IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

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

CRIMINAL APPEAL NO. 277 OF 2019

1. VICENT CLEMENCE
2. KATO SIMON ..... **...APPELLANTS**

VERSUS

THE REPUBIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Bukoba)
(Mkasimongwa, J.)
dated 12th Day of June, 2019
in
Criminal Session Case No. 13 of 2015

JUDGMENT OF THE COURT

14th & 17th December, 2020

KITUSI, J.A.:

That on 6th December, 2013 at Kabale – Bwera Village in Karagwe District Exavery Edmund met a brutal death, is beyond controversy. There is evidence that he had been suspected of stealing quantities of the illicit liquor commonly known as "gongo", and he paid dearly for it, because as a result he was flogged, tied and hung up on rafters of an abandoned house, where he was left to die.

The appellants were jointly charged under section 196 of the Penal Code allegedly for being the ones who flogged Exavery Edmund to death. Three witnesses testified to have seen and identified the

appellants at the scene of the murder as the ones who inflicted the fatal injuries on the deceased. The appellants denied any involvement in the killing of the deceased and alleged bad blood between them and those who arrested them.

The High Court accepted the version of the prosecution witnesses and rejected that of the appellants. Consequently, it convicted the appellants of the charged offence of murder and sentenced them to death, both of which are the subject of this appeal.

Before us, Mr. Zedy Ally learned advocate who represented the appellants had raised three grounds of appeal but argued only two. He started with the third ground of appeal, which Mr. Emmanuel Bugembe Kahigi, learned State Attorney for the Republic conceded to, that summing up to the assessors was not properly done.

Mr. Ally submitted that the learned trial Judge did not direct the assessors on some vital points which were relied upon in deciding the case. He cited for instance, the fact that the trial court's finding was based on the evidence of visual identification given by Chichi Gosbert (PW2), Pauline Edmund (PW3) and the deceased's wife Evodia Exavery (PW5), but the learned Judge did not direct to the assessors the key aspects in relation to evidence of visual identification. The other point on which the trial judge did not direct the assessors is the alleged

presence of many people at the scene and whether there was common intention amongst them. Neither did the Judge direct the assessors on circumstantial evidence which he mentioned in passing at page 79 of the record of appeal. Citing section 298 (1) of the Criminal Procedure Act [Cap 20 R.E 2002] (The CPA), the learned counsel concluded that its violation vitiated the proceedings.

The learned counsel went on to argue that ordinarily he would have called upon us to nullify the proceedings, quash the judgment and set aside the sentence and also order a retrial, but on the basis of what he was going to argue in the next ground of appeal, an order of retrial will not meet the justice of this case.

Mr. Kahigi, as already shown earlier, conceded to the ground of appeal alleging improper summing up. He also submitted in support that there were no directions on circumstantial evidence, mob justice and common intention.

We think both Mr. Ally and the learned State Attorney have a valid point. At page 109 to 110 of the record of appeal for instance, the learned Judge discussed at length the factors constituting unmistaken visual identification as set out in **Waziri Amani v. Republic** [1980] TLR 250. However, nowhere in the summing up to the assessors was the learned Judge equally elaborate. At page 111 to 112, the learned

Judge discussed the issue of malice afore thought. However, nowhere again did the learned Judge direct the assessors on the key elements to that legal requirement.

It is also true that while introducing to the assessors the concept of circumstantial evidence at page 79-80 of the record, the leaned Judge did not explain to them its breadth. Similarly, in directing the assessors to consider the defence case, the learned Judge did not explain to them that all the accused needs to do in defence is to raise reasonable doubt.

Participation of assessors in trials before the High Court is a statutory requirement under section 265 of the CPA; a provision so familiar that we need not reproduce here. In many instances non-compliance with that section has vitiated proceedings and rendered them a nullity. See for instance cases of **Samitu Haruna @ Magezi v. Republic,** Criminal Appeal No. 429 of 2018; **Hilda Innocent v. Republic,** Criminal Appeal No. 181 of 2017 and **Marius Simwanza and Another v. Republic**, Criminal Appeal No. 389 of 2017 (all unreported).

It is also to be remembered that the role of assessors in those trials is not ceremonial or a mere formality, but an active one. We have had occasions to say so in the cases of **Hilda Innocent v. Republic**

(supra) and **Marius Simwanza v. Republic** (supra). Such active role may not be played by the assessors unless the Judge properly directs their minds to vital points of the case. That was not done in this case, but we shall discuss the consequences later.

We shall, in the meantime, consider Mr. Ally's other ground of appeal which, he promised, would enable us decide whether to order a retrial or not. This ground complains that the charge against the appellants was not proved to the required standard.

To appreciate the arguments involved, we shall tell the relevant part of the story. On 6/7/2013 at around 7.30 p.m, PW2 was at his shop where he sells various items including "gongo". There were five other people including the deceased. The hamlet chairman known as Zakayo arrived there in the company of seven people including the appellants. One Edwin Edmund had lodged a complaint that somebody had stolen "gongo" from him and it was suspected that it was the deceased who had stolen it and sold it to PW2. After some indigenous methods of investigation by the hamlet chairman, that included tasting of samples of the liquor, the deceased was grabbed by the people and taken outside the shop. Peeping from the window, PW2 could see the deceased being tied with ropes then he saw the two appellants drag him towards Kabale area.

What took place at Kabale area is told by PW3 and PW5. PW3 stated that she saw from 7 paces away the deceased being tied and she also saw the first appellant and one Robert Josephat hang him on the ceiling. PW5 testified to have been standing 4 paces away from where she saw Josephat John, Robert Josephat, Fubius Fabian and the second appellant assault the deceased. She further testified to have seen many people who could have been 25 to 30 in number.

The learned counsel had two arrows to his bow in addressing the first ground of appeal. First, he submitted that the evidence of visual identification coming from PW2, PW3 and PW5 was insufficient to ground the convictions. Mr. Ally referred us to the evidence of PW2 at page 42 of the record where the witness stated that he could identify the appellants by watching from the window opening in his business stall.

The learned counsel submitted that the intensity of the light from solar power that assisted PW2's identification was described to be 2 watts. Counsel's submission is that the intensity of that bulb's light would not enable PW2 positively identify people who were outside his business stall.

As regards the evidence of PW3, he testified that he was able to identify the appellants by aid of moonlight and torch light. Mr. Ally

submitted that the fact that a torch was used suggests that the moonlight was insufficient. In addition, he drew our attention to the fact, on page 47 of the record, that the torch was directed on the roof of the house.

Submitting further, the learned counsel referred us to the evidence of PW5 who said she identified the assailants as Josephat John, Robert Josephat, Fubius Fabian and the second appellant. She stated that identification was facilitated by a bright moonlight at the scene of crime. This was the wife of the deceased and she testified that she went to the scene on that night after she heard noise while at her residence, a walk of 8 minutes. At the scene she saw her husband in ropes, hanging down the house rafters. She ran to her in-laws, that is; the deceased's parents, to deliver the bad news to them. Then she and the in-laws went to the scene again. When she could not bear the sight of her husband any longer, she went home and retired to bed.

Mr. Ally submitted that PW5 was inconsistent and her behavior after finding the deceased in that precarious state does not speak well of her reliability. She was inconsistent, he submitted, because first she said she was standing 4 paces away but later she changed to 15 paces away. He submitted further that her behaviour was strange because

she had the nerve to retire to bed leaving her husband's seriously battered body hanging.

The learned counsel concluded this part of the argument by referring us to our decision in **Bubinza Mabula v. Republic,** Criminal Appeal No. 266 of 2016 (unreported) which cited the case of **Waziri Amani v. Republic** (supra). He submitted that PW2, PW3 and PW5 did not satisfy the factors for positive visual identification as stated in those cases.

The other thread of argument by Mr. Ally was that there were fundamental inconsistencies in the evidence of PW3 and PW5. It was submitted that the main inconsistency is that PW3 claims to have seen the first appellant at the scene of crime while PW5 stated that she did not see him.

The learned counsel prayed that since the summing up to the assessors did not comply with the law, we should nullify the proceedings by using our revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 (AJA), quash the judgment and set aside the sentence. He implored us to order the appellants' immediate release from prison instead of ordering a retrial because, as demonstrated by him in his submission, the evidence of visual identification is inadequate and there are material contradictions in the prosecution evidence.

In response to those submissions, Mr. Kahigi submitted that there is enough proof that the appellants were identified at the scene of crime as the perpetrators of the offence. According to the learned State Attorney, PW2 identified the appellants before they reached at the spot where they tied the deceased. Then, PW3 and PW5 identified the appellants as the ones who flogged the deceased at the scene. Explaining the different versions as between PW3 and PW5, Mr. Kahigi submitted that it depends on the angle from where each was viewing. He insisted that the two appellants were both at the scene of crime despite the fact that PW5 saw only the second.

Mr. Kahigi who had conceded that the summing up was improper, prayed that we nullify the proceedings and judgment for that reason, quash the conviction and set aside the sentence. He submitted that there is sufficient evidence against the appellants to justify an order of retrial. He maintained that there are no gaps in the prosecution evidence that will be filled in upon a retrial being ordered.

In addition to their respective submissions, the learned counsel responded to our question whether the trial Judge properly considered the defence case. At the trial, the appellants stated that despite being known around the village, they were arrested more than two years after the alleged murder. They associated their arrest with pre-existing

conflicts between them and those who effected the said arrest. We note with curiosity that the police officers who testified at the trial did not know how the appellants landed in police custody.

The learned trial Judge dismissed this defence because it did not feature in questions the appellants had put to the prosecution witnesses. Secondly and more importantly, the High Court concluded that the second appellant could not be heard alleging bad blood while he was in good relationship with PW5 as they were both members of a group known as "chama cha kuzikana".

Mr. Ally submitted that the delayed arrest, when considered along with the allegations of bad blood introduced doubt in the prosecution case. He submitted that the Judge's conclusion that PW5 was in good terms with the second appellant was a misdirection because that fact relates to the first appellant.

Those are the arguments and material facts for our consideration, and it is our considered view that this case turns on the issues of visual identification, which is a very familiar landscape in our jurisdiction. First of all, we accept the evidence of PW2, PW3 and PW5 that the incident happened at night. We also accept PW5's version as regards the number of people who were at the scene of crime as being about 25-30 people.

Secondly, we shall state the settled law as regards evidence of visual identification. According to the settled position in the case of **Waziri Amani v. Republic** (supra) cited by the counsel for the appellants, evidence of visual identification is of the weakest type because of possibilities of mistake. It is because of those possibilities of mistakes that what the prosecution needs to do is to show by evidence that the conditions in a particular case favoured correct identification. This is what the Court stated in **Raymond Francis v. Republic**, [1994] TLR 100, at page 104. This may be done by establishing the duration during which the witness observed the suspect, the distance, whether it was day or night, the source and intensity of light and familiarity. See the case of **Yohana Kulwa @ Mwigulu and 3 Others v. Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 397 of 2016 (unreported).

Back to our case, we are dealing with evidence of visual identification of culprits among a group of not less than 25 people at night. We agree with the learned counsel for the appellants that there was no sufficient light because moonlight had to be supplemented by torches which, incidentally, were aimed in the direction of the victim hanging on top of the ceiling. We find it hard to agree with the prosecution that the bulb of 2 watts assisted PW2 who was peeping

through the window to identify those who were outside. We find no plausible explanation why the prosecution witnesses' ability to identify those who were at the scene was limited to only two out of those 25 or so people. In **DPP v. Nyangeta Somba and 12 Others**, [1993] TLR 69 we held the evidence of visual identification doubtful because the suspects were picked from a commotion and charged atmosphere in a huge crowd, just like in the instant case.

As for the contradiction between PW3 and PW5 regarding whether or not the first appellant was at the scene, we cannot rely on Mr. Kahigi's submission to resolve that evidential aspect because his is a statement from the bar. It is our conclusion that there is a fundamental contradiction as to whether the first appellant was identified at the scene of crime.

We also wish to consider and resolve the issue whether the trial court properly dealt with the defence, especially that of the second appellant. With respect, the learned trial Judge slipped into an error by rejecting the second appellant's allegation of bad blood citing good relationship with PW5 as the basis. It is actually the first appellant who had stated at page 62 of the record of appeal that he and PW5 were members of a group known as "chama cha kuzikana" and therefore in good terms. Undoubtedly therefore, the trial court did not deal with the

defence case of the second appellant properly because it misapprehended the evidence, and that renders its decision susceptible to being overturned.

In the end we find merit in the second ground of appeal because we are satisfied that the evidence of visual identification was too weak to ground the conviction of the appellants and the contradiction of PW3 and PW5 on a material aspect of the case remained unresolved.

In addition, there is a consensus on the first ground of appeal, that the summing up was not properly done by the trial court. We find merit in this ground of appeal so consequently, we nullify the proceedings, and quash them as well as the conviction and set aside the sentence.

We decline the invitation to order a retrial, lest the prosecution fill in the fundamental gaps we have pointed out in the course of addressing grounds 2 of appeal. Our position is guided by the principle long established in the case of **Fatehali Manji v. Republic,** [1966] E.A 343, followed in many of our decisions, such as in **Matheo Ngua and Another v. DPP**, Criminal Appeal No.452 of 2017 (unreported).

We therefore allow the appeal and order the appellants' immediate release from prison unless they are otherwise held for another lawful cause.

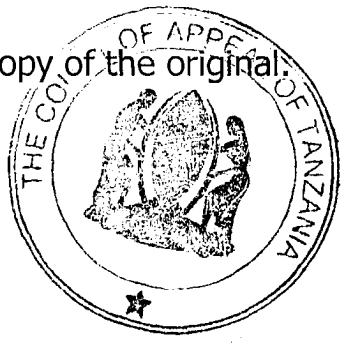
DATED at **BUKOBA** this 17th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 17th day of December, 2020 in the presence of the appellant in person and Mr. Juma Mahona, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL