IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA,J.A., LUANDA, J.A., And JUMA,J.A.

CRIMINAL APPEAL NOS. 232 & 233 OF 2014

1. **CROSPERY GABRIEL**
2. **ERNEST MUTAKYAWA** } .....**APPELANTS**

VERSUS

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

Appeal from the Judgment of the High Court of Tanzania

at Bukoba)

(Mjemmas, J.)

dated the 3rdday of July, 2014

in

Criminal SessionsCase No. 13/2013

JUDGMENT OF THE COURT

17th&,20th day of February, 2015

JUMA, J.A.:

The appellants, Crospery Gabriel and Ernest Mutakyawa, (hereinafter referred to as the 1st and 2nd appellants respectively), were each sentenced to suffer death following their conviction by the High Court of Tanzania at Bukoba, of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. Four other accused persons, one Mustapha Kihanga, Christian Tryphone, Issa Said and Mathias Nestory were acquitted.

The salient facts giving rise to the charge of murder and subsequent conviction and sentencing of the two appellants trace back to events that took place between 1 a.m. and 2 a.m. on 5th April, 2004. Twaha Abdullatiff (PW1) the head of his household was asleep in his house in Rutoro village of the Ngenge Ward in Muleba district. He was awaken from sleep by the sound of his dogs barking from outside.PW1 took a precautionary step of moving his children including Muktari Twaha (the deceased) to a room used by his wife, Safina Twaha (PW4). He then moved to the living room (*sebule*) where his son, Jabili Twaha (PW2) slept. He did not open the door when he heard voices from outside ordering him to open the door. It was at this moment when he heard a sound of a heavy stone crushing into the back yard door. The door, though shattered into pieces, it did not provide adequate opening for the intruders to enter the house. A match of words ensued, with the bandits ordering him to come out of the house, while he urged them to enter the house. Both PW1 and PW2 testified that they were able to recognize the intruders by their voices and visually through the broken door.

It was while PW1 was exchanging words with the bandits when four shots were fired from outside through the broken door. PW1 ran through

the backyard door in order to seek assistance. Meanwhile Abdallah Twaha (PW3) remained with his mother (PW4) when his father ran outside to seek assistance. PW3 saw two people who he did not recognize, enter their house taking money. He however recognized the two appellants, Crospery Gabriel and Ernest Gabriel, who entered his mother's bedroom (i.e. PW4's bedroom). According to PW3, it was Crospery Gabriel who cut PW4's head with an axe, felling her down. He then proceeded to cut PW4 with the machete. According to PW3, it was Crospery who used his machete to slash him and his younger brother, Muktari Twaha (deceased).

PW4 told the trial court how that night she heard her husband (PW1) and some other people in argument. Her children PW3, Fatna and Muktari (deceased) joined her in her bedroom when the bandits attacked. PW4 opened the window to her bedroom to shout for help. She could see flash of torch lights. She managed to identify the first and second appellants. She could identify these two because they were not only her neighbours, but on some occasions the two worked as their casual labourers. There were about four gunshots. From her position at the window she later saw her husband (PW1) and her son Jabil (PW2) running away from the house.

Her ordeal began so she testified, when two bandits Said and Mustapha who she recognized, entered her bedroom. The two demanded money, they took Tshs. 14,000/= which was on the table. They also took away her cell phone. It was at this juncture when the 1st and 2ndappellants entered her bedroom and as if on a cue, Said and Mustapha moved out of the bedroom. According to PW4, the 1st appellant carried an axe and a machete; whereas the 2nd appellant had a torch and a machete. It was the 1st appellant who hit PW4 on the head using a heavy object. PW4 became unconscious. PW1 later found his wife and child bleeding profusely from their injuries. The deceased who had four wounds on his arm, died later at Bukoba Regional Hospital.

Defending himself under oath to deny any role in the murder of the deceased, the 1st appellant (DW1) testified that he knew PW1 who was not only his neighbour, but was formerly his employer who assigned him occasional casual menial work. The 1st appellant insisted that he could not have participated in the crime because he had earlier on 27th February 2009 left Rutoro village. And the deceased was attacked much later on5th April, 2009. The 1st appellant also wondered how PW1 who was hiding from the bandits could still identify him through a wick lamp. According to

the 1st appellant, wick lamp ordinarily facilitates visual identification of only those who are close enough to the source of its light.

In his defence, the 2nd appellant (DW2) insisted that he could not have committed the offence because he had earlier on 10th March, 2009 left Rutoro village for Nsambya village. He was obviously surprised when he was arrested on 20th February, 2010 by members of peoples militia led by the village chairman and his executive officer.

When this appeal came up for hearing, Mr. Josephat Rweyemamu appeared for the appellants, whereas Mr. Paul Kadushi, learned State Attorney, appeared for the respondent Republic. Mr. Rweyemamu rose to inform the Court that he has abandoned the two sets of memoranda of appeal which the appellants had earlier filed on 25th September, 2014 and relied upon the memorandum of appeal he filed on 3rd February, 2015 which manifests the following grounds of complaints:

1. *The trial Judge misdirected himself in believing the evidence of identification from PW3 and PW4 and wrongly based on such evidence to convict the accused persons.*

2. *The trial Judge did not properly evaluate the credibility in the testimonies of the said PW3 and PW4.*

3. *The trial Judge failed to note that the conditions of identification were very unfavorable and could not render a correct identification.*

4. *That the Hon. Trial Judge having suspected and dismissed the alleged identification by PW1 and PW2 who are members of the same family with PW3 and PW4, should have taken pains to suspect the authenticity of the testimonies of PW3 and PW4.*

Mr. Rweyemamu then condensed the four grounds of appeal into one ground contending the appellants' appeal hinge on the evidence of identification and the credibility of PW3 and PW4, the two witnesses who identified the appellants as the bandits who entered the bedroom during that night of attack. He also underscored the undisputed fact that the evidence of PW3 and PW4 was that of recognition.

The learned counsel submitted that just as the learned trial Judge had rejected the identification evidence of PW1 and PW2 on ground of want of credibility, so too, he should also have disregarded the identification evidence of PW3 and PW4. Mr. Rweyemamu believed that disturbances caused by the throwing of a huge stone to break down the door, firing of gunshots and trading of verbal threats, had psychological effect on PW3 and PW4. The learned advocate faulted the trial Judge for failing to direct his mind to the possibility that the prevailing commotion affected the identification by, and credibility of PW3 and PW4. He also argued that nowhere, in the judgment of the trial court, does the learned Judge direct his mind to the composure of the then ten-year old PW3 and his ability to properly identify the two appellants at the scene of crime.

The learned counsel in particular assailed the credibility of evidence of PW4 on the ground that this witness had on page 31 of the record stated that when she looked outside the window to scream for help, she managed to see about four torches and some people including the 1st and 2nd appellant whom she identified and recognized as their former casual employees. The learned counsel urged us to disbelieve this version of

evidence because the light from torches outside could not facilitate any positive identification and recognition.

Mr. Rweyemamu next discredited the evidence of PW3 and PW4 which had identified and recognized the two appellants when they entered PW4's bedroom. He pointed out that the size of the bedroom was not specified for purposes of determining where the lamp stood in relation to where the appellants and the victims of the crime were positioned. He also noted that the source of light from wick lamps is ordinarily insufficient to facilitate positive identification.

Because, according to Mr. Rweyemamu, the prevailing environment for positive identification was so challenging, he urged us to allow the appeal and order the immediate release of the two appellants.

When his time came for him to reply, Mr. Kadushi supported the conviction and resulting sentence. He argued that PW3 and PW4 were credible witnesses and their evidence sufficiently identified and recognized the two appellants with help from a wick lamp that was burning. On the intensity of the source of light, the learned State Attorney referred us to

page 28 of the record of the trial court where PW3 testified how the two appellants entered PW4's bedroom while *"the wick lamp (kibatari) was on the table. I was with young brother Muktari near the table."* The learned State Attorney submitted that this evidence shows the vantage position where PW3 was, where he was able to identify the assailants who also went on to attack him later on. The apparent small size of the room also enabled PW3 to identify the appellants. For a discussion on the size of the room, the learned State Attorney referred us to the evidence of PW4 on page 34 where this witness stated that: *"...The bedroom had a bed, table and small space remaining."* This, according to Mr. Kadushi, confirms how close-up PW3 and PW4 were with the two appellants.

The learned State Attorney submitted on time which identifying witnesses had. He contended that PW3 and PW4 had ample time to identify and recognize the assailants because the appellants spent considerable time inside the bedroom. It was while they were in bedroom when they demanded money from PW4.It was also this same space of time when the deceased uttered the words *"Ta Koro umemuua mama ukachukua simu yake,"* prompting the 1st appellant to stop slashing PW4 with machete and turning his wrath on PW3 and Muktari Twaha (the

deceased). He also urged us to find that identification and recognition was also facilitated by the fact that the appellants were not strangers to PW3 and PW4.

Mr. Kadushi rejected the suggestion made by Mr. Rweyemamu that there were contradictions in the evidence of PW3 and PW4. He insisted that any differences in their evidence were very minor and extended only in so far as identification of Mustapha Kihanga and Issa Said (their other co-accused) and the total number of assailants who entered the bedroom. He invited us to find that for purposes of proving identification and recognition of two appellants, the evidence of PW3 and PW4 was mutually corroborating.

Finally, Mr. Kadushi cited our decision in **John Lazaro vs. R.,** Criminal Appeal No. 230 in urging us to be persuaded by the opinion of assessors, just like the way the learned trial Judge was persuaded.

This appeal is before us in our capacity as the first appellate court. As such, we are enjoined as we have, to re-evaluate the entire evidence that was presented before the trial High Court and we may come to our own

conclusions. Our decision in **Juma Kilimo vs. The Republic**, Criminal Appeal No. 70 of 2012 (unreported), reiterates the settled role of any first appellate court:

> *".....This is a first appeal. It is trite law that it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the entire evidence and our own decision thereon: see,* ***D.R. Pandya v. R.*** *[1957] E.A 336.All the same, we can only interfere with a finding of fact by a trial court where the Court "is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises",* ***(Salum Bugu v. Mariam Kibwana,*** *Civil Appeal No. 29 of 1992, CAT, (unreported))****.*** *Do we have good cause to interfere in this appeal as urged by Mr. Sangawe?"*

As correctly observed by the learned judge and also by the two learned counsel before us, resolution of this instant appeal turns on our re-evaluation of the credibility of the evidence of PW3 and PW4 and probity of their identification and recognition evidence. We shall ask ourselves whether there is any cause, upon our re-evaluation, for us to interfere with

the trial court's finding of fact that the 1st and 2ndappellants were positively identified and recognized at the scene of crime by PW3 and PW4.

The learned trial Judge emphasized in his judgment that he heeded the warning which this Court issued in **Waziri Amani vs. R.** [1980] T.L.R. 250 to the effect that evidence of visual identification is ordinarily weak and most unreliable; courts should only act on such evidence after ensuring that all possibilities of mistaken identity have been eliminated.

The trial Judge dealt with the important question regarding the credibility of identifying witnesses when he said:

> *"...Of course I am alive to the principle that every witness is entitled to be believed unless there are good reasons not to believe him; refer to GOODLUCK KYANDO V REPUBLIC [2006] TLR 363."*

The learned Judge then took his time to evaluate credibility of all identifying witnesses who alleged to have identified and recognized the two appellants. The trial Judge ended up doubting the credibility of the evidence of PW1 and of his son PW2.He described these two witnesses as

overly keen to exaggerate their testimonies. He described the evidence of PW1 in the following way:

> *"...I therefore hold that the evidence of PW1 has not passed the test for upholding evidence of visual aural identification as discussed above... "*

He followed up by discarding the evidence of PW2:

> *"...As stated before in this judgment the evidence of PW2 (Jabiii Twaha) is not quite different from that of his father (PW1)..."*

In our opinion, the trial Judge was well aware of the important question of credibility when from page 132 to page 137 of the record, he rejected the identification evidence of PW1 and PW2 to be unreliable:

> *"I have seriously considered the evidence of PW1 as quoted above but with respect I am unable to agree with him that he properly and un-mistakenly recognized Crospery Gabriel, Ernest Gabriel, Mathias Nestory and Christian Try phone as alleged. There is no dispute that the incident took place in the midnight (1.00 am-2.00*

am) so the conditions of identification were unfavourable. The people or rather the bandits were outside. There is no doubt that he knew them before but voice identification has been held to be one of the weakest kinds of evidence and great care and caution must be taken before acting on it..... There are some people who are capable of imitating another person's voice. The Witness (PW1) claimed that light from his torch and also light from torches held by the bandits helped him to identify the accused persons he had mentioned. Again this piece of evidence raises doubt because of two reasons. One, it is now settled that where torch light is flashed at a person that person is temporarily blinded by the light; refer to ***Mohamed Musero vs. R.,*** *[1993] T.L.R. 290. If the bandits were flashing the torch light at the witness (PW1) then he could not clearly see them. Two, the witness said that he used the small opening at the door to flash his torch light to see the accused persons. That was quite unlikely because it was dangerous for him to face that small opening knowing that the bandits were outside watching. Besides, the witness himself stated that the bandits fired about four gunshots through the same small opening at the door....."*

Mr. Rweyemamu has suggested to us that having doubted the credibility of the identification evidence of PW1 and PW2, the learned trial Judge should have extended the same doubt to the identifying and recognition evidence of PW3 and PW4. Before addressing ourselves to this proposal, it is appropriate to see how the learned Judge dealt with the evidence of PW3 and PW4. On evidence of PW3, the trial Judge observed on page 141:

> *"Although there are some few discrepancies in the evidence of PW3 and PW4 I was impressed by his credibility. PW4 stated that after Issa Said and Mustapha Kihanga had taken money and cell phone then came Crospery Gabriel and Ernest Gabriel. She (**PW4**)did not say there was a third person. Although he **(PW3)**was about ten years old when the incident happened he was able to explain it thoroughly and candidly. For instance where he saw a person who he did not recognize he frankly said he did not recognize him. Whereas PW2 and PW4 broke into tears in the course of giving evidence this one (PW3) was calm, honest and well composed even during cross examination....."*[Emphasis added].

We are inclined to disagree with Mr. Rweyemamu in so far as his invitation that we should disregard the credibility of the

identifying evidence of PW3 and PW4 is concerned. We must at very outset observe that events which PW1 and PW2 witnessed occurred in the living room (*sebule*) before these two witnesses escaped leaving PW3 and PW4 in the latter's bedroom. Even in his evidence, PW1 insisted that despite breaking the door, the intruders could not gain entry through the small spaces created by the impact of the heavy stone. Both PW1 and PW2 used torch lights for identification. So the environment under which PW1 and PW2 alleged to have identified and recognized the appellants was markedly different from what pertained in PW4's bedroom. In fact, it was after PW1 and PW2 had managed to disappear when the assailant went up to PW4's bedroom.

We therefore think, the learned trial Judge sufficiently warned himself of the dangers of acting on the identification evidence of PW3 and PW4 without ensuring that all possibilities of mistaken identity had been eliminated. The record bears out the detailed precaution which the learned trial Judge took into consideration before giving credence to the evidence of PW3 and PW4.He took into account the duration of time PW3 and PW4 were in proximity with 1st and 2nd appellants; also took into account the size of the bedroom, position

of the wick lamp, space in the bedroom separating PW3 and PW4 on one hand, from the two appellants, on the other hand. He asked himself what the lighting situation was in the bedroom when the two appellants entered. The learned Judge finally considered the fact that PW3 and PW4 and the two appellants were well known to each other prior to the incident. All these precautions which the learned trial Judge took are reflected in his considered decision on pages 144, 145:

> *"What one can gather from the above explanation by PW4 and PW3 is that the bedroom was not too big. I therefore find that the light from the wick lamp which was described as big and having a long and large wick was enough to enable PW3 to see and recognize Crospery Gabriel and Ernest Gabriel. It was sufficient to enable PW4 to see and recognize Crospery Gabriel, Issa Said and Mustapha Kihanga.*
>
> *Apart from the issue of light and its intensity I am satisfied that the accused persons were correctly recognized because PW4 was standing on the bed and PW3 was standing near the table in the bedroom so they were close enough to those accused persons and after all PW3 and PW4 knew Crospery Gabriel and*

Ernest Gabriel. Even those accused persons acknowledge that they were neighbours of PW3 and PW4..."

The way the learned trial Judge handled duration of time when PW3 and PW4 spent together with the appellants in PW4's bedroom appears on page 146:

"With regard to the issue of time which witnesses spent in observing the accused persons PW4 clearly stated in cross examination that she could not estimate the time when the accused persons came in and when she became unconscious, however, PW3 who said that he knew Crospery Gabriel cutting the deceased with a machete before cutting him said during cross examination that they took about forty five minutes. I have considered that evidence and am satisfied that although PW3 was merely estimating the time he had sufficient time to observe the accused persons. He had time to observe the first two people who he could not recognize and then he had time to observe Crospery Gabriel and Ernest Gabriel when they entered the bedroom and started to attack his mother first and later attacked his young brother Muktari (deceased) and finally attacked him (the witness-PW3)."

From the foregoing, as a first appellate court, we have no cause to interfere with the way the learned trial Judge dealt with the probity of identification evidence of PW3 and PW4.With due respect to Mr. Rweyemamu, we are not persuaded by his determined and resourceful submission that the trial Judge had to determine the effect the traumatic commotion at the scene of crime had on the credibility and probity of the identification evidence of PW3 and PW4 when they testified.

We find the appeal to be devoid of merit. It is accordingly dismissed.

DATED at BUKOBA this 20th day of February, 2015.

E.M.K.RUTAKANGWA
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL