IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 134 OF 2022

GODFREY WILLIAM @ MATIKO..... 1ST APPELLANT

THOMAS MWITA @ NYAGANCHA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rumanyika, J.)

dated the 30th day of November, 2021
in
Criminal Sessions Case No. 116 of 2014

JUDGMENT OF THE COURT

4th & 8th July, 2022

KEREFU, J.A.:

The appellants, Godfrey William @ Matiko and Thomas Mwita @ Nyagancha, the first and second appellants herein were charged with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code) before the High Court of Tanzania at Mwanza (Rumanyika, J. as he then was) in Criminal Sessions Case No. 116 of 2014. It was alleged that, on 23rd November, 2012 at about 20:00 hours at Nyichoka Village within Serengeti District in Mara Region, the appellants

murdered one Simion Nyansaho @ Mabogi (the deceased). The appellants pleaded not guilty to the charge. However, after a full trial, they were convicted and each handed down the mandatory death sentence.

It is noteworthy that, initially, the trial of the appellants was conducted before De-Mello, J. who, after hearing the evidence of three prosecution witnesses and the appellants who were the only defence witnesses, she found that the prosecution had proved its case to the required standard and thus found the appellants guilty of the offence charged and proceeded to sentence them as indicated above. On appeal to this Court vide Criminal Appeal No. 409 of 2017, the Court nullified the trial court's proceedings, quashed the conviction and set aside the sentence meted out against the appellants on account of failure by the learned trial Judge to adhere to the procedures of selecting the assessors and failure to explain to them their roles and duties before commencement of the trial. Consequently, the Court ordered a trial *de novo* before another Judge and a different set of assessors.

Following the above decision of the Court, hearing of the case commenced afresh before Rumanyika, J. (as he then was). At the trial *de novo,* the prosecution relied on the evidence of three witnesses, namely

Chacha Simion Mabogi (PW1), Chacha Mabogi Kitina (PW2) and F.6733 D/CPL Faru (PW3). They also tendered a cautioned statement of the second appellant (exhibit P1). The appellants relied on their own evidence as they did not summon any witness.

In essence, the substance of the prosecution case as obtained from the record of appeal indicates that, the deceased was living at Nyinchoka Village within Serengeti District in Mara Region with his wife and their son (PW1). The deceased's wife was the blood sister of the second appellant. On the fateful date i.e 23rd August, 2012, the deceased went to drink beer at the grocery owned by one Samwel Kisaiwa and he returned home at around 20:00 hours with two bottles of beer. He awakened his wife and PW1. The wife served him with dinner outside the compound of their house and then, she and PW1 went back to their bedrooms while living the deceased eating his food outside. Having finished eating, the deceased continued to drink his two bottles of beer at the said compound.

A moment later, PW1 heard someone crying. He got up, went outside while lightning his torch at the scene of crime. PW1 testified that, he saw the appellants and two others who stopped and threatened to finish him up. PW1 went on to state that, shortly, he saw his father brutally killed with

panga cuts. That, through the aid of his torch which had new batteries, PW1 recognized the second appellant to be his maternal uncle with his friend. He stated that, the distance from where he was to the scene of crime was about three paces.

On his part, PW2 stated that, on 23rd August, 2012 at midnight while asleep, he heard a dog barking outside, he picked his arrow and torch and rushed to the scene of crime where he found his elder brother, the deceased, brutally and deadly cut with *pangas* and was at his last kicks as he died shortly thereafter. Upon inquiring on what had befallen him, PW1 mentioned the appellants. Thus, the incident was reported to the police and PW2 led the policemen to arrest the first appellant on the same date and the second appellant was apprehended later.

PW3 stated that he interrogated the second appellant and recorded his cautioned statement. He said that, in the said statement, the second appellant confessed to have murdered the deceased together with the first appellant. The said statement was admitted in evidence as exhibit P2. PW3 stated further that, the key investigation officer of the case was Detective Sergeant Raphael.

In their defence, both appellants denied any involvement in the alleged murder case. They both testified that they did not know each other before 28th August, 2012 when they appeared before the District Court of Serengeti for committal proceedings. Specifically, the first appellant stated that he was arrested on 24th August, 2012 for the offence of cattle theft in respect of Criminal Case No. 230 of 2012 in Tarime District Court where the complainant was one Manyoka @ Mama Chacha. The second appellant, though admitted to be the brother of the wife of the deceased and an uncle of PW1, he distanced himself from the alleged murder incident. He stated that, he was initially arrested together with his mother and siblings who were later discharged for unknown reasons. He also repudiated exhibit P2 alleging that he was tortured and forced to sign it.

When the respective cases on both sides were closed, the presiding learned trial Judge summed up the case to the assessors who sat with him at the trial. In response, the assessors unanimously returned a verdict of guilty to both appellants. They were of the opinion that, at the fateful date, they were both properly identified by PW1 at the scene of crime and thus responsible with the death of the deceased. The learned trial Judge, agreed

with the assessors and found the appellants guilty and convicted them as indicated above.

Aggrieved, the appellants filed separate memoranda of appeal on 12th April, 2022 containing five grounds each. Later however, on 29th June, 2022 and 28th June, 2022 respectively, their advocates filed supplementary memoranda of appeal containing two grounds for the first appellant and five grounds for the second appellant.

When the appeal was placed before us for hearing, the first and second appellants were represented by Mr. Geofrey Kange and Mr. Cosmas Tuthuru, both learned counsel respectively, whereas the respondent Republic had the services of Mr. Emmanuel Luvinga, Senior State Attorney assisted by Mr. Isihaka Ibrahim, learned State Attorney.

Upon taking the floor to amplify on the grounds of appeal, Mr. Kange informed us that he had agreed with his client to argue the grounds of appeal raised in the supplementary memorandum of appeal. He thus abandoned the grounds raised in the memorandum of appeal filed by his client and submitted only on the two grounds contained in the supplementary memorandum of appeal which are to the effect that:

(1) The learned trial Judge grossly erred in law by convicting the first appellant basing on a weak and unreliable evidence; and

(2) The learned trial Judge erred in law by holding that the evidence adduced by the prosecution witnesses proved the case beyond reasonable doubt.

Submitting on the first ground, Mr. Kange challenged the finding of the learned trial Judge to have convicted the appellants relying on the PW1's evidence on visual identification which was not watertight. He argued that, since the offence took place at night under unfavorable circumstances, the conditions of visual identification stated in the case of **Waziri Amani v. Republic**, [1980] TLR 250 ought to have been met. It was his strong argument that, the appellants were not properly identified at the scene of crime as PW1 who was the sole eye prosecution witness, though he testified that he managed to identify the appellants through the aid of a torchlight, he failed to state the intensity of that light.

To justify his point, he referred us to page 181 of the record of appeal where, in his judgment, the learned trial Judge also found that, *"PW1 did not state exact light intensity,"* but he ended up concluding

erroneously that the appellants were properly identified. It was his argument that, after making such a finding that PW1 did not explain the intensity of the light which aided him to identify the appellants, the learned Judge was expected to find that the visual identification evidence was not watertight. To buttress his proposition, he cited the cases of **Masolwa Samwel v. Republic,** Criminal Appeal No. 348 of 2016 and **Chacha Nyamhanga @ Samwel and Another v. Republic,** Criminal Appeal No. 40 of 2007 (both unreported).

Mr. Kange added that, apart from failing to explain the intensity of the light at the scene of the crime, PW1 did not witness the act of the appellants attacking the deceased and he did not even state with certainty as who exactly, among the four people alleged to be found at the scene, attacked and/or murdered the deceased. It was his argument that, in such a terrifying situation which obtained at the scene of crime and the fact that the incident happened at night involving a group of four people, the conditions were not favourable to eliminate the possibilities of mistaken identity.

On the second ground, Mr. Kange also faulted the procedure adopted by the learned trial Judge in admitting the second appellant's cautioned

statement (exhibit P2) and which was finally relied upon to convict the appellants. To clarify on this point, he referred us to pages 158 to 162 of the record of appeal and argued that, when the said statement was tendered by PW3, both learned counsel for the appellants objected to its admissibility on two grounds (i) that it was recorded contrary to section 50 (1) (a) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (the CPA) and (ii) that it was involuntary recorded. Thus, a trial within trial was conducted where the first point was dismissed and the second point was not resolved. However, the learned trial Judge admitted the said statement as exhibit P2, and promised to incorporate the reasons of its admission in the ruling of case to answer or the judgment. He contended that, the said procedure was improper, because the learned trial Judge was required to first determine the issue of voluntariness raised by the second appellant before admitting that statement into evidence. As such, Mr. Kange argued that, exhibit P2 deserved to be expunged from the record of appeal and he thus invited us to do so. He then argued that, after expunging the said exhibit from the record there is no other evidence linking the first appellant with the offence he was charged with, as he was only implicated in this case after being mentioned by the second appellant in that exhibit. On the basis

of the pointed shortcomings in admitting exhibit P2 and unreliable visual identification evidence of PW1, Mr. Kange prayed for the first appellant's conviction to be quashed, the sentence imposed on him be set aside and he be released from the prison.

On his part, Mr. Tuthuru also informed us that he had agreed with his client to abandoned the grounds of appeal lodged on 12th April, 2022 and that he will argue only the grounds raised in the supplementary memorandum of appeal lodged on 28th June, 2022 containing five grounds which raised almost similar complaints argued by Mr. Kange above. He thus supported the submission made by his learned friend and on the second ground he added the case of **Marwa Rugumba @ Kisiri v. Republic,** Criminal Appeal No. 225 of 2011 (unreported) and also urged us to expunge exhibit P2 from the record of appeal. It was his argument that after expunging exhibit P2 from the record, the remaining evidence is insufficient to connect both appellants with the offence charged as the evidence of PW1 was weak and unreliable.

He added that, despite the fact that in his evidence, PW1 also indicated that he managed to recognize the second appellant to be his maternal uncle, that alone does not eliminate the possibility of mistaken

identity. To support his proposition, he cited the case of **Sebastian Muna v. Republic**, Criminal Appeal No. 299 of 2016 (unreported). He then argued that, since the testimony of PW1 the sole prosecution eye witness was weak on the visual identification of the appellants, the remaining evidence could not have any weight to corroborate it. On that basis, he also urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellants and release them from the prison.

In response, Mr. Luvinga, at the outset expressed his stance that he was supporting the appeal on the grounds that the evidence on visual identification of the appellants at the scene of crime was not watertight and exhibit P2 was unprocedurally admitted in evidence. He thus joined hands with the submissions made by his learned friends in respect of the above two grounds. He thus urged us to allow the appeal, quash the conviction, set aside the sentence imposed on the appellants and set them at liberty.

In view of the fact that Mr. Luvinga supported the appeal, both learned counsel for the appellants did not make a rejoinder.

Having carefully considered the record of appeal and the submissions made by the learned counsel for the parties, it is clear to us that they are all at one that it was improper for the learned trial Judge to rely on the

evidence of visual identification which was not watertight and exhibit P2 that was unprocedurally admitted in evidence to convict the appellants. We respectfully, share similar views on both grounds. However, in determining the appeal we wish to consider first the second ground.

It is evident at pages 158 to 162 of the record of appeal that, during the trial and specifically on 11th November, 2021 when PW3 produced the second appellant's cautioned statement for admission, both learned counsel for the appellants objected to its production and admission in evidence on two points (i) that it was recorded contrary to section 50 (1) (a) of the CPA and (ii) that it was involuntary recorded. Thus, a trial within trial was conducted where the first point was dismissed and the second point on the voluntariness of the second appellant was not decided upon, but the learned trial Judge admitted it as exhibit P2 while promising to assign reasons for its admission in the ruling of case to answer and/or judgment, but that was not done. Therefore, the reasons of its admission were never disclosed. Counsel for the parties were in agreement that exhibit P2 was improperly admitted into evidence contrary to the requirement of the law.

As we intimated earlier, we agree with them on this point and we wish to emphasize that, in a criminal trial, where an objection is raised on

the admission of cautioned statement or extrajudicial statement, the trial Judge has a duty to conduct a trial within a trial and come to a conclusion as to whether it should admit it or otherwise. It follows therefore that the procedure that was adopted by the trial Judge, in the case at hand, of admitting an exhibit without making a finding and conclusion on whether it was voluntarily obtained or not was, with respect, improper. As such, exhibit P2 cannot be validly relied upon in evidence. Consequently, we accept the invitation and we hereby expunge exhibit P2 from the record of appeal. In the result, we allow the second ground of appeal.

Now, the next question is whether after expunging exhibit P2 there is sufficient evidence on record to ground conviction of the appellants. Determination of this issue, brings us to the first ground on the visual identification of the appellants at the scene of the crime. It is on record that the only prosecution eye witness who was at the scene of crime and who was alleged to have properly identified the appellants was PW1. However, in his evidence, PW1 did not explain clearly on the intensity of the said light which assisted him to make a proper identification of the appellants.

We wish to emphasize that a proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identity is eliminated. This Court has always reiterated that caution should be exercised before relying on the identification evidence -see **Waziri Amani** (supra), **Issa s/o Mgara @ Shuka v. Republic,** Criminal Appeal No. 35 of 2005 (unreported), **Masolwa Samwel** (supra) and **Chacha Nyamhanga @ Samwel and Another** (supra). Specifically, in **Issa s/o Mgara @ Shuka** (supra), the Court observed that it is not sufficient for the witnesses to make bare assertions that '*there was light.*' The Court held that:

> *"It is our settled minds; we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns, etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in sufficient details on the intensity of the light and size of the area illuminated."*

In the case at hand, as rightly argued by learned counsel for the parties and also correctly observed by the learned trial Judge at page 181

of the record of appeal, PW1 did not explain the intensity of the light which aided him to identify the appellants. For the sake of clarity, PW1's account at page 155 of the record reflects the following:

> *"...I got out and shone a torch at them, I identified the two accused and 2 others they stopped and threatened to finish me up. Only shortly to find my father was brutally murdered with panga cuts. My torch was of two new cells such that it was sufficiently bright no obstacles between. The 1st accused was my uncle's friend, the 2nd accused was my maternal uncle. I therefore recognized them."*

In **Chokera Mwita v. Republic,** Criminal Appeal No. 17 of 2010 (unreported) when the Court was confronted with a similar issue, it held that: *"...neither PW1 nor PW3 spoke of the intensity of its light, thus leaving unattended the issue of likelihood of mistaken identity."*

The Court went further to state that:

> *"In short, the law on visual identification is well settled. Before relying on it,* ***the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight."*** [Emphasis added].

Similarly, in the matter at hand, it was not enough for PW1 to make bare assertions that there was light without giving sufficient details on its intensity and the size of the area illuminated to rule out the possibility of mistaken identity. Admittedly, the second appellant was known to PW1 but, that does not eliminate the possibility of mistaken identity. Faced with an akin situation in **Boniface s/o Siwingwa v. Republic,** Criminal Appeal No. 421 of 2007 (unreported) the Court held that:

> *"Though, familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as in this case, that the conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."*

On the strength of the above authorities, it is our settled view that, despite the fact that the appellants were familiar to PW1, that did not rule out and eliminate the possibility of mistaken identity.

In addition, we are mindful of the fact that, in his evidence, DW1 testified that he was arrested on 24th August, 2012 for the offence of cattle theft in respect of Criminal Case No. 230 of 2012 in Tarime District Court

where the complainant was one Manyoka @ Mama Chacha. This fact was never disputed by the prosecution side. Worse still, the Detective Surgent Raphael who was mentioned by PW3 to be the key investigation officer of this case was not summoned to testify at the trial to clarify on this aspect and no reasons were explained for that failure. It is our considered view that, entitles the trial court to draw an adverse inference against the prosecution. For purposes of emphasis, in the case of **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported) when considering a similar matter, the Court stated that:

> *"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

Earlier on, the Court had made corresponding remarks in the case of **Aziz Abdallah v. Republic** [1991] T.L.R. 71. In view of what we have endeavoured to demonstrate, we also find the first ground of the appeal to have merit.

In the circumstances, we find with respect, that had the learned trial Judge subjected the identification evidence of PW1 to the above test, he would have found that such evidence failed to prove that the appellants were properly identified at the scene of crime. Such evidence was not watertight and could not therefore, found the appellants' conviction.

In the event, we hereby allow the appeal, quash conviction and set aside the sentence that was imposed on the appellants. We order that the appellants be released from custody forthwith unless they are otherwise lawfully held.

DATED at **MWANZA** this 6th day of July, 2022.

S. E. A MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 8th day of July, 2022 in the presence of Mr. Nasimiri, learned Advocate for the first Appellant who also holds brief for Mr. Geofrey Kange, learned counsel for the second appellant and Ms. Mwamini Y. Fyeregete, Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL