IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 93 OF 2018

FRANK MAGANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Dar es Salaam)

(Mwandambo, J.)

Dated the 7th day of March, 2018
in
HC. Criminal Sessions Case No. 23 of 2012

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JUDGMENT OF THE COURT

8th February & 13th April, 2021

MKUYE, J.A.:

The appellant, Frank Maganga, was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. He was, thereafter, sentenced to death by hanging. It was alleged that the appellant on 15th September, 2009 at Kidimu Village within Kibaha District in Coast Region, did murder, one, Joyce Jeremia.

The facts leading to this appeal are that: the appellant and deceased had once cohabited and were blessed with one issue, Jacqueline Frank, but had separated. The deceased stayed with her

children among them being Cecilia Biko (PW1) and Jacqueline Frank. PW1 used to share a bedroom with the deceased.

On the material date at night, the appellant allegedly gained ingress into the deceased's house and demanded money from the deceased. In the course of demanding the money, he was insulting and threatening the deceased that he would kill her if his demands were not met. It was the evidence of PW1 that when the deceased said she had none, the appellant unleashed a bush knife from underneath his clothing and proceeded to attack her with it. He inflicted severe cut wounds on her body from which she fell down and succumbed to death.

PW1 testified that she witnessed all what the appellant did by her naked eyes. She said after the death of her mother, the appellant lit a torch and flashed out towards the body of the deceased. Then, he told her (PW1) to show where the money was and if she failed, he could do the same thing he did to her mother. When she told him that she did not know the place where the same was kept, he left while locking the door from outside. PW1 testified further that she then left with her siblings Anna aged 4 years and David aged 9 months and went to Bibi Jane but incidentally she refused to assist them. Then, they went to their aunt

Merina (PW2) who took them to their uncle Mathias Jeremia (PW3) where she narrated the whole story about her mother's death and mentioned the appellant as a person who had killed her.

PW3 reported the matter to the local government chairman who also conveyed a report to the police station. They went to the scene of crime where they saw a pool of blood on the bed in the room and the body of deceased lying on the floor. PW2 also testified that when they went to the scene of crime, she saw Frank Maganga (appellant).

PW6, Ally Abdallah Masamike together with the Acting Officer Commanding Criminal Investigation Department (Ag. OC CID) and Doctor Baruani Sudi Musa (PW7) went to the scene of crime. PW7 conducted a postmortem examination on the deceased's body which revealed that the cause of her death was blood leakage from the body. After getting information from the informer that the suspect was arranging to escape, they (PW6 inclusive) went where he was and arrested him with the assistance of bystanders and took him to the police station.

In defence, the appellant denied involvement in killing the deceased whom he termed as his ex-wife having been blessed with a child, one Jacqueline Frank. Though he admitted visiting her, he denied having

visited her on 15/9/2009 as he was busy at his sand quarry. He testified further to have been called by PW3 on 15/9/2009 at about 10:00 hrs and when he went there, he was informed about the death of the deceased. They went to the scene of crime and upon arrival at the deceased's home they found many people already gathered but he was unable to gain access into the room where the deceased's body was lying. He said, later the policemen arrived and had a discussion with the local government chairman. He was arrested on 17/9/2009 by the policemen who were accompanied by local government chairman at a place he was supervising youths to dig sand for sale and was taken to Tumbi Police Station. He said, he was arraigned before the Court on 18/9/2009 on a charge of murder.

As alluded to earlier on after a full trial, he was convicted on the evidence of the eye witness (PW1) that he was seen at the scene of crime and that it was him who hacked the deceased to death.

Protesting his innocence, the appellant has preferred the appeal to this Court. He initially lodged both substantive and supplementary memoranda of appeal consisting a total of twelve grounds of appeal. Later, on 24th September, 2020, the counsel for the appellant lodged a

substituted memorandum of appeal containing seven grounds; **one,** the trial judge failed to take into consideration the age of PW1; **two**, the appellant was convicted on the basis of untenable and incredible evidence of visual identification of the appellant; **three,** the appellant was wrongly convicted relying on Exh. P3 (Postmortem Examination Report) which was unreliable; **four,** the appellant was wrongly convicted relying on Exh. P1 (bush knife); **five,** the appellant's conviction and sentence were based on defective proceedings; **six,** the appellant was convicted without taking into consideration his testimony in defence given under oath in court; and **seven,** the prosecution failed to prove the charge beyond reasonable doubt.

When the appeal was called on for hearing, the appellant was represented by Ms. Elizabeth John Mlemeta learned counsel; whereas the respondent Republic enjoyed the services of Ms. Cecilia Mkonongo, learned Senior State Attorney assisted by Ms. Salome Assey, learned State Attorney.

Much as counsel from both sides argued at length all the grounds of appeal, we have found it appropriate to deal with the 2nd ground of appeal alone on the visual identification evidence, as we think, it is

capable of disposing of the entire appeal without necessarily discussing the other grounds of appeal. In this regard, our determination will focus on the counsel's submissions on the said ground of appeal.

To build up her case, Ms. Mlemeta submitted that the visual identification evidence by PW1 which was relied upon by the trial court to convict the appellant was not watertight. In elaboration, she contended that though PW1 said there was light of a wick lamp she did not explain its intensity. On top of that, the learned Senior State Attorney challenged PW1's identification evidence for being contradictory. She said, much as at one stage PW1 seemed to suggest that she was able to identify the appellant through the light from wick lamp but at a later stage she said she identified the appellant irrespective of the fact that the light was put off which, according to her, raised doubt if she really identified him. Apart from that, it was Ms. Mlemeta's further submission that PW1 gave two versions on the appellant's attire as at one stage she said that the appellant wore shorts and yet at another stage she said he wore a pair of trousers. Due to these discrepancies she referred us to the case of **Christian Kale and Another v. Republic** [1992] TLR 302 at page 305 where the Court reproduced the excerpt of the High Court as follows:

"Where the evidence of visual identification is that of a single witness such evidence must be very narrowly examined and usually the Court will look for some corroborative evidence, be it direct or circumstantial, particularly where the circumstances did not favour a correct identification."

In addition to that, Ms. Mlemeta contended that the fact that the appellant was known to PW1 before the incident is not sufficient to sustain the conviction. In support of her argument she referred us to pages 17-18 of the typed decision of the Court in **Mabula Makoye and Another v. Republic,** Criminal Appeal No, 227 of 2017 (unreported). The learned counsel also challenged the identification evidence as the conditions which enabled identification were not stated; and that the voice identification that was relied upon by the trial judge does not feature in evidence.

In the end, she urged the Court to find that the appeal is meritorious and allow it.

In reply, Ms. Mkonongo in the first place supported both the conviction and sentence. Submitting on the ground of appeal relating to visual identification she forcefully contended that the said evidence was

watertight. She premised her argument on several factors: **one,** the appellant was known to PW1 before the incident as her step father; **two,** PW1 heard when her mother sent Jaqueline to her neighbour, one George; **three,** the appellant entered in the room while the wick lamp was on and that though she did not explain its intensity, the circumstances allowed clear identification. She referred us to the case of **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004 (unreported), wherein the Court allowed the light from a match box stick to be sufficient for identification. **Four,** that PW1 mentioned the appellant to PW2 and PW3. **Five,** that the incident took some time as the appellant was demanding to be given money by the deceased. As such, it was her view that the circumstances allowed clear identification of the appellant and urged the Court to dismiss the appeal.

In rejoinder, Ms. Mlemeta reiterated what she had submitted in chief and urged the Court to allow the appeal.

We have carefully examined the submissions from either side. We think the issue for our determination is whether or not the appellant was properly identified by PW1 at the scene of crime.

In this case, it is common knowledge that PW1 was the sole identifying witness who testified to have identified the appellant at the scene of crime. In dealing with the issue of identification, the trial Court as shown at page 141 of the record of appeal was satisfied that PW1 saw the appellant at the scene of crime and also recognized him by his voice. It also found that despite the fact that there was no proof of the intensity of light, familiarity of the appellant to PW1, the fact that PW1 was in the same room where the deceased was being attacked by a *panga* and the fact that the encounter took a considerable period of time provided conditions favourable for a visual identification.

As regards the visual identification evidence, it is trite law that no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight. In the case of **Waziri Amani v. Republic**, [1980] TLR 250, the Court expounded the principles to be considered in establishing favorable conditions for identification. The Court stated as hereunder:

> *"...The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation*

occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not"

Also, in the case of **Mgara Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court acknowledged the fact that light has different intensities and underscored the need to explain the intensity of such light when it stated as follows:

"In our settled mind, we believe that it is not sufficient to make ***bare assertions that there was light at the scene of 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 pressure lamp or fluorescent tube. Hence, the overriding need to give in sufficient details the intensity of the light and the size of the area illuminated."* [Emphasis added]

Likewise, in the case of **Christopher Ally v. Republic,** Criminal Appeal No. 510 of 2017 (unreported) the Court emphasized the need to state the intensity of light.

In this case, as alluded to earlier on, PW1 is the only witness who testified to have identified the appellant. She said she was able to identify the appellant through the light from the wick lamp. She did not, however, explain the intensity of the light from the said wick lamp. She did not even state the size of the room allegedly illuminated or the distance she was when observing the appellant. Nor did she state the time spent in observing him. Moreover, there is no mention by PW1 on how she managed to identify him say the conditions which favoured correct identification of the assailant.

In addition, we do not have any qualms with the decision in **Abdallah Rajabu Waziri** (supra) which was cited by Ms. Mkonongo. In that case, the Court was satisfied that a match box light was sufficient to enable proper identification. However, we are of the view that that case is distinguishable to the case at hand as in that case the intensity of light was explained unlike in this case where it was not stated. In addition, other factors were also explained. To be specific, in the said case of **Abdallah Rajabu waziri** (supra) the Court stated that:

> *"It is common ground that PW4 knew the appellant prior to the event. It is also common ground that at the scene of crime was a single*

> *village house.* ***According to PW4 he said he struck a match box stick and saw the appellant slaughtering the deceased and that the burning match box stick gave sufficient light which enabled him to properly identify the appellant.*** *This was strongly contested by the appellant's learned counsel who contended that a light from a match box stick cannot be sufficient for a proper identification because it does not last long. We have carefully considered this submission.* ***In our view, under the circumstances of the case where PW4 knew that appellant prior to the event and in a single roomed in the village house, light from a match box stick was sufficient for proper identification, and that PW4 properly identified the appellant. His evidence on identification is watertight free from the possibility of a mistaken identity..."*** [Emphasis added].

The respondent also relied on the fact that appellant was known to PW1. We equally do not have any problem with that. However, in our view, that is not enough to rule out any possibility of mistaken identity more so when taking into account that there was no explanation on how

she identified the appellant in such horrific condition at the scene of crime. Besides, no explanation of whether or not the conditions were favourable for identification was given. We are fortified with our earlier decision of **Mabula Makoye and Another** (supra) in which we quoted the case of **Boniface Siwinga v. Republic**, Criminal Appeal No. 421 of 2007 (unreported) where the Court stated:

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as in this case that conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."*

In view of the above cited authorities, we entertain no doubt that though the PW1 knew the appellant before the incident, that alone did not eliminate the possibility of mistaken identity.

Besides that, we think the visual identification evidence by PW1 was not watertight due to contradicting versions she gave on how she

identified the appellant. At one stage she said she identified him through light from a wick lamp and later she said she could see him irrespective of the fact that light was off as she saw him while entering in the house. Yet in her testimony, she said the appellant lit his torch after he had killed the deceased. We wonder, then, when was the said wick lamp lit to enable her to identify the appellant if he had entered in the room while it was off. And, if it was lit, who did it? Above all, was there any need for him to switch on his torch after he had killed. These nagging questions remain unanswered and leave a lot be desired.

But again, PW1 gave two different versions regarding the appellant's attire. At first, she said he wore a pair of shorts but later she said he wore a white trouser. Her evidence was materially contradictory and inconsistent. In **Mohamed Said Matula v. Republic** [1995] TLR 3 it was held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions the court has a duty to address the inconsistences and try to resolve them where possible or else the court has to decide whether the inconsistences and contradictions are only minor, or whether they go to the root of the matter."*

Unfortunately, in the case at hand, the trial court did not discharge its duty to address such contradictions and inconsistencies. Having examined and considered the said contradictions and inconsistencies we are of the view that they are fundamental. They raise doubts to the extent that we are unable to eliminate the possibilities of mistaken identity. As they go to the root of the prosecution's case, we resolve them in favour of the appellant.

Apart from that, the trial court found that the appellant was also identified by PW1 through his voice. We must state at once that the identification by voice is also the weakest kind of evidence (See **Mabula Makoye & Another's** case (supra)). Nevertheless, in the matter at hand, the appellant cannot be said to have been identified by voice. We agree with both counsel that such evidence does not feature in the record of appeal. Much as PW1 testified to have heard when the appellant was demanding to be given money by her mother (deceased) and when he told her to show where the money was kept, she did not say in evidence that she was also able to recognize him through his voice. We think, with respect, the voice recognition which was relied upon by the trial court, being not supported by any evidence amounted to an extraneous matter which ought to be discounted.

Ms. Mkonongo also based her argument on the fact that PW1 had mentioned the appellant to PW2 and PW3 immediately after the incident. Admittedly, it is a cardinal principle that the ability to mention the accused at the earliest possible time is of utmost importance. This stance was stated in **Jaribu Abdalla v. Republic** [2003] TLR 271 where this Court had this to say:

> *"In matters of identification, it is not enough merely to look at facts favouring accurate identification, equally important is the credibility of the witness.* ***The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."*** [Emphasis added]

(See also **Marwa Wangiti & Another v. Republic** [2002] TLR 39; **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001 (unreported) and **Daniel Severine & 2 Others v. Republic**, Criminal Appeal No. 431 of 2018 (unreported).

We have scanned the evidence of Merina Yona (PW2) who was the first to be encountered by PW1 together with her siblings after Bibi Jane refused to assist them but we were unable to see such evidence. PW1 herself said nothing on whether she mentioned him to PW2. PW2 said

after PW1 told her about the death of her mother, she took them to PW3 where she heard PW1 narrating the story while mentioning the appellant to be the assailant. It means that PW2 did not know the assailant until when she heard PW1 mentioning him to PW3. However, according to PW2, from her place to PW3's home was a distance of about one kilometre which was not a short one meaning that they must have spent some time before reaching PW3's home. It is surprising that, if PW1 had identified the appellant at the scene of crime, what prevented her to mention him to PW2 who was the first to encounter after the incident and decided to keep such crucial information until she meets PW3 who was far away. We wonder why PW1 did not mention him even during the time they were walking towards PW3's home. In our view, in the absence of any explanation why PW1 was not able to disclose it to PW2, then there was no credence on her identification evidence. (See **Jaribu Abdallah's** case (supra)).

That said and done, we are satisfied that the visual identification evidence of PW1 was not cogent enough for proper identification of the appellant as the murderer of the deceased. In other words, the visual identification evidence against the appellant was not watertight to sustain the conviction and sentence meted out against him. In the event, we

hereby allow the appeal, quash the conviction, set aside the sentence and order that the appellant Frank Mganga be released forthwith from custody unless he is held for other lawful causes.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgement delivered this 13th day of April, 2021 in the presence of the appellant Mr. Geofrey Paul Hold Brief for Miss Elizabeth Mlemeta, learned advocate for the appellant and Mr. Cristian Joas, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL