

**IN THE COURT OF APPEAL OF TANZANIA  
AT TABORA**

**(CORAM: RAMADHANI, C.J., MROSO, J.A. And MUNUO, J.A.)**

**CRIMINAL APPEAL NO. 91 OF 2005**

<b>1. KALUGENDO DOMINICK 2. JEREMIA JOHN</b>	}	..... <b>APPELLANTS</b>
<b>VERSUS</b>		

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

**(Appeal from the conviction of the High Court of Tanzania  
at Tabora)**

**(Mwita, J.)**

**dated the 4<sup>th</sup> day of April, 2005  
in**

**Criminal Sessions Case No. 107 of 1998**

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**JUDGEMENT OF THE COURT**

**16 & 26 September, 2008**

**MUNUO, J.A.:**

The co-appellants, Kalugendo Dominick and Jeremiah John, were jointly charged with murder c/s to the provisions of section 196 of the Penal Code, Cap. 16 in that they allegedly murdered one Ndagiwe Ngeze on the 26<sup>th</sup> April, 1997 at night at Nyabitaka Village within Kibondo District in Kigoma Region.

On the fateful night, the deceased, his wife and two children were asleep in their dwelling house. The deceased and his wife, PW1 Chubwa Minani, were sleeping in one room. Their children, PW2 Kanani Ndagiwe, then aged 8 years and his sister, PW3 Nyandwi Ndagiwe, then aged 12 years, shared another room. At about 23.00 hours, bandits struck at the material dwelling house. Apparently the bandits were many but PW1, PW2, PW3 and PW4 could only identify the appellants, both of whom were their co-villagers at Nyabitaka Village.

When the appellants stormed into the house, they held the deceased captive by tying both of his hands at the back by using a "*kitenge*", that is, printed linen cloth. The bandits demanded money. To facilitate their extortion for money, the second appellant, Jeremiah, stabbed the deceased at the ribs. Kalugendo ransacked the room in which PW2 and PW3 slept by using a torch and threatened to stab the said witnesses if they did not show him where their father kept money. During the banditry, a cut wound was inflicted on the left eye of the deceased's wife. It was the evidence of PW1, PW2 and PW3 that the rooms were lit with tin lamp

commonly known as "*koroboi*". The bandits failed to get money in the deceased's room. They ushered the family into the sitting room demanding money in vain. They took the family outside the house and back to the house insisting they be given money. As no money was forthcoming, the bandits stole cooking pots and clothing. When the bandits were searching for money in the rooms, PW1, PW2 and PW3 separately managed to escape. PW2 reported the robbery to his neighbour and the next day to the police. As the eye witnesses had identified the appellants, the police went to their homes but could not get them. Upon information, however, PW6 No. D7175 Cpl Laurence traced and arrested both appellants in one Nuta's house at Mabamba Village on the 28<sup>th</sup> April, 1997, two days after the murder of Ndagiwe Ngeze. Subsequently the appellants were jointly charged with the present offence.

Either appellant denied the charge. They admitted being residents of Nyabitaka Village but denied being party to the murder of their co-villager, Ndagiwe Ngeze.

The assessors and the learned judge found the appellants guilty of murder. Aggrieved, the appellants lodged the present appeal against the conviction and sentence.

Mr. Kabuguzi, learned advocate, represented the co-appellants. The Respondent Republic was represented by Mr. Manyanda, learned Senior State Attorney.

At the commencement of the hearing, counsel for the appellants applied to consolidate the memoranda of appeal filed by the respective appellants under the provisions of Rule 62 of the Tanzania Court of Appeal Rules, 1979 on the ground that they are substantially the same and founded on the same trial and judgement. The learned Senior State Attorney conceded to the application for consolidating the memoranda of appeal. We accordingly consolidated the memoranda of appeal.

Counsel for the appellants advanced three grounds of appeal. **One**, that the learned trial judge erroneously held that the prosecution had proved the case beyond all reasonable doubt. **Two**, that the learned trial judge erroneously held that the identification of

the appellants was watertight. **Three**, that the learned judge erroneously held that the inconsistencies in the identification evidence against the appellants were minor discrepancies. Mr. Kabuguzi argued the three grounds of appeal generally.

Challenging the identification evidence adduced by PW1, PW2, PW3 and PW4, counsel for the appellants contended that the said identification was weak and unreliable because the murder was committed at night when conditions of identification are unfavourable. He doubted whether under the terror of being invaded by bandits, the prosecution witnesses could properly identify the suspects by weak "*korobois*" burning in three different rooms as alleged by the prosecution witnesses.

Counsel for the appellants, furthermore, contended that the wife, her son and daughter ran away so they might not have had time to identify the bandits on the fateful night. He observed that PW1, PW2 and PW3 did not give a description of the bandits to establish that they really saw and identified them on the material night, giving an example of PW3, who, when asked to identify the

suspects at the trial, first pointed to the assessors but later to the appellants which showed that PW3 was not sure of the identity of the suspects who killed Ndagiwe Ngeze on the material night. The discrepancies in the identification evidence, counsel for the appellants maintained, should confer the benefit of doubt on the appellants. He urged us to allow the appeal, quash the conviction and set aside the sentence thereby setting the appellants at liberty.

Mr. Kabuguzi cited the case of **Republic versus Allu** (1942) E.A.C.A. 72 wherein it was held that the description of witnesses is essential for a proper identification. Failure to describe the attire, and, or appearance of the appellants on the material night, counsel for appellants contended, indicated that the four eye witnesses did not identify the bandits who killed the deceased so the learned judge should have acquitted the appellants.

Urging us to find the demeanour of the prosecution eye witnesses not worthy of credibility, counsel for the appellants referred us to the case of **Jackson Mwakatoka and 2 Others versus Republic** (1990) TLR 17 in which the appellants had been

involved in a fight causing the death of the deceased. Later, they repudiated their confessions. Upon conviction for murder, they appealed to this Court. The Court held that there was a conflict of evidence as regards the identity of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants so the demeanour of the witnesses lacked credibility.

In this appeal, Mr. Kabuguzi contended, the eye witnesses gave inconsistent and doubtful evidence of identification because none of the prosecution witnesses could describe the attire or facial features of the appellants to prove that they were the invaders who murdered the deceased. The omission, counsel for the appellants further argued, indicated that the said eye witnesses did not identify the killers so the learned judge ought not to have grounded a conviction. He prayed that the appeal be allowed for lack of sufficient evidence to support the conviction.

Mr. Manyanga, learned Senior State Attorney, resisted the appeal. He contended that the evidence of identification by PW1, PW2, PW3 and PW4 was watertight because the appellants were familiar co-villagers, who the said witnesses knew previously. In that

regard, mistaken identity was ruled out, the learned Senior State Attorney urged. He further observed that the scene of crime was lit with "*koroboi*" which the witnesses left burning to expel mosquitoes. The trial was conducted some eight years after the murder of Ndagiwe Ngeze so minor discrepancies were bound to appear in the evidence of the eye witnesses due to lapse of time. There was moonlight on the fateful night and visibility was good outside the house so PW4 clearly identified the appellants who were her co-villagers, but the killers of the deceased on the night in question. The learned Senior State Attorney cited the case of **Jeremiah Mandebele versus Republic**, Criminal Appeal No. 64 of 2004 (CA)(unreported) at page 7 where the Court had this to say on identification by candle light on a dark night:

"There is evidence by PW1 and PW3 that when the appellant arrived at the fish market, it was already dark, but that they saw the appellant well through the light of a candle which was there. Under the circumstances there is no doubt with identification, especially

that PW1 and PW3 *knew the appellant prior to the event.*

In the instant appeal, the evidence adduced at the trial shows that the deceased, the prosecution eye witnesses, PW1 to PW4, and the appellants were co-villagers at Nyabitaka Village in Kibondo District so the appellants were not strangers to the victims. The appellants spent considerable time in the house of the deceased demanding money in vain during which extortion they fatally stabbed the deceased in the stomach right into the small intestine and duodenum causing excessive haemorrhage, the cause of his death, as shown on the postmortem examination report, Exhibit P1. The Respondent Republic prayed that the appeal be dismissed for lack of merit.

The issue before us is in the identification of the appellants. The appellants admitted in their sworn defences that they reside at Nyabitaka Village. This admission corroborates the testimonies of PW1, PW2, PW3 and PW4 that the appellants were their co-villagers, persons they knew prior to the murder on the material night. The scene of crime, the evidence on record shows, was lit with "*koroboi*", the typical tin kerosene light lamp in rural areas which the eye

witnesses said had been burning to repel mosquitoes in the rooms of the deceased, the children's room as well as in the sitting room where the appellants assembled the deceased and his family, tied his hands at the back with *kitenge* cloth, and in the course of extorting money fatally stabbed the deceased. PW4's house was also lit with "*koroboi*". Besides, there was moonlight outside the house, so the eye witnesses had no difficulty recognizing the appellants who were their co-villagers. As the appellants ransacked the deceased's house for money and stole household items from the victim's dwelling house, PW1, PW2 and PW3 escaped separately leaving PW4 outside the house with the fatally injured deceased.

The appellants were traced and arrested after the eye witnesses reported them to the police in the morning. They were not traced at their homes but on information received, both appellants were trekked and arrested at Mabamba Village on the second day.

In the case of **Waziri Amani versus Republic** (1980) TLR 250, the Court considered visual identification evidence and stated, inter alia:

"..... The time the witness had with 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 lightning at the scene; and further whether the witness knew or had seen the accused before or not ....."

We are satisfied that PW1, PW2, PW3 and PW4 had close contact with the appellants when the latter searched the rooms for money, and, or demanded they be shown where the deceased kept money. We stated earlier on, that the parties are co-villagers at Nyabitaka Village so they were not strangers to each other. The scene of crime was lit with "*koroboi*" and there was moonlight outside so visibility was good. The children of the deceased, PW2 and PW3 saw the appellant search for money in their room by using a torch. Under the circumstances we are of the settled mind that the eye witnesses properly identified the appellants at the scene of crime.

The common intention of the appellants was to rob the deceased. To execute the robbery, they fatally stabbed him. Section 23 of the Penal Code, Cap. 16 states inter-alia:

23 – When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

As the appellants jointly and together stormed into the deceased's dwelling house, robbed his properties and fatally wounded him causing his violent death, they prosecuted an unlawful common intention and by so doing killed the late Ndagiwe Ngeze.

Under the circumstances we find no merit in this appeal. The learned judge rightly convicted and sentenced the appellants for murdering Ndagiwe Ngeze on the fateful night.

We accordingly dismiss the appeal.

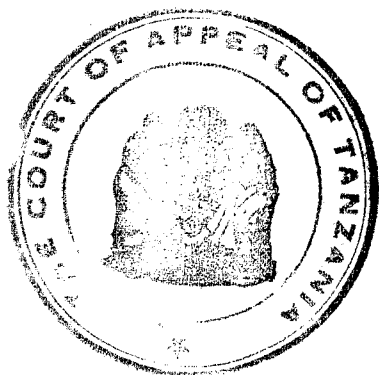
DATED at TABORA this 26<sup>th</sup> day of September, 2008.

A. S. L. RAMADHANI  
**CHIEF JUSTICE**

J. A. MROSO  
**JUSTICE OF APPEAL**

E. N. MUNUO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



(P. B. KHADAY)  
**DEPUTY REGISTRAR**