IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 56 OF 2013

1. JOHN BALAGOMWA
2. HAKIZIMANA ZEBEDAYO } **..... APPELLANTS**
3. DEO MHIDINI

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khaday, J.)

Dated the 3rd day of August, 2010
in
Criminal Sessions Case No. 25 of 2009

JUDGMENT OF THE COURT

21st & 24th June, 2013

RUTAKANGWA, J.A.:

The three appellants appeared before the High Court of Tanzania sitting at Sumbawanga (the trial court) to answer two charges of murdering Rahabu d/o Nyandwi (1st count) and Elias s/o Sabaga @ Munuko (2nd count). The two deceased were wife and husband and resided at Ivungwe village, Katumba Refugees camp.

The appellants denied the charges. After a full trial, which involved six witnesses for the prosecution and five defence witnesses, the trial court (Khaday, J.) was satisfied of the guilt of the appellants and convicted them as charged. The death sentence being the only mandatory one, was imposed on them. Aggrieved by the conviction and sentence, they have jointly lodged this appeal protesting their innocence.

In this appeal, the appellants are fended for by Mr. Victor Mkumbe, learned advocate. The memorandum of appeal cites two grounds of complaint against the decision of the trial court. These are:-

> *"1. That the learned trial judge erred in law and fact in holding that the appellants had been sufficiently identified at the scene of the crime.*
>
> *2. That the learned trial judge erred in law and fact in rejecting the appellants defence of alibi."*

The respondent Republic, which supported the appeal, was represented before us by Ms. Catherine Gwaltu and Mr. Basilius Namkambe, learned State Attorneys.

Before canvassing the grounds of appeal, we have found it helpful to give a brief summary of what led to the prosecution and eventual conviction of the appellants as charged.

It was the prosecution's case that on 19th September, 2007 at about 9.00 p.m., three men called at the homestead of the deceased Elias. PW1 Jeremia Elias, the son of the two deceased, was allegedly the first to see them. The trio, who were armed with a gun and two pangas, told him that they were in need of Elias. As they were talking, Elias got out of the house. PW1 Jeremia, who told the trial court that the three men were the appellants, went on to claim that the 3rd appellant (Deo) got hold of the deceased Elias, while the 1st appellant (John), who was their labourer, demanded to be given money. There was a scuffle as Elias tried to free himself. PW1 Jeremia tried unsuccessfully to intervene but he was pulled by the 2nd appellant (Hakizimana) who is the son of Elias's sister, as Deo threatened to cut him with a panga. In the process, PW1 Jeremia claimed, Hakizimana cut the deceased Elias on the head with a panga. Fearing to be shot, PW1 Jeremia allegedly fled to a nearby village of Mtambo. He returned home the following morning, after spending the night in bushes, to learn

that his mother had been murdered and his father had been critically injured and hospitalised. According to PW1 Jeremia while Elias was being attacked, the deceased Rahab was outside the house.

After PW1 Jeremia had taken to flight, his elder brother, PW2 Shamba Elias arrived at Elias's homestead. What attracted him to the scene of the crime, he claimed, were sounds of gunshots he had heard. There he found bandits,one of them being the 3rd appellant (Deo) who at that time was being battered by the deceased Rahab with a club. On being threatened by Deo with a panga, he rushed back to his house, which was about 70 meters away. He returned to his parents' home later only to find their mother dead and their father fatally wounded. Elias told him that his money had been stolen by some bandits he never identified. PW2 Shamba tellingly testified that he "could not do anything" until when his brother Joshua arrived and took the deceased Elias to hospital, where he died on 21/09/2007.

We must point out from the outset that although the 2nd appellant (Hakizimana) was their cousin and there was moonlight and light from a fire which was burning at the place, which purportedly enabled PW2

Shamba to identify Deo, PW2 Shamba failed to identify the 1st and 2nd appellants among the bandits. It was two days later, after the burial of the deceased, that both PW1 Jeremia and PW2 Shamba told the Police and the mourners who included PW3 Saidi R. Kapaka, the deceased Elias's brother, that the murderers of their parents were the appellants. Post-mortem examinations conducted on the bodies of the deceased, by PW4 Dr. Daudi Salum, established that Rahab died of loss of blood (haemorhic shock), while Elias died of septicaemia shock following a ruptured spleen and a cut wound on the skull (see, the Reports on P.M. Examination: exhibits PII and PIII, respectively.) Thereafter, the appellants were arrested and charged accordingly.

The appellants denied killing the deceased. The 1st appellant testified that prior to his arrest on 6th October, 2007, by PW3 Saidi, he used to live at Mtambo village. He firmly stated that he had never set foot at Ivungwe village. His witness was his son, DW2 Freddy John. He swore to have been with his father at Ivungwe village on 19/09/2007 up to 10.00 p.m. when they retired to bed. The 2nd appellant equally denied being at the scene of the crime on 19/09/2007, as alleged by the prosecution, claiming he was at home from 17.00 hrs. until they went to

bed. He also denied being related in any way to the deceased Elias, and that he was arrested at his home on 9/10/2007.

Deo Madini (3rd appellant) denied being near the scene of the crime on 19/09/2007 claiming that he spent the entire day at his home village of Kalungu. On this, he called his wife, DW4 Agnes Deo, and his neighbour, DW5 Shautieli Hagaza, to bear him out.

Convinced that the three appellants "were adequately identified at the scene of the crime" by "PW1 and PW2," the three gentlemen assessors who aided the learned trial judge, were unanimous in their verdict. The appellants, committed the two murders, they opined. The learned trial judge was of the same firm view.

We have gathered from the evidence that the fact that the two deceased were murdered was not disputed at the trial. Indeed Mr. Mkumbe conceded this before us. So the learned trial judge found herself with one crucial issue to contend with. This is how she rightly put it:

"The main issue here is who killed the deceased persons. Or, are the accused persons now before us murderers of those innocent human beings?"

This still remains the critical issue in this appeal.

After thus properly directing herself on this vital issue, she equally properly directed herself that its determination rested entirely on the credibility of PW1 Jeremia and PW2 Shamba, whose visual identification evidence appeared to point unerringly to the Appellants as the murderers. She was also totally alive to what we take to be settled law to the effect that "evidence of visual identification is of the weakest kind and most unreliable." As such, she held rightly, "courts are not expected to act on" such evidence "unless all possibilities of mistaken identity are eliminated and that the evidence is absolutely watertight." Relying on **Waziri Amani v. R.** [1980] T.L.R. 250, she went on to properly direct herself that "corroboration is usually required particularly when it refers to a single identifying witness."

We may as well add here, without any risk of appearing to prejudge the issue, that it is trite law that in a case depending for its

determination essentially on identification, be it of a single witness or more than one witness, such evidence of identification must be watertight, even if it is evidence of recognition. This rule, however, does not exclude a conviction if the court is fully satisfied that a single identifying witness is telling the truth: See, for instance, **Hassan Juma Kenenyera v.R.** [1992] T.L.R. 100, **Nhembo Ndalu v.R.,** Criminal Appeal No. 33 of 2005 and **Mengi Paulo Samweli Luhanga and Another v.R.,** Criminal Appeal No 222 of 2006 (both unreported). As to what amounts to "watertight evidence," this Court had this to say in **Nhembo Ndalu**(supra):

> *"In law, then, for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt."*

With these well settled legal principles in her mind, how did the learned trial judge resolve this issue? She felt safe to convict the appellants as charged on the basis of the evidence of PW1 Jeremia and PW2 Shamba. She said:

"All three court assessors are of unanimous opinions that the accused were properly identified by PW1 at the scene of crime. They find that the witnesses PW1 and PW2 are credible and reliable witnesses. They are not convinced by the alibi defence by the accused persons. I tend to agree with them. I find the evidence of PW1 on identification of all three accused persons credible and/or reliable. PW1 knew the accused persons prior to the incident. He met them when they arrived at his father's place. They talked albeit shortly or briefly. He asked them as to what was the matter and if everything was okay. He noted how they were heavily armed. They had explained to him that they wanted to meet his father, the late Elias. He even heard the accused asking money from his late father. There was moonlight as confirmed by DW6 (sic) in his defence so made. There were also firewood flames nearby. PW1 and PW2 had similar evidence that while the 1st accused once worked with them, 3rd accused (sic) was their cousin. So in my opinion, the time taken by PW1 to talk to the accused was enough to have a proper identification of them, having in mind that they were known to him, and that there was enough light to provide vision. PW2 supported the evidence of PW1 on identification of the suspects, but in

respect of 3rd accused only. Why disbelieving these two witnesses? No grudge between the two had been suggested by either party. Why should the witnesses be against the accused persons? The 2nd accused denied not only commission of the crime, but also declined being a relative of PW1 and PW2. Why should PW1 and PW2 force the accused to be their relative among other innocent persons around? I tend to think that had there been any negative aspect or reason certainly the said 2nd accused would have said so as a basis for lie against him. With this in mind, I am tempted to draw the authority in Dengwa's case (supra), and I am in agreement with Mr. Kllanga that the 2nd accused was a liar, hence an inference of guilty against him, and the lie should be taken as corroboration to the prosecution case."

In his written submission, notable for its brevity and clarity, Mr. Mkumbe pressed us to overturn the decision of the trial court and acquit the appellants. He predicated this call on two major reasons. One, the identification evidence going to implicate them was not worth of credence. PW1 Jeremia and PW2 Shamba contradicted each other, he contended, and had they really witnessed the incident and identified the

murderers, they would not have waited for two days before naming them. He referred us to the decision of this Court in **Marwa Wangiti Mwita v. R.** [2002] T.L.R. 39 in support of his request to take this evidence with great circumspection and reject it. Mr. Namkambe supported the appeal on this basis also. Two, in view of the fact that there was no cogent evidence placing the appellants at the scene of the crime, their alibis, which were supported by independent evidence, were wrongly rejected.

It was Mr. Namkambe's strong contention before us that the learned trial judge erred in giving undeserved credence to the purported identification evidence of PW1 Jeremia and PW2 Shamba. Although the two witnesses alleged to have identified the appellants by the aid of moonlight and fire light, he said, their evidence is starkly silent on the intensity of the light from these two sources. He went on to argue that contrary to the holding of the trial judge, their evidence does not reflect the length of time they had the murderers under observation and the distance in between them and the fire. He accordingly urged us to allow the appeal.

This is a first appeal. In law, a first appeal takes the form of a re-hearing. The appellants, therefore, are entitled to the Court's own fresh re-evaluation of the entire evidence and arrive at its own conclusions of fact. (See, **Peters v. Sunday Post** [1958] EA 424 and **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (unreported). We have done so here as by law enjoined and requested by counsel for the appellants. We have found ourselves respectfully differing with the learned trial judge on her findings of fact based on the evidence of PW1 Jeremia and PW2 Shamba. We shall show why.

After subjecting the evidence of PW1 Jeremia and PW2 Shamba to a dispassionate critical analysis, we have found ourselves in full agreement with the appellant's advocate major complaint before us and as supported by Mr. Namkambe, that the learned trial judge erred in law and fact in holding that the appellants had been unmistakably identified as the murderers. This is because the evidence of these two witnesses is patently wanting in cogency. Contrary to the holding of the learned trial judge, we are of the firm view, that this evidence is contradictory, inconsistent and wholly implausible, smacking of a fabrication in fact. We do not need an extended elaboration to demonstrate this. We shall

give a few instances, which in fact Mr. Mkumbe relied on in his strong submission in support of the first ground of appeal.

Both witnesses testified that the appellants were known to them before the fateful day. To cement this allegation, they claimed that the second appellant Hakizimana was the son of their paternal aunt. If that was the case, in our considered opinion,Hakizimana should have been well known to the deceased, who survived the brutal attack for one day at least.

It was also claimed by PW1 Jeremia that the 1st appellant, John, was their father's labourer. Again if that was the case, he too was well known to the deceased Elias. Going by the evidence of both witnesses, the encounter between Elias and the bandits was a close one and took quite some time. The two witnesses were at one on their claims that the scene of the crime was well lit as already shown. As such, they were able to make an unmistaken identification of the bandits, they asserted.

If the above claims carried any grain of truth in them, we are sure the deceased Elias would not have failed to recognise all the bandits or any one of them. For this reason, we have found it impossible to buy the explanation of the learned trial judge that Elias failed to name them because he "was too weak to talk about the attack." With due respect, we have found no iota of evidence on record to support this startling finding of fact as rightly contended by Mr. Mkumbe. On the contrary, if the evidence of PW2 Shamba is anything to go by, the deceased was in full control of his mental faculties. For PW2 Shamba testified that his father told him that his money had been stolen by bandits whom he had failed to identify. The deceased Elias repeated this statement to PW5 No. 8800D/Sgt. Mkingira who visited him at the hospital on 20th September, 2007, and who had arranged for Elias to be rushed to hospital contrary to the claims of PW2 Shamba. This was in the presence of PW6 No. B 6863 D/Sgt Musa. That Elias failed to mention his cousin and his labourer as the bandits, lends credence to their respective defences of alibi, which unfortunately the learned trial judge casually rejected. Again if PW2 Shamba had witnessed the incident and recognised any bandit, he could not have failed to name them to his father, when he told him that he did not identify the bandits.

We have keenly read the evidence of PW3 Saidi, the paternal uncle of PW1 Jeremia and PW2 Shamba. He told the trial court that when he learnt, on 20/9/2007, what had befell his brother, he hastened to Ivungwe village without any delay. When he arrived there he:-

"found so may people at the Elias place..."

On that day neither himself nor those who were mourning the death of Rahab, were told by either Jeremia or Shamba, who were there, that the robbers-cum-murderers were the appellants. Indeed, these two brothers never told anybody, not even the Police, on that day to have witnessed the incident and/or identified any bandit at the scene of the crime. If these two witnesses had eyewitnessed what they told the trial court in June, 2010 (three years later), what prevented them from so telling PW3 Saidi, PW5 Mkingira and the mourners, hardly a day after the brutal incident when every detail was still fresh in their memories? Unfortunately, the learned trial judge did not address herself and the gentlemen assessors to this crucial fact. That they did not do so is proof that they either never witnessed the incident or if they did, they did not identify or recognise the bandits. Holding otherwise would not only be contrary to common sense but blinking at reality also. We

are not prepared to do so as that would result in a gross injustice. In so concluding we are also mindful of the persistent holdings of this Court to the effect that failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable. See, for instance, **R. V. Mohamed Bin Alhui** (1942) 9 EACA 72, **Marwa Wengiti Mwita and Anotherv. R.,** [2002] T.L.R. 39 **Joseph Mkumbwa & Another v. R.,** Criminal Appeal No. 94 of 2007 (unreported, etc). PW1 Jeremia and PW2 Shamba cannot escape this reproof. That is why in **Mathias Bundala v.R.,** Criminal Appeal No. 62 of 2004 we gave a specific warning to the effect that "in most cases even where witnesses purport to give direct evidence, there is always a common fear of manufactured evidence." Trial courts, therefore, must always be cautious when dealing with such evidence.

Furthermore, as alluded to earlier on, PW2 Shamba testified that he went to his parents home after hearing sounds of gunfire there. PW1 Jeremia testified that as he was fleeing he met PW2 Shamba to whom he "narrated the entire episode." On this he was belied by PW2 Shamba who said:-

"I didn't see PW1 running from the scene of the crime."

Immediately before, he had said:-

"I didn't meet any one on the way when running to my parents."

These pieces of evidence render the claims of the two witnesses highly suspect. None of them ought to be credited with being a truthful witness. PW1 Jeremia was further exposed to be an unaccomplished liar by PW3 Saidi. While PW1 Jeremia claimed that it was PW3 Saidi who went to report the incident to the police, PW3 Saidi denied this. He said that he was the one who had advised them on 20th September, to go and report the matter to the police.

We have also found it difficult to believe PW2 Shamba that he went to the deceased's home after hearing sounds of gunfire. If there were gunshots, then PW1 Jeremia ought to have heard them also, because he was allegedly present at the scene of the crime and met PW2 Shamba on the way as he was running away from the scene of the crime. Now who is to be believed? We are increasingly of the view that both were lying, although we are not inclined to say that they had a role

to play in their parents' death. And incidentally, although PW2 Shamba testified on hearing sounds of gunfire about four times, no single spent cartridge was seen at the scene of the crime. This is in spite of the fact that PW5 Sgt. Mkingira was very categorical in his evidence that he went to "the scene of the crime the very night."

In addition to the above, we have been appalled by the fact that although PW5 Sgt. Mkingira testified that "at the area the houses are not far from each other", no single neighbour of PW1 Jeremia and PW2 Shamba testified to bear them out on their claims. Indeed PW2 Shamba made no secret of the fact that "no other people who came to the scene of the crime that night". But this evidence is in contradiction to that of PW5 Mkingira as shown immediately above. Should it be taken that PW2 Shamba was not at the scene of the crime? We believe so in the circumstances, otherwise PW1 Jeremia could not have spent the night in the bushes as he claimed.

In their evidence these two brothers mentioned to have unmistakably seen only three bandits. PW1 Jeremia went further and stated the trio to be the appellants. However, the undisputed evidence

of PW6 D/Sgt Musa, the investigator, shows that a total of five (5) people were initially arrested as suspects. In addition to the appellants, were Alex Niyongabo and Frederick Sintomwe @ Baume. The D.P.P. entered a nolle proseque in respect of these two on 22nd June, 2010, the day the trial of the appellants began. Now if PW1 Jeremia, PW2 Shamba and Elias had seen only three bandits who were unmistakably recognized by PW1 Jeremia as the learned trial judge held, why were Alex and Frederick arrested and detained in custody for almost three years? To us, this goes to prove that if there was any robbery which resulted in the murder of the deceased, then the perpetrators were not positively identified at the scene of the crime. That was why PW2 Shamba failed to recognize the 1st and 2nd appellants if at all he set foot at the scene of the crime while the crime was being committed. That he failed to do so, if he were present, leads to an irresistible conclusion that the conditions at the scene of the crime were not conducive at all for an impeccable identification of the bandits as correctly contended by both counsel in the appeal and contrary to the holding of the learned trial judge.

Another nagging pertinent but unanswered question is: if PW1 Jeremia and PW2 Shamba witnessed the incident, though separately, why did they not raise any alarm to alert their neighbours? Responding to the defence counsel's question, PW5 S/Sgt. Mkingira said:

> *"At the area the houses are not far from each other. If raised (sic) an alarm, people could have responded."*

And why did their brother Joshua, who according to PW2 took the deceased Elias to hospital not testify? Would he have belied his brother? In view of these open lies, inconsistencies, implausibilities, etc, we believe an affirmative answer is the only option.

We think it will be very instructive to return to what was said by Shaw, C.J. in **Commonwealth v. Webster** (1850) 50 Mass. 255 with respect to positive evidence in which category visual identification falls. He aptly said:

> *"The advantages of positive evidence is that it is the direct testimony of a witness to the fact to be proved who,* ***if he speaks the truth, saw it done, and the only question is whether he is entitled to belief. The disadvantage is that the***

> ***witness may be false or corrupt,*** *and that the case may not afford the means of detecting his falsehood." [Emphasis is ours]*

This was said over one hundred and fifty years ago, but the conventional wisdom it bears is still relevant today.

The evidence of PW1 Jeremia and PW2 Shamba was positive evidence. Had it been truthful beyond any reasonable doubt, it would have proved the guilt of the appellants with the precision of mathematics. For us, alas, it was not for the clear reasons we have given above. We are of the firm view that this was not a case of an honest or sincere mistake in recognising a close relative, neighbour or friend, which mistakes often occur (see, **Shamir s/o John v. R.,** Criminal Appeal No. 166 of 2004 (unreported). Given the patent contradictions, inconsistencies, implausibilities found in the evidence of PW1 Jeremia and PW2 Shamba, we can hold without demur that this was one of those few cases in which apparently contrived evidence was used to secure a conviction of the appellants. That is why in **Jaribu Abdalla v. R.,** Criminal Appeal No. 220 of 1994 (unreported), the Court held:-

In matters of identification it is not enough merely to look at factors favouring accurate identification. ***Equally important in the credibility of witnesses****. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence." [Emphasis is ours].*

We may again add that:

> *"Eye witness testimony can be a very powerful tool in determining a person's guilt or innocence.* ***But it can also be devastating when false witness identification is made due to honest confusion or outright lying****" (see Mengi Paulo S. Luhana & Another v. R. (supra) and Joseph Mkumbwa & Another v. R (supra). [Emphasis is ours].*

As we have tried to demonstrate above, the seemingly positive evidence of PW1 Jeremia and PW2 Shamba, has not been discredited or doubted on account of " honest confusion," but strictly speaking it borders on "outright lying."

In view of the above findings, we are compelled to hold that the evidence of PW1 Jeremia and PW2 Shamba, did not even on a

preponderance of probabilities, place the appellants at the scene of the murder of the two deceased. Their alibis were accordingly wrongly rejected. We therefore allow the two grounds of appeal, leading to the quashing and setting aside of the conviction for murder and the death sentence. The appellants are to be released forthwith from prison unless otherwise lawfully held.

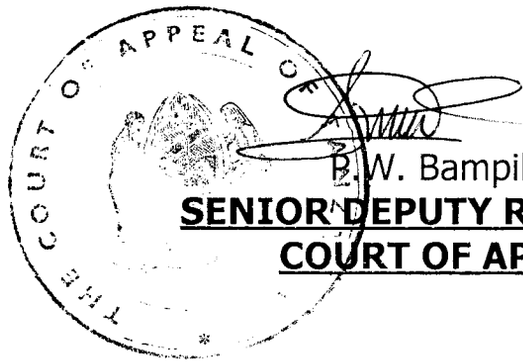
DATED at **MBEYA,** this 21st day of June, 2013

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.



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