IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 216 OF 2021

ALFREDY KWEZI @ ALFONCE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

Dated the 8th day of April, 2021
in
Criminal Sessions Case No. 1 of 2021

.....

JUDGMENT OF THE COURT

10th & 16th June, 2022

WAMBALI, J.A.:

On 8th April, 2021, the High Court of Tanzania sitting at Kigoma delivered the decision in Criminal Sessions Case No. 1 of 2021 in which it found the appellant, Alfredy Kwezi @ Alfonce guilty of the offence of murder contrary to section 196 of the Penal Code, R.E 2019 (the Penal Code). Ultimately, the appellant was convicted and in terms of section 197 of the Penal Code, he was sentenced to suffer death by hanging.

It was plainly laid in the particulars of the information presented before the High Court that on 15th day of November, 2018 at Mgwanda "B". Hamlet within Kakonko District in Kigoma Region the appellant murdered Godfrey Ndayate.

Essentially, the prosecution case was supported by the evidence of six witnesses, namely, Anatalia Thomasi (PW1), Laurence Gasper (PW3), Bigilimana Francis Mapigano, a doctor (PW4), Insp. Kisu A. Mwapongo (PW5) and G. 3226 DC. Cretus Ngonyani (PW6). In addition, the postmortem Report and sketch map of the crime-scene were tendered and admitted as exhibits P1 and P2 respectively.

Briefly, at the trial, it was the evidence of PW1 and PW2 that on 15th November, 2018 at about 20:00 hours, they witnessed the appellant and one Linus Ngowe (not part of the trial and this appeal as he allegedly escaped to an unknown place to date), attacking the deceased with a bush knife (panga) at his home.

Particularly, PW1 testified that on the fateful date and material time she was at her home sleeping when she heard a bang and when she woke up and came out towards the sitting

room, while standing at the back of the door, she saw the appellant (her nephew) and Linus Ngowe cutting her husband with a panga at the sitting room. She testified further that while standing about five paces away, she managed to see the assailants clearly and identified them by the aid of a solar light fixed on the roof whose intensity was high in what she described in Kiswahili as "ilikuwa na mwanga mkubwa sana". PW1 allegedly witnessed the incident for about 4 or 5 minutes before she came out of the room and ran to the neighbours for help and when she returned at the house, she found the deceased laying down dead and the assailants had fled.

PW1 also testified that before the incident, on 10th October, 2018 while with her deceased husband from the market to their home, the appellant invaded and cut them three times with a panga and was arrested and charged in court, convicted and sentenced to three months conditional discharge. Besides, she stated the conviction and sentence was in respect of the assault of her husband as on her part she decided not to pursue her case against the appellant. During cross-examination she testified that

prior to the assault and the deceased's death she had a land conflict with the appellant's father.

PW2, the daughter of the deceased, gave a somewhat similar story that she witnessed the appellant and Linus Ngowe cutting her late father outside the house where he was seated. However, for her part, before the incident, she was in the kitchen which is a building separate from the house cooking when she heard people murmuring. When she came out, she saw the appellant who threatened her with a panga. She nevertheless later while standing about 3 paces from the crime scene, saw the assailants attacking the deceased with panga, and that she managed to identify them including the appellant, her cousin being aided by the moonlight and solar light. She did not however describe the intensity of the light at that particular place as the deceased sat outside the house. Following the incident, PW2 was also afraid and ran to the neighbours for help leaving the assailant accomplishing their unlawful act, and when she came back in the company of neighbours, she found her father dead and the culprits had run away.

PW3, PW5 and PW6 were among the persons who arrived at the scene on that fateful night and found the deceased dead, with his neck almost completely chopped off. According to their testimonies, they were informed by PW1 and PW2 that they managed to identify the assailants and loudly named the appellant and Linus Ngowe, the Hamlet Chairman who had already escaped. PW5 in company of other police officers took the body of the deceased to the mortuary at Kakonko hospital and in the morning of the next day, he proceeded with the investigation, recorded the witnesses' statements and drew the sketch map of the scene of crime. PW5 also tried to trace the appellant and Linus Ngowe at their homes but they were not there, and he stated that the latter had escaped and was at large up to the time he testified at the trial.

Notably, in a bid to explain the contents of the sketch map (exhibit P2), PW5 testified that the deceased was outside the house at point A where he was seated and later taken inside the house-sitting room at point B and after the assault, he was taken outside at point C. PW5 described the distance between point D, the kitchen where PW2 was to point A as five (5) meters. PW5

further through exhibit P2 indicated that Jovaness Godfrey witnessed the crime from point F and saw the appellant at point K running from the scene of crime.

PW6, (the investigator) essentially agreed with the evidence of PW3 and PW5 in respect of going to the scene of crime, taking the body of the deceased to the mortuary and that the appellant and Linus Ngowe were mentioned by the relatives of the deceased (PW1 and PW2) to have committed the offence. It is PW6 who testified that he arrested the appellant on 30th November, 2018 at Kibondo District Court where he had gone to attend the hearing of his criminal case though he did not know where he came from as he had traced him at his home in vain. However, PW6 stated that after he interrogated the appellant, he denied to have committed the heinous offence on the fateful date. PW4, a doctor who examined the body of the deceased and filled the postmortem report (PMR) which was tendered and admitted as exhibit P1 confirmed that the deceased was butchered and his head almost chopped off his corpus. He described the cause of death as multiple severe cut wounds.

In short, the substance of the prosecution evidence was that the appellant murdered the deceased on the fateful day with malice aforethought.

On his part, the appellant defended himself with the allegation (as DW1) and sought the support of two witnesses, namely, Francisco Gombo (DW2) and Sikiliza Francisco (DW2). He testified that at the material day and time he was at his grandfather's (DW2's) home together with other relatives, Ntezimana, Baliyahunda, Keka, Sikiliza. While there at around 20:00 hours, they heard an alarm (mwano) which was raised signaling that something bad had occurred in the Hamlet, and thus they all decided to go where the alarm was heard, only to learn that the deceased was murdered and they were accused of killing him.

Indeed, he testified that, while they were walking towards the scene, they met one Kasindi Godfrey, a son of the deceased, who started to attack them and injured Sikiliza. As a result, they ran to save their lives and went to the Village Executive Officer (VEO) home, asking for and they were given a letter allowing them to take Sikiliza to hospital for treatment. The appellant

emphasized that his family escaped his home as they were fearing to be attacked, and that he did not flee out of the village until when he was arrested by the Police. He maintained that he did not harbour any grudge with the deceased family despite the conflict which existed between his late father and that family. He also admitted to have been arrested and charged in connection with assaulting the deceased and PW1 but was granted bail by Kibondo District Court where he usually attended the hearing of the case.

DW2 and DW3 essentially associated themselves with the appellant's testimony that DW3 was attacked and they obtained a letter from the VEO and went to hospital. Generally, the appellant therefore categorically disassociated himself from committing the offence of murder on the fateful date.

At the height of the trial, the learned trial judge who presided over the trial with the aid of two assessors evaluated the evidence for both sides and found that the defence had not punched serious holes in the prosecution case and thus disbelieved it. He patently found that the appellant was properly identified at the scene of crime by PW1 and PW2 whose evidence

was supported by PW3, PW5 and PW6. Eventually, he affirmatively found that the case of murder against the appellant was proved to the hilt. Consequently, he found the appellant guilty, convicted and sentenced him to death by hanging as intimated above.

The findings, conviction and sentence of the appellant by the trial Court has seriously dissatisfied him, hence the instant appeal, in which the memorandum of appeal comprises of three grounds of complaint which were wholly adopted by the counsel assigned to represent him at the hearing.

The hearing of the appeal proceeded in the presence of the appellant in person and his advocate, Mr. Silvester Damas Sogomba, whereas on the adversary side, Mr. Shabani Juma Massanja and Ms. Happiness Ezekiel Mayunga, learned Senior State Attorney and State Attorney, respectively entered appearance for the respondent Republic.

Before the commencement of the hearing, it was unreservedly agreed that the thrust of the appellant's appeal lies on the question whether the prosecution proved the case beyond reasonable doubts.

Submitting in support of the appeal, Mr. Sogomba argued that the prosecution case was not proved to the hilt, because; one, there are contradictions in the evidence of PW1, PW2 and exhibit P2 regarding the exact position where the deceased was allegedly assaulted. He explained that while PW1 stated that the assault was in the sitting room, PW2 testified that it was outside the house. Besides, he argued, according to the evidence of PW6 and exhibit P2, the deceased was taken from outside and assaulted inside the house and later dragged outside where the body was found laying down. He thus submitted that the contradiction went to the root of the case as the two witnesses, that is, PW1 and PW2 were on different places, and thus it was difficult to conclude in which place the deceased was attacked by the assistants.

Two, that the identification of the appellant at the scene of the crime which was allegedly made by PW1 and PW2 was not watertight. Though the learned advocate did not dispute that according to the record of appeal the witnesses and the appellant knew each other as nephew and cousin respectively, he forcefully submitted that the condition at the scene of crime was not

favorable as both of them were under great fear to the extent of fleeing away living the attackers and the deceased. He also argued that the few minutes spent at the scene, that is, 4 or 5 minutes and 10 minutes for PW1 and PW2 could not have enabled them to properly identify the assailants. Indeed, he stated that the distance of 5 paces and 3 paces for PW1 and PW2 respectively from the attackers described by them, was doubtful. Mr. Sogomba also submitted that though PW2 stated that she saw the appellant and Linus Ngowe through the aid of the moonlight and the solar light, she did not describe the place where the solar light was placed and its intensity. Besides, he added the intensity of the moon light was not disclosed by PW2 leaving doubt on its reliability. He also argued that while PW1 testified that the solar light was inside the house, it is not clear whether it is the same source which enabled PW2 to identify the assailants as she did not disclose if another solar light bulb was placed outside the house. Thus, relying on decision of the Court in **Hassan Said v. The Republic,** Criminal Appeal No. 264 of 2015 (unreported) at page 6 he argued that the moon light could not have assisted PW2 to identify the appellant and another, amid the fear and lack of explanation on its intensity on the particular

day as it really dependent on the weather. To this end, the learned advocate concluded this point by arguing that the criterial for visual identification set by the Court in **Waziri Amani v. The Republic** [1980] T.L.R. 250 were not fully met as the identification of the prosecution eye witnesses was not water tight.

Thirdly, Mr. Sogomba argued that the defence of the appellant which he believed threw doubts to the prosecution case and had to be resolved in his favour was lightly considered by the trial court and wrongly rejected. He maintained that the story of the appellant that he heard the alarm and was on the way to the scene, but was attacked and thus ran to rescue his life was sufficient to alert the trial court to critically scrutinize the entire evidence in the record and come to the conclusion that the appellant was not involved in committing the offence of murder on the material day.

In this regard, the learned advocate faulted the trial judge for drawing an inference from the previous conflicts between the appellant's and deceased's family and the accusation of the assault whose case was pending at Kibondo District Court to

conclude that the appellant must have been the one who assaulted the deceased to accomplish the desire he had intended previously. In the circumstances, Mr. Sogomba prayed that the appeal be allowed on the contention that based on the evidence on record, the prosecution did not prove the case against the appellant beyond reasonable doubt.

In response, Ms. Mayunga categorically registered the respondent's stand to oppose the appeal on the contention that the case for the prosecution was proved to the required standard. Basically, she stood firm in support of PW1 and PW2 on the argument that their testimonies were not contradictory as each stated what she saw with regard to the incident and the involvement of the appellant and Lihus Ngowe based on the position each stood at the scene of the crime. She argued that while PW1 was at the backdoor looking at what transpired at the sitting room, PW2, was at the kitchen cooking and went outside, witnessed what transpired outside the house where the deceased initially sat, before they both ran away from the scene to seek the neighbours' assistance. Indeed, she argued that the evidence of PW5 supported that of PW1 and PW2 that there was blood

outside and inside the house where the deceased was attacked by the assailants. She therefore, maintained that there was no contradiction as alleged by the appellant's counsel since each witness stated what she saw on that particular day, the bottom line being that the appellant and Linus Ngowe attacked the deceased by panga and caused his death.

With regard to identification of the appellant, Ms. Mayunga argued that though there is no dispute that the incident occurred at night, PW1 and PW2 fully identified the appellant and Linus Ngowe at the scene of crime by the aid of solar light and moonlight whose intensity was unquestionable considering that distance where they stood being five meters and three meters for PW1 and PW2 respectively.

The learned State Attorney submitted further that the possibility of mistaken identity was fully eliminated because, the appellant and Linus Ngowe were well known to PW1 and PW2 as relatives of the former and that they resided in the same village with them. She added that the fact that PW1 and PW2 mentioned the appellant and Linus Ngowe to PW3, PW5 and PW6 soon after the incident added credence to their credibility that

they dully identified the assailants at the scene of crime. Besides, she argued that the appellant did not contest the fact that PW1 and PW2 knew him well as he said so in his defence and did not cross examine them on the respective fact. Ultimately, she submitted that, the conditions for proper identification set out in several decisions of the Court including **Waziri Aman v. The Republic** (supra) and **Chacha Jeremia Murimi and Another v. The Republic,** Criminal Appeal No. 551 of 2015 (unreported), among others, were equally met.

Responding to the complaint that the trial judge did not consider properly the appellant's defence, she submitted that the contention is unfounded. She made reference to the specific part of the reasoning and finding of the trial judge in which he dealt at lengths with the evidence of the appellant and found that it was wanting because of the apparent contradictions between him and his witnesses did not raise any serious doubt to the prosecution case. She added that the trial judge properly rejected the appellant's defence of *alibi* in which he had alleged that on that material day he was not at the scene of crime.

Moreover, Ms. Mayunga strongly opposed the appellant's counsel argument that the trial judge was greatly influenced in his decision in which he convicted the appellant based on the previous allegations that confronted the appellant against the deceased's family, including the pending criminal case before Kibondo District Court.

In short, the learned State Attorney strongly and spiritedly defended the findings leading to the conviction of the appellant by the trial court and the ultimate sentence, hence she urged us to dismiss the appeal in its entirety.

Having heard the submissions from the parties, the crucial issue for the determination at this point is whether the prosecution case against the appellant was proved to the required standard.

We wish to begin our deliberations by alluding to the settled position that in order to prove the case of murder under the provision of section 196 of the Penal Code the following element should be established. One, that death was caused to the deceased person; two, that death was unnatural; three, that the death was caused by an unlawful out or omission; four that it was

the accused person who did the unlawful act or omission leading to the death of the deceased; and five, that death was caused with malice aforethought, meaning that the accused intended to cause such death or grievous harm.

To appreciate the deliberation which will follow shortly, we deem it appropriate to reproduce fully the reasoning and the finding which was made and reached by the trial judge in respect of the guilt of the appellant. It is noted that in the process of evaluating the prosecution evidence and before considering the defence evidence the trial judge stated:-

> *"I am aware that PW1 and her deceased husband survived a murder attempt just five days prior to the instant crime in which the accused was alleged to have been among the companion to several others but that is not the case before me. And even if I would have to consider it, the same would only be corroborative evidence against the accused that he had intended to kill PW1 and her husband but on his unsuccessful he rearranged and finally succeeded to murder DW1's husband on 15/11/2018 just few days after the first attempt. This is because PW1 could not only wait crimes to befallen her to incriminate the accused. That*

means in the absence of crimes committed against her the accused is not fabricated. It does not click a reasonable mind that a person intending to fabricate another would wait to be victimized in a crime as if he or she is aware of the nature of the crime and its degree. And if she or he will service the crime.

It is undisputed fact that the deceased died brutally in the presence of PW1 and PW2, the two witnesses were shocked and ran away under this worry situation, it is unexpected that an eye witness to such a brutal killing coned quickly memories of his or her historical enemies, quickly make a decision as who among them should be fixed and immediately name him to the people who respondent to the crime. I had time to observe their demeanor, they were responding to the questions at the examination in Chief and during cross-examination in a manner that persuaded not only me but also the two lay gentle assessors that they were speaking nothing but only the truth. ***I therefore rule that PW1 and PW2 were witness of truth, credible and reliable. I have no any good reason and or even cogent one for not believing these witnesses.*** *I find them to have properly identified the accused person Alfredy Kwezi @*

Alfonce in companion of another stabbing the deceased person to death. That being said, I find that the evidence of PW1 and that of PW2 could even stand independent of the other evidence on record, and either of it couid sustain conviction of the appeilant ever if it would have been the only evidence on record provide that I would have warned my self of the danger to rely on the evidence of a single witness as it was held in the case of ***Ahmed Omari v. The Republic,*** *Criminal Appeal No. 154 of 2995 which quoted with approval the decision in case of* ***Anil Phalen v. State of Assam*** *1993 AIR 1462 which held as follows:*

> *"A conviction can be based on the testimony of a* ***single eye witness*** *and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone."*

Even though and as rightly observed by the assessors, the evidence of PW1 and PW2 got corroborated by that of PW3, PW5 and PW6.

The three witnesses supra arrived at the crime scene in the same night, they authenticated the availability of solar light and the moon light

as well, so does DW3 the accused's own witness. The identifying witnesses named the accused to them instantly to have been among the assailants. The accused disappeared from the village and that is why he was not seen soon after the crime despite of being traced by the village authority as testified by the village chairman PW3. The averment of the accused that he was in the village throughout is not true. This is because he himself admitted that he was indeed traced by the local authority and the police from the first day of the crime. If he was really in the village and did not commit the offence, or the knowledge that he was accused and traced, one would expect him to have surrendered himself. Even though he was not arrested in the village but in the different District at Kibondo as rightly observed by MS Mwamvua Ramadhani lay assessor."

After that deliberation and findings, the trial judge considered the appellant's defence and disbelieved it for being a fabricated story.

Admittedly, though the trial judge dealt with the appellant's defence at a considerable length in which he found that there was contradictions between him and his witnesses, namely DW2

and DW3 concerning what transpired when they allegedly responded to the alarm and who they met on the way to the scene, and also rejected the defence of alibi, basically, he started by disbelieving it before he embarked on the respective analysis. Particularly, at the very beginning he stated thus:

> *"I have carefully gone through the defence evidence and dully considered it. I however disbelieve it just like my two assessors I find the defence of evidence of the accused to have been fabricated story. This is because the accused contradicted so much with his own witnesses in tying to establish the alibi..."*

Notably, after the said evaluation of the defence evidence the trial judge concluded as follows:-

> *"I therefore concur with my two lay assessors that the prosecution case has been proved beyond reasonable doubts against the accused person..."*

It is the above reproduced reasoning and findings of the trial court that has greatly attracted the criticism from the appellant's advocate. On the contrary, it was fully supported by the respondent's Republic counsel. It is common knowledge, and

as acknowledged by the trial judge in his judgment, the subject of this appeal, that the prosecution side has the duty to prove the charges against an accused person beyond any reasonable doubts, and that it is not for the accused person to establish his innocence. Additionally, the responsibility never shift throughout.

On the other hand, while it is appreciated that the monopoly of assessing the credibility of a witness rests on the trial court, this duty can also be exercised by the appellate court where it is demonstrated that the trial court misapprehended the evidence on record or wrongly applied the law hence coming to a wrong conclusion causing miscarriage of justice. For this stance see the decisions of the Court in **Juma Selemani @ Paulo & Another v. The Republic**, Criminal Appeal No. 283 of 2013 (unreported), **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149.

Besides, this being the first appeal from the trial High Court, the Court is vested with power to re-appraise the evidence and draw inferences of facts as prescribed by rule 36(1)(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In determining this appeal, we intend therefore to re-appraise the evidence on record to ascertain the findings and conclusion of the trial court.

With regard to the evidence of identification, we think it is appropriate to start by reiterating the principle enunciated in an unbroken chain of decisions of this Court including, **Waziri Amani v. The Republic** (supra) and **Raymond Francis v. The Republic** [1994] T. L. R 100, that before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In such cases, the court is required to consider, among others, the following matters; **one**, the time the witness had the accused under observation; **two**, the distance at which he observed him; **three,** the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; **four**, whether the witness knew or had seen the accused before or not; and **five**, all factors on identification considered, it should also be plain that were any material impediment or discrepancies affecting the correct identification of the accused person by the

witness (see **Kazimiri Mashauri v. The Republic,** Criminal Appeal No. 252 of 2010 (unreported).

Indeed, even in a case where the identifier recognized the assailant the court should be cautious of rushing to the conclusion that the assailant was easily recognized because he was well known to the victim as some times there may be mistake in identifying even a near relative. Instructively, in **Hamis Hussein and Two Others v. The Republic,** Criminal Appeal No. 86 of 2009 (unreported) the Court stated that:-

> *"We wish to stress that even in recognition cases, where 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, ever when the witness is purporting to recognize someone he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."* (See also the case of **Shaban Daudi v. The Republic,** Criminal Appeal No. 28 of 2001 (unreported)

Having examined the evidence in the record of appeal, we think the determination of this appeal revolves on the question

whether the appellant was properly identified at the scene of crime.

It is apparent from the prosecution evidence that PW1 and PW2 firmly testified that as they knew the appellant, they duly identified him at the scene of crime on the fateful date with the aid of the solar light and moonlight and that they were some few paces from where the incident took place. On the other hand, it is on record that at that particular incident they were terrified by such horrifying situation to the extent of running away to the neighbours for a few minutes, only to return later to find that the assailants had fled and the deceased dead with the body laying on the ground outside the house.

It is not clear, as no testimony was led to the effect that even under such horrifying situation and the few minutes PW1 and PW2 spent at the scene could have assisted them to properly identify the assailants. At this juncture, it is worthy sounding the caution of the Court of appeal of Kenya in **Wamaliwa and Another v. The Republic** [1999] 2 EA 358 which inspired the court to deliberate on the question of identification and reach the conclusion in **Tagara Makongoro and Two Others v. The**

Republic, Criminal Appeal No. 126 of 2015 (unreported)

specifically it was stated that:

> *"The court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of on offence fleetingly and under stressful circumstances."*

We are however aware that sometimes, depending on the circumstances of each case, even in horrifying situation the victim may surpass the fear of the perpetrators. But this must be born from the evidence on record (see the cases of **Hassan Juma Kanenyera and Others v. The Republic** [1992] T.L.R 100 and **Philip Rukaira v. The Republic,** Criminal Appeal No. 215 of 1994 (Unreported). In the later decision the Court stated that:-

> *"It is not always impossible to identify assailants even at night and even where victims are terrified. The evidence in every case where visual identification is what is relied on, must be subjected to careful scrutiny, and regard being paid to all the prevailing condition and 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 been dispelled."

However, we are of the view that this is not the case in the appeal at hand as there is nowhere in the evidence on record showing that even under horrifying circumstances and few minutes spent at the scene before they ran away PW1 and PW2 overcome or surpassed fear. It is also common knowledge that the reliability of identifying witness must depend on his or her demeanor.

In the appeal at hand, it is apparent in the excerpt of the trial court's judgment reproduced above that though that court initially casted doubt on whether PW1 and PW2 could properly identify the assailants under such stressful situation, the trial judge later reasoned that it was possible because they were eye witnesses to the incident, they knew the appellant before, the condition was favorable and therefore they were credible. The crucial issue thus is whether this conclusion is supported by the evidence on record.

For our part, having thoroughly perused the evidence on record, we think the evidence of PW1, PW2 (eye witnesses),

PW3, PW5 and PW6 poses much doubts with no answers. We shall demonstrate. Firstly, both PW1 and PW2 did not state categorically whether both assailants used the panga jointly to cut the deceased and on which particular part of the body since they were allegedly 5 and 3 paces closely which could have enabled them to see clearly and clarify on this issue. This is notwithstanding the fact that each saw the assailants from a different angle and place. Certainly, it could not have been possible for both assailants to jointly use the panga to cut the deceased. Secondly, while the testimony of PW1 is that she spent four or five minutes to view the incident before she went out crying for help, PW2 stated that she spent ten minutes and ran away. Though they spent different time to view the incident, according to PW1 when she went out, she got her children running to seek help to the neighbours. Unfortunately, PW1 did not mention the name of her children who she got them running. Similarly, PW2 did not state that she met her mother, PW1 running.

On cross examination PW1 stated that she raised alarm for help when she started to ran away from the incident. On the

contrary, PW1 testified in chief that she ran away on her own to seek help from the neighbours. On the other hand, during cross-examination PW2 stated that on that particular day she was with her young sibling aged 16 years old but she did not mention the name. More importantly, it is not clear from the evidence on how she managed to identify the assailants closely, because during cross examination she stated that she peeped through the window while in the kitchen and saw the appellant and Linus Ngowe and that when she wanted to come out, she was threatened by the appellant.

At the same time while on cross-examination PW2 stated that Linus Ngowe also assaulted her and required her to keep quiet. She also stated that the assailants took about ten minutes. Though this fact was stated during cross-examination, it is not clear how she was threated within the said period of ten minutes by the two assailants not to came out but still managed to see them from a different part of the main house. This is because according to the sketch map (exhibit P2), it was possible for a person stationed at point D (kitchen building) to see what transpired at point A (the main house) where the deceased was

seated and latter assaulted. Generally, if we are to go by the sketch map, PW2 must have been impeded to see what transpired at the other corner of the main house amid the alleged threats effected by the assailants. Besides, in her evidence in chief PW2 did not state that she was threatened and ordered to keep quite by Linus Ngowe.

Furthermore, it is not known how PW2 knew that the assailants might have spent about ten minutes to accomplish their unlawful act white she had already ran away. Indeed both PW1 and PW2 did not state how long they stayed to neighbours before they returned at the scene in their company.

Thirdly, further doubt is raised by the fact that though both PW1 and PW2 testified that they returned in the company of neighbours they did not mention the name of any neighbour who returned with then to the scene of crime. This is notwithstanding the fact that exhibit P2 which was drawn by PW5 shows that among the house of neighbours who were close to the scene are Kasindi Godfrey, Emmanuel Lukunkuma and Danie Mhenyi located on point E, F and G respectively. We think this was important as the ascertainment of the neighbours who firstly

respondent to the scene even before the arrival of PW3, PW5 and PW6 would have thrown some light on why if they really accompanied PW1 and PW2 they were not the first to be informed of the involvement of the appellant and Linus Ngowe. If really the neighbours accompanied them to the scene the information concerning the identification of the assailants could not have been revealed to PW3, PW5 and PW6 as per the evidence on record. The prosecution evidence is silent on this issue. We however note from the record of appeal that Kassindi Godfrey was among the witnesses who was listed to appear before the trial court to testify, but it s not known why he was not summoned.

Fourthly, both PW1 and PW2 did not state categorically in their testimonies that they informed PW3, PW5 and PW6 that they identified the appellant and Linus Ngowe at the scene of the crime. This story is only found in the evidence of PW3, PW5 and PW6. This raises doubt on whether PW3, PW5 and PW6 were immediately informed by PW1, and PW2 concerning the involvement of the appellant and his colleagues on the fateful day.

Fifthly, it is noted that according to the evidence in the record of appeal, PW1 and PW2 were not the only eye witnesses to the incident at the scene of crime. It is borne from Exhibit P2 which was drawn by PW5 with the assistance of PW1 and PW2 and other relatives of the deceased, that Jovaness Godfrey who was at point J, saw the appellant escaping from the scene of crime at point K which is 42 meters from point J. It is unfortunate too that, though Jovaness Godfrey was listed among the witnesses for the prosecution during the committal proceedings, he was not summoned to testify. Presumably, Jovaness Godfrey would have helped the prosecution to explain some missing links in the evidence PW1 and PW2. Concerning the identification of appellant at the scene on that day.

We are aware of the position of the law under section 143(1) of the Evidence Act, Cap. 6 R.E 2019 that the prosecution is not bound to summon all witnesses who witnessed the incident as what matters is not the numbers, but the relevancy and weight to be attached to the evidence of the particular witness. In **Speratus Theonest @ Alex v. The Republic,** Criminal Appeal No. 135 of 2003 (unreported) the Court stated that:-

"The prosecution does not have the obligation to produce witness irrespective of consideration of their number for the evidence has to be weighed and not counted."

However, it is also the settled law that where the prosecution or a party to the case does not summon a witness who is in a position to explain some missing links in the case, permits the court to draw some adverse inference to that party's case. In this regard, in **Kisinza Richard v. The Republic** [1989] T. L. R. 143 the Court held that:-

"The prosecution is under prima facie duty to call all material witnesses who from their connection with the prosecution in question are able to testify on all material facts. If such witnesses are not called without sufficient reasons the court may draw an adverse inference to the prosecution."

In the appeal at hand, we think in view of what we have stated above, had the High Court after it admitted exhibit P2 considered the importance of Kasindi Godfrey and Jevaness Godfrey to the prosecution case, particularly concerning the issue of the presence of neighbours who might have been the first to arrive to the scene and one of them allegedly witnessed the

appellant escape from the scene, it could have drawn an adverse inference, as we accordingly do, since no reasons were disclosed by the prosecution for non-summoning of the respective witnesses.

We hold this view because the involvement of Jovanes in the alleged identification of the appellant was more apparent as according to exhibit P2, on the fateful day he was in one of the room whose door faced the sitting room designated as point N. moreover, if we go by exhibit P2, Jovannes Godfrey and PW1 could have came into contact on the material day as point N is located closer to point M Where PW1 slept before she come out to the sitting room and later went to the back of the door at point L. Unfortunately, PW1 did not state anything concerning the presence of Jovaness Godfrey on that room and whether he also saw the assailants before he went outside the house where the deceased was assaulted to death. Further, according to exhibit P2 it is the same Jovanes Godfrey who was at point J outside the house who allegedly saw the appellant running at point K as alluded to above.

Sixthly, though the trial judge held PW1 as witness of truth, with respect, we think this conclusion was made without careful consideration of her evidence. It is on record that PW1 did not state the truth about the status of the criminal case which faced the appellant on the allegation of assaulting her and her deceased husband. We say so because while it is settled as per the evidence on record and the trial judge's finding in his judgment that up to the time PW1 testified at the trial the case had not been concluded, and that is why the appellant was arrested at Kibondo District Court where he had gone to attend the hearing on 31/11/2018, just two weeks from the date of the incident, PW1 testified that the case had ended and the appellant was convicted and sentenced to three months conditional discharge in respect of assaulting the deceased accordingly. We also note that almost one quarter of the PW1's testimony direct on the misunderstanding of the appellants family and the deceased family and the allegation of the previous assault whose case had not been concluded by the trial District Court of Kibondo. It is no wonder that even in his judgment the trial judge also took considerable time to discuss the issue and made some finding

concerning the guilty of the appellant even before he evaluated defence evidence as intimidated above.

With respect, we think that was not proper as it might have influenced his findings and therefore prejudicial to the appellant. We, do not therefore respectfully considering the judgement of the trial court agree with the learned State Attorney that the evidence of previous allegation against the appellant which was still a subject of the court case did not influence the trial judge in reaching the conclusion of convicting the appellants.

In the circumstances, it is not always correct to conclude that in visual identification eye witnesses are perfect. Eye witness visual identification is therefore of the weakest character and most unreliable. To this end, the Court in **Shamir John v. The Republic** (supra), categorically held as follows:-

> *Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of*

the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.

It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press or people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police

by the witnesses when first seen by them and his actual appearance?

...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."

All in all, considering the above raised discrepancies, inconsistences and doubts in the evidence of PW1 and PW2 with regard to the identification of the appellant at the scene of crime, it cannot be concluded with certainty that the respective witnesses are witness of truth and therefore credible as held by the trial judge amid the defence evidence in which as we have exposed above raised doubts on his being at the scene of crime on the fateful date.

In **Jaribu Abdalla v. The Republic** [2003] T.L.R 271 it was stated that:-

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the

*credibility of the witness. The conditions for identification might appear ideal but that is not a guarantee against untruthful evidence. The ability of a witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor. [see also; **Mafuru Manyama and Two Others v. the Republic,** Criminal Appeal No. 178 of 2007; **John Gulikola v. The Republic,** Criminal Appeal No. 31 of 1999 and **Yohana Dioniz and Shija Simon v. The Republic,** Criminal Appeal No. 114 and 115 of 2009 (all unreported)]*

Among the major issue which was raised by the appellant in his defence is that while he was on the way to where the alarm was raised, he was attacked by a mob including Kasindi Godfrey who injured DW2 and as a result he and his family had to escape to the safe place fearing being harmed. The trial judge would also considered that, if the appellant had intended to escape definitely to an unknown place, he could not have gone to the Kibondo District Court to attend a hearing of a criminal case in which he was accused of assaulting the deceased and PW1. We have no hesitation to state that this was plausible explanation why the appellant escaped from the village. On the contrary, with

respect, the trial judge basically dealt with the defence of the appellant which raised doubt to the prosecution case on his presence at the scene of crime as if the burden of proof had shifted to him contrary to the settled position of law which he had acknowledged at the beginning of his judgment.

With regard to the evidence of PW3, PW5 and PW6 which the trial judge held to have sufficiently supported or corroborated the evidence of PW1 and PW2, we are settled that in view of weakness we have exposed above on insufficient proof by the eye witnesses to the commission of the crime, it is clear that the said witness cannot corroborate the later.

For our part, the evidence of PW3, PW5 and PW6 contains inconsistences and doubts which cannot make them reliable witnesses. PW3 for instance stated that he was initially telephoned by Linus Ngowe, one of the alleged assailants, about the incident. However, this information was not disclosed by PW5 and PW6 who were accompanied by PW3. Interestingly, none of them stated at the trial that they tried to contact Linus Ngowe through the same means of communication but failed though the previous communication was allegedly made few minutes before

they arrived at the scene. What the witnesses stated is that after they arrived at the scene of crime and informed of the identify and names of the assailants, they started to trace them to their respective homes but they could be found.

Moreover, as we have intimated earlier on concerning the doubt on the presence of the neighbours at the scene of crime, save for PW6 who stated that apart from the family members of the deceased, other persons who were present included the village leaders. Nobody among them mentioned the presence of neighbours at the scene of crime.

Indeed, PW3's evidence on the arrest of the appellant is not consistent with the evidence of PW6. While PW3 stated that the appellant was arrested at his home after sometimes, it is a fact as per the evidence of PW6 and the appellant that he was arrested on 30th November, 2018 at Kibondo District Court. This anomaly casts doubt on the credibility of the evidence of PW3.

On the other hand, the evidence of PW5 and exhibit P2 which he tendered at the trial is not consistent with the evidence of PW1 and PW2. Generally, what is contained in exhibit P2 was not stated by the respective witnesses as we have plainly

demonstrated above. In the circumstances, we are settled that the evidence of PW5 cannot be of assistance to the prosecution case.

Equally important, the evidence of PW6, who was the investigator of the incident did not throw any light which could have assisted the trial court and this court to reach the conclusion that it is no other person than the appellant who committed the offence he is charged with. As stated above, though PW6 was among the persons who arrived at the scene on fateful day, he did not explain whether he found some of the witnesses to the crime who are shown in exhibit P2, including Jovaness Godfrey who was an important person to assist the prosecution case as intimated above. moreover, the evidence of PW4 is only supportive of the fact that the deceased is dead and that he died unnatural death, but cannot necessary connect the involvement of the appellant in the commission of the offence amid the weakness in the prosecution evidence.

From the foregoing deliberations, while we appreciate the industry demonstrated by the learned State Attorney for the respondent Republic in defending the trial court's findings and

conviction of the appellant of the offence of murder, we respectfully differ with her and hold that considering the evidence on record, the case for the prosecution was not proved beyond reasonable doubt.

Consequently, we allow the appeal, quash conviction and set aside the sentence of death by hanging imposed on the appellant by the trial court. Ultimately, we order that unless the appellant is held for other lawful causes, he should be released from custody forthwith.

DATED at **KIGOMA** this 15th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence Mr. Silvester Damas Sogomba, learned Counsel for the Appellant and Mr. Raymond Kimbe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL