. PW2 also returned home and was awaken by another alarm raised after the deceased's arrest. He followed the villagers who made the arrest to the river where he witnessed the deceased being beaten and cut by machete. The deceased finally succumbed to his death at the scene of the crime at the late hours of 22nd January, 2019. Dr. Tabayi D. Tumbo conducted a post-mortem examination on 22nd January, 2019 at 11.00 am and established the cause of death which was severe bleeding occasioned by the injuries sustained by the deceased. The appellants were arrested on 3rd February, 2019.

In their defence, all the appellants distanced themselves from the accusation. The 1st appellant admitted to have heard the alarm around 2.00 am, but he testified that he did not respond to the alarm or go to the deceased's house. He remained in his house and on the next day he heard about the demise of the deceased. He attended the funeral and was arrested on 3rd February, 2019 while the incident took place on 22nd January, 2019. The 2nd appellant also denied that he was involved in murdering the deceased. He claimed the charge against him was fabricated as there is no single witness who mentioned his name. He was identified on the dock. Further, he averred that he did not respond to the alarm on that fateful night because of his old age. He heard about the death of the deceased on the following day. The 3rd appellant gave a similar account that, on the fateful night he was asleep in his house when he heard the alarm from Tatwe villagers, but he did not go out. He slept till morning and proceeded with his daily routine.

The trial court was satisfied that the prosecution proved the case against the appellants beyond a reasonable doubt. It thus convicted and sentenced the appellants to death by hanging.

Undaunted, the appellants jointly have instituted the instant appeal. Initially, the appellants themselves lodged a memorandum of appeal

containing eight on 10th April, 2021. Mr. Leonard Elias Magwayega, the appellants' advocate, on 11th May, 2021 lodged another memorandum of appeal containing five grounds. On 31st October, 2022 the appellants themselves lodged a supplementary memorandum of appeal containing four grounds. For the reason, shortly to be clear, we opt not to reproduce the grounds of appeal.

At the hearing of the appeal, the appellants were represented by Messrs. Leornard Elias Magwayega and Juma David Mwita, learned advocates whereas the respondent Republic was represented by Mr. Yese Temba, learned State Attorney.

When Mr. Magwayega took the floor he out-rightly informed the Court that, having consulted his clients, they agreed to condense all the grounds of appeal into two grounds that:

> *"1. That the trial court erred in law and facts to rely on visual identification to convict the appellants while the incidents occurred at night and there was no sufficient light to enable the witnesses to identify the appellants.*
>
> *2. The trial court erred in law and facts to convict the appellants while the prosecution side did not prove its case beyond a reasonable doubt."*

However, we find that these two grounds of appeal boil down to issue that is whether the prosecution managed to prove its case against the appellants beyond reasonable doubt.

Arguing the appeal, Mr. Magwayega raised four issues to support his contention. The first issue is on the contradictions appearing in the prosecution case. Mr. Magwayega argued that, there are contradictions in the testimony of PW1 as seen on page 13 and 14 of the record of appeal. On page 13, PW1 said she was inside the house while on page 14 she said she was outside the house. In addition, PW1 failed to mention the name of the 2nd appellant on her statement made at the police station, but when she testified at the trial court she mentioned the name and identified the 2nd appellant as one of the person who attacked the deceased. Mr. Magwayega argued that, these contradictions went to the root of the case. He buttressed this point by the Court's decision in **Mohamed Said Matula v. The Republic** [1995] T.L.R. 3.

Mr. Temba, the learned State Attorney opposed the appeal and re-affirmed his support for the appellants' conviction and sentence. With respect to the issue of contradictions, he submitted that there were no contradictions in the prosecution case. The whole incident in that fateful night had three phases, he said. The first phase is when the people from

the two villages went to the deceased's house in search of the deceased, PW1 was inside the house and came out to see what was going on. This phase ended with Tatwe villagers leaving with a black bull. The second phase started when the deceased returned home, arrested and tied at the entrance of the house. PW1 and her children were outside the house. The third phase is when the deceased was taken Chirya river, PW1 remained at her house and did not follow the deceased to the river.

Before, we embark on determining the issues raised in the sole ground of appeal, we wish to state that this is the first appeal and as a matter of law, the Court is entitled to re-appraise the entire evidence and arrive at its own decision. (See - rule 36 of the Tanzania Court of Appeal Rules, 2009, and **The Director of Public Prosecutions v. Stephen Gerald Sipuka**, Criminal Appeal No. 373 of 2019 [2021] TZCA 330 (20th July 2021, TANZLII).

The first limb of this issue need not detain us as we agree with the learned State Attorney that there was no contradiction in that aspect. PW1 was not static; she was moving around in accordance with the events taking place around her house. She was inside the house at the beginning and went outside when people gathered at her house. The Court in **Sano Sadiki and Another v. The Republic**, (Criminal Appeal No. 623 of 2021)

[2023] TZCA 17476 (9th August 2023, TANZLII) dealt with the issue of contradictions and stated thus:

> *"... not every contradiction or discrepancy on witnesses' account will be fatal to the case. Minor discrepancies on details due to normal errors of observations, lapse of memory on account of passage of time or due to mental disposition such as shock or horror at the time of occurrence of the event could be disregarded whereas fundamental discrepancies that are not expected of a normal person count in discrediting a witness".*

With respect to the second limb of this issue that, PW1 failed to mention the name of the 2nd appellant in Exhibit P3 the learned State Attorney argued that, the statement given at the police station is the initial statement. A witness while testifying in the trial court can elaborate on that statement made earlier and the elaboration is not a contradiction. To support his argument, he cited the Court's decision in **Abel Orua @ Matiku and 2 others v. The Republic**, Criminal Appeal No. 441 of 2020 [2024] TZCA 78 (21st February 2024, TANZLII).

The dispute on this issue is whether the 2nd appellant was named by PW1 in her statement made at the police station (Exhibit P3). If we look at Exhibit P3 among the name mentioned is Ongoro s/o Onyando. There is no

mention of Charles Ongoro, but when PW1 testified before the trial court she mentioned and identified Charles Ongoro as the 2nd appellant. We are of the view that this is not a contradiction, it is addition of a new person who was not earlier on mentioned. To us this is fatal and goes to the root of the prosecution case. Charles Ongoro and Ongoro s/o Onyando are two different persons. Further, as the appellants were arrested even before PW1 recorded her statement we keep wondering about the motive behind the arrest.

With respect to the case of **Abel Orua** (supra) relied on by the learned State Attorney, we are of the view that it is distinguishable to the present case. In **Abel Orua** the witness testifying in the trial court was elaborating on what he narrated in his statement and did not deviate from his previous statement. In the instant case, PW1 mentioned a different name which did not feature in the Exhibit P3. All being said, we are of settled view that, since PW2 was not there when the deceased was arrested and tied there was no evidence that, the 2nd appellant was involved in arresting and tying the deceased.

The second issue raised was the failure of the prosecution witnesses to name the appellants at the earliest opportunity. Mr. Magwayega argued that, the record of appeal shows that the offence was committed on 22nd

January, 2019, but the statement of PW1 and PW2 were recorded on 17th February, 2019 and 18th February, 2019 respectively while the appellants were arrested on 3rd February, 2019. There was no explanation for the delay in arresting the appellants and why the appellants were arrested when there was no complaint filed at the police station. He cited the case of **Jaribu Abdalla v. The Republic** [2003] T.L.R. 271 to support his argument.

The learned State Attorney did not dispute this fact, and in fact, this Court is baffled by the sequence of events explained by Mr. Magwayega. Since the police arrived on the morning of 22nd January, 2019 it was expected that the statement of the complainant and arrest would have been made immediately. Unfortunately, that was not the case. The Court in numerous decisions has held that, failure to name a known suspect at the earliest available and appropriate opportunity renders the evidence of the witness highly unreliable (see - **Marwa Wang'iti Mwita v. The Republic** [2002] T.L.R. 89 and **Joseph Mkumbwa and Another v. The Republic**, Criminal Appeal No. 94 of 2007 [2011] TZCA 118 (23rd June 2011, TANZLII).

The third issue was that the prosecution failed to call material witnesses. Mr. Magwayega argued that, the trial court was supposed to

draw adverse inference against the prosecution case as it failed to call material witnesses who are the arresting officer and the investigator. These witnesses, he added, would have explained why the appellants were not arrested immediately as they were living in the same village and did not abscond.

Responding to this point, the learned State Attorney argued that, they called material witnesses and tendered the relevant exhibits. The arresting officer was not called because the issue of arrest was not disputed in the preliminary hearing. Further, the sketch map was tendered without any objection. Hence, there was no need to bring the investigating officer. He relied on the Court's decision in **Azizi Abdalla v. The Republic** [1991] T.L.R 71.

While it was true that there was no dispute regarding the arrest of the appellants which was made on 3rd February, 2019, but there are many unanswered questions surrounding the arrest. **Firstly**, if the offence was committed on 22nd January, 2022 and the appellants were identified at the scene by the two witnesses, PW1 and PW2 then why the appellants were arrested on 3rd February, 2019 when there is no evidence that they run away. **Secondly**, the complaint regarding the offence was recorded at the police station on 18th February, 2019. The question is on what basis the

appellants were arrested on 3rd February, 2019, when there was no complaint filed at that time. If the arresting officer and the investigator were called to testify, these questions would have been answered. In **Lucia Antony @ Bishengwe v. The Republic**, (Criminal Appeal No. 96 of 2016) [2018] TZCA 542 (24th April 2018, TANZLII) the Court remarked as follows:

> *"We are of settled mind that, in the circumstances of the case it was crucial for the investigator also to be called to testify at least on the appellant's arrest in connection with the capital offence of murder which is punishable by death".*

Therefore, we agree with Mr. Magwayega that the arresting officer and the investigator were material witnesses in the case and the failure of the prosecution to call them entitled the Court to draw an adverse inference against the prosecution that, the arrest was caused by other factors than the death of the deceased.

The fourth issue which is the epicentre of the appellants' appeal is that, the conditions for visual identification were not favourable for correct identification of the appellants. To support this argument, Mr. Magwayega advanced the following reasons: **One**, PW1 did not explain the source of light inside the house, and the intensity of the moonlight shinning outside

the house. He argued that, considering the large number of people present in PW1's compound and the fact that, when the deceased was being arrested and tied was surrounded by people she could not make proper identification of the appellants.

Two, PW2 also failed to mention the intensity of the moonlight. This became more relevant as PW2 claimed that, before people started to assault the deceased, an order to kill him was issued which forced him to flee and hide behind the bushes. Mr. Magwayega argued that, the darkness and the bush made it impossible for PW2 to identify the people assaulting the deceased and especially taking into account the deceased was surrounded. He bolstered his argument by the Court's decision in **Waziri Amani v. The Republic** [1980] T.L.R. 250.

Three, Mr. Magwayega argued that, PW1 and PW2 failed to describe the physical appearances of the appellants and the outfit they wore on that day. There is no such details in the statement of PW1, what is seen is the description given during examination in chief and cross-examination. He prayed for the appeal to be allowed and the appellants be set free as the prosecution failed to prove their case beyond a reasonable doubt.

Responding to the issue of visual identification, Mr. Temba submitted that, the appellants were properly identified with the help of

moonlight as mentioned by PW1 and PW2. Further, the appellants were living in the same village and were familiar to PW1 and PW2. Therefore, they were recognised and there was no issue of mistaken identity. He prayed for the dismissal of this appeal.

Before canvassing the issue of visual identification let us grip with the law. The law relating to visual identification is well settled in this jurisdiction. See the case of **Waziri Amani** (supra), **Raymond Francis v. The Republic** [1990] T.L.R. 100 and **Marwa Wang'iti Mwita and Another v. The Republic** (supra). In **Waziri Amani,** the Court laid down guidelines which have been religiously followed by the courts. The Court on page 251-252 stated:

> *"... 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 on visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight".*

The Court went on to state that:

> *"Although no hard and fast rules can be laid down as to 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 circumstance 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."

Further, the Court in **Sadick s/o Hamis @ Rushikana and Others v. The Republic** (Criminal Appeal No. 381 of 2017, Criminal Appeal No. 382 of 2017 and Criminal Appeal No. 383 of 2017) [2021] TZCA 625 (1st November 2021,TANZLII) citing the case of **Shamir s/o John v. The Republic**, Criminal Appeal No. 166 of 2004 (unreported) added to the list the elements to be observed in the visual identification. It stated:

"The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarised as follows: how long did the witness have the accused under observation? At what distance? In what light? ***Was the observation impeded in any way, as for example by passing traffic or a press of people?*** *Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the 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?***

... ***Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made"***

(Emphasis supplied)

We now have to apply the above guidelines to the instant appeal. This appeal hinges on the evidence of two witnesses, PW1 and PW2. None of these witnesses testified on the distance the appellants were when they

identified them. None of them identified the attire the appellants were in, save that PW2 on cross-examination mentioned the attire of the 1st appellant on page 25 of the record of appeal.

Coming to the source of light, PW1 and PW2 stated that the source of light was a moon, but none of them testified on its intensity. To appreciate our stance we reproduce their testimonies on page 14 and 22 of the record of appeal. PW1 stated: "*I know them, they came to my home place and there was moonlight.*" PW2 stated: "*Your Lordship there was light from the moonlight. The moonlight was shinning perpendicular from above*".

Further, it is on record that, when the incident took place the visions of the two witnesses were blocked. We let the record of appeal speaks for itself. PW1 on page 16 of the record of appeal stated:

> *"Wolde Kaler and Ongoro tied my husband. I identified them. Some were tying him and others holding him not to run away. Persons who tied my husband were infront of me. They surrounded my husband. I saw them".*

Similarly, PW2 on page 25 stated as follows:

> *"I was threatened to be killed. I hide myself in the guava trees and let my head peep to see what was going on.... there were many people at the time of*

killing Okumu. I went there and found people beating the deceased. People who killed Okumu surrounded him. I saw them even though they surrounded the deceased."

Therefore, as the incident took place at night and the intensity of light was not specified, coupled with the blockage of the view of the two witnesses, we cannot say with certainty that, PW1 and PW2 were able to identify the appellants. The evidence of PW1 and PW2 cumulatively did not meet the minimum threshold of the elements of visual identification as articulated in **Waziri Amani** (supra) and **Shamir s/o John** (supra).

Turning to the issue of recognition, it is on record that, PW1 and PW2 knew all the appellants before the incident as they are all residents of Panyakoo village. In that respect, it would have been expected that they would name the appellants as the persons who caused the death of the deceased at the earliest opportunity. In the instant appeal none of the two witnesses named the appellants at the earliest opportunity. In fact their statements were recorded at the police station on 18.2.2019 while the incident which caused the death of the deceased took place on 22.1.2019. As we mentioned earlier in the case law, failure of PW1 and PW2 to name the appellants at the earliest opportunity made them unreliable.

All in all, the evidence placing the appellants at the scene of crime is lacking. As a result their participation in murdering the deceased stand not proved beyond a reasonable doubt. Therefore, the appeal is allowed, convictions are quashed and the sentences set aside. Consequently, we order the release of the appellants forthwith unless they are detained in the prison for some other reasons.

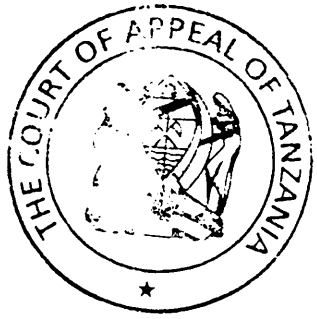
DATED at **MUSOMA** this 7th day of May, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2024 in the presence of Mr. Leonard Elias Magwayega, learned advocate for the Appellants and Mr. Abdulkheri A. Sadiki, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
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