IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A.,MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 187 OF 2015

PHILIMON JUMANNE AGALA @ J4 ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated the 26th day of March, 2015
in
H/C Criminal Sessions Case No. 16 of 2012
.....
JUDGMENT OF THE COURT

18th & 26th October, 2016

RUTAKANGWA, J.A.:

This appeal seeks to impeach the propriety of the trial of the appellant and the quality of the prosecution evidence which led to his conviction for the murder of one Selemani s/o Gershon ("the deceased") by the High Court sitting at Mwanza ("the trial court").

The challenge to the trial court's decision is premised on two major legal issues: **One,** the legality or otherwise of the trial itself. **Two,** the cogency of the single eyewitness identification evidence upon which the conviction for murder was predicated.

We are fully alive to the fact that the reliability of disputed eyewitness identification evidence, which in this case the respondent Republic relied upon to successfully mount a prosecution for murder, has never been trouble free. We propose, therefore, to first canvass the prevailing law on visual identification evidence and its attendant vagaries in criminal trials before attempting to resolve the two issues presented by this appeal.

The Russians have a saying of respectable antiquity and uncertain provenance, but of enduring popularity among defence lawyers beyond our regional bounderies. The saying runs thus:

"He lies like an eyewitness."

Although, in our considered opinion, not every eyewitness is a liar, as most of them are honest but mistaken, we have no flicker of doubt that there might be a modicum of truth in this saying.

As aptly observed in **State of Utah v. Deon Lomax Clopten**, 223 P 3d 1103 (2009) 2009 UT 84:-

> *The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. ... Decades of study ... have established that eyewitnesses are prone to identifying the*

wrong person as the perpetrator of the crime where certain factors are present ....

The most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate identification may be just as convincing to a jury as an accurate one... As one leading researcher said:

"[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says: That's the one!" ***Elizabeth F. Loftus, Eyewitness Testimony*** *19 (1979).*

[Elizabeth F. Loftus is an American cognitive psychologist and expert on human memory, who has conducted extensive research on the malleability of the human memory].

This is all because most people, triers of fact in judicial proceedings included, tend "to be swayed most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy."

There has never been a dispute on the fact that the basic foundation for eyewitness is a person's memory. But as Elizabeth Loftus describes in her book entitled: **Memory: Surprising New Insights into How We Remember and Why We Forget:-**

Memory is imperfect. This is because we often do not see things accurately in the first place. But even if we

take in a reasonably accurate picture of some experience, it does not necessarily stay perfectly intact in memory. Another force is at work. The memory traces can actually undergo distortion. With the passage of time, with proper motivation, with the introduction of special kinds of interfering facts, the memory traces seem sometimes to change or become transformed. These distortions can be quite frightening, for they can cause us to have memories of things that never happened. Even in the most intelligent among us is memory thus malleable.

William Poulos, *a Barrister, correctly posits that: "[B]ecause of the dangers inherent in eyewitness testimony, eyewitness identification evidence is inherently unreliable. The inherent frailties of eyewitness identification evidence are well – established and can lead to wrongful convictions, even in cases where multiple witnesses have identified the same accused (found at, http:/www.williampouloslaw.com/blog/uncategorized/eyewitness dentification).*

One of the many instances in which eyewitness evidence has led to wrong convictions and more regrettably in capital offences, is the case of **State of Maryland v. Kirk N. Bloodsworth,** 1984. Learned authors, Gary L. Wells, Amina Memon and Steven D. Penron, of Iowa State

University, University of Aberdeen and John Jay College of Criminal Justice respectively, instructively and graphically recount the facts and ramifications of the case as follows:-

> *Kirk Bloodsworth had never been in trouble with the law, and yet he was convicted in March 1985 for the 1984 sexual assault and slaying of a 9-year-old girl in Maryland. Five witnesses identified Bloodsworth at trial. Later that month, a judge sentenced him to death. He spent 2 years on death row before he received a new trial based on the prosecution's withholding of information about other suspects. This time he received a life sentence. Bloodworth maintained a claim of innocence from the outset, but it was not until 1993 that he was released from prison on the basis of DNA testing that proved he was not the source of semen found in the little girl's underwear. Bloodsworth was lucky that the underwear had been preserved, because earlier (pre-DNA) tests had indicated nothing of value on the underwear. But what kind of luck is being convicted of a*

murder you did not commit? His mother died while he was in prison, before learning the truth that he was innocent. And despite his release from prison, some people, including one of the original prosecutors, continued to believe that Bloodsworth may have been the murderer. The eyewitness evidence just seemed too strong. Maybe Bloodsworth really was the murderer, they reasoned, and the tiny speck of semen came from someone other than the murderer-perhaps someone who had access to the little girl's dresser drawer, for instance. Bloodsworth went on with his life, confident in his own innocence but having to live with the occasional doubt raised by those who somehow remained unpersuaded. Then, in September 2003, DNA testing got a hit on the actual murderer, Kimberly Shay Ruffner. Nineteen years after Kirk Bloodsworth was sentenced to death, the proof was finally there: He had had nothing to do with the sexual assault and slaying of the young girl.

The case of Kirk Bloodsworth illustrates several problems with eyewitness evidence. First, it illustrates the fallacy of assuming that inter-witness agreement is necessarily strong evidence of accuracy. Many factors can lead to inter-witness agreement, such as interaction among the witnesses in which they share information. In general, factors that lead one eye-witness to make a particular error will lead others to make the same error. Second, the Bloodsworth case illustrates the profound level of proof required for exonerating evidence to trump eyewitness identification evidence. Even when the semen was proved not to match Bloodsworth's DNA, many people were unwilling to believe he was innocent. It was necessary to prove that someone else had committed the murder. Third, the Bloodsworth case illustrates that mistaken identification is a dual problem: Not only might an innocent person be convicted but the guilty party remains free to reoffend.

> *The role of scientific psychology in the problem of eyewitness evidence is a profound one. With few exceptions, the legal system has not conducted research on eyewitness evidence, has never conducted an experiment on memory, and has no scientific theory regarding how memory works. The scientific study of eyewitnesses is purely the domain of psychology.:* ***Eyewitness Evidence: Improving its Probative Value*** *[Psychological Science in The Public Interest, Vol. 7 No. 2,2006, pp. 45-75].*

Kirk Bloodsworth was one of the few lucky ones who got off the hook as a result of rapid advances in science. But myriads of accused persons are not as lucky. In the developing world, where DNA facilities and legal aid services are not readily and/or inexpensively available, the administration of criminal justice still relies heavily on eyewitnesses evidence, which is not scientific, to determine mostly the guilt of persons accused of committing various crimes.

But even in the developed world, we are aware that:-

> *no one thinks that only scientific evidence may be used to convict or acquit a defendant. The increasingly well*

documented fallibility of eyewitness testimony, see ***Elizabeth F. Loftus*** *et al,* ***Eyewitness Testimony:*** *Civil and Criminal (4th ed. 2007,* ***United States v. Ford,*** *683 F.3d 01 at 764 – 06, has not banished it from criminal trials:* ***United States of America v. Clacy Watson Herrera,*** *704 F. 301 480 (2013), U.S Court of Appeal, 7th Circuit.*

We shall, therefore, continue to depend on eyewitness evidence for a long time in solving disputed crimes.

Aware of this enduring problem, settled jurisprudence both here and the rest of the Commonwealth as well as in the U.S., is to the effect that eyewitness visual identification evidence is of the weakest character and most unreliable. Though totally relevant and admissible, it should be acted upon cautiously after the court has first satisfied itself that such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated. See, for instance:-

(i) ***R.v. Turnbull,*** *1976, 63 Criminal Appeal R. 132 or (1977) Q.B.224,*

(ii) ***Waziri Amani v. R.,*** *(1980) T.L.R 250,*

(iii) ***Magwisha Mzee & Another v.R.,*** *CAT, Criminal Appeal Nos. 465 and 467 of 2007,*

(iv) ***Said Chally Scanla v.R.,*** *CAT, Criminal*

Appeal No. 69 of 2005,

(v) ***Lukanguji Magashi v. R.,*** *CAT, Criminal Appeal No. 119 of 2007,*

(vi) ***Shamir s/o John v.R.,*** *Criminal Appeal No. 166 of 2004 (all unreported).*

(vii) ***State v. Classens,*** *285 or 221, 590 P. 2d 1198 (1979),*

(viii) ***Commonwealth of Pensylvania v. Benjamin Walker,*** *A. 3d 766 (2014), (Supreme Court).*

In **Commonwealth of Pensylvania v. Walker** (supra), it was succinctly stated that:-

> *The recent advent of DNA tests has raised the profile of erroneous* ***eyewitness*** *identifications, and the resulting overturning of convictions based upon such testing has made the concern over the accuracy of* ***eyewitness*** *identification manifest. Further, DNA testing has brought to the fore the damaging impact of erroneous* ***eyewitness*** *identification as well. While an erroneous* ***eyewitness*** *identification which leads to the wrongful conviction of an innocent defendant no doubt generates great suffering on the part of the individual and his or*

her family, and possibly death in the capital arena, it is not an issue that impacts only the wrongfully accused; incorrectly identifying their attackers can be traumatizing for a victim, as well, due to the guilt of convicting an innocent person, and the resulting awareness that the criminal who perpetrated the crime remains at large. It is axiomatic that law enforcement officers would express similar views if a wrongful conviction due to erroneous ***eyewitness testimony*** *permitted dangerous criminals to remain on the loose.*

This should not be a wishful thinking. It should be a wake-up call to all law enforcement agencies anywhere.

This Court in **Shamir John v. R.,** (supra), lucidly held as follows:-

Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the

accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.

It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?

... Finally, 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.

On account of this, we believe that it will be highly illuminating for triers of fact to be made aware of the variables or factors that impact most eyewitness accuracy as this is critical to a fair adjudication in search of truth. We have found this to be very important today because as DNA evidence is largely unavailable, determination of an accused guilt on the basis of eyewitness evidence is here to stay but must be based on an accurate understanding of the perception, memory and recall of such witnesses.

Based on decades of research in which more than 2000 scientific studies have been made in the aftermath of the **Turnbull** guidelines given by Lord Widgery, **State v. Classen** (supra) and our seminal decision in **Waziri Amani** (supra), a voluminous body of scientific knowledge on eyewitness identification has developed. Furthermore, a number of factors has been recognized as affecting the accuracy of an identifying witness. These fall into three major categories. The first category pertains to the **eyewitness** and includes factors such as uncorrected visual defects, fatigue, injury, intoxication, presence of a bias, an exceptional mental

condition such as an intellectual disability or extremely low intelligence, age (if the **eyewitness** is either a young child or elderly). The second category relates to the event witnessed and includes the effects of stress or fright, limited visibility, distance, distraction, the presence of a weapon (weapon focus), disguises, whether the eyewitness was aware at the time that a crime was occurring. The third category pertains to the identification itself. This category includes such factors as the length of time between observation and identification, any instance in which the **eyewitness** failed to identify the suspect or gave an inconsistent description, the value of lineups compared to show-ups, the value of photo identifications, compared to in-person identifications, and any exposure of the **eyewitness** to influences such as news reports or interaction with other witnesses. It also includes potentially suggestive police conduct, such as the instructions given to the **eyewitness** by police, the composition of the lineup, the way in which the lineup was carried out, and the behaviours of the persons conducting the line-up: [See, **State of Utah v. Clopten** (supra) and Gary L. Well & Elizabeth A. Alson, **Eyewitness Testimony,** 2003 Ann. Rev. Psychology 277, 280 – 1].

We find these factors impeccable, for while you can expect a colour-blind person to testify accurately on the generic attire of a suspect, for instance, he cannot do the same in respect of the colour of that attire.

And if we may quickly engage ourselves in an exercise of soul-searching. How often, if ever, do we address our minds to the impact of short-sightedness on the accuracy of visual identification evidence by an eyewitness who purports to have identified a stranger at close range? Impairment in the sensory acuities of the identifying witness, therefore, should always be taken into account when considering on whether or not there was an unmistaken identification.

Having made this modest exposition of the law governing eyewitness identification evidence, it behoves us now to apply it to the facts of this case.

As we stated at the outset, the appellant was convicted by the trial court for the murder of the deceased on the night of 19th August, 2008 in Rorya District.

The appellant had denied the accusation. Indeed, at the preliminary hearing held on 28th June, 2012, nearly three (3) years before the first prosecution witness testified, the defence had given a detailed notice of the defence of *alibi.* The trial court was told that

on the material date, the appellant was not at the scene of the crime but he was at Bwai village, Landon area, where his host was one Mrembo.

It is trite that in a murder trial the prosecution must prove the elements of murder, which we take to be common knowledge, as well as the identity of the accused as the murderer. When identity is disputed, as

was the case here, the prosecution has a duty to negate any reasonable probability of misidentification.

As the murder of the deceased was not disputed, the prosecution relied wholly on the sole visual identification evidence of PW1 Yokabeth d/o Selemani, one of the two wives of the deceased, to connect the appellant with the murder.

In her brief testimony, PW1 Yokabeth told the trial court that on the material night, she had slept with the deceased. At past midnight, they were invaded by five bandits who were armed with machetes and sticks. The couple was assaulted with those weapons, the deceased fatally wounded, and subsequently died at the scene of the crime. The bandits, who also had a torch or torches, made away with 10,000/=. The cause of death, per the Report on Post-mortem examination Report (Exh. P1), was **"severe anaemia secondly to severe bleeding due to multiple cut wounds."**

PW1 Yokabeth alleged to have identified only the appellant among the five robbers and had subsequently named him to her co-wife, PW2 Akinyi, and one Mẓee Almada, who never testified. The only other prosecution witness and to whom PW1 Yokabeth also allegedly named the appellant as one of the bandits, was PW3 No. E9766 D/Cpl. James.

PW3 D/Cpl. James visited the scene of the crime on 19th August, 2008. The only task he performed was to draw a sketch map of the scene

and witness the Post-mortem Examination of the deceased. The appellant, all the same, was arrested on 24th October, 2010.

In his sworn evidence, the appellant strongly denied complicity in the murder of the deceased. He maintained that on 18th and 19th August, 2008, he was at Bwai village in Butiama district. To bolster his defence he had tellingly said:

> *... PW1 might have been taught to incriminate me due to the fact that I complained against police officers for taking my money ... if the prosecution had reliable information about the murder in question, I would have been arrested earlier before 24/4/2010 as prior to that I happened to be accused of cattie theft at Uteji Police station.*

The three assessors, who sat at the trial of the appellant, opined that he was guilty as charged. The learned trial judge agreed with them, convicted the appellant, and sentenced him to death, hence this appeal.

The appellant was advocated for before us by Mr. Antony Nasimire, learned advocate. The respondent Republic was represented by Ms. Mwamini Fyeregeti, learned State attorney.

Mr. Nasimire had three complaints touching on the trial and conviction of the appellant. These were to the effect:-

1. *That the learned trial judge erred in failing to direct the assessors on the Appellant's defence of alibi.*
2. *That the learned trial judge was not justified in rejecting the appellant's defence of alibi*
3. *That since the conditions for the Appellant's proper identification were not favourable it was unsafe for the learned trial judge to ground the Appellant's conviction on the evidence of visual identification.*

Mr. Nasimire's arguments in support of the first and third grounds of appeal were both brief and focused. He began with a major premise that the appellant had raised a defence of *alibi.* This defence was not rebutted by the prosecution at all although it had an almost two-year notice, he argued. Notwithstanding these facts, he contended, the learned trial judge not only failed to address the assessors on this vital point of law, but he rejected it in his judgment without assigning any good reason or reasons.

It was Mr. Nasimire's strong submission that settled law is to the effect that failure to direct the assessors on the defence of *alibi* vitiates the entire trial. In support of this submission, he referred us to our decision in the case of **Tubuluzya Bituru v. R.,** [1982] T.L.R. 264. He accordingly urged us to nullity the appellant's trial and due to the paucity of evidence implicating the appellant with the murder of the deceased, he pressed us not to order a re-trial, as that would not be in the interests of justice.

Ms. Fyeregeti agreed with Mr. Nasimire on one crucial aspect. This was that the appellant's trial was a nullity on the ground articulated by Mr. Nasimire. She, too, was of the firm view that as the learned trial judge never directed the assessors on a vital point of law, that is the defence of *alibi,* the trial was a nullity. She accordingly urged us to quash and set aside the trial court's proceedings, its judgment and the death sentence. However, she pressed for a re-trial on the ground that the visual identification evidence of PW1 Yokabeth was cogent enough to sustain the prosecution case.

We think that the point touching on the legality of the trial of the appellant need not detain us. There is no gainsaying that the appellant had properly raised a defence of *alibi.* The prosecution made no attempts to rebut it to date. If the prosecution doubted its genuineness, it had all the opportunities and resources to marshall evidence to rebut it. It was not taken unawares by the defence. The appellant assumed no duty to prove it, though two of the assessors opined that he had such a duty. They are not to blame because they were not directed on this crucial issue of law in the summing up.

There is a plethora of authorities to the effect that where there is inadequate summing up, a non-direction, or a misdirection on a vital point of law to the assessors, the trial is deemed to be one without the aid of assessors and is rendered a nullity, as correctly submitted by both learned

counsel: See also, **Said Mshangama @ Senga v. R.,** criminal appeal No. 8 of 2014, **Masolwa Samweli v. R.,** Criminal Appeal No. 206 of 2014, **Kandi Marwa Maswe v. R.,** Criminal Appeal No. 467 of 2015 (all reported), etc.

In the light of the above stated settled law, we are enjoined to hold that the trial of the appellant was conducted without the aid of assessors, and therefore was a nullity. We accordingly uphold the first ground of appeal. The trial of the appellant and his conviction and sentence are hereby quashed and set aside.

The issue of whether or not there should be a re-trial order will not tax our minds. It is a general consensus that the sole evidence connecting the appellant with the murder of the deceased was the purported visual identification of PW2 Yokabeth.

We have already sufficiently demonstrated that visual identification and/or recognition evidence should be cautiously acted upon as it is prone to fabrication or being based on honest mistakes. It has been repeatedly held that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying: See, for instance **Mẹngi Paulo Samwel Lahana & Another v.R.,** Criminal Appeal No. 222 of 2006 and **Nyakango Olala James v.R.,** Criminal Appeal No. 32 of 2010 (both unreported).

In the case of **Jaribu Abdalla v. R.,** Criminal Appeal No. 220 of 1994 (unreported) this Court thus held:

> *...in matters of identification it is not enough merely to look at factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence.*

In the case under scrutiny, it was Mr. Nasimire's contention, and we agree with him, that the conditions at the scene of the crime were not that much conducive to an impeccable positive identification even to a known person.

Apart from the attack by five armed bandits being sudden, the evidence on the source of light and its intensity which would have enabled PW1 Yokabeth to identify the appellant, is very doubtful. At first, PW1 Yokabeth alleged that the bandits had one torch whose light enabled her to identify the appellant. Under cross-examination, she changed her story and said:-

> *All five bandits had torches; when accused was taking money torches were shone, I managed to properly identify the accused.*

But that was not the only contradiction.

While under examination-in-chief, she claimed that after the bandits had murdered her husband, they "turned" on her, and began assaulting her. They hit her on various parts of her body and as they were about to kill her, she showed them where the money was. They took the money and left. After the departure of the bandits, she claimed, she had a talk with her husband, who had "died instantly" earlier on. Unbelievably, her dead husband told her that he was dying and she responded telling "him" that she too had been "severely cut by panga." We have failed to buy this cheap story. These were not only doubtful pieces of evidence but very discrediting ones. As nobody else saw the appellant at the scene of the crime, we respectfully hold that the learned trial judge was not justified to reject the unrebutted defence of *alibi* of the appellant in favour of these open lies by PW1 Yokabeth. If indeed, PW1 Yokabeth had identified the appellant and named him immediately, why was he not arrested immediately? There is no suggestion that he was on the run. Our misgivings on her credibility gets support from her answer while under examination0in-chief that:-

> *"I did not manage to immediately name the accused as I was to be treated first..."*

The Russians appear to be vindicated by PW1 Yokabeth.

All said and done, we find ourselves constrained to hold that the purported visual identification evidence which smacks of a fabrication, does not justify a re-trial order. We accordingly order that the appellant be released forthwith from prison unless he is otherwise lawfully held.

DATED at MWANZA this 22nd day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL.