IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 589 OF 2017

1. **YUSUPH SAYI**
2. **MALISHA SAYI** ..... **APPELLANTS**
3. **MACHILU SAYI**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 31st day of October, 2017
in
Criminal Sessions Case No. 165 of 2014

.....

JUDGMENT OF THE COURT

28th June & 8th July, 2021

NDIKA, J.A.:

The appellants, Yusuph Sayi, Malisha Sayi and Machilu Sayi, are brothers born of the same mother and father. Following their trial by the High Court of Tanzania sitting at Mwanza (De-Mello, J.), they were convicted of the murder of their mother, Tilu Sayi. Consequently, they were sentenced to death.

In a nutshell, the evidence adduced at the trial was as follows: it was in the evening at 8:00 p.m. on 19th September, 2012 at Bulumbaga 'B' Village within Bukombe District that the appellants' father, Sayi Mhuli (PW1), was

sitting by the flaming hearth locally known as *kikome* outside his home along with his wife, Tilu Sayi ("the deceased"), and granddaughter, Eva Stephen (PW2) waiting for supper. Suddenly, three armed men appeared uttering to the deceased in Swahili, "*Neno letu linaisha leo*", literally meaning "our dispute will be settled today." PW1 queried, "*Neno gani tena?*", plainly meaning "what dispute?". There and then, the men hacked the deceased with machete and hit PW1 on his head. The deceased died on the spot.

Both PW1 and PW2 named the appellants as the assailants. PW1 said he saw them at the scene and recognized their voices. He said that the flaming hearth and moonlight illuminated the scene sufficiently for him to see the appellants' uncovered faces even though each of them wore a hat. PW2's account dovetailed with that of PW1 but she added a detail that each of his three uncles wore a black jacket apart from a hat. However, she did not say if the scene was moonlit. As to the motive for the alleged murder, the two witnesses testified that the appellants had raised persistent allegations against the deceased that she was a witch, that she allegedly cast spells that killed the second appellant's cattle.

The appellants' younger sibling, Seni Sayi (PW3), rushed to the scene of the crime in response to an alarm. He found his mother dead and PW1 crying in anguish, bemoaning to have been stabbed by his own sons. He also

alluded to the simmering disagreement in the family caused by the appellants' accusation against the deceased that she was a witch casting spells against her own children. An effort to reconcile the appellants with the deceased bore no fruit.

The prosecution featured Dr. Christopher Msafiri (PW4) from Bukombe District Hospital who examined the deceased's body. He said the deceased's skull was broken resulting in the brain to spill over. The body also exhibited a large wound on the neck and shoulder. For an apparently obscure cause, the post-mortem examination report that he tendered in evidence was rejected by the trial court upon sustaining an apparently unclear objection from the defence.

The investigator of the case, E.4032 Detective Station Sergeant Kelvin from Runzewe Police Post in Bukombe District, recorded cautioned statements attributed to the second and third appellants. These statements were rejected upon the court finding that they were recorded after the expiry of the basic period of four hours for custodial investigation in terms of section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019).

When put to their defence, the appellants disassociated themselves from the alleged murder. The first appellant said that the murder occurred

while he was at his home, not far from the scene of the crime. Only after he heard the distress call, he rushed to the scene but found his father severely wounded and his mother lying dead, her body showing visible cut wounds on the head, neck and shoulder. He admitted to being arrested as a suspect that very night. On the part of the second and third appellants, they both raised an *alibi*, claiming to have been at Upele village in Kaliuwa District that fateful night. They also refuted the witchcraft tale.

The three assessors who sat with the learned trial Judge returned a unanimous verdict of guilty. In convicting the appellants, the learned Judge relied on the evidence of the two identifying witnesses (PW1 and PW2). She was alert that, based on several decisions that she cited, both strands of visual identification evidence and voice recognition evidence had to be approached cautiously and that they could only be relied upon if all possibilities of mistaken identity were eliminated. Finally, she was satisfied that the identifying witnesses were credible and the appellants were positively recognized as circumstances at the scene favoured correct identification. As to the contradiction between the testimonies of the two witnesses regarding the appellants' attire that fateful night, the learned trial Judge found it immaterial, not going to the root of the case.

On whether the killing was committed with malice aforethought, the learned trial Judge found it proven on the evidence that the manner the appellants brutally hacked their mother to death, as a premeditated act of vengeance for her alleged debilitating witchcraft spells, manifested a clear intention to cause her death or grievous bodily harm.

In this appeal against the convictions, the appellants, who appeared before us via a video link from Butimba Central Prison, were advocated for by Mr. Anthony Nasimire, learned counsel. Ms. Ajuaye Bilishanga Zegeli, learned Senior State Attorney, who stood for the respondent together with Mr. Clemence Kato, learned State Attorney, stoutly opposed the appeal.

In his submissions in support of the appeal, Mr. Nasimire argued generally a five-point memorandum of appeal that the appellants had lodged on 21st January, 2019. In essence, the memorandum raises four grounds of grievance: **one**, that the visual identification evidence was not watertight; **two**, that the evidence by the identifying witnesses was contradictory; **three**, that the defence evidence was not fully considered; and **four**, that the offence was not proven beyond reasonable doubt especially because the post-mortem examination report on the deceased was not admitted in the evidence.

We find it convenient to begin our deliberations by dealing with an issue arising from the fourth ground on the absence of the autopsy report on the deceased. As hinted earlier, the autopsy report on the deceased was rejected by the learned trial Judge. It is, therefore, pertinent to determine if the said rejection of the report was fatal to the prosecution case.

In his submissions, Mr. Nasimire did not specifically address the issue at hand. Conversely, Ms. Zegeli, for the respondent, submitted that the rejection of the report had no deleterious effect to the conviction because such documentary evidence is not the only proof of death as held by the Court in **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported). She also cited **Abasi Makono v. Republic**, Criminal Appeal No. 537 of 2016 (unreported) where the Court acted on oral testimony of a medical witness after his medical examination report (PF.3) had been expunged on account of an incurable procedural infraction. It was thus her contention that the evidence adduced by the medical witness (PW4's) coupled with the testimonies of PW1, PW2 and PW3 sufficiently established that the deceased died violently.

On our part, we entirely agree with the learned Senior State Attorney that an autopsy report is not the only proof of death. It is settled that the cause and incident of death can be proved by direct evidence from

eyewitnesses who saw or handled the deceased's body or even circumstantial evidence – see, for instance, **Mathias Bundala** (*supra*); and **Hamisi Juma Chaupepo @ Chau v. Republic,** Criminal Appeal No. 95 of 2018 (unreported). As rightly submitted by Ms. Zegeli, in the instant case the testimonies of PW1, PW2, PW3 and PW4 sufficiently proved the cause and incident of death. While PW1 and PW2 adduced on how the deceased was hacked to death on the spot, PW3, who went to the scene in response to the alarm, confirmed to have found the mutilated lifeless body of his mother lying on the ground. Dr. Msafiri (PW4) confirmed that the deceased's skull was broken resulting in the brain to spill over and that the rest of the body exhibited a large wound on the neck and shoulder.

The above apart, all the appellants acknowledged in their respective testimonies that their mother was killed. The first appellant was more detailed on this aspect. He asserted that upon reaching the scene of the crime in the fateful evening in response to the alarm, he found his mother lying dead, her body showing visible cut wounds on the head, neck and shoulder. Given these circumstances, we were taken aback that the appellants had the temerity to question the proof of their mother's death. Accordingly, we affirm the High Court's finding that the deceased, Tilu Sayi, died violently on 19th September, 2012.

Addressing the rest of the grounds of appeal, Mr. Nasimire sought to impress upon us that the appellants were not positively identified at the scene. He said the two eyewitnesses, PW1 and PW2, gave differing accounts on what happened at the scene. While PW1 adduced that with the aid of the flames from the hearth and moonlight he saw the assailants wearing hats with uncovered faces, PW2 averred that, with light from the flaming hearth, she recognized her uncles as the killers, wearing jackets and hats with uncovered faces. Apart from being discrepant, the evidence gave no hint on the intensity of the light from the hearth or moonlight. He added that the two witnesses said nothing about the description of the assailants, their proximity with the assailants and the duration of the attack. On the claim that the appellants were also recognized by their voices, he argued that PW1 did not say of the three appellants who exactly said *"Neno letu linaisha leo."*

Mr. Nasimire urged us to treat the evidence of the two eyewitnesses with circumspection. He reasoned in view of our observation in a number of cases notably **Baya s/o Lusama v. Republic**, Criminal Appeal No. 593 of 2017 (unreported) wherein we referred to our holding in **Issa s/o Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported) thus:

> *"We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is*

of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

The learned counsel went on to argue that given the bad blood between the appellants and the rest of the family, suspicion naturally arose that the appellants were the killers. However, he hastened to submit that suspicion alone was insufficient to found conviction. He then faulted the learned trial Judge for finding that the appellants fled the scene and for inferring guilt from the fact that the appellants did not show up at their deceased mother's burial. Referring to PW1's evidence, he said there was no dispute that the second and third appellants stayed in Tabora while the first appellant lived in the same village not far from PW1's home but he was arrested shortly after the murder of his mother.

Ms. Zegeli, on the other hand, disagreed with her learned friend. It was her contention that the differences in detail between the testimonies of PW1 and PW2 on the assailants' attire and the source of light at the scene were minor and inconsequential. As regards proximity, she contended that PW2, at page 16 of the record of appeal, clearly stated that she sat by the hearth closely with her grandparents, meaning that she saw the assailants

from close range as they attacked the deceased. On the intensity of the light illuminating the scene, the learned Senior State Attorney referred us to PW1's testimony at page 13 of the record of appeal that the flaming hearth emitted sufficient light for the witness to see distant objects with it.

Coming to the alleged recognition of the appellants by their voices, Ms. Zegeli acknowledged initially that voice recognition was one of weakest forms of evidence and that it must be approached cautiously. However, she argued that in the present case PW1 heard the appellants' utterances to which he responded and that, as shown at page 11 of the record of appeal, they were shouting while attacking the deceased. Referring to PW2's evidence at page 15 of the record of appeal, she posited that PW2 said she saw the appellants and heard their utterances. Accordingly, she urged us to find that PW1 and PW2 correctly recognized the appellants by their voices which they were quite familiar with.

To bolster her submission, the learned Senior State Attorney referred us to the case of **Kenedy Ivan v. Republic**, Criminal Appeal No. 178 of 2007 (unreported) for the proposition that for voice identification to be relied upon it must be shown that the witness was familiar with the voice as being the same voice of a person at the scene. In that case, we relied on two of our earlier decisions: **Badwin Komba @ Ballo v. Republic**, Criminal

Appeal No. 56 of 2003 (unreported); and **Kanganya Ally and Juma Ally v. Republic** [1980] TLR 270.

Ms. Zegeli also made reference to page 18 of the record of appeal indicating that when PW3 arrived at the scene he found his father lying on the ground injured, crying in agony naming the appellants as the assailants. This piece of evidence, she said, assured the reliability of the claim that PW1 recognized the appellants at the scene and named them at the earliest opportunity. The learned Senior State Attorney also urged to take into account that the after the robbery the second and third appellants disappeared and did not attend their deceased mother's burial. She added that even if though the duo were living in Tabora, it did not mean that the could not travel to their home village as PW2 stated at page 16 of the record of appeal that they frequently visited their family home but surprisingly they were no show at the burial. Referring to the learned trial Judge's finding in her judgment at pages 79 and 80 of the record of appeal that PW1 and PW2 were credible and truthful, Ms. Zegeli urged us to uphold the trial court's finding that the appellants were positively identified at the scene.

As regards the appellants' defence that they were not at the scene of the crime at the material time, the learned Senior State Attorney submitted that once PW1 and PW2's evidence is accepted and relied upon, the

appellants' *alibis* would naturally dissipate. To buttress the point, she cited the case of **Fadhili Gumbo Malota & 3 Others v. Republic**, Criminal Appeal No. 52 of 2003 (unreported).

In a brief rejoinder, Mr. Nasimire referred us to PW1's evidence at page 11 of the record of appeal, contending that the seating arrangement by the hearth was unclear and that it was uncertain of what was said by each appellant, if at all. Regarding the alleged recognition of the appellants by their voices, he said while PW1 claimed to have heard the appellants' utterances and shouting, PW2 said nothing of the sort. He added that the absence of the appellants from their deceased mother's burial was of no relevance. The first appellant, for one thing, could not attend his mother's burial because he was in police custody at the material time.

We have examined the record of appeal and duly considered the contending submissions of the learned counsel as well as the authorities cited. The appeal, in our view, turns on the issue whether the appellants were positively identified at the scene as the assailants.

It is undoubted that the incident in the instant case occurred in the evening around 8:00 p.m. Thus, the evidence on how the raiders were seen and identified is so crucial. It is pertinent that we refer to the guidelines on

visual identification as stated by the Court in its seminal decision in **Waziri Amani v. Republic** [1980] TLR 250, where the Court cautioned, at pages 251 to 252, that:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.****"*[Emphasis added]

Then, the Court stated, at p. 252, that:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he***

observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

The above guidelines have been re-emphasized in numerous cases including **Said Chaly Scania v. Republic**, Appeal No. 69 of 2005 (unreported) thus:

"We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."

In **Raymond Francis v. Republic** [1994] TLR 100, the Court underlined that:

> *"It is elementary that a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."*

As regards voice recognition, we are cognizant that it is the most unreliable. In **Nuhu Selemani v. Republic** [1984] TLR 93, we observed that:

> *"... it is notorious that voice identification **by itself** is not very reliable."* [Emphasis added]

See also **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014; and **Frank Maganga v. Republic**, Criminal Appeal No. 93 of 2018 (both unreported).

Guided by the above authorities, we subjected the evidence on record to a thorough and exhaustive scrutiny. Having done so, we are of the settled view that the appellants were positively recognized at the scene of the crime as all possibilities of incorrect or mistaken identification were eliminated. We so hold in view of the following aspects of the evidence on record: **first**, that the identifying witnesses being biological father and niece, respectively, to

the appellants were familiar with each other. The witnesses said they saw the appellants' faces because they were uncovered even though each of them wore a hat. In particular, PW1 said in cross-examination, at page 13 of the record of appeal, that the second appellant was the one who started hitting the deceased with a machete and that the rest followed. PW2 confirmed, at page 16 of the record of appeal, seeing the second appellant with a machete with which he hacked the deceased. **Secondly**, it is in the evidence that the two witnesses sat by the flaming hearth next to the deceased. It is inferable, therefore, that when the assailants descended upon the deceased with their machetes, PW1 and PW2 had them under view from close proximity. **Thirdly**, whether the scene was illuminated just by the flames from the hearth and the moonlight according to PW1 or just the flaming hearth as testified by PW2, the essential aspect, in our view, is that both witnesses asserted, at pages 13 and 15 of the record of appeal, that the light was sufficient to see distant objects. This piece of evidence sufficiently answers the appellants' complaint that the intensity of the light was not mentioned.

Fourthly, besides the visual identification made by the witnesses, the appellants were recognized by their voices as they made several utterances and shouted while attacking the deceased. From the utterances and the

shouts, it was discernible that the attack was made by vengeful assailants settling a long-standing family disagreement fueled by the accusation that the deceased cast against them or one of them devastating witchcraft spells. As did the learned trial Judge, we find it quite improbable in the circumstances of this case that PW1 as the biological father to the appellants could mistake the voices of his sons, the appellants. In the same vein, we do not think that PW2 mistook his uncles' voices with which she was familiar.

Fifthly, we agree with the learned Senior State Attorney that PW3's evidence, at page 18 of the record of appeal, that upon arriving at the scene in response to the alarm he found his father (PW1) lying on the ground injured, crying distressingly naming the appellants as the assailants, guarantees the credibility of PW1 as well as the reliability of his claim that he saw and recognized the appellants at the scene. Certainly, it is elementary that the ability of a witness to mention a suspect at the earliest opportunity is of utmost importance – see **Marwa Wangiti & Another v. Republic** [2002] TLR 39; **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001 (unreported); and **Jaribu Abdalla v. Republic** [2003] TLR 271. It is worthwhile to excerpt our observation in the latter case thus:

> *"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."*

Mr. Nasimire argued that PW1 and PW2 gave differing accounts on certain aspects of case in particular the appellants' attire and the source of the light at the scene. With respect, we endorse Ms. Zegeli's submission that the alleged variations are trivial. These variations are likely to have arisen due to lapse of memory as the testimonies were given five years after the fateful incident. As we held in **Masanja Mazambi v. Republic** [1991] TLR 200, such minor variations are, if anything, a healthy sign that the witnesses had not rehearsed the evidence before testifying.

The peculiar circumstances of this matter have left us wonder whether a father could team up with his granddaughter set up his own sons. The learned Judge who tried the case heard and observed the witnesses and believed them. Given the circumstances, we find no cause to disturb the trial court's findings based on these witnesses' accounts.

Coming to the appellants' *alibis*, Ms. Zegeli is right that as we held in **Fadhili Gumbo Malota** (*supra*), the said *alibis* would naturally dissipate

upon acceptance of the evidence of the identifying witnesses placing the appellants at the scene of the crime at the material time. It is, therefore, our view that the learned trial judge properly rejected the *alibis* which were not proved and which could not obliterate the overwhelming evidence given by the prosecution witnesses, notably PW1 and PW2, who the learned trial Judge believed. We would thus uphold the finding that the appellants were present at the scene and that they killed the deceased.

On whether the killing was committed with malice aforethought, we would as well uphold the learned trial Judge's finding that the manner the appellants brutally hacked their mother to death in a vengeful and premeditated act in a misguided belief that she had cast debilitating witchcraft spells against them or one of them leaves no doubt that they had a clear intention to cause her death or grievous bodily harm. The appellants were, therefore, rightly convicted of matricide, that is the murder of their own mother, and that for that offence they deserved the mandatory death penalty. In consequence, all the grounds of appeal fail.

As we take leave of the matter, we would observe that this case is certainly a sad reminder of the negative effects of our country's prevalent belief in witchcraft. The dark side of it is that people are quick to blame their adversities and tribulations on supposed conjurers, who mostly happen to

be older women. We only wonder if the matricide in this case could have been averted had the protagonists in the matter engaged as a family and sorted out the simmering disagreement before it eventually boiled over leaving appalling and heartbreaking consequences.

In sum, we find the appeal unmerited. We dismiss it in its entirety.

DATED at **MWANZA** this 7th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered on this 8th day July, 2021, in the presence of the appellants in person linked via video conference and represented by Mr. Kange Geoffrey, learned advocate holding brief for Mr. Anthony Nasimire, learned advocate and Mr. Hemed Halidi Halifani, Senior State Attorney for the respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL