IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A And MJASIRI J.A.)

CRIMINAL APPEAL NO. 252 OF 2010

KAZIMILI MASHAURI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Rugazia, J.)

dated the 27th day of July, 2010
in

Criminal Sessions Case No. 42 of 2009

.....

JUDGEMENT OF THE COURT

1 & 2 March, 2012
BWANA J.A.:

Initially two persons were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16. The two persons were Kazimili Mashauri, the present appellant, and one Mathias Italange @ Mahona, who was acquitted by the High Court.

It was claimed before the trial court that on or about the 21st day of January, 2008 at Nyangh'olo village, Misungwi District, the accused persons murded one Mariam Emanuel, a girl aged five years who was an albino.

The appellant was convicted of the offence and sentenced to suffer death by hanging. He has now appealed against both conviction and sentence. Before us the appellant was represented by Mr. Silveri Chikwizile Byabusha, learned counsel, and the respondent Republic was represented by Mr. Ayoub Mwenda, learned Principal State Attorney, assisted by Ms Judith Nyaki, learned State Attorney.

The prosecution case was centred on the evidence of eight (8) prosecution witnesses who, in summary, testified before the trial court as follows. The deceased was one of the children of Flora Mabula, PW1. PW1 used to sell millet porridge at a trading centre within their village. On the fateful day, that is, on the 20th day of January, 2008 while at her business, the appellant went there to deliver tobacco to one Kundi Rozalia, PW4. PW1's children were also at the place. They included Mhindi Emmanuel, PW2. After delivering the tobacco, the appellant is said to have called the children aside and asked them about their sleeping arrangements at their home. Innocently as it would appear, they told him that they slept in their grandfather's house. We use the word "innocently" because it did not

strike them nor their mother as to the motive behind that question by the appellant. This is particularly so because the said appellant was a distant relative, whom they knew for sometime. He lived in the same village.

Mariam Emmanuel was murdered the following night. According to PW2, her sister and who witnessed the killing, three bandits stormed into the bedroom where the children were sleeping. Out of the three assailants, PW2 could identify the appellant. They had a torch, a cooking pot and were armed with a machete and knife. PW2 could identify the appellant by the light from the torch.

It was PW2's evidence that the appellant is the one who slaughtered the deceased while one of them held the torch and the third one was busy collecting blood using the pot. After the death of Mariam, her two legs were chopped off as well as part of the tongue was cut and the killers left. An alarm was raised and people gathered around. The following morning, the first appellant was arrested and subsequently jointly charged with Mathias Italange.

The appellant denied killing Mariam. He however admitted to have gone to the trading centre to deliver tobacco to PW4 that afternoon before the killing.

The trial judge arrived at his decision basing it on identification – whether the appellant was positively identified by PW2 using torch light. That evidence also forms the basis of the appellant's grounds of appeal that-

1. That conditions at the commission of the offence were unfavourable to a clear identification of the appellant.
2. That the trial judge erred in convicting the appellant on the evidence of a single identifying witness in the light of contradictory and insufficient circumstantial evidence.
3. That the trial judge erred in not testing the prosecution evidence against that of the appellant before convicting the appellant.

Both Mr. Byabusha and Mr. Mwenda, learned counsel and learned Principal State Attorney, respectively, addressed us on the three issues above. We are, however, convinced that the key issues in this appeal are

one, whether the evidence of the sole witness, PW2, could be relied upon to enter a conviction against the appellant; and **two,** whether there was sufficient light to enable PW2 identify the appellant.

As rightly put by the trial judge, this case rested squarely on the evidence of a single identifying witness. It happened also that the said single witness was a child of tender years. The trial court conducted a *voire dire* examination of that child and was satisfied that she was sufficiently intelligent and "appreciates" an oath. She was then sworn, implying that her evidence could be considered without the need for corroboration. That is in conformity with the provisions of section 127 (2) of the **Evidence Act** as stated by the Court in the case of **Shozi Andrew v Republic** (1987) TLR 68 that-

> *"in terms of section 127(2) of the Evidence Act, sworn testimony of a child of tender years does not need corroboration. It can be treated as any other sworn testimony and it could form a basis of a conviction".*

It could form a basis for conviction, in our view and as provided under the same Evidence Act, where such witness is the only one. It is

now settled, as stated by the Court in **Yohanis Msigwa v R** (1990) TLR 148, that-

> *"as provided under section 143 of the Evidence Act, 1967, no particular number of witness is required for proof of any fact.* ***What is important is the witnesses' opportunity to see what he/she claimed to have seen and his/her credibility."*** *(Emphasis Provided).*

The trial judge considered the credibility of PW2 and came to the conclusion that she was a credible witness. We have no reason to fault him on this finding of fact. Mr. Byabusha attempted to convince us that the case relied on circumstantial evidence. With due respect, we differ. PW2 was an eye witness to the killing.

The other issue is whether there was sufficient light for identification, to meet the guidelines set by the **Waziri Amani v Republic** (1980) TLR 250 case. Mr. Byabusha thought torch light was not sufficient to enable PW2 adequately identify the appellant and eliminate all possibilities of mistaken identity. It is important to restate here that the "guidelines" set in the Waziri Amani case are just **guidelines**, as the exact meaning of the

word provides. They are not principles of law that have to be followed without expressing departing views. Further, the said guidelines are not conclusive/exhaustive. The circumstances of each case therefore, have to be borne in mind. Relevant to the present case are the following guidelines-

1. Whether the witness knew the accused person before the incident and if possible show for how long this has been.
2. The amount of time the witness had the accused under observation.
3. The distance between the two persons during the commission of the offence.
4. The kind and intensity of light at the scene.
5. All factors on identification considered, were there any material impediments or discrepancies affecting the correct identification of the accused person by the witness.

In the case at hand, it is evident that PW2 knew the appellant for sometime before this incident. There is evidence that in fact the appellant was a distant relative of the deceased's family and they lived in the same village. It is against this background that the children may have spoken

freely and without suspicion to the appellant and disclosed their sleeping arrangements.

It is also on record that the brutal murder of Mariam took a considerable time. This may be supported by the evidence that she was slaughtered, her blood allowed to ooze out from her body into the cooking pot the killers had and subsequently chopping off her legs. During all this time PW2 observed the appellant, described as the one who slaughtered Mariam and eventually chopped off her legs.

The brutal murder took place in a room where the children were asleep. Going by standards of houses in villages, it was a small room. Therefore all the people therein should have been close to one other.

It is in evidence that one of the bandits was holding an illuminated torch, thus allowing the appellant to slaughter Mariam. That holding of the torch enabled PW2 to clearly witness that horrible, brutal murder of her young sister. Given the size of the room as observed above, we are of the considered view that the intensity of light was adequate in the circumstances of this case.

All the above considered, we are satisfied that the appellant was sufficiently identified by PW2 to the exclusion of any mistaken identity. The evidence of PW2 as to the positive identification of the appellant was absolutely watertight. He is one of the three people who entered the children's bedroom and brutally slaughtered Mariam Emmanuel, an alibino child aged five years, then. We therefore, see no merit in the appellant's grounds of appeal. We dismiss the appeal in its entirety.

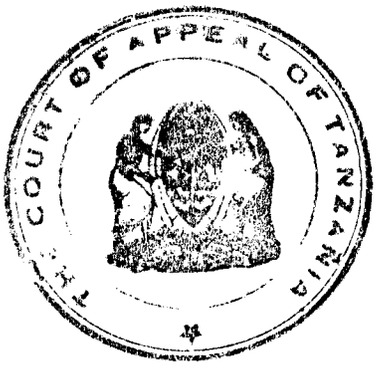
DATED at **MWANZA** this 2nd day of March, 2012.

J. H. MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J. S. Mgetta
DEPUTY REGISTRAR
COURT OF APPEAL