IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 488 OF 2016

1. ANDREA ZABRON

2. FLORIAN KALUMBETE .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mambi, J.)

dated 11th day of October, 2016
in
Criminal Sessions Case No. 11 of 2014

JUDGMENT OF THE COURT

23rd & 27th August, 2019

MUGASHA, J.A.:

The appellants were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. The prosecution alleged that, on 16th December, 2012 at Mwambani Village, Chunya District within Mbeya Region, the appellants jointly and together did murder one Zawadi Msheto, the deceased. After a full trial they were all convicted and sentenced to suffer death by hanging. Undaunted, the appellants have appealed to the

Court. In the Memorandum of Appeal, they have fronted three grounds of complaint as follows:

1. That, the learned trial Judged erred in law allowing assessors to cross-examine witnesses, thereby vitiating the trial.

2. That, the learned trial judge erred in law and fact in holding that the two appellants had been sufficiently identified as perpetrators of the murder of the deceased.

3. That, the learned trial judge erred in law and fact in dismissing the defence of alibi put forth by the 2nd appellant, Florian Kalumbete.

In order to appreciate, what led to the apprehension, arraignment and conviction of the appellants it is crucial to briefly state the background to that effect.

From a total of six witnesses, the prosecution case was to the effect that, on 16/12/2012 Zawadi Msheto (the deceased) was struck to death after being attacked by a crowd which suspected her to be a thief. It was the prosecution evidence that, Patrick Cyprian Mwinuka the deceased's husband

(PW1) testified that while at his home around 20.00 hours, the deceased went to the shop to buy cigarettes. A moment later he heard the deceased lamenting "*why do you want to kill me while I stay at Mkisas, house.*" PW1 made a follow up, and found the crowd attacking the deceased. Having inquired on the reason behind the attack, the deceased was being beaten as she was suspected to be a thief. PW1 in vain attempted to rescue the deceased but she was pursued by the crowd and beaten by the 2nd appellant and other people. After the deceased managed to reach home one Mashaka Chipungu who had a steel bar forcefully grabbed the deceased from the door and took her to the backyard where the appellants used a steel bar and a pestle (Mtwangio) to severely beat her. In response to the question asked by the trial court, PW1 claimed to have been aided by solar light and managed to identify the appellants and six others in the entire crowd.

Felista Renatus (PW2) the other wife of PW1 was also at the scene of crime together with her husband. She recounted that, after the deceased had returned from buying cigarettes, a group of people started to shout at her "*mwizi, mwizi".* Their neighbor Mr. Hassan Sijaona (PW5) attempted to rescue the deceased but was hit by stones thrown by those in the crowd and he opted to retreat. Thereafter, PW2 recounted that, the group invaded

their house, destroyed the fence and broke the window. PW2 with the aid of light managed to identify Mashaka Chipungu who is not among the appellants because he was a regular visitor at their house. However, she did not mention the nature of light and its intensity. PW5 who went at the scene of crime to assist the deceased testified that, in the crowd which was attacking the deceased he managed to recognize Mashaka Chipungu, the 2nd appellant, Gema, Fredy by voice and in addition saw the appellant holding a pestle and that he uttered words: "*mbona mimi nikishikwa mwizi napigwa, na mimi lazima kumpiga.*" In reply to the question put to him by the trial court PW5 stated that, PW1 had bulbs like those in Mwanjelwa Primary Court but he fell short of stating if on the fateful incident the lights were on or not. When cross examined by the learned defence counsel, PW5 stated to have seen the 2nd appellant holding the pestle decided to retire at his home. Apparently, PW5 did not testify to have seen the 2nd appellant hitting the deceased.

Roster Mwaniwe (PW4), who was informed about the incident by PW1 at around 22.00 hours, went to the scene of crime and found chaos while the deceased who was heavily injured laying down. As it was the case for PW5, PW4 also claimed to have recognized the 1st appellant, his neighbor

and the 2nd appellant that held a pestle and that others present were, Mashaka Chipungu, Gema and Fredy. PW4 claimed to have been aided by light from his torch to have recognized the 2nd appellant holding a pestle.

The incident was reported to the police and the deceased sent to the hospital where she succumbed to death on the following day as per testimonial account of the Doctor Steven Richard Mshana (PW3), He recalled to have admitted the deceased who was seriously injured and later following death, he conducted the autopsy and established the cause of death to be trauma of the skull and two cut wounds. D. 8471 Seargent Hassan, (PW6) a police officer who was probably the investigator, recalled to have visited the scene of crime and found PW1's house and fence destroyed. Later he went to the hospital where he found the deceased unconscious. According to PW6, PW1 mentioned the appellants as the culprits because he knew them before. This precipitated to the arrest of the 1st appellant and as the 2nd appellant was not found at his residence, he was pursued and arrested at Sazafosi village. PW6 recalled that, from the beginning the appellants denied to have killed the deceased.

In their defence, the appellants denied to have killed the deceased. Apart from the 1st appellant recalling to have heard people shouting *mwizi mwizi,* he opted to stay home and later went to sleep. He recounted to have done so because of the previous conflict with PW1 on the boundaries of their plots since 2009 which was resolved in his favour. As such, he stated that, PW1 had mentioned his name in revenge. As for the 2nd appellant, he told the trial court that, on the fateful day he was at his farm in Sazafosi Village and not at the scene of crime.

On the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt. Thus, as earlier indicated the appellants were convicted and sentenced to suffer death.

At the hearing, the appellants was represented by Mr. Victor Mkumbe, learned counsel whereas the respondent Republic had the services of Mr. Ofmedy Mtenga and Ms. Prosista Paul, both learned State Attorneys.

In the first ground of appeal, the trial court is faulted to have: **One**, having allowed the assessors to examine the witnesses contrary to sections 146 and 147 of the Evidence Act Cap 6 RE 2002. **Two,** at the summing up, the trial judge did influence the assessors with his own views and as such,

the assessors were not impartial in making their opinions as to the guilt or otherwise of the appellants. **Three,** the trial judge did not direct and explain to the assessors on a vital point of law in relation to the defence of *alibi* which was relied on by the 2nd appellant. In this regard, it was argued by Mr. Mkumbe that, the trial was vitiated and it cannot be safely vouched to have been conducted with the aid of the assessors which is against the dictates of the law as prescribed under section 265 of the Criminal Procedure Act Cap 20 RE: 2002 (the CPA).

Thus, it was Mr. Mkumbe's submission that, though the anomalies would have been remedied in a retrial, in view of the discrepant prosecution evidence, a retrial is not worthy. As to the insufficient evidence, he pointed out that the appellants were not properly identified at the scene of crime due to the contradictory account of the prosecution, insufficiency of light at the scene of crime and circumstances surrounding the occurrence of the offence whereby the deceased was attacked by a group of about thirty (30) people. He submitted that, though PW1 testified that there was solar light at the scene of crime, later on he claimed to have identified the appellants with the aid of torch light which presupposes that, the light if any, was not sufficient to aid the proper identification of the appellants in a group of thirty

(30) people. To support this proposition, he cited to us the case of **MOHAMED MUSERO VS. REPUBLIC** TLR [1993] 290.

Secondly, Mr. Mkumbe argued that though PW1 and PW2 who are husband and wife were all at the scene of crime, however, each had own account as to who was identified at the scene of crime. While PW1testified to have seen the 2nd appellant with the pestle, PW2 contradicted that account having testified to have seen Mashaka Chipungu as the one who led the group which struck the deceased. According to Mr. Mkumbe such contradictory account suggests that the appellants were not identified.

As for the 2nd appellant who was on the fateful day at his farm in Sazafosi, his account was confirmed by PW6 who arrested him at that village. As such, it was wrong for the trial judge to shift burden to the 2nd appellant having required him to bring evidence to prove the *alibi*. Furthermore, Mr. Mkumbe faulted PW5's account on voice identification of the 2nd appellant arguing the same impracticable considering the commotion of a group of thirty (30) people who were shouting. Finally, Mr. Mkumbe urged the Court to allow the appeal instead of making an order of retrial.

On the other hand, the learned State Attorney supported the appeal only on the account of the procedural irregularities and conceded that the trial was vitiated. To back up the proposition, he cited to us the cases of **JOSEPHAT MUMBI WITHERA VS REPUBLIC**, Criminal Appeal No. 72 "B" of 2016 and **AJILI AJILI VS REPUBLIC**, Criminal Appeal No. 316 of 2015 (both unreported).

As to the way forward, the learned State Attorney initially preferred for an order of retrial. However, on reflection, he conceded on account of the discrepant prosecution evidence not sufficing to conclude if the appellants were properly identified at the scene of crime. He availed this on account of the contradictory testimonies of PW1 and PW2 who despite being at the scene of crime, each had own account as to who struck the deceased. Therefore, the learned State Attorney conceded that in the circumstances, the defence of *alibi* raised by the 2nd appellant is consistent with the questionable and doubtful identification of the 2nd appellant.

After a careful consideration of the grounds of complaint, the record before us and submission of the learned counsel for the parties, the issue for determination is the propriety or otherwise of the trial and whether on record there is evidence to hold on the prosecution case.

We agree with the learned counsel for the parties that, the trial judge did allow the assessors to cross-examine the assessors, did not direct them on the vital point of law on the defence of alibi and did influence the assessors with his own opinion.

We have observed that, the assessors cross-examined witnesses for both the prosecution and the defence which was followed by the re-examination of the respective counsel to some of the witnesses. The irregularity starts at page 5 whereby, after PW1 was cross-examined by the learned counsel for the defence, she was cross-examined by the two assessors which was followed by re-examination by the prosecution. As for PW2, the cross examination by three assessors appears at page 7. PW4 was also cross-examined by the three assessors at page 11 which was followed by re-examination by the prosecuting state attorney. PW5 was cross examined by one assessor at page 13. PW6 was cross-examined by three assessors from page 16 to 17 followed by re-examination by the prosecution. The trend of the said irregularity also appears in the defence witnesses whereby the 1st appellant was also cross-examined by assessors whereas the 2nd appellant at page 22 was cross-examined by an assessor which was

followed by re-examination by the learned counsel for the defence at page 23.

In terms of sections 146 – 147 of the Evidence Act, the examination and cross examination of witnesses is the exclusive domain of the parties and not the assessors. Since in terms of section 155 of the Evidence Act the aim of cross-examination is basically to contradict, weaken or cast doubt upon the accuracy of the evidence given by the witness during examination in chief, the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial in terms of section 177 because by the nature of their function; assessors in a criminal trial are not there to contradict. See - **KULWA MAKOMELO AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 15 of 2014 and **MAPUJI MTOGWASHINGE V REPUBLIC,** Criminal Appeal No. 162 of 2015 (both Unreported).

We have also gathered that, the substance of the cross-examination by PW2, PW4 and PW6 questions were not aimed at seeking clarification but testing the veracity of the account of the witnesses as reflected by the following examples:

At page 7 of this record PW'2 answers to the cross-examination were as follows:

> *"When they finished beating the deceased, they broke tube lights but I recognised Mashaka. While the deceased was shouting at the shop, I was cooking my husband brought the deceased inside but the crowd also come (sic) inside by force."*

As for PW4's response to the cross-examination by the assessors, at page 11 of this record the following is evident:

> *"I found a group of people at the scene. I recognised some of them. I didn't ask the source of chaos".*

PW6's part of his reply to the cross-examination was:

> *"I saw solar power at Patrick house, which helped him to identify the accused."*

In this regard, having cross-examined the witnesses, the assessors played the role of adverse party as it targeted to contradict the account of those witnesses which was irregular because that is not their duty. The assessors' duty is to aid the trial judge in accordance with section 265 the CPA and to do so they may put their questions to the witness for clarification

as provided for under section 177 of the Evidence Act. See - **ABDALLA BAZAMIYE & ANOTHER VS REPUBLIC** [1990] TLR 42.

As earlier stated, after the assessors had cross-examined, the Prosecutor made a re-examination which was quite irregular because the defence could not have an opportunity of making any further replies which raises a crucial point as to what stage in the trial can assessors ask questions. This was addressed by the Court in the case of **MATHAYO MWALIMU AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 147 of 2008 (unreported) the Court where it said:

> *"... we think that this depends on the trial judge. In our considered respectful opinion, however, we think that assessors can safely ask questions after re-examination of witnesses."*

As to who should guide the assessors in asking questions which seek clarifications, in **REPUBLIC VS CROSPERY NTAGALINDA @ KORO**, Criminal Appeal No. 73 of 2014 (unreported) the Court said:

> *"... the presiding Judge should warily guide the assessors' questions and see to it that they are within the permissible mandate. As is clearly fortified by section 177 of the Evidence Act, the assessors*

function is to put questions to a witness is to be effected through or by leave of the court."

In view of the settled position of the law, it is thus clear that, section 265 of the CPA which requires trials before the High Court to be conducted with the aid of assessors does not envisage the assessors usurping the role of the parties in either, examination, cross-examination or re-examination of the witnesses.

In the matter under scrutiny, by cross-examining the witnesses, the assessors crossed boundaries and acted beyond the intendment of the legislature as they identified themselves with interests of the adverse party which is tantamount to demonstration of bias which is a breach of one of the rules of natural justice.

The learned counsel for the parties faulted the trial judge to have influenced the assessors at the summing up. In the course of summing up, a trial judge should as far as possible desist from disclosing his views or making remarks or comments which might influence the assessors in one way or another in making up their minds about the issues being left with them for consideration. See - **ALLY JUMA MAWEPA VS REPUBLIC**, [1993] TLR

231, where the Court emphasized that, the assessors should be made to give their opinions independently, based on their own perception and understanding of the case after the summing up; the Judge makes his views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case.

In the matter under scrutiny, we have noted that, in the course of summing up, at page 2 of the record, the trial judge addressed the assessors as follows:

> *"In my summing up, I will only dwell in few areas. As you may recall from the evidence, the deceased was hit on his head with a pounding object or pestle (mtwangio/ mchi) and sharp object (panga) by the accused persons. The deceased died after internal bleeding."*

Moreover at page 4 of the summing up notes, in addressing the assessors on the evidence of the Doctor (PW3) who prepared and tendered the Postmortem Examination Report (Exhibit P2) the trial judge made following remarks:

> *"PW3 read the contents and informed the it shows that court that it shows : Marehemu alipigwa na kitu*

kisicho na ncha kali kama mchi au mtwangio (pounding object/ or pestle) au Rungu (club) kichwani na kuvimba huku damu nyingi ikitoka ndani kwa ndani. He further told the court that the deceased was also hit with a sharp object like a panga. There was internal bleeding and the deceased was not found with any stolen item."

The remarks are neither in the oral account of PW3 nor in the Postmortem examination report where the Doctor who examined the deceased documented what he observed as reflected from 77 to 78 of the record as follows:

"SUMMARY OF THE REPORT:

Head injury due to trauma of the skull & two cut wounds at the parietal bone also huge haematoma at the occipital region. Two cut was bleeding. External Appearances: Swollen head & 2 cut wound of the skull & haematoma of the head."

In our considered view, we think these directions and misdirections clearly expressed the judge's own findings of fact on the evidence which were aimed at influencing the assessors to agree with him and had nothing to do with wanting to get their opinion. It was thus with respect, wrong for

the judge to have made his impressions known to the assessors. (See **LUSABANYA SIYANTENI VS REPUBLIC** [1980) TLR]). We therefore agree with the learned counsel that, the trial judge misdirected and influenced the assessors with his own views during the summing up.

Furthermore, the trial judge in his summing up to the assessors did not direct the assessors on vital points of law on the defence of *alibi*. As such, the assessors were not properly guided to aid the trial court as per dictates of section 265 of the CPA and as such, it cannot be safely vouched that, they were properly informed to make rational opinion as to the guilt or otherwise of the 2nd appellant. We are thus satisfied that, the trial was vitiated.

As to the way forward, ordinarily, the pointed out shortfalls would have been remedied in a retrial. However, both counsel submitted against that course on account of the discrepant prosecution evidence. They both faulted the propriety of the identification of the appellants at the scene of crime. At this juncture, it is crucial to revisit the evidence of the identifying witnesses.

While PW2 claimed to have identified Mashaka Chipungu at the scene of crime, PW1, PW4 and PW5 claimed to have identified the appellants and some other persons. As it will be recalled, the fateful incident which caused

the death of the deceased occurred at night after she was pursued and hit by the group of about thirty people. We recall that each witness had own account on the light which aided him/her to identify who was at the scene of crime. It is thus crucial to revisit the evidence in respect of light alleged to have aided the identifying witnesses as follows:

At page 4 of the record, PW1 initially stated: *"I have solar power with bulbs.* Later he stated: *"It was night but there was enough solar light and I also had torch."* Whereas PW2 who was at the scene of crime with PW1 her husband recalled that: *"I saw Mashaka through light."* However, she fell short of mentioning if there was solar light and if PW1 used the torch. As for PW5 who claimed to have gone to the scene to assist PW1 in rescuing the deceased, initially he did not mention about existence of any light at the scene of crime and claimed to have identified the 2nd appellant and others by their voices. However, in reply to the question by the trial court he stated: *"Patrick has bulbs like those in Mwanjelwa Primary Court."* Patrick is PW1. However, PW5 never told the trial court that the lights were on.

The Court has always reiterated that caution should be exercised before relying solely on the identification evidence. It is not enough merely to look at factors favouring accurate identification. In **CHOKERA MWITA VS.**

REPUBLIC, Criminal Appeal No. 17 of 2010 (unreported) the Court was confronted with a similar issue; the Court held:

> *"In so far as the lantern lamp is concerned, neither PW1 nor PW3 spoke of the intensity of its light, thus leaving unattended the issue of* ***likelihood of mistaken identity****."*

[Emphasis supplied]

The Court further held:

> *"In short, the law on visual identification is well settled. Before relying on it the Court should not act on such evidence* ***unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight..."***

[Emphasis supplied]

See also **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250.

Moreover, in **ISSA S/O MGARA @ SHUKA VS REPUBLIC**, Criminal Appeal No. 37 of 2005 (unreported), the Court said that it is not sufficient for the witnesses to make bare assertions that "there was light". The Court held:

"It is our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated."

This requirement was underscored by the Court in **SAID CHALLY SCANIA VS REPUBLIC,** Criminal Appeal No. 69 of 2005 and **KURUBONE BAGIRIGWA AND THREE OTHERS VS REPUBLIC,** Criminal Appeal No. 132 of 2015(both unreported).

In the present matter, whereas the intensity of the solar light was not stated by the identifying witnesses, the alleged use of torches as correctly submitted by the learned counsel presupposes that there was no light at the scene of crime which aided the proper identification of the appellants so as to rule out the possibility of mistaken identity.

The other aspect on which the evidence of the identifying witnesses was attacked is the reliability of the identification of the appellants in a crowd. In **DIRECTOR OF PUBLIC PROSECUTIONS v NYANGETA SOMBA AND TWELVE OTHERS** [1993] TLR 69 (CA), the DPP appealed to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Musoma acquitting thirteen persons who were charged with murder. The learned trial judge's basis for acquittal was insufficiency of evidence of identification of the deceased's assailants from a huge crowd characterized by commotion of the moment and a charged atmosphere. Having considered the reliability of the identification of the accused in such circumstances, the Court held that:

> *"Given the huge crowd, the commotion of the moment and the charged atmosphere, reliability of the identity evidence of the three witnesses was doubtful."*

In **MEREJI LOGORI VS REPUBLIC**, Criminal Appeal No. 272 of 2011 (unreported) the Court had to determine the reliability of evidence of identification of the appellant in a robbery committed in a busy street. The Court held:

"Possibility that someone else other than the appellant was responsible for the offence that took place in a busy street cannot be ruled out. Such doubt should operate in favour of the appellant."

In the case at hand, it is not in dispute that the deceased was attacked at night by the crowd of about thirty (30). Moreover, all the prosecution witnesses recalled that there was commotion, people were shouting and stones were hurled which was acknowledged by PW5 who recalled to have been hit by stones and forced to retreat when he attempted to assist PW1 to rescue the deceased. Therefore, in our considered view, in the crowd of 30 people or more, the commotion of the moment and the charged atmosphere, reliability of the identity evidence of the PW1, PW4 and PW5 was highly questionable and doubtful. Also, PW5's account that he identified the appellants by voice is highly suspect on two fronts: **One,** considering the commotion whereby the shouting of those in the crowd it was not practicable to single out the voice of the appellants. **Two,** since PW5 claimed to have retreated to his home after being hit with stones, when he attempted to rescue the deceased, his evidence on voice identification of the appellants taints the credibility of his evidence.

Furthermore, the contradictory account of PW1 and PW2 who were together at the scene of crime leaves a lot to be desired because as correctly pointed out by the learned counsel for the appellants, each had own account as to those present at the scene of crime. While PW1 claimed to have seen the appellants as he knew them before as they were neighbours, PW2 recounted to have only seen Mashaka Chipungu who is not among the appellants. We have also observed that, the defence of *alibi* put forth the 2nd appellant that he was at Sazafosi as correctly argued by the appellant's counsel is cemented by the evidence of PW6 the investigator who arrested the 2nd appellant at that village which cast a cloud of heavy doubt on the prosecution case about the presence of the 2nd appellant at the scene of crime. As such, the prosecution evidence on his identification did not eliminate all the possibilities of mistaken identification. With respect, had the trial judge properly evaluated the entire evidence and resolved the said contradictions he would have not convicted the appellants.

In view of what we have endeavored to demonstrate, all the above infirmities go to show that the evidence against the appellants is so discrepant, and so it would not be in the interests of justice to order a retrial. We fortified in that account because, a retrial will not be ordered for the

purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. A retrial should be made where interests of justice so require. (See **FATEHALI MANJI VS. THE REPUBLIC (1966) EA, 341**).

All said and done, we allow the appeal and order the immediate release of the appellants unless if they are held for another lawful cause.

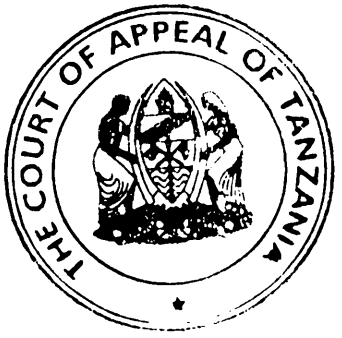
DATED at **MBEYA** this 26th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and the appellants in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL