IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 131 OF 2009

1. AHMAD SELUKE
2. SILABONA KWININA
3. ZUNGU KWININA
4. ATHUMANI SELUKE
5. JUMANNE SELUKE
6. YUSUPH SAID
7. HARIRI NTAHIYE
8. HAMISI PIUS @ PILLY
9. MOSHI PIUS @ PILLY
10. PEN CHITUNZE

.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court Extended Jurisdiction at Kigoma)

(Awasi, PRM. Ext. Jur.)

dated the 20th day of May, 2008
in
Criminal Sessions Case No. 53 of 2005

JUDGMENT OF THE COURT

29 & 30 June, 2011

MSOFFE, J.A.:

The deceased Bryton Athuman @ Dida and the appellants lived together at Muhunga village within Kasulu District in Kigoma Region. It is said that the deceased was a reputed witch. It is also said that the

appellants belonged to a notorious group known as *"Kosovo"* which used to terrorize the villagers. As such, the group was feared in the village. As part of the terror campaign, so alleged PW3 Seza Kwinina, on 18/9/2003 he went to the home of one Mzee Kalone to drink *"pombe"*. He stayed there for only 30 minutes. While there the appellants came in and ordered the owner of the bar to close it with a further order to all the customers to leave the area. A short distance away, PW3 was attacked by the second appellant Silabona Kwinina, the third appellant Zungu Kwinina and the sixth appellant Yusuph Said. According to him, the first appellant Ahmad Seluke, the fifth appellant Jumanne Seluke the eighth appellant Hamisi Pius and the ninth appellant Moshi Pius were also there but they did not attack him. Anyhow, after the attack he lost consciousness. But before he lost consciousness he heard the appellants retorting: -

Tunakuanzia wewe hadi tunaenda kummalizia Athumani Dadi.

On 9/10/2003 at around 5.00 p.m. PW1 Samwel Ruyahanzi and PW2 Bilayungu Rashid @ Ntanulingwa Rashid witnessed the appellants attacking the deceased with the aid of iron rods and clubs on the pretext that he was a witch. The attack was in an open space and so PW1 and PW2 identified

the appellants properly. Further to this, PW1 stayed at the scene for about 20 minutes while PW2 spent about eight minutes. PW1 stood at about 10 or 11 paces away from the scene while PW2 stood at about 8 paces away. So, according to PW1 and PW2, since the scene of crime was in an open space and they stood at close range just a few paces away from the scene, added with the other factor that the incident took place in broad daylight, they easily identified the appellants. Indeed, when giving evidence in court both PW1 and PW2 mentioned the appellants by names.

The appellants denied participation in the murder of the deceased. They came up with defences of *alibi*. According to the trial Principal Resident Magistrate with extended jurisdiction, the defences *"were funny and very interesting so to say. Their uniformity and similarities leaves a lot to be desired."*

The trial Principal Resident Magistrate very carefully reviewed the evidence of PW1, PW2 and PW3 and found it was all reliable. He found the appellants guilty of the murder of the deceased and, accordingly, convicted and sentenced them to death. The appellants believe they were wrongly

convicted and, through Mr. Revocatus Mugaya Mtaki, learned advocate, have filed in this Court two grounds of appeal. In the first ground of appeal they complain that the trial Principal Resident Magistrate with extended jurisdiction erred in law in holding that the appellants were properly identified as the attackers of the deceased. The second ground of appeal is that the trial Principal Resident Magistrate with extended jurisdiction misdirected himself in capitalizing on the weakness of the defences raised by the appellants.

At the hearing of the appeal, in support of the first ground of appeal Mr. Mtaki argued that, although in the respective testimonies of PW1, PW2 these witnesses claimed to have identified the appellants as the people who set on attacking the deceased to death it is surprising that they did not report the incident to the relevant authorities. In support of this complaint, Mr. Mtaki referred us to this Court's decision in **John Gilikola v Republic,** Criminal Appeal No. 51 of 1999 (unreported), an authority also cited to us by the State Attorney in the list of authorities, in which at page 4 thereof, this Court referred to a passage by this Court in **Marwa**

Wangiti Mwita and Another v Republic, Criminal Appeal No. 6 of 1995 (unreported) that: -

> *The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability;* ***in the same way as unexplained delay*** *or complete failure to do so should put a prudent court to inquiry.*
>
> (Emphasis supplied.)

In this case, Mr. Mtaki went on to say, the unexplained delay by the prosecution witnesses to report the incident should cast doubt on the prosecution case against the appellants.

Ms. Lilian Itemba, learned State Attorney, who represented the respondent Republic on the first ground of appeal, submitted that it was not true that there was a delay by **both** the prosecution witnesses (PW1 and PW2) to report the incident. She referred us to the evidence of PW2 in which it is evident that he reported the incident to the police in the next morning.

With respect, we agree with the proposition that unexplained delay by a witness who claims to have identified an offender to name the offender at an early opportunity casts doubt on the credibility of the witness. We think, however that, as correctly submitted by Ms. Lilian Itemba, that was not the case here. It is not true that there was complete failure to report. On the contrary, it is true that the evidence of PW2 shows that he reported the incident to the police in the following morning. Having done so, we think, there was no need for PW1 to report again to the police as that would have been a duplicity of the exercise.

In another limb of Mr. Mtaki's submission, he urged that although the incident is alleged to have taken place in broad daylight there was need for the prosecution witnesses to give descriptions of the appellants. In this sense, he referred us to the guidelines on evidence of visual identification set out by this Court in the celebrated case of **Waziri Amani v Republic** 1980 TLR 250 that *"no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight".* In response, Ms. Lilian Itemba maintained that in this case there was no need

for descriptive evidence because the witnesses knew the appellants by names. At any rate, she went on to say, PW1 described the appellants when at page 16 of the record he said that: -

> *Every accused was armed, the 1st, 2nd, 3rd were armed with iron roads and the remaining had clubs.*

In our considered view, we agree with Ms. Lilian Itemba that it is not in every case that evidence of description is necessary. In a case, such as this one, where the witnesses knew the appellants by names we think that it was not necessary to give descriptive evidence.

Having said so, we think that the crucial and central issue in the case is whether or not the appellants were identified on the date and time of incident. Our answer to this question is in the affirmative.

There is no dispute that the incident took place in broad daylight. It is also undisputed that the appellants were known to the prosecution witnesses prior to the date of incident. Indeed, they knew them by their names and repeated the same names when testifying in court. It is further

not in dispute that on the date and time of incident PW1 and PW2 stood at close range to the place of incident and were able to see vividly what was going on. It is also undisputed that they spent a considerably long period of time at the scene. In the midst of all the above evidence, we are satisfied that there was no possibility of mistaken identity. It follows that the first ground of appeal has no merit. We hereby dismiss it.

In support of the second ground of appeal Mr. Mtaki referred us to several passages in the judgment of the trial Principal Resident Magistrate with extended jurisdiction and urged that the Magistrate capitalized on the weaknesses of the defence case. On the other hand, Mr. Mgisha Kasano Mboneko, learned State Attorney representing the respondent Republic on the second ground, was of the view that the Magistrate was duty bound to assess the credibility of the witnesses as a whole and in the process he could not avoid discussing the defence case.

With respect, this ground need not detain us. It is true, as correctly submitted by Mr. Mboneko, that in a trial the presiding judge or magistrate is duty bound to discuss both the prosecution and the defence cases in

arriving at a decision. We have read the passages referred to by Mr. Mtaki. We are satisfied that the trial Principal Resident Magistrate with extended jurisdiction did exactly what was required of him in evaluating the evidence as a whole. Indeed, there is no suggestion by Mr. Mtaki that perhaps in the course of doing so the Magistrate ever shifted the burden of proof to the defence. At any rate, in view of the position we have taken on the first ground a discussion of this ground is merely academic. We dismiss the second ground as well.

In fact, if we may observe here by way of emphasis, the facts of this case fit in squarely within the parameters of the observation made by this Court in **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 (unreported) thus: -

> *...We wish to observe that as far as we know there is no civilised country in the world in which the so called mob justice is regarded as Justice. Depending upon the particular facts of the case, an attack in the course of administering justice which results in the death of the victim may under the law of this country constitute murder.*

Provided common intention existed, it would not matter who inflicted the fatal wound or wounds.

In the instant case the evidence discloses quite clearly that the appellants set out with the common intention of killing the deceased allegedly because he was a witch.

In the event, for reasons stated, we dismiss the appeal in its entirety.

DATED at **TABORA** this 30th day of June, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL