IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

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

CRIMINAL APPEAL NO. 83 OF 2021

ANTHONY KINANILA ..... 1ST APPELLANT

ENOCK ANTHONY ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matuma, J.)

Dated the 14th day of December, 2020
in
Criminal Sessions Case No. 32 of 2020

JUDGMENT OF THE COURT

7th & 16th June, 2022

KENTE, JA.:

The High Court of Tanzania (Matuma, J.) sitting at Kigoma, convicted the appellants Anthony Kinanila and Enock Anthony who are respectively a father and son of the offence of murder with which they stood charged contrary to section 196 of the Penal Code (Cap 16 R.E 2019). They were subsequently sentenced to the statutory death sentence pursuant to section 197 of the Penal Code. In convicting the appellants, the learned trial judge of the High Court was satisfied as

alleged by the prosecution that, on 26th December, 2018 at Katundu Village within the District of Buhigwe in Kigoma Region, the appellants murdered their close neighbour one Cosmas Pastory. Needless to say, they had initially pleaded not guilty to the charge.

The appellants' conviction was essentially based on the visual identification evidence adduced by the deceased's wife one Jenitha Kabetelo (PW1), his daughter Upole Cosmas (PW2) and his young brother one Otto Pastory (PW3) and, therein lies the nub of the appellants' main complaint in this appeal that the said evidence of identification was very poor if not altogether lacking to ground a conviction.

Submitting in support of the appeal, Mr. Sadik Aliki, learned counsel representing the appellants begun by putting the appellants' grievances in this appeal into four categories. Whereas the first category is the one in which the appellants are challenging the visual identification evidence by the eyewitnesses, under the second category, the said prosecution witnesses are challenged for being incredible. The third category of the appellants' complaint faults the trial judge for allegedly not directing the gentlemen assessors with whom he sat on the factors affecting the quality of visual identification evidence. Finally

is the complaint in the last category of the appellants' grievances where they are alleging that in convicting them, the trial judge unconventionally made capital out of the weakness of their defence evidence rather than relying on the strength of the prosecution case.

Before getting down to the nitty gritty side of the appeal, it seems very apposite to revisit the undisputed facts leading to this appeal which may be summarised as follows: The deceased and appellants were neighbours who lived in close proximity in Katundu Village Buhigwe District, Kigoma Region. On the fateful night, the deceased was at home together with his wife and daughter who was outside washing dishes. At about 9:00 p.m, their home was invaded by two men who seemed uncompromising right from the beginning both in word and in deed. Whereas the one in the front position was armed with a spear and a bush-knife, following him immediately behind was the second man who was armed with a bush-knife and a club. Being on the lookout, the deceased moved towards the door and inquired as to what they were after but they held their ground insisting that there would be murder on that night, using all available means for the desired ends, including, if necessary, fatal stabbing. It appears that the unexpected nocturnal visitors of this family had no time to argue with

the deceased. Within a heartbeat, they wrestled him on the ground as one of them jumped and stood on him thereby letting his accomplice spear the deceased on the thorax fatally wounding him. When (PW3) responded to the alarm raised by the deceased's wife and went to the rescue of the deceased, one of the attackers pulled out the spear from the deceased's body and threatened him and by that means, creating the opportunity for them to run away.

In ill health and on the verge of death, the deceased was hurriedly taken to the nearby police station where he was issued with a PF3 referring him to hospital. Unfortunately however, the gallant efforts to save his life proved futile as he succumbed to the fatal wounds while he was still in the process of being admitted to hospital. Upon Postmortem examination which was conducted on the following day, it was found that the deceased's death was due to hypovolaemia and cardio-respiratory failure. Physical examination of the body of the deceased revealed a penetrating stab wound on the anterior chest left lateral lower to the sternum which according to the pathologist who carried out the postmortem examination, might have wounded the heart or spleen leading to severe internal haemorrhage. That was in

accordance with the findings posted on the post mortem examination report which was received and admitted in evidence as exhibit "P2".

According to PW5 one corporal Omari Lukele Kisanzu who was the officer commanding station at Katundu Police station, on 26th December, 2018 at about 8:45 pm, the first appellant went to the said Police Station and reported to him that the deceased and his family-members had invaded his home and committed acts characterised by overt hostility and aggression towards him. PW5 recounted however that, in a dramatic turn of events, as the first appellant was still lodging his complaint with the police, another Police Officer who was on duty came and told him (PW5) that a group of people had brought a seriously wounded person and were in a dire need of immediate help. When PW5 got out and talked to the deceased who was still alive asking him which tragedy had befallen him, the deceased told him that he had been attacked by the appellants. Suspecting that the first appellant might have simply tried to conceal the truth by reporting false accusations against the deceased and his family members, PW5 ordered for his immediate arrest and detention. After issuing instructions for the deceased to be quickly referred to hospital, PW5 together with some of the persons who had accompanied the deceased

to the Police Station went back to look for the second appellant who had been mentioned by the deceased and, who despite being the deceased's close neighbour, was conspicuously missing from the group of neighbours who had responded to the alarm and went to his rescue. On arriving at the second appellants' home, they met his mother and his wife who on being asked, they told him that the second appellant was nowhere to be seen. Not believing what the second appellant's mother and wife had told him and apparently being strong and willed as not to be taken for a ride, PW5 ordered them to open the house which was closed and locked but the second appellant's wife told him that she had no key. In view of the seriousness of the accusations levelled against the appellants and there being reasonable suspicion that the second appellant might have gone into hiding or escaped, PW5 broke into the locked house where he found him hiding in one of the rooms. Having examined the scene of the crime and directed for the statements of the witnesses to be recorded, PW5 left with the second appellant and later on, he referred the matter to the Officer Commanding Criminal Investigation Department for further steps.

Back to the deceased's home, PW1 and PW2 told the trial court that, the two men who invaded their home on the fateful night and

who they identified as the first and second appellants were wielding a spear, bush-knives and a club. The two eyewitnesses recounted how, on arrival, the appellants were determined to commit murder as they kept on threatening the deceased that there was going to be murder on that night. Further, that when the deceased came out in an attempt to establish what was wrong, they set out on him instantly felling him down and stabbing him with a spear on the chest inflicting on him a grave wound which eventually caused his death. Since the appellants were neighbours of and well known to PW1 and PW2, and as such, there was a relatively sufficient level of illumination from low energy light bulbs working by electricity generated from a solar panel fixed on the roof, the two eyewitnesses told the trial court that they were able to identify the appellants. They also recounted the role played by each of the two in subduing and killing the deceased.

Before the trial court, the appellants denied committing the charged offence. As expected, their defences were that of an alibi for the whole of the fateful period. Both of them are recorded to have told the trial court that at the material time they were at their respective homes. However, as earlier mentioned, the trial judge rejected their defences and convicted them as charged.

As it is before this Court, it was common ground at the trial that the determination of the case depended mainly on identification of the appellants. Submitting in support of the appeal and relying on the applicable jurisprudence, Mr. Aliki maintained that it was necessary for PW1 and PW2 to lead evidence describing the intensity of the light which illuminated the scene of the crime enabling them to identify the appellants. He argued in this regard that, it was not sufficient for PW1, PW2 and PW3 to just say that there was sufficient light to enable them identify the appellants without describing the intensity of the said light. The learned advocate further contended that the conditions during the attack of the deceased were not conducive to identification which can be said to have been accurate and reliable. The learned advocate was doubtful as to what extent light coming from the bulbs working by electricity generated from a solar panel could have intensely illuminated the scene of the crime bearing in mind that the offence was committed during the rainy season and there was no witness who told the trial court that there was enough sun light to generate sufficient electricity during the day preceding the night of the deceased's vicious attack. In support of the point that solar panels differ in terms of their capacities to generate electricity and therefore the intensity of solar light must be

explained by the identifying witness, Mr. Aliki referred to our decision in **Kurubone Bigirigwa and Three Others v. Republic,** Criminal Appeal No. 132 of 2015 (unreported).

Coming to the credibility of the three eyewitnesses, Mr. Aliki contended that their evidence should not have been relied upon to convict the appellants as he found them pretty incredible. For instance, the learned counsel submitted, the eyewitnesses did not describe the attire of the attackers and they contradicted each other on some material points. The learned counsel claimed that it appears that a sort of rehearsal took place at which the three eyewitnesses were couched to the gills to say that the light coming from the bulbs illuminating the crime-scene was sufficient enough for one to see even a small gliding snake.

As to contradictions, Mr. Aliki submitted that whereas PW3 is recorded to have told the trial court while under examination in-chief that the first appellant was attacking the deceased on the head using a club, PW7 who examined the body of the deceased did not specifically say that he saw any wound on the deceased's body which might have been caused by a blunt object such as a club. The learned advocate further sought to discredit PW3 for allegedly contradicting himself as to

whether or not he was present when the deceased was stabbed with a spear. Reverting to PW2, who told the trial court, among other things that, after she heard her father crying thus "I'm dying", she ran away into hiding, Mr. Aliki questioned how such a scaredy-cat person could be said to be a credible eyewitness to the killing of her father. Mr. Aliki referred us to the case of **Jaribu Abdalla v. Republic** [2003] TLR 271 to underscore the importance and need for the court to look at not only the factors favouring accurate identification but also to the credibility of the witness when determining the identity of the offender.

Moving forward to the appellants' third grievance against the decision of the trial court, Mr. Aliki contended that the trial judge did not draw the attention of the assessors to the factors affecting favourable visual identification and that as a result, one of the said assessors gave an uninformed opinion that PW1 was able to identify the appellants without addressing himself on the intensity of the solar powered electricity light at the scene of the crime. In support of this submission, he referred us to our decision in **Philimon Jumanne Agala @ Jumanne v. Republic,** Criminal Appeal No. 187 of 2015 (unreported).

With regard to the complaint that the appellants were convicted not on the basis of the strength of the prosecution case but rather on the weakness of their defence evidence, without elaborating and pointing out any particular example, Mr. Aliki complained generally that the trial judge had capitalised on the appellants' evidence to form the basis of their conviction.

On his part, Mr. Shaaban Massanja learned Senior State Attorney who teamed up with Mr. Raymond Kimbe learned State Attorney to resist the appeal on behalf of the respondent maintained basically that, the appellants were positively identified on the fateful night. His argument was founded on the following evidential aspects: **one,** that the appellants were well known and close neighbours of PW1, PW2 and PW3; **two** that immediately before they embarked on attacking the deceased, the appellants uttered some words to the effect that they were bent on killing him thereby enabling PW1 and PW2 who were present to further identify them by their voices; **three,** that the scene of crime was well and sufficiently illuminated; lastly that PW1 had mentioned the appellants when the opportunity to do so presented itself. The learned Senior State Attorney briefly submitted with regard to the credibility of the three eyewitnesses which was seriously called

into question by Mr. Aliki, that the said witnesses were credible and further that they cannot be discredited for instance for giving the same example in describing the intensity of the illumination at the crime scene. He added that there was no witness who told the trial court that the deceased was hit by the appellants on the head using a club and that the eyewitnesses' evidence regarding the part of the body on which the deceased was seriously wounded and the weapon used was materially corroborated by the findings of the pathologist who examined the deceased's body. As for PW2 whose evidence Mr. Aliki invited us to discredit on account that she ran away and went in hiding after she heard her father crying that he was dying, Mr. Massanja submitted in counter that, PW2 did not run away immediately after seeing the appellants but rather she went into hiding after observing them when they arrived as she was outside washing dishes and after she had identified them and seen what they were doing. Regarding the complaint that the assessors were not properly and specifically guided by the trial judge on the factors affecting favourable conditions for visual identification, Mr. Massanja was very brief but focussed. Referring to page 125 of the record of appeal, he submitted and we think correctly so that, the assessors were asked to determine whether

the surrounding circumstances and conditions at the scene of the crime were ideal for correct identification without leaving any possibilities of a mistaken identity. He thus saw no merit in the appellants' complaint on that aspect.

With regard to the contention that the appellants' conviction was unorthodoxically based on the weakness of their defence, basing his argument on the strength of the evidence led by the prosecution witnesses in this case, Mr. Massanja did not find it necessary to dig deep into the prosecution case. He simply submitted that the appellants' guilt was proved beyond doubt and that their complaint that they were convicted on the basis of the weakness of their defence versions was without substance. Asked to comment on the submission by Mr. Aliki that PW3 had contradicted himself when he failed to state if the deceased was stabbed before or after his arrival at the scene of the crime, the leaned Senior State Attorney maintained that, that did not affect the credibility of PW3.

Submitting in rejoinder, Mr. Aliki reiterated his position that the appellants were not positively identified and therefore the trial judge was wrong to convict them on an unsubstantiated charge. He also argued that the relationship and neighbourhood between the appellants

on one hand and PW1, PW2 and PW3 on the other hand, could not take the place of the need for proof of correct identification beyond reasonable doubt. He urged us to find merit in the appeal and consequently allow it.

Now as we strategize on how to determine this appeal, it is trite but important to observe that, in order to determine the culpability of an accused person in a criminal case, several principles must be considered. First and foremost is the cardinal presumption that the accused person is presumed innocent until the contrary is proved. (See Article 13(6)(b) of the **Constitution of the Republic of Tanzania, 1977** Cap 2). Moreover, in line with the above-stated principle, in any criminal trial, the prosecution bears the burden to prove beyond reasonable doubt not only that the offence was committed but also that it was committed by the accused person or that he participated in the commission of the offence to the extent or degree as prescribed by law. Put in other words, it is the exclusive duty of the prosecution in any criminal trial to place the accused person at the scene of the crime.

As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable

doubt and here, one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in Enland way back in 1935 in **Woolmington v. DPP** [1935] AC 462 from where our present general principles of criminal law and procedure emanate.

In a charge of murder like the one in the instant case, it is trite that the prosecution required to prove all the ingredients of murder in order to win a conviction thereof. The said ingredients which the prosecution must prove beyond reasonable doubt are;

i) *That the deceased is really dead.*

ii) That the death was caused by someone unlawfully

iii) That there was malice aforethought and

iv) That the accused person directly or indirectly took part in the commission of the murder.

As it can be gleaned from the evidence in the present case, it is common ground that the deceased Cosmas Pastory is dead and that his death was unlawfully caused. It is as well not in dispute that the killing was committed with malice aforethought. What is strongly contested is the question whether the appellants or anyone of them ever

participated in the offence of murder of the deceased as alleged by the prosecution during the trial and subsequently ruled by the trial judge.

In an attempt to place the appellants at the scene of crime, the prosecution relied on the three eyewitnesses who told the trial court that they saw and identified the appellants as the persons who arrived at the deceased's home on the fateful night, viciously attacked him causing him a serious wound which eventually resulted into his death. As stated earlier, this evidence was believed as being true and subsequently relied on by the trial court in arriving at the conviction.

Before going further, we wish to start from the common position of the law that evidence of visual identification or recognition should be cautiously acted upon as it is always prone to fabrication or being based on honest mistakes. We are also mindful of the stance of the law that eyewitness evidence can be devastating when false witness identification is made due to honest confusion or outright lying. (See **Philimon Jumanne Agala** (supra) and **Mengi Paulo Samwel Lahana & Another v. Republic,** Criminal Appeal No. 222 of 2006 (unreported). However, we need to quickly observe that in the circumstances of the case under scrutiny, upon considering the evidence led by the prosecution side, we are of the settled opinion as

did the trial judge that the appellants were positively identified as the persons who stormed into the deceased's home on the fateful night and killed him in cold blood. We say so in view of the following aspects of the visual identification evidence. **One,** that the appellants were close neighbours and well known to PW1, PW2 and PW3. **Two,** that when they arrived at the scene of crime, PW2 who was outside washing dishes, was able to see and recognise them. **Three,** that as opposed to Mr. Aliki's submission on the intensity of light at the crime-scene, the said place enjoyed sufficient illumination to allow for correct identification and the attack of the deceased lasted for a relatively long period which was not only sufficient for PW1 and PW2 to recognise the appellants but also to allow PW3 to rush the scene of the crime and recognise them as he vainly sought to rescue his brother. **Four,** the three eyewitnesses were not contradicted on the undisputed fact that they were the appellants' close neighbours and that they knew them well before the date of incident. **Five,** that the witnesses were not contradicted that when the opportunity to mention the attackers presented itself, PW1 mentioned them to the neighbours who had responded to the alarm. (See **Marwa Wangiti Mwita and Another v. Republic** (2002) T L R 39.). It may also be significant to observe

here that, all the three eyewitnesses were consistent on the material aspects of the evidence such as the type of weapons used by the appellants, the place where the attacking took place and the part of the body on which the wound which caused the decease's death was inflicted as well as the nature of the weapon used. As correctly submitted by Mr. Massanja, there was no prosecution witness who told the trial court that the deceased was severely hit on the head and for that matter, no witness can be said to have contradicted himself or herself on any material point pertaining to the identity of the appellants. Needless to say, the above finding resolves as well the question as to whether the prosecution witnesses were credible or not. Like the trial court, we find them as having been credible witnesses and we proceed to dismiss the appellants' complaint on that aspect.

We now turn to the complaint that the learned trial judge did not direct the assessors on the factors affecting favourable conditions for visual identification. There are authorities galore restating the position of the law that, where there is inadequate summing up, a non-direction or a misdirection on a crucial point of law to the assessors, the trial is deemed to be one without the aid of assessors and is rendered a nullity. (See **Philimon Jumanne Agala** (supra). However, as for the

instant case, the complaint that the trial judge did not direct the assessors on the factors affecting favourable conditions for visual identification is much more raised than proved. In his summing up to assessors, the learned trial judge briefly stated as follows in respect of the conditions obtaining at the scene of the crime which are relevant to visual identification;

> *"You should also consider whether the surrounding circumstances at the crime-scene and the conditions thereof were favourable to PW1, PW2 and PW3 for correct identification, and that all possibilities of mistaken identity are eliminated."*

With respect, in our view, the above passage invites no question as to whether the assessors were directed to consider whether the conditions at the scene of the crime were favourable enough to support a correct identification. In our respectful opinion, what we discern from the above quoted passage is that the learned trial judge did albeit very briefly, draw the attention of the assessors to the need to consider the conditions and circumstances obtaining at the crime scene and return their respective opinion answering among other questions, the question as to whether the said conditions were favourable for a correct identification or recognition of the appellants. As rightly submitted by

Mr. Massanja, supported as we should, by the trial court record, we can safely say that the learned trial judge went on directing the assessors on the vital points of law arising out of this dispute and therefore he cannot be faulted for the imaginary omission.

Before we conclude the judgment we wish to make the following point in which we will as well address the question as to whether the appellants were convicted on the strength of the prosecution case or the weakness of their defence as alleged. It is common ground among the legal fraternity and we think we need not cite any authority to support the legal position that, in any criminal trial, the accused person must not be convicted because he has put forward a weak defence but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person committed the offence with which he stands charged. That in brief is what is called proof beyond reasonable doubt which is the responsibility cast on the prosecution side. However, according to Lord Denning in **Miller v. Minister of Pensions (1972)-2 ALL ER 372** and this must again be common knowledge that:

> *"proof beyond reasonable doubt does not mean*
> *proof beyond the shadow of doubt and the law*

would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence "of course it is possible but not in the least possible" then the case is proved beyond reasonable doubt."

To the extreme, other people have gone further to say that reasonable doubt is the doubt of men of good sense not of imbeciles or fools.

Having considered all the evidence led by the witnesses in support of the prosecution case and being mindful of the appellants' bizzare conducts immediately after the decease's vicious attack which included the first appellant's masquerading as a victim by making a false report to the police that his home had been invaded by the deceased's family members while he is the one who, along with his son had gone to the deceased's home and attacked him; together with the second appellant's act of going into hiding in his house and instructing his mother and wife to hoodwink PW5 and others who were looking for him into believing that he was not at home, we are finally satisfied that, putting aside the fanciful explanations given by the appellants, their

guilt was proved beyond reasonable doubt. For all intents and purposes, their complaints were underserved, and on that account, we have no reason to fault the trial judge.

We thus dismiss the appeal in its entirety.

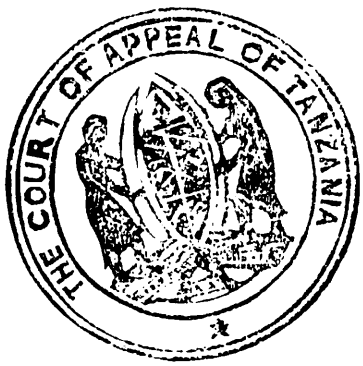
DATED at **KIGOMA** this 15th day of June, 2022.

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. Sadiki Aliki, Counsel for the Appellants and Mr. Raymond Kimbe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



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