IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 295 OF 2009

CHALAMANDA s/o KAUTEME ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tunduru (Songea Registry)

(Chocha, J.)

dated 17th day of September, 2009

in

Criminal Session No. 9 of 2008

JUDGMENT OF THE COURT

15th & 19th March, 2012.

MBAROUK, J.A.:

In the High Court of Tanzania at Tunduru, (Songea Registry) the appellant Chalamanda s/o Kauteme was charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002. He was found guilty of the offence and was sentenced to the mandatory death penalty. Aggrieved by the decision of the High Court, the appellant preferred this appeal.

The facts as found at the trial court are that, on 4th September, 2007 Zainabu Salum (PW1) returned from her work place at Mkomi Hotel late at around 22.00 hours. On her way home, she found one Kaduguda (deceased) a stall keeper close to her home. As it was fairly late, when she reached her home, she retired to bed. At around 02:00 – 03:00 hours, while asleep, PW1 heard a bang from the stall which the deceased was attending as a watchman. She woke up and pulled aside a window curtain of her room which had no shutters, but only with iron bars and wire mesh. That enabled her to see outside having pulled aside the window curtain.

She saw some unusual activities going on around the stall. With the help of a tube light which was inside the stall, PW1 saw three people around the stall, two of them entered in the stall through the main door which was forced open. PW1 further testified that as the door of the stall was facing her window, she was able to observe the events. She said that, there was another person who stayed outside the stall as a guard who frequently signaled those who were inside to hurry up. During that process, PW1 testified

that, the person unknowingly exposed himself to the strong three feet tube light within the stall. As the stall was about 20 paces from her home, PW1 said, with her watchful eye for more than half an hour, she was able to identify the person to be the appellant. Apart from that, PW1 said that she knew the appellant from his childhood. She then proceeded to describe that person to have put on a black long sleeve shirt with a bare feet. She said, she was able to identify the appellant as he had not masked his face.

PW1 testified further that she later heard a voice from the stall which was not clear like it was obstructed by an object squeezed into a mouth. Later, PW1 while still at the window helplessly saw a person coming out of the stall holding a sulphate bag. She was unable to identify its contents. The sulphate bag was handed over to the appellant who was still at the door of the stall. Thereafter, all the three assailants left after locking the stall from outside with a latch.

After the assailants had left, PW1 awoke her landlord and other neighbours and told them what she had seen. The landlord

opened and examined the stall and established that the attendant (deceased) had been butchered and pressed down with a sack of rice on his body. Whilst still at the scene, the appellant came. Two youths asked him who he was, but without giving an answer, the appellant ran away but was soon apprehended. After being caught, when he was asked, he gave confusing answers, first that he came from his lover and later that he was coming from the kiln. The owner of the stall later came and went to report the matter at Tunduru Police Station. Thereafter, PW1 made her statement at the Police Station and implicated the appellant. The police arrived and inspected the crime scene and took away the dead body, arrested the appellant and accordingly charged him.

At the trial, the appellant categorically denied the charges against him. He insisted that when he was arrested at the scene of crime, he came from his lover's (PW2 – Sophia Abdallah) home. He admitted not to have any grudges with PW1, but said that he had cases with PW1's natural and half blood fathers. Unlike PW1 who said that her house was 20 paces from the scene

of crime, the appellant claimed that the two places were as far apart as two football pitches away.

Before us, the appellant was represented by Mr. Rwezaula Kaijage, learned counsel, while Mr. Faraja Nchimbi, learned Senior State Attorney assisted by Mr. Edson Mwavanda, learned State Attorney represented the respondent/Republic.

Earlier on, Mr. Rwezaula raised two grounds of appeal namely:-

1. That the trial court greatly erred in law and fact by relying on loose evidence before convicting the accused.

2. In the alternative but without prejudice to the foregoing, the trial court greatly misdirected itself by failing to follow the proper course of justice.

However, later on at the hearing, Mr. Rwezaula opted to withdraw the 2nd ground of appeal and remained with the 1st ground of appeal only.

In support of his views on the 1st ground of appeal, the learned counsel for the appellant submitted that, the prosecution mainly relied on the evidence of PW1 as their principal witness. He added that, the trial High Court believed PW1 as a credible witness on the point of identification. However, Mr. Rwezaula claimed that the possibilities of mistaken identity from the evidence of PW1 were not eliminated. Citing a decision of this Court in the case of **Waziri Amani v. Republic** (1980) TLR. 280, Mr. Rwezaula contended that it has been stated in that case that visual identification is of the weakest kind, hence all possibilities of mistaken identity have to be eliminated.

In support of his argument that possibilities of mistaken identity were not eliminated, Mr. Rwezaula submitted that, the dispute on the issue of a distance from the place where PW1 stayed at the window to a place where the appellant was alleged to have stood, raises doubt. He said, the appellant in his defence said the distance was like that of a size of two football pitches. Apart from that, he further submitted that the sketch plan admitted as Exhibt P.2 is vague on the issue of a place where

PW1 was, to a place where the stall was situated. He further submitted that, the problem of distance raises doubt on the issue as to whether PW1 correctly identified the appellant at the scene of crime or not.

Mr. Rwezaula further contended that PW1's credibility is doubtful as to whether she really knew the appellant since his childhood. He gave the reason that, at the time the appellant gave his evidence at the trial High Court, he was 37 years. Mr. Rwezaula wondered as to how PW1 who said she was familiar with the appellant for 37 years did not know his second name. He claimed that, that is another doubt which should be resolved in favour of the appellant.

Mr. Rwezaula proceeded by claiming that, the evidence of PW1 on the issue of identification was not watertight, because the conditions were not favourable enough to make the appellant be correctly identified. He maintained that PW1's evidence was speculative and the description of the appellant she gave was not reliable. With the presence of those doubts Mr. Rwezaula urged us to resolve them in the appellant's favour.

He further added that, apart from those doubts the prosecution side failed to call principal witnesses to testify in court. He gave the example that the landlord who was mentioned by PW1 and C. 9745 D/Sgt. Nicodemus who drew the Sketch plan (Exhibit P.2), and also Nuru with other persons named by PW1 were not called to testify at the trial court. For not having called those witnesses, Mr. Rwezaula urged us to find that the prosecution evidence created gaps which were not filled, hence need to be decided in favour of the appellant. For those reasons, he finally urged us to allow the appeal.

On his part, Mr. Nchimbi submitted that, he supports the conviction and sentence imposed on the appellant. In his well narrated and focused submission, he started by contending that, the record shows that in this case, the prosecution proved their case beyond reasonable doubt. He added that the trial High Court found PW1 credible on the issue of identification of the appellant at the scene of crime.

Analysing the evidence of identification as adduced by PW1 at the trial court, Mr. Nchimbi submitted that, PW1 knew the appellant before since his childhood as a neighbour. He added that, PW1 knew the appellant even by his name as Chalamanda. As to the general description of the situation at the scene of crime, Mr. Nchimbi submitted that PW1 said she was able to identify the appellant with a help of a three feet tube light illuminating the area with sufficient light. He further submitted that PW1 gave sufficient description of the appellant and the attire he had worn. He said, PW1 testified that she spent around half an hour viewing the appellant, hence he was of the view that PW1 had enough time to properly identify the appellant. He then urged us to find that there was no possibility of a mistaken identity.

His reaction to Mr. Rwezaula's criticism of the sketch plan, Mr. Nchimbi submitted that since at the preliminary hearing stage, the advocate for the appellant did not object to the tendering of the sketch plan, he is now barred from commenting to the contrary. He said that under section 192 (4) of the Criminal

Procedure Act, as the sketch plan was admitted as Exhibit P2 without any objection, it is deemed to have been proved. He further submitted that PW1 was found credible by the trial High Court, hence what she testified on the issue of distance is sufficient according to section 61 of the Evidence Act, and the appellant's testimony did not assail her credibility.

Mr. Nchimbi further proceeded by pointing out that, the conduct of the appellant to run away when he was asked by the two youths mentioned by PW1, gives inference that the appellant knew what went wrong at the scene of crime. Also, he said, when the appellant's prevaricative answers to questions put to him after being stopped at the scene of crime, also corroborated the prosecution's case.

As to a point that the prosecution failed to call essential witnesses, Mr. Nchimbi submitted that according to section 143 of the Evidence Act there is no specific number of witnesses to which the prosecution is required to call so as to prove their case. He added that, it is upon the prosecution to call what they find as

relevant witness to prove their case, and that what matters is the credibility of the witness(es).

All in all, Mr. Nchimbi said, the decision of the High Court cannot be faulted as the evidence of PW1 relied on the issue of identification was coherent and consistent. For that reason, he urged us to dismiss the appeal.

As properly submitted before, the determination of this appeal mainly lies on the issue of identification. As propagated by Mr. Rwezaula, the prosecution side relied on PW1 as their principal witness. PW1 at length narrated in her testimony as to how she was able to sufficiently identify the appellant and his involvement at the scene of crime. The trial court found the witness (PW1) credible, and the judgment relied on that to find the appellant guilty. Mr. Rwezaula claimed that such evidence of PW1 on the issue of identification failed to eliminate all the possibilities of mistaken identity and hence submitted in support of the appeal. It was his contention that the issue of the distance from where PW1 stayed to view the incident and where the appellant stood was not clear enough as the sketch plan was

vague. It was his further view that PW1 was not well known to the appellant as she just named the appellant by his first name only, even if as she said, she knew him since his childhood. Hence the guidelines in **Waziri Amani** (supra) were not met, he maintained.

With respect, we are not prepared to go along with Mr. Rwezaula's submission to the effect that the evidence of identification in this case was insufficient for purposes of grounding the conviction. In other words, as we shall see later on, we have no reason to fault the trial court's decision.

Guided by the numerous decisions of this Court especially in the case of **Raymond Francis v Republic** (1994) TLR 103, the Court held as follows:-

> "it is elementary in a Criminal case where determination depends essentially on identification evidence on conditions favouring a correct identification is of utmost importance....."

Furthermore, the law is settled as pointed out in the case of **Waziri Amani** (supra) that, evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely watertight.

In the instant case, our evaluation of the evidence as a whole especially that of PW1 on the issue of identification has made us to be satisfied that the appellant was properly identified at the scene on the night in question. This is because, the evidence is clear to the effect that:-

1. The appellant was well known to PW1 since his childhood, hence not a stranger to her.
2. The appellant had not covered his face, hence clearly seen by PW1.
3. There was sufficient light from a three feet tube light which enabled PW1 to identify the appellant clearly.

4. The proximity of a distance as to the place where PW1 stood and where the stall was to a place where the appellant stood was about 20 paces. Hence that distance enabled PW1 to identify the appellant who unknowingly exposed himself to the strong three feet tube light within the stall.

5. PW1 spent half an hour to view the appellant which was sufficient enough to identify a person who she knew.

6. She gave a description of the attire worn by the appellant.

Apart from establishing that the appellant was sufficiently identified at the scene of crime, and as submitted by Mr. Nchimbi and we agree with him that, the appellant's conduct of running away after being stopped by the two youths at the crime of scene, gives inference that he knew what went wrong at the scene of crime. Our assessment is that the appellant's conduct strengthened the prosecution's case. If there was any need of

corroboration the appellant's conduct after the commission of the crime and his evasive answers as to where he was coming from on that night provided ample corroboration (see **MASUMBUKO s/o MATATA AND TWO OTHERS V R**. consolidated Criminal Appeal No. 318, 319 & 320 of 2009 (unreported).

Apart from all that, we join hands with the finding of the trial judge on the appellant's contribution to the death of the deceased when he stated at page 56 of the record that:

> "The presence of the accused at the scene of crime in a manner explained by PW1 which have found to be true signifies pre-arranged plan to cause what happened. Under section 23 of the Penal Code, Cap 16:-
>
> > *"when two or more persons form a common intention to prosecute an unlawful purpose in conjuction 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."

The accused is caught up here. Although he simply stood aside while his colleagues were executing their intention, he was in the same degree of offenders."

Considering that the Court is under an obligation to consider the circumstances of each case and make its own determination, we have seen no reason to fault the trial court's finding on the issue of conviction and sentence imposed on the appellant.

For the reasons stated herein above, we are constrained to dismiss the appeal. In the event, the appeal is hereby dismissed in its entirety.

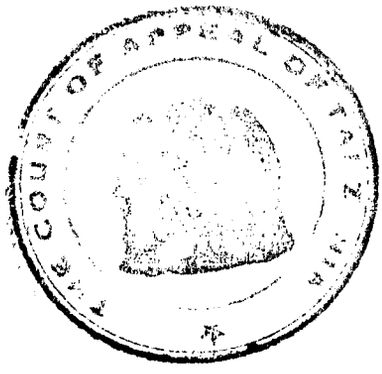
DATE at **IRINGA** this 19th day of March, 2012

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL