IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 479 OF 2016

1. LAMECK BAZIL
2. PACRAS MINAGO **.....APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

dated the 27th day of October, 2016

in

Criminal Session Case No. 57of 2015

JUDGMENT OF THE COURT

21st August & 4th September, 2018

MKUYE, J.A.:

Lameck Barazil and Pancras Minago were arraigned in the High Court of Tanzania sitting at Bukoba (Matogolo, J.) for murder of one Magdalena d/o Andrew. At the preliminary hearing stage, they both denied the charge. In order to prove the charge the prosecution called twelve (12) witnesses and produced eleven (11) exhibits. For the defence side, six (6) witnesses testified. At the end of the trial both

were convicted and sentenced to death by hanging. Aggrieved, they lodged the appeal to this Court.

When the appeal was called on for hearing on 21/8/2018, the appellants were represented by Mr. Aaron Kabunga, learned counsel, whereas the respondent Republic enjoyed the services of Mr. Athumani Matuma, learned Senior State Attorney. Before the hearing of the appeal commenced, Mr. Matuma informed the Court about the information they received that the 2nd appellant passed away. He produced a death certificate to that effect. After being satisfied that the 2nd appellant is, indeed, dead, we marked his appeal accordingly abated in terms of Rule 78(1) of the Tanzania Court of Appeal Rules, 2009. For that matter, this judgment will be in respect of the surviving appellant Lameck Brazil alone. For purpose of this appeal, the first appellant would be referred to as the appellant and the second appellant as Minago.

Before embarking on the merits of appeal, we feel it prudent to give the background of the case leading to this appeal as follows:-

Some days before the date of the incident, Magdalena Andrea (deceased) visited her brother, one, Evarist Andrea (PW1) at Kabukome

village in Kayanza hamlet. On a certain day while heading back home, she passed at Minago's residence who was a neighbour of PW1. On the following day PW1 met Minago and he told him about a guest at his residence who was his son in-law and a traditional healer (appellant) and that when the deceased passed at their house, that guest remarked that *"Watu wa Biharamulo bado mko nyuma sana mnaacha mali inatembea hivi hivi"*. This referred to the deceased who was an albino. He did not, however, report it anywhere as he did not take those words seriously.

On 21/09/2008, PW1 realized that the appellant was at his father in-law's (Minago) residence. He recalled what Minago had told him. He went at Minago's residence and warned them that should his sister be harmed he would report them to the police, but they chased him and he left.

On the same date (21/9/2008) at about 04:00 p.m, the deceased who was also a mother in-law of Fraiska Felix left and went to the market. PW10 testified that thereafter, Minago and two other persons came to ask for the deceased. She told them that she had gone to the market and they left. At about 7:30 p.m, PW1 heard the deceased shouting for help as some people were attacking her. When

she went there she saw, at a distance of seven meters, the assailants beating her with a stick. Among the assailants, she identified the appellant and Minago as there was still ample light. When they realised that she was watching at what was going on, the assailants chased her. She ran to the ten cell leader (Makoye) while shouting. Some people gathered among them being Mateso Matayo (PW4).

The police officers SSP Majaliwa (PW6) and Mashaka Yunus Majula (PW7) also came at the scene of crime. They found the deceased slashed with machetes on different parts of the body and her palm chopped off. While there, PW1 informed them about the utterances which were made by the appellant; and PW10 informed them how the appellant and Minago went at their home to ask for the deceased and how she identified them to be the assailants. At about 12:00 midnight the appellant was arrested at Minago senior wife's house and Minago at his junior wife's house. Also, the appellant's bag containing assorted things like traditional medicines, bed sheets and an animal horn was taken.

PW6 and PW8 collected and prepared some samples and forwarded them to the Government Chemist for DNA examination

(scientific analysis) (Exh P3). PW8 also being an investigator of the case collected evidence from various witnesses.

Meanwhile, the body of the deceased was examined by PW9, Dr. Donasian Martin Kamara and he revealed that the deceased's cause of death was due to multiple cut wounds which caused external bleeding leading to anaemia shock.

Gloria Thom Machive (PW11), and Fidelis Segumba (PW12), conducted scientific analysis on samples such as the hoe handle found at the scene of crime with blood stains, blood samples of appellant and Minago, blood and buccal swap of the deceased's brother and they revealed the appellant's involvement in the commission of the offence. (Exh P 10 and P11).

In defence, both the appellant and Minago denied to kill the deceased. They raised a defence of alibi that they were not at the scene of crime but were at Minago's home where the appellant was treating Minago's sick child, one Moses. They also testified on having heard the alarm and that Minago and other family members responded to the alarm and found someone killed. They also said that they were arrested in the same night.

As to Minago, he did not deny to have been told by PW1 that since he kept a traditional healer, if anything bad happens in the village he will report them to the police. He however, denied to have told PW1 about the plan to kill his sister (deceased) and to have gone to PW1's home to ask for the deceased.

The other witnesses for defence, Riziki Pancras (DW4), William Anthony (DW5) and Severin Khamis (DW6) testified to the effect that the appellant did commit the offence since they were at Minago's residence where there was a dowry payment ceremony until when alarm was raised.

As alluded earlier on, after a full trial both the appellant and Minago were convicted and sentenced to death by hanging.

The appellant has filed a memorandum of appeal consisting of seven (7) grounds of appeal. Mr. Kabunga adopted it and sought to condense it into two main grounds to the effect that:-

1. *The prosecution evidence did not prove the case against the appellant beyond reasonable doubt as required by the law.*

2. *The trial judge erred in law in relying on the evidence of visual identification of the appellant while there was no corroborative evidence to that effect.*

Submitting in support of the appeal, Mr. Kabunga argued generally that the evidence of all 12 witnesses for the prosecution was weak, incredible and doubtful. In elaboration, he contended that **one**, there were inconsistencies in the evidence of PW1 relating to the words uttered by the appellant as at one stage at page 17 of the record he said that the words uttered were "*watu wa Biharamulo bado mko nyuma sana mnaacha mali inatembea hivi hivi*"; and at another stage at page 20 of the record he said "*Biharamulo ni wajinga mnaacha mali Magdalena inatembea ovyo.*" Apart from that PW8, Mashaka Yunus Majula while narrating what he was told by PW1 said "*Mnakaa na mali zinazagaa tu hazichungwi. Siku moja atakuja kuchukua mali.*" These inconsistencies, he said, showed that PW1 was not a reliable witness worthy believing. **Two,** the time when those threatening utturances were made was not certain as PW1 told PW6 that they were uttered one week before the incident while at another stage at page 20 he said about three months before the incident. **Three**, since the appellant

was a stranger in the village and was not known to PW10 who identified him, she ought to give a description of the assailant. He referred us to the case of **Frank Christopher @ Mallya v. Republic**, Criminal Appeal No. 182 of 2017 (unreported). **Four**, the visual identification evidence by PW10 was not watertight as she failed to mention the appellant at the earliest opportune time. He elaborated that PW10 did not mention them to Makoye where she went after being chased by the assailants or to people who gathered at the scene of crime in response to the alarm raised. He argued that, this makes her evidence incredible. He referred us to the case of **Waziri Amani v. Republic**, [1980] TLR 250. **Five**, the forensic analysis report on the DNA profiling of the hoe handle with the appellant's sample was not reliable as the hoe handle was touched by many people.

On his part, Mr. Matuma prefaced by not supporting the appeal. Starting with the DNA report, he vehemently argued that, the DNA report at page 156 shows that the hoe handle which was recovered one meter from the deceased with blood stains, had blood of a female connoting it was used to kill her. Further to that, the DNA profiling test of the hoe handle and the samples of the appellant and Minago resembled which also connoted that the appellant and Minago were

involved in killing the deceased. He referred us to the case of **Abdul-Abdul Baad Timim v. SMZ**, [2006] TLR 188 at 189.

With regard to the words that PW1 said were uttered, Mr. Matuma contended that the fact that PW1 ignored them, it was possible for him not to remember exactly how they were uttered. He elaborated that it was after realizing that the traditional healer was in the street when he recalled them and he took action of warning to report them in case his sister gets harmed. Besides that, PW1 narrated the incident to the police officers PW6 and PW8. For that matter, PW1 was a credible witness, he said.

As regards to PW10, Mr. Matuma submitted that, since PW1 saw when the appellant and his fellow went at their home at about 4:00 p.m. to ask for the deceased; she saw the appellant and Minago beating the deceased; and she mentioned them to the police; the description of the appellant was unnecessary. He argued further that the case of **Frank Christopher** (supra) which was cited by Mr. Kabunga, was distinguishable because in that case the accused was a total stranger seen by the victim for the first time.

Mr. Matuma went further to discredit the defence evidence as being full of lies which corroborated the prosecution's case and that the appellant and Minago's evidence contradicted in material particular with the evidence of their witnesses DW4, DW5 and DW6.

At this juncture, we wish to point out that the conviction in this case depended much on the credibility of PW1, the evidence of visual identification by PW10 and the DNA profiling report by PW11 and PW12.

With regard to the credibility of a witness it is settled law that the trial court is better placed to assess the witness's credibility. For that matter, this Court will only interfere if there is a misdirection or non-direction. (See **DPP v. Jaffer Mfaume Kawawa** [1981] TLR 149; **Salum Mhando v. Republic,** [1993] TLR 170; and **Shihone Seni and Another v. Republic**, [1992] TLR 330.

After having dispassionately examined the submissions by both counsel, we agree with Mr. Matuma that the prosecution proved its case beyond reasonable doubt. We say so because, PW1 clearly testified to have been told by Minago about the appellant's utterances that "*watu wa Biharamulo mko nyuma sana, mnaacha mali inatembea*

hivi hivi." Meaning that the people in Biharamulo were still living in the past by leaving the "deal" to walk freely without being protected. The "mali", "deal" was taken to mean people with albinism having in mind PW1 had a sister with albinism. Since, there was no such occurrence in their locality, PW1 did not take it seriously by informing other people or even reporting it to the relevant authority. It was after realizing that the appellant was in the street when it clicked in his mind and took action of going to the Minago's house to warn them in case anything bad happens to her sister. That PW1 had gone to Minago's residence to warn them was supported by both Minago and his wife Elizabeth Pancras (PW2) though they said that they chased him thinking he was drunk.

Of course, we agree with Mr. Kabunga that there are some inconsistencies on the said utterance as at one stage PW1 said what Minago told him was that "*watu wa Biharamulo bado mko nyuma sana mnaacha mali inatembea hivi hivi.*" At another stage he said he told him that "*Biharamulo ni wajinga mnaacha mali Magdalena inatembea ovyo*". But again, PW8 related what PW1 had told him that "*Mnakaa na mali zinazagaa tu hamzichungi.*"

However, our critical look at those utterances has revealed that they depict a similar meaning. We say so because, all phrases refer to "mali" literally meaning "treasure" or "deal." Also, there are words "inatembea hivi hivi", "inatembea ovyo" and "zinazagaa to hazichungwi" literally meaning "moving around unprotected." When these words are taken cumulatively they mean "the "treasure" or "deal" is moving around unprotected." Deducing it further it meant that "the deceased who was living with albinism was the "treasure" or "deal" which was referred to, as having been left to move around unprotected." In our view, these inconsistencies do not change the gist of the utterances and they do not go do the root of the matter.

Besides that, we have taken note of the fact that PW1 did not take those words seriously as he did not report anywhere. However, this was explained that there was no occurrence of such evil occasion done in their locality. Also the fact that PW1 testified in the trial court seven (7) years after the incident, we think, the possibility of missing out the accuracy of the words uttered cannot be overruled. Since the gist of those utterances was still maintained, they carried the same meaning of the words uttered. As to the exact time when those words were uttered, we think, is immaterial especially when taking into

account that the witness was a peasant. At any rate, the trial judge who had a chance of assessing the credibility of the witness found him credible. Since we are not availed with anything to discredit him, we find PW1 to be a credible witness.

Likewise, the evidence of visual identification which came from PW10 was relied upon in this case. As was correctly argued by Mr. Kabunga, the evidence of visual identification is the weakest kind of evidence and most unreliable. Thus, courts are required to decline or not to act on such evidence unless all the possibilities of mistaken identity are eliminated, and the court is fully satisfied that it is absolutely watertight. (See **Waziri Amani** (supra).

It is also important to emphasize that in weighing such evidence, the court has to remain focused in whether or not the conditions at the scene of crime were favourable for correct identification. (See **Raymond Francis v. Republic**, [1991] TLR 100).

Moreover, it is worth to note that providing description and the term of description are matters of the highest importance of which evidence ought to be given, first of all by the person who gave the description or purported to identity the accused, and then by the

person to whom the description was given (See **Republic v. M. B. Allui**, [1942] EACA 72).

Further to that, the ability of the witness to name the suspect at the earliest opportunity is an important assurance of his reliability; and in the same way unexplained delay or complete failure to report must put a prudent court to inquiry. (See **Marwa Wangiti and Another v. Republic**, [2002] TLR 39).

Applying the above tests to the evidence of PW10, we agree with Mr. Matuma that PW10 explained how on 21/9/2008 at about 4:00 p.m the deceased left and went to the market. At around that time the appellant, Minago together with another person went and asked her whether Magdalena (deceased) was present. On telling them that she has gone to the market they left. It would appear that the appellant and his fellows tracked her as at about 7:00 p.m. - 7:30 p.m., PW10 heard the deceased shouting for help suggesting she was attacked. When PW10 responded, at a distance of seven meters from the scene of crime she saw the assailants beating the deceased. At that time there was still ample time as was explained by PW8 that in Biharamulo during that time it is still light. Since PW10 had known Minago before

the incident after having been introduced to her by her father in-law; and having seen the appellant together with Minago some few hours ago when they went to ask for the deceased; and having in mind that there was still light then it cannot be said that she mistakenly identified them. We are satisfied that, given all the circumstances, the conditions were favourable for a correct identification. (See **Raymond Francis's** case (supra)).

As to the complaint that PW10 did not give description of the appellant and Minago, we think, it was not applicable. In the case of **Frank Christopher** (supra) which was cited by Mr. Kabunga, the Court emphasized the requirement of giving description of the accused because the accused was a stranger to the victim. In that case the Court stated as follows:

> "*... with respect, however, in her evidence PW1 did not say anything as regards the description of the person who raped her. It is such description which is necessary to eliminate the possibility of mistaken identity. This is more so because,* ***PW1 saw the person who raped***

her for the first time on the material date."

[Emphasis added]

In our view, the above cited case is distinguishable to the instant case. In this case, PW10 had seen the appellant before. She saw the appellant when they came to ask for the deceased some few hours before the incident and when they were attacking the deceased. Since, PW10 had seen him before, giving his description was, in our view, unnecessary.

As regards the complaint against PW10's failure to mention the assailants at the earliest opportunity, we equally agree with the learned Senior State Attorney that she did comply with it. In doing so we are mindful of the settled law on the aspect as was stated in the case of **Marwa Wangiti and Another** (supra).

In this case, the evidence shows that when PW10 saw what was going on and after being chased by the assailants she ran to Makoye while shouting. People gathered and also the police came on the same night after being informed of the incident. PW10 mentioned the appellant and Minago to the police and they managed to arrest them

on the same night. Mr. Kabunga's construction of the rule that the earliest opportunity time could have been to the ten cell leader Makoye or people who gathered at the scene of crime, in our view, is relative depending on the prevailing circumstances. We are of such view because, there are situations where five minutes may be the earliest opportunity and in some situations even more than five hours may be an earliest opportunity. PW1 said that when she ran to the ten cell leader Makoye while being chased by the assailants, he (Makoye) also ran away. This was also confirmed by Makoye's statement (Exh P8). Thereafter, she together with Makoye's wife locked in Makoye's house. In that situation, how could she have mentioned them to him? Certainly, she could not have done so under the circumstance. Nevertheless, since PW10 mentioned the appellant and Minago to the police officers PW6 and PW8 and they managed to arrest them on the same night which was not more than five hours, we are settled in our mind that, that was the earliest opportunity time in the circumstances.

Mr. Kabunga also complained that the DNA profiling test on the hoe handle could not have produced a correct result since many people handled it. On our part, we agree with the learned Senior State Attorney that the DNA report at page 156 item (ii) revealed the

remnants of the DNA profiling of sample A1 and A2 from the appellant and Minago indicating they had touched the said handle which was found only one meter from the deceased's body with the blood of a female who was deceased. This was according to PW11 and PW12 who conducted the DNA profiling analysis. However, even if the report may have given an alternative possibility to the evidence given by PW11 and PW12, the same cannot be accepted as conclusive. On this we are guided by the case of **Abdul – Abdul Baad Timim** (supra) where the Court stated that:

> *"When the evidence of the eye witnesses is found to be credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive."*

In this case, apart from the testimonies of PW11 and PW12 who were credible witnesses, we are of a firm view that, the DNA profiling report also proved the appellant's involvement in killing the deceased. Even if the DNA profiling report would have given an alternative result, it would not have been accepted as conclusive.

With the foregoing, we are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt.

In the final analysis, we find the appeal to be devoid of merit. Hence, we dismiss it in its entirety.

DATED at **BUKOBA** this 4th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL