IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)

CRIMINAL APPEAL NO. 40 OF 2007

1. **CHACHA NYAMHANGA @SAMWEL**
2. **SHABAN IDRISA BARAKA @ BEKA** } ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mackanja, J.)

dated the 23th day of January, 2001
in
Criminal Session No. 150/2001

JUDGMENT OF THE COURT

28th September & 7th October, 2010

LUANDA, J.A.:

Following their trial by the High Court of Tanzania sitting at Tarime, the appellants namely CHACHA NYAMHANGA@ SAMUEL and SHABAN IDRISA BARAKA @ BEKA (henceforth the 1st and 2nd appellants respectively) were found to have murdered a man called PATRICK

MINIBI(the deceased). The appellants were convicted as charged and each was sentenced to suffer death by hanging.

The prosecution case was to this effect:- On the fateful day of 9th April, 1997 around 2.00am while Restituta Legu Patrick (PW1) was sleeping with her husband –the deceased in their house, they were invaded by a group of bandits who were armed with a gun and machete. The bandits threatened the deceased while outside the house that they were hired to kill him lest he offered them Sh 500,000/=. PW1 and the deceased had Sh 38,000/= only. Before that amount of money was surrendered to the bandits, PW1 was ordered to open the door which she complied. Four men entered their bedroom and asked PW1 how much money she had. The reply was that she had Sh 38,000/=. The bandits ordered PW1 to sit down which she complied.

It is further evidence of PW1 that among the four bandits, who entered inside the house she recognized Kichere by voice. While the bandits were busy inquiring PW1 the contents in the briefcase, PW1 said she heard another voice from outside the house which she claimed was of

the 1st appellant. As time was running out, the 1st appellant appeared to loose patience. He uttered the following words:-

"Unaongeaje na mwanamke akiwa amevaa"

Following those words, Kichere placed a machete on PW1's neck. Then one Kipara is heard to have said thus:

"Mwanamke wa nini? Achana naye"

Notwithstanding the foregoing words, PW1 claimed that Kichere slashed her with the machete on her thighs, head and palm. Then she was ordered to take out a number of items outside the house. However, the record is silent as to whether she complied with that directive. Whatever the position, an attempt was also made to destroy a small box which PW1 said they used to put loose coins. It was at that juncture, the 1st appellant urged his colleagues to speed up the exercise. The four withdrew from the bedroom. Then the 1st appellant entered the said bed room.

On entering, he ordered the deceased to surrender his gun. The deceased replied he had none. The 1st appellant directed the 2nd appellant to lift the mattress, which he did, to see whether the gun was there; there was none. The two also left. Not long, PW1 heard a gun shot. The bullet pierced the door and hit the deceased. The bullet killed the deceased. PW1 claimed to have seen the appellants with the aid of a wick lamp and torch which was shone by bandits. She also claimed that the faces of the appellants were familiar.

In this appeal, the appellants were advocated for by Mr. Bernard Kabonde assisted by Mr. Stephen Magoga learned counsel; whereas the respondent/Republic was represented by Mr. David Kakwaya learned State Attorney who did not resist the appeal of the appellants and said the crucial aspect in this appeal is the question of identification.

Mr. Kabonde raised five grounds in the joint memorandum of appeal of the appellants. However, having going through the record, we are satisfied that the central issue in this appeal as correctly observed by Mr. Kakwaya which is the basis of the appellants conviction which will also dispose of the

appeal is whether the finding of the trial High Court that the appellants were positively identified was correct and therefore they were the ones who murdered the deceased.

As regard to identification, Mr. Kabonde submitted that the evidence of visual identification was not watertight. He gave the following reasons. One, he said PW1 did not say the size of the room and the light of the wick lamp it illuminated. Two, PW1 was in fear so she was unable to identify the assailants. Three, if the bandits directed the torch at PW1, how did she recognized them; he querried. Four, PW1 failed to mention the names of the assailants to Emmanuel Domicaous (PW2) among the people who went to the deceased house after hearing a sound of a gun. Five, the evidence of PW1 that he recognized the appellant through their voice, should not be relied upon. He referred us to the celebrated case of **Waziri Amani VR** (1980) TLR 250; **Nuru VR** (1984) TLR 93.

Mr. Kakwaya did not say much. Basically he is at one with Mr. Kabonde.

From the evidence on record, we are satisfied like the trial Court that on 9th April, 1997 around 2.00am the homestead of the deceased was invaded by a group of bandits intending to steal by force and in the process the deceased was killed. Since the deceased met his death under the aforesaid circumstance, under section 200(c) of the Penal Code, whoever has caused his death is deemed to have killed the deceased with malice aforethought. The question is whether the appellants are the ones, as held by the High Court, who killed the deceased.

It is the evidence on the prosecution side that the incident occurred during night time. So, it is important to ensure that all possibilities of mistaken identity are eliminated before a conviction is grounded. To put it differently, where it is shown that the case depends essentially on identification, evidence on conditions favouring correct identification is of paramount importance. (**see Raymond Francis VR (1994**) TLR 100)

In the High Court, the trial learned judge convicted the appellants upon satisfying himself that the appellants were properly identified because of the burning wick lamp; were known by PW1 prior to the incident and the

mentioning of the name of Chacha. The trial learned judge did not rely on the light of the torch of the bandits directed in the eyes of PW1 and that of voice. We think he was perfectly right. As PW1 was dazzled, she could not see and that evidence of identification by voice is of the weakest kind.

Be that as it may, we have carefully gone through the evidence on record. We were unable to see the intensity of light the wick lamp illuminated. Was the light illuminated by the wick lamp bright or poor? Further, it is also not stated the size of the room and the place the wick lamp was positioned so as to enable us assess and decide whether really PW1 was able to identify the appellants. Taking these conditions into consideration, it is doubtful whether the wick lamp illuminated a bright light to enable PW1 identify the appellants. We are of the considered opinion that the light was poor. Chances are that the witness might be honest but mistaken. In cases depending on identification particularly at night and with so little light, the chances of mistaken identify are very great.

Coming to the question of familiarity; we have the following observation to make. Though familiarity is one of the factors to be taken into

consideration in deciding whether or not a witness identified the assailants, the question is only relevant when it is first shown that the conditions prevailing were favourable for correct identification. Since the intensity of the light was not disclosed, the conditions were not favourable. Therefore, the trial Court ought not to have gone further and discussed it. Surely the High Court have jumped the gun.

Last but not least, is about the mentioning of the name Chacha to be among the bandits. But PW1 did not at all say that after the incident people assembled at her homestead. It was PW2 who said so and claimed PW1 to mention Chacha. When cross examined by the defence counsel, at first he said PW1 mentioned Chacha. Later he changed version and said PW1 did not mention any name. Ordinarily, a witness who mentions a person to be involved in the commission of an offence before people who assemble immediately after the incident, is taken to have seen the person in question.

In our case there is nothing of that sort. The name Chacha came in the lime light during trial. Indeed, when PW1's statement was read in Court it

With due respect to Mr. Kabonde and Mr. Kakwaya the evidence in the prosecution was not absolutely water tight.

We accordingly allow the appeal, quash the conviction of the appellants and set aside the death sentence passed on them. The appellants are to be released forthwith from prison unless otherwise lawfully held.

Order accordingly.

DATED at MWANZA this 4th day of October, 2010.

N. P. KIMARO

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

W. P. Bampikya

SENIOR DEPUTY REGISTRAR