IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 367 OF 2014

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

1. MICHAEL NORO
2. JUMA MNIGA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Makuru, J.)

dated the 20th day of October, 2014
in
Criminal Sessions Case No. 1 of 2008

JUDGMENT OF THE COURT

04/06/2015 & 08/06/2015

KILEO, J.A.:

The two appellants, namely Michael Noro and Juma Mniga appeared before the High Court of Tanzania sitting at Kondoa in Criminal Sessions Case No. 1 of 2008 on an Information for Murder contrary to sections 196 and 197 of the Penal Code. They were found guilty of the murder of one Mathias s/o John Soloka and were sentenced to suffer death by hanging. Being aggrieved by the decision of the High Court they have appealed to

this Court with the legal services of their learned counsel, Reverend Kuwayawaya S. Kuwayawaya.

It was not disputed that the deceased Mathias Soloka met a violent death. The postmortem report which was admitted at the trial as exhibit P1 without objection showed that the cause of death was hemorrhage which was a result of multiple penetrating wounds on various parts of the deceased's body. The prosecution relied on the testimonies of three witnesses to establish the charge against the appellants. According to PW2 Mdachi Kibwana who was the only eye witness, while he had gone to the forest on the fateful day at around 4.00 pm to look for sticks he heard someone screaming. Upon going to find out what was amiss he saw Mninga, the second appellant (who appeared as the second accused at the trial), attacking the deceased who had been grazing cattle. At the same time he also saw the first appellant (who appeared as the first accused at the trial) in the company of the second appellant and was holding a bill hook.

In denying the charge against them both appellants implored the trial court to find that the principal witness for the prosecution (PW2) was not one to be relied upon for among other reasons, considering that it took some

months (September 2006 to January 2007) for the 2nd appellant to be arrested.

In arriving at a conviction the learned trial judge found that PW3 was a witness of truth and that he sufficiently identified the two appellants as the deceased's assailants. She also found corroboration of the testimony of PW2 from the circumstances as reproduced below:

> *"... I also had an opportunity of observing the demeanor of PW2 when he testified in court, I am satisfied he was a credible witness telling nothing but the truth.*
>
> *Even though, apart from the evidence of PW2 there was ample corroboration as follows: the first accused's threats to PW3 that he will shed blood in one of his family members, the second accused's act of disappearing from the village immediately after the incident, the first accused telling lies that there was no previous misunderstanding between him and the deceased and the deceased's body had multiple wounds as stated by PW1 and PW3"*

Two memoranda of appeal were filed in Court, one by Rev. Kuwayawaya on 20/05/2015 and the other one by the appellants themselves on 21/05/2015. Rev. Kuwayawaya opted to adopt the memorandum he had filed the grounds of which were:

1. That the trial judge erred in law and in fact in convicting the appellants without proof of their guilt on the required standard.
2. That the trial judge erred in law and in fact in holding that the appellants were properly identified.

The learned counsel argued, and was supported by Mr. Angaza Mwipopo, learned Principal State Attorney who appeared for the respondent Republic that it was in error to convict on the evidence of a sole identifying witness without corroboration. Emphasizing the need for great caution in convicting on the evidence of visual identification by a single witness Rev. Kuwayawaya referred us to **Godfrey Richard vs. R**.- Criminal Appeal no. 36 of 2008 (unreported). The Court in the above case cited **R. v. Mohamed Bin Allui** (1942) 9 EACA 72 where the then Court of Appeal for Eastern Africa held:

> *"that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify*

the accused and then by person to whom the description was given."

Mr. Angaza made reference to the decision of this Court in **Ahmad Omari v. R.**, Criminal Appeal No. 155 of 2005 (unreported) which states that *"even though a fact may be proved by the testimony of a single witness there is need for testing with greatest care the evidence of a single witness."* The Court went further in that case and cited with approval **Anil Phukan v State of Assam** 1993 AIR 1462 where it was held:

"A conviction can be based on the testimony of a single – eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"

Both Rev. Kuwayawaya and Mr. Angaza were also of the view that conviction should not have been entered in view of glaring contradictions as between the prosecution witnesses as well as contradictions in the testimony of the key witness himself.

This matter revolves around credibility of witnesses. Being a first appellate court we have a duty of carefully considering and re-evaluating the facts in

all respects before confirming the findings of the trial judge and the correctness of those findings.

Without much ado, we will state right away that the evidence of PW2 who was the sole identifying witness was not worthy of sustaining a conviction for the charge of murder that the appellants were faced with. Had the learned trial judge tested the testimony of the witness with sufficient care she would no doubt have found that it was not trustworthy. In the first place, going by the record, (page 53) PW2 claimed that he reported the matter to his ten- cell leader and remained at home while fellow villagers went to the scene in response to the alarm that had been raised. He said that he was afraid to go back to the scene as the appellants had threatened to kill him if he reported the matter. We agree with Rev. Kuwayawaya that this was a flimsy explanation as indeed there were many people who had gone to the forest in search of the deceased and there was no cause for him to be afraid. Further still, though the witness claimed to have reported the matter to his ten-cell leader immediately with a description of the deceased's assailants and that he and the ten- cell leader were actually taken by the police to record their statements, the ten-cell leader never testified in court. This appears to us to be strange. It is now

established that a trial court is entitled to draw an adverse inference to the prosecution where witnesses who, from their connection with the transaction in question, are able to testify on material facts and such witnesses are within reach but are not called without sufficient reason. See for example, **Azizi Abdalla v. R.** [1991] TLR 71. In the present case it is not only a matter of drawing an adverse inference. The evidence of PW2 was highly suspect. At page 52 of the record he is recorded as testifying to the effect that the police went to take him and the ten-cell leader to record their statements after one week. He specifically said that he was at home from where the police went to pick him up. PW1 however stated, at page 43 of the record that *"One Mdachi came at the police station and told us that he witnessed when...."*

The other areas of discrepancy in the testimony of PW2 which were pointed out by Mr. Mwipopo and which we also noted rendered the testimony of PW2 to be of no value. For example at line 6-8 on page 51 of the record the witness said:

> *"About 10 paces from where the deceased was I saw Mninga, the second accused attacking the deceased using an arrow. Mninga was with Michael."*

Shortly thereafter at line 13 he said:

"they were chasing the deceased while I was looking at them."

Chasing and attacking are two different scenarios. Also at page 51 he said that the appellants threatened him but at page 52 he said it was Mninga Jumbe the second appellant who threatened him.

The learned trial judge stated that there was corroboration in the testimony of PW2 from circumstances we earlier noted. However, it is our considered opinion that for corroboration to apply, the witness whose evidence is said to be corroborated must himself/herself be found to be truthful in the first place. Moreover, the allegation that the second appellant disappeared from the village which the learned trial judge considered to be one of the corroborating factors was mere hearsay. The second appellant himself insisted that he was in the village throughout and wondered why it took months for him to be arrested if the identity of the culprits was known from the day of the incident. His evidence to the effect that he was in the village throughout was never challenged by the prosecution. He rightly pointed out, while defending himself, that there was no witness who testified to the effect that he ran away from the village.

Having considered the matter as above we are settled in our minds that it was highly unsafe to convict the appellants on the evidence of the single eye witness in this case.

In the end, we find that the appeal was filed with sufficient cause for complaint. We, in the circumstances allow it. Conviction entered is quashed and sentence passed is set aside. The appellants are to be released from custody forthwith unless they are otherwise held for some lawful cause.

DATED at **DODOMA** this 06th 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
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL