

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

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

CRIMINAL APPEAL NO. 49 OF 2013

OSCAR LWELAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of
Tanzania at Sumbawanga)**

(Mmilla, J.)

dated the 25th day of July, 2010

in

Criminal Sessions Case No. 7 of 2007

JUDGMENT OF THE COURT

19th & 21st JUNE, 2013

MJASIRI, J.A.:-

In the High Court of Tanzania at Sumbawanga (Mmilla, J), the appellant Oscar Lwela was convicted of the offence of murder and was sentenced to the statutory death sentence. Aggrieved by the decision of the High Court the appellant has preferred his appeal to this Court.

At the hearing of the appeal the appellant was represented by Mr. Justinian Mushokorwa, learned advocate and the respondent Republic had the services of Ms Catherine Gwaltu, learned State Attorney.

The appellant lodged before this Court a two point memorandum of appeal which is reproduced as under.

- (a) The trial Court failed to adequately consider the inherent dangers of visual identification in horrifying conditions.*
- (b) The defence case was not adequately considered.*

The circumstances which led to the conviction of the appellant are as follows:- It was alleged by the prosecution that on December 4, 2005 at around at 11:00 p.m. at Ilemba Village within Sumbawanga District in Rukwa Region, the appellant murdered Ramadhani s/o Mohamed. On the material date the deceased who was accompanied by his friend, Idi Mwambulukutu (PW1) came all the way to Ilemba Village from Solola Village to have a drink and to visit their girlfriends, Veronica Mbasha (PW6) and Lydia Mwamwile, who were working as bar-maids at a club owned by

one focus. At around 11:00 hours, the deceased and his friend PW1 left the bar in the company of their girlfriends. The appellant was also drinking in the same bar. After PW1 and his friend the deceased left the club, the appellant also left and trailed behind the two couples. PW1 and his girlfriend PW 6 walked behind the deceased and his girlfriend. The appellant caught up with them and asked PW6 to call deceased's girlfriend. When she refused to do so, the appellant walked towards her. He attacked the deceased. The deceased called out for help from PW1. PW1 ran towards his friend and left PW6 behind. Upon reaching the deceased, he was assaulted by the appellant on the arm and head. The appellant used a sharp instrument. He ran away. In the course of the scuffle the appellant stabbed the deceased by pushing a knife between his nose and mouth. The force used was such that the knife remained at the position until the doctor pulled it out. The appellant denied any involvement with the death of the deceased. He raised the defence of alibi, that he never went to Ilemba village on the fateful night and that he was not present at the bar.

Mr. Mushokorwa contended that the appellant was not properly identified. The incident occurred at night and it was not properly established by the prosecution that the circumstances surrounding the identification of the appellant were conducive to a correct identification.

Mr. Mushokorwa submitted that the High Court relied on the evidence of PW1, PW6, and the statement of Lydia Mwamwile which was admitted in the High Court as Exhibit P.5. The three witnesses above gave a different account as to what transpired on the fateful night. Their testimony was full of discrepancies, contradictions and inconsistencies, and the trial Judge should have doubted their credibility.

He stated that contrary to the findings of the trial Judge, the contradictions were major which went to the root of the matter. In relation to the evidence of PW1 and PW6, he submitted that whereas PW1 testified that he witnessed the appellant stabbing the deceased as there was electric light which was powered by a generator from the club owned by Focus, which was situated close to the scene. PW6 testified that there was no electric light, but it was not very dark and she was accustomed to

seeing in the dark (sic!) and could therefore identify the appellant. She was sure that it was the appellant who killed the deceased. Lydia on the other hand stated in her statement (Exhibit P.5) that she witnessed the appellant stabbing the deceased as she was present at the scene while PW1 and PW 6 testified that she was not present at the scene. The other discrepancy is that while PW6 testified that the appellant was at the club that night, PW1 did not mention the presence of the appellant.

Mr. Mushokorwa strongly argued that none of the witnesses should have been believed by the trial Judge, as there is a great possibility that all the three witnesses were lying. He challenged the finding of the trial Judge that the contradictions were minor. He stated that the conditions set by **Waziri Amani v Republic** (1980) TLR 250 were not met. He asked the Court to quash the decision of the High Court and set aside the sentence.

Ms. Catherine Gwalta on her part did not support the conviction of the appellant. She submitted that in reviewing the record she was compelled to do so as the main witnesses relied upon by the prosecution

were not credible witnesses, that is PW1, PW6, and Lydia's statement (Exhibit P5). She argued that the inconsistencies and contradictions in the evidence of the three witnesses were major and went to the root of the matter. She also submitted that though the three prosecution witnesses claimed to have reported the incident to the Village Authorities, no village officer was called as a witness. All the three prosecution witnesses admitted to have been arrested by the Village Authorities as suspects.

The major issue for consideration is whether the three witnesses namely PW1, PW6 and Lydia were credible.

It is evident from the evidence on record that there were major contradictions and inconsistencies in the evidence of the above three witnesses. We are of the considered view that these contradictions and inconsistencies were major and went to the root of the matter. See **Mohamed Said Matula v . Republic** 1995 TLR 1 and **John Gilikola v Republic**, Criminal Appeal No. 31 of 1999 CAT (unreported).

We are of the considered view that the inconsistencies and contradictions of the three prosecution witnesses are so fundamental that they left a lot of questions unanswered. On the issue of light PW6 categorically testified that there was no electricity, it was dark, while PW1 said there was electricity. This aspect alone is enough to discredit the evidence of these two witnesses. Who is then to be believed? Should it be PW1 or PW6. If there was no light how was the appellant identified? As if this was not enough, Lydia stated that she witnessed the appellant stabbing the deceased. While PW1 and PW6 testified that Lydia was not at the scene and was left behind. PW1 also testified that he found Lydia at the office of the Hamlet chairman when he went to report the incident. The village authorities were never called to testify. We are inclined to agree with Counsel that the evidence of PW1, PW2 and that of Lydia cannot be relied upon.

All the three witnesses were arrested as prime suspects. This means they are accomplices whose evidence needed corroboration. The question is, are PW1, PW6 and Lydia, credible witnesses? Can the Court rely on their testimony?

We are alive to the fact that an appellate court can only interfere with a finding of fact by a trial court where there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice.

In **Omari Ahmed v. Republic** 1983 TLR 52, it was held that the trial court's finding as to credibility of a witness is usually binding on an appeal court unless the circumstances on an appeal court on the record calls for – re assessment of credibility. See also **Dickson Elia Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 CAT (unreported).

As this is a first appeal, it is in the form of a re-hearing. The appellant is therefore legally entitled to have our own consideration and views of the entire evidence. We can review the evidence to determine whether the conclusion of the trial court should stand.

In the case of **OKENO – VS – REPUBLIC**_[1972] E.A. L.R.33, it was held inter alia, that:

"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

In Criminal Appeal No.252 of 2005, **Alex Kapinga and 3 others v The Republic** CAT (unreported), it was stated as follows:-

"It is trite law that on a first appeal, the Superior Court has a duty to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld. In so doing however, allowance must be made for the fact that the trial court had the advantage of hearing and seeing witnesses."

See **Peters v Sunday Post** [1958] EA 424 .

In the case of **Shabani Daudi v Republic** Criminal Appeal No. 28 of 2000 (unreported) the Court stated:-

*"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: **One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.** Our concern here is the coherence of the evidence of PW1."*

(Emphasis added)

In the case of **Maloda William and Mahagila Mlimi v R**, Criminal appeal No. 256 of 2006 CAT (unreported) the Court stated thus:-

"... the credibility of of each witness in a case ought to be dispassionately assessed by testing it not only against the whole of his or her own evidence but more compellingly against the entire evidence on record be it testimonial or documentary. It is unjudicial and unacceptable to pick out the evidence of a particular witness or witnesses and accept it as true without first testing its accuracy in the manner described above and use it as a yardstick for disbelieving the rest of the evidence."

In assessing a witness's credibility, his or her evidence must be looked at its entirety, to look for inconsistencies, contradictions and / or implausibility or if it is entirely consistent with the rest of the evidence on record. See **Shabani Daudi** (supra).

After carefully reviewing and analyzing the evidence on record, the judgment of the High Court and the submissions made by Counsel, we have found a compelling need to interfere with the finding of the trial court.

In this case, the trial Judge did not test the accuracy of the evidence of PW1 against that of PW6 and the statement made by Lydia in reaching his conclusion. The inconsistencies, contradictions or discrepancy and any such inconsistencies as there were, were material and capable of affecting the totality of the incriminating evidence against the appellant.

The issue arising is whether or not the evidence of PW1, PW6, and that of Lydia can be relied upon, and whether the appellant was sufficiently identified. The issue of identification is very crucial in this case. We need to satisfy ourselves whether the conditions were favourable for adequate and correct identification. See **Saidi Chally Scania v Republic, Criminal** Appeal No. 69 of 2005 CAT (unreported).

We are fully aware that the evidence of visual identification is one of the weakest kind and should be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely water tight. The identification of the appellant was not clear given the sequence of events and the source of light. The conditions laid down in **Waziri Amani v Republic** 1980 TLR 250 CAT,

were not met. See also **Anthony Kigodi v Republic**, Criminal Appeal No. 94 of 2005 CAT (unreported) and **Raymond Francis v Republic** 1994 TLR 100.

In criminal cases the burden of proof lies on the prosecution to prove the case against the accused beyond reasonable doubt. The burden never shifts. See **Woolmington v Director of Public Prosecutions** (1935) AC 462. We are satisfied that the prosecution has not established the standards required under the law that it was the appellant who killed the deceased.

Given the fact that the credibility of PW1, PW6 and Lydia is questionable, their evidence cannot be relied upon.

In the result, we allow the appeal, quash the conviction and set aside the death sentence. The appellant is to be set free forthwith unless otherwise lawfully held.

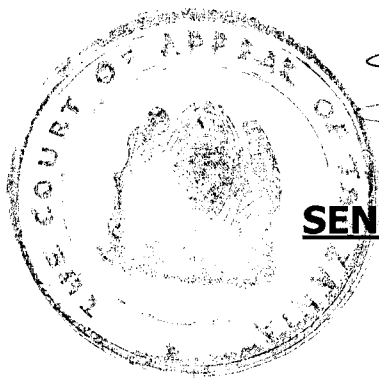
DATED at **MBEYA** this 20th day of June, 2013.

E.M.K. RUTAKANGWA
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.



P. W. BAMPIKYA

SENIOR DEPUTY REGISTRAR
COURT OF APPEAL