IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 444 OF 2017

MASANJA LUPILYA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Makani, J.)

dated the 30th day of August, 2017
in
Criminal Session Case No. 42 of 2015

JUDGMENT OF THE COURT

10th August & 17th September, 2021

MASHAKA, J.A.:

Being dissatisfied with the decision of the High Court, Shinyanga Registry in Criminal Session Case No. 42 of 2015, the appellant MASANJA LUPILYA appeals against the conviction and death sentence delivered on the 30th August 2017.

The appellant was convicted of the murder of Hollo d/o Mange his grandmother, on the 9th day of October, 2011 at or about 02:00 hours at Nyanza village in Meatu District within the region of Shinyanga. The

conviction against him was substantially based on the evidence of a single witness. During the defence case, only the appellant testified and did not tender any exhibits.

The prosecution case arose from the following background; Kulabya Lupilya (PW1) was living with her aunt Hollo Mange, the deceased. On 9th day of October, 2011, two people entered the room where PW1 was sleeping with her aunt at about 3:00hrs; one was holding a torch and the other held a gun. It is alleged that in the room, the other assailant shone the torch and the appellant shot the deceased. As the deceased was restless and struggling for her life on the bed, it is alleged that the appellant used an axe, hit her on the head and the axe remained stuck therein due to a deep cut. While all this was going on, the other assailant was holding the torch. PW1 probed the appellant as to why he killed her grandmother he told her to keep quiet and said, "*hayakuhusu na usimwambie mtu*". That the whole incident took about ten minutes and because of the gunshot, PW1's hearing was impaired. PW1 emphasized that the torch held by the other assailant was big resembling those used by hunters, its light was bright and helped her to identify one of the assailants to be Masanja Lupilya, the appellant with whom they were living together.

It was further alleged that after the gruesome act by the appellant, he asked for money which he took from under the mattress after throwing off the deceased from it.

After the mission was accomplished, the attackers left and PW1 alleged to have identified the appellant outside with the aid of moon light. She added that, the appellant was not a stranger and he used to live in their house. Subsequently an alarm was raised and people gathered.

Mr. Joseph Magumba Ng'home (PW2), the Village Executive Officer (VEO) of Nyanza village arrived at the scene of crime the next day at 5:00 hours in the morning, found people gathered, entered the house and saw the deceased body swollen, with injuries on the stomach and an axe was protruding from her head. PW2 called the Police and the Ward Executive Officer (WEO). The police officer (PW3) and a doctor arrived around 14:00 hours at the scene of crime and the deceased's body was examined. Those interviewed were people gathered at the scene and a sketch map was drawn by PW3. Under the instructions of the WEO, PW2 arrested the appellant based on information received from PW1 on what actually took place. Upon the information, the appellant was charged with the murder of the deceased.

In his defence, the appellant raised the defence of *alibi* that on the fateful date, he was at his other home at Mwandoya. That upon receiving information that his grandmother was killed; he took a motorcycle and went to his grandmother's place. He denied to have grudges or misunderstandings with the deceased.

The trial court convicted the appellant relying on the visual and voice identification made by the single witness (PW1). It was decided by the trial court that the contradiction of the evidence between PW1 and PW2 raised by the defence on the position of the axe found on the head of deceased whether right or left, was minor taking into account that the prosecution witnesses testified after a long lapse of time since the incident happened. On the defence of *alibi*, the trial court did not consider it because the appellant failed to file a notice on time as it was filed on the day the appellant commenced his defence case. Dissatisfied, the appellant is protesting his innocence and has lodged this appeal comprised of eight grounds of appeal, reproduced with minor corrections as follows:

1. *That, corroboration of evidence of PW2 and PW3 was suspect and weak to warrant a conviction of the appellant basing on visual and voice identification of PW1 Kulabya Lupilya.*

2. *That, the evidence of misunderstanding that the appellant stole the deceased cows and sold the land was not supported by any other independent witness including PW2 VEO.*
3. *That PW1 and PW2 failed to demonstrate or to explain vividly as between the appellant and unknown guy who had a torch and gun.*
4. *That, the trial judge erred in law and fact for failure to consider section 194(4) of the CPA in resolving the issue of alibi made by the appellant.*
5. *That the evidence of PW2 and PW3 was not straight regarding an axe which was on the head of the deceased, as the said axe was not tendered in court as exhibit.*
6. *That the trial judge grossly and incurably erred both in law and fact to convict the appellant relying on weak evidence of PW1 and PW3 who failed to prove that HELLO (sic) D/O MANGE was murdered by the appellant with malice aforethought.*
7. *That the exhibits tendered by the prosecution together with the evidence adduced by PW1, PW2 and PW3 were not strong enough to warrant a conviction.*
8. *That there was no cogent evidence from the prosecution to prove the case beyond reasonable doubt.*

At the hearing of the appeal, the appellant was present and represented by Mr. Frank Samwel, learned counsel, whereas the respondent Republic had the services of Ms. Edith Tuka assisted by Ms.

Mercy Ngowi, both learned State Attorneys. When addressing the Court, learned Counsel for the appellant prayed to abandon grounds three and six and argue jointly grounds seven and eight. We marked grounds three and six withdrawn.

Arguing ground one, that the testimony of PW2 and PW3 is hearsay cannot corroborate the evidence of PW1 as they were told by PW1 about the killing incident. Mr. Samwel submitted that, since there were other people at the deceased's home, like Ramadhani Mohamed, guests and a neighbour named Bulugu, they should have been called as witnesses to corroborate the evidence of PW1. On the light of torch shone on the face of PW1, the learned counsel argued that the circumstances are doubtful for if the torch was held by the appellant, the light from it had a blinding effect on PW1 so she could not identify the appellant. That apart, the case of **Francisco Daudi and Two Others vs The Republic**, Criminal Appeal No. 430 of 2017 (unreported), was cited to us where the Court held that a single witness identification under unfavorable conditions calls for corroborating evidence. Thus, it was argued, that hearsay evidence of PW2 and PW3 cannot corroborate the evidence of PW1, who claimed to have identified the appellant.

In reply, learned State Attorney did not support the appeal. On this first ground, she argued that the conviction was proper basing on visual and voice identification of a single witness, who testified to have been aided by the intense torch and moon light and properly identified the appellant who shot the deceased and struck her head with an axe. She added that, the reliability of PW1's account is cemented by her mentioning the appellant immediately after the incident. It was also argued that, as a rule of practice corroboration is required of the evidence of a single witness made under unfavorable conditions but it does not preclude reliance on such witness's evidence if the court is fully satisfied that the witness is telling the truth. To bolster the proposition, she referred us to the case of **Hassan Juma Kanenyera and Others vs Republic** [1992] TLR 100. On the issue of intensity of light which enabled PW1 to identify the appellant, the learned State Attorney referred us to the conditions set in the case of **Waziri Amani vs Republic** [1980] TLR 250. That the intensity of the torch light was stated by PW1, who knew the appellant as the son of her brother and saw him striking the deceased. It was also contended that, PW1 observed the time taken to identify the appellant, interacted with him at the scene of crime and mentioned him immediately after the incident.

On the other people mentioned who were not called to testify, learned State Attorney contended that **PW1** had not seen Bulugu the neighbour after the burial. In relation to the other person namely Ramadhani, the learned State Attorney maintained that though he was in the same house, he was not a crucial witness as he was not in the room when the killing incident occurred.

In rejoinder, the learned counsel for the appellant maintained that the intensity of the torch light was shone on PW1 hence it was not possible for her to identify the assailants bearing in mind the circumstance, hence corroboration was required, which the prosecution failed to provide.

The main issue before us is whether the prosecution proved their case beyond reasonable doubt. It is not disputed that Hollo Mange died on the 9th October 2011 by a gun shot in her stomach and a cut wound on her head by an axe, which lead to excessive bleeding. PW1 is the only witness who saw what transpired on the fateful night and she claimed to have identified the appellant by the light of a hunting torch, moon light and voice.

The follow up question is whether the appellant was properly identified. It is settled law that, courts should only act on visual identification or evidence of recognition after eliminating all the possibilities of mistaken identity and the potential of miscarriage of justice. This caution is borne out of the appreciation that the evidence of visual identification is of the weakest kind, invariably the most unreliable and thus before it is acted upon as a basis of conviction, it must be watertight. See: **Waziri Amani vs Republic** (*supra*).

Certainly, every witness is entitled to credence and must be believed and his/her testimony accepted unless there are good and cogent reasons for not believing, see **Goodluck Kyando vs Republic** [2006] TLR 363. The testimony of a witness will always be that it is true unless the veracity of the witness has been assailed or it has been established or has given fundamentally contradictory or improbable evidence. However, there are other ways in which the credibility can be assessed by the appellate court as we held in **Shabani Daudi vs Republic**, Criminal Appeal No. 28 of 2001 (unreported), that: -

> *"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the*

coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."

The trial court had reasons to believe PW1 was a credible witness. However, for the reason which we will demonstrate shortly, there are doubts in her testimony. We must determine whether the visual identification or evidence of recognition by PW1 was made under the conditions that were conducive for positive and unmistaken identification and/or recognition of the appellant. To begin with the visual identification, the trial court was firm that the appellant was positively identified by PW1. Going back to the evidence at page 37 of the record, PW1 stated that,

> *"... I was sleeping with mother Hollo Mange. And two people entered; one of them had a torch and I could identify Masanja Lupilya I know him (she points to the accused) I could identify him because of the light of the torch and he used to lived (sic) in our house..."*

The evidence on record suggests that, the appellant was not a stranger and was known to PW1, as they were relatives. PW1 used to live with the appellant in the same house. This was akin to identification by recognition. Although such identification may be more reliable, courts must

be cautious to act on it as we emphasized in the case of **Hamis Hussein & Others vs Republic**, Criminal Appeal No. 86 of 2009 (unreported): -

> *"We wish to stress that even in recognition cases when such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friend are often made."*

Taking into account the above position and the evidence of PW1 that the appellant was not a stranger to her, the issue of intensity and source of light is of paramount importance. At page 40 of the record, PW1 contended that: -

> *"The light from the torch enabled me to identify Masanja. The torch was being held by Masanja and the torch was big and the lighting was so big..."*

From the above excerpt, there was enough light in the room though the size of the room was not explained, as it is a principle that the bigger the room the lesser the intensity and vice versa. Also, no evidence was led

on the intensity of the moon light which aided PW1 to identify the appellant as they left. See: **Oscar Mkondya & Others vs DPP,** Criminal Appeal No. 505 of 2017 (unreported).

Further it was stated that, the appellant was the one who held the torch shone to PW1 and it is common sense that in the circumstances it was the appellant who was better placed to see the deceased and PW1. This was emphasized in the case of **Michael Godwin and Another vs Republic,** Criminal Appeal No. 66 of 2002, where we held;

> *"It is common knowledge that It is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly."*

In the premises, PW1 could not easily identify the appellant as alleged for the torch light dazzled her and that apart, the person behind the torch light cannot be easily identified. This proves that the appellant was not properly identified and recognition cannot be trouble free considering the unfavorable surrounding. Thus, the alleged identification by PW1 did not eliminate the possibility of mistaken identity of the

appellant. Moreover, even mistakes in recognition of close relatives and friends are often made. See, **Waziri Amani vs Republic** (*supra*); **Juma Magori @ Patrick and Four Others vs Republic,** Criminal Appeal No. 328 of 2014(unreported).

Going to the third complaint is that the evidence of PW1 that there were misunderstandings between the appellant and the deceased, that he stole her cows and sold her land was not supported by any other independent witness. The prosecution case was able to parade only three witnesses, as mentioned earlier PW1, PW2 and PW3. PW1 raised the motive for the murder of the deceased was due to: *"My mother was given cows and land on behalf of his son the father of the accused....... So he started selling the cows of the deceased, my mother. In the end he decided to kill the deceased so that he could take over all the properties of the deceased".* In re-examination PW1 stated that Masanja had no misunderstandings but had a problem with ownership of the cows and properties. So, what is the truth? This testimony was not corroborated by any of the prosecution witnesses. PW2 being the VEO stated there was no record of any dispute between the appellant and the deceased reported in his office.

Another inconsistency which has shaken the veracity of PW1 concerns the recognition and audio identification of the appellant. That she asked the appellant why he killed her mother and the appellant replied '*hayakuhusu na tena usimwambie mtu kabisa*'. In her testimony, PW1 asked the appellant after he shot and hacked her mother on the head with an axe. At page 38 of the record PW1 stated that "*the gun shot made me not to hear well. I cannot hear well now. Masanja, the accused was the one who shoot my mother and also cut her by the axe.*" Even the learned trial Judge observed at page 43 of the record that PW1 had a problem of hearing well hence repetition of questions for purposes of clarification. Also, PW1 testified that "*I was silent because I feared that I would be killed.*" How do we reconcile the different versions of the testimony of PW1? This raises doubt as to whether she could hear well after the gun shot which killed her mother whom she was sleeping with on the same bed. PW1 was the single witness to testify while other material witnesses listed to be called namely, Bulugu s/o Lupilya @ Mboje and Ramadhani s/o Mohamed both of Nyanza failed to testify to corroborate the testimony of PW1. It is alleged that Bulugu was grazed by a bullet shot by one of the

assailants. If these witnesses had testified, it would have corroborated PW1's account and strengthen the prosecution case.

In the absence of any evidence that the witnesses were not reachable or could not be found, the prosecution was duty bound to call them. Failure to call such material witnesses entitles the Court to draw inference adverse to the prosecution. See, **Aziz Abdallah vs Republic** [1991] TLR 71.

The fourth complaint is that, the learned High Court judge erred in law and fact for failure to comply with section 194(4) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA) in resolving the issue of *alibi* made by the appellant. Section 194 (4) of the CPA stipulates that: -

> *"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case".*

The law is settled that a notice by the appellant was to be given to the trial court and the prosecution before hearing of the case. In this appeal, the appellant raised the notice under section 194 (5) of the CPA on the 01 June, 2017, as reflected at page 84 of the record that during the commission of the offence at Nyanza village, he was at his home in

Mwandoya with his wife. Where the person intending to rely on the defence of *alibi* fails to furnish the notice under section 194 (4) of the CPA, he is required under sub section (5) to furnish the prosecution with the particulars of *alibi* at any time before the close of prosecution case. According to the record, the case commenced hearing on the 01st June, 2017 when the said notice was filed. However, it is our finding that the trial court was at fault for failure to consider the defence of *alibi* raised by the appellant. For example, PW1 stated that the appellant was not at home the whole day, he was at Mwandoya staying with a woman and he came in the morning around 6:00 or 7:00 am. The trial court failed to consider that the defence of *alibi* introduced reasonable doubt in the prosecution case that the appellant was in Mwandoya when the murder of Hollo Mange was committed in Nyanza village. As this was flanked by the evidence of PW1 and PW2, the appellant had discharged the onus and had no further duty to prove the truthfulness of his *aiibi.* The burden was upon the prosecution to disprove it. See, **Chacha Pesa Mwikwabe vs Republic**, Criminal Appeal No. 254 of 2010 (unreported). Thus, we find merit in this ground.

Approaching the fifth ground, the appellant faulted the trial court in relying on the evidence of PW2 and PW3 regarding an axe found on the

head of the deceased, which was not tendered in court as exhibit. We find that though the axe was not tendered in evidence, it is not disputed that the deceased was cut on the head by a sharp instrument as shown in the post mortem report (exhibit P1) which is conclusive proof that the deceased died of unnatural cause. Hence, this ground fails.

Grounds seven and eight concern complaint that the prosecution failed to prove the case beyond reasonable doubt in that the evidence adduced by the prosecution was not strong enough to warrant a conviction. On the visual identification and voice recognition by PW1, the sole witness whose testimony is bursting on the seams with inconsistencies as elucidated above. We find that the trial court should not have acted on the evidence of visual identification unless all possibilities of mistaken identity were eliminated and the evidence found to be absolutely watertight. See; **Waziri Amani vs Republic** (*supra*).

Having pointed the doubts shrouding the prosecution evidence, we are satisfied that the appellant was not properly identified and the case against the appellant was not proved to the hilt. Thus, the appeal is meritorious.

We allow the appeal, quash the conviction and set aside the sentence; and order the immediate release of the appellant from custody unless if he is held for another lawful cause.

DATED at **DAR ES SALAAM** this 9th day of September, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of September, 2021 in the presence of the Appellant in person linked via video conference at Shinyanga prison and Mr. Enosh Kigoryo, State Attorney linked via video conference at Shinyanga High Court is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL