IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., LUANDA, J.A, And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 39 OF 2011

1. DAVID FAUSTINE @ GASKOI MUSHI
2. WAKATI SELEMANI @ MTEI } **..... APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Makuru, J.)

Dated 17th day of August, 2010
In
Criminal Sessions Case No. 8 of 2007

JUDGMENT OF THE COURT

27th & November,& 6th December, 2012

MBAROUK, J.A.:

The appellants, David Faustine @ Gaskoi Mushi and Wakati Selemani @ Mtei were convicted of two counts of murder contrary to section 196 of the Penal Code, Cap 16 of the Laws. The High Court (Makuru, J.) sentenced the appellants to a mandatory sentence to suffer death by hanging. Dissatisfied, they have lodged this appeal.

It was alleged by the prosecution at the trial court that on 24th December, 2005 at around 6.30 p.m. PW7 Mussa Ayub

was attending Wilson Magese's shop as a shopkeeper. Six bandits invaded the shop and approached PW7 and demanded money from him. When PW7 tried to resist one of the bandits held a pistol on him. He was then forced to surrender the money he collected on that day. As if that was not enough, the bandits ordered PW7 to take them to the main house and show them Wilson Magese's room. Three of the bandits went with PW7 inside the house compound where they met PW1, Aneth Magese PW2, Grace Magese and one Neema. When PW1 and PW2 saw PW7 being led at gun point, they raised an alarm for help. The bandits then shifted attention to PW1 and PW2 and ordered PW1 to show them her father's room. Having refused, PW1 was shot on her leg.

The bandits forced the rear door to the main house open using a "*panga*" and an axe. Bricks were also used to break the door. PW2 managed to run away and hide in a nearby bar known as "*Upendo*". On her way she passed at the house of Eveline Ngaliwa (the deceased) and saw her standing outside her house. On her way home from "*Upendo bar*" she saw Uponi (Eveline's Son) crying that her mother has been killed.

PW2 was later informed that another person by the name of Michael had been killed after being injured on his head.

PW1 and PW2 testified that they identified the appellants at the scene of crime with the help of electric tube light. They said, the appellants were their neighbours and they frequently used to see them. On the material day, the appellants were not covered and had ample time with the appellants at the scene of crime.

PW6, Yared Mnaya testified that both deceased, Eveline and Michael were killed by the same bandits who invaded Magese's house. Also PW8, Inspector Magige testified to the effect that the killing took place near the house where the armed robbery occurred. He too was of the view that the appellants were responsible for both the armed robbery incident and the death of Evaline and Michael.

In their defence, the appellants denied any involvement concerning the charges against them. They both gave notice under section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 and relied on the defence of *alibi*. As to the 1st

appellant, he admitted to have known Mr. Wilson Magese and members of his family before the incident as his neighbours. However, the 1st appellant stated that he was not in good terms with PW1, because of the Tshs. 10,000/= alleged to have been dished out by the 1st appellant which is said to be a fake one. He was also not in good terms with PW5 Noel Kafola and PW6.

As to his defence of *alibi* the 1st appellant testified to the effect that on the material date and time, he was at his mother's house. He just heard a sound of an explosive.

The 2nd appellant also raised a defence of *alibi* to the effect that he was at his bar by the name of Sunset from 4:00 p.m. to 9:00. p.m. There was a Baptism party of Eveline's (deceased's') grandchild. At around 10:30 p.m. the 2nd appellant claimed to have been informed by one Pilato that at Kisiwani Uzunguni area, some bandits have invaded. Thereafter, next day he was informed that the grandmother of the baptised child was shot by bandits the previous night.

The 2nd appellant further testified that, on 26th December, 2005, he reported at the Police Station after being informed by

Godlove. He was surprised after being told to surrender his belongings and put in the lock up.

In this appeal, the appellants were represented by Mr. Abdon Rwegasira, learned advocate, whereas the respondent Republic was represented by Mr. Prudens Rweyongeza, learned Principal State Attorney.

The following five grounds of appeal were preferred by the appellants, namely:-

1. *That, the learned trial judge erred in law and in fact in basing conviction on the useless identification parade which was also conducted contrary to legal procedures.*
2. *That, the learned trial judge erred in law and fact in basing conviction on P. 5 and 6 which were illegally obtained by the police and objected on admission by the appellants.*
3. *That the learned trial judge erred in law and fact in convicting the appellants based on inconsistent, contradictory and weak testimonies of the prosecution witnesses.*
4. *That the learned trial judge erred in law and in fact by basing conviction on circumstantial evidence which was not water tight.*

5. *That the learned trial judge erred in law and in fact in convicting the appellants when the prosecution had failed to prove the case against the appellants beyond reasonable doubt.*

At the hearing, Mr. Abdon Rwegasira submitted in depth on each of the ground of appeal. As to the 1st ground of appeal he directed his submission to the effect that the Identification Parade was uselessly conducted contrary to legal procedure. He added that it was a useless exercise to conduct an Identification Parade as the appellants were known to the prosecution witnesses before. He supported his submission by citing to us the decisions of this Court in (1) **Kimwaga Athumani and Two Others v. The Republic**; Criminal Appeal No. 24 of 2006 and (2) **Bakari Hussein v. The Republic**; Criminal Appeal No. 159 of 2007, (Both unreported).

Mr. Prudens Rweyongeza without wasting much time conceded to the 1st ground of appeal by submitting that it was not necessary to conduct an Identification Parade as the appellants were known to the prosecution witnesses as their

neighbours. In support of his arguments he cited to us the decision of this Court in the case of **Hassan Juma Kanenyera and Others v. Republic** [1992] TLR 100 at p. 106.

We are of the opinion that, this ground of appeal should not detain us, as this Court has already laid a principle from its various decisions to the effect that if the accused is known to the prosecution witnesses before the incident, it is a useless exercise to conduct an identification parade. For example, in the case of **Kimwaga Athumani and 2 others** (supra) this Court stated as follows:-

> *"**On the issue of the identification parade,** Mr. Kameya differed with the two courts below, **and rightly so in our considered opinion**. He was of the firm view that the **identification parade did nothing to strengthen the prosecution case against all the appellants because it was not necessary as one of the two appellants was, admittedly, well known to both PW1 and PW3 prior to the robbery incident....***
>
> *..... We accordingly hold without demur that **the two courts below erred in relying on the***

> ***useless identification parade*** *in order to establish the guilty of the two appellants and the late Kavitaka.* ***No weight ought to have been given to that evidence*** *at all for the cogent reasons given by the appellants and Mr. Kameya." [Emphasis added].*

So, the identification parade has no evidential value.

After discussing the question of identification parade, we are of the settled view that the main ground in this appeal which can dispose of the appeal revolves around on circumstantial evidence.

Submitting on the ground concerning circumstantial evidence, the learned advocate for the appellants contended that, the trial judge erred in law and in fact by convicting the appellants on circumstantial evidence which was not watertight. He said as there was no one who witnessed the killing of the deceased persons, it was very dangerous to convict the appellants without cogent circumstantial evidence which could have irresistibly led to the conclusion that it was the appellants who killed the deceased persons. He said this bearing in mind that there may be other persons who

murdered the deceased persons. He added, that created doubt which weakens the prosecution's case especially when the circumstantial evidence relied on by the prosecution does not irresistibly lead to a conclusion that it was the appellants who shot Eveline Ngaliwa (deceased) and hit Michael Saimon Gwela (deceased) by an iron bar and caused their death. In support of his submission, he cited to us the decision of the erstwhile East African Court of Appeal in the case of **Samson Daniel v. Republic** (1934) EACA 134 cited in the case of **Republic v. Betram Mapunda And Optatus Tembo** [1999] TLR 1.

Mr. Abdon Rwegasira further contended that even if the record shows that when the incident occurred a pistol was used and some cartridges were left at the scene of crime, but the prosecution failed to produce them at the trial High Court as exhibits and a ballistic report be made. In the absence of such an important report, Mr. Abdon urged us to find that the facts of the case were not cogent enough to prove that it was the appellants and no one else who caused the death of the deceased persons.

On his part, Mr. Prudens Rweyongeza who from the outset did not support the appeal submitted that there was enough circumstantial evidence which led the trial High Court to convict the appellants. He said, PW1 to PW7 sufficiently identified the appellants at the scene of crime as there was sufficient light. Not only that, he added that the appellant were known to the prosecution witnesses.

The learned Principal State Attorney further contended that the record shows no similar incident to have occurred on that material day. He said, the murder incident was directly linked with the incident of armed robbery, because immediately after the bandits left the scene of crime, two people died. For those reasons, Mr. Rweyongeza urged us to find that there was enough circumstantial evidence which led the trial High Court to convict the appellants.

There is no doubt that the trial High Court relied upon circumstantial evidence to reach its conclusion. It is common ground that when a case rests on circumstantial evidence, such evidence must satisfy the following tests:-

1. *That the circumstances from which an inference is sought to be drawn, must be cogently and firmly established.*

2. *That the circumstances taken cumulatively should form a chain to make sure that there is no escape from the conclusion that within all human probability the crime was committed by accused and no one else.*

See the decision of this Court in the case of **Gabriel Simon Mnyele v. The Republic**, Criminal Appeal No. 437 of 2007 (Unreported).

Where circumstantial evidence is to be relied upon in a case, the erstwhile East African Court of Appeal in the case of **Simon Musoke v Republic** [1958] E.A 715 at 718 held as follows:-

> *"....in a case depending conclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

Emphasizing on the same point, the case of **Simon Musoke** (supra) referred to the decision in the case **Teper v. R** (2) [1952] A.C 480 as p. 489 where the Privy Council stated as follows:-

> *"...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*

Having amply examined the tests and principle governing reliance of circumstantial evidence, it is settled that mere suspicion, however strong, is insufficient to ground a conviction. Cogent evidence is required which will irresistibly lead to a conclusion that there was no one else but the accused who did the act.

We agree with the learned advocate for the appellants that the co-existing circumstances earlier shown herein have weakened and broken the chain of events that it were the appellants and no one else who killed the deceased person. It has to be borne in mind that in a criminal case, it is the duty of the prosecution to prove their case beyond reasonable doubt. The prosecution must clearly

connect the facts from which an inference is to be made and those facts must irresistably lead to the guilty of the appellants.

In the instant case, the record shows weak evidence mainly based on mere suspicion that the death of the deceased persons were directly linked with the armed robbery which occurred at the scene of crime. We think, the facts adduced by the prosecution witnesses did not irresistibly lead to the guilt of the appellants. First, there was a possibility that Eveline Ngaliwa (deceased) might have been shot by other person other than the appellants, because the shooting of the deceased was not at the house where the armed robbery occurred. Second, the body of Michael Saimon Gwela (deceased) was found in the bush after the robbery incident which also lead to a possibility of being killed by any other person. We are increasingly of the view that the facts fall short of connecting the appellants with the offence charged.

All in all, we are of the opinion that there are doubts in prosecution's case. For that reason, we are of the opinion that it is safer to give such benefit to the appellants.

In the event, we are constrained to allow the appeal. Hence, we quash the convictions of both the appellants and set them aside as well as the sentences imposed to them by the trial High Court. The appellants are to be released forthwith from prison unless they are lawfully held.

DATED at **DAR ES SALAAM** this 29th day of November, 2012.

M.S.MBAROUK
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

S.MJASIRI
JUSTICE OF APPEAL

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

E.Y.MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL