IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 273 OF 2017

1. GODFREY GABINUS @ NDIMBA
2. YUSTO ELIAS @ MNGEMA } **..... APPELLANTS**
3. EXAVERY ANTHONY @ MGAMBO

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania sitting at Mtwara)

(Mlacha, J.)

dated the 7th day of June, 2017
in
Criminal Session Case No. 9 of 2014

JUDGMENT OF THE COURT

13th February & 1st March, 2019

MZIRAY, J.A.:

Before the High Court of Tanzania sitting at Mtwara in Criminal Sessions Case No. 9 of 2014, the three appellants were prosecuted for and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 of the Revised Edition, 2002. They were each sentenced to death by hanging. Aggrieved, they are now before this Court appealing against both conviction and sentence.

It was alleged that on 9th of September, 2012 at Chimbendenga Village within Nachingwea district in Lindi Region the appellants jointly and together murdered Zainabu Nassoro @ Chikawe.

The evidence in outline upon which the conviction of the appellants was grounded was as follows. It was alleged at the trial court that on 8/9/2012 Joseph Farahani who was sick and admitted for a number of days at Nachingwea Hospital died. He was the nephew of the appellants. PW1 testified that on that day the deceased body was brought home during the evening. The gathered people on that day for the funeral of Joseph Farahani had an argument saying that his death was unnatural and speculated that he died out of witchcraft.

The following day on the burial ceremony some boys together with the appellants were directed to go to the rear part of the house to collect food and serve the mourners but they did not heed to the issued directives. PW1 heard them saying in Kiswahili that, "*hapa lazima afe mtu*" literally meaning someone must die today. They believed that their nephew Joseph Farahani was bewitched. Thereafter, PW1 saw the appellants

making commotion by breaking and destroying plates and cooking pans which were to be used to serve food for people who had gathered at Farahani's funeral. They also entered inside the house where the deceased Zainabu was, took her out and started beating her by using their fists and blocks of burnt bricks which were around until she lost consciousness, on belief that she was the source of Farahani's death. He also heard them saying "*tumemaliza kazi*", meaning that we have finished the work. They did not stop there, they also put dry grasses with petrol and burnt her body. She died on the spot. That evidence was corroborated by the evidence of PW2, PW3 and PW4 who were at the scene of crime. It was supported by the evidence of PW5 who conducted the autopsy and tendered a post mortem report.

On the basis of that evidence, the trial court was satisfied that the case against the appellants was proved beyond reasonable doubt. The appellants were convicted and sentenced to death.

They have now come to this Court to challenge their conviction. In this appeal, Mr. Hussein Mtembwa, learned counsel appeared for the

appellants whereas the respondent/Republic was represented by Mr. Kauli George Makasi, learned State Attorney.

The gist of the complaint in the memorandum of appeal is that there was no fair trial and that the prosecution case was not proved beyond all reasonable doubt. On this point, three reasons were given. **First**, he stated that the summing up to court assessors was not done according to the law. To support his assertion, he contended that during summing up, assessors were not informed of what happened at the preliminary hearing and the exhibits tendered thereof. He also pointed out that the trial judge did not either direct the assessors on principles of identification or consider and address them on the defence of *alibi* and its legal implications. On that basis, he was of the view that the omissions constituted a fundamental error. **Secondly**, on the basis of evidence adduced, the identification was not adequate so as to remove all chances of mistaken identity. Citing the unreported case of **Ayubu Zahoro v. Republic**, Criminal Appeal No. 177 of 2004, he said that the distance between where PW1 was standing to where the assailants were, was not explained. **Thirdly**, he stated that the incident took place in a broad daylight and according to PW1 and PW2, more than one hundred people were around and witnessed the same. He

said, all those people who were around were material witnesses and they would have given evidence on what actually transpired instead of PW1 and PW2, who were the deceased relatives. He pointed out that failure to call some of them as independent witnesses without explanation tainted the prosecution case. He concluded that since the entire prosecution case was clouded with a shadow of doubts, the trial and first appellate courts erred in failing to give the appellants the benefit of doubt. To support his argument, he cited the case of **AZIZI ABDALLAH V. REPUBLIC [1991] T.L.R 71.**

On his part, Mr. Makasi, learned State Attorney, did not support the appeal. He submitted that there was no substance in any of the grounds of complaint and prayed for the dismissal of the appeal. In response to the first complaint, he submitted that the summing up to assessors was exhaustive and done according to the law and that the trial judge apart from explaining to them the role and duties of assessors, he also considered and addressed them on the principles of identification and defence of *alibi*. As to the complaint that the assessors were not informed of what transpired during the preliminary hearing, he stated that they were

not informed of what happened during the preliminary hearing because they were not part of the court at that stage of hearing.

On the issue of identification, the learned State Attorney submitted that the incident happened in a broad daylight. The scene according to the sketch plan was plain and that the appellants were related to both PW1 and the deceased. He stressed that PW1, whose testimony was similar in material particular to that of PW2 explained how the appellants entered into the kitchen and took the deceased out. He explained how they assaulted her by using their fists and burnt bricks and how he himself tried to prevent them in vein. He saw them setting fire on her and he reported the incident to PW3, the Village Executive Officer. On the basis of the foregoing evidence, he argued that under the circumstances there could be no mistaken identity.

As to the issue of witnesses who were at the scene but were not called to testify, the learned State Attorney stated that the law is clear under section 143 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 that no number of witnesses is required to prove a case. What is relevant is the credibility of the witness. He stressed that both the trial and first

appellate court were satisfied that all the five prosecution witnesses were credible and reliable.

The learned State Attorney concluded by stating that the appeal was without merit and should be dismissed.

We have dispassionately considered the rivalry arguments by the parties to this appeal in the light of the record of appeal, the grounds of appeal as well as the substance of the oral submissions during the hearing of the appeal. We should now be in a position to confront the grounds for determination as appearing in the grounds of appeal raised. We start our determination of the contending matters in the appeal by addressing first the first ground that the summing up to the court assessors was not exhaustive and not done according to the law. This ground should not detain us. A close look at the record of appeal and as rightly submitted by the learned State Attorney, the trial judge at pages 68, 71-72 considered and addressed the court assessors on the principles pertaining to identification and the defence of *alibi*. That being the case, this ground of appeal is baseless and unfounded.

Next for consideration is the complaint which hinges on the issue of identification. We wish to state quickly that the law is settled in this jurisdiction that evidence of visual identification is of the weakest kind and most unreliable. As such, this type of evidence should only be relied upon to convict an accused person when all possibilities of mistaken identity are eliminated and when the court is satisfied that the evidence before it is absolutely watertight. This observation was made by this Court in **Waziri Amani v. Republic** [1980] TLR 250. Apart from that observation, the Court restated the principles to be taken into account when deliberating whether or not to rely on such evidence. It was stated that before relying on such evidence, the court should put into consideration such factors as 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 prior to the incident. - See also: **Raymond Francis v. Republic** [1994] TLR 100 and **August Mahiyo v. Republic**, [1993] TLR 117.

In the case at hand, the appellants were both relatives of the deceased and the identifying witnesses. The incident took place in a broad daylight and it is in evidence that after the burial ceremony of Joseph Farahani PW1 and PW2, the identifying witnesses heard the appellants saying *"Hapa lazima afe mtu"* thereafter, the appellants entered into the house where the deceased was, they took her out and started assaulting her brutally by using their fists and burnt bricks. It is also in evidence that PW1 tried to prevent them in vein. PW1 and PW2 also witnessed the appellants burning the deceased. PW1 reported immediately the incident to PW3, the Village Executive Officer naming the appellants as the culprits. The totality of evidence at the trial, we think, was well founded that the recognition of the appellants was watertight. The complaint to the effect that the appellants were not properly identified or recognized cannot hold water and is dismissed for want of merit.

In addition to the above, the appellants were mentioned as the culprits to PW3 at the very earliest opportunity. The ability of PW1 to mention the appellants at the earliest possible moment is an assurance of his reliability. We have applied this principle in a number of our decisions.

One such case is **Minani Evarist v. Republic**, Criminal Appeal No. 124 of 2007 (unreported) in which, referring to our earlier unreported decision of **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001, we observed:

> *"... the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."*

We took the same position in our earlier decisions of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 and **Jaribu Abdallah v. Republic** [2003] TLR 271. In **Marwa Wangiti Mwita** (supra), this Court observed thus:

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".*

This position of the law was restated in **Jaribu Abdallah** (supra) where the Court observed:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor".*

[See also: **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999, **Mafuru Manyama & Two Others v. Republic**, Criminal Appeal No. 256 of 2007, **Kenedy Ivan v. Republic** Criminal Appeal No. 178 of 2007, and **Yohana Dionizi & Shija Simon v. Republic**, Criminal Appeals No. 114 and 115 of 2009 (all unreported).

On the basis of the evidence adduced, we are of the firm view that the appellants' complaint in this ground is misplaced and we dismiss it.

The last issue to answer is how many witnesses are required to prove a fact in a criminal trial? As rightly put by the learned State Attorney and to our minds rightly so, there is no particular number of witnesses required by law to prove any fact. What is important is the credibility of the witness. The provision of section 143 of the Evidence Act tells it all. It reads:

"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

On reading the provision quoted above we are satisfied that the trial court had justification to find that PW1 and PW2 were credible witnesses.

Another important point for consideration at this stage is how much weight should be accorded to the evidence of PW1 and PW2 who were blood relative of the appellant and at the same time related to the deceased Zainabu. It was claimed that such witnesses might have a common interest to serve. The position taken by this Court however, has always been twofold. **First,** that since there is no law which forbids relatives from testifying in court for the same cause, that argument should not be given credence. The Court's position is reflected in several decisions, some citing an early decision of the then East African Court of Appeal. See **R. v. Lulakombe Mikwalo and Kibege.** 1936 EACA 43 at 44) where it was observed;

"There is no rule of law or practice which permits the evidence of near relatives to be discounted

because of their relationship to an accused person..."

Second, that in a situation where near relatives are enjoined to testify, what must be born by the court is their credibility and for that matter each one's evidence must be considered on merit as should also the totality of the story told by them. (See, **Tarayi v. Republic,** Criminal appeal No. 216 of 1994; **Rashidi Abdallah Mtungwe v. Republic,** Criminal appeal No. 91 of 2011 – both unreported). In **Abdallah Teje @ Malima Makula v. Republic,** Criminal appeal 195 of 2005 (unreported) the Court held that what matters is the credibility of their evidence and the weight to be attached to such evidence. In that regard, such evidence has to satisfy the following conditions: -

1. *Whether such evidence was legally obtained.*
2. *Whether it was credible and accurate.*
3. *Whether it was relevant, material and competent.*
4. *Whether it met the standard of proof requisite in the particular case, that is, its believability.*

Upon going carefully through the evidence adduced before the trial Court we are satisfied that the case at hand met the four conditions set out

in **Abdallah Tefe's** case herein above. If that is the case, then there was no need to call for independent evidence as argued by the learned counsel for the appellant. On that reason, we see logic in the argument of the learned State Attorney.

That said and for the foregoing reasons, we do not find any basis for which to fault the findings of the two courts below on all substantive matters considered herein. The appeal is patently wanting in merit. Accordingly, it is dismissed in its entirety.

DATED at **MTWARA** this 28th day of February, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL