IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 114 OF 2015

GOZBERT HENERICO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Judgment of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

Dated the 22nd day of April, 2015
in
Criminal Session No. 7 of 2012

JUDGMENT OF THE COURT

24th & 26th February, 2016

MMILLA, J. A.:

The appellant, Gozbert s/o Henerico is appealing against the judgment of the High Court of Tanzania at Bukoba in Criminal Session Case No. 7 of 2012 before which he was charged with murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that he killed Winchislaus s/o Mwemezi (the deceased). He was tried, convicted and sentenced to the mandatory death sentence. He was aggrieved, hence the present appeal to this Court.

The facts of the case were not complicated. Theonestina Grasian (PW1) of Nyakaka Buturage village, Izimbya Ward in Bukoba Rural District

was living with her two daughters; Rosemary Grasian (PW2) who had a child named Winchislaus s/o Mwemezi (the deceased) and Grasiana d/o Grasian @ Siima (PW3). The appellant was their neighbour, and they had a relationship with him in that he was the paternal uncle of the husband of PW2.

On 27.5.2008 at about 8.00 pm, the house of PW1 and his family was stormed into by the appellant. Then, all the family members were at home. The appellant was armed with a panga and on arrival there he slashed PW1 with it on the shoulder, neck and in the head. He also cut the deceased whom PW1 had carried on her back and killed him instantly. PW1 fell down and lost consciousness. PW2 and PW3 were also slashed each in the hands. Unlike PW3 who also lost consciousness, PW2 was not in serious condition compared to others. She raised alarm and several people rushed to the scene to render assistance. Upon gaining consciousness, PW1 was informed that her daughters were alive but her grandchild, Winchislaus Mwemezi, was dead.

On the other hand at about 8.00 pm on that same day, PW4 heard a person calling him saying ***"Kaka yangu nifungulie".*** He identified that person by voice to be Gozbert (the appellant) and he opened for him. The

appellant readily told him that he was surrendering to him as a hamlet chairman because he had killed a person. He showed him the panga he used, and it was stained with blood. He dispossessed him the panga, tied him with ropes, locked him in his house and asked one John Sospeter to guard the place. Meanwhile, he went to the scene together with other villagers. They found many people there. Of special interest was the fact that one child had died and three other members of Theonestiner's family, including Theonestina herself were injured. P4 and his other fellow villagers hired a motor vehicle and rushed all the victims to hospital. Others took the appellant together with the panga he used to the police station.

On 28.5.2008, PW7 A/Insp. Christopher Kapera and a couple other police men and a medical doctor went to the scene of crime. They found the deceased. He asked the doctor to conduct a post mortem examination. He found that the **cause of death was severe haemorrhage following the cut wound on the scalp** (exhibit P1).

Meanwhile, PW7 drew the sketch map and interrogated some of the people who had vital information in connection with that incident after which he and his team went back to the office. The appellant, who was

then in police custody was interrogated and subsequently charged with murder.

In his defence the appellant protested his innocence. He testified that on that day at about 8.00 pm he was returning home from a walk. When he was near to his home he heard cries that ***"wamemuua mtoto wangu."*** He went to that place to render assistance. He allegedly met Siima and Rosemary and asked them what happened. They told him that ***"Goz umetukata,"*** **meaning** ***"Gozbert you have cut us."*** He was annoyed and decided to leave. A little while later however, he was arrested on directions of the village leadership, tied with ropes and sent to police. He insisted that he was innocent, and that the victims of that incident mistakenly believed that he was the one who committed that crime.

Before us, the appellant was represented by Mr. Aaron Kabunga, learned advocate, while the respondent Republic had the services of Mr. Ngole, learned Principal State Attorney.

At the commencement of hearing, Mr. Kabunga informed the Court that he was abandoning the grounds of appeal which were filed by the appellant in person, thereby remaining with the grounds of appeal he himself filed on 19.2.2016 on behalf of the appellant. He also successfully

sought the Court's permission to abandon the first ground, thus remained with only two of them, the second and third. Those grounds were as follows:-

1. That the Honourable trial judge of the High Court erred in law to admit in evidence the alleged "Cautioned statement" of the appellant (Exhibit P.4) which was extracted by torture and which did not comply with the mandatory provisions of law.
2. That the Honourable trial judge of the High Court erred in law and on fact to rely on the evidence of voice and visual identification of PW1, PW2 and PW3 who were incredible and unreliable

Mr. Kabunga proposed to begin with the third ground. In that regard, he challenged that the appellant was not correctly identified by the prosecution's eye witnesses namely; is PW1, PW2 and PW3 **(invariably referred to as the three eye witnesses)**. After laying down the underlying principles relevant to reliability or otherwise of such evidence, he submitted that the evidence of the eye witnesses in the present case on visual and voice identification was very weak, also that those witnesses were incredible. He warned of the impending dangers of relying on their evidence.

To begin with, he contended that the charged incident occurred at 8.00 pm when it was dark. Thus, the acceptability of the evidence of the witnesses depended much on whether the conditions at the scene of crime were favourable for correct identification. Since PW1, PW2 and PW3 testified that a wick lamp was the only source of light in their seating room, and because a wick lamp is ordinarily one of the poorest sources of light, for their evidence to be reliable, they ought to have mentioned the intensity of the light from that lamp, the place where it was kept, the size of the room and the distances from which each one of the witnesses observed the appellant. He contended that apart from PW3 who said at page 19 of the Court Record that the sitting room was not too small or too big, which meant the room was big, the others did not talk about the size of that room. He similarly said that all the three witnesses were not clear on the intensity of the said lamp, the place where it was stationed, and the distance at which each one of them observed the attacker. He contended that in view of those pit falls, it cannot be said the witnesses properly identified the appellant. On top of that he added, all the three eye witnesses were attacked. Obviously he contended, they were shocked, therefore that their concentration on the attacker was detracted. He relied

on the case of **Chacha Pesa Mwikwabe v. Republic,** Criminal Appeal No. 254B of 2010, CAT (unreported)

On the other hand, Mr. Kabunga warned that identification by voice was equally unreliable because there was a possibility of mistaking the appellant's voice with someone else, hence that it was unsafe to rely on such evidence. He cited the cases of **Nuhu Selemani v. Republic** (1984) T.L.R. 93, and **Gerald Lucas v. Republic,** Criminal Appeal No 220 of 2005, CAT **(**unreported) in which it was commonly stated that great care must be taken to rely on such evidence. He urged the Court to cast doubt on that evidence and hold that it was improperly relied upon by the trial court.

On the other hand however, he admitted that there was other evidence which may be said to have lent support to the visual and voice identification evidence. He pointed out the evidence of PW4 Hubert Filbert and PW5 Shekerea Mwerinde. He quickly challenged however, that their evidence was similarly unreliable. He stated that the evidence of PW4 that the appellant surrendered to him, also that he had a blood stained panga was not corroborated by any other independent evidence, thus unsuitable. He also contended that the evidence of PW5 who was the owner of the

panga allegedly used by the appellant in perpetuating the assault was similarly unreliable because it was not corroborated. In all, he urged the Court to allow this ground.

The second ground of appeal asserts that the appellant's cautioned statement which was admitted as exhibit P4 was wrongly relied upon because it was tainted with fundamental irregularities. Mr. Kabunga submitted that though it was tendered in court without any objection, in fact it suffered three serious defects which ought to have attracted the trial court to reject its admission or rather decline to rely on it; **one** that it was not voluntary; **two** that its recording did not comply with the mandatory provisions of law; and **three** that it was not read to him. He elaborated that at the time it was admitted, the learned advocate who represented the appellant in that court did not consult the appellant on whether or not he freely made it, which is why, he went on to say, the appellant stated in his defence that he was beaten and forced to sign it. Also, he stated that the procedural part of the statement had mixed entries which showed that the appellant was not informed of his rights before his statement was recorded. Mr. Kabunga submitted further that nowhere in the said cautioned statement was it indicated that it was read over to him before he

allegedly signed. Relying on the case of **Emmanuel Malahya v. Republic**, Criminal Appeal No. 212 of 2004, CAT (unreported), the learned advocate prayed the Court to expunge that evidence from the record. He requested the Court to allow this ground too.

On his part, Mr. Ngole was express that he was supporting conviction and sentence on account that the prosecution proved their case against the appellant beyond reasonable doubt.

To begin with, Mr. Ngole admitted that PW1, PW2 and PW3 were the only eye witnesses in the case, and that they identified the appellant visually and by voice. He also admitted that a wick lamp was the only source of light with the aid of which those witnesses managed to identify the appellant. He said PW1, PW2 and PW3 testified in common that the light from the wick lamp was very strong and it afforded them a good chance of clearly seeing their attacker. He submitted that at page 14 of the Court Record, PW1 testified that the ***"wick lamp emitted sufficient light to enable one remove a lava (sic) (funza)."*** That meant, Mr. Ngole went on, the intensity of light was very strong. He also said that according to PW7 A/Insp. Christopher, the size of the room was 2M x 3M, meaning it was a small room. He also stated that even the appellant said in

his defence that he went to the victims' house after the incident in an endeavour to render assistance, and that he met Siima and Rosemary. He reasoned the appellant could not have identified the people he met if the light was not sufficient.

Mr. Ngole's other strong point was that the three eye witnesses were appellant's neighbours and knew him very well, a fact which minimized mistaken identity. He added that according to those three witnesses, on that day the appellant went to their house two times during day time, the third time having been at 8.00 pm when he carried out the ugly assault.

As regards identification by voice, Mr. Ngole submitted that while agreeing with the warning which was made in the case of **Gerald Lucas v. Republic** (supra) that great care must be taken before the court relies on the evidence of voice identification, he quickly added that the fact that the three eye witnesses were very familiar to the appellant was an assurance that they did not mistake his voice. He referred the Court to the cases of **Rajabu Khalifa Katumbo & 3 others v. Republic** [1994] T.L.R. 129 (CA). He summed up that in view thereof, the evidence of identification of the three prosecution eye witnesses was correctly relied

upon by the trial court and prayed the Court to uphold the finding of the trial court on this point too.

Careful as he seemed, Mr. Ngole submitted that there was other evidence from other witnesses which supported that of PW1, PW2 and PW3. He had reference to the evidence of PW4 and PW5. PW4 testified that on arrival at his home the appellant told him that he was surrendering because he killed a person, and that he carried with him a panga which was stained with blood. On the other hand, PW5 had testified that the appellant used a panga he borrowed from him to kill the deceased. He submitted that the appellant's statement to PW4, a person in authority as he was a ten cell leader, was a confession, and that it was freely given, therefore that it boosted the prosecution case.

Mr. Ngole did not agree with his learned friend Mr. Kabunga on the second ground of appeal that the cautioned statement which was admitted as exhibit P4 was wrongly relied upon because it was tainted with fundamental irregularities. He contended that had it been so, they were expected to have raised an objection under section 169 (4) of the CPA at the time it was tendered. He added that raising it now is nothing else but an afterthought. Also, while agreeing with what was stated in the case of

Emmanuel Malahya (supra) that mistakes should not be taken lightly, he held the view that even where the evidence contained in exhibit PE4 may be expunged, there is other strong evidence to sustain conviction. He pressed the Court to dismiss this appeal.

In a short rejoinder, Mr. Kabunga stated that if there are problems in the conduct of the case, including improper reception of documents, this Court is expected to put things right. Of course, he cannot be more right.

On another point, Mr. Kabunga contended that the evidence of PW7 that the room was 2M x 3M was an afterthought and should not be relied upon because the sketch map he drew constituted in exhibit P2 did not contain those measurements. He reiterated his previous position that we allow this appeal.

We have carefully gone through the proceedings and judgment of the trial court, as well as the grounds of appeal and the rival submissions of counsel for the parties. We wish to first of all honestly commend the counsel of both sides for their able and well researched presentations. They have really made our task a bit lighter. We sincerely thank them.

We propose to begin with the third ground like they did. It challenges the reliability on the visual and voice identification evidence which was the

domain of the three eye witnesses in the case. As already pointed out, Mr. Kabunga is skeptic that those witnesses correctly identified the appellant both, visually and by voice.

Admittedly, the incident took place in the village and at night time when, under normal circumstances darkness had set in. In such circumstances, the courts are required to closely examine the manner in which identification by a witness in any particular case was made, but always remembering that each case must be decided on its own set of facts. The rationale for this requirement is gathered from the case of **Waziri Amani v. Republic** (1980) T.L.R. 250 in which it was stated that evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water-tight. The Court stressed in that case that before relying on such evidence, the trial courts should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before. See also the cases of **Raymond Francis v. Republic, [1994]**

TLR 100, and **Aburaham Daniel v. Republic**, Criminal Appeal No. 6 of 2007 CAT (unreported), among others.

We appreciate the fact that in our present case, the wick lamp was the only source of light. Also, we agree with Mr. Kabunga that the witnesses were expected to mention the intensity of the light from that lamp, the place where it was kept, the size of the room and the distances from which they observed the appellant.

It is certain that all the three eye witnesses testified in common that the light from that wick lamp was very strong. PW1 in particular stated that ***"wick lamp emitted sufficient light to enable one remove a lava (sic) (funza)."*** Also, basing on the evidence of PW3, their sitting room was not very clear but we believe that it was not a huge one as is ordinarily the position in many rural houses - See the case of **Emmanuel Luka and others v. Republic,** Criminal Appeal No.325 of 2010. In that case the problem was, among others, the size of the room in which it was said the wick lamp was the only source of light. Court stated that:-

"The size of the living room is not given nor that of the bedroom. But objectively one would expect them to be small rooms where a

hurricane lamp may provide sufficient intensity of light. It was a house in a village, not a villa in an affluent part of a city or town."

It is also the case that if the room had the ordinary size as we have justified above, it means each one of those witnesses was within a short distance to enable a clear vision, especially taking into account the fact that the light in that room was very strong. Besides, all the three witnesses had known the appellant very well; not only because he was their fellow villager, but also that his paternal uncle married PW2 Rosemary Grasian (mother of the deceased). In other words, he was the grandfather of the late Winchislaus Mwemezi. As has often been stated by the Court, knowing or having seen a person before the time of incident minimizes mistaken identity – See cases of **Eva Salingo and others v. Republic** [1995] T.L.R. 220 and Emmanuel **Luka and others v. Republic** (supra). For reasons we have assigned, the trial court properly believed and relied on the evidence of visual identification by PW1, PW2 and PW3.

The prosecution eye witnesses had similarly testified that they identified the appellant by voice. We heed to the caution which was stated in the cases of **Nuhu Selemani v. Republic** (supra), **Gerald Lucas v. Republic** (supra) and **Stuart Erasto Yakobo v. Republic**, Criminal

Appeal No. 202 of 2004 (unreported) that great care must be taken before the court relies on evidence of voice identification because it is generally perceived as the weakest kind of evidence because there is always a possibility of a person imitating another person's voice. In **Stuart Erasto Yakobo v. Republic,** the Court stated that:-

> *"...the issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it... there is always a possibility that a person may imitate another person's voice.* ***For voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime..."*** [Emphasis provided].

In our instant case, PW1, PW2 and PW3 were witnesses who were familiar to the appellant. As already stated, he was their neighbour and a

close relative in that his paternal uncle married PW2 Rosemary Grasian who was the mother of the deceased. This being the position, the possibilities of mistaking the appellant's voice were vouched by that situation. Like we said in respect of visual identification, the voice identification evidence by these witnesses was similarly correctly relied upon by the trial court.

At any rate, we succumb to the submission of Mr. Ngole, as was also admitted by Mr. Kabunga, that visual and voice identification was not the only evidence relied upon in finding the appellant guilty of the charged offence. There was other strong evidence which came from PW4 and PW5, which in our view corroborated the evidence of PW1, PW2 and PW3 that the appellant was the person who committed the charged crime. PW4 testified in court that on that day around 8.00 pm, the appellant went to his house and informed him that he was surrendering because he had just killed a person, and that he carried with him a blood stained panga with which he killed the alleged person who happened to be Winchislaus s/o Mwemezi. We agree with Mr. Ngole that this witness was properly held to be credible by the trial court, and that his statement that he was surrendering to him because he had just killed a person, was indeed a

confession to the charged crime, and surely it boosted the prosecution case.

Another such evidence came from PW5 who told the trial court that he was the one from whom the appellant borrowed the panga which was indeed the killer weapon. This witness clarified that the appellant had asked for the panga so that he could use it in cutting banana in his shamba. He identified that panga by pin-pointing the special marks it had, a fact which connected the appellant to the killing.

In view of such evidence, we are satisfied that the trial court correctly found that the prosecution side proved the case against the appellant beyond reasonable doubt, and we uphold that finding.

We now come to the second ground of appeal alleging that the cautioned statement which was admitted as exhibit P4 was wrongly relied upon because the recorder of that statement did not comply with the mandatory provisions of law.

We begin by appreciating that the cautioned statement under consideration was admitted as evidence in court without any objections. According to Mr. Kabunga, the complaint against that document was raised by the appellant in his defence allegedly because his advocate did not

consult him at the stage when that document was admitted in evidence. He had also complained that the statement was not voluntary, also that the recorder did not comply with the law governing the recording of such statements. Worse more, the appellant complained that it was not at all read over to him.

We wish to point out here that if the situation was like as portrayed by the appellant, then there was a serious problem. Of course, under such circumstances, one would have expected the appellant to resort to section 169 (1) of the CPA which contemplates the taking of objections at the earliest possible opportunity, but as is the case this was not done.

However, as was correctly submitted by Mr. Kabunga, if there are problems in the conduct of the case, including improper reception of documents, the Court cannot stay put. It is expected to put things right. This has been done before by this Court in a number of cases, including those of **Ahmad Nangwalanya v. Republic**, Criminal Appeal No. 105 of 2010, CAT (unreported) and **Emmanuel Malahya v. Republic** (supra). In both these cases, the Court expunged the respective cautioned statements upon noticing that regardless of the fact that they were

admitted without any objections, on the ground of failure to observe the procedure governing recording of such statements.

Guided by these cases, we come to the same conclusion that because the recording of exhibit P4 in the present case violated the law as stated above, we have no better option but to expunge it from the record as we accordingly do.

Having found however, that the appellant was properly identified as the person who committed this crime, save for what we have said in respect of the second ground, it remains to be said that the appeal lacks merit and we dismiss it.

Dated at **Bukoba** this 26th Day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL