IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 363 OF 2014

1. GODLISTEN RAYMOND
2. ADAM SHABAN HOLE .....APPELLANTS

VERSUS

THE REPUBLIC..... ..... RESPONDENT

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

(Makuru, J.)

Dated 7th day of March, 2014
in
Criminal Sessions Case No. 2 of 2007

JUDGMENT OF THE COURT

2nd & 9th June, 2015

MBAROUK, J.A.:

The appellants were arraigned before the High Court of Tanzania sitting at Singida. They were charged with the offence of manslaughter contrary to sections 195 and 198 of the Penal Code Cap. 16 Vol.1 of the Laws (R.E. 2002). The High Court (Makuru J.) convicted and sentenced them to an

imprisonment term of ten (10) years each. Dissatisfied, they have preferred this appeal.

In this appeal, the appellants are represented by three learned advocates. The 1st appellant was represented by Mr. Kuwayawaya Steven Kuwayawaya (Rev.) and Mr. Deus Nyabiri, learned advocates, whereas Mr. Hurbert Lubyama represented the 2nd Appellant. On the other hand, Ms. Lina Magoma, learned State Attorney represented the respondent/Republic.

At the hearing, we observed that there were three memoranda of appeals, one was filed by the 2nd appellant on 10th May 2015, the second one was filed by Mr. Kuwayawaya (Rev.) on 30th May, 2015 on behalf of both appellants and the third one was lodged by Mr. Lubyama on behalf of both appellants on 21st May, 2015. In avoiding the confusion, the learned advocates preferred to adopt the Memorandum of appeal filed on 30-05-2015 which contained the following grounds:-

1. *THAT, the Trial Court erred in law and infact in holding that 1st Appellant was identified by PW1, PW2, PW3 and PW4.*
2. *THAT, Trial Court erred in law in failing to hold that the identification parade was improperly conducted.*
3. *THAT, the Trial Court erred in law and in fact in holding that the dying declaration was corroborated by the evidence of PW1 and PW4.*
4. *THAT, the Trial Court erred in law and in fact by convicting the appellants on insufficient evidence.*

In support of the grounds of appeal, Mr. Kuwayawaya (Rev.) filed the written submissions in terms of Rule 34 (2) of the Court of Appeal Rules,2009 (the Rules) on 28th May, 2015 which he prayed to adopt as part of their submission.

Before proceeding to examine the grounds of appeal, we have found it useful to examine even if briefly the facts of the prosecution's case, as they appeared at the trial court. It was alleged that, sometime in late May, 2002, the 2nd appellant had a relationship with Hamida d/o Athman (deceased) a girl

of Standard VII Primary School. In their relationship, the deceased conceived and the 2nd appellant approached Mwajuma d/o Juma (PW4) the mother of deceased and advised her that they should call a doctor for abortion. It was further alleged that on 7th day of September, 2006, the 1st appellant as a doctor arrived at the deceased home and conducted such an abortion. Thereafter, the deceased's condition worsened and was rushed to Tumaini Dispensary where she was attended but to no avail and eventually caused her death on 17th day of September, 2006 at about 17:00 hours. According to the Post- Mortem Examination Report, the deceased's death was due to hemorrhage and septic shock caused by unsafe abortion. The 1st appellant was thereafter arrested and charged with manslaughter. On the other hand, after the deceased's death, it was alleged that the 2nd appellant ran away and he was arrested on 29th day of November, 2008 and charged with manslaughter too.

In their defence, both appellants categorically denied to have committed the offence charged against them. The 1st

appellant, testified that, on 07-09-2006 at around 01:00 p.m., he was at home with his fiancée preparing himself for an afternoon shift. He categorically denied to have attended Hamida Athumani (the deceased) and denied to have committed the offence. After all, he said, at Tumaini Dispensary they do not attend abortion cases because they do not have the facilities. He further testified that he has never been to Kintandaa Village and does not know where that village is situated. He also testified that, he saw the 2nd appellant in 2011 in court. He further contended that on 17-09-2006 while he was on duty at Tumaini Dispensary, he was arrested by A/Insp. Kitenge Shabani (PW1). While at the police station, he was informed that he stood charged with homicide case. Thereafter, he said an identification parade was conducted and he was identified by Athumani Msanku (PW2) the father of the deceased. However, he was of the view that the identification parade was not properly conducted. At the trial court, he prayed to be set free as he did not commit the offence.

On his part, the 2nd appellant testified before the trial court that he is a businessman selling goats and cattle from one market to another and transporting them to Vingunguti Dar es Salaam. He said he left to Dar es Salaam on 06-09-2006 alone to transport 120 goats and returned on 19-09-2006. He denied to have committed the offence charged against him. He relied on the defence of alibi but the trial judge rejected the ticket which he tried to tender as an exhibit to prove that he was not at Kintandaa village at the time when the offence was committed. The 2nd appellant also denied to have told PW4 that he was responsible for Hamida's (deceased) pregnancy. He further testified that, he was informed of the death of Hamida by his fellow businessman and village/mate called Manase through a telephone call on 22-09-2006 and thereafter he went to pass his condolences. The record also shows that, the 2nd appellant testified that it was his first time to see the 1st appellant in court in 2009 and denied to have sent Hamida to Tumaini Dispensary or

told PW4 that the name of the doctor was Gody (the 1st appellant).

At the hearing of the appeal, Mr. Nyabiri took charge of submitting on the grounds of complaint and he prayed to adopt the appellants' written submission. He started his submission by combining the 1st and 2nd grounds of appeal which are basically concerning the issue of the identification. In his analysis of evidence concerning identification, Mr. Nyabiri started with the evidence found in the dying declaration (Exhibit P2) the statement made by Hamida (the deceased). He submitted that, in that dying declaration, the only description regarding a person who allegedly performed such an abortion was "*Mweupe wa Wastani*". Mr. Nyabiri was of a firm view that, that type of description could fit a lot of people and not necessarily the 1st appellant.

As regards the evidence of identification made by PW2, Mr. Nyabiri submitted that at page 97 of the record PW2 testified that they arrived at Tumaini Hospital at around 08:00 p.m.

and it took seconds to take Hamida from the car to the hospital and they did not go through the reception. He further submitted that the record shows that PW2 did not talk to the two people who came to collect Hamida from the car. After all, PW2 testified that the two people did not introduce themselves and he didn't remember the type of clothes the appellant had put on. Mr. Nyabiri added that even if PW2 testified to have been told by Hamida and the 2nd appellant that one of the two people who collected her from the car at the hospital was a person who conducted the abortion, but there was no clear mark which specifically pointed to the 1st appellant.

As regards the evidence of identification adduced by PW4, Mr. Nyabiri submitted that as far as PW4 was in custody as a co-accused person and appeared in court together with the 1st appellant for a long time, the alleged identification made by her was a mere dock identification. He went on further by submitting that, legally the identification of the 1st appellant in court made by PW4 was not proper as the witness herself

admitted at page 92 of the record that *"it is true that I was charged jointly with the 1st accused person. I am not seeing him for the first time in dock ..... I did not mention Goody's name to the Police because they did not ask ...."*

Mr. Nyabiri was of the view that, considering the anomalies he has pointed out, it is doubtful whether the 1st appellant was correctly identified. In support of his stand, he cited to us decisions of this Court in the case of **Waziri Amani v. Republic** (1980) TLR 250, **Maloda William and Another v. Republic**, Criminal Appeal No. 256 of 2006 and **Ally Shabani v. Republic,** Criminal Appeal No. 32 of 2011 (both unreported).

Mr. Nyabiri further submitted that the identification parade was improperly conducted. He submitted that since PW2 could not have identified the 1st appellant at the Tumaini Hospital, it follows that he could not have identified him at the parade. Mr. Nyabiri was of the view that the identification parade was not fairly conducted since PW1 A/Inspector Kitenge was the

duty officer before the parade. He was also the investigator and took care of the identifying witnesses including PW2 who claimed to have seen them when they were called at the identification parade. Mr. Nyabiri added that if PW2 saw those who were summoned for the parade including PW3 Omary Juma who was his brother in law, then it was obvious that PW2 would have easily picked the one whom he had not seen. In support of his argument, Mr. Nyabiri cited to us the following authorities: **Mwangu Manaa v. Republic** (1936) 3 EA 29 and **Republic V. XC -7535 PC Venance Mbuta** (2002) TLR 48, where detailed guidelines on the conduct of an identification parade were stated. Finally, Mr. Nyabiri urged us to find that the guidelines stated in the cases cited above were flouted by the Police at the parade since it was PW1 who was dealing with the identifying witnesses and PW2 admitted to have seen people who were paraded before the parade started. Also, he said, PW3 was PW2's relative and was not in the same class of life as that of the 1st appellant. After all, he

added there was no evidence that other participants in the parade generally had similar clothing with the 1st appellant.

As regards the 2nd appellant, both Mr. Nyabiri and Mr. Lubyama claimed that the trial court simply stated that the defence of alibi raised by their client did not raise any doubt without any elaboration as to how it reached to that conclusion. They also submitted that there was no proof that the appellants knew each other prior to the case so as to form the common intention to commit the crime of abortion. In the absence of such evidence both Mr. Nyabiri and Mr. Lubyama urged us to find that the trial court wrongly convicted the appellants.

On her part, the learned State Attorney supported the appellants' appeal. As a whole, she submitted on the same line as those submitted by the learned advocates for the appellants concerning the ground of identification and identification parade. She urged us to resolve the doubts pointed out earlier in favour of the 1st appellant as he was not

properly identified. As regards the 2nd appellant the learned State Attorney submitted that there was no evidence that the 2nd appellant participated in the abortion which led to Hamida's death. She also submitted that there was no D.N.A. test which was conducted to implicate the 2nd appellant with the pregnancy of the deceased. As on the issue of alibi raised by the 2nd appellant, the learned State Attorney submitted that the trial judge misdirected herself in rejecting to admit the ticket tendered by the 2nd appellant. Finally she urged us to allow the appeal, quash the convictions and set aside the sentences.

Having examined the submissions made by both sides in this appeal, we are of the considered opinion that this appeal can be resolved by examining two main issues: **One,** whether the 1st appellant was correctly identified as a doctor who conducted abortion which led to the death of Hamida (the deceased). **Two,** whether the 2nd appellant was involved in searching for a doctor to conduct an abortion which led to the death of Hamida (deceased).

As regards the issue as to whether the 1st appellant was correctly identified as a doctor who conducted an abortion on Hamida (deceased), we fully agree with the submissions made by the learned advocates for the appellants and the learned State Attorney that the prosecution witnesses have failed to prove beyond reasonable doubt that the 1st appellant was correctly identified. First of all, the description given by Hamida (the deceased) in her dying declaration was not enough to avoid mistaken identity on the part of the 1st appellant. The deceased simply stated in her dying declaration that a person who allegedly performed on her was *"Mweupe wa wastani",* meaning that the doctor was of light complexion. However, we are of the considered opinion that, that type of description is not enough, as it could have fit many other people not necessarily the 1st appellant.

It is now settled that when a court of law relies on visual identification one of the important aspects to be considered is to give enough description of a culprit in terms of body build, complexion, size, attire, or any other peculiar body features to

make the next person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime. See the decision of this Court in the case of **Shabani Bakari v. Republic**, Criminal Appeal No. 118 of 2015, **Omar Iddi Mbezi and Three Others V. Republic**, Criminal Appeal No. 227 of 2009 (both unreported) to a name a few.

In the instant case, since the deceased's dying declaration has failed to give such full description of the 1st appellant, we are of the view that it is unsafe to rely upon such description in finding the 1st appellant to have been correctly identified.

Secondly, we are of the opinion that all other prosecution witnesses have failed to give sufficient evidence in favour of correct identification of the 1st appellant. The crucial witnesses relied upon by the prosecution were PW2 and PW4, and in essence, we fully agree with Mr. Nyabiri that the tests for correct identification from the evidence adduced by those prosecution witnesses were not met. This Court in the case of

Dorika Kaugusa V. Republic, Criminal Appeal No. 174 of 2004 (unreported) stated as follows:

> *"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 must be watertight, even if it is evidence of recognition**....."*

(Emphasis added).

Also see **Waziri Amani v Republic** (supra) and **Maloda William and Another v Republic** (supra) where in both cases it was emphasized that in a case where its determination relies on visual identification, a court of law is required to make sure that such evidence must be watertight. In the instant case as pointed out by Mr. Nyabiri as the evidence adduced by PW2 and PW4 was not watertight, we are constrained to find that their evidence has failed to establish beyond reasonable doubt that the 1st appellant was correctly identified. Here, we have found no need to repeat

the submissions made by Mr. Nyabiri on that issue as we fully agree with him.

Apart from examining the issues of visual identification, we have also found it useful to examine the status of the identification parade in this case. According to the decision in the case of **Republic v. XC -7535PC Venance Mbuta** (supra) the guidelines on the conduct of an identification parade as stipulated in the Police General Orders (PGO) Number 231 were stated. For purpose of this case, the relevant rules are as follows:-

> *2 (h) Officer who made the arrest or who took part in the investigation will not be sent to bring or notify witnesses to attend the parade and will not communicate with them before the parade is held.*
>
> *(i) Arrangements will be made to ensure that witnesses have no opportunity to see, be seen by, any of the persons to be paraded.*

(k) Persons selected to make up the parade should be of similar age, height, general appearance and class of life. Their clothing should be in a general way similar.

(l) The persons selected for the parade must not be known to the complainant or the identifying witnesses as identification would then have little value.

We fully agree with Mr. Nyabiri that the above stated rules were flouted since PW1 was dealing with the identifying witnesses while at the same time he was an arresting officer and took part in the investigation which is contrary to Rule 2(h) of the PGO No. 231. Also rule 2(i) was violated when PW2 had seen the people who were paraded before the parade was conducted. Rule 2(k) was also violated as PW3 and others in the identification parade were not in the same class of life as the 1st appellant. It is also on record that PW3

was a relative of PW2 which is contrary to the requirement under Rule 2 (l) of the PGO No. 231.

The record shows that all those guidelines were not taken into consideration by the police and the trial court, and that means that the identification parade was wrongly and improperly conducted. Once the issue of visual identification and identification parade excluded for being improper, we are of the considered opinion that the 1st appellant was not correctly identified and hence wrongly convicted. But the case is different with the second appellant.

There is no dispute that in the instant case, the deceased's death was caused by unsafe abortion believed to have been performed by the 1st appellant. But we have just ruled that the 1st appellant was not properly identified and so wrongly convicted. We now wish to examine the evidence against the 2nd appellant.

The evidence on record against the 2nd appellant in the deceased's dying declaration (Exh. P1) and the testimonies of

PW2 and PW4 was that, it was the 2nd appellant who was responsible for the deceased's pregnancy and the one who procured a doctor to abort the pregnancy to enable the deceased do her final Primary School examinations. This was corroborated by the appellant's own admission to PW2, which he did not dispute. His conduct in assisting the deceased to and back from Tumaini Dispensary when her condition worsened also corroborated by his conduct in disappearing from the village after the deceased's death from 2006 until 2009 when he returned and was arrested. With due respect to the learned counsel, we have no shade of doubt about the 2nd appellant's participation and culpability in the crime. The issue however is, in view of the our finding that of the 1st appellant, was wrongly convicted, and he was the one who allegedly actually performed the abortion can the 2nd appellant's conviction be sustained?

Section 22 (1) (d) and (3) of the Penal Code provides:-

"22 (1) .....when the offence is committed, each of the following persons is deemed to have taken

part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely.

(d) .....any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission."

(3) .....a person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.

We are very much aware of the general principle that where in a criminal charge, the principal offender is acquitted, the conviction of an accessory, cannot be sustained. See **Nkahanemeheto s/o Masukura V. Republic** (1959) E.A. 598 (CAK) where it was held :-

> *"the conviction of the alleged principal having been quashed, there was a repugnancy on the face of the record in that the appellant stood convicted of assisting or receiving the alleged principal, knowing him to have committed murder, when that person had been held not guilty."*

In that case, the accessory's appeal was allowed and the conviction and sentence were quashed.

In that case the appellant was convicted of aiding and abetting another in commiting an offence. The alleged actual offender was acquitted, and it was not proved that the offence was committed. So, that explains why the Court thought that it was illogical to sustain the conviction of an accessory. In the present case the offence was actually committed. There is no dispute that the 2nd appellant participated in procuring a person to perform the abortion. In terms of section 22(3) above, such person could in law be charged and convicted of actually performing or procuring the commission of the

offence. He is as good as a principal offender. Hence, this case is distinguishable from **Masukura's case** (supra).

In elaboration of the evidence regarding the involvement of the 2nd appellant in that abortion, we would like to refer to the testimony of PW2 at page 73-74 of the record of appeal, who testified as follows:-

> *"I asked my daughter who was responsible for her pregnancy. My daughter told me that Adam Shabani Hole was responsible. I went after Shabani Hole.* ***I summoned him at my house and Adam Shabani Hole admitted to be responsible. I inquire further why had decided to abort the pregnancy. He told me it was because he wanted my daughter to sit for exams."***
>
> (Emphasis added*).*

The second appellant never denied in his defence that he told PW2 those words, hence we take an adverse inference that such an admission was true. The dying declaration (Exh.

P1) of the deceased implicated the 2nd appellant in the following words:

> *"Mnamo mwezi Julai, 2006 nilianza kutoziona siku zangu za hedhi; nilipata wasiwasi na nilimfuata mama ADAM SHARIF na kumueleza hali hiyo na kanieleza kuwa nisiwe na wasiwasi atamueleza ADAM na atanipeleka kwa Daktari na tutaitoa, hivyo ndipo siku hiyo alipokuja daktari huyo na kuniingiza mikasi ukeni na nilishindwa kwenda shuleni kwa sababu nilikuwa na maumivu makali; na usiku wa tarehe hiyo 07-09-2006 niliona damu zikitoka ukeni kidogo kidogo na nilikuwa ninatumia dawa aina ya Panadol na Amoxyilin nilizopewa na huyo daktari; hali yangu ilizidi kuwa mbaya na nikiwa nimelala usiku mama alikuja na kuniamsha na alinipandisha katika TAXI ninayoelezwa iliitishwa na ADAMU; mama na baba yangu wakanipeleka katika hospitali niliyokuwa naifahamu kwa jina la TUMAINI na nilikutana na yule yule daktari aliyekuja nyumbani na kunitolea mimba".*

The evidence of PW2 and PW4 further shows how the 2nd appellant participated fully in making sure that the abortion was performed to the deceased. The evidence according to PW2 and PW4 also shows that it was the intention of the 2nd appellant to assist Hamida to perform her examinations by conducting such an abortion after she became pregnant. Both, PW2 and PW4 testified to that effect. It is also on record at page 88 that the 2nd appellant was the one who sent a doctor to perform such an abortion on Hamida according to the testimony of PW4.

For those reasons, we are very much convinced that in terms of section 22 (l) (d) and (3) of the Penal Code the 2nd appellant procured the commission of the offence charged against him, and he is as liable as the person who carried out the abortion.

All said and done, we allow the 1st appellant's appeal, quash his conviction and set aside the sentence imposed on him. In the result, we order his immediate release from

custody unless he is held therein for some other lawful cause. On the other hand, the 2nd appellant's appeal is hereby dismissed in its entirety.

DATED at **DODOMA** this 09th day of June, 2015.

E.A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
DEPUTY REGISTRAR
COURT OF APPEAL