

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 378 OF 2015

FRANK JOSEPH @ SENGIREMAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mrango, J.)

Dated the 25th day of March, 2015

In

Criminal Session Case No. 168 of 2012

JUDGMENT OF THE COURT

12th & 25th April, 2016.

MWARIJA, J.A.:

The appellant was charged before the High Court of Tanzania at Tabora with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E 2002]. It was alleged that on 15/7/2011 at old Shinyanga in Shinyanga Municipality within the district and region of Shinyanga, the appellant murdered one Sara D/o Malongo (the deceased).

The background facts of the case can be briefly stated as follows:-

The deceased and her younger sister, Rose Charles (PW1) were, until the material date of the incident leading to the arrest and arraignment of the appellant, living with their mother, Yasinta Malongo (PW3). The deceased was employed by one Michael Hassara (PW4) who owned a kerosene retail business. In the night of the fateful date, PW1 and the deceased were alone at home as their mother had travelled to Kahama. At about 5.00 a.m. while they were asleep, the door of their room was broken and a burglar entered. He stole two mobile phones and cash, Shs. 62,000/=. In the process, he stabbed the deceased with a knife. The deceased died later in hospital. On that same day, the appellant was arrested and after investigation, he was charged with the murder of the deceased. His arrest came as a result of being named by PW1 shortly after the incident, as the person who committed the offence.

It was her evidence that the offence was committed by the appellant whom she vividly recognized at the scene of crime because she had known him before. Narrating the incident, she said that in the fateful night, she was awakened by the entrance of the appellant in the room. Having entered, he went straight to the bed and took from the top of its drawer,

two mobile phones and Shs. 62,000/= from inside the drawer. As he was leaving, the deceased mentioned him by name and asked him why he was taking the money and the phones. (*"Wewe Frank Mbona umechukua hizo hela na simu"?*). The appellant turned back and responded by saying *"Kwa hiyo mnajifanya wajanja"* meaning "so you are pretending to be clever". He then approached the deceased and stabbed her on the abdomen. As the deceased and PW1 sounded an alarm, he ran away.

The alarm was not immediately responded to by the neighbours. That compelled PW1 to rush to the deceased's employer, Michael Hassara (PW4) who resided in the neighbourhood and informed him about the incident naming the appellant as the culprit. PW4 called a taxi and together with PW1 took the deceased to hospital after they had reported to the police where the deceased's statement was recorded.

In her evidence, PW1 explained that she unmistakably identified the appellant because, firstly, she had known him before and secondly, that there was sufficient light from a hurricane lamp in the room.

The prosecution relied also on the testimony of PW2 and PW4. On his part, PW4 supported the evidence of PW1 that when she reported the

incident to him, she named the appellant as the person who assaulted the deceased. As for PW2, he testified that she recorded the statement of the deceased before she was rushed to hospital. According to the witness, the deceased named the appellant as the person who assaulted her. Her dying declaration was admitted in evidence as Exh. P.2.

In his defence the appellant admitted that he was known to the deceased before the date of incident. He however denied the allegation that he burgled the deceased's room and stabbed her with a knife after the theft. He said that he was arrested on 15/7/2011 by the commander of the people's militia (sungusungu), one Unonu who was in the company of the village chairman, known by the name of Dotto. On 16/7/2011 he was sent to police station and later on 25/7/2011, he was charged in Court.

Having heard the evidence of the prosecution witnesses and the appellant's defence, the High Court (Mrango, J.), found that the identification evidence as supported by the deceased's dying declaration sufficiently proved the prosecution case beyond reasonable doubt. The appellant was thus convicted and consequently sentenced to suffer death by hanging. Dissatisfied with conviction and sentence, the appellant has preferred this appeal.

In his memorandum of appeal filed on 14/9/2015 the appellant raised five grounds challenging the finding of the trial court that he was identified at the scene of crime. He also contended that the learned trial judge failed to properly evaluate the evidence and erred by acting on the evidence of dying declaration. Later on 23/3/2016 however, through his learned counsel, the appellant filed another memorandum of appeal raising therein two grounds:

- "1. That the learned trial Judge erred in law and in fact in holding that the Appellant had been properly identified as the assailant of the deceased.*
- 2. That the learned trial judge erred in law and in fact in relying on the deceased's dying declaration to hold that the appellant was guilty of the murder of the deceased one SARA D/O MALONGO."*

At the hearing of the appeal, the appellant was advocated for by Mr. Mugaya Mtaki, learned counsel while the respondent Republic was represented by Mr. Ildephonse Mukandara, learned State Attorney. Mr. Mtaki argued the two grounds raised in the latter memorandum of appeal.

On the first ground, the learned counsel submitted that since the case rested mainly on the evidence of identification, the evidence should have been acted upon after the trial court had satisfied itself that the conditions for identification were favourable, leaving no doubt for a mistaken identity of the identified person.

Relying on the often cited case of **Waziri Amani v Republic**, (1980) LRT 250, Mr. Mtaki argued that although in her evidence, PW1 stated that she identified the appellant with the aid of light from a hurricane lamp, she did not describe the intensity of that light. Failure by PW1 to do so, the learned counsel argued, rendered her evidence unreliable. To bolster his argument, he cited the case of **Njamba Kulamiwa v. Republic**, Criminal Appeal No. 460 of 2007.

With regard to the 2nd ground, Mr. Mtaki submitted that the evidence of the deceased's dying declaration should not have been relied on because of the same reason, that the intensity of the light was not explained. He argued that on the basis of uncertainty of the intensity of the light, the deceased might have been labouring under a mistaken identity. He added that the evidence of dying declaration was not reliable for another reason, that it lacked corroboration.

On his part, Mr. Mukandara supported the appellant's conviction. He submitted that the appellant was properly identified by PW1 because, firstly, she had known him before the date of the offence and secondly, because the conditions for identification were favourable. The learned State Attorney argued that although the offence was committed in the night, PW1 sufficiently identified the appellant because there was, in the room, sufficient light from a hurricane lamp. He added that basing on the guidelines stated in the **Waziri Amani Case** (supra), the identification evidence met the laid down conditions. This, he said, is because PW1 explained the intensity of the light by stating that it was enough to enable her identify the appellant whom she had known before.

Mr. Mukandara argued further that although it is a correct position, as argued by the learned counsel for the appellant, that evidence of dying declaration requires corroboration, the evidence of PW1 was trustworthy and therefore it was sufficient to found the appellant's conviction without corroboration. He cited as an authority, the case of **Hassan Juma Kenyera v. R**, (1992) TLR 100.

As shown above, the appellant's conviction was grounded on both the identification evidence and the deceased's dying declaration. As for the

evidence of dying declaration, both learned counsel for the parties agreed that the same required to be corroborated. The only evidence which could corroborate that evidence is that of PW1. Being the evidence of single witnesses of identification which also requires corroboration as a matter of practice, not law cannot however, be used as corroborative evidence. We therefore agree that by so acting without warning itself of the danger of relying on such uncorroborated evidence, the trial court erred. On the basis of that finding, we need not say more on the evidence of dying declaration.

The issue whether or not the High Court erred in basing the appellant's conviction on identification evidence forms the basis of the appellant's complaint in the first ground of appeal. This is the issue which we now embark on consideration and determination. It is trite law that before an accused person's conviction is founded on identification evidence, that evidence must be watertight. It should only be acted upon when all the possibilities of a mistaken identify have been eliminated. In the celebrated case of **Waziri Amani** (supra) cited by the learned State Attorney, the court held *inter alia* as follows:-

"(i) *evidence of visual identification is of the*

weakest kind and most unreliable.

- (ii) *no Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight."*

In that case, the Court laid down some guidelines which are to be followed in order to establish whether or not identification evidence is watertight. The following factors must be established:

- (i) The time the witness had the accused under observation.
- (ii) The distance at which he observed him.
- (iii) The conditions in which such observation occurred, for instance, whether it was day or night time. Whether there was good or poor lighting at the scene.
- (iv) Whether the witness knew or had seen the accused before or not.

In the present case PW1 gave evidence that he had known the appellant for almost one year before the date of the incident. Her evidence

was therefore that of recognition. She testified that she unmistakably recognized the appellant because she had known him before. Evidence of recognition has been taken to be more reliable than that of identification. Notwithstanding that position, we are mindful of the requirement that care must be taken before any court acts on that kind of evidence. In **Shamir s/o John v The Republic**, Criminal Appeal No. 166 of 2004 (unreported) the Court observed as follows:-

"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

In this appeal, the appellant maintained that he was not known to PW1 and that therefore, her evidence that she recognized him, should not have been relied on. It has been argued also that the conditions for identification were not favourable.

We start with the issue whether or not the appellant was known to PW1. The trial Court did not determine that issue. Having however, re-evaluated the evidence, we are left with no doubt in answering that issue in the affirmative. PW1 gave explanation on how she came to know the appellant. She said that apart from the fact that the appellant, who was until the material time of the incident a taxi driver, used to park his taxi near the premises where the deceased was working, the fact which he admitted in his defence, he also used to visit her and the deceased at their residence. Furthermore, when she went to report the incident to PW4, she was unhesitant in naming the appellant as the person who stabbed the deceased. She maintained so when she went with the deceased to police. As found by the learned trial judge, we find that PW1 was consistent in her evidence that she recognized the appellant.

On the conditions under which she identified the appellant, we are of the settled minds that, as described by PW1, the same favoured proper recognition of the appellant. PW1 described the intensity of the light in the room which according to her, had bright walls. She said that the light was enough to enable her recognize the appellant. She explained that as they went to bed, they left, as had been their habit, the lamp lighted. It was

sufficient Kerosene after she had properly cleaned its glass cylinder.

Although as a rule of practice, the evidence of a single witness of identification made under difficult conditions requires corroboration, the court may convict on that evidence without corroboration if it is satisfied that the witness is credible. In the case of **Hassan Juma Kanenyera** (1992) TLR 100 cited by the learned State Attorney, the Court had this to say on that position:-

" it is a rule of practice, not law, that corroboration is required of the single witness of identification of the accused made under unfavourable conditions; but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth."

Applying the guidelines stated in the **Waziri Amani case** as pointed out above, we are of the settled view that PW1's evidence was watertight. She was a truthful witness. We therefore agree with the learned State Attorney that the appellant was properly recognized by PW1.

Her evidence was therefore sufficient even without the dying declaration or any other corroboration, to found the appellant's conviction.

For the above stated reasons, this appeal is devoid of merit. The same is hereby dismissed in its entirety.

DATED at TABORA this 22nd day of April, 2016.

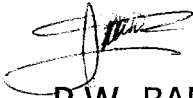
S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL