

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KILEO, J.A., MUSSA, J.A., And JUMA, J.A.)
CRIMINAL APPEAL NO. 352 OF 2014
MAGARI JUMA DIMBWE APPLICANT
VERSUS
THE REPUBLIC RESPONDENT
(Appeal from decision of the High Court of Tanzania at Dar es Salaam)

(Manento J.)

Dated the 18th May, 1999

In

Criminal Session Case No. 95 of 1996

REASONS FOR JUDGMENT OF THE COURT

20th July, & 19th August, 2015

JUMA, J.A.:

When this appeal came before us for hearing on 20th July, 2015, we heard submissions on the grounds of appeal and allowed the appeal but reserved our reasons to a later date. Having considered and reflected on the same, we hereby give the reasons.

The appellant Magari Juma Dimbwe has preferred this appeal being aggrieved by the judgment of the trial High Court of Tanzania (Manento, J.) in Criminal Sessions No. 95 of 1996. At the conclusion of the trial the

appellant was convicted of the offence of murder and was sentenced to suffer death by hanging. It was alleged that on or about the 12th June, 1995 at Chamwino area of Morogoro District, the appellant murdered Abdallah Habibu, the deceased.

Through the services of Mr. Paschal Kamala, learned advocate, the appellant filed a memorandum of appeal, containing five (5) grounds of appeal. In their totality, these grounds of appeal boil down to the question of probity of the identification evidence of the single prosecution witness who had readily acknowledged that she was drunk when the deceased was killed that fateful night.

Mwamvita Simon (PW1) was the only witness who testified for the prosecution. On the day the deceased died PW1 had gone to a shop where she sold traditional brew which her sister had prepared for sale. The deceased popularly known as "Michigan" was her boyfriend who provided her company that day as she sold and consumed alcohol from 6 p.m. By the time they left around 9 p.m. the lovers had become drunk. They walked home through a moonlit night. At the playground, as she was walking ahead and her boyfriend behind her, someone came from behind and attacked the deceased. When she looked back, it was the appellant

who was fighting with the deceased. PW1 ran away when the deceased fell on the ground. In his defence, the appellant denied any responsibility in the death of the deceased. He insisted that he was not at Chamwino but he was away at home village of Mzinga.

At the hearing of the appeal, the appellant was represented by Mr. Kamala who placed reliance on the Written Statement which he had earlier filed under rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to expound the appellant's grounds of appeal. Through this statement, Mr. Kamala faulted the learned trial Judge for holding and regarding the evidence of PW1 as consistent in so far as identification of the appellant is concerned. He submitted that it was not enough in the eyes of the law for PW1 to merely allege that there was moonlight without so much as specifying whether that source of light had sufficient intensity to enable the positive identification of the person who had attacked the deceased. The learned counsel further submitted that PW1 did not specify the distance which she was from the person who had attacked the deceased.

Apart from lack of consistency in so far as identification evidence of PW1 is concerned, Mr. Kamala faulted the trial Judge for concluding that

the evidence of PW1 was watertight despite her admitting her state of drunkenness when the deceased was attacked. He referred us to page 5 of the record of appeal where PW1 admits that when the deceased fell down she was under the influence of the alcohol. Mr. Kamala urged us to disregard the probity of the evidence of this witness as a basis for convicting the appellant.

For the respondent Republic, Ms. Anunciata Leopold, learned State Attorney, did not support the conviction of the appellant. She singled out as weak, the visual identification evidence of PW1. The learned State Attorney submitted that by the appellant being PW1's neighbour alone, is not sufficient proof of her ability to identify the appellant at that time of the night. She further submitted that the visual identification evidence of PW1 does not meet the criteria for proper identification which the Court has expounded through several decisions, including **Waziri Amani vs. Republic**, [1980] T.L.R. 252, **Scapu John and Lupi Shala vs. Republic**, Criminal Appeal No. 197 of 2008 (unreported) and **Aburaham Daniel vs. R.**, Criminal Appeal No. 6 of 2007 (unreported).

From submissions of the two learned counsel, it is appropriate to restate the role of this Court in so far as the offence of murder subject of

this appeal is concerned. We are sitting as a court of first appeal. In that capacity, we are expected to have our own fresh re-evaluation of the entire evidence that was presented before the trial court and come to our own conclusion: see **Juma Kilimo vs. The Republic**, Criminal Appeal No. 70 of 2012 (unreported).

As correctly submitted by Mr. Kamala and Ms. Leopold, the prosecution rested its case on the identification evidence of only one witness, PW1. It is this evidence which Manento, J. regarded as sufficiently watertight to sustain the conviction of the appellant when he concluded that:

"...Given the prosecution evidence on record that the accused was identified by PW1 Mwamvita in a moonlight night, that the accused and Mwamvita PW1 were known to each other long time ago, I am of the opinion that he was properly identified...."

In our re-evaluation, we agree with the two learned counsel that the evidence of PW1 does not show how in fact the moonlight facilitated the

proper identification of the appellant at the scene of crime. It is clear to us that during her examination in chief, PW1 did not relate the source of light from the moonlight to the positive identification of the appellant when she stated that:

"...At 9 pm we deceased (sic) to go home. I was holding chips on my hands. We had bought the chips with the deceased.

The deceased was my boyfriend. On the way, at a playground, the accused (sic) was assaulted 'alivamiwa' by Dibwe...Then there was a quarrel/fight between the accused and the deceased. Shortly, the deceased fell down. I started to run and Dibwe chased me...."

The aspect of moonlight and the fact that this prosecution witness was drunk, came much later when PW1 was being cross examined by Mr. Massati, the learned counsel representing the appellant at his trial:-

"...On the night when I was making the statement, I was drunk. Though I was drunk, I knew the people. I told Peter Chitema that I knew the people who were fighting....

...

...There were no lights, it was moonlight. There were no other people in the playground." [Emphasis added].

In **Hamimu Hamisi Totoro Zungu Pablo & Two Others vs. The Republic** Criminal Appeal No. 170 of 2004 (unreported), this Court had an occasion to deal with visual identification evidence that was alleged to have been facilitated by moonlight. From the legal premise that source of light from the moonlight is a weak source for purposes of positive identification the Court emphasized the need for the identifying witness to also disclose such surrounding factors as the proximity, familiarity to the assailant (in terms of appearance, living in the same locality, being a family member, in names, walks). The Court insisted that it is after taking into account the source of light and other related factors can it be said that the moonlight facilitated the positive visual identification:

".....Admittedly, moonlight is a weak source of light and is not as strong a light as sunshine or powerful electric light. However under certain circumstances, such as proximity and familiarity to the assailant, moonlight can enable the victim to sufficiently recognize his or her assailant."

For purposes of present appeal before us, the visual identification of the appellant at 9 p.m. was by any standard made under difficult circumstances by a witness who was admittedly drunk. The question of moonlight as a source for identifying the appellant came out belatedly, during cross examination. Even if we assume that there was moonlight, there is no evidence to show how such other factors as intensity of the light, proximity etc. enabled PW1 (being drunk as she was), to positively identify the appellant. Such doubts in the identification evidence of the only prosecution witness should be resolved in the appellant's favour, which we hereby do.

Mr. Abdallah Kondo, one of the two assessors, has perhaps best explained the doubtful nature of the identification evidence of PW1. He gave the following non-binding opinion to the trial Judge:

"...I don't agree with the other assessor because the witness has two versions. That she was drunk. She said (PW1) that she was in the company of the deceased and that she was running after the deceased had fallen down. How could she see the knife if she was running! She didn't say the type of the knife, whether a folding pocket knife or a straight knife. I would be happy if she could just say one word always that it was the accused who killed the deceased. Even, if she knew him before that day, it may be that on that day, she did not identify him properly. PW1 said that it is true that she drank alcohol on that day. I don't trust the evidence of PW1 Mwamvita.

Signed- A.Kondo."

In the upshot of the foregoing reasons, we allowed the appeal, quashed the conviction of murder and set aside the sentence of death by hanging which the trial High Court imposed on the appellant. We further ordered for the immediate release of the appellant from prison unless he was lawfully being held for any other purpose.


DATED at **DAR ES SALAAM** this 31st day of July, 2015.

E.A.KILEO
JUSTICE OF APEPAL

K.M. MUSSA
JUSTICE OF APEPAL

I.H. JUMA
JUSTICE OF APEPAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL