IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 184 OF 2018

MAWAZO MOHAMED NYONI @ PENGO.....1ST APPELLANT
TELAS NDAGIJIMANA.....2ND APPELLANT
KENYATA PETER @ MZEE MWENZANGU.....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mlacha,J.)

dated the 16th day of May, 2018
in
Criminal Sessions Case No. 42 OF 2015
.....

JUDGMENT OF THE COURT

9th Aug & 16th September, 2021

KIHWELO, J.A.:

Following their trial by the High Court of Tanzania sitting at Dar es Salaam (Mlacha, J.) the appellants, Mawazo Mohamed Nyoni @ Pengo, Telas Ndagijimana and Kenyata Peter @Mzee Mwenzangu were on 16th May, 2018 found guilty of murdering G. 2641 PC Mwinyi ("the deceased") on the 11th February, 2013 at TAZARA Mchicha area within Ilala District, Dar es Salaam Region. They were duly convicted and accordingly sentenced to suffer death by hanging. Aggrieved, they have lodged this appeal.

It was common ground that the deceased died violently on 11th February, 2013. According to the postmortem examination report on his body (exhibit P1), whose contents were read out in court by PW6 and were undisputed, the death resulted from *"bullet wound with entry at left parietal bone causing crushed skull. Brain was missing. Exit wound was 20 mm wide on right parietal and temporal bones."* The question at the trial was, therefore, whether the appellants were the murderers.

To establish its case, the prosecution featured seven witnesses: E. 8604 S/Sgt Benjamin (PW1), F. 9921 PC Amelya (PW2), ASP Mauridio Changae (PW3), F. 5946 PC Revocatus Ndamugoba (PW4), D. 2940 D/Sgt Musa (PW5), Dr. Herbert Isack Nguvumali (PW6) and E. 2937 D/Sgt Matiku (PW7). Apart from the postmortem examination report (exhibit P1), the prosecution tendered the cautioned statement of the second appellant (exhibit P2), a sketch drawing of the scene of the crime (exhibit P3), and the cautioned statement of the third appellant (exhibit P4).

On the part of the appellants, they gave their respective evidence on oath and produced four documentary exhibits. These were a medical chit for the second appellant (exhibit D1), statement of PW2 (exhibit D1), X-Ray picture of the second appellant (exhibit D2), statement of PW5 (exhibit D2) and statement of PW7 (exhibit D3). The appellants did not call any witness.

Before canvassing the points of grievance, we find it desirable first, to give essential factual background to the appeal as gleaned from the totality of the evidence on record.

Briefly, the prosecution case which was believed by the trial court shows that, on the fateful day PW1 was in charge of the Crisis Response Team (CRT) from Chang'ombe Police Station which was christened Tembo 16. He left the station to TAZARA Mchicha area along Kiwalani road at 11:00 am together with PW2 and he was in charge of seven police officers. Others in the group were Nos. D.8005 Cpl. Hamad, G. 7863 PC Joel, G. 2461 PC Jafari, F. 9921 PC Emanuel, the deceased and Police Officer with No. G. 2317 PC Seif. The team was using a Landrover Defender with Registration No. PT 1114 which was driven by Cpl. Hamad and at that time they were on routine patrol. As a police routine they had with them radio call and were armed with two Sub-Machine Guns (SMG) and two Long range weapons. They also had a box of tear gas canisters (bombs).

It was a further telling by PW1 and PW2 that upon arrival at TAZARA they parked their car on the left side of the road and began conducting routine and random questioning of drivers and motorcyclists that were passing through that road. PW1 and Cpl. Hamad were seated inside the car

while listening to the radio call and two policemen PC Said and PC Emmanuel were seated at the back of the car. On the other hand, PC Jafari and PW2 who were both carrying SMG were on the roadside while the deceased was unarmed stopping vehicles and motorcycles for questioning.

This exercise went on for about three hours until two cars appeared coming from Nyerere Road heading the way to Kiwalani on the rough road towards where the CRT unit was. The first car was Toyota carina grey in colour (henceforth "the carina") and the other one behind was Noah. The carina was moving in a high speed with full lights on and unaware of what was going to happen next, the deceased who was on the left side of the road by then stopped the carina, but the driver only slowed down. There and then, one of the passengers in the carina suddenly started shooting randomly at the police. As a result of this gruesome incident, the deceased was shot right in the head and fell down while his brain got out. PW2 was shot in his hand and a thigh and PC Jafari was shot too but was not seriously injured. The incident did not take long and the deceased was pronounced dead upon arrival at Temeke hospital where they were rushed for treatment.

PW2 alleged to have identified the driver of the carina whom he claimed to know before the incident. According to PW2, he knew the first appellant who lived at Kiwalani and was working for one Mr. Yasin, the owner

of a whole sale shop and was driving a Corona. To be more precise, PW2 alleged that he knew Mawazo, the first appellant for more than a year. He also identified in the dock the third appellant and claimed that he was the one who was firing at the police during the fateful day.

PW3, who by then was a Police Inspector and Assistant Officer-In-Charge of the Criminal Investigation Department (OC-CID), Chang'ombe Police Station got the news of the horrifying incident at TAZARA Mchicha area through the police radio and immediately rushed to the hospital to see the victims and upon arrival he realized that the deceased was already pronounced dead. He rushed to the scene of crime and immediately the wheels of investigation were put into motion. They launched a manhunt of the attackers which led to the discovery of an abandoned carina.

PW4 who was working with the Regional Crimes Officer (RCO) Kinondoni and a member of a Task Force assigned to investigate the armed robbery which occurred in Masaki area arrested one Saidi Ndonde who confessed to have been involved in a number of armed robbery incidences including one in this case and implicated the second appellant. He also assisted the police to lay a trap that ultimately led to the arrest of the second appellant who in turn mentioned the first and the third appellants.

Further, PW5 was assigned by the RCO Kinondoni to take the cautioned statement (exhibit P2) of the second appellant who was said to have confessed to the allegations and implicated the first and third appellants. There was further evidence from PW5 that he wrote an order for postmortem examination and actually witnessed the postmortem examination exercise.

On his part, PW6 conducted the postmortem examination of the body of the deceased and his report (exhibit P1), as indicated above revealed that, the deceased died a violent death which was caused by a bullet wound on his head and that the deceased's head had no brain.

PW7 who visited the scene of crime drew a sketch plan of the scene of the crime which was tendered and admitted in evidence as exhibit P3. It was PW7's further telling that he recorded the cautioned statement of the third appellant which was admitted in evidence as exhibit P4.

On their defence, the appellants totally denied the accusation against them. The first appellant disassociated himself with the rest of the appellants and his evidence was to the effect that he is not a driver and has never driven a car and denied to have any knowledge of the carina. On the part of the second appellant his evidence was to the effect that he was a foreigner who came to Tanzania for business purposes and that he was arrested for

no apparent reason and forced to sign the cautioned statement at gun point. He complained of being tortured by the police in order to confess to the crime he did not commit and denied any association with the first and third appellants. The third appellant also disassociated himself with his co-appellants and his evidence was to the effect that he was arrested by the police in respect of the crime he did not commit and that he was tortured to sign his cautioned statement.

At the conclusion of the case for the prosecution and the defence, the learned trial Judge summed-up the case to the assessors who then returned an unanimous verdict of guilty against all appellants. Siding with the assessors, the learned trial Judge found it proven upon the evidence of the prosecution witnesses that the appellants were responsible for the murder of the deceased. Accordingly, they were convicted and sentenced as shown earlier.

This appeal was initially predicated on self-crafted six- point memorandum of appeal lodged on 28th September, 2018. On 20th September, 2019, the appellants also lodged a self-crafted supplementary memorandum of appeal containing seven, ten and seven grounds of appeal in respect of the first, second and third appellants respectively. Further, on 22nd May, 2020, the appellants lodged yet another self-crafted

supplementary memorandum of appeal having six, five and five grounds for the first, second and third appellants respectively.

On 14th August, 2020, the second appellant's counsel, Mr. Revocatus Thadeo Mathew, filed a six-point supplementary memorandum of appeal in terms of rule 73(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in substitution of the earlier filed points of complaint and on 5th August, 2021 the first appellant's counsel, Ms. Blandina Harrieth Kihampa, filed a four-point supplementary memorandum of appeal as per order of the court dated 5th August, 2021 in terms of rule 73(2) of the Rules in substitution of the earlier filed points of grievance. The appellants also lodged joint written statement of arguments in support of their grounds of appeal. Generally, they maintained that the trial judge wrongly convicted and sentenced them for the offence of murder while the prosecution did not prove the case against them beyond reasonable doubt. The counsel prayed to adopt the joint written submissions.

On our part, we have found that the grounds of appeal raise the following eight paraphrased points of grievance: **One,** that there was variance between the charge and exhibit P1. **Two,** that the prosecution wrongly relied on the evidence of PW3 whose name was not listed at the committal proceedings. **Three**, that the evidence of PW4 was wrongly

admitted and relied upon to ground the appellants' conviction while the said witness was not sworn before he testified. **Four,** that exhibits P2 and P4 were not properly tendered and ultimately admitted in evidence. **Five,** the visual identification of the appellants was not watertight given the circumstances prevailing at the scene of the crime. **Six,** failure to call key material witnesses for the prosecution adversely impacted on prosecution's case. **Seven**, failure to tender the Carina had adverse effect to the prosecution's case; and **Eight**, that the case against the appellants was not proved beyond reasonable doubt.

At the hearing of the appeal before us, Ms. Blandina Kihampa, Mr. Revocatus Thadeo Mathew and Mr. Florence Tesha, learned advocates represented the first, second and third appellants respectively. On the other hand, Ms. Gloria Mwenda, learned Senior State Attorney together with Mr. Gabriel Kamugisha, learned State Attorney, represented the respondent Republic.

Submitting in support of the first ground Mr. Tesha, briefly argued that, whereas the charge referred to the deceased as G. 2641 PC Mwinyi, exhibit P1 referred to him as G. 2641 PC Mwinyijuma Amiri Mahimbo and according to Mr. Tesha it was legally not clear as to who exactly was the deceased person alleged to have been murdered by the appellants.

In reply to this ground of complaint, Ms. Mwenda, who opposed the appeal, contended that this anomaly was clarified by PW1 at page 27 of the record of appeal where he testified that PC Mwinyi was also known as PC Mwinyijuma. Taking the argument further, she contended that, in any case there was no issue as regards to name of the deceased.

In his brief rejoinder submission, Mr. Tesha insistently argued that, the confusion about the name PC Mwinyi and Mwinyijuma Amiri Mahimbo has not been clarified to date.

We have examined the record of appeal and the submissions by the Counsel for the parties in the light of this ground of complaint and found that, exhibit P1 was tendered in court by PW6 and was admitted in evidence on 5th April, 2018 and none of the three learned counsel who appeared for the appellants objected to its admissibility nor did they raise any question to PW6 regarding the name of the deceased. Ideally, the appellants' counsel by then were already satisfied by the clarifications made earlier by PW1 during his testimony who said at page 27 of the record of appeal *"The Doctor said PC Mwinyi was already dead. He is also called PC Mwinyijuma."* This is the reason why this matter was not raised at any particular time during the trial leave alone at the stage of admission. As rightly submitted by the

learned Senior State Attorney, this matter was not an issue anyway during trial.

With due respect, we don't agree with Mr. Tesha's argument that this matter has not been clarified to date. Arguably, there is no one who is alleged to have been murdered in the instant matter except the deceased in this case. Accordingly, we dismiss this ground of complaint.

With regard to the irregular reception of evidence of PW1 and PW3, Ms. Kihampa contended that section 246 (2) of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E. 2019) (henceforth "the CPA") imposes a duty on the committing court to read the statements or the substance of the evidence of witnesses whom the prosecution intends to call at the trial. However, the learned advocate argued that, looking at the record of appeal, neither did the prosecution include in the list of prospective witnesses the name of PW3 nor was the substance of his evidence read before the court as required by section 246 (2) of the CPA. Accordingly, the reception of the evidence of that witness was contrary to section 289 (1) of the CPA and thus the improperly received evidence deserves to be expunged, the learned advocate argued.

For his part, Mr. Mathew, while supporting and reiterating briefly the foregoing submission, he referred this Court to its previous unreported decision in **Jumanne Mohamed and Others v. Republic,** Criminal Appeal

No. 534 of 2015 and prayed that the evidence of PW3 should be discarded from the record. Taking the argument further he contended that having discarded the evidence of PW3 the remaining evidence is not sufficient to warrant the conviction of the appellants.

In response to this ground of complaint, Ms. Mwenda was quick to concede to the non-compliance with section 246 (2) and 289 (1) of the CPA. She admittedly, agreed that, this was a fatal irregularity and therefore the evidence of PW3 be discarded from the record. Ms. Mwenda, argued further that despite the improperly received evidence of PW3 the remaining evidence on record is sufficient to sustain conviction of the appellants.

We have examined the record of appeal in particular page 15 in light of the concurrent submissions of both counsel and we are satisfied that, PW3 was not among the prosecution witnesses whose statements were read to the appellants during the committal proceedings. Neither could we locate a notice in writing by the prosecution to have him called as additional witness. His evidence was thus taken in contravention of section 289 (1) of the CPA which provides that:

> *"No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice*

in writing to the accused person or his advocate of the intention to call such witness."

The effect of that cited provision of the law is that no witness whose statement or substance of his evidence was not read at the committal proceedings shall be called by the prosecution as a witness at a trial unless a notice in writing is given within the confines of that provision and that, any evidence taken in contravention of that requirement is illegal evidence.

We think, however, that PW3 ought to, in the first place, not to have been allowed to testify. Indeed, the Court echoed that position in **Hamisi Meure v. Republic** [1993] TLR 213 when confronted with a similar situation it stated that:

"It having been accepted by the prosecution and the Judge himself that PW2 did not feature in the record of committal proceedings, he should have not been allowed to give evidence in contravention of the provisions of section 289 which are mandatory." [Emphasis added]

See also **Samwel Henry Juma v. Republic**, Criminal Appeal No. 211 of 2011 (unreported) and **Jumanne Mohamed and Others v. Republic** (supra). We accordingly expunge the evidence of PW3 from the record. As to the consequences that may befall following the expunging of the evidence

of PW3, we reserve the answer to this question for now for reasons that will become apparent later.

As to the point of grievance that the evidence of PW4 was wrongly admitted and relied upon to ground the appellants' conviction while the said witness was not sworn before he testified, Mr. Mathew, was fairly brief and contended that PW4 gave his testimony without swearing in and therefore what was recorded when he testified was legally no evidence at all and could not be acted upon to determine the appellants' guilt or otherwise. He submitted that such evidence was recorded in total contravention of peremptory requirement of section 198 (1) of the CPA. He thus implored us to expunge the evidence of PW4 from the record, placing reliance on the case of **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017 (unreported) in which this Court faced with similar situation discarded the evidence of PW1 and DW1 who gave their evidence without being affirmed.

For her part, Ms. Mwenda, conceded to the foregoing point of complaint and urged the Court to expunge the evidence of PW4 from the record. However, she was quick to submit that, even without the evidence of PW4, the remaining evidence on record is sufficient to sustain conviction.

We have weighed the learned rival submissions on this issue. There is, in this regard, a long and unbroken chain of decisions of the Court which underscores the duty imposed on the court to ensure that every witness is examined upon oath or affirmation. It is an elementary principle of law that, evidence to be acted upon by any court must come from a competent witness and unless a witness is exempted under written law such as section 127 (1) of the Evidence Act, Cap 6 R.E 2019 (EA), any other witness in any judicial proceedings must be sworn or affirmed. This is a peremptory requirement under Section 198 (1) of the CPA which states that:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary,* ***be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act.***"
> [Emphasis added]

The spirit of the above provision is to the effect that no witness in any criminal case or matter will be examined without oath or affirmation and that any evidence recorded without oath or affirmation will have no value before any court of law and therefore will be disregarded. In **Mwami Ngura v. Republic,** Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani v. Republic**, Criminal Appeal No. 311 of 2017 (both unreported), we

underlined the need to meet the threshold of section 198(1) of the CPA. In the former case it was stated that:

> *"....as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless, she falls under the exemptions provided in a written law. As demonstrated above one such exemption is section 127(2) of the Evidence Act. If this is not done, such evidence must be visited by consequences of non-compliance with section 198(1) of the CPA. And, in several cases, this Court has held that if in a criminal case, evidence is given without oath or affirmation, in violation of section 198(1) of the CPA, such testimony amounts to no evidence in law. See eg.* ***Mwita Sigore @Ogorea v. Republic,*** *Criminal Appeal No. 54 of 2004 (unreported). The question of such evidence being relegated to "unsworn" evidence does not therefore arise."*

In the instant matter, we subscribe to the concurrent submissions by the learned counsel that, the trial Judge's recording of the testimony of PW4 without being sworn was clearly irregular. On the strength of the authorities cited above, PW4's evidence recorded when he gave his testimony was no evidence at all and, in that accord, we agree with both learned counsel that, such evidence deserves not to be considered by the Court to determine the guilty or otherwise of the appellants.

In view of the infractions as canvassed above, we are constrained by the law to hold that the testimony of PW4 was irregularly recorded by the trial Judge in contravention of section 198 (1) of the CPA and therefore, is hereby accordingly discarded.

On the point of cautioned statements, Ms. Kihampa submitted that, the conviction of the appellants was mainly based upon the cautioned statements of the second and third appellants, exhibit P2 and exhibit P4 respectively. She however, contended that exhibit P2 was improperly admitted and wrongly relied upon by the trial court because it was recorded outside the time prescribed by the law. She explained that the second appellant was apprehended on 7th June, 2013 and his cautioned statement was recorded on 9th June, 2013 from 11:00 am to 12:45 pm. It was her further submission that while PW5 testified that the second appellant was taken to them on 9th June, 2013, PW4 testified to the effect that the second appellant was apprehended on 7th June, 2013 at 1:15 pm for a different offence but he confessed to have committed the instant offence. The learned counsel argued that the question is when and at what time was the second appellant arrested in respect of the murder in question and she concluded that because of the glaring ambiguity as to the exact date and time the second appellant was arrested in respect of the murder in question, the

presumption is that the cautioned statement was recorded two days after the arrest in contravention of the mandatory requirement of four hours. She contended further that, exhibit P2 should be expunged from the court record.

The learned counsel also submitted in respect of the cautioned statement of the third appellant that, it was equally recorded outside the time prescribed by law. According to her, PW1 arrested the third appellant on 1st May, 2013 at 1:00 pm and the cautioned statement was recorded from 5:10 pm to 7:20 pm clearly outside the time prescribed by law. She pressed the Court to expunge exhibit P.4 from the record.

In reply, Ms. Mwenda was fairly brief and argued that the issue of recording the cautioned statements exhibit P2 and exhibit P4 contravening section 50 (1) (a) of the CPA does not arise at this point as this was well dealt with at the trial stage following the objections which were raised by the appellants and which after a trial within trial they were overruled by the trial court. She further contended that, the second and third appellants were convicted on their own cautioned statements which were admitted after trial within trial. To support her argument, she referred us to the decision of **Geofrey Kitundu and Another v. Republic,** Criminal Appeal No. 96 of 2018 (unreported) in which the Court convicted the appellant based on a

repudiated confession. She submitted further that, the evidence on record is watertight to convict the appellants.

We have given due consideration to the submission made by the counsel for both sides and more particularly we have considered the issue of ambiguity as to when and at what time exactly were the appellants arrested in respect of the offence in question. We are aware of the principle that any ambiguity to the prosecution evidence has to be resolved in favour of the accused person. We are alive to the cherished principle of law under section 50 (1) (a) of the CPA. That section provides that:

> *"50(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint in respect of the offence."*** [Emphasis added]

As argued by the learned counsel for the appellants, we agree that the 2nd and 3rd appellants' cautioned statements were improperly admitted and used as evidence because they were taken in contravention of section 50 (1)(a) of the CPA. This is because the evidence of prosecution witnesses contradicts each other as to the exact date and time the second and third

appellants were arrested this is more in particular the testimonies of PW4, PW5 and PW7 as well as exhibits P2 and P4 which were also tendered by the prosecution and therefore we were unable to establish with precision when did the basic period of four hours start to count. Therefore, going by the reasoning of that where there is any doubt in the prosecution evidence it has to be resolved in favour of the accused, this means the statements were recorded outside the basic period of four hours contemplated under section 50 (1) (a) of the CPA. Although section 50 (1) (b) gives room for extension of time within which to record the suspect's statement after four hours have elapsed, the recording officer in the instant matter did not take that advantage. There is a plethora of legal authorities which all underscore that non-compliance with that provision of the law is a fundamental irregularity that goes to the root of the matter and renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the court. See the case of **Mkwavi s/o Njeti v. Republic,** Criminal Appeal No. 301 of 2015 and **Said Bakari v. Republic**, Criminal Appeal No. 422 of 2013 (both unreported). The effects of non-compliance with these provisions is to render such documents bad evidence liable to be expunged from record. Thus, we find that the cautioned statements of the second and the third appellants is bad evidence and accordingly expunge them from the record.

Arguing in support of the complaint in respect of visual identification, Ms. Kihampa, contended that the trial court convicted the appellants on the strength of the evidence of PW1 and PW2 without even conducting an identification parade. Taking the argument further, she submitted that the visual identification evidence which tends to link the appellants with this incident came from PW2. She however, emphatically argued that the visual identification evidence of PW2 is inherently weak, unreliable and does not meet the tests required by law. In demonstrating the alleged weakness and unreliability, Ms. Kihampa referred us to pages 29 and 146 of the record of appeal and contended that the trial Judge failed to properly direct his mind to the fact that PW2 failed to name the first appellant at the earliest opportune time and more so his evidence before the court contradicts with his earlier statement made before the police (exhibit D1). She pointed out that, despite exhibit D1, PW2 did not offer any description of the first appellant he alleged to know for about a year.

The learned counsel further contended that the circumstances surrounding the commission of the crime were not favorable for proper identification since PW2 testified that the car in which the appellant were driving had tinted window glasses, was moving in a high speed and did not stop but merely slowed down upon approaching where PW2 and his fellow

police officers were. She further argued that the entire incidence was terrific and horrifying as the attackers were firing at PW2 and his fellow police such that PW2 was shot twice on his hand and thigh and that the event took hardly three minutes and PW2 was forced to lie down in an attempt to save his own life while at the same time trying to alert fellow police officers to escape from the firing shots that were aimed towards them. She was of the view that under those circumstances chances for mistaken identity were very high. To bolster her submission, the learned counsel cited the case of **Juma Hamad v. Republic,** Criminal Appeal No. 141 of 2014 (unreported) where the Court was confronted with an issue of identification parade in a robbery case and emphasized the need to meet tests and guidelines enunciated in the celebrated case of **Waziri Amani v Republic** [1980] TLR 250.

Responding to the issue of visual identification, Ms. Mwenda, contended that the first appellant was properly identified by PW2 who was at the scene of the crime as he knew him for about a year before, the event took about three minutes and it was a daylight which made it easier for PW2 to identify the first appellant. She admittedly argued that PW2 did not mention the name but in his statement said that if he sees the attackers he will remember them and before the trial court he said that he knew the first appellant. She further argued that, as a trained police PW2 was able to

identify the first appellant despite the horrific and terrifying scene at the time of the commission of the crime.

In a brief rejoinder, on behalf of his learned friends, Mr. Tesha insistently, contended that, the issue of visual identification was not watertight given the circumstances surrounding the commission of the crime in question which was very horrifying besides the fact that the attackers were in a tinted glass windows car which was moving while firing shots towards PW2 and his fellow police officers. He therefore prayed that this ground be allowed.

In this case we have considered the lone visual identification evidence by PW2 and the submissions from either side and we are inclined to agree with the learned counsel for the appellants that the visual identification evidence was not watertight. We say so for the following reasons. One, the circumstances surrounding the commission of the crime were very terrific and horrifying given the fact that PW2 and his fellow police officers were suddenly attacked under ambush. Two, the car in which the attackers were driving was moving in a high speed and just slowed down as the police were being attacked. Three, the attackers' car had tinted window glasses and therefore not easy to identify someone inside that car in those circumstances and within that span of time. Four, PW2 did not give description of the first

appellant or any of the attackers in his statement at the police (exhibit D 1) and even during his testimony before the trial court; and five, PW2 did not mention the first appellant at the earliest opportune time as required by the law.

Undoubtedly, the law on visual identification is that such identification must be watertight in order to found a conviction. This time honoured principle was stated in the landmark case of **Waziri Amani** (supra). But in **Jaribu Abdallah v. Republic** [2003] TLR 271 this Court religiously held thus:

> *"In matters of identification is not enough merely to look at factor 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."*

Similarly, in the case of **Philipo Rukaiza @ Kicheche Mbogo v. Republic**, Criminal Appeal No. 25 of 1994 (unreported), this Court stated that:

> *"The evidence in every case where visual identification is what is relied on must be subject to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable*

possibility of error has dispelled. There could be mistake in identification notwithstanding a honest belief of the identifying witness."

We, on our part, agree with the proposition that unexplained delay by a witness who claims to have identified an offender to name the offender to investigating police, in this case PW2, casts doubts on the credibility of the witness. In **Marwa Wangiti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported), it was succinctly stated as follows:

"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his credibility; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."

With the foregoing analysis we find merit in this complaint that the appellants were not properly identified.

Arguing in support of the complaint that the prosecution did not produce material witnesses to testify, Ms. Kihampa contended that, the prosecution did not produce crucial witnesses who witnessed the murder incident that is the other police officers and the civilian who was shot along with the police. She submitted that, ideally, these were eye witnesses who were very crucial to the prosecution case as they were better placed to describe how they witnessed the incident but the prosecution chose not to produce them to testify. She argued further that, although no particular

number of witnesses is required to prove a case, she urged us to draw an adverse inference on such failure to call them to testify in court.

On his part, Mr. Mathew who represented the second appellant also joined hands with his fellow advocate that, the prosecution did not produce key material witnesses to testify. He argued that Said Ndonde who allegedly mentioned the second appellant as reflected at page 161 of the record of appeal was not produced to testify which had adverse effect on the prosecution case.

In reply, Ms. Mwenda was fairly brief, she admittedly argued that the prosecution did not call witnesses other than those who were lined up at the trial to testify as they did not see the need to do so. She however, argued that this did not affect the weight of evidence that led to the conviction of the appellants.

We have anxiously considered the rival submissions by the learned counsel and at the outset, we wish to reaffirm the elementary principle of law under section 143 of the EA that there is no particular number of witnesses required to prove a fact as it was aptly discussed in **Yohana Msigwa v. Republic** [1990] TLR 148, **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 and **Godfrey Gabinus**

@Ndimbo and Two Others v. Republic, Criminal Appeal No. 273 (both unreported).

It is commonplace that, the truth is not discovered by a majority of votes. One solitary credible witness can establish a case beyond reasonable doubt provided that the court finds the witness to be cogent and credible and the case in point is the victim of sexual offence as laid down in the celebrated case of **Selemani Makumba v Republic** [2006] TLR 379.

We think, with respect, that, the argument by the appellants' advocates that the respondent failed to produce key material witnesses to testify at the trial affected the weight of the prosecution's case is unfounded for, and the urge to us to draw an adverse inference although attractive, in our considered view, it is inexplicable for the reasons we have advanced above. This complaint therefore does not merit.

Next, we will examine the issue of failure by the prosecution to produce the items that were used to commit the crime and in particular the Carina. In support of this argument, Ms. Kihampa contended that, the prosecution was in the position to produce in court the Carina which was allegedly used in the commission of the crime because this was in the custody of the police according to the evidence on record. She did not though implore upon us as

to what was the effect of that nor did she cite any authority to support her proposition.

In reply, Ms. Mwenda admittedly submitted that, the respondent did not produce the motor vehicle in court. Despite this admission, Ms. Mwenda argued that the remaining evidence is sufficient to sustain conviction. She did not expound further on this nor did she cite any authority either.

In our view, we think, we should not belabor much on this issue. Admittedly, the prosecution did not tender the car in question despite the fact that there was evidence on record that the car was in the custody of the police at Chang'ombe Police Station. It defies logic and common sense as to why did the prosecution elect not to produce in evidence the car which was alleged to be used by the attackers more in particular considering some descriptions offered by the prosecution's witnesses such as tinted window glasses. In our considered opinion, production of the car in evidence before the court would have landed more credence to the prosecution's evidence. This failure raises more questions than answers as to why the prosecution did not find the need to tender the carina. We therefore find merit in this complaint.

Finally, is the complaint that the prosecution case was not proved to the required standard that is beyond any reasonable doubt. In support of

this proposition, Mr. Mathew contended that this case being in relation to a capital offence there was no direct evidence that connected the second appellant with the crime. To wind up, he prayed that the appeal be allowed.

On his part, Mr. Tesha, also joined hands with his fellow advocates that, the prosecution did not prove the case to the hilt. He argued further that, there was no proof as to who exactly shot the deceased between those attackers who were in the carina and the ones who were in the Noah behind the carina. Curiously, Mr. Tesha attacked exhibit D3 at pages 153, 154 and 155 of the record of appeal, the statement of PW7 made at the police station. He argued that, what stood out most vividly from that statement was the contradictions and inconsistences of the prosecution evidence as exhibit D3 was recorded on 20th February, 2013 at 10:15 am but accounting for the events which were yet to happen and implicating the appellants to the instant case. In particular he referred this Court to where PW7 was narrating to the events of 5th March, 2013, 28th April, 2013 as well as 8th June, 2013. For those reasons he reiterated what his fellow advocates had submitted by praying that the appeal be allowed.

In reply, Ms. Mwenda forcefully argued that the case against the appellants was proved beyond any reasonable doubt bearing in mind that the appellants are the ones who committed the offence, they used lethal

weapon and shot the deceased in the head which demonstrates malice on their part. She contended that this was clear from the evidence on record as presented by the witnesses who testified before the court as well as the documentary exhibits including the cautioned statements of the second and third appellants. She, therefore, implored upon us to dismiss the appeal for being devoid of any merit.

In a brief rejoinder, Mr. Tesha submitted that the cautioned statements despite being irregularly admitted they were retracted and repudiated by the appellants and there was no evidence to corroborate them.

Upon a thorough consideration of the rival submissions by both learned counsel and upon considering the evidence on record and in particular the infractions as indicated above, we are inclined to agree with the learned advocates for the appellants that the remaining evidence on record is so skeletal to warrant conviction of the appellants. We are saying so bearing in mind that the evidence of PW3 and PW4 have been expunged from the record and PW2 did not properly identify the appellants. His evidence on identification as indicated earlier on is not watertight free from any possibility of mistaken identity. Furthermore, exhibit P2 and exhibit P4 have been expunged from the record and even if we assume, for the sake of arguments, that the cautioned statements were not expunged from the record, the same

were repudiated and retracted and there is no any evidence on record to corroborate them. Furthermore, exhibit P4 neither implicated the third appellant himself nor any of his co-appellants.

For these reasons, we think the guilty of the appellants was not proved beyond reasonable doubt. We allow the appeal, quash the convictions and set aside the sentences of death and direct the appellants' immediate release from custody forthwith unless held for other lawful cause.

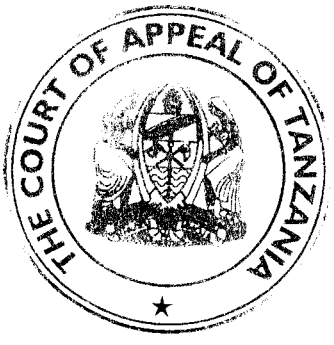
DATED at **DAR ES SALAAM** this 10th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered on 16th day of September, 2021 in presence of appellants linked via video conference at Ukonga prison, Mr. Revocatus Thadeo Mathew, counsel for the 2nd appellant and also holding brief of Ms. Blandina Kihampa for the 1st appellant and Mr. Richard Tesha for the 3rd appellant and Ms. Nuru Manja, learned State Attorney for the respondent/republic is hereby certified as true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL