IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO 124 OF 2012

ZACHARIA PETRO .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba)

(Mjemmas, J.)

dated 15th day of November, 2011
in
Criminal Sessions Case No. 64 of 2008

JUDGMENT OF THE COURT

5th & 6th August, 2013

JUMA, J.A.:

ZACHARIA PETRO the appellant was convicted by the trial High Court (Mjemmas, J.) of the attempted murder of Emmanuel s/o Festo, contrary to section 211 (a) of the Penal Code. He was sentenced to imprisonment for twenty years. This is his first appeal. The Appellant, through the dock-brief services of Mr. Constantine Mutalemwa has put forward one substantive ground of appeal contending that the trial court erred in law in convicting him on the basis of visual identification evidence of PW1 and PW2. He also had an alternative ground of appeal, contending that the

sentence of 20 years imposed by the trial High Court was manifestly excessive in the circumstances of the case.

12th November, 2007 was a typical evening at Kagoma village of Biharamulo District. According to witnesses, although it was around 7 p.m. and the sun was setting down, there was all the same, sufficient sunlight for the family to complete their ordinary chores for that day. Merecian Festo also known as Mariam Festo (PW1) was at home, washing her clothes. Her co-wife, Advela Simon (PW2) was in the kitchen preparing the family evening meal. Their husband, Mzee Festo Lutema was not at home. He was away attending to his business at Songambele business centre. Also within the compound were the five children of PW1, including the seven year old Emmanuel s/o Festo and nine year old Jennifer d/o Festo. The children were warming themselves around a fire locally known as "kikome." Emmanuel is the only child in that family who is an albino. Due to this genetic condition, his body is pale white because of lack of pigment, or colouring matter.

The tranquility of that homestead was soon shattered when Zacharia Petro, the appellant arrived. He was well known to the family because he not only used to work as a farm hand, but was married to one of the family

members. According to PW1, the appellant called her husband (Mzee Festo Lutema) his uncle. Zacharia Petro arrived at the homestead together with another man who carried machetes. Zacharia explained that he was just coming from his farm, and he asked for a glass of water. Although she was busy cooking the family meal, Advela Simon (PW2) overheard the conversation and recognized the presence of Zacharia and his other colleague who was not known to PW2.

While she continued with her washing, PW1 sent her daughter Jennifer, to bring a glass of water. Soon thereafter, PW1 heard a sound like someone chopping firewood. She stood up only to find that it was not chopping of firewood. Zacharia Petro and his colleague had just chopped off her son's left arm and had taken it away with them. Her son Emmanuel was on the ground, writhing in pain before fainting. His right palm was hanging after enduring several cut wounds. While using her clothes to try and stem off the flowing blood, PW1 screamed for help. Her co-wife rushed from her cooking to see Zacharia Petro and his colleagues running away. Mgambo Saanane (PW3) was amongst the first people who arrived in response to the alarm. PW3 was informed that it was Zacharia Petro and another unknown people who were responsible. PW3, who was also the Kitongoji Chairman asked some young men to join him in the search for

Zacharia Petro. Zacharia was at home. He wore kitenge wrapper when he opened the door. He changed into pair of trousers and accompanied the group back to the scene. On the way, they met a small van that was taking the injured Emmanuel to the police station and for treatment in hospital. Zacharia and PW3 boarded the van to the police station where he was formally arrested.

In his defence testifying as DW1, Zacharia Petro denied any responsibility. On that fateful day, he was in his farm together with his wife till around 6 p.m. when they returned home. He went to bed early that day at 6.30. He maintained that he was not anywhere near the household where Emmanuel was attacked.

At the hearing of appeal, Mr. Mutalemwa argued that the appellant was not sufficiently identified at the scene of crime. While making reference to the definition of "night" provided under section 5 of the Penal Code to be the period between 7 p.m. and 6 a.m., Mr. Mutalemwa submitted that the prevailing conditions were not conducive for positive identification of the appellant.

On the alternative ground of appeal, the learned Advocate submitted that had the learned trial Judge taken on board the mitigating factors

presented on the appellant's behalf, the trial court would have reduced the sentence to a lower level than twenty years. Mr. Mutalemwa submitted that in considering the need to reduce the sentence, this Court should take judicial notice of prison overcrowding.

From the very outset, Mr. Alloyce Mbunito, learned State Attorney on behalf of the respondent Republic resisted this first appeal. He submitted that the evidence of PW1 and PW2 confirm that there was adequate light. While admitting that section 5 of the Penal Code defines "night" as the period between seven o'clock in the evening and six o'clock in the morning, the learned State Attorney urged us to look at special circumstances of this case where witnesses testified that there was sufficient light. Mr. Mbunito also recounted moments confirming familiarity of the appellant to the household, for example the conversations between the appellant and PW1 with the appellant indicating that he had just come from his farm. There was also the moment where the appellant asked for water, and it was during this interlude when the attack took place.

With regard to the alternative ground on excessive sentence, Mr. Mbunito submitted that the sentence of 20 years was in the circumstances of the case proper. He noted that the appellant has not shown that any

principles governing sentencing which have been violated by the trial court, to warrant the intervention by this Court (CRIMINAL APPEAL No. 370 OF 370, **RWEYEMAMU THOMAS @ KANINGILI MUZAHURA VS THE REPUBLIC** (CAT at Mwanza, unreported).

From the foregoing submissions, there is no doubt in our minds that the prosecution case against the appellant hinged essentially on the evidence of visual identification of the appellant. After surveying authorities guiding the evidence of visual identification and need to guard against possibilities of mistaken identification, the learned trial Judge on pages 75 and 76 of the record of this appeal, was in no doubt that the appellant was positively identified and there was no possibility of mistaken identity. He said,

> *"Now keeping in mind the above principles or guidelines can it be held with absolute certitude that the two witnesses [PW1 and PW2] in this case identified or recognized the accused person as the person who attacked the victim Emmanuel s/o Festo on the fateful day? From the evidence on record there is no dispute that the accused person was well known by PW1 and PW2. Even the accused person does not dispute that. He, the accused person often visited the home of PW1 and PW2 because he is married to the daughter of the sister of one Festo who is the husband of PW1 and PW2. In addition to that the accused person lived in the same hamlet of Isebya with the*

witnesses before he moved to Songambele village. PW1 and PW2 stated that the accused person used to work for them as a farm worker although he disputed that. From the evidence of PW1 and PW2 the accused person visited their house on the fateful day or night. He was accompanied by another person who the witnesses could not identify. They both carried machetes. According to PW1 the accused person arrived at 7.00 p.m. when the sun was setting down but there was some light...."

Despite the conclusion by the learned trial Judge that the prosecution had proved its case against the appellant beyond reasonable doubt, this Court, as the first appellate court over a decision of the trial High Court, is still duty bound to weigh and re-evaluate the entire evidence. In that mandated re-evaluation of the evidence we shall be guided by the question whether evidence of visual identification by PW1, PW2 should be relied upon because there are no possibilities of mistaken identity: (see- CRIMINAL APPEAL NO. 202 OF 2004, **STUART ERASTO YAKOBO VS. THE REPUBLIC** (CAT at DSM, unreported).

The appellant was placed at the scene of crime by visual identification, voice identification and familiarity evidence. He was like a family member, so to speak, walking in the homestead of PW1 and PW2 asking for a glass of water. He was well known to the family, for he is not only married to one member of the family, in addition he used to work as a

farm hand. He was so familiar that he could walk into the homestead and ask for water without raising any suspicions. PW2 who was in the kitchen at first identified the appellant's voice when he announced his arrival at the homestead with calling out "hodi." Although PW2 was in the kitchen preparing the family meal, she could still see the appellant she described him as not only as their "*mkwilima*" i.e. their son in law, but also as their former farm boy. PW2 continued with her cooking only to hear PW1 scream out. The evidence of PW3 who was the first at the scene, confirms that PW1 and PW2 identified to him the role of the appellant in the crime the moment he enquired what had happened. The first ground of appeal is devoid of merit. We think that the learned Judge was with due respect correct that the visual identification evidence placing the appellant at the scene of crime was watertight and without any possibilities of mistaken identity.

We also find no reason to fault the decision of the trial Judge to impose a sentence of twenty years out of possible life imprisonment. We agree with Mr. Mbunito that the appellant has not shown to us any principles we have set down to govern sentencing which the trial court violated to necessitate our interference: [**see-RWEYEMAMU THOMAS @ KANINGILI MUZAHURA** (supra), CRIMINAL APPEAL No. 208 OF 2005,

SAMWEL YOSE @ KIJANGWA VS THE REPUBLIC (CAT at Tanga, unreported).

The offence of attempted murder is by any means a serious offence deserving the sentence which the learned trial Judge deemed proper. The offence of murder would have been preferred had the attempted murder ran its full course to completion. Deliberately cutting off a hand from the body of a living human being is a clear manifestation of an intention to cause the death or to do grievous harm. And because Emmanuel Festo survived this brutal attack, the trial court was entitled to impose the sentence of twenty years in prison upon the conviction of the appellant.

All in all, this appeal is devoid of merit and is dismissed in its entirety.

DATED at MWANZA this 5th day of August 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL