

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

CRIMINAL APPEAL NO. 80 OF 2011

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

**JUMA SAID CHANYUNGA APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Mtwara)**

(Mipawa, J.)

dated the 26th day of June, 2009

in

Criminal Appeal No 1 of 2009

JUDGMENT OF THE COURT

20th & 27th June, 2012

MBAROUK, J.A.:

In the High Court of Mtwara at Mtwara, the appellant Juma Said Chanyunga 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, hence convicted and sentenced to death by hanging. Aggrieved by the decision of the High Court, the appellant has preferred this appeal.

A brief account of the facts at the trial court were as follows: Fatuma Omari Kwitende (PW1) a resident of Kiwalala testified that she lived with her granddaughter, Amina Mashua (deceased), Hawa Mohamed (who is now dead) and her brother who is blind. She said she knows the appellant as he is the son of her brother named Said Hemedi Chinyunga. She added that, the appellant used to live in Mdobwa Village which is not far from Kiwalala Village where she lived. PW1 further testified that, the appellant used to visit her home for a night and leave the following day.

On the fateful day (24-11-2004), PW1 stated that, the appellant came and asked for food and she gave him. Having eaten the food, they went to sleep, but the appellant slept at the veranda. PW1 slept in one of the rooms, Amina (deceased) and Hawa Mohamed shared the other room. PW1 proceeded by contending that, when they were asleep, she was awoken by voice (aah), she thought it was Amina who was calling her so as to attend a short call (call of nature). PW1 woke up, dressed and lit a kerosene (wick) lamp (kibatari). She then went to the door where she saw the appellant holding something in his hands and walking towards the door leading to outside. Even

though it was night, PW1 said she recognized the appellant with the help of the wick lamp (Kibatari). She further added that, she saw the appellant naked, with a "hirizi" around his arm and waist. She then asked the appellant "Juma umebeba nini?" but he remained silent, and went outside and placed what he was carrying in a round flat basket (ungo) and tray. PW1 said when she went to check, she discovered that it was a human being and recognized the body as that of Amina her granddaughter who was already dead. Her neck was cut through and there was a lot of blood in the tray. Thereafter, PW1 shouted "Juma ameua", and the appellant ran away. Then her husband Abeid Mussa came and others like Ally Naimba and other villagers also arrived. Some people started to look for the appellant and arrested him later in Mtualonga village. Later on the Police came.

Ally Salim Naimba (PW2) mainly testified on how he saw the appellant on the fateful day at the house of PW1. PW2 testified that on 24th November, 2004 at around 8:00 p.m. he went to greet his mother (PW1) and met the appellant cooking food. PW2 then went to his home and slept. At around 1:00 a.m., he heard the voice of

PW1 crying out and saying that "mtoto kachinjwa". He woke up, took his bushknife and ran to the house of PW1 where he met her. PW2 was told by PW1 that the small girl (Amina) was killed by the appellant who ran away.

Omari Athumani Mainginiko (PW5) testified to the effect that on 25th November, 2004 at around 7:00 in the morning, he was at his residence, he heard people talking that a child was killed at Mzee Abeids place (PW1's husband). PW5 asked as to what happened, and he was told that it was the appellant who killed the child. He was shocked as both the appellant and the child (deceased) were his relatives. After a while he saw Mohamed Kawanga (PW4) and the appellant coming to his house. PW4 told PW5 that the appellant was his (PW5) guest, he met him at his (PW5) house. PW5 contended that the appellant's condition was not normal, because when he tried to speak to him but he just looked down. PW5 further stated that the appellant had dirty clothes, but did not investigate whether they were wet or not. PW4 went to the market and came with some youths. PW5 told the youths to arrest the appellant and send him to the Village Executive Officer.

In his defence, the appellant testified that PW1 is his aunt, but he categorically denied to have slept at the house of her aunt on the material day when the incident occurred. He further testified that he slept at his home and denied to have met PW2 at the house of PW1 on 24-11-2004. He also denied to have killed Amina (deceased). He said that, he was arrested at Longa Village after being beaten severely without being told anything. He concluded by contending that all the prosecution witnesses were telling lies.

In this appeal, the appellant was represented by Mr. Michael Ngalo, learned advocate, whereas the respondent/Republic was represented by Mr. Paul Kimweri, learned State Attorney.

Four grounds of appeal were preferred by the appellant, but at the hearing, Mr. Ngalo mainly concentrated only on one ground namely:-

1. That, the learned trial judge erred in law and in fact in finding and holding that the "Kibatari light" was very sufficient and enough in the

circumstances to have enabled PW1 identify the appellant.

Substantiating on the ground of appeal, Mr. Ngalo submitted that PW1 failed to satisfy the favourable conditions of identification stipulated in the case of **Waziri Amani V. Republic** [1980] TLR 250. He contended that PW1 did not state the intensity of light from the "kibatari" wick lamp.

Mr. Ngalo further contended that there is no doubt that Amina (deceased) died, but it is not known with certainty who killed the deceased. He added that, as there is no other witness who saw the appellant at the scene of crime, it is doubtful to come to a conclusion that it was the appellant who committed the offence. He then strongly submitted that, in the absence of a direct evidence that the appellant killed the deceased, it is dangerous to uphold the conviction. Then, Mr. Ngalo urged us to revise the evidence on the issue of identification and find the appellant not guilty.

On his part, Mr. Kimweri from the outset, did not support the appeal for the reason that the appellant was sufficiently identified.

Mr. Kimweri briefly and concisely submitted that **firstly**, the light of the wick lamp was enough to identify the appellant as PW1 knew the appellant before as her close relative. **Secondly**, the appellant used to visit PW1's house. **Thirdly**, the record shows that the appellant slept at PW's house on that day when the offence was committed. **Fourthly**, PW1 named the appellant immediately after the incident occurred. In support of his argument, he cited to us the case of **Thomas Mgira V. The Republic**, Criminal Appeal No. 87 of 2005 (unreported).

Mr. Kimweri proceeded by submitting that even if there was no direct evidence which clearly shows that there is a witness who saw the appellant killing the deceased, but, he said there was enough circumstantial evidence which implicates the appellant to that effect.

Furthermore, Mr. Kimweri added that, the appellant's conduct of carrying a deceased and thereafter run away without giving any explanation to the contrary as PW1 pointed out shows that, it was the appellant and no other person who is closely associated with the killing of the deceased.

As on the issue of the appellant's defence of *alibi*, Mr. Kimweri submitted that **section 194 of the Criminal Procedure Act** was not complied with as the appellant had not given a prior notice to that effect. He added that as the record shows, PW2 saw the appellant at the house PW1 cooking food. Also, PW4 and PW5 saw the appellant next morning not very far from the scene of crime not in a normal condition where his clothes were dirty. Furthermore, Mr. Kimweri contended that, the appellant failed to call his mother to testify that he slept at her house and not at PW1's house on the fateful day. To support his argument, he cited to us the case of **Kesi Bagome Hande and three others V. The Republic**, Criminal Appeal No. 121 of 2003 (unreported).

Finally, Mr. Kimweri urged us to find that there was sufficient evidence adduced by the prosecution to prove the offence against the appellant. For those reasons, he prayed that the conviction and sentence be upheld resulting to the appeal be dismissed.

As properly submitted earlier, we too are of the opinion that the determination of this appeal, mainly lies on the issue of identification. As propagated by both Mr. Ngalo and Mr. Kimweri, the

prosecution side relied on PW1 as their principal witness in proving the issue of identification. PW1 at length narrated in her testimony as to how she was able to identify the appellant and his involvement at the scene of crime. The trial court found PW1 as a credible witness, and its decision relied on her to find the appellant guilty. Mr. Ngalo strongly contested that the evidence adduced by PW1 on the issue of identification failed to eliminate all the possibilities of mistaken identity, hence submitted in support of the appeal. At was his contention that the light of a wick lamp (kibatari) was not enough to enable the appellant be properly identified. He added that the intensity of the light from "Kibatari" was not stated. Hence, urged us to find that the guidelines stipulated in the case of **Waziri Amani** (*supra*) were not met.

With respect, we are not in agreement with Mr. Ngalo's view, this is because as rightly submitted by Mr. Kimweri, PW1 knew the appellant before and they were closely related as family members. Also, on the fateful day, it was sufficiently established by PW1 and PW2 that the appellant slept in the house of PW1. Apart from that, PW1 named the appellant immediately after the incident occurred.

As this Court in the decision of **Marwa Wangiti Mwita and Another V. The Republic**, Criminal Appeal No. 6 of 1995 (unreported), it was stated that:-

"the ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability"

Not only that, the record shows that just next morning after the incident occurred, PW4 and PW5 saw the appellant not very far from the scene of crime, hence even his defence of *alibi* is baseless.

Cumulatively, we think, those stated reasons given above sufficiently prove that the appellant was identified and was at the scene of crime when the killing of the deceased occurred. We have reached to that conclusion after being aware of the fact that the evidence relied is mainly circumstantial. We are of the considered opinion that there are no other co-existing circumstances which would weaken or destroy the inference that there is no other person but appellant as the one who killed the deceased. See, the case of **Teper V. R** [1952] A.C. 480 at page 489 and **Seif Selemani V. Republic**, Criminal Appeal No. 130 of 2005 (unreported).

As to the issue of the appellant's conduct of having been seen carrying the body of the deceased by PW1 and thereafter run away, we are of the view that, such an act is related to his guilty conscience and inconsistent with innocence.

All said and done, we find this appeal with no merit. Hence we dismiss it in its entirety.

DATED at **MTWARA** this day of 25th June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL



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


MBUYA R. M.
DEPUTY REGISTRAR