IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 195 OF 2019

REVOCATUS LUHEGA KISANDU .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania

at Mwanza]

(Gwae, J.)

Dated the 11th day of March, 2019

in

HC Criminal Session No. 141 of 2014

.....

JUDGMENT OF THE COURT

5th & 11th July, 2022

MUGASHA, J.A.:

The appellant, Revocatus Luhega Kisandu was charged with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E.2002]. It was the prosecution allegation that, on 30/5/ 2013, at Luhiza village within Sengerema District in Mwanza Region, the appellant did murder one Yovin Zikampwelayo, the deceased. He denied the charge and after a full trial, he was convicted and sentenced to suffer death. Dissatisfied, he has now appealed to this Court.

At the trial, the prosecution case hinged on the evidence of four witnesses namely: Irene Yovin (Rev. Sister Emil) who testified as PW1, Balyezuka Yovin (PW2), Sachelita Mafayo (PW3) and E. 9219 D/Cpl David (PW4) and two documentary exhibits namely, the Postmortem Examination Report (exhibit P1) and the sketch map of the scene of the crime (exhibit P2).

A factual account of the prosecution as gathered from the oral account of witnesses and documentary exhibits was briefly to the effect that: The deceased, his wife (PW3), and their children that is, PW1 and PW2, resided in the same compound but in different houses. On the fateful day at about 23:00 hours, PW1 was at home studying together with one Felister Florence Mafayo. While there, she noticed movement of people outside the house and later heard a bang and the door was opened. Then, she went out only to encounter the appellant accompanied by three other persons namely, Faustine, Mussa, and Dickson. The appellant struck her on the head and demanded to be shown where was the deceased which was not heeded to by PW1 and she was released. While PW1 was still outside the house, the appellant together with his fellows proceeded to the house of PW2 within the compound and shortly thereafter, her brother (PW2) was heard crying

loudly in pain as he was assaulted by the bandits. Since the deceased who was in his house could not bear what befallen his son who was in agony, he raised his voice revealing where he was pleading with the bandits not to kill his son. The bandits ordered him to open the door. They broke the door, stormed therein demanding money and attacked the deceased. PW1 who was still outside watched and heard the bandits harassing the deceased as the door of his house remained wide open. After the bandits left, PW1 entered into the deceased's house only to find her father deadly cut by the bandits. The deceased's wife (PW3) had to escape for safety after the bandits started to attack the deceased and upon returning home she found her husband dead. PW3 recalled that, it is PW1 who told her about the appellant being among the bandits at the scene of crime.

PW1, PW2 and PW3 all recalled that at the scene of crime there was solar light which illuminated inside the houses and outside in the compound. They also revealed that, their deceased father had a land dispute with the appellant and attributed the same to the killing incident. According to PW1 the incident took about 20 minutes and with the aid of solar light she managed to recognize the appellant whom she was familiar with because he resided in the neighbouring village and that, they used to meet regularly

when going to the farm. She as well, described the attire of the appellant at the scene of crime that he wore a black coat and a khaki trouser. She stated to have identified Dickson and Mussa who happened to visit their residence but were not among those charged. When cross-examined, she reiterated her earlier account that it is the appellant who struck her on the heard and that since she was outside the deceased's house she saw the appellant when accessed the deceased's house. She also recalled to have given a statement at the police and mentioned the appellant to be the one who was armed and killed the deceased and maintained to have known the appellant prior to the killing incident.

PW1's account was flanked by her brother PW2, who besides narrating how he was beaten by the bandits who demanded to be shown where was the deceased was, he gave a similar account on what had befallen the deceased who was hacked to death by the bandits. He also stated to have been aided by solar light and managed to identify the appellant whom he was familiar with and that he wore black clothes at the scene of crime. After the bandits had left, PW1 and PW2 went to the deceased's house only to find their father deadly cut. Upon being cross-examined he stated that, at the scene of crime, the appellant was accompanied by Dickson and Mussa

who all wore black clothes. PW4, a police who investigated the incident also told the trial court that the suspects were identified by the deceased's children.

On the defence side, the appellant denied to have killed the deceased. He stated that on 20/5/2013 at night hours while at his residence he heard about the murder of the deceased. So, he went to the scene of crime where he found a crowd of people including the local chairperson of Luhiza village and the councilor. He added that, shortly thereafter the police came at the scene and arrested eight villagers including Njugile Tumbo and two others from Funzi village. The appellant also recalled to have attended the burial of the deceased and then he returned home. According to him he was forced to escape to Mwanza fearing to be arrested because he was among those involved in land disputes with the deceased. He returned after a month only to be arrested on 20/1/2014, at his house in Buhambo area. DW1 further stated to have been implicated in the killing incident due to the existence of land dispute with the deceased.

Believing the prosecution account to be true, as earlier stated, the trial court convicted the appellant upon being satisfied that, the evidence

garnered from PW1 and PW2 was watertight having established that the appellant was properly identified at the scene of crime.

Undaunted, the appellant has appealed to the Court. In the Memorandum of Appeal dated 4/6/2019 he raised seven grounds of complaint as hereunder:

1. *That, PW1 did not mention/describe the appellant to any recipient (no matter independent one or else) on her first information report at the scene rather than afterthought claims as was reported at the police station and when undergoing medical treatment.*
2. *That, as regards to defence contention and in contrast to the entire intricacies in identifying witnesses evidence, the appellant identification was rather an afterthought pressurized by suspicions as to the land dispute between the two adverse parties.*
3. *That, the presiding Court did not resolve upon incurable intricacies as to whether the appellant was identified and described to PW3 soon after the felony.*
4. *That, the trial Court had erroneously relied on recognition and familiarity claims (land dispute) and in thus, failed to analyze the identification evidence as it opposed to the known yardsticks and elementary factors well provided for by the law and precedent.*
5. *That, the presiding Judge wrongly relied on purely incredible witness theory regarding the weapon held by the appellant during the saga.*

6. *That, the presiding Court did not detect and resolve upon the fact that the entire trial case was not investigated in this the appellant suffers Mistrial.*
7. *That, the appellant is the victim of unfavorable visual identification and a theory of prosecution evidence.*

Later on 21/7/2020, the appellant filed a Supplementary Memorandum of Appeal raising seven grounds of complaint which we shall not reproduce on account of what will become soon apparent.

At the hearing, the appellant had the services of Ms. Rose Edward Ndege, learned counsel and the respondent Republic was represented by Ms. Magreth Bernard Mwaseba, learned Senior State Attorney. Upon taking the floor, the appellant's counsel having consulted the appellant, abandoned all the grounds in the Supplementary Memorandum together with the 5th ground in the Memorandum of Appeal. She then opted to argue the first ground separately and the remaining grounds of appeal together.

It was Ms. Ndege's submission that the identification of the appellant by PW1 is doubtful because she never mentioned the appellant to the neighbours which was the earliest opportunity and instead, mentioned the appellant while she was in hospital which is an afterthought and dents the reliability of the evidence on visual identification. Further she argued that,

the prosecution account on visual identification is weakened by **one,** the delayed arrest of the appellant although he had attended the burial whereby others were arrested; **two,** missing indication on the presence of solar light in the sketch map which contradicts the oral account of PW1, PW2 and PW3 on the nature of light which aided them in the identification of the appellant; **three,** although PW1 and PW2 were all at the scene of crime each gave own account on the attire worn by the appellant at the scene of crime; **four,** while PW3 testified that the appellant was mentioned to her by PW1, this is at variance with the testimony of PW1 who did not confirm as such. **four,** PW1 and PW3 gave a contradictory account as each of them claimed to have been with the deceased when he was attacked by the bandits which is not supported by the record; and **five** the matter was not properly investigated and as such, the conviction of the appellant was based on mere suspicion of related witnesses. On this submission, she argued that the case against the appellant was not proved to the hilt and urged us to allow the appeal and set the appellant at liberty.

On the other hand, at the outset, the learned State Attorney intimated to us that she was not supporting the appeal arguing that, the charge against the appellant was proved beyond reasonable doubt. On this, she submitted

that the appellant was properly identified at the scene of crime in line with the respective criteria as stated in case law. She pointed out that, since the incident took about 20 minutes, PW1 observed the appellant who held her hand when dragging her to show him where he deceased was. She added that, at the scene of crime there was solar light and when the bandits stormed they found PW1 reading which confirms the sufficiency of light which enabled PW1 as well, to see and identify the appellant who was not a stranger to her and proceeded to mention him to her mother, PW3 who so confirmed in her testimonial account.

In addressing the concern that the prosecution account came only from the related witnesses, she argued that it is not barred under the law considering the credible account of PW1 which was reliable because having mentioned the appellant to PW3 which was the earliest opportunity. To back up her proposition, she cited to us the case of **MAKENDE SIMON VS REPUBLIC,** Criminal Appeal No. 412 of 2017 (unreported).

As to the variance on the description of the attire in the account of PW1 and PW2, she argued this to be minor as it did not go to the root of the matter considering that PW1 observed the appellant at a close range as opposed to PW2 who was 10 meters away. Further she contended that, there

was no contradiction as to who was with the bandits when the deceased was attacked because PW1 was studying together with one Felista and PW3 was with the deceased but she had escaped after the bandits started to hit the deceased. Finally, she urged the Court to dismiss the appeal because the charge was proved beyond reasonable doubt and the conviction of the appellant is justified.

In rejoinder, Ms. Ndege reiterated her earlier stance that at the scene of crime light was insufficient and which caused the prosecution witnesses to give a contradictory account on the attire of the appellant which weakened the evidence on visual identification.

After a careful consideration of the record before us, the grounds of appeal and submissions from either side, the issue for determination is whether the charge against the appellant was proved to the hilt.

In grounds 1, 2, 3, 4, and 7 the appellant's complaint hinges upon reliance by the trial court on weak and unreliable prosecution account on visual identification to convict which to us it constitutes an issue for determination. It is settled law that visual identification is of the weakest kind and most unreliable and as such, the courts are cautioned not to act on such evidence unless all the possibilities of mistaken identity are eliminated

and the court is fully satisfied that the evidence before it is absolutely water tight. This is what made the Court to state factors to be taken in account when considering evidence on visual identification in the case of **WAZIRI AMANI VS. REPUBLIC** [1980] 250. Those factors include: **One,** the duration the identifying witness observed the accused; **two,** the distance at which he observed him, **three,** the conditions in which the observation occurred, for instance, whether it was day or night-time and whether there was good or poor light at the scene; and **four,** further whether the witness knew or had seen the accused before. This was further emphasized in cases of TLR 250, **RAYMOND FRANCIS VS. REPUBLIC** [1994]T.LR 100 as the Court stated:

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance;"*

[See also: **JOHN BALAGOMWA, HAKIZIMANA ZEBEDAYO AND DEO MHIDINI VS. R.**, Criminal Appeal No. 56 of 2013 (unreported) which was referring to **WAZIRI AMANI V. REPUBLIC** (supra).]

We shall accordingly be guided by the stated principles in determining the appeal at hand and considering that this is a first appeal, we shall have

to re-appraise and re-evaluate the evidence on record. It is not in dispute that; the fateful incident took place at night in the dark. The follow up question is whether the conditions were favourable to facilitate the positive identification of the appellant. Our answer is in the affirmative and we shall explain why. It is evident in the testimonies of PW1 and PW2 that at the scene of crime: **one,** there was light from solar which illuminated inside the house and the entire compound; **two,** after the bandits stormed in the compound, proximity in a duration of 20 minutes enabled PW1 to observe the appellant at a very close range considering that, he is the one who held her hand when demanding to be shown where was the deceased**; three,** after being released by the appellant who remained outside, PW1 saw the appellant together with other bandits accessing the house of his brother who was also attacked before they stormed in the deceased's house who was attacked and found dead with cut wounds; **four,** the appellant was not a stranger to PW1 because prior to the incident he was known to her as a resident of the neighbouring village and they used to meet when going to the farm; and **five,** PW1 gave the terms of description having stated the attire of the appellant at the scene of crime that he wore a black coat and khaki trousers. Also, PW2 who happened to be at the scene of crime and

who was attacked, managed to see and identify the appellant and other bandits when they were moving to the deceased's house and he stated that they all wore black clothes. In **NICHOLAUS JAME URIO V. THE REPUBLIC**, Criminal Appeal No. 244 of 2010 (unreported), the Court quoted with approval the decision of the Court of Appeal of Kenya in **KENGA CHEA THOYA V. THE REPUBLIC**, Criminal Appeal No. 375 of 2006 (unreported), where it was stated that: -

> *"On our own evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by this court, that recognition is more satisfactory more assuring, and more reliable than that identification of a stranger."*

Similarly, in the case at hand, in view of the evidence of PW1 and PW2, this is a clear case of recognition than identification considering that, the appellant was known to the identifying witnesses prior to the incident. This is further cemented by the fact that, PW1 mentioned the appellant to PW3 on the fateful day which is the earliest opportunity and in our considered view adds credence to the reliability and assurance of the evidence of PW1

on the visual identification of the appellant at the scene of crime. Thus, we do not agree with the proposition by the appellant's counsel that the appellant mentioned the appellant while in the hospital as that is not supported by the record. Indeed, PW1 had identified the appellant on the fateful day before she was taken to the hospital. Moreover, we found no contradiction as to who was with the deceased when the bandits struck him as suggested by the appellant's counsel. We say so because PW1 who was outside through the broken door of the deceased's house managed to observe the bandits attacking her father while PW3 who had escaped came later and found her husband dead.

In addressing the concern raised by the appellant's counsel on the variance of the prosecution evidence on the attire worn by the appellant at the scene of crime and that the prosecution witnesses were related, we found this wanting and we shall explain why. While it is true that PW1 stated that the appellant wore a black coat and a khaki trouser, PW2 stated that the appellant wore black clothes. We found this to be a minor flip which did not go to the root of the matter as we are satisfied that, the testimonial account of PW1 and PW2 on visual identification of the appellant at the scene of crime is credible on account of being coherent and consistent when

compared to the testimony of other witnesses including the appellant. That apart, the minor variations were inescapable considering the lapse of five years from the occurrence of the offence up to when the witnesses testified, such trifling discrepancies should be ignored. This was underscored in the case of **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported), whereby the Court relying on its earlier decision in the case of **KIROYAN OLE SUYAN VS REPUBLIC,** Criminal Appeal No. 114 of 1994 (unreported), it stated:

> *"In its judgment dated 17.02.2002, the Court unequivocally stated that when a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies. In the case at hand, the witnesses were testifying after a lapse of nine years. Such trifling contradictions should be appropriately ignored."*

Therefore, although relatives are not barred to testify in relation to an incident they have witnessed, PW1 and PW2 were the only crucial prosecution witnesses who gave direct and credible account on the occurrence of the killing incident and those responsible including the appellant. Thus, we found no compelling reason to discredit such account

merely because the duo are relatives. See: **MUSTAFA RAMADHANI KIHIYO VS REPUBLIC** [2006] TLR 323 and **NDEGE KOA VS DIRECTOR OF PUBLIC PROSECUTIONS**, Criminal Appeal No. 34 of 2008 (unreported).

Pertaining to the issue of delayed arrest of the appellant raised by his counsel, although he was arrested on 20/1/2014 which was past six months from the killing incident, it is self-explanatory in the evidence of the appellant who after the fateful incident escaped to Mwanza claiming to have been sacred because he had a land dispute with the deceased and that others were arrested. In this regard, the appellant was the architect for the delayed arrest and he cannot be heard to complain at this stage. Besides, his conduct of going to Mwanza after the fateful incident leaves a lot to be desired and we say no more. Finally, in the event the appellant was positively recognized by PW1 and PW2, we found the complaint on inadequate investigation misconceived considering that, even the investigator who went at the scene of crime on the fateful day, gathered and confirmed that the deceased's children mentioned the appellant to be one of the culprits which as earlier stated, cements the fact that he was mentioned at the earliest opportunity by PW1.

In view of what we have endeavoured to discuss, having re-evaluated the entire trial evidence, we are satisfied that, the conviction of the appellant by the trial court is justified because the charge was proved beyond reasonable doubt that the deceased was killed by the appellant and none other. Thus, all grounds of appeal are not merited and we accordingly, dismiss the appeal in its entirety.

DATED at **MWANZA** this 8th 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 11th day of July, 2022 in the presence of Ms. Rose Edward Ndege, learned advocate for the appellant and Ms. Maryasinta Lazaro Sebukoto, learned Senior State Attorney for Respondent/Republic, is hereby certified as true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL