IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J.A, MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 441 OF 2018

SABATO THABITI ..... 1ST APPELLANT

BENJAMINI THABITI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kairo, J.)

Dated the 7th day of November, 2018
in
Criminal Session Case No. 68 of 2015

JUDGMENT OF THE COURT

27th November & 4th December, 2019

KWARIKO, J.A.:

Sabato Thabiti and Benjamini Thabiti, the first and second appellants, respectively, are blood brothers who stood before the High Court of Tanzania at Bukoba charged with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002] (the Penal Code). It was alleged by the prosecution that on 22nd day of December, 2013 at night

hours at Mkalinzi village within Ngara District in Kagera Region, they murdered one Japhet Thabiti (the deceased), who was also their brother.

The appellants denied the charge hence the case was fully tried. At the end of the trial, the appellants were convicted and sentenced to suffer death by hanging. Aggrieved by that decision, the appellants have come before this Court on appeal.

We find it apposite at this point to recapitulate the facts of the case which led to the appellants' conviction. On 22/12/2013 at 05:00 pm, Felister Kateragi (PW1), a resident of Mkalinzi village was at home. Whilst there, she saw four people coming running towards her direction. They were her neighbours. Three of them were; Sabato @ Miburo, Nyandwi @ Benjamini, the appellants and their brother one Segwenda. These three while armed with sticks of eucalyptus and a knife which was carried by the first appellant, were chasing Bigirimana the other name of the deceased. When they reached at her house the three started assaulting the deceased with sticks and cut him with the knife in the neck and stabbed his chest. When PW1 asked the three to stop the assault, the second appellant assaulted her with a fist in the breast, then she retreated. The deceased

ran for about five paces but he fell down. The three assailants followed him and continued to assault him. When PW1 shouted for help, the assailants ran away but the deceased had already been killed.

Amongst those who responded to the scene of crime was, Stephano Gwasa Muhanika (PW4) who was the ten-cell leader of the locality. PW4 was informed by PW1's husband Kateragi, that it was the appellants and their brother Segwenda who killed the deceased. Thereafter, some people kept guard of the deceased body and others went to look for the killers at their home. At the appellants' home, the search team found Mzee Thabiti, the appellants' father, drunk and the appellants were there save for Segwenda who was at large. The appellants were apprehended and were taken to the scene of crime. In a bid to impeach PW1's testimony, the defence introduced her police statement which was admitted as exhibit P1 (sic). In that statement, PW1 was recorded to have said that, the incident took place at 07:00 pm as opposed to her testimony in court where she said it was 05:00 pm.

Meanwhile, upon information of the incident, the police officers, including No. G 5681 DC. Evarist (PW3) and the Doctor arrived at the

scene the following morning. The deceased' body was examined by Dr. Victor Peter (PW2). In his testimony, PW4 said that the deceased' body had multiple injuries particularly in the neck, chest and private parts. He added that, there was a deep cut wound in the neck which exposed the spinal cord and the left side testicle was completely removed. PW2 concluded that the injuries resulted to severe internal and external haemorrhage which caused the death of the deceased. The post-mortem examination report was tendered by PW2 and was admitted as exhibit P2. On his part, PW3 drew a sketch map of the scene of crime which was admitted in court as exhibit P3.

In their defence, the first and the second appellants were the only witnesses for the defence and testified as DW1 and DW2 respectively. They denied the allegations of murder. They commonly testified that on 22/12/2013 at night they were asleep at their home when the ten-cell leader and other villagers went and apprehended them. They were taken to the scene where they found the body of the deceased. At the scene, PW1 implicated them to be the killers and thus they were kept under custody until the police arrived the following day. Upon interrogation at

the police station they denied involvement in the said murder. They also denied to have been taken to the justice of the peace as it was claimed by PW3. It was the appellants' further testimony that they did not hear the alarm as their house was far from the scene and there is a valley in between. While DW1 said he had boundary dispute with PW1 and not the second appellant or Severin, DW2 said he also had land dispute with PW1 that is why she implicated them with the murder.

As noted earlier, at the end of the trial, the appellants were convicted and sentenced as such.

Earlier, on 01/2/2019, the appellants filed a five grounds Memorandum of Appeal; however, on 25/11/2019 the appellants' counsel, Mr. Peter Joseph Matete, filed a Memorandum of Appeal containing two grounds in substitution of the appellants' Memorandum of Appeal as follows:-

1. ***THAT,*** *the learned trial Judge erred both in law and in facts to convict and sentence the appellants basing on a weak, inconsistency (sic) and contradictory evidence and without considering the defence evidence.*

2. ***THAT,*** *the learned trial Judge erred both in law and in facts to convict the appellants basing on the evidence of PW1 Felister Kateragi, the sole eye witness, without cautioned that she had an interest to serve.*

At the hearing of the appeal on 27/11/2019, the appellant appeared being represented by Mr. Peter Matete, learned advocate. On the other hand, Ms. Suzana Masule, learned State Attorney, appeared for the respondent/Republic.

In his submission, Mr. Matete opted to argue the two grounds of appeal together. He therefore submitted that the trial court erred to believe the prosecution evidence which had several contradictions. He listed the contradictions as follows; **One**, while at page 11 of the record of appeal, PW1 said the incident occurred at 05:00 pm, in her police statement which appears at page 80 of the record of appeal, she said the time was 07:00 pm. **Two**, while at page 12 PW1 said the police came to Mkalinzi village to take her statement, at page 13 she said, she went down to the police station to give her statement. **Three**, while PW1 said the deceased ran for five paces from her house to the point where he fell

down, PW3 said it was 24 paces and PW4 said it was 15-20 paces. **Four**, PW1 said the ten- cell leader, PW4 was the first person who responded to the scene, on his part PW4 said he was not the first as he found many people at the scene. **Five**, PW1 said she mentioned the identities of the killers to PW4 but PW4 said he was informed by PW1's husband, Mr. Kateragi. It was Mr. Matete's contention that due to these contradictions, PW1 was not a credible witness. Further, the trial judge did not address on PW1's demenour for her to be accorded such credibility. To bolster his argument, Mr. Matete cited the Court's previous decision of **Michael Haishi v. R** [1992] T.L.R 92. Mr. Matete also urged the Court to re-asses the credibility of PW1 as it was the case of **Augustino Peter Mmasi v. Tausi Seleman** [2016] TLS LR 135.

The learned counsel wound-up by contending that, PW1's evidence was suspect evidence which did not even deserve to be corroborated. To cement this argument, Mr. Matete cited the case of **Mbushuu** *alias* **Dominic Mnyaroje & Another v. R** [1995] T.L.R 97. He implored us to find merit in the grounds of appeal and allow the appeal.

On the other hand, Ms. Masule prefaced her submissions by resisting the appeal. She argued that, PW1 was a key witness and her evidence was not at all contradictory. She contended that, even if there were contradictions, they were not material. As regards the time of the incident, Ms. Masule argued that, throughout her testimony, at pages 11 and 13 PW1 maintained that it was 05:00 pm. She argued that PW1's police statement which indicated that the time was 07:00 pm had one shortcoming, that; it was not read over in court. To put credence to her argument, Ms. Masule cited the case of **Robinson Mwanjisi v. R** [2003] T.L.R 218.

It was Ms. Masule's further contention that, even if PW1's statement was read over in court, it could still not defeat her testimony in court. The case in reference was that of **Abdallah Rajabu Waziri v. R**, Criminal Appeal No. 116 of 2004 (unreported).

As regards the difference in paces from PW1's house to the point the deceased fell, Ms. Masule argued that the same is immaterial. She went on to argue that assuming it was twenty paces, at 05:00 pm, one could see properly.

Ms. Masule argued further that the trial judge was at a better position to assess the demeanor of PW1. In that, at page 102 of the record of appeal the trial judge said that she had nothing to fault PW1's credibility. For the foregoing, the learned State Attorney was of the view that, there is nothing for this Court to re-assess.

The learned State Attorney contended that, the prosecution case was proved beyond reasonable doubt. This is so because PW1 properly identified the appellants as they were her neighbours, who also beat her when she tried to stop them from assaulting the deceased. She also said that at 05:00 pm there was still day light. Thus, the conditions for favourable visual identification were met as it was outlined in the case of **Waziri Amani v. R** [1980] T.L.R 250 and **Kazimili Mashauri v. R**, Criminal Appeal No. 252 of 2010 (unreported).

Concerning the credibility of PW1, Ms. Masule contended that, PW1 was credible and her evidence alone was sufficient to prove the case as it was the case in **Goodluck Kyando v. R** [2006] T.L.R 363. Further, PW1 immediately mentioned the appellants to the people who responded to the scene, Ms. Masule argued.

As to whether PW1's evidence needed corroboration, it was Ms. Masule's argument, that her evidence was corroborated by the injuries which were inflicted on the deceased's body. As such PW1 said the deceased was cut in the chest and neck which tallied with the report given by PW2. The injuries were also seen by PW3 and PW4. The learned counsel was of the view that, the injuries proved that the appellants intended to kill the deceased.

On being prompted by the Court, Ms. Masule submitted that the appellants said that, PW1 implicated them with the murder because there was a land dispute between them, which defence was rejected by the trial court. She also said that the charge showed that the incident occurred at night hours. Ms. Masule urged us to find the appeal without merit which deserves to be dismissed.

In rejoinder, Mr. Matete, argued that there is sufficient reason for this court to re-assess the credibility of PW1. Further, he contended that the case of **Robinson Mwanjisi v. R** (supra) is distinguishable from the instant case as such it was not necessary to read over PW1's statement. He argued that, once the document is admitted it is admitted wholly with

its content, and after all PW1 saw the statement and acknowledged it as hers.

Finally, Mr. Matete argued that, PW1 had interest to serve as the body of the deceased was found near her home, hence she was expected to give explanation.

We have considered the grounds of appeal and the parties' submissions for and against the appeal. We will deliberate the grounds of appeal generally as were argued by the counsel for the parties but focusing on the issues raised thereof. The appellants' counsel maintained that, the prosecution evidence was not worth of belief as it was tainted with contradictions. Firstly, in a view to discredit PW1's evidence, Mr. Matete argued that, at first PW1 said that, the police came to Mkalinzi to write her statement and later she said she went to the police station to give her statement. It is our considered view that this is minor contradiction which did not go to the root of the case so long as PW1 gave her statement to the police.

In regards the time of incident as evidenced by PW1, we are certain that there was no any contradiction on her part. This is so because, during

examination-in-chief at page 11 of the record of appeal, PW1 said the incident took place at about 05:00 pm and extended for two hours; this explains why the charge indicated that the killing took place at night hours. PW1 maintained this stance during cross-examination and re-examination at pages 12 and 13 respectively, and said if the police wrote 07:00 pm in her statement, it was their fault. However, even if we were to consider the content of PW1's police statement, the same suffers from an ailment. This is to the effect that, it was not read over in court for PW1 to hear what was its content. Even though PW1 acknowledged that statement to be hers, but the content of it was not read over for her to hear. It is trite law that documentary evidence ought to be read over in court after admission in evidence. In the case of **Robinson Mwanjisi v. R** (supra), the Court held inter alia thus:-

> *"Whenever it is intended to introduce any document in evidence, it should* ***first be cleared for admission, and be actually admitted, before it can be read out."*** (emphasis supplied).

Similar stance was taken in the cases of **Kurubone Barigirwa & 3 Others v. R,** Criminal Appeal No. 132 of 2015, **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015, **Lack s/o Kilingani v. R,** Criminal Appeal No. 402 of 2015 and **Ramadhani Mboya Mahimbo v. R,** Criminal Appeal No. 325 of 2017 (all unreported). We are therefore of the view that, PW1's police statement which was received contrary to law lacked evidential value and it deserves to be expunged from the record as we hereby do.

Now, if PW1 observed the assailants at 05:00 pm, it means it was still day time and thus she properly identified them as the appellants who were her neighbours and the incident took about two hours. The distance between them was short as she was also assaulted by the appellants. The conditions for favourable visual identification were met as enunciated in the celebrated case of **Waziri Amani v. R** (supra).

Mr. Matete also complained that, the trial judge erred in law when she invoked section 234 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002] to resolve the issue of differences in time of the incident. It is our view that even though that provision relates to trials before the

subordinate courts, the omission is immaterial because we have ruled out that there was no contradiction in respect of the time of the incident.

Another complaint relates to the difference in the distance from PW1's house to the point where the deceased fell down after being assaulted. While PW1 said it was five paces, PW3 said it was 24 paces and PW4 said it was 15 to 20 paces. We do not think that this distance had any material bearing on the case. This is so because first, estimation of the length of paces from one individual to another may differ and secondly, even before the deceased ran from PW1's house to the point he fell down, PW1 had already identified his assailants.

Further, the appellants complained that, while PW1 said that PW4 was the first to answer her alarms, PW4 said when he got to the scene, he found many people already gathered. As correctly argued by the learned State Attorney, this discrepancy is immaterial as it does not go to the root of the case. The important thing is that PW4 was one of the people who visited the scene of crime shortly after the incident. We can therefore safely conclude that, there was no material contradictions in the witnesses' evidence which went to the root of the case. The trial court properly

addressed the contradictions and found them immaterial. However, contradictions by a witness or among witnesses in a particular case are normal occurrences. For instance, in the case of **Emmanuel Josephat v. R,** Criminal Appeal No. 323 of 2016 (unreported), this Court said thus;

> *"We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case."*

See also; the Court cases of **Dikson Elia Nsamba Shapwata & Another v. R,** Criminal Appeal No. 92 of 2007 and **Lusungu Duwe v. R,** Criminal Appeal No. 76 of 2013 (both unreported).

As to the credibility of PW1, we are in agreement with the learned State Attorney that, the trial court was better placed to assess it as it had the opportunity to see her demeanor. The appellate court can be called upon to assess the credibility of a witness if there is reason to do that. In the case of **Shabani Daudi v. R,** Criminal Appeal No. 28 of 2000 (unreported), which was relied upon in the case of **Alex Nyambeho @**

Fanta and Another v. R, Criminal Appeal No. 309 of 2013 (unreported), the Court said thus:-

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1."*

Following the above authority, this being the first appellate court, where need arises, can assess the credibility of witnesses. In our case the bone of contention is the evidence of PW1. The trial court which had the opportunity to observe PW1's demeanor, said at page 102 of the record of appeal as follows:-

"I confess that I have neither observed nor heard anything to fault the credibility and reliability of PW1."

On our part, we have read and considered the evidence of PW1 and we have found that, she was coherent enough and worth of belief. She mentioned the identity of the killers immediately to the people who responded to the scene, including PW4. We have also considered her evidence along with other witnesses together with the appellants' testimonies and we are settled that her evidence needs no any re-assessment.

The appellants also complained that, the trial court did not consider their defence. It is our considered view that the trial court dealt with all issues raised by the defence during the trial including the contradictions in the witnesses' evidence as shown above. What the trial court did not address is the issue of land dispute the appellants alleged they had with PW1. We have considered this complaint and found that the land dispute issue was not the appellants' main agenda in their defence. This is so because the same only surfaced during cross-examination of the appellants. They did not even cross- examine PW1 on that issue at the

time she gave her evidence. The appellants also differed on who had land dispute with PW1. While the first appellant said it was him only who had land dispute with PW1 and not the second appellant or Severin, the second appellant said it was him who had land dispute with PW1.

Additionally, in this case, even though there was only single eye witness, that is PW1, her evidence is worth of belief. The trial court also assessed PW1's evidence and was satisfied that she was credible. In the case of **Ally Rajabu and Four Others v. R,** Criminal Appeal No. 43 of 2012 (unreported), the Court said thus:-

> *"The law is settled that even though a fact may be proved by the testimony of a single witness, there is a need for testing such evidence with great care."*

We entertain no doubt that PW1's evidence has been tested and found credible and truthful. It did not even require corroboration as contended by Mr. Matete. The purpose of corroboration was well explained in the case of **Azizi Abdallah v. R** [1991] T.L.R 71, where it was held that:-

> *"The purpose of corroboration is not to give validity or credence to evidence which is deficient or*

suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible."

[See also; **Mbushuu** alias **Dominic Mnyaroje and Another v. R** (supra)].

In this case, even though PW1's evidence did not need corroboration but in some aspects, it was supported by PW2, PW3 and PW4. This is because, PW1 said the deceased was cut in the chest and neck and these witnesses said they saw the deceased's body with injuries on those areas. The appellants complained that PW1 had interest to serve because the deceased body was found near her house. Because we have believed PW1's evidence as it was the case at the trial, the issue of serving interest cannot arise.

To wind up, we are settled in our minds that, considering the type of weapons used which were directed on the vulnerable parts of the body in concert between the appellants and their brother who went at large, show that they had malice aforethought to cause the death of the deceased. The

prosecution case was therefore proved beyond any shadow of doubt against the appellants. The grounds of appeal thus fail.

We therefore find the appeal devoid of merit and we hereby dismiss it in its entirety.

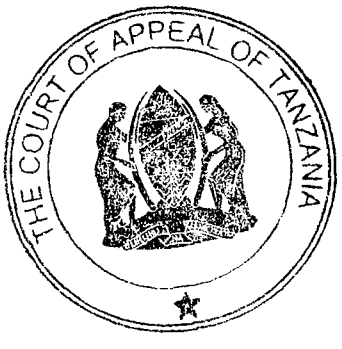
DATED at **BUKOBA** this 4th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of December, 2019 in the presence of Mr. Peter Matete, learned Counsel for the appellants and Ms. Suzan Masule, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL