IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 26 OF 2018

HATIBU s/o MOHAMED MAULID @ KAUSHA @ SAID s/o MOHAMED @ MWANAWATABU KAUSHA................................APPELLANT

VERSUS

THE REPUBLIC... RESPONDENT

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

(Mlacha, J.)

dated the 30th day of November, 2017
in
Criminal Session Case No. 45 of 2014

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JUDGMENT OF THE COURT

22nd October & 8th November, 2019.

SEHEL, J.A.:

In the High Court of Tanzania sitting at Masasi, Mtwara Registry, the appellant, Hatibu s/o Mohamed Maulid @ Kausha @ Said s/o Mohamed @ Mwanawatabu Kausha was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 and was sentenced to death. Aggrieved by the conviction and sentence, he has appealed to this Court.

It was the prosecution case that on 24th day of October, 2012 the appellant did murder one Ally s/o Chibwana Sanula (the deceased) at Mahuta Town within Tandahimba District in Mtwara Region.

The facts read at the preliminary hearing alleged that the appellant with others who are not subject of this appeal, beat the deceased on his head with an iron bar. The appellant denied the charge. The prosecution called four (4) witnesses, namely; **Salum Halifa Bilali** (PW1), **Fadhili Abdillah Mawazo** (PW2), **G. 5808 D/Constable James (PW3)**, and **Haji Sefu Mamu** (PW4) and tendered three documentary exhibits, to establish its case. At the conclusion of the trial, the two assessors who sat with the presiding Judge unanimously returned a verdict of guilty against the appellant. The learned presiding trial Judge (Mlacha, J.) concurred and, as the result, the appellant was found guilty, convicted and handed down the mandatory death sentence. Aggrieved by the finding of the High Court, the appellant has preferred this appeal.

In his memorandum of appeal, the appellant raised three (3) grounds of appeal that read as follows:

1. That the Honourable trial court erred in law and fact by failure to consider that the appellant was not identified thus the evidence by the prosecution on visual idention was insufficient to warrant conviction.
2. That the Hounourable trial court erred in law and fact by failure to consider that the appellant's defence of alibi and shifted the burden of proof to the appellant.
3. That the Honourable trial court erred in law and fact by relying in exhibit P2 without considering that the said exhibit was doubtful and not detailed.

Before we reflect on the grounds of appeal, it is necessary to briefly unveil the factual background. On the night of 24th day of October, 2012, PW4 was asleep at his shop. In the middle of the night, he was awaken by a sound of shop breaking. He went outside and saw a man at PW2's shop who he allegedly identified to be the appellant. He said he identified him with the aid of moonlight and electrical bulbs. Having seen him, he rushed back inside and phoned his neighbours; PW1, Abood Chimbyoka and Rajabu Lihipuka. The neighbours came and threw stones to the man who ran away and this gave an opportunity to PW4 to join his neighbours. At the broken shop, they saw tools used in breaking the shop. They were heavy iron

bar, chisel and hammer. They also saw the watchman (the deceased) lying unconscious on the ground and he was bleeding from his head.

PW1 decided to phone PW2, the owner of the shop in order to alert him about the incident. While still there waiting for PW2 to come, the appellant resurfaced and tried to throw an arrow to PW1 but he escaped it. Having seen that, they ran inside the shop to hide. The appellant came and locked them and told them to mind their own business just like the way the people in Dar es Salaam live.

The fact that PW1 and PW4 were locked inside the room was corroborated by PW2, who told the trial court that he found both of them locked inside the shop. Hence, he unlocked the door and the trio decided to go to the police station to collect PF3 in order to take the deceased to the hospital. Upon their return at the scene of the crime and while still discussing on what to do next with the injured guard's body, the appellant returned and stood at a foundation, opposite where they were and yelled at them that they should mind their own business like the way the people in Dar es Salaam live. He then threw at them a pipe and disappeared. The trio decided to take the deceased to Mahuta Health Centre where he was declared dead.

Both PW1 and PW2 alleged to have had identified the appellant and Hamisi Kassim using moonlight, electricity light as well as a torch. PW4 also said he identified the appellant by his voice.

The record is silent as to whether the murder was reported at the police station. There is, however, the evidence of PW3 whose evidence was essentially on the sketch map he drew. No any other police officer was called to explain on how, when and where the appellant was arrested.

That aside, in his sworn evidence, the appellant raised the defence of *alibi* that on that fateful day he was at Kyela, Mbeya. He stayed there from November, 2011 to December, 2012. He said he received sms message that he was alleged to be involved in the crime while in his whole life he never committed any criminal offence. He said he was arrested a year after the incident, that is, sometime in 2013.

The trial court ruled out the defence of *alibi* and found the three identifying witnesses to have positively identified the appellant at the

scene of the crime. In believing the evidence of PW1, PW2, and PW4, the trial court said:

> *"....None of the prosecution witnesses saw the accused killing the watchman. They just saw the watchman on the ground bleeding....The evidence show that the accused was seen attempting to break the shop. He was seen moving around at the scene of crime. He was seen holding a bow and an arrow. He threw an arrow to PW1. All witnesses saw him at the road side. His voice was identified behind the house and at the road side. He cautioned the witnesses to behave like Dar es Salaam people and mind their business. The fact that he was seen at the scene of crime holding an arrow and his conduct at the scene of crime suggest that he had come there to steal from the shop....The circumstances show that those who had come to break and steal from the shop must have been the ones who beat the watchman. There is no other explanation for that. The evidence show that there were two people at the broken shop. The accused was one of the two people. He must have*

therefore, taken part in the killing of the deceased. I see no possibility of another person other than the accused and the other who is at large."

Having been convinced with the evidence of PW1, PW2, and PW4, the trial court returned a verdict of guilty to the appellant and sentenced him to capital punishment.

At the hearing of the appeal, the appellant had the services of Mr. Rainery Songea, learned advocate while Mr. Kauli George Makasi, learned Senior State Attorney appeared to represent the respondent/Republic.

In his submission, Mr. Songea abandoned the second ground of appeal and proceeded to argue the two remaining grounds. Since the submission by the learned advocate for the appellant centered was largely on the issue of identification, we will not reproduce herein their submission on the other grounds of appeal.

Elaborating on identification, Mr. Songea contended that the trial court erred in law by finding that the appellant was not positively identified by PW1, PW2, and PW4 whereas there are several

shortcomings on the evidence of identifying witnesses. He pointed out that, PW1 said he identified the appellant by bright moonlight and electricity tube lights but later on he said he had also used a torch. In his cross-examination he admitted that there was darkness. He contended that PW2 who alleged to have identified the appellant by using moonlight and bright electric bulbs and was at a distance of 50 meters or so, contradicts the evidence of PW1. PW1 said there were tube lights and moonlight but also he had to use a torch; whereas PW2 said there were bulbs and tube lights; and PW4 said there were only bulbs with dim light. Mr. Songea wondered if there was enough light and if so, then why had PW1 to use a torch? Was the area not illuminated enough? Mr. Songea explained further that the distance described by PW1 was 4 meters while PW2 said it was about 50 metres. To cement his submission, he referred us to the case of **Oden Msongela & 5 Others v.Republic**, Consolidated Criminal Appeals No. 417 of 2017 & 223 of 2018 (unreported).

Another shortcoming, he said, was the failure by the identifying witnesses to describe the appellant's attire, body physique and size. Lastly, Mr. Songea drew inspiration from the quoted case of the **State**

of Maryland v Kirk N. Bloodsworth, 1984 quoted in the case of **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015 (unreported) at page 7 wherein it was held that visual identification is not one of the strongest evidence of accuracy as there is possibility for witnesses to collude in cooking up the story. He thus urged us to find that the evidence of the identifying witnesses suggested conspiracy and framing up of a case against the appellant. To that effect, he argued that the identification evidence of PW1, PW2, PW4 was wanting for the trial court to warrant conviction and sentence against the appellant.

In his reply, Mr. Makasi forcefully submitted that the visual identification was water tight and satisfied all the conditions for proper identification of the appellant. He pointed out that PW1 knew the appellant from the young age of 16 years; PW1 managed to indentify the appellant more than once. First at the scene when he saw him in company with another person named Hamis @ Ng'ombe; secondly, when PW2 came and threw stone at him, thirdly when he locked them inside the shop, and lastly when he was standing at the far end of the road.

It was his submission that apart from PW1, there were other witnesses who identified the appellant and these are PW2 and PW4. To him, the identifying witnesses were able to give details on the type and intensity of the light. For instance, he contended, PW1 said he identified the appellant by moon and tube lights. On that day there was a full moon whose light was bright enough to identify the appellant. As such, the area was illuminated with enough light. He also submitted that the witnesses described the distance they were from where the appellant stood as having been about 4 meters away. In Mr. Makasi's view, the distance between them was very near for a person not to have a mistaken identity. He submitted that the evidence of all these three witnesses satisfied the principle of visual identification as held in the case of **Godfrey Gabinus @ Ndimba & 2 Others v. Republic**, Criminal Appeal No. 273 of 2017 (unreported) where it was held:

> *"...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 of light and intensity of such light, and also whether the witness knew the accused prior to the incident." [At page 8].

Mr. Makasi therefore concluded by arguing that the case of **Oden Msongela** (supra) cited by his learned counsel was distinguishable to the facts in the present appeal. With that submission, he prayed for the appeal to be dismissed.

Mr. Songea briefly rejoined by reiterating his earlier submission and argued that the cited case by the learned Senior State Attorney is distinguishable since the incident in that case occurred during the day time unlike in the present appeal.

The appeal at hand is centred on the issue whether the appellant was positively identified by PW1, PW2, and PW4. The law on visual identification is now well settled, that such evidence is of the weakest type and courts should not act on it unless fully satisfied that the evidence on the conditions favouring a correct identification is watertight to eliminate any possibility of the mistaken identity: See, for instance, **Waziri Amani v. Republic** (1980) T.L.R 250; **Raymond Francis v. Republic** (1991) T.L.R 100; **Issa s/o Mgara @ Shuka v.**

Republic, Criminal Appeal No. 37 of 2005; and **Felician Joseph v. Republic,** Criminal Appeal No. 152 of 2011 (both unreported).

In the case of **Felician Joseph** (*supra*), we emphasized as follows:

> *"....visual and aural identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, such as at night, is of the weakest kind and most unreliable. Such evidence should be approached with the utmost circumspection. No court should act on such evidence unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."[At page 9]*

We have repeatedly warned courts to be cautious that there might be an honest but mistaken identifying witnesses and sometimes there are circumstances where there might also be dishonest witnesses: See **Nyakango Olala James v. Republic**, Criminal Appeal No. 32 of 2010 (unreported).

In **Jaribu Abdalla v. Republic** [2003] TLR 271 we said:

> *"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 ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."*

In the appeal at hand, the incident occurred at night, around 02:00 p.m. Therefore, the conditions for proper identification were unfavourable. That being the case, we had to approach the evidence of the three identifying witnesses by carefully analyzing their account on how they managed to identify the appellant. The three identifying witnesses were PW1, PW2, and PW4. The trial court was convinced by the evidence of the three identifying witnesses. It be noted that this being a first appeal, where it is in a form of a re-hearing, we have a duty to consider and re-evaluate the evidence of the identifying witnesses. We start with evidence of PW1 who told the trial court as follows:

> *"We managed to identify two people. I identified Hatibu who is popularly known as*

Kausha. I saw that guy (accused). I also saw Hamisi @ Ng'ombe. We identified through the lights and moonlight. There were tube lights. The moon had a bright light. The accused was close to us....The accused was near. It is about here to that corner (about 4 meters)....Now still there, Kausha came suddenly. I shone a torch to him. He shot an arrow. We run inside the house."

Responding to a question posed by the counsel for the appellant on how he was able to identify him, PW1 responded:

"I saw him. I identified him because I knew him earlier. Shone a torch between the house and saw the accused with the arrow which he short. It was a bright moon. I shone a torch because there was some darkness between the two houses. The light between the houses was small...."

What comes out clear from PW1's evidence was his admission in his cross-examination that there was no enough light at the place where the killer was standing. And this explains why PW1 failed to give details on the appellant's body physique and attire. Had it been

that he truly identified the appellant, PW1 would have easily told the trial court on the attire that the appellant wore on that day. No such evidence was forthcoming from PW1.

The other identifying witness was PW2 who said:

> *"I saw Kausha at a later stage....The distance was...50 meters. I identified him through the moonlight and bright electrical lights. There were big bulbs and tube light. The moonlight had a bright light."*

In his cross-examination, he maintained that:

> *"I identify him at 50 meters due to his body features and the face. There was electricity and bright moonlight. It was possible to identify a person using the light if you knew him earlier. He was on the other side of the road."*

Although PW2 claimed to have identified the appellant by his body physique and face, there is no iota of evidence on the description of that unique body feature and face. If he truly identified the appellant by aid of bright moonlight, bulb and tube light it is not clear

why he failed to give an account of the appellant's body physique, attire, or any peculiar features, like his height.

The last identifying witness was PW4 who told the trial court that:

> *"I witness breaking. I saw a person at the door of my neighbor, Fadhili Mawazo. I saw him turning around. He was looking around. I closed my door. I opened the door which lead to that direction so that I could see properly. I could see him. There was moonlight that night. It had light which enabled one to see a person who was ahead. The distance from my shop to the broken shop was like here to that bench (about 3 meters). Electricity was on. He was moving around by then because he heard the sounds from the door and window. He had a bow and arrow ready for everything. I could identify him as Hatibu @ Kausha.* ***The bulbs were bright but not so much done to the moonlight.*** *The bulbs were outside the frames." (*emphasis added*).*

The evidence of PW4 says it all. The intensity of the light illuminated from the electricity lamps, be it bulbs or tube lights was

not bright enough. Admittedly, the light illuminated from the tube lights cannot be compared with light from bulbs. The two lights give out light with varying intensities. PW1 on his part, alleged to have identified the appellant by the aid of tube lights and moonlight whereas PW2 said there were bulbs and of course moonlight. But we are told by PW4 that there was no enough light coming from bulbs. With this evidence on record, our reservation is whether there was sufficient light for proper identification of the appellant.

Our worry is intensified by the evidence of PW1 who said he had to resort further to the use of a torch. We are very much perplexed with that evidence. If the scene of the crime was lit in the manner explained by the three identifying prosecution witnesses, then we find it very difficult to understand why PW1 had to resort to the use of a torch. The only possible explanation we get from that evidence is that, either there was no light or it was very dim as explained by PW4.

Another disturbing fact in this appeal is the claim made by the three identifying witnesses that they had positively identified the appellant. If that is the case then why did they fail to report him and have him arrested immediately? The only evidence on the record came

from the appellant himself who said he was arrested in 2013 but there was no any other evidence coming from the prosecution side to establish how, where, and when was the appellant arrested. None of the three identifying witnesses said about making a report either to the village authorities or police. We thus take that the witnesses did not name the appellant at the earliest opportunity. The fact that the appellant was not named at the earliest time casts grave doubts on the credibility and reliability of the three identifying witnesses-See: **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 40.

Going by the evidence available on the record, we are inclined to sustain Mr. Songea's submission that the credibility of PW1, PW2, and PW4 is questionable due to their inconsistencies and implausible account on the conditions favouring the identification of the appellant. Admittedly, if the trial court could have properly directed its mind, it would not have arrived at the guilty verdict. Strictly speaking, no court could have acted on that evidence. In totality, the evidence on identification did not prove beyond reasonable doubt that the appellant was positively identified to be the culprit and so the case for the prosecution was not proved on the required standard.

All said and done, we allow the appeal. The appellant's conviction is hereby quashed and the sentence imposed on him is set aside. The appellant is to be released forthwith from prison, unless he is otherwise lawfully held.

Order accordingly.

DATED at **MTWARA** this 8th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 8th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Meshack Lyabonga, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL