IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A, MUGASHA, J.A And MKUYE, J.A)

CRIMINAL APPEAL NO. 359 OF 2015

DAUD JEREMIAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania
at Mwanza)
(Gwae, J.)

dated the 21st day of July, 2015
in
High Court Session No. 158 of 2013

JUDGMENT OF THE COURT

19th & 25th April, 2018

MKUYE, J.A.:

Daudi Jeremiah, the appellant, was charged with murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002]. The particulars of the offence were that on about the 24th day of July, 2011 at Nyawilimilwa village within Geita District in Mwanza Region, the appellant murdered one Mereciana D/O Lugata, the deceased. Following a full trial, the High Court at Mwanza (Gwae, J.) convicted the appellant with an offence of murder and sentenced him to suffer death by hanging. After being dissatisfied with both the conviction and sentence, the appellant has lodged his appeal to this Court.

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

On the 24th day of July, 2011 around 8:00 pm, the deceased together with her daughter Felista Masalu (PW1) were in the kitchen outside their house, preparing dinner. The deceased sent PW1 to get some flour in the house. While inside, PW1 heard her mother screaming from outside. She rushed outside and found some people including a person whom she identified to be the appellant, slashing the deceased on her various parts of her body with a panga. In the course, deceased's hand was amputated and fell down. Thereafter, the deceased lost consciousness, fell on the ground and died instantly. Meanwhile, the appellant together with his co-assailant vanished.

The deceased's body was taken to the hospital where upon conducting a postmortem examination it was revealed that her death was caused by haemorrhagic shock due to excessive blood loss (See – Exh. P2). The appellant was arrested on 25/7/2011 and was arraigned before the court.

In his defence, the appellant denied participation in the alleged murdering of the deceased who was his former neighbour. He testified that the murder case against him was a frame up due to the land dispute that

existed between him and Marco Sahani (PW6). He also denied to have had any grudge with the deceased.

On 4/10/2016, the appellant filed a memorandum of appeal consisting nine (9) grounds of appeal. Likewise, Advocate Syliveri Chikwizile Byabusha on 29/3/2018 filed yet another memorandum of appeal with two grounds. However, Mr. Byabusha sought to withdraw the former memorandum appeal and remain with the latter memorandum appeal. We granted leave and marked the former memorandum appeal withdrawn. In the remaining memorandum of appeal, the learned advocate raised two grounds as follows:

> *1) That the purported identification of the appellant by a single witness of tender age in an unfavorable condition did not prove the prosecution's case beyond reasonable doubt.*
>
> *2) That the evidence of PW3 No. F. 3780 D/C Linus, PW4 Dr. Alen Makonda and PW5 D. 5188 D/SSgt Alphonce was received against the law in the absence of a notice for additional witnesses.*

When the appeal was called on for hearing on 19/4/2018, the appellant was represented by Mr. Sylveri Byabusha, learned advocate; whereas the respondent Republic was represented by Mr. Victor Kalumuna, learned Senior State Attorney.

Submitting in support of the first ground of appeal Mr. Byabusha contended that, since the offence was committed at 8:00 pm when it was dark, the appellant was not properly identified as there were no favorable conditions to enable proper identification. The learned advocate added that even though PW1 said she identified the appellant through the light from the fire wood, she did not explain how it lit the place or its intensity. As regards to the torch light which PW1 said it enabled her identification, he said, it was not explained as to how it was flashed at the scene of crime or how it enabled her to identify the appellant. Mr. Byabusha added that even if PW1 said she saw the appellant wearing a black coat, a cap and a pair of shoes which she did not identify its colour, that was not sufficient in the absence of the appellant's physique. While citing the cases of **Waziri Amani V Republic**, (1980) TLR 250 at 251-251; and **Michael S/O Godwin & Another v Republic;** Criminal Appeal No. 66 of 2002 (unreported), he reiterated that the conditions were not favorable for proper identification.

As regard to the second ground of appeal, Mr. Byabusha argued that three withnesses, that is, PW3 No. F. 3780 Linus, PW4, Dr. Alen Makonda and PW5, D 5188 D/SSGT Alphonce testified without their statements being read over to the accused during committal proceedings and no notice of calling additional witnesses was issued by the prosecution under section 289

(1) of the Criminal Procedure Act, Cap 20 RE 2002. For that reason he urged the Court to expunge the evidence of PW3, PW4 and PW5. At the end, he prayed to the Court to allow the appeal and release the appellant from custody.

On his part, Mr. Kalumuna in the first place, expressed his stance of supporting the appeal. He agreed with Mr. Byabusha that the identification evidence was not watertight because the intensity of light which enabled identification was not explained. He added that even the torch light was not explained on how it assisted PW1 in identifying the appellant.

As regards to the second ground of appeal, he readily conceded that PW3 and PW5 testified while their statements were not read over during committal proceedings and he advised their evidence to be expunged. Regarding PW4's evidence, he was of the view that, since the Postmortem Examination Report to which he was called to tender was listed during committal proceedings, his evidence did not vitiate the proceedings. On this, he advised the Court not to expunge his evidence. Otherwise, he urged the Court to allow the appeal.

In this case, the identification evidence as was, rightly submitted by Mr. Byabusha, came from PW1. She testified to have identified the appellant

when killing her mother. PW1 told the trial court that when she was sent to get some flour from inside the house she heard her mother screaming. On rushing outside she saw her mother being cut /slashed by the assailants, and that due to the fire light emanating from fire wood (kikome), she identified the appellant "Tall" to be among the assailants. PW1 testified further that the said "Tall" was their former neighbour and she saw him wearing a black coat, a cap as he did not cover his face and that he had put on shoes she did not identify its colour. Further to that she identified the appellant while she was at Nestory's house (their neighbor) which was 10 paces from their house due to fire wood light and the assailants' torches which were flashed in all directions. PW1 also stated that she mentioned the appellant to the people who responded to the alarm.

It is trite law that the evidence of visual identification is one of the weakest kind and most unreliable. In that regard it must be acted upon cautiously when the possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is watertight. (See – **Waziri Amani Vs Republic,** [1980] TLR 250. Likewise, it is also a settled principle that in the evidence of visual identification depending on some source of light, the source and the intensity of such light must be clearly described. This Court has taken such stance on a number of decisions. To mention just

a few, they include: **Issa Mgara @ Shuka Vs. Republic**, Criminal Appeal No. 37 of 2008; and **Omar Iddi Mbezi and 3 Others Vs. Republic**, Criminal Appeal No. 227 of 2007 (both unreported). In **Issa Mgara's** case (*supra*) for example, the Court stated that:-

> *"It is **not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity**."*
>
> *[Emphasis added].*

In this case, PW1 said she was able to identify the appellant through the light illuminated from fire wood and torch flashed by the appellant's co-assailant. She did not, however, explain as to how such light from fire wood illuminated or how its brightness (intensity) was, to the extent of enabling her to identity the appellant. In order for the visual identification especially at night to be relied upon, such explanation was important in order to establish whether or not the prevailing conditions were favorable for proper identification. Absence of such description renders such evidence a suspect.

But again, PW1 said she identified the appellant through a torch light flashed by the appellant's co-assailant. Regarding torch light this Court in the

case of **Venance Muba and Another Vs. Republic**, Criminal Appeal No. 425 of 2013 (unreported) had this to say:-

> *"With respect, we cannot accept such an inconceivable and an obviously implausible theory. Under ordinary circumstances, a torch when flashed, enables the person who holds it to see an object or the person who is lit on and not the vice versa. More often than not, the flash of a torch tends to dazzle the person who is shone at, rather than enable such person to see the person who wields the torch.* ***Thus, on account of the aforegoing reality, this Court has, on occasion, held that an identification through the aid of a torch which is held and wielded by the alleged culprits is most unreliable."***
>
> *[Emphasis added].*

Even in this case, under the circumstances in which PW 1 did not describe how the torch light was shone at the scene of crime, we are satisfied that such light could not have enabled her to identify the appellant. We do not think the one who was wielding the torch could have shone it to the appellant to facilitate his easy identity. We, therefore, agree with both counsel that the visual identification evidence at the scene of crime was not watertight at all to enable proper identification of the appellant.

With regard to the second ground of complaint, we agree that PW3, PW4 and PW5 testified in the trial court while their statements were not listed during committal proceedings meaning they were not read over to the accused.

At this juncture we wish to deal first with the evidence of PW4. The record of appeal at pages 22 – 24 show that Dr. Alen Makonda testified as PW 4. He testified in relation to the Postmortem Examination Report (the PMR) he had prepared and listed during committal proceedings among the documents of which their substance had been explained to the accused person/appellant. Under the circumstance, we think, as was rightly argued by Mr. Kalumuna, his evidence does not have a similar status with PW3 and PW5's evidence. We say so because, the PRM, the substance of which was explained to the appellant during committal proceedings, was sufficient to show the gist of the evidence PW4 was to adduce at the trial court in as far as the cause of death was concerned. This means that the appellant was not prejudiced by such evidence, having been aware of the same during the conduct of committal proceedings. We, therefore, find that his evidence did not vitiate the proceedings and as such we do not expunge it.

As regards to PW3 and PW5, the record of appeal shows at pages 18-21 E. 3780 D/C Linus testified as PW3; and at pages 24 to 30 D. 5188 D/SSGT

Alphonce testified as PW5. Our glance at the record relating to the committal proceedings has revealed that their statements were not listed among the statements of persons read over to the accused person during committal proceedings as required by section 246 (2) of the CPA. The said provision reads:-

> *"(2) Upon appearance of the accused person before it,* ***the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses*** *whom the Director of Public Prosecutions intends to call at the trial."*
>
> *[Emphasis added]*

Under section 289 of the CPA a person whose statement has not passed the threshold under the above provision cannot be summoned to testify in court. The said section stipulates as follows:-

> *"(1)* ***No witness whose statement or substance of evidence was not read at committal proceedings shall not be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the***

accused person or his advocate of the intention to call such witness.

(2) ***The notice shall state the name and address of the witness and the substance of the evidence which he intends to give."***

[Emphasis added].

In the case under consideration, much as the two witnesses' statements were not read over to the accused and listed down, the prosecution did not issue the notice of its intention to call them and no gist/substance of their evidence was availed to the appellant. The fact that the prosecution failed to comply with the provisions of sections 246 (2) and 289 (1) and (2) of the CPA, rendered the proceedings to be irregular which amounted to a miscarriage of justice.

In the case of **Hamis Meure Vs. Republic**, [1993] TLR 213 at 217, where a witness testified in court while his statement was not read over at the committal proceedings and no notice of calling him was given to the appellant and his advocate, this Court stated:-

"It having been accepted by the prosecution and the judge himself that PW2 did not feature in the record of committal proceedings, he should not have been

allowed him to give evidence in contravention of the provisions of section 289 which are mandatory."

Even in this case, we agree with both learned counsel that it was wrong to allow PW3 and PW5 to testify in court in contravention of the mandatory provisions of sections 246 (2) and 289 (1) and (2) of the CPA. Hence, we expunge their evidence.

In the final event, since the evidence which was relied by the prosecution is not water tight, we allow the appeal, quash the conviction, set aside the sentence and order the appellant to be released from prison forthwith unless he is detained in connection with another lawful reason.

DATED at **MWANZA** this 24th day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL