IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A And KEREFU, J.A.)

CRIMINAL APPEAL NO. 37 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT
VERSUS

ASHAMU MAULID HASSANI ..... 1ST RESPONDENT
MUSSA ABADALLA MTILANJE ..... 2ND RESPONDENT
HAMIS YUSUPH MUHIDIN@ CHONGO ..... 3RD RESPONDENT

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

(Dyansobera, J.)

dated the 12th December, 2018
in
Criminal Sessions No. 42 of 2016

JUDGMENT OF THE COURT

16th & 23rd November, 2020.

MUGASHA, J.A.:

The respondents were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE: 2002. It was alleged by the prosecution that on 25th May, 2015 at Majengo Village, Mtwara Rural District within Mtwara, the respondents did murder one Alex s/o Elias Dismas Aputu, the deceased. They did not plead guilty. Subsequently, in order to prove its case, the prosecution lined up three prosecution witnesses and tendered two documentary exhibits namely: the Report on

Post Mortem Examination (Exhibit P1) and the sketch map of the scene of crime (Exhibit P2).

It was the prosecution account that, in the evening of 25/5/2016 around 19.30 hours, Elias Dismas Aputu (PW1) and his wife Martina Thomas Namkwando (PW3) happened to be at their residence together with their children. While there, they heard many people shouting and uttering threatening words. This prompted PW2 to take their four children and run away in a hideout in the forest. PW3 as well, fled with two other youngsters. Then, PW2 left behind the four children under the baobab tree, and opted to retreat to his home to see what had befallen it. From a distance of about 52 metres he saw his house, kitchen and poultry shed on fire. From where he stood, he recalled to have been aided by bright moon light and fire from the burning homestead and saw at the scene of crime the respondents among others. Then, PW2 notified the police and returned to the bush. At around 2.00 am he met his wife who told him that the deceased was taken by the respondents to the burning homestead. According to the record, neither PW2 nor PW3 saw the appellants setting their homestead ablaze or the deceased being thrown in the burning fire because as they were both informed by some other people that the deceased was burnt to death. However, none of those who

relayed the information was paraded as prosecution witnesses. Ultimately, Dr. Hamis Bakari Msangawenga (PW1) accompanied by the police officer who was not among the prosecution witnesses and PW2 went to the scene of crime where they were received by the village chairman and found the deceased severely burnt. According to PW2, owing to the bad state of the body of the deceased, the doctor advised a hastened burial. During cross-examination, PW3 disclosed that, the homestead in which the deceased was burnt was a subject of a criminal case whereby the appellants faced a charge of arson among others but were subsequently acquitted. In this particular case we shall only be referring to the charge of arson.

In their defence, the appellants denied the assertions by the prosecution. Apart from contesting the death of the deceased, they all told the trial court that, before the District Court of Mtwara in criminal case No. 135 of 2016 they were charged but acquitted of the among others, the offence of arson accused to have set ablaze PW2's homestead in which the deceased in the present case was alleged to have been found dead. To support the averments, they tendered in the evidence the respective judgment of the trial court which was admitted as Exhibit D1. This was not objected to by the prosecution who also did not appeal against that decision. Moreover, the 1st respondent told the trial court that despite

being related to PW2, he was unaware of the death of Alex because he was not informed about it let alone the burial of the deceased. Another witness who testified for the defence was Daniel Michael Mtumbati (DW4), a chairman of Majengo village. According to him, upon being informed that the house of PW2 was broken into and set ablaze, visited the scene of crime and found that no house was burnt and no person had died because of being burnt in the respective house. However, to his surprise, on 27/5/2015 the doctor was brought at the scene and stated that a body of a dead child was found in the burnt house. During cross-examination, DW4 maintained that the fact that the house was not burnt was witnessed by several police officers including Essau and Sanga.

After a full trial, the judge summed up the case to the assessors who returned a unanimous verdict of guilt. However, the learned trial Judge acquitted the respondents on the ground that they were not positively identified at the scene of crime and that the alleged death of Alex was not substantiated in the wake of the strong respondents' account on non-existent of the house burnt and any occurrence of death.

Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. Two grounds were raised in the Memorandum of appeal as follows:

1. The High Court Judge erred grossly both in law and fact by holding that the evidence of visual identification by PW2 and PW3 was not sufficient.
2. The High Court Judge erred grossly both in law and fact by holding that there was no sufficient evidence that PW2's house was burnt and the deceased Alex Dismas Aputu was burnt and is dead.

To prosecute the appeal, the appellant had the services of Mr. Paul Kimweri, learned Senior State Attorney whereas the respondents had the services of Mr. Stephen Lekey, learned counsel.

In addressing the first ground of complaint, Mr. Kimweri faulted the trial court in having concluded that the respondents were not positively identified at the scene of crime. On this, he argued that although the evidence of PW2 is silent on the duration he observed the respondents from a distance of 52 metres and managed to identify them because they were not strangers to him and besides, PW2 and PW3 mentioned the assailants by their names. When probed by the Court if the prosecution account on identification of the respondents was watertight, apart from

conceding that not all the identification criteria were met, he maintained that the respondents were positively identified at the scene of crime by PW2 and PW3.

In relation to the second ground, Mr. Kimweri submitted that, the death of the deceased in a burnt house was ably substantiated by the evidence of the Doctor PW1 who went at the scene and found the deceased completely burnt. When asked by the Court as to why the police who had accompanied PW1 who went to the scene of crime not paraded as a witness or in that case, any other police investigator, Mr. Kimweri was of the view that, the account given by PW1 and PW2 sufficed to prove the occurrence of death of Alex which was caused by the fire in the ravaged house. Moreover, we were also curious to know as to what made the prosecution to commence against the respondents a charge of arson instead of murder. On this, apart from Mr. Kimweri submitting the same to be irregular he maintained that, the strong prosecution account from PW1 and PW2 did prove that Alex was burnt to death and that the respondents had a hand on it. He thus urged the Court to allow the appeal, quash the decision of the trial court and proceed to convict the appellants with the charge of murder and sentence them accordingly.

On the other hand, on behalf of the respondents, Mr. Lekey strongly resisted the appeal. He submitted that the appellants were not properly identified at the scene of crime. On this he argued that, neither were the respondents described nor the intensity of the light at the scene of crime stated by the identifying witnesses namely, PW2 and PW3. He as well challenged the credibility of their evidence (PW2 and PW3) because in having fled in the wake of a terrifying incident it is improbable that they could retreat to the scene of crime merely to identify the culprits. He thus urged the Court to disregard such evidence in the light of what was decided by this Court in the case of **YOHANA KULWA @ MWIGULU AND OTHERS VS REPUBLIC**, Criminal Appeal No. 192 of 2015 and 397 of 2016 (unreported).

In response to the second ground of appeal, Mr. Lekey submitted that since the respondents were tried and acquitted of arson by the District Court on account of lack of proof that PW1's house was burnt, the prosecution was estopped from filing the information of murder against the respondents which was alleged to have occurred in the same house which was proved not to have been burnt in the initial charge of arson. To support the propositions, he cited to us the case of **ISSA ATHUMANI TOJO VS REPUBLIC** [2003] T.L.R 199. He added that, the prosecution miserably

failed to prove beyond reasonable doubt that Alex was dead and that he met his death in PW2's homestead which was burnt in the wake of strong defence account that neither was the house burnt nor was the said Alex killed in the alleged incident. Regarding the autopsy report, Mr. Lekey urged us to expunge it because following its admission, it was not read out to the respondents. He challenged the reliability of the doctor's account who apart from stating that the body of Alex was completely burnt to the 4th degree he claimed to have managed to have seen his private parts and established that he was male. Finally, Mr. Lekey urged the Court to dismiss the appeal and sustain the verdict of the High Court.

After a careful consideration of the submission of counsel from either side and the record before us, the issue for consideration is whether the charge of murder was proved against the respondents to the hilt. Before that, we have to determine if the autopsy report was properly admitted in the evidence to warrant its reliance to convict the respondents. Parties locked horns on the propriety or otherwise of the autopsy report whereas the respondents' counsel urged the Court to expunge it from the record on account of the pointed out infraction.

It is glaring at page 25 of the record of appeal that the autopsy report was admitted without any objection from the respondents.

However, it was subsequently not read out to the respondents. We agree with Mr. Lekey's proposition and expunge the autopsy report because it is settled law that, failure to read documentary exhibits after admission in evidence is irregular as it denies an accused person the opportunity of knowing and understanding its contents. See – **NKOLOZI SAWA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 574 of 2016, **MARK KASIMIRI VS REPUBLIC,** Criminal Appeal No. 30 of 2017, **MBAGA JULIUS VS REPUBLIC,** Criminal Appeal No. 131 of 2015 and **JUMANNE MOHAMED AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 534 of 2015 (all unreported). However, without prejudice, the occurrence of death of Alex is in the oral account of PW2 the father of the deceased and that of the Doctor (PW1).

Pertaining to the first ground of appeal, parties marshalled arguments for and against the identification of the respondents at the scene of crime. The Court has always reiterated that caution should be exercised before relying solely on the identification evidence. In the case of **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250 the Court laid down certain factors to be taken into account by a court in order to satisfy itself on whether such evidence is water-tight. They include the time the witness had the accused under observation; the distance at which he observed him; the conditions

in which such observation occurred; if it was day or night time; whether there was good or poor lighting at the scene; and whether the witness knew or had seen the accused before or not. This was followed in the case of **CHOKERA MWITA VS. REPUBLIC**, Criminal Appeal No. 17 of 2010 (unreported) whereby confronted with a similar issue; the Court 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]

Moreover, in **ISSA S/O MGARA @ SHUKA VS REPUBLIC**, Criminal Appeal No. 37 of 2005 (unreported), the Court among other things, said that it is not sufficient for witnesses to make bare assertions that "there was light". Thus the Court among other things, emphasized the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated by the identifying witness. 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).

What we said in the case of **ISSA S/O MGARA** (supra) is quite relevant in the present matter. We are fortified in that account because although PW2 and PW3 testified to have been aided by the burning fire and moon light, none of them gave sufficient details on the intensity of the moon light or the size of the area illuminated by the fire of the burning homestead considering that PW2 was about 52 metres away from the scene of crime and it was night time in the dark. Moreover, in the wake of terrifying situation as acknowledged by PW3 which made them flee, it is highly probable that they never retreated at their homestead and that is why they had to be told by other people about what had befallen their child. However, none of those was paraded as prosecution witness. That apart, there was no investigator or a police officer G.4223 Frank who is alleged to have accompanied the doctor at the scene of crime irrespective of being listed as one of the witnesses at the committal stage was not summoned to testify in order to clear the doubts on what actually transpired on the fateful day in relation to the killing incident. To say the least, those were material witnesses and the prosecution was under a

prima facie duty to call them as they were able to testify on material facts relating to the fateful incident. Since nothing was said if those witnesses were not within reach, the Court is entitled to draw an inference adverse to the prosecution. In a nutshell, the circumstances were not conducive for the positive identification of the respondents. See – **AZIZ ABDALLA VS REPUBLIC** [1991] T.L.R 71

The other disturbing feature in the present case is the reliability of the identification of the appellants in a crowd and this is in the evidence of PW2 and PW3. 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."*

Similarly, 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 disputed that PW2 and PW3 were attacked at night by many people. They both recalled to have seen their house set ablaze when retreating from the forest in the dark. In our considered view, in the group of many people and the charged atmosphere, reliability of the identity evidence of the PW2 and PW3 was highly questionable and doubtful and in addition taints the credibility of their evidence. Therefore, the prosecution evidence on the identification of the respondents did not eliminate all the possibilities of mistaken identification. With respect to the learned Senior State Attorney, we do not have any cogent reason to fault the verdict of the trial court and find the first ground not merited and it is hereby dismissed.

In the second ground of complaint, the DPP is faulting the trial court in concluding that PW2's homestead in which Alex allegedly died was not burnt. While Mr. Kimweri argued that the proof of the house being set ablaze was proved by the prosecution, Mr. Lekey challenged the same arguing that in view of the evidence paraded by the defence the assertions by the prosecution were not established to the hilt and the circumstances surrounding the death of Alex s/o Elias Dismas Aputu, remain questionable. What really taxed our mind is the contested death of Alex alleged to have occurred at the homestead of PW2. We must say that this case was not properly investigated which made the prosecution to have an uphill task to prosecute it. We say so because notwithstanding that the matter was reported to the police, none of the police officers was paraded as a witness. On the other hand, the evidence of the village chairman that there was no death and no house was set ablaze was remained uncontested by the prosecution who had an opportunity to challenge it during cross- examination which was not the case. The respondents' case was cemented by their acquittal on the offence of arson on 1/11/2016 in the initial criminal case before the subordinate court. Apparently, the prosecution did not prefer an appeal against the acquittal of the respondents and opted on 7/12/2016 to commence information of murder

against the respondents. Thus, if Alex died, those who know the circumstances surrounding his demise are the police and it is very probable that if he is indeed dead, he met his death elsewhere and not in the homestead of PW2. In a nutshell, the prosecution did not prove the charge against the respondents to the hilt and the second ground of appeal is hereby dismissed as well.

We agree with the learned counsel for the respondents that, following the acquittal of the respondents for the offence of arson among others, the appellant was estopped from filing the subsequent charge of murder against the respondents. We are fortified in that account in view of what we said in the case of **ISSA ATHUMANI TOJO VS REPUBLIC** (supra) which was cited to us by the respondents' counsel, having held:

> *"Where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of the accused,* ***such finding would constitute an estoppel against the prosecution, and thus evidence disturb that finding of fact when the accused is tried subsequently, even for a different offence, will not be received."***
>
> [Emphasis supplied].

In the present case, given that the respondents were initially charged and acquitted by subordinate court for the offence of arson which in the present case is claimed to have caused death, the prosecution was estopped from filing the information of murder against the respondents.

All said and done, having re-evaluated the entire evidence on record and subjecting it to scrutiny, we do not find any cogent reasons to disturb the findings of the trial High Court. We thus, dismiss the appeal in entirety.

DATED at **MTWARA** this 20th day of November, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of November, 2020 in the presence of Mr. Gideon Magesa, State Attorney for the Appellant and Mr. Stephen Lekey, Counsel for the Respondents, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL