IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI., J.A. And MWAMPASHI., J.A.)

CRIMINAL APPEAL NO. 566 OF 2019

HEKIMA MADAWA MBUNDA.....1ST APPELLANT
ONESMO KUMBURU.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

[Appeal from decision of the Resident Magistrate's Court of Ruvuma at Songea with Extended Jurisdiction]

[Malewo PRM,(Ext. Juris)]

dated the 22nd day of November, 2019

in

RM. Criminal Session No. 10 of 2019

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JUDGMENT OF THE COURT

14th & 24th March, 2022

LILA, J.A.:

The appellants in this matter, Hekima Madawa Mbunda and Onesmo Kumburu, (henceforth the 1st and 2nd appellant, respectively), are faulting both the conviction and the death sentence meted out by the learned Principal Resident Magistrate with Extended Jurisdiction (Malewo, PRM) who had the conduct of the case upon the same being transferred to him under section 256A of the Criminal Procedure Act, Cap. 20 (R. E. 2002) (now R. E. 2019) (the CPA), in Criminal Sessions

Case No. 10 of 2019 in which they were charged of the offence of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002 (Now R. E. 2019) (the Penal Code).

The allegation leveled against the appellants was to the effect that they murdered one John Kapinga (the deceased) on 6/1/2017 at uhuru Village within Nyasa District in Ruvuma Region.

To substantiate the allegation during trial, four witnesses were marshaled by the prosecution and two exhibits were tendered namely, report on postmortem examination (P1) and the PF3 (P2). For the defence, three witnesses testified, the appellants inclusive.

The factual background leading to this appeal seems not be complicated. It was common ground that the appellants, the deceased and one Suzana were residents of Mipotopoto village within Nyasa District. Suzana Mbunda (PW1) and the 1st appellant were married and lived together from the year 2013 to 2016 when they parted ways. It is not clear whether they divorced through court or not. Following that, PW1 went to live with her grandmother at Mkongonywita village which is not too far from Uhuru village.

According to PW1, while living with her grandmother, she developed an affair with the deceased such that the latter would spend a night with PW1 in her grandfather's house. It is not open whether they officially married but she referred to the deceased as her husband. Came the fateful night, when the two had retired to bed in a room with half covered window, PW1, who was yet to get asleep due to pains she experienced from an aching finger, saw a flash light from a torch and she awoke the deceased. In her bid to know who was flashing the torch, she rose and held a torch too, lit it and flashed through the opening at the window. She claimed to have been able to see and identify the appellants who were about two paces. She claimed that she was able to identify them because they were not strangers to her as she had stayed with them in the immediate past; the 1st appellant as her husband and the 2nd appellant as the appellant's brother. She further told the trial court that the 1st appellant held a "nyengo" and also heard his voice when he entered in the room after breaking the door and said "*today I am finishing you together with your rat*". Then, she said, the appellant attacked the deceased with the "nyengo" (a billhook) on his head. She got out and awoke her grandmother who, in turn awoke her grandfather one William Mbunda (PW2). In the meantime, the deceased got out of

the house and ran in the direction of the valley while being chased by the appellants. Upon arrival, PW2 and PW1 mounted a search for the appellants and the deceased alas they found the deceased lying helplessly near a stalk of tree and they took him back home. She further claimed that PW2 left her alone at home and the appellant later surfaced, held her by the neck and upon struggling she managed to escape and ran but was chased by the 1st appellant who then cut her on the foot with a "nyengo". She was later taken back home by her grandfather and before she was later taken to Liparamba Health Centre for treatment, the deceased passed away.

When PW1 was cross-examined by Mr. Mpangala, learned advocate, who defended the 1st appellant, she stated that the appellant used to follow her and used to beat her sometimes. As for the attire the 1st appellant did wear, she said he was wearing a black t-shirt and had slippers. And, in respect of the source and extent of light, she stated that, we quote: -

> *"It was dark. There was weak light and it was not able to assist to identify somebody...when the 1st accused entered inside the light was shining as I was having a torch..."*

PW1 further told the trial court, upon being cross-examined by Mr. Nyoni learned advocate who defended the 2nd appellant, that she could not remember how the 2nd appellant dressed. Responding to one of the assessor's questions, she said the torch was shining very well.

On his part, PW2 told the trial court that he was told by PW1 that the deceased was being killed by the 1st appellant who had entered in their house, attacked the deceased and chased him down the hill. That, upon making a chase, he found the deceased bleeding from his mouth and head near a trunk of tree. That, assisted by PW1 they took the deceased home where he left PW1 with the deceased. But on his return, he found PW1 unable to stand and she told him that the 1st appellant appeared again and cut her leg.

When PW2 was cross-examined by Mr. Mpangala on the issue of light, he stated that, I quote: -

> *"Moonlight was weak. It was dark. I used torch...I saw a person running. I did not manage to identify him. Suzana Mbunda had a torch also."*

PW2 insisted, when cross- examined by Mr. Nyoni that: -

"I used torch. Moon light was very weak. It was not easy to identify a person easily. ...The incident occurred at 10:00 pm".

The deceased's cause of death was established to have been caused by brain damage and severe bleeding due to injury of the occipital bone of the head by one Romanus Romanus Komba (PW3), Assistant Medical Officer, who conducted an autopsy and posted the findings on a Post Mortem Report which he tendered and was admitted as exhibit P1. He also stated that he attended PW1 and posted the findings on a PF3 (exhibit P2).

A Police Officer One G 2747 D/Constable Elia (PW4) who investigated the case, told the trial court that he visited the scene of crime whereat he met PW2 who told him that he was told by PW1 that it was the appellants who attacked and caused the deceased's death. He drew a sketch map of the scene of crime and went to meet PW1 at Liparamba hospital who told them that the 1st appellant injured her when he was with the 2nd appellant. He further stated that they took the tree trunk and search was conducted on 7/1/2017 in the 1st appellant's house where a "nyengo" with human blood stains was found. He also stated that PW2 told him that before the deceased passed away he

heard him saying "*Hekima unaniua*". Both the certificate of seizure and the tree trunk were not, however, tendered in court as exhibit for the reason that they were not important. Based on the information he collected, the police arrested the appellants and charged them.

Both appellants, apart from admitting that they knew PW1 as the former wife of the 1st appellant, raised a defence of *alibi*. The 1st appellant (DW1) alleged that on the fateful date he was at Turo in Mozambique where he was doing business of selling maize floor and fish. That he left on 5/1/2017 and returned on 27/1/2017 but he had no business documents and was arrested at Mitomoni village before he arrived at his home. He dismissed the evidence by PW1 and PW3 as being sheer lies and that PW2 said he did not see him.

On his part, the 2nd appellant (DW2) claimed that on 6/1/2017 he was at his home at Mipotopoto with his wife one Emina Misheki Pili (DW3) the whole day and on 7/1/20117 he was at one Kumburu's farm who is the young brother of his father where he was arrested by five persons and was asked the whereabouts of the 1st appellants. That he told them that he had left to Turo two days past to do his business. He said he was then informed of the death of the deceased and that the 1st

appellant was a suspect and he was to assist the police to trace DW1. He was then arrested and taken to Tingi Police Station and charged together with the 1st appellant.

To substantiate his allegation, DW2 summoned his wife (DW3) who told the trial court that she was with her husband (DW2) on 6/1/2017 and he left to Kumburu's farm on 7/1/2017 and after that he never returned home only to, later, be told by one Julius that her husband was arrested so as to assist the police in looking for the 1st appellant.

The learned trial Magistrate was, at the conclusion of the trial, convinced that the prosecution had proved the charge beyond reasonable doubt and he proceeded to convict the appellants.

In convicting the appellants, the learned trial Principal Resident Magistrate was convinced that the appellants were properly recognized by PW1 on the material night. He relied on the evidence by PW1 that she saw and recognized the appellants using torch light when she flashed it through the window and, in particular the 1st appellant, when he heard his voice and later when he held her by the neck and cut her with a "nyengo" on her foot. Based on that evidence by PW1, the

learned Principal Resident Magistrate was satisfied that the factors to be considered as laid down in the often-cited case of **Waziri Amani v. R** [1980] TLR 250 were all met as well as the source and extent of light was sufficiently explained as was emphasized in the case of **Raymond Francis v. R** [1994] TLR 100 and **August Mahiyo v. R** [1993] TLR 117.

The learned Principle Resident Magistrate also reasoned that PW1 named the appellants to PW2 as being the ones who attacked the deceased. PW2 was the first person to turn up at the scene of crime. For him, that was an assurance of her credibility as was stated by the Court in the case of **Swalehe Kalonga and Another v. Republic**, Criminal Appeal No. 45 of 2002 which was referred in **Minani Evarist v. Republic**, Criminal Appeal No. 124 of 2007 (both unreported). He also made reference to the Court's decisions in **Marwa Wangiti and Another v. Republic** [2002] TLR 39 and **Jaribu Abdallah v. Republic** [2003] TLR 271 on the point that the ability of a witness to name the offender at the earliest possible moment is an assurance of his reliability.

Regarding whether the killing was with malice aforethought, the learned Principal Resident Magistrate adjudged the appellants' conducts of asserting that they were set to finish PW1 and her rat and chasing the deceased when he got out of the house and attempted to run away as well as cutting PW1 with the "nyengo" exhibited their intention to execute their promise of eliminating PW1 and the deceased.

In the light of the prosecution evidence, the appellants' defence evidence of alibi was brushed aside. The 1st appellant's assertion was found wanting for failure to produce passport and other business documents to substantiate his allegation that he went to Turo Mozambique to do business while the 2nd appellant's assertion that he was with his wife was held not to be able to prevent him from participating in the commission of the offence of murder.

He accordingly convicted them with murder and sentenced each of them as above stated. Dissatisfied, the appellants preferred this appeal.

The appellants lodged separate memoranda of appeal. The 1st appellant advanced eight (8) grounds of appeal while the 2nd appellant preferred seven (7) grounds of appeal which were followed by a joint memorandum of appeal comprising five (5) grounds of appeal. Common

to all is a ground challenging the finding of the trial court that they were recognized by PW1 at the scene of crime which, in both counsel's and the Court's views, is a decisive ground in this appeal.

In this appeal, the appellants were advocated for by Mr. Jally Willy Mongo, learned counsel while the respondent Republic was represented by Ms. Hellen Chuma, learned State Attorney.

The learned counsel were of a concurrent view that the appellants' convictions were grounded on both the visual identification evidence and identification by voice by PW1 at the scene of crime which they, however, contended were insufficient. They contended that as PW1 and the appellants were not strangers the kind of identification was identification by recognition which, like evidence of visual identification, the trial court is cautioned not to act on it unless it is satisfied that all chances of a mistaken identity are eliminated and the same is water tight. As for identification of the 2nd appellant, they were agreed that apart from PW1 claiming that she saw him when she flashed torch light through the opening in the window, nowhere else did he come to light and PW1 was clear that she was unable to tell the attire he wore hence suggesting that she did not recognize him. After all, Mr. Mongo added,

the 2nd appellant was not named to PW2 by PW1 when the former arrived at the scene. They were not hesitant, in respect of the 1st appellant, to also contend that, notwithstanding the allegation by PW1 that the 1st appellant later turned to her and held her by the neck and then cut her on her leg, as PW1 and PW2 were clear in their respective testimonies that the light was weak and actually it was dark such that it was difficult to identify a person, it cannot be said that she (PW1) was able to identify the 1st appellant. With such evidence, both counsel were of the view that there was no evidence upon which his conviction could be grounded.

Regarding identification of the 1st appellant by torch light, both counsel were of the view that given that it was dark as stated by PW1 and PW2 and failure by the two witnesses to explain the intensity of light from the torch they allegedly held and whether they flashed the same to the appellants during the incident, it was doubtful that PW1 could have managed to see and identify the 1st appellant. In substantiating his assertions on the need to tell the source and intensity of light, Mr. Mongo referred the Court to the decision in the case of **Ally Miraji Mkumbi v. Republic**, Criminal Appeal No. 311 of 2018 (unreported). He further contended that had PW1 seen and recognized

the appellants she would have told their features instead of simply stating that she identified them as she did. He referred the Court to the case of Ally Miraji v Republic (supra) and **Noel Gurth aka Bainth and Another v. Republic**, Criminal Appeal No. 339 of 2013 (unreported). On her part, Ms. Chuma added that as two torches were involved, it was not clear which one was used to light the area and she referred the Court to the decision in **Ngaru Joseph and Another v. Republic**, Criminal Appeal No. 172 of 2019 and **Michael Godwin and Another v. Republic**, Criminal Appeal No. 66 of 2002 (both unreported).

Voice identification of the 1st appellant was viewed as insufficient by both counsel on the ground that it is highly unreliable and is prone to being mistaken given the fact that the chances of imitating ones voice cannot be ruled out. The more so, they submitted that had PW1 been a witness of truth she would have revealed that to PW2, which is not the case.

In all, both counsel contended that the identification evidence by recognition of both appellants was wanting hence they beseeched the Court that ground, alone, sufficiently disposes the appeal hence no need to consider the remaining grounds. For that reason, they were inclined

to ask the Court to allow the appeal, quash their convictions and order their released from prison.

Like the learned counsel of the parties, upon examining the record of appeal, grounds of appeal and the concurrent arguments by the learned brains, we have no doubt that the trial court based its finding of guilty of both appellants on the evidence of identification by recognition. The key witness in this case is PW1 who told the trial court that she saw and identified the appellants at the scene of crime. The issue before us for determination is therefore whether the trial court erred in basing the appellants' convictions on identification evidence by recognition. It is trite law that in a case entirely depending on the evidence of visual identification of a single identifying witness a court can only act on it upon satisfying itself that the conditions for a proper and unmistaken identification are favourable such that they eliminate the chances of a mistaken identity. On this, we let the Court's apt words in the most cited case of **Waziri Amani v. Republic** (supra) tell it all. The relevant part states that:-

> *"... evidence of visual identification... 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."

In the present case PW1, the only identifying witness, said she identified the appellants simply because she was familiar to them having been married to the 1st appellant and also staying together with the 2nd appellant during the subsistence of her marriage. She saw them using torch light. No more evidence was elicited on the strength of the light from the torch in order to give the court an assurance that the witness actually saw and identified the appellant. Mere assertion by a witness that he identified the appellant is not enough. Faced with an akin situation in the case of **Richard Athanas v. Republic**, Criminal Appeal No. 115 of 2002 the Court expressed its dissatisfaction with the failure by the prosecutor to lead a witness on crucial issues relating to identification at night in these words: -

"...He could have asked the witness to explain what the source of the light was, how strong it was and whether the light [was] shone on the intruder in order to give the court an assurance that the witness actually saw and identified the intruder. Instead, the prosecutor did not ask the

witness any question in re-examination. With respect, it cannot be enough in evidence of identification during night time for a witness to simply say-

"I identified you. There was light"

In our instant case, PW1 simply said she identified the appellants. She did not go further to explain in details how she was able to do so. Much as it was not disputed that the appellants were not strangers yet that is no guarantee that there could be no chances of a mistaken identification. Cognizant of that possibility the Court has consistently held that even in identification by recognition chances of a mistaken identity still obtains. One such case is in **Maselo Mwita @ Masele and Another v. Republic**, Criminal Appeal No. 63 off 2005 where the Court was categorical that the principles in **Waziri Amani** case (supra) applies even in cases of recognition evidence and went further to state that: -

"Even recognizing witnesses often make mistakes or deliberately lie."

The above stance was reiterated by the Court in yet another case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported), where with lucidity, the court observed that: -

> *"Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

Courts are required to be cautious when dealing with the evidence of identification by a single witness as is the case herein when the conditions are unfavourable for a correct identification. In the case of **Abdalla Wendo and Another v. R** (1953) 20 EACA 166 at 168, it was stated that: -

> *"Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were lacking...* (Emphasis added).

It can be said at once that the present case was no exception. Well, PW1 knew well the appellants before the incident but it cannot be said that she was not prone to making a mistaken identity. There was an overriding need to describe the intensity of the light from the torch

that would have enabled her to correctly recognize the appellants hence lend assurance that the persons she saw that night were no other but the appellants. The doubt is even heavier bearing in mind that she had also led evidence that the light was weak and it was dark which evidence was fully supported by PW2.

To us and in accordance with the evidence by both PW1 and PW2, it seems clear that the conditions were unfavourable for a proper and unmistaken recognition. Both witnesses were forthcoming that it was dark and it was not possible to identify any person. Not surprising too, PW1 was unable to explain the 2nd appellant's attire. So, much as we acknowledge the principle that naming the culprit at the earliest opportunity adds credence to witness's evidence of identification, but for it to have value and weight it must be preceded by a proper and unmistaken identity of the person named and that, too, depends on the circumstances prevailing at the scene of crime being favourable for a proper and unmistaken identity. Where conditions are difficult, as is the case herein, naming a person as a suspect, is worthless in the eyes of the law. That said, notwithstanding the familiarity between PW1 and the appellants, the visual identification evidence by PW1 is doubtful hence not watertight.

We now briefly turn to consider the claim by PW1 that she identified the 1st appellant by voice because she stayed with him as her husband hence she knew his voice. Settled law as propounded by the Court in the case of **Mussa Maongezi @ Pilato v. Republic**, Criminal Appeal No. 263 of 2005 (unreported) is that such evidence is the weakest and most unreliable evidence which require great care to be taken before acting on it. (See **Nuhu Selemani v. Republic** [1984] 93, and **Stuart Erasto Yakobo v. Republic**, Criminal Appeal No. 202 of 2004 (unreported). The rationale for that is not hard to find. There is always a possibility that a person may imitate another's voice so as to disguise his identity as was rightly argued by the counsel of the parties. (See **Stuart Erasto Yakobo v. Republic (supra).** Familiarity with the voice in question is of essence before acting on it. (See **Kaganja Ally and Another v. Republic** [1980] TLR 270). In principle, therefore, being a close relative, staying together with someone for quite a sufficient time or hearing regularly someone talking may enable one be familiar with someone's voice. We would add that, it is also of essence that the identifying witness must have properly heard the suspect talking at the scene of crime. Strength of the voice and the duration the suspect had taken in talking.

Much as it is common ground that PW1 stayed with the appellants for about three years, we have no quarrel with the fact that she was familiar with the 1st appellant's voice. But, like in the case of **Mussa Maongezi @ Pilato v. Republic** (supra), the question is how strong was the 1st appellant's voice when he allegedly stated that "*today I am finishing you together with your rat*". Unfortunately, the record is silent. Bearing in mind that the statement was stated once, chances of PW1 confusing it with another person's voice or the appellant's voice being imitated cannot be ruled out. It was therefore unsafe to ground the 1st appellant's conviction on the voice identification. Otherwise, we are convinced that PW1 might have had named the 1st appellant out of suspicions based on the allegation that the 1st appellant used to follow and beat her. It is trite law that suspicion, however grave, is not a basis for a conviction in a criminal trial (See **MT. 60330 PTE Nassoro Mohamed Ally v. Republic**, Criminal Appeal No. 73 of 2002 (unreported).

The cumulative effect of our above findings is that there is no evidence placing the appellants at the scene of crime. Given the unfavourable conditions for identification, PW1's early naming of the appellants to PW2 carried no weight at all. The appellants ought to have

been given the benefit of doubt. Their convictions were therefore unjustified.

Our foregoing finding conclusively determines the appeal. Consideration of other grounds of appeal will not change the outcome of this appeal. Accordingly, we refrain from dwelling on them.

In fine, we allow the appeal, quash the appellants' convictions and set aside the sentences meted out by the trial court. We order the appellants to be released from prison forthwith if not incarcerated therein for any other lawful cause.

DATED at **IRINGA** this 23rd day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of Mr. Jally Willy Mongo, learned counsel for the appellant and Ms. Magreth Mahundi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL