

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

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

CRIMINAL APPEAL NO. 366 of 2014

1. RICHARD MAWOKO	}	
2. KEDMOND KUTITU	}APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dodoma)**

(Makuru, J.)

**Dated 31 day of October, 2014
in
Criminal Sessions Case No. 67 of 2004**

JUDGMENT OF THE COURT

3rd & 9th June, 2015

MBAROUK, J.A.:

In the High Court of Dodoma sitting at Dodoma, the appellants with three others were charged with the offence of Murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002. The appellants were the only ones who were found guilty, hence they were convicted and sentenced to suffer

According to Ngozi Mahajile (PW1), he testified that the deceased was his uncle and said that on the fateful night he heard noise from the western part of the deceased's house and rushed to where the noises came from. He said, his house was about fifty meters to the place where the deceased's house was situated. While rushing to that place at about ten (10) paces from there he saw some people running. He said, he managed to identify two of them as they faced each other as there was moon-light which was overhead and clear. He named the 1st appellant and one Mussa Mazungu (who was later discharged) as those he identified.

On the other hand, Mercians Mahajile (PW2) the wife of the deceased testified that on 05-01-2004 at night, they were invaded by bandits who assaulted her husband and managed to identify two of them. She said, during the invasion she was sleeping in the sitting room with her daughter while the deceased was sleeping in another room. PW2 testified to have managed to identify the bandits because she knew them

before and outside the house there was moon-light which passed through the space between unplastered raffers of the wall of the house which permitted light to pass through. She added that, after the bandits entered inside the house, they started to assault the deceased which later caused his death.

In their defence, the 1st appellant denied to have committed the offence, and stated that he was arrested sometimes in January, 2014 in his house at Ndogowe Village. He further testified that it was alleged that Mussa Mazungu was the one who implicated him because he had grudges against him. Whereas the 2nd appellant simply said that he was arrested in connection with this case in 2006 at Ndogowe Village and denied to have killed the deceased. He also claimed that since January, 2004 until the time he was arrested, he was residing at the same village.

In this appeal, the appellants were represented by Mr. Paul Nyangarika and Ms. Salome Magesa, learned State Attorney represented the respondent/Republic.

Earlier on, the appellants lodged their own grounds of appeal, but at the hearing, Mr. Nyangarika prayed to argue the appeal relying on the grounds which he filed on 18-05-2015, which are as follows:-

- 1. That, the Hon. Trial Judge erred in law and in facts in failing to properly evaluate the evidence on record; which evidence is in favour of the appellants' case.*
- 2. That, the Hon. Trial Judge erred in law and in facts in not holding that the appellants were not properly identified at the scene of crime.*
- 3. That, the Hon. Trial Judge erred in law and in facts in not making adverse inferences against the prosecution's case regarding their not calling the local authority officials of the village where the incident occurred as well as their failing to call Daudi and or Jeremiah who were in the same room with the deceased on the fateful night.*

At the hearing, Mr. Nyangarika started his submission by submitting on the 2nd ground of appeal which is concerning identification where he submitted that, the visual identification adduced by PW1, PW2 and PW3 was very weak. He further contended that, it is now settled that, in a case where identification is to be relied upon to prove the case, the evidence of visual identification of a suspect has to be watertight so as to avoid mistaken identity. In support of his contention, he cited to us the case of **Waziri Amani v. Republic** (1980) TLR 250. He strongly argued that in the instant case the circumstances at the scene of crime were not favourable leading to correct identification of the appellants. For example, he said, PW1 at page 62 of the record testified that he identified the 1st appellant by the help of a moon-light which was overhead. However, Mr. Nyangarika submitted that, no intensity of that moon-light was disclosed by PW1 which is very important in avoiding mistaken identity. To support his argument, he cited the case of **Lubeleje Mavina and Another V. Republic**, Criminal Appeal No. 172 of 2006

(unreported). Mr. Nyangarika added that sometimes clouds may cover the moon and its light may diminish away for sometime, hence moon-light may not be a reliable source to rely upon for correct identification.

As for the evidence adduced by PW2 concerning the identification of the appellants, Mr. Nyangarika completely discredited her evidence for three reasons. He said, **one** is that PW2 at page 71 of the record testified to have identified the appellants by the help of the moon-light as there was a space on the wall which permitted light to pass through it. Mr. Nyangarika wondered how can a person correctly identify another person in such a situation where an intensity of that source of light was not disclosed? **Two**, he said, PW2 at page 73 testified not to have known the number of the bandits as they flashed a torch to her. He further submitted that, as the bandits flashed a torch light towards PW2's face, she could not have been able to identify those bandits correctly. **Three**, Mr. Nyangarika said, at page 74 of the record, PW2 testified

that she was confused. Hence, he said, taking into account such confusion, PW2 could not have safely identified the appellants. On the other hand, Mr. Nyangarika contended that, even PW3 at page 78 of the record was quoted to have said, that she was scared when the bandits entered into their house, hence under those circumstance she could not have sufficiently identified the appellants.

For that reason, Mr. Nyangarika urged us to find that under those circumstances it could not have been safe to reach to a decision that the appellants were correctly identified by PW1, PW2 and PW3 at the scene of crime.

In his submission on the 3rd ground of appeal, Mr. Nyangarika submitted that the prosecution have failed to call some key witnesses to testify in court. For example, the chairman of "Kitongoji" and the one who went to report the matter to him called Dotto also Daudi and Jeremiah who were in the same room with the deceased on the fateful night were not called to testify. He was of the view that as all those

key witnesses were not called to testify, the prosecution could have hidden something.

As to the 1st ground of appeal, Mr. Nyangarika submitted that the trial judge failed to evaluate the evidence on record in favour of the appellants. For example, he said the trial judge failed to consider the late reporting of the incident at the police station as the incident occurred on 05-01-2004 but the same was reported on 08-01-2004. Apart from that, he said, the trial judge failed to consider why Mussa Mazungu was acquitted while the 1st appellant was not acquitted hence that showed double standard as it was Mussa Mazungu who implicated the 1st appellant as they were together. He said such a failure in evaluating the evidence on record led to injustice on the part of the appellants.

For those reasons, Mr. Nyangarika urged us to allow the appeal, quash the convictions and set aside the sentences.

On her part, Ms. Magesa out-rightly supported the appeal. She went on the same lines as submitted by Mr.

Nyangarika. She further submitted that the convictions and sentences imposed on the appellants at the trial court mainly relied on identification. However, she contended that, the identification in this case was not watertight. She then cited to us the case of **Waziri Amani v. Republic** (supra) **Saleh Msuta v. Republic** (1980) TLR 174. She added that, generally the evidence was not enough to establish the guilt of the appellants, hence she joined hands with the advocate for the appellants and prayed for the appeal to be allowed convictions quashed and sentences to be set aside.

On our part, we too join hands with both, Mr. Nyangarika and Ms. Magesa that the evidence adduced by the prosecution witnesses was not enough to establish the guilt of the appellants. We are of the view, that, the decision of the trial court in this case was mainly centered on the issue of identification of the appellants at the scene of crime. However, it is now settled that if the witness is relying on some source of light as an aid to visual identification, he/she

must clearly describe the source and intensity of that light. There is a string of the decisions of this Court which emphasizes that position. For instance See **Waziri Amani v. Republic** (supra), **Issa Mgara @ Shuka V. Republic** Criminal Appeal No. 37 of 2005 (unreported) **Lubeleje Mavina and Another V. Republic** ,(supra) **Omar Iddi Mbezi and Three Others v. Republic** Criminal Appeal No. 227 of 2007 (unreported) to name a few.

In the instant case, as pointed out by Mr. Nyangarika, that PW1, PW2 and PW3 have failed to have correctly identified the appellants at the scene of crime. For example, PW1 simply testified that he identified the appellants by the aid of the moon-light which was overhead, but he failed to describe its intensity. The issue of the description of the intensity of the source of light has been emphasized in our various decisions that it should be clearly stated so as to avoid mistaken identity of a suspect. We see no reason to re-emphasize it now.

Taking into account all the circumstances in this case, stated herein above, we are constrained to allow the appeal. In the event, we allow the appeal, quash the convictions and set aside the sentences. In the result, we order that the appellants be released from custody forthwith, unless they are otherwise lawfully held.

DATED at DODOMA this 8th 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.

