IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 349 OF 2014

1. PASILID HERMAN JOSEPH @ BAYI
2. WILIAD EVARIST DAUD @ MKAMBAA .....**APPELLANTS**
3. DEOGRATIUS SAMSON KANTE @ KAKAA

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Munisi, J.)

Dated 18th day of July, 2014
in
Criminal Session No. 7 of 2012

JUDGMENT OF THE COURT

12th & 15th October, 2015

JUMA, J.A.:

On 18/7/2014, the High Court of Tanzania sitting at Rombo (Munisi, J.) convicted Pasilidi s/o Herman Joseph @ Bayii (the 1st appellant), Williad s/o Evarist Daudi @ Mkambaa (the 2nd appellant) and Deogratias s/o Samson Kanje @ Kakaa (3rd appellant) for the offence of murder contrary to section 196 Cap 16 R.E. 2002. The prosecution's case against these appellants alleged that on the 23/5/2010 at Nayeme Kafumbu Tarakea

area in Rombo District of Kilimanjaro Region, they murdered Athanasia w/o Nicodemu (the deceased). Following their conviction they were sentenced to suffer death by hanging. Aggrieved by both their conviction and sentence, the appellants have preferred this appeal.

Briefly, it was around 21:00 hours on a Sunday, Nicodemus Kanyenge (PW2) and his wife Athanasia w/o Nicodemu, who is now deceased, returned back home after visiting their neighbours. The dogs were at that time barking outside, but this did not raise much of their concern as they headed to the kitchen adjacent to their main house where they ate their meal of banana. After their meal, PW2 opened the door leading to their house to let his wife in first. He immediately noticed that their house was in a disheveled and disorderly state, as if it had been searched. PW2 went outside to relieve himself in an out-toilet. PW2 was still in the toilet when he heard a sound of something being cut three times. Then, a piercing voice of his wife calling out in distress: "**Kakaa unaniua?**" (Translated: Kakaa, why are you killing me?). It dawned on PW2 that there were intruders in the house.

Abound with caution and a torch in hand; PW2 directed his attention at the front door of his main house. He flashed on his torchlight. As he did so, he saw Bayi (the 1st appellant) and Mkambaa (the 2nd appellant). When PW2 moved closer, he saw Kakaa (the 3rd appellant) and another man he did not recognize. It was after the bandits had left, PW2 moved from where he stood to check on his wife. He saw a lot of blood. His wife was lying on a mattress, breathing but barely talking. She had sustained three cuts on her head, similar times on her neck and once on her arm. PW2 rushed out to inform his neighbours about the attack.

Gilbert Ignas Asenga (PW3) heard the cries for help from PW2 just as he was getting ready to sleep. PW2 was his neighbour who lived in the opposite side of the road separating their houses. When PW3 arrived, he found the deceased lying down on the floor, seriously injured. According to PW3, his neighbour (PW2) told him that he identified Mkambaa and Bayi to be amongst the bandits who had invaded his house. With the help of his neighbours, PW2 secured a vehicle to transport his injured wife to the hospital. They did not go far because; by the time she was loaded onto the vehicle she had died.

The post-mortem report which was admitted during the preliminary hearing as exhibit P2 revealed that the deceased had sustained a severe head injury. Dr. I.N. Moshi who examined the body on 26/5/2010 also found multiple deep cut wounds on the right side of the head. The brain matter had drained from the head injuries.

Meanwhile, the stolen motorcycle was traced to a house in a nearby village. On 30/5/2010 which was seven days after being stolen, it is alleged that Kakaa (the third appellant) and one Sonko abandoned the motorcycle and took flight when they saw Selestine Bokera (PW4) and local leaders going where they were.

D.4570 D/CPL Fabian (PW5) testified that while the 1st and 2nd appellants were arrested a day after the murder of the deceased, the 3rd appellant was arrested on 4/6/2010. PW5 recorded the cautioned statement of the 3rd appellant on 5/6/2010. In that confessional statement the 3rd appellant expressed his displeasure with the deceased whom he blamed for failing to pay him his Tshs. 9,600/= for the work he had done. He narrated how he and other two appellants had slipped into the house where the deceased lived with her husband (PW2) and how it ended in the

death of the deceased. After a trial within trial, the cautioned statement was admitted as exhibit P5. The 3rd appellant was on 7/6/2010 taken before a Justice of the Peace, Dismas Thobias Mallya (PW1) where his extra judicial statement was taken down. He again admitted that it was himself, the 1st and 2nd appellants who had killed the deceased.

In their defence, appellants testified on oath. They denied any involvement in the crime of murder for which they were charged. The 1st appellant testified as DW1 that from 6:00 p.m. till 10:00 p.m. when he retired to bed, he was at home where he even ate dinner together with his sister, Datifa. He thereafter retired to his room and slept till 7 a.m. of 24/5/2010. He accused PW2 for fabricating lies against him. He wondered why PW2 could not tender in court the torch which he had used to identify him. Datifa Herman (DW2) supported DW1's claim that he was at home with her when the bandits killed the deceased. DW2 insisted that after having their dinner together, his brother retired to his house till the following morning.

On his part, the 2nd appellant (DW3) testified that on 23/5/2010 he had gone away to a funeral where he stayed till the following morning of

24/5/2010 when, like everybody else he had learnt of the death of the deceased. This assertion was supported by Erasmina Tonas (DW4) and Pius Tonas (DW5). According to DW4, the second appellant was at her house on between 22/5/201 and 23/5/2010 to mourn with her over the death of her son, Reginald Tonas. According to DW4 and DW5, the second appellant returned back to his house on 24/5/2010.

In his defence, the 3rd appellant denied any role in the murder of the deceased. He stated that well before 23/5/2010 when the deceased was killed, right up to 4/6/2010; he was away in the neighbouring Kenya engaged in farming in Lang'ata.

In its considered judgment which convicted the appellants, the learned trial judge was not in any doubt about the strength of the four pieces of evidence which the prosecution had leveled against the three appellants. The **first** is the identification evidence of PW2 who heard his wife (the deceased) calling out in distress asking why KAKAA (the 3rd appellant) was killing her. The trial judge believed that the torch which

PW2 carried had bright lights sufficient to facilitate the identification of all the three appellants who were at the scene of crime.

Secondly, the High Court believed the evidence of PW4 who after the crime had been committed, testified that he saw the 3rd appellant riding the stolen motorcycle (exhibit P4) at Loserono village. After spotting the stolen motorcycle, PW4 made a following-up. The 3rd appellant who was together with another youth (Sonko) riding the motorcycle, abandoned it before making their escape. **Finally,** the trial court concluded that the evidence of extra-judicial statement (exhibit P3) and the evidence of cautioned statement (exhibit P5) linked all the three appellants to the murder of the deceased.

In their joint memorandum of appeal to manifest their grievance with their conviction, the 1st and 2nd appellants through Mr. Kelvin Kwagilwa, their learned advocate, preferred the following three grounds of appeal:

1. That the trial High Court erred in law and in fact in sustaining the first and second appellants' convictions on the basis of weak and unreliable visual identification evidence of PW2.

2. That the trial High Court erred in law in admitting Exhibit P3 and P5 in clear contravention of the law.

3. That on the whole of the evidence on record; the case for prosecution was not proved beyond reasonable doubt due to prosecution witnesses contradictions.

The 3rd appellant through Mr. Peres Seneto Parpai, learned advocate, preferred the following four grounds of appeal:-

1. *That the trial High Court erred in law and fact in sustaining the 3rd Appellant conviction on base of weak and unreliable visual identification evidence of PW2.*
2. *That the trial High Court erred in law and fact for admitting extra-judicial statement, exhibit P3, as support for conviction of Appellant No. 3.*
3. *That the trial High Court erred in law in admitting exhibit P5 in a clear contravention of section 58 of Criminal Procedure Act, Cap. 20.*

4. *That on the whole of the evidence on record, the prosecution case was not proved beyond reasonable doubt.*

When this appeal was called on for hearing, the 1st and 2nd appellants were represented by Mr. Kelvin Kwagilwa, learned advocate. Mr. Peres Seneto Parpai, learned advocate, represented the 3rd appellant. The respondent/Republic was represented by learned Senior State Attorney Mr. Julius Semali.

With regard to grounds no. 1 and 3, Mr. Kelvin Kwagilwa questioned the evidence of PW2 who claimed that the torch which he had, enabled him to identify the 1st and 2nd appellants. He submitted that this mode of identification is at best, doubtful. By merely claiming that he "flashed a torch" does not clarify the duration the torchlight he carried was flashed to identify the 1st and 2nd appellants. Mr. Kwagilwa further expressed his doubts why, during his examination in chief, PW2 failed to shed more information regarding the distance that separated him from the 1st and the 2nd appellants but he mentioned four metres during cross examination. The learned counsel insisted that clarification of the distance should not have left to be pursued by way of cross examination. He also wondered why

more details about the distance which separates the main house from the toilet were not forthcoming.

Placing reliance in the decision of the Court in **Ally Bakari Danga vs. R.,** Criminal Appeal No. 103 of 2015 (unreported), which emphasized the need to clarify the intensity of light from the torch and duration of time when that torch was lighted, the learned Counsel urged us to make a finding that the identification evidence of PW2 is very doubtful.

Turning to the evidence of recognition, Mr. Kwagilwa attacked PW2's evidence that he recognized the 1st and 2nd appellants by their names, Bayi and Mkambaa. He submitted that this type of identification is too general. According to the learned Counsel, further descriptions were needed to eliminate possibility of mistaken identity. He gave an example of the decision of the Court in **Raymond Francis v R.** [1994] T.L.R. 100 (CA) which discourages such generalized descriptions.

Mr. Kwagilwa next directed his attack on the evidence of PW2 who also claimed that he had seen Bayii and Mkambaa pushing his motorcycle from his house. This, he submitted, is another example of generalized assertions which are short of details. Because PW2 was the sole eye

witness, the trial Judge should have warned herself before acting on his evidence, he submitted.

Mr. Kwagilwa moved on the ground of appeal contending that in light of contradictions in the evidence of witnesses, the prosecution's case cannot be said to have been proved beyond reasonable doubt. He pointed out the evidence of PW2 who on page 24 of the record said he identified four people. But this account is different from the evidence of PW3 who on page 27 testified that PW2 told him that he had seen only two people, Bayi and Mkambaa. He also pointed at the evidence of PW2 during his cross examination on page 24 where he changes the number of people he saw from four to three. These contradictions, Mr. Kwagilwa submitted, created unresolved doubts on the exact number of people who PW2 saw at the scene of crime.

The learned Counsel refers to the sketch map (exhibit P1) to illustrate another contradiction. The toilet where PW2 was coming from, is not reflected in the sketch. This makes it hard to determine where PW2 stood when he shorn his torch light to identify the appellants.

Mr. Parpai, for the 3rd appellant, adopted all what Mr. Kwagilwa had submitted on. Submitting on ground contending that the extra-judicial statement (exhibit P3) was not recorded within four hours, he argued that as long as the 3rd appellant was in police custody before he was taken before a Justice of the Peace, time limit under section 50 of CPA would apply. Mr. Parpai also attacked the cautioned statement (exhibit P5) for contravening section 58 of CPA because it was taken in a questions-and-answers format. The 3rd appellant should have been given a paper to write his own, he submitted.

Mr. Semali the learned Senior State Attorney opposed the appeal. Submitting on identification evidence, he submitted that the 3rd appellant had on several occasions worked for PW2 and his wife as a casual labourer. Inevitably, he was well known to PW2 who easily identified and recognized him. Mr. Semali supported the evidence of PW2 that he was able to identify the appellants with the help of the light from his torch. Mr. Semali supported the claim by PW2 that he was able to recognize Bayi and Kakaa by their one names. He insisted that PW2 was even able to name

the appellants immediately to the well-wishers who had rushed to assist his family.

On alleged contradictions in the sketch map, Mr. Semali submitted that no miscarriage of justice was occasioned by failure to indicate where the toilet was in the sketch map.

With regard to the suggestion that the extra-judicial statement was taken outside the prescribed period, the learned counsel submitted that the conduct of the extra-judicial statements is guided by the Chief Justice's Rules and section 50 of CPA does not apply. Mr. Semali similarly dismissed off the suggestion that the cautioned statement (exhibit P5) violated section 58 of the CPA. He pointed out that PW5 who recorded the cautioned statement testified that he was instructed by his superiors to take down the cautioned statement which he did under section 57 (2) of the CPA.

Before us being a first appeal, the settled law enjoins us to subject the entire evidence on record to our own fresh evaluation in order to arrive at our own conclusions without losing sight of the fact that it was the trial court which was in a more vantage position to see, hear and appraise the

evidence of the witnesses and hence better placed to assess the credibility of these witnesses: see **Demeritus John @ Kajuli & Three Others vs. R,** Criminal Appeal No. 155 of 2013 (unreported).

It seems to us, the outcome of this appeal turns on our determination of two questions. First, whether with the aid of light from the torch which PW2 had, he was able to identify and recognize Bayi, Mkambaa and Kakaa (the three appellants) at the scene of crime that night using torchlight. Second, is whether, using the same source of light, PW2 was able to identify and recognize Bayi and Mkambaa, pushing a stolen motorcycle, immediately after attacking the deceased?

On evidence placing the three appellants at the scene of crime, we cannot but point out that their visual identification by PW2 was done under difficult circumstances taking into account that it was at night, after 9.00 p.m. In such difficult circumstances, this Court has always underscored the need for the courts to warn themselves before hasting to rely on evidence of visual identification done under difficult circumstances. In the case of **Raymond Francis vs. R**. (*supra)* which Mr. Kwagilwa referred to us, this Court regarded as elementary that in a criminal case where determination

depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance.

PW2 had testified that the bandits were separated by what he described as ten paces separating his main house and the toilet which was at the back of the house. That area of ten spaces was unlit and PW2 used his torch which he described as having bright light. He flashed his torch and saw Bayi and Mkambaa who he recognized as his neighbours. As he moved closer, PW2 saw two other men, but managed to identify and recognize only Kakaa. PW2 also knew Kakaa because he not only visited his house for casual labour but sometime in May he had given some work to Kakaa removing corn from maize cobs.

PW2 did not describe the intensity of torchlight apart from the fact that it was bright. Even while being cross examined by Mrs. Minde, learned advocate who represented the 1st and 2nd appellants, PW2 replied:

> *"...I saw three accused person through my torch which had bright light, I was not far I was standing about four metres away and I identified them properly. I do not remember clothes he had worn. I was confused already I had heard my wife*

yelling. I do not notice the kind of clothes they were putting on. The name KAKAA is the name used in their home and I have never heard any other person known by that name..."

Intensity of torchlight for purposes of positive identification at night is a very subjective area especially where the torch is the only source of light used for the identification. The need to establish the intensity of torch light in order to eliminate possibilities of mistaken identification has attracted considerable attention of the Court. For instance, in **Seleman Rashid @ Daha vs. R.**, Criminal Appeal No. 190 of 2010, the Court expressed itself in the following way:

> *The factual evidence in this case suggests that PW1 and PW4 could identify the appellant using torch light which was held by the appellant. Can it then be said that the torch light made the identification watertight so as to exclude all possibilities of mistaken identity? We think it was not. We hold so because, **firstly**, the intensity of the torch light is not clearly stated. **Secondly**, both PW1 and PW4 claim that they could identify the appellant, even though he is the one who was holding the torch, because at times he moved it around.* [Emphasis added].

In **Ally Bakari Danga vs. R,** (supra), the room was in darkness. PW2 claimed that she all the same used a torch and managed to identify the appellant. The Court observed that PW2 did not address the question of the duration of time when the torch was lighted to enable positive identification. In addition, the two courts below did not address the question of the intensity of the light from the torch. The Court was of the considered opinion that in the circumstances of that case, it could not from the evidence of PW2; reach a conclusion that she positively identified the appellant as that person who raped her.

In **Aidan Fredinand Mnamba and Three Others vs. R.**, Criminal Appeal No. 187 of 2014 (unreported) the Court while reiterating the position to the effect that even where the appellant may not be a stranger to an identifying witness, there is still the need to eliminate the possibility of mistaken identity, made reference to the case of **Issa Mgara @ Shuka vs. R.,** Criminal Appeal No. 37 of 2005 (unreported), where the Court reiterated the need to establish intensity of light:-

> *"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of light and its intensity is of paramount importance. "*

In the instant appeal before us, we think, the trial High Court did not address itself to the question of intensity of light from the torch and the duration of time which PW2 kept the 1st and 2nd appellants in his observation as the two allegedly pushed the motorcycle they had stolen. However, while the possibility of mistaken identity at the scene of crime were not eliminated with respect to the 1st and 2nd appellants, we settled in our minds that the possibilities of mistaken identity were eliminated with respect to the 3rd appellant, Kakaa.

From the evidence on record, there is no doubt that while PW2 and his wife Athanasia w/o Nicodemu were away, bandits had slipped into their house, stayed still and hidden waiting for an opportunity to attack. This opportunity presented itself when PW2 briefly left the main house to an out of the house toilet. There is evidence of PW2, that whilst still in the toilet, he heard his wife's distressed shout, yelling the name of the son of Mzee Mtafani, their neighbour: "Kakaa, why are you killing me?" It was clear the deceased had identified and recognized Kakaa. PW2, who heard the name of Kakaa, immediately informed his neighbour Gilbert Ignas Asenga (PW3)

who was the first person to arrive following the commotion at the household of PW2. In his evidence, PW3 proved that inside the room where the deceased faced Kakaa, there was a lantern which was alight:

> *"...We went together [with PW2] in the main house, inside I found his wife lying down on her stomach on the ground— I saw a lantern burning under the bed so I picked it up and put it on the table. I saw the deceased had been cut on the head and neck....".*

We think the lantern, which was alight when Kakaa (the 3rd appellant) and other bandits emerged from their hiding place inside the house, enabled the deceased to identify Kakaa as one of her attackers. There is evidence that before the incident, Kakaa was well known to the family. The light from the lantern in the proximity of the room in our evaluation enabled the deceased to not only identify and recognize Kakaa hence her loud shrill that *"Kakaa unaniua"*, that loud shout of the name Kakaa, alerted PW2 to shine his torch on the named 3rd appellant.

In both his cautioned statement (exhibit P5) and the extra-judicial statement (exhibit P3) the 3rd appellant corroborates in material particular,

the evidence of PW2 and PW3 by recalling how he and other bandits had climbed over a wall into the house of PW2. Once inside, they hid under a bed to wait for PW2 and his wife to finish their dinner. He even explained how the deceased managed to get hold of her machete which used to injure one of his fingers.

Mr. Semali is with due respect correct to submit that there is no law prescribing the minimum time within which to take an accused person to a Justice of the Peace to record an extra-judicial statement. With regard to the cautioned statement, the learned State Attorney is correct to point at the evidence of PW5 who testified that he recorded the cautioned statement (exhibit P5) of the 3rd appellant on instruction of his superior officers. Exhibit P5 shows that it was under section 57 (2) of the Criminal Procedure Act, but not section 58 as the 3rd appellant grounded his complaint. We found no reason to fault the trial court's finding after conducting trial within trial that cautioned and extra-judicial statements of the 3rd appellant were anything but voluntary.

In the upshot of the above, the appeal by Pasilidi s/o Herman Joseph @ Bayii (the 1st appellant), Williad s/o Evarist Daudi @ Mkambaa (the 2nd

appellant) is allowed, their conviction by the High Court is quashed and their sentence of death by hanging is set aside. The 1st and 2nd appellants shall henceforth be set free unless otherwise lawfully held.

The appeal by Deogratias s/o Samson Kanje @ Kakaa (3rd appellant) is hereby dismissed.

DATED at **ARUSHA** this 13th day of October, 2015.

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL