IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 305 OF 2018

MAKONYO JOHN @ KIBUNA .....1ST APPELLANT

TURUKA MATIKO @ GASARYA .....2ND APPELLANT

MUHONI CHACHA @ NG'WEINA.....3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Ebrahim, J.)

dated the 16th day of March, 2018

in

Criminal Sessions Case No. 42 of 2014

.....

JUDGMENT OF THE COURT

25th April & 13th May 2022

GALEBA, J.A.:

Makonyo John @ Kibuna, Turuka Matiko @ Gasarya and Muhoni Chacha @ Ng'weina the first, second and the third appellants, respectively, were jointly charged of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002 now R.E. 2019] (the Penal Code).

According to the prosecution, on 29th June 2012 at Sirari, Sokoni area within Tarime District in Mara Region the trio invaded the house OF Mgesi Mtongori, (the deceased), robbed from him TZS. 1,000,000.00, cut him on the legs and before they left the scene of crime, one of them

shot him twice in the stomach. The injuries, inflicted on the legs and the two gunshots led to his death the next day on 30th June 2012.

At the trial, all the appellants raised a defence of *alibi* and denied to have been at the scene of crime during the material night. Nonetheless, at the end of it all, the High Court made a finding that the prosecution had proved the case beyond reasonable doubt against the three appellants. They were accordingly, convicted and sentenced to the capital punishment of suffering death by hanging, as required by section 197 of the Penal Code.

Aggrieved by both conviction and sentence, they appealed to this Court, raising a total of seven (7) grounds of appeal in a joint memorandum of appeal, to challenge the decision of the trial High Court. However, upon assignment of the dock briefs to learned advocates, Mr. Anthony Nasimire, learned advocate for the first appellant lodged a memorandum of appeal containing only two (2) grounds and Mr. Fidelis Cassian Mtewele, also learned advocate, for the third appellant, lodged a supplementary memorandum of appeal containing three (3) grounds. The two memoranda of appeal for the first and third appellants were filed on 14th April 2022. Ms. Rose Edward

Ndege, learned advocate, for the second appellant had, too, lodged a fresh memorandum of appeal for her client on 20th April, 2022.

At the hearing of this appeal on 25th April, 2022, the appellants were represented by the above advocates respectively, whereas the respondent Republic had the services of Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney assisted by Ms. Sabina Choghogwe learned State Attorney.

Prior to commencement of hearing, there were preliminary matters that we had to deal with. **First,** Mr. Nasimine made two prayers; **one**, he prayed to abandon all the grounds of appeal in the joint memorandum of appeal which had been lodged jointly by his client and two other appellants on 25th February 2020, in as far as such grounds relate to the first appellant; and **two**, he informed us that in arguing his client's appeal he would be guided by the memorandum of appeal he had lodged on 14th April, 2022, but even in that memorandum he abandoned the second ground of appeal and argued only the first. We allowed both prayers and took note that Mr. Nasimire would argue only the first ground of appeal in the memorandum of appeal which was lodged on 14th April, 2022.

Second, Ms. Ndege, rose to inform the Court that although she had lodged a fresh memorandum of appeal on behalf of the second appellant, it had however, come to her attention vide a letter of reference No. 209B/MZ/1/XX/334 dated 4th April 2022 from the Prison Officer incharge of Butimba Central Prison, to the Deputy Registrar of the High Court at Mwanza, indicating that his client passed away on 18th June 2020 at Bugando Hospital. In the circumstances, she moved the Court under rule 78(1) of the Tanzania Court of Appeal Rules, 2009, (the Rules), to mark the appeal of the second appellant as abated. After going through the letter from Butimba Central Prison and having perused burial certificate No. 59964 attached to that letter, we were satisfied that indeed the second appellant passed away on 18th June 2020. Accordingly, under rule 78(1) of the Rules we marked the appeal of the second appellant abated and discharged Ms. Ndege from the coram.

Third, Mr. Mtewele, like Mr. Nasimire abandoned all the grounds in the previous memorandum of appeal which had been lodged jointly by the appellants, and informed us that he would, instead address us on grounds two and three in the memorandum of appeal that he lodged on

14th April 2022 thereby abandoning the first ground in the fresh memorandum, which prayers we allowed.

With the above preliminary issues ironed out, this appeal is therefore predicated on three grounds, one raised by Mr. Nasimire for the first appellant and two by Mr. Mtewele for the third. The ground of appeal for the appellant is as follows:

> *"1. That the first appellant's conviction was against the weight of evidence on record.*
>
> *2. (Abandoned)"*

The grounds of appeal for the third appellant are as follows:

> *"1. (Abandoned)*
>
> *2. That the learned trial judge erred in law and fact for convicting the third appellant by relying on the evidence which is full of contradictions and therefore unreliable.*
>
> *3. The learned trial judge erred in law and fact for convicting the third appellant while the prosecution side failed to prove the case beyond reasonable doubt."*

Before getting to the real discussion on the above grounds, there is one point we wish to clarify. The point is that, this being the first

appellate court to the High Court and the complaints in the grounds being largely questioning the validity of the evidence upon which the appellants were convicted, the Court is entitled to re-evaluate and reconsider the evidence tendered at the trial court, and if appropriate, reach at a decision of its own independent of that of the High Court. In the case of **Hassan Mzee Mfaume v R,** [1981] T.L.R 167, the Court made the reappraising of evidence, a duty not only of the first appellate court but even the second, if the first did not perform that obligation. This Court stated, in the above case as follows:

> *"(i) A judge on first appeal should re appraise the evidence, an appeal is in effect a rehearing of the case.*
>
> *(ii) Where the first appellate court fails to re-evaluate the evidence and to consider the material issues involved on a subsequent appeal the court may re -evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

The above has since been the position of this Court, which has been restated on quite a number of occasions in cases coming before it. Those cases, just to mention but a few, include **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, **Leopold Mutembei v.**

Principal Assistant Registrar of Titles and Two Others, Civil Appeal No. 57 of 2017 and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported).

We will therefore, in that context, have to look at the prosecution evidence tendered at the trial and assess its sufficiency in discharging the burden of proof placed on the prosecution at a necessary standard, which is beyond reasonable doubt. With that point clarifying the mandate of the Court when hearing an appeal; and an indication of how wide we will have to go, we are now confident that we may proceed with our statutory endeavour to dispose of this appeal, starting with the submissions by Mr. Nasimire.

To amplify on the sole ground raised for the first appellant, before us, Mr. Nasimire submitted that the case was decided based on the evidence of visual identification by PW1 during the night, which according to him, the identification was prone to mistakes, because the circumstances for proper identification were very unfavourable. To be particular, he referred us to page 40 of the record of appeal line 14, where according to him, PW1 stated that their house had no light. He added that if the source of light was the torches of the assailants, still the identification was not credible, because according to PW1, light from

the torches was directed to her face, in which case, he implied, her vision must have naturally been seriously impaired. Mr. Nasimire also challenged PW1's evidence that she identified the appellants by using moonlight, whose intensity she did not explain.

Mr. Nasimire also questioned the unexplained delay in arresting the first appellant, who was arrested in August 2012 whereas the incident took place in June 2012.

He submitted also that the trial Judge was wrong to rely on the extra judicial statement of the first appellant (PE3) at page 198 of the record of appeal whereas, the same was denied at the trial. He stated that the evidence which itself needs corroboration for it to be reliable cannot be used to corroborate another piece of evidence which needs corroboration. He submitted that exhibit PE3 was not supposed to corroborate any evidence as it happened in this case.

Finally, Mr. Nasimire raised another point, although not relating to his ground of appeal, but which we think raises a crucial point of law, which we consider meritorious. He stated that after the High Court had taken the evidence of PW1 on 9th May 2017, trial court discovered that the statements of witnesses were not read over to the appellants during committal proceedings before the subordinate court. He submitted that

the record was remitted to the committing court with appropriate directions as per the law, which were carried out and a hearing resumed after a preliminary hearing was conducted. PW1's evidence was again taken, which means there were on record two sets of the evidence of PW1. Mr. Nasimire's concern was that the existence of the two records of PW1's evidence, one before nullification of the first committal order and the second after the fresh committal order, made it unclear if the trial of the appellants in the High Court was a credible trial. He did not propose any way forward to us other than indicating that he left the matter in the hands of the Court consider its merits or otherwise.

To conclude his submission, he prayed that based on his arguments, the first appellant's appeal ought to succeed with orders quashing his conviction and setting aside the sentence that was imposed upon him, with a natural consequence of unconditionally releasing him from prison. That conclusion, marked Mr. Nasimire's end of his submissions.

In reply to the above submissions, Ms. Fyeregete, first affirmed to us the position of the Republic of supporting the conviction of the appellants and the sentence imposed upon them. As for Mr. Nasimire's submission, she contended that identification by PW1 was sound and

very reliable because of the light that was in the room from three torches which were lit by the appellants whom she knew by names which she mentioned, and that she was even able to mention the details and colours of their outfits they wore during the material night. She added that the identification was by recognition in which case she was not identifying strangers to her, they were people she knew well before the date of the incident and she mentioned their names to F4393 Det/Copl Mustafa (PW2). In brief, her submission was that the visual identification by PW1, the eye witness was very credible. Finally, she referred us to the case of **Kenedy Ivan v. R,** Criminal Appeal No. 178 of 2007 (unreported).

As for the issue of the appellants delayed arrest, she submitted that PW2 testified that he made a follow up of the appellants but he could not arrest them immediately as per his evidence at page 48 of the record of appeal.

In respect of the issue of the evidence of PW1 being corroborated by extra judicial statements, she submitted that, the evidence of PW1 did not need any corroboration because it was very credible as observed by the trial Judge at page 200 of the record of appeal.

As regards the new issue raised by Mr. Nasimire, she remarked that it is true that the trial court nullified the first committal order, but it did not do anything to the evidence of PW1 which had been taken basing on the unlawful order. Other than that plain and linear observation, she virtually had no useful comment to assist us in resolving that issue.

To conclude her reply, Ms. Fyeregete stated that the appeal of the first appellant had no merit in view of her submissions and prayed that the same be dismissed.

To resolve the first appellant's ground of appeal, we will start with Mr. Nasimire's point which was not part of his appeal, but which we also considered to be of some legal significance. We have scrutinized the record of appeal and we agree with the trial Judge and with all counsel that the statements of witnesses containing the substance of the prosecution evidence were not read over and explained to the appellants before the subordinate court during committal proceedings as required by section 246 (2) of the Criminal Procedure Act [Cap 20 R.E. 2002, now 2019] (the CPA). We agree too, that on 9th May 2017, the trial court nullified, properly so in our view, the committal order and directed that the original record be remitted to the committing court for rectification

of the skipped step. That order was quickly complied with by the District Court and the record was brought back to the trial Judge for carrying out a preliminary hearing and continuation of trial. On 23rd May 2017, the trial Judge started afresh to record the evidence of PW1, after having conducted a preliminary hearing afresh on 10th May 2017. However, other than an observation at page 29 of the record of appeal that the omission by the court bellow would render the trial proceedings a nullity, is no clear order on record as regards the fate of the evidence of PW1 that was recorded on 8th and 9th May 2017 whose substance is contained from page 12 to page 24 of the record of appeal. It is the silence of the record on this aspect that worried Mr. Nasimire.

In our view, the High Court having found itself in such a situation, it would not have nullified the trial it had already conducted and ended there, it was duty bound to go ahead and vacate the evidence that had been recorded based on an illegal committal order. It could have done so under Section 264 of the CPA which provides that:

> *"264. The High Court may, subject to the provisions of this Act and any other written laws, regulate its own practice in the exercise of its criminal jurisdiction."*

The issue that confronts us at the moment, having stated as we have above, is that although the trial court would have vacated the evidence of PW1 contained from page 12 to page 24 of the record of appeal, the court however did not do it. In other words, should we, having discovered the anomaly, fold our hands and like a bystander, leave the offensive part of the proceedings intact on record? We do not think so, and we cannot do that. The evidence of PW1 that was recorded before the resumed hearing on 23rd May 2017 is superfluous and has nothing to do on record. In the circumstance, we invoke this Court's powers under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] and nullify the proceedings of the trial court appearing between pages 12 and 24 of the record of appeal, in a quest to maintain purity of the proceedings of the trial court and therefore of the record of appeal.

After getting that issue out of our way, we shall now proceed to determine the the merits or otherwise of the sole ground of appeal raised by Mr. Nasimire. The issue for our determination in that ground is whether the visual identification evidence of PW1 was sufficient to ground a conviction of the appellants for the offence charged or it fell short of it.

Before we get to the detailed analysis of the contested evidence, there is one general principle that has been developed over time by this Court for the sole purpose of guiding courts when dealing with issues of visual identification in circumstances unfavourable to human visibility. The principle may be restated generally thus; the evidence of visual identification is easily susceptible to error, it is of the weakest kind and accordingly, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight. See **Waziri Amani v. R**, [1980] T.L.R. 250, **Raymond Francis v. R,** [1994] T.L.R. 100, **Chalamanda Kauteme v. R,** [2012] T.L.R. 127 at 128. In criminal trials, to be able to hit the ceiling of that high level of strictness and achieve it, there are further criteria that have been developed.

To criteria to determine whether evidence is absolutely water tight a trial court need to consider the following points; **one**, the source of light; **two**, the evidence as to the intensity of the light; **three**, the proximity or the distance between the witness and the accused; **four**, whether or not the accused covered his or her face; **five**, whether or not previous to the crime, the witness knew the accused; **six,** if the witness knew the accused, for how long or how often has the witness

known the accused before the incident and; **seven**, the length of time spent during the observation of the crime at the scene. We must state however, that the list of the tests or criteria to establish that the evidence is water tight, is not exhaustive.

As stated above, these criteria have been developed by this Court. In the case of **Said Chaly Scania v. R,** Criminal Appeal No. 69 of 2005, (unreported), this Court among other observations, stated as follows:

> *"We think that where a witness is testifying about identifying another person in unfavorable 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 the view and also whether the person is familiar or a stranger."*

See also, **Issa Mgara Shuka v. R,** Criminal Appeal No. 37 of 2005, **Scapu John and Another v. R,** Criminal Appeal No. 197 of 2008 and **Paschal Christopher and Six Others v. R,** Criminal Appeal No.

106 of 2006 (all unreported). The tests set in the above cases, as intimated above, will assist us when we come to our discussion.

The other principle relevant to our discussion relates to reliance on the evidence of a single witness to enter conviction. The principle is that for such evidence to be relied upon, the evidence of that witness has got to be watertight. See this Court's decisions in the cases of **Ramadhani Said Omary v. R,** Criminal Appeal No. 497 of 2016, **Masero Mwita Maseke Another v. R,** Criminal Appeal No. 63 of 2005 (both unreported) and **Masoud Amlima v. R** [1989] T.L.R. 25.

The final principle in our view, relevant to the first appellant's ground of appeal, is that in law, the best test for the quality of evidence is based on the credibility of a witness as was held in **Yohanis Msigwa v. R,** [1990] T.L.R. 148, **Anangise Masendo Ng'wang'wa v. R,** [1993] T.L.R. 202 and **Richard Mtengule and Another v. R,** [1992] T.L.R. 5.

Acquainted, and within mind the above principles as our tools in resolving the only appellant's ground of appeal, we are now in position to determine whether the evidence of PW1, being a testimony on an incident that took place during the night and she being the only eye witness, was as credible as Ms. Fyeregete submitted or it was as

unreliable as Mr. Nasimire implored us to hold. To do so to the fullest, we propose to start with the relevant substance of the evidence of PW1. From page 40 to 41 of the record of appeal. PW1 is recorded as having testified as follows:

> *"They came to our room and the room of the children. They asked us to open...My husband pulled the coach to the door to prevent them from opening. ...They first broke the door to the living room. They started breaking the bedroom door. They were firing guns and we screamed and they got into the room. In the room they started attacking Mgesi with machetes. He fell down. I was under the bed and Makonyo took me from under the bed. When Mgesi was down, they asked for money. I took Tshs. 300,000/= and gave them...I gave money to Makonyo who gave it to Muhoni...They said it was not enough. Mgesi took Tshs. 700,000/= from his pocket and gave it to them. They continued to search in the room looking for money. Muhoni searched on the bed, when he did not get the money, he came back and gunned Mgesi. When they came in, they had torches. They were lighting everywhere. When they took me from under the bed, he lightened me and I saw him. Again, I saw Mukonyi when he lighted Muhoni to give him the money. There were 3 (three) torches... I know their names for a long time. Muhoni is the son of my*

brother-in-law. Muhoni lives in the nearby village and we graze on their farms. I know Muhoni from our village Pemba since he was a small boy. Makonyo lives at Nyabisaga village. I also recognized Turuka Matiku. I saw him cutting the deceased. I also recognized Marwa Mkilya...Muhoni was dressed in black coat and black trousers. Makonyo was dressed in a black trousers and blue coat. Turuka was dressed in a black trousers and red coat. Marwa Mkilya was dressed all in black...After searching for the money and gunned Mgesi, they left. They went out and stood near our window. They blamed each other. Marwa Mkilya asked them why they gunned Mgesi on the stomach while he told them to only cut his legs so that he doesn't walk."

As for the source of light and its intensity, PW1 stated at page 43 of the record of appeal during cross examination, that:

"They lightened the area looking for me. They did not light me on the eyes. The torches were so bright. When they lightened the room they saw me and took me out from under the bed...Makonyo had a torch on his left hand when he pulled me. I properly recognized Makonyo when I gave him money and he gave the money to Muhoni. He lightened on his hand. The light was so big and I saw him. The room was so small and I raised my face to see. They were all in the

room. The room had two beds. They had three (3) torches..."

Further, at page 45 during cross examination, on the same issue, PW1 concluded:

"I saw a gun with Muhoni. They were lighting the torch randomly. I managed to see them..."

In our view, the above is the substance of the evidence of PW1, upon which Mr. Nasimire and Ms. Fyeregete locked horns. The former vehemently submitting that the evidence was too insufficient to found a valid conviction, while the latter strongly arguing that the evidence discharged the burden of proof and attained the standard necessary for criminal cases, which is beyond reasonable doubt as required by section 3(2)(a) of the Evidence Act [Cap 6 R.E. 2019] (the Evidence Act).

It is opportune for us, to dissect the evidence and agree with one of the parties. We will look at the requirement of a credible visual identification in unfavourable situations in view of the decisions considered above.

In this case as for the source of light and its intensity the witness stated that the appellants, each had a torch and that each individual torch was very bright lighting the whole room. She also testified that the

size of the room was small, which means that PW1 was close to the appellants and one of them pulled her from under the bed and she even handed TZS. 300,000.00 to the first appellant who in turn gave it to the third appellant. This suggests extreme proximity between the witness and appellants. In this case the witness gave fine and minute details of the clothes of all the four robbers he identified at the scene. The witness and the appellants were not new to each other, for instance the third accused is a relative to both the deceased and the witness, for she stated that Muhoni was the son of her brother-in-law. PW1, sufficiently described how she knew the appellants previous to the incident. In that respect, she testified that she had known the first appellant from when he was a small boy. To cap it all, there was no evidence that any of the appellants had his face masked or in any manner covered. As for the time taken, PW1 stated that they spent time inside but they spent about fifteen minutes outside arguing on why had the third appellant shot the deceased instead of cutting him on the legs as instructed earlier on.

The issue that the torches were being lit on the face of the witness (PW1) is not supported. With respect to learned counsel for the first appellant, the witness herself stated that the appellants were not lighting on her face and that they were lighting the whole room at

random. We must, in the circumstances, firmly state that we are settled in our mind and satisfied that although the incident occurred at night, the evidence of PW1, eliminated all possibilities of mistaken identification of the appellants. The evidence of PW1 although of a single eye witness, in our view, was absolutely watertight as required by our jurisprudence developed over time.

There was too, an issue that was raised by Mr. Nasimire, namely that as the offence was committed in June 2012, and the arrest effected in August 2012, the competence of the prosecution case was badly undermined. On this aspect, PW1, stated at page 41 of the record of appeal that all the bandits disappeared in the aftermath of the killing and were arrested later by Ritongo elders in August, 2012 at Pemba Ward. She added that when Marwa Mkilya appeared in the village, he was instantly killed by mob justice in retaliation to the brutal murder of her husband. We are settled in our mind therefore that the delay in arresting the appellants was sufficiently explained and the delay cannot be said to have compromised the prosecution case. The delay was due to the appellant's own disappearance from their homes.

Before we can pen off on that ground, we must also observe that we are aware of the principle regarding credibility of a witness as laid

down in **Festo Mawata v. R**, Criminal Appeal No. 299 of 2007 (unreported) which is that:

> *"...Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."*

This point which was also adopted by the Court in another decision of **Marwa Wangiti Mwita and Another v. R,** [2002] T.L.R. 39, needs our attention because Mr. Nasimire remarked that PW1's credibility has to be put to question because, she did not mention any appellant as a perpetrator of the crime, as soon as neighbours assembled to the scene of crime in response to her alarm.

In that respect, we strenuously and spiritedly perused the record, and we noted that although there is no evidence that she mentioned any of the appellants as the assailant to the neighbours that assembled at her home in the same morning, nonetheless, PW1 was able to mention all the appellants to PW2 on 30th June 2012 when she had her statement recorded. We think mentioning the names of the appellants to the police as soon as she got there, meets the requirement of the law, of disclosing the name or names of the culprit or culprits at the earliest

possible opportunity, in the circumstances where some of the criminals are relatives, particularly, of the deceased.

For the sake of completeness on the issue of credibility of PW1, we are owed to add, that although PW1 was a single witness, nonetheless, we are satisfied that, her evidence was credible in all respects as was assessed by the trial Judge at page 200 of the record of appeal.

We must also remark at this point that, it is a principle of law that a trial court's finding as to credibility of a witness or witnesses is usually binding on an appellate court unless there are vivid circumstances before the appeal court that call for reassessment of the credibility, see **Omari Ahmed v. R,** [1993] T.L.R. 52. Further, in law a witness is entitled to credence unless there are sound and cogent reasons to discredit it, see **Goodluck Kyando v. R,** [2006] T.L.R. 363 and **Nyindwa Kundinga v. R**, [2008] T.L.R. 288 at 289. Other cases on the same point include **Ally Hussein Katua v. R,** Criminal Appeal No. 99 of 2010; and **Machela Magesa v. R,** Criminal Appeal No. 265 of 2010 (both unreported). In this case we did not find any reason tainting the credence of the evidence of PW1.

We are therefore in agreement with Ms. Fyeregete that the evidence of PW1, eliminated all potentialities of mistaken identity and

we hold that the evidence needed no corroboration at all. As we have observed that the evidence of PW1, needed no corroboration, in our view, the results of the discussion of Mr. Nasimire's complaint that the trial Judge was wrong to have used one of the extra judicial statements to corroborate the evidence of PW1 would be of a theoretical and academic significance with no useful purpose to serve.

For the above reasons, we hold that the sole ground of appeal raised and argued for the first appellant has no merit and we dismiss it.

We now move to the two grounds raised by Mr. Mtewele for the third appellant. In brief his complaints were twofold, **one,** that the conviction of the third appellant was based on evidence that was contradictory and unreliable; and **two,** that the case against the third appellant was not proved beyond reasonable doubt.

There were four alleged contradictions that we gleaned and struggled to gather from Mr. Mtewele's submissions. The **first** was that although the information which initiated the trial of the appellants and the sketch map show that the appellant was murdered on 29th June 2012, the Report on Post-mortem Examination (exhibit PE2) shows that the deceased died on 30th June 2012. **Second,** PW1 stated that her statement was recorded on 29th June 2012 but PW2 at page 48 of the

same record stated that the statement was recorded on 30th June 2012. **Third,** at page 49 of the record of appeal, PW2 stated that when drawing the sketch map, he was accompanied by PW1, but on the same sketch map, PW2 indicates that the person who accompanied him in drawing it was one Marwa Nashon and **fourth**, whereas exhibit PE2, shows that the deceased was injured on the thigh, PW1 did not specify where the deceased was injured.

According to Mr. Mtewele, these contradictions were of a serious nature going to the very substratum of the case and they would not have been ignored by the trial court. His point was that had the trial court addressed its mind on the contradictions highlighted, it would not have convicted the third appellant based on the trial marred with such serious inconsistences.

In reply to that ground of appeal, Ms. Fyeregete submitted that the sketch map shows the date of the incident that led to the death to be on 29th June 2012 and the actual death occurred the next day on 30th June 2012 according to the Report on Post-mortem Examination (exhibit PE2). Her argument was that there was no contradiction, because the incident took place on 29th June 2012 and the victim died the next day, that is 30th June 2012.

As to who accompanied PW2 to the scene of crime, she submitted that at page 49 of the record of appeal, PW2 stated that, both PW1 and Marwa Nashon accompanied the police officer to draw the sketch map. For these contractions and the other two, Ms. Fyeregete submitted that the same were minor inconsistencies, if any, and they were not major inconsistences going to the root of the case, implying that the trial court was justified in disregarding the alleged contradictions.

On our part, we propose to start with the law applicable. The law on inconsistences and contradictions, is that where a party raises an issue that there were inconsistences or contradictions in the evidence implicating him, the duty of the trial court is to address the contradictions and determine whether they are minor or major contradictions. If the court makes a finding that the contradictions are minor and inconsequential, it may go ahead to rely on the evidence as tendered. However, if it finds that the inconsistences go to the root of the case to the extent of shaking its very substratum, the trial court cannot take such evidence as credible or reliable. That is the principle of law as per this Court's decisions in **Mohamed Matula v. R,** [1995] T.L.R. 3 and **John Gilikola v. R**, Criminal Appeal No. 31 of 1999 (unreported).

On this aspect, we have considered the submissions of parties on the issue, and we will take some time to navigate them all starting with the issue of the Sketch Map and even the charge sheet indicating that the incident occurred on 29th June 2012 while the Report on Post-mortem Examination reflects that the death occurred on 30th June 2012. With respect, that is natural, for the deceased to have been injured on the previous date and dying the next day or days. It is different if the documents showed that death occurred on a date before the date of the attack. Otherwise, with respect to counsel for the third appellant, we find no point due for consideration in line with his reasoning.

The other point raised by Mr. Mtewele was that PW1 and PW2 mentioned different dates on which her statement was recorded. That complaint has no merit for two reasons **first**, the deceased was attacked in June 2012 and PW1 and PW2 were called to testify about five years later in May 2017. The position of the law is that minor differences on exact timings or details of minor occurrences are expected to escape the memory of a witness when there is a long lapse of time. See the cases of **Mohamed Said Matula** (supra), **Dickson Elia Nsamba Shapwata and Nelson Mohamed Mwazembe v. R,** Civil Appeal No. 92 of 2007, and **Issa Hassan Uki v. R,** Civil Appeal No. 92 of 2007 and **Evarist**

Kachembaho and Another v. R, [1978] L.R.T. 70. That is why in the latter case, the Court held that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

That is to say, because of lapse of time, which we think is the case in this matter, the act of the witness missing trivial details, may be overlooked.

The **second** reason, why the complaint has no merit is because, even if there was to be no legal excuse as per the above decision, still the inconsistence is a minor contradiction with no ability to shake the charge of murder that was laid at the third appellant's door.

The other issue related to who actually accompanied PW2 to draw the sketch map. This point is not going to detain us for we agree with Ms. Fyeregete that PW2 explained at page 49 of the record of appeal that he was accompanied by both PW1 and Marwa Nashon, there was therefore no contradiction in that respect, be it minor or major.

The final contradiction as submitted by Mr. Mtewele, is that whereas the medical report indicated that the deceased was injured on the thigh, PW1 did not specify which exact part of the body that her

husband was attacked. We do not agree with the learned advocate's understanding, because PW1 testified abundantly that the deceased was attacked with a machete on the legs and he was later on shot twice in the abdomen. The medical report shows that he was injured on the thigh and his intestines were perforated. With respect to Mr. Mtewele we do not agree with him that PW1 did not testify on which part of the body that her husband was attacked. In the circumstances we do not find any material contradiction in this case, in the context of the submission by counsel for the third appellant.

In the circumstances the second ground of appeal raised on behalf of the third appellant has no merit and the same is hereby dismissed.

The third ground of appeal raised on behalf of the third appellant was that, the case against him was not proved beyond reasonable doubt. In support of this ground Mr. Mtewele submitted that the sketch map was wanting, because PW1 stated that the money she gave to the robbers was taken from the bucket, the said container ought to have been indicated in the sketch map. He submitted further that because the evidence of PW1 was that their neighbour was Marwa Nashon and that there were children in the house, these individuals ought to have been called as witnesses otherwise the case was not proved against the third

appellant. He even contended that the deceased's pair of trousers from which he took the TZS. 700,000.00 and gave to his aggressors, was supposed to be tendered in order to prove that the third appellant participated in the killing.

In reply to these arguments, Ms. Fyeregete contended that the submissions were barren of merits because, the bucket and the trousers that Mr. Mtewele was faulting the prosecution for not having tendered at the trial had nothing to do with the death of the deceased. She submitted further that as the only eye witness who witnessed the attack on her husband was PW1, calling Marwa Nashon who was not at the exact scene of crime or the children who were in another room was not necessary. Ms. Fyeregete beseeched us to hold that the case was proved to hilt.

We have considered the contending arguments of both counsel and we do not intend to spend a lot of time on this ground. In our view, expecting or demanding the prosecution to tender the plastic container in which PW1 was keeping the TZS. 300,000.00 she gave to the robbers or tendering a pair of trousers that the deceased wore in order to examine the size of the pocket and see whether it would have accommodated the TZS. 700,000.00 which was kept in it as submitted

by Mr. Mtewele, would be demanding too much from the prosecution in proof of the murder case. With respect, we do not think production of the container or the cloth would have any use value to add to the prosecution case. In other words, it is our considered position that, the omission to physically tender in court the above items did not affect the competence of the prosecution case.

It was also not necessary, in our view, to call the children who did not witness the attack on their father or Marwa Nashon who was in another room. In any event, the decision on whether or not to prosecute a criminal case, the prosecution evidence to tender, the prosecution witnesses to call, are all matter within the exclusive domain of the prosecution. The defence may not legally, advise the prosecution on how to conduct the prosecution. Further, under section 143 of the Evidence Act, the prosecution is mandated to call any number of witnesses to support his case. What matters is their credibility.

In the circumstances, we dismiss the third ground of appeal raised on behalf of the third appellant and hold that, in the context of the manner we disposed of the sole ground of appeal raised on behalf of the appellant, the case against both appellants was proved to the hilt.

For the above reasons, we uphold the decision of the trial court and find this appeal without merit. We hereby dismiss it.

DATED at **MWANZA** this 12th day of May, 2022

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2022 in the presence of Mr. Anthony Nasimire, learned counsel for the first appellant who also holding brief for Mr. Fidelis Cassian Mtewele, learned counsel for the third appellant and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL