IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL No. 432 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

1. MOHAMMED SAID
2. ISACK CLAVERY @ ISACK } ..... RESPONDENTS

[Appeal from the Judgment of the High Court of Tanzania, at Bukoba]

(Mallaba, J.)

dated the 30th day of October 2018
in
Criminal Sessions Case No. 35 of 2015

JUDGMENT OF THE COURT

7th & 18th December, 2020

MWANDAMBO, J.A.:

Mohammed Said and Isack Clavery @ Isack, the first and second respondents herein were tried before the High Court sitting at Bukoba on the information of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2002]. They were alleged to have caused the unlawful death of Edward s/o Angelo on 7th May, 2013 at a place called Rutemi, Kimwani in Muleba District, Kagera Region.

It was common ground that the deceased died an unnatural death at the first respondent's house as a result of internal bleeding according to a post-mortem report (exhibit P2) tendered in evidence by G 792 DC Isack (PW3). After the trial involving four witnesses for the prosecution, the High Court (Mallaba, J) found the evidence too wanting to prove the case against the respondents on the standard required in criminal cases. Consequently, it acquitted the respondents. The acquittal aggrieved the Director of Public Prosecutions (the DPP), the appellant, who has preferred the instant appeal predicated on four grounds of appeal.

The arraignment and the trial of the respondents were a result of facts the host of which are not in dispute. On 7th May, 2013 in the evening, Rodrick Edward (PW1) the son of the deceased, was found by a person going by the name of Rashidi stealing maize in a farm of Leonard Nchimani at Galu Hamlet in Rutemi Village. The first respondent was, at the material time, the chairman of the Hamlet. Rashidi raised an alarm which attracted about ten people who took PW1 to the house of the first respondent while beating him.

Upon arrival at his house, the first respondent ordered that PW1's father be brought to account for the theft by his son. Later at 08:00 p.m. a group of people brought the deceased at the first respondent's

house whereat the prosecution alleged that the deceased was beaten by the people present which included Rashidi, the first respondent, 2nd respondent and one Masungu Rugoma (third accused at the trial). At that time, PW1 stood watching his father being beaten at a distance of 5 paces. Subsequently, the first respondent ordered that the deceased and his son be taken to his kitchen house for custody. However, the deceased did not live long beyond 03:00 am on 8th May, 2013. He fell down and died there.

News of the deceased's death reached, amongst others, Tumwesige Lwakayango (PW2) the Village Executive Officer at the time who visited the scene early that morning. Upon enquiry, the first respondent told PW2 that the deceased had met his death following beatings by an angry mob which had punished him for theft. PW2 called the police. In response, PW3 leading the investigation team arrived at the scene later in the day accompanied by Dr. Fidelis Nyanga Mabula (PW4) who examined the deceased's body before it was released for burial.

After the examination, PW4 concluded that the cause of the deceased's death was severe internal bleeding. PW4's had his findings posted in a post mortem report (exhibit P2). With the assistance of the

first respondent, PW3 drew a sketch map of the scene of crime which he tendered in evidence as exhibit P1. Earlier on, PW2 had taken PW1 in his office where he was alleged to have mentioned several people including the first respondent as responsible for beating his father resulting in his death. Subsequently, the respondents and the 3rd accused were arrested in connection with the death and were arraigned in the trial High Court of the information of murder of the deceased to which they pleaded not guilty and hence their trial.

Out of four prosecution witnesses for the prosecution, it is PW1 who testified as an eye witness who was at the scene of crime. PW1 claimed before the High Court that it was the respondents and the 3rd accused who were among the people who participated in torturing his deceased father. It was his evidence that at a distance of 5 paces away assisted by electric lamp from the first respondent's house, he was able to identify the culprits. PW3, who was led the investigation team arrested the people said to have been mentioned to PW2 by PW1 as responsible for beating his father resulting into his death. At the end of it all, it is the respondents and one Masungu Rugoma (3rd accused) who stood trial. However, the case against the 3rd accused abated following his death.

In defence, whilst admitting that the deceased met his death at his homestead, the first respondent maintained that the deceased was a victim of mob justice having been beaten by people punishing the deceased for his son's (PW1's) act of stealing maize. It was the first respondent's case that his role as a Hamlet Chairman was to keep safe custody of the deceased and his son for that fateful night awaiting taking them to the police, the following day. In contrast to PW1, the first respondent denied that his house was electrified. On the contrary, he told the trial High Court that the source of light at his house was a *kibatari*; a wick lamp. His evidence on the source of light was supported by his wife; Apolonia Mohamed (DW2) who also stated in her evidence that she saw the deceased with some injuries suggesting that he had been beaten before he was brought to their house on the material night. For his part, the second respondent raised the defence of *alibi*. He denied having been anywhere near the scene of crime on the material night.

In its judgment, the trial High Court was satisfied that the there was no dispute on the death and cause of the deceased's death. The only dispute was whether it was the respondents who caused the death and if so, whether they did so with malice aforethought. From the

evidence, it was common ground that the case against the respondents rested on the evidence of visual identification through PW1 which could only be acted upon if it met the threshold of its reliability in line with **Waziri Amani v. R** [1980] TLR 250. However, the learned Judge entertained doubt on the reliability of PW1's evidence of visual identification. This is because the incident occurred at night which entailed the prosecution leading cogent evidence on the source of the light and its intensity which enabled PW1 to positively identify the respondents at the scene of crime. This became more so in view of two conflicting versions of evidence by PW1 on the one hand and DW1 and DW2 on the other on the source of light.

In resolving the conflicting evidence on the source of light, the learned trial Judge reasoned that a sketch map could have been helpful in clearing the doubt on the two versions of evidence and since that was not done, it could not have been held that the prosecution had proved its case on the required standard. Under the circumstances, the trial Judge concluded that the conditions for a positive identification set out in **Wazir Amani v. R** (supra) reinforced in **Mathew Stephen @ Laurent v R**, Criminal Appeal No. 16 of 2007 and **Mussa Mbwaga v R**, Criminal Appeal No. 39 of 2013 (booth unreported) were not met.

In the absence of water tight evidence of visual identification, the trial court found the case against the respondents not proved beyond reasonable doubt. It acquitted them. In this appeal, the appellant faults the judgment of the trial court on the following grounds of appeal: -

1. ***THAT**, the trial Court erred in Law and facts by ignoring the evidence of the prosecutions' key witness one **RODRICK EDWARD** (PW1), the evidence of which would have sufficed to have found the accused persons guilty of the offence.*
2. ***THAT**, the trial Court erred in Law and Facts by failure to consider that all factors/ingredients necessary to establish watertight visual identification were dully proved by the Republic.*
3. ***THAT**, the trial Court erred in Law and facts by misdirecting itself when held that to prove visual identification the sketch map must show or indicate the source of light without stating under which law or authority.*
4. ***THAT**, the trial Court erred in Law and facts by relying on the defence evidence leaving out the prosecution evidence and thorough analysis of the prosecutions' evidence.*

In the course of hearing, Mr. Shomari Haruna, learned State Attorney who represented the appellant Republic abandoned ground 4 and consolidated his arguments in the remaining grounds 1 and 2 promising to argue ground 3 separately. However, it became apparent

later that that ground was superfluous because in the course of his submissions, Mr. Haruna conceded that the contents of exhibit P1; a sketch map of the scene of crime tendered by PW3 were not read thereby offending the rule laid down in **Robinson Mwanjisi & Others v. R** [2003] T.L.R. 218. It became inescapable to expunge that exhibit from the record. In consequence, the appellant's criticism against the learned trial Judge in relation to exh. P1 became superfluous and indeed, Mr. Haruna was man enough to desist from pursuing that ground any more. That means that the determination of this appeal turns on ground 1 and 2 dedicated to the evidence of visual identification.

Essentially, the substance of the submissions by the learned State Attorney on ground 1 and 2 was that the trial High Court strayed into an error in holding as it did that the evidence of visual identification was too weak to find the respondents guilty of the offence they stood charged with. On the contrary, the learned State Attorney argued, PW1 who was present at the scene of crime and saw his father being beaten by the respondents adduced sufficient evidence which should have been acted upon to found conviction. Whilst conceding that the incident occurred during night hours amidst many people at the scene of crime,

Mr. Haruna argued that PW1 was able to single out the respondents as the persons who participated in causing the unlawful death of his father through electricity which illuminated sufficient light that enabled him to positively identify them.

In elaboration, Mr. Haruna argued that PW1 named the suspects at the earliest to PW2 which gave credence to his evidence of identification consistent with the Court's previous decisions notably; **Wangiti Marwa Mwita and Others v. R.** [2002] T.L.R 39. The learned State Attorney sought refuge from our decision in **Mussa Mbwaga v. R, Criminal** Appeal No. 39 of 2013 (unreported) reinforcing the factors for a positive visual identification discussed in **Waziri Amani v. R** (supra) that is; explanation on the source and its intensity of that light, the proximity between the culprit and the witness and the time he spent on the encounter. However, Mr. Haruna was at pains with regard to the specific people mentioned by PW1 to PW2. Yet, he invited the Court to hold that PW1 was a credible witness whose evidence should have been believed by the trial court in the absence of anything to the contrary on the authority of **Goodluck Kyando v. R** [2006] T. L. R. 363.

Ms. Theresia Bujiku learned advocate representing the respondents began her submissions in reply with the general principle, that is to say; it is the duty of the prosecution to prove its case beyond reasonable doubt. Supporting the trial Court's reasoning, the learned advocate contended that the evidence of visual identification was too weak to support the case against the respondents. The learned advocate pointed out several doubts in the prosecution's evidence particularly that of PW1 which she argued that it lacked credibility particularly the people he mentioned to PW2 at the earliest as responsible for beating the deceased.

That aside, the fact that PW1 did not single out who, amongst many people attacked his father at the scene of crime coupled with his own evidence that the deceased was brought there while being beaten and swollen created doubt on his evidence which could not have been acted as rightly held by the trial Court. On those submissions, Ms. Bujiku prayed for the dismissal of the appeal for lacking in merit.

In his rejoinder, Mr. Haruna conceded that the deceased was taken to the first respondent's house whilst being beaten by a group of people. Nonetheless, the learned State Attorney contended that those who were responsible were mentioned by PW1 to PW2. He sought to

"Furthermore, the identifying witness or witnesses must clearly state in their evidence conditions favouring a correct identification or recognition. Courts should always refrain from acting on bare and unsubstantiated assertions of witnesses. See, for example, ***Raymond Francis v. R*** *[1991] TLR 100,* ***Issa Mgara v. R****, Criminal Appeal No. 37 of 2005 and* ***Mustapha Kusa and Beatus Shirima@ Mangi v.R.*** *Criminal Appeal No. 51 of 2010 (both unreported)." [at page 7].*

The tests for a reliable evidence of visual identification have been revisited and refined by the Court in a number of cases including; Mussa **Mbwaga v. R** (supra) cited by both Counsel. Our decision in **Omari Iddi Mbezi & 3 Others v .R**; Criminal Appeal No. 227 of 2009 (unreported) made an explicit summary of the tests that is to say; the witness must make full disclosure of the source of light and its intensity, explanation of the proximity to the culprit and the witness and the time he spent on the encounter, description of the culprits in terms of body build, complexion ,size, attire.

Additionally, the witness must mention any peculiar features to the next person that person comes across which should be repeated at his first report to the police on the crime who, would in turn testify to that

effect to lend credence to such witness's evidence of identification of the suspect at an identification parade and during the trial to test the witness's memory (at pp 7 and 8). Apparently there is no quarrel on the application of any of the tests. The point of disagreement lies in whether those tests were met in the trial resulting into the instant appeal. As of necessity we shall be required to face this obvious question; was the evidence of visual identification through PW1 watertight as contended by Mr. Haruna?

To start with, there is hardly any dispute with regard to the distance at which PW1 stood in relation to the place where his deceased father was being beaten. PW1 was not controverted that he stood 5 paces away. There is equally no dispute as to the time spent by PW1 under observation. However, there is a serious dispute in relation to the source of light and its intensity. Mr. Haruna would have us believe PW1's story that he managed to identify the appellants through electricity light from the appellant's house mainly because there was no cross- examination on this. However, his burden lies in the fact that PW1's evidence was just one of the versions on the same issue. It is common ground that the first respondent had a different version

supported by his wife; DW2 who stated that the source of light to their house was a small oil lamp.

We heard Mr. Haruna that PW1 was not cross examined on this and so his evidence stood unchallenged. That may be so but it is plain that neither DW1 nor DW2 was cross examined on the source of light. In our view, the old adage; what *is good for the goose is also good for the gander* must apply equally to this. That means, therefore, the first respondent's version on the source of light remained unchallenged as well. Under the circumstances, **Goodluck Kyando v. R** (supra) relied upon by Mr. Haruna to reinforce his argument that PW1 was a credible witness who should have been believed along with other prosecution witnesses cannot apply selectively to prosecution witnesses only. That principle applies to the defence witnesses alike who had a different version on the source of light.

On our own evaluation of the evidence which we are mandated to do as a first appellate court by rule 36(1) of the Court of Appeal Rules, 2009, PW1's evidence cannot be said to be watertight on the source of light. His evidence was not free from being doubtful and therefore reliable as rightly held by the learned trial Judge. As the learned State Attorney would appreciate, it is trite law that where there is any doubt in

the prosecution's case, such doubt must be resolved in favour of the accused. In not so many words, the learned trial Judge rejected PW1's version on the source of light. We are constrained to share the trial court's view and hold that the source of light was a small oil lamp whose intensity could not have enabled PW1 to correctly identify the respondents as the person who beat and tortured his father on the material night amidst many people who gathered at the first respondent's house. But the problem does not end there. By PW1's own evidence in cross examination he said:

> *"When my father was brought, he was being beaten by those who went to pick him when my father was brought, body was swollen, when he came, he just said to me "mimi naenda ubaki unamlinda mdogo wako". Thereafter, he started to be beaten. He dead at around 3:00 am. There were still many people".* [at pp.15 and 16]

The prosecution did not seek to re-examine PW1 and so his answers remain intact. It is pertinent that the deceased had already been beaten and his body swollen when he was brought by people at the first respondent's house, PW1 could not have seen which of those persons beat his father earlier on.

by PW2. Under the circumstances, it is hard to lend credence to PW1's evidence that it is the respondents he mentioned as the ones who beat his father causing his death on the material date

We think the above will be sufficient to dispose of the appeal against the appellant DPP for lack of merit. The appeal is in consequence hereby dismissed.

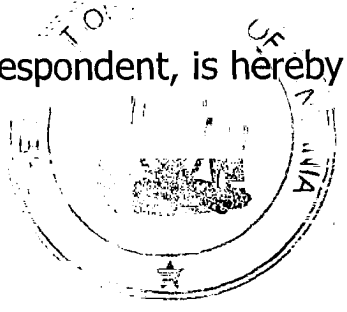
DATED at **BUKOBA** this 18th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This judgment delivered this 18th day of December, 2020 in the presence of Mr. Joseph Mwakasege, the learned State Attorney for the Appellant / Republic and Ms. Theresia Bujiku, the learned counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL