IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 165 OF 2012

ESPILIUS GOVERNMENT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment/Conviction of the High Court of Tanzania at Mwanza

(Mruma, J.)

dated the 13th day of March, 2012

in

Criminal Session Case No. 133 of 2005

.....

JUDGMENT OF THE COURT

22nd Nov. & 3rd Dec. 2013

MUSSA, J.A.:

The appellant stood arraigned in the High Court at Mwanza for six counts of Murder, contrary to section 196 of the Penal Code. The information laid in the respective counts alleged that the deceased persons were, namely, Agness Kamuhanda, Bonevantura Kwitega, Charles Katisho, Daniel Thomas, George Mashimba and Ngelela Kalamu. We shall, in due course, refer to them, respectively, as the first to sixth deceased persons. The appellant refuted the accusation but at the conclusion of the trial, he was convicted for the first two counts with respect to the murder of the first and second deceased persons. Upon conviction, the High Court (Mruma, J), handed down the mandatory sentence of death by hanging. The appellant, presently, seeks to impugn both the conviction and sentence. To facilitate a quick appreciation of

the appellant's complaint, it is necessary to recapitulate the factual background giving rise to his arrest, arraignment and subsequent conviction.

From a total of four prosecution witnesses, it was common ground that on the 31st May, 2004 a commuter bus christened Nyehunge Express was on its routine trip from Rwamgasa village to Mwanza city. The journey commenced around 6:30 a.m. or so, with more than fifty passengers aboard. Evidence was to the effect that all went well up until when the bus was cruising down Katangaro village where there is a valley, bridge and a forest of eucalyptus trees. At this site, the bus was abruptly shot at by a man who was standing in front and wielding a gun. As will shortly come to light, this man was one among four other bandits who were set upon perpetrating a highway robbery. After the shooting and, apparently, apprehensive of an imminent danger, the bus driver halted the vehicle, whereupon he unceremoniously abandoned the steering wheel and ran for refuge at the rear of the bus. As to what transpired next, was elaborately, narrated during the trial by one of the passengers, namely, No. F. 4145 Detective Constable Chalula (PW1):-

> *The person who was shooting towards the bus moved to a side and fired one shot which killed a lady who was seated just beside me. I knew that lady she was called Agness Robert. She was my neighbour at Buckreef area. Her husband was a guard at Buckreef mines. She was working with Red cross – Bugando Mwanza. One of the bandits went to stop the engine and another came to the bus cabin. He ordered all passengers to get out of the bus. We got out, outside we found three other bandits. But*

while still in bus the bandit who was shooting moved behind the bus and fired one shot which hit one passenger Mr. Kwitega in the head. He died instantly. I knew him he was a teacher at Nyamsebei Primary school. That person continued to shoot randomly.

The detective constable who was stationed at Rwamgasa Police Post, was on his way to Geita. As it turned out, the constable was not the only witness to the horrific bus attack which led to the demise of two fellow passengers. The attack was similarly witnessed and testified to by William Elikana Msongolo (PW2), incidentally, the bus conductor of the ill – fated Nyehunge Express. To a great extent, his details on the attack dovetailed with the constable's narrative. As regards what followed after the passengers were commanded to disembark from the bus, both Constable Chalula and William told the trial court that all passengers were ordered to lie down. Then, each was thoroughly searched in the course of which some were dispossessed of their monies as well as a variety of valuables. Some of the passengers, including William, were discourteously stripped down to nakedness. More particularly, constable Chalula had a sum of shs 180,000/= and a mobile phone grabbed away from his pockets. In his estimation, the roadside standoff lasted for 45 minutes or, perhaps, close to and hour. The ordeal actually ended after one of the bandits shouted an alarm to others that they should leave. The bandits then ran away, on foot, in the direction of Kisesa village.

Futher evidence was to the effect that the bandits were not masked and, in his recollection, the constable made a positive identification claim on some of the alleged robbers:-

During the incident I managed to identify two persons. I identified them because I knew them before. One of them was working as tractor driver at Buckreef mines. The mine is owned by Cristopher Kabeho. He is called Espilus s/o Government. The one identified him (sic) by face but I didn't know his name. He was working as a technician in that mine.

For his part, William did not advance any identification claim in his evidence in – chief but, in the course of the assessors questioning, the witness frantically made a dock identification, implicating the appellant as being the person who entered the bus with a machete. He conceded, though, that it was his first time seeing the appellant.

A little while later, after the departure of the bandits, a motor vehicle owned by Buckreef Mines arrived at the scene. On the vehicle were security guards, presumably, deployed to the scene to pursue the bandits or to rescue the victims. Also arriving at the scene, was Corporal Leonard, the Officer Commanding Buckreef Police Station. Whilst William remained in the bus, Constable Chalula embarked aboard the Buckreeef van which drove towards Katoro Village where they were joined by a police van with policemen from Geita Central Police Station. Thus, the occupants of the two vans as well as the villagers of the locality, jointly set upon in search of the highway robbers. As the search party picked courage to face the challenge, it was hinted to them that four more persons had been shot to death by the robbers. It was later revealed that those killed were the third to sixth deceased persons who were, respectively, gunned down at Kasesa, Kadunda and Mwendakulima villages. Unfortunately, there were no details as to exactly how these villagers met their demise.

Soon after, according to the constable, the search party located the robbers on a rice paddy at Mwendakulima village. At the rice field, there was an exchange of fire from either side, in the course of which, the bandit who had a gun was hit by an arrow, presumably, thrown at him by a villager. The injured bandit, momentarily, handed over the gun to the appellant and, somehow, the former slipped away from the scene. The appellant, who was described by the constable as a novice at guns, was arrested as he fumbled in the process of replacing a magazine. Speaking of this particular detail, it is worth reflecting from the evidence that, aside from the constable, there was another witness who claimed that the appellant was arrested whilst holding a Sub-Machine Gun (SMG). The witness was none other than Jeremiah Muswanzali @ Zacharia (PW3), the Mwendakulima Village Exercutive Officer (VEO), who had also joined the searching party. Not insignificantly, though, the witness had not known the appellant prior to the incident. As regards the remaining three bandits, the evidence of both witnesses was to the effect that all were viciously attacked by an angry mob of villagers and killed there and then.

Later in the afternoon of the occurrence, Dr. Leornard Bathelomew Mgema (PW4) conducted postmortem examinations on the bodies of the six deceased persons. Incidentally, in his final findings, the respective deaths of each of the six deceased persons was secondary to bullet penetrating wounds. More particularly, the medical officer determined that Agness Kamuhunda, the victim of the first shot, succumbed to severe haemorrhage which came secondary to a bullet penetrating wound through the right lung. Likewise, Boneventura Kwitega, the other

victim of the bus shooting, died of severe haemorrhage as well as brain damage similarly caused by a penetrating bullet wound on the skull. Having produced the autopsy reports respecting the six deceased persons, the prosecution drape was drawn closed. Ironically though, the SMG which was allegedly seized from the appellant's hands, was not amongst the prosecution exhibits.

In his sworn defence, the appellant told the trial court that he is a resident of Kakonko Division in Kibondo District and operates for gain through buying and selling rice. He normally bought rice from Kahama or Geita and sold it in Kibondo or Kasulu. Thus, on the 30th May, 2004 he arrived at Mwendakulima village on a business trip. The following day, with effect from 10.00 a.m., he was at the village rice fields negotiating prices with peasants who were harvesting their farms. Whilst there, the appellant heard an array of bullet shots coming toward where they were. Those present ran astray, as it were, taking random hideouts. The appellant hid at a shrub where he was joined by three to four persons, who were unknown to him. Soon after, armed policemen arrived and began shooting toward their hiding place. The police were in the company of armed villagers. Seeing the police, the appellant emerged from the hideout, hoping to be rescued. On the contrary, the villagers greeted him with scorn and hostility, as he put it, on account of his being a stranger. The police intervened, but the appellant was, nonetheless, arrested and later implicated for accusation giving rise to this appeal.

In his further testimony, the appellant denied any involvement in the highway robbery. He categorically refuted the evidence of Chalula

and William to the effect that he was as amongst the bus attackers. He similarly discounted the prosecution claim that he was arrested whilst holding a gun. More specifically, he insisted that he does not know Chaula; that he had never lived at Rwamgasa Village; that he had never worked at Buckreef Mine; that he does not know how to drive a tractor and; that he does not know Christoper Kabeho, let alone, being employed by him. At the conclusion of his testimony, the appellant produced a PF 3 issued on him the 4th June, 2004 which was admitted, without objection, as exhibit D2.

As already hinted, on the whole of the evidence, the appellant was convicted for the first two counts in a verdict which he, presently, seeks to impugn. From the adduced evidence, it was, indeed, beyond question that the six alleged deceased persons are, indeed, dead and that their deaths were attributed to severe haemorrhagie shocks secondary to penetrating bullet wounds on the respective parts of their bodies. To this end, it cannot be doubted as well that the six deceased persons met their demise violently. Nonetheless, whilst there was evidence hinting on the circumstances leading to the demise of the first two deceased persons, not a single witness was called to explain how the rest of the deceased persons were shot to death. Thus, the issue before the trial court, as well as before us, was whether or not the appellant was sufficiently implicated for the deaths of the first two deceased persons.

At the hearing before us, the appellant had the services of Mr. Serapion Kahangwa, learned advocate. The respondent Republic was represented by Mr. David Kakwaya, learned Senior State Attorney who, incidentally, declined to support the conviction and sentence. As it turns

out, in the memorandum of appeal, learned counsel for the appellant seeks to contest the conviction and sentence upon a sole ground, namely:-

> *That the evidence adduced by the prosecution was not sufficient in law for the Judge to ground a conviction of murder.*

Expounding the point of grievance, Mr. Kahangwa, submitted that the basis of the appellant conviction was the trial court's finding that Constable Chalula (PW1), William (PW3) and Jeremiah (PW3) were credible witnesses, particularly, on the question of identification of the appellant, either during the bus attack or at the scene of his arrest. Beginning with the constable, learned counsel criticized the trial Judge for non – directing himself on the fact that the witness self – contradicted himself on a number of material aspects of the case. For instance, he said, the constable initially implicated the appellant by name but in the course of cross examination, the same witness conceded that he did not mention the appellant's name in his previous police statement. Counsel also referred to the constables' claim that the appellant used to work and reside at Rwamgasa village which he later disclaimed by saying that the appellant was a refugee from Mtendele camp at Kibondo. Learned counsel, similarly, criticized the constable for not including in his police statement, his testimonial detail that the appellant was found in possession of gun at the time of his arrest. In sum, Mr. Kahangwa urged that it was not safe for the trial court to convict on the basis of such a self – contradicting witness. Coming to the implicating testimonies by William (PW2) and Jeremiah (PW3), learned counsel contended that theirs were, essentially, evidence of a dock identification without more and, for that matter, worthless testimonies.

For his part, Mr. Kakwaya entirely subscribed to the sentiments of his friend and urged, generally, that the evidence of identification was far from being satisfactory. In addition, the learned State Attorney faulted the prosecution for not producing the gun which was allegedly seized from the appellant.

Having re – appraised the evidence in the light of the submissions of both counsel, we are of the respectful view that the evidence of constable Chalula was, indeed, fraught by self – contradictions on material aspects of the case as highlighted by counsel for the appellant. In this regard, we are particularly disturbed by the constable's concession that he did not actually implicate the appellant at the earliest opportunity, as and when he recorded his police statement. Undoubtedly, the non-disclosure travelled to the root of his credibility and ultimately undermined his claim that he identified the appellant. In this respect, this Court provided some guidance in the unreported Criminal Appeal No. 220 of 1994 - **Jaribu Abdallah v. Republic:-**

> *In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruth evidence. The ability of the witness to name the offender at the earliest possible moment is in our view, are assuring though not a decisive factor.*

The latter part of the foregoing passage was adopted and somehow elaborated in the subsequent unreported Criminal Appeal No. 6 of 1995 – **Marwa Wangiti Mwita v Republic:-**

The ability of a witness to name a suspect at the earliest opportunity is an all – important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry.

Accordingly, we are of the view that, in the situation at hand, the failure by the constable to implicate the appellant in his police statement is indicative of uncertainty about the truth of his subsequent identification claim. This is particularly so, in the light of the witnesses' positive assertion that he previously knew the appellant by name. In similar vein, we are unable to comprehend how and why the witness forgot to mention, in his police statement, such a material particular as his testimonial claim that the appellant was arrested in possession of a gun. Furthermore, we are unable to sychronise the constable's claim that the appellant used to work and reside at Rwamgasa with his subsequent concession that the appellant was a refugee resident of Mtendele camp in Kibondo. It is noteworthy that the latter detail augurs well with the appellant address which was reflected on the PF3 (exhibit D2).

As we now turn to a consideration of the identification claims by William and, Jeremiah, we hasten to remind that the appellant was not previously known to both witnesses. And neither were their implication of the appellant in court preceded by an identification parade. To say the least, as correctly formulated by Mr. Kahangwa, their's was a dock identification of the appellant without more. We wish to reiterate, in this regard, that it is, presently, well established that dock identification is valueless unless if it is preceded and corroborated by a properly conducted identification parade. (See the unreported Criminal Appeal No.

139 of 2005 **Francis Majaliwa Deus and Others v Republic)**. In the case under our consideration, the identification claims by William and Jeremiah were not preceded by any identification parade, let alone, a properly conducted one.

Having discounted the identification claims by constable Chalula, William and Jeremiah, nothing of substance remains to sustain the conviction of the appellant. However, before concluding this judgment, we wish to make an observation, in postscript, with regard to the manner this matter was handled. We need hardly say that this was, indeed, a serious case from which, as already hinted, six lives were terminated at the expense of banditry. From the factual setting, it seems the perpetrators were bent on whatever eventuality, hence the indiscriminate terminations. Our concern here is in the fact that, quite unfortunately, this matter was not accorded its deserving treatment at the levels of investigations and prosecution. The case was poorly handled at all levels with the result that some crucial evidence was either indifferently trampled down or withheld for unexplained cause. Mr. Kakwaya conceded that there was such mishandling and pointed out that apart from the non – production of the gun, no attempt was made at the investigation level, to collect the used cartridges for comparison with the retrieved gun. We also note that the investigations officer as well as a score of persons from the searching party were not called into testimony. We hope that in future, such serious happenings as the one at hand would be accorded deserving treatment.

As already intimated, on account of suspect and insufficient evidence of identification, the conviction cannot be sustained. Accordingly, we allow the appeal, quash the conviction and set aside the sentence of the trial court. The appellant is to be released forthwith unless otherwise lawfully detained in prison custody.

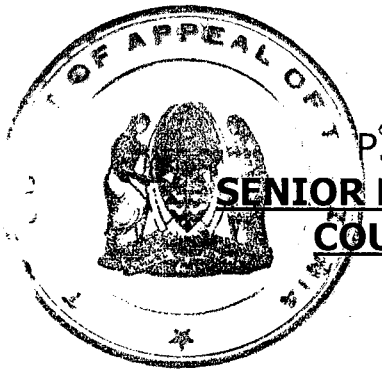
DATED at MWANZA the 2nd day of December, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



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