IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO.295 OF 2020

(CORAM: KWARIKO, J.A., LEVIRA, J. A. And MWAMPASHI, J.A.)

CHACHA MATIKO @ MAGIGE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Mwanza District Registry, sitting at Tarime)

(Siyani,J)

dated the 31st day of May, 2019

in

Criminal Sessions Case No. 122 of 2013

.....

JUDGMENT OF THE COURT

8th & 12th July, 2022

MWAMPASHI, J.A.:

In Criminal Sessions Case No. 122 of 2013, before the High Court of Tanzania, Mwanza District Registry sitting at Tarime (the trial court), the appellant, Chacha Matiko @ Magige, was charged and convicted of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2022] (the Penal Code). It was alleged before the trial court by the prosecution that on 11.12.2012 at about 17:00 hrs at Gibaso Village within the District of Tarime in Mara Region, the appellant murdered one Marwa s/o Kiruka @ Nyangarya (the deceased).

The plea of not guilty having been entered by the trial court following the appellant's denial to the charge, the trial was commenced and in proving the case against the appellant, the prosecution called two witnesses and tendered one exhibit, to wit, a post mortem report. On the other hand, the appellant was a sole witness in his defence case. After a full trial, it was found by the trial court that the case against the appellant had been proved to the hilt. Consequently, the appellant was convicted and sentenced to suffer death by hanging. Believing that the law went for the wrong person, the appellant has now sought to vindicate himself by appealing to this Court.

The facts of the case as it can be gathered from the record of appeal, are as follows: On the fateful day at about 17:00 hrs, Ghati Gikaro Marwa, a resident of Gibaso village who testified as PW1, went to their bar where local brew used to be served which was being operated by her and one Nyaroso Gikaro, her co-wife. Upon getting there, she found that her co-wife had already opened the bar and in it there were three customers namely; Chacha Matiko Matiko (Appellant), Daud Sangari and Makuru Chacha. In a short while, one Mwita Magige who is the appellant's uncle, came and joined the trio. After he had been saluted by the appellant, the appellant's uncle was heard by PW1 asking the appellant if he could recognize the deceased who, at that moment,

was also seated in the bar. The appellant said he did not know who the deceased was and that is when the two, that is, the appellant and his uncle had private conversation and then they got out. Few minutes later, the appellant came back and approached the deceased asking him why he was still there. PW1 then saw the appellant grabbing the deceased and stabbing him at the back before he disappeared as it was for those other customers who were in the bar. PW1 raised an alarm and called her husband who was in another bar with the OCS of Gibaso. Many people responded to the alarm and she heard them saying that the deceased was no more. Thereafter, the case was reported to the police and the deceased body was left at the scene till in the morning when a medical doctor came and examined it before the same could be handed over to relatives for burial.

In cross-examination, PW1 is on record stating that when she got in the bar, there were many people in there and that the appellant was her village mate. She also insisted that all customers escaped after the incident and that when the incident was happening her co-wife had gone to look for a change.

The last prosecution witness was Dr. Kagamira Kaijage who testified as PW2 telling the trial court that he is a medical doctor who

performed the post mortem examination of the deceased body on 12.12.2012 at Nyangoto Health Centre. He observed that the deceased had sustained a deep wound at the back right side of the chest (posterior chest). To his opinion, the said wound had been caused by a sharp object. The post mortem examination report in which it was indicated that the cause of the death was an acute blood loss due to the stab wound, was tendered by PW2 and was admitted in evidence as exhibit P1.

In his sworn defence evidence, the appellant who testified as DW1, denied to have committed the murder in question. He told the trial court that a day before the material day he had gone to Mtonyo in Kenya tracking his stolen cattle and that he returned to Gibaso on the material day at about 11:00 hrs. After his return, he went at Sanawa's place where illicit liquor (gongo) is sold and joined other people who were there drinking till at about 15:00 hrs when the liquor finished. Thereafter, his uncle Mwita Magige took him to another bar owned by Gikaro where they continued drinking. Because he was so drunk, he had to spend the night at his uncle's home which was close to the bar. In the morning at about 08:00 am he got the news about the demise of the deceased and he thus joined other villagers at Gikaro's bar where the deceased was. He participated in burying the deceased and

peacefully stayed at the village for more than a month till on 06.02.2013 when he was arrested by game officers for grazing his cattle in a game reserve. DW1 further stated that after being arrested he was taken at Nyamwaga Police Station where he was remanded in custody till on 08.02.2013 when one police officer known as James Kasaki asked him some general questions. On 13.02.2013, the same police officer took him to a certain boss where he was asked to sign on some papers. He finally told the trial Court that it was a surprise to him when he was brought before the court and charged with murder, the offence he did not commit.

Basing on the evidence from PW1 who was found by the trial court to be a credible, truthful and reliable witness, the trial court was satisfied that the charge against the appellant had been proved beyond any reasonable doubt. It is also noteworthy that, the trial court considered the appellant's defence and accorded it no weight. The trial court did also note some discrepancies and shortcomings in the prosecution evidence, such as, the failure by PW1 to tell when the deceased entered in the bar and the contradiction between PW1 and PW2 on the place where the deceased body was medically examined and concluded that the same were minor and did not affect the credibility and reliability of PW1 and PW2. As we have alluded to above,

basing on PW1's evidence which was to the effect that it was the appellant who stabbed the deceased to death, the appellant was convicted and sentenced to suffer death by hanging. Aggrieved, the appellant has preferred the instant appeal.

At the hearing of the appeal, Mr. Fidelis Mtewele, learned advocate, appeared and represented the appellant, whereas the respondent Republic was represented by Ms. Magreth Bernard Mwaseba, learned Senior State Attorney.

Upon taking the floor and after consulting the appellant, Mr. Mtewele abandoned the memorandum of appeal the appellant had filed on 29.05.2020 and which contained seven grounds. He then prayed and was granted leave in terms of rule 81(1) of the Tanzania Court of Appeal Rules, 2009, to argue on a single new ground which was formulated by him as follows:

> *"That the learned trial Judge erred in law and in fact in convicting the appellant while the case against him was not proved beyond reasonable doubt".*

In his submissions to support the above ground of appeal, Mr. Mtewele argued that the prosecution evidence on which the conviction was based, was full of material contradictions and inconsistencies which

ought to have resulted into the acquittal of the appellant and not conviction. He clustered what he thought were the contradictions and inconsistencies into three areas; **one**, lack of evidence on the presence of the deceased at the scene of crime before the happening of the incident, **two**; the place where the post mortem examination of the deceased body was performed; and **three**, the time the offence was committed.

As in regard to the first area, it was submitted by Mr. Mtewele that PW1 gave doubtful evidence on the time when the deceased got into the bar. It was argued that while PW1 firmly stated that when getting in the bar she only found three customers namely the appellant, Daud Sangari and Makuru Chacha, she did not tell at what point in time the deceased got in the bar. Mr. Mtewele wondered how PW1 could see the appellant stabbing the deceased while the deceased was not among the three customers who were in the bar at the material moment. He also faulted the trial court which held that the doubt on the time when the deceased got in the bar was minor and not reasonable. He argued that the doubt was material as it does not only go to the root of the case but it also goes to the credibility and reliability of PW1.

Mr. Mtewele submitted on the second area that PW1 and PW2 contradicted themselves on the place where the deceased body was medically examined. He pointed out that while according to PW1, the deceased body, which had remained at the scene till the morning on the next day, was medically examined by a medical doctor at the scene of crime, PW2's testimony on that fact was to the effect that the examination of the deceased body was performed at Nyangoto Health Centre. To Mr. Mtewele the contradiction was not minor or immaterial as ruled out by the trial court. He contended that the contradiction goes to the root of the credibility and reliability of the two witnesses, particularly to PW1 who claimed to have seen the appellant stabbing the deceased.

Regarding the third area of the alleged prosecution contradictory and inconsistent evidence, it was argued by Mr. Mtewele that while PW1 stated that the offence was committed at 17:00 hrs she is also on record at page 95 of the record of appeal stating that it was at 16:00 hrs when she explained what had just happened to the villagers who had gathered at the scene. Mr. Mtewele wondered how comes PW1 explained about the incident to the villagers at 16:00 hrs when the said incident had not yet happened. He insisted that PW1's self-contradictory evidence places her credibility and reliability in doubt.

Mr. Mtewele further argued that the prosecution evidence was too weak to support the appellant's conviction because a number of material witnesses were not called to testify for the prosecution. He contended that there are so many gaps in PW1's evidence on the issue of who murdered the deceased that could have been filled up by material witnesses who, unfortunately, were not called to testify. For instance, there were three customers named by PW1 who were present when the appellant allegedly stabbed the deceased to death who the prosecution did not call. It was also pointed out that PW1's co-wife who might have seen the people who were in her bar was also a material witness. Again, it was argued by Mr. Mtewele that, there were villagers who allegedly responded to the alarm raised by PW1 but the prosecution chose not to call any one of them to come and testify. Mr. Mtewele did also contend that no investigations were done in the instant case and it is therefore not known how, when and where was the appellant arrested. It was therefore argued by him that in totality of the above pointed out shortcomings, the trial court ought to have drawn an adverse inference as against the prosecution. On this, Mr. Mtewele placed reliance on our decision in the case of **Raphael Mhando v. Republic,** Criminal Appeal No. 54 of 2017 (unreported).

For the above reasons, Mr. Mtewele urged us to find that PW1's evidence was unreliable and not sufficient to prove that it was the appellant who murdered the deceased. He insisted that the case against the appellant was not proved to the required standard and therefore that the appeal should be allowed by quashing the conviction and setting aside the sentence.

At the outset, Ms. Mwaseba made it clear that she was not supporting the appeal. She argued that the case against the appellant was proved to the required standard. She also contended that there might have been some doubts or contradictions in the prosecution evidence, but the same, as rightly held by the trial court, were not reasonable or material. Ms. Mwaseba insisted that PW1 who saw the appellant stabbing the deceased to death was, as found by the trial court, credible, truthful and reliable witness.

Ms. Mwaseba argued further that the failure by PW1 to tell when exactly the deceased entered the bar is immaterial as it was for the contradiction on the place the deceased body was medically examined. She pointed out that as the two prosecution witnesses were giving evidence after the lapse of six years since when the murder was committed, allowance of some minor contradictions and inconsistencies

should be given to the witnesses. To buttress this point, Ms. Mwaseba referred us to the decision of the Court in **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004 (unreported).

As in regard to the argument on the failure by the prosecution to call material witnesses, it was argued by Ms. Mwaseba that bearing in mind the strength of PW1's evidence there was no any other material witness who ought to have been called. She insisted that there were no gaps in PW1's evidence to be filled by any other witness. It was contended by her that the law does not require a particular number of witnesses to prove a fact and therefore that, PW1's sole evidence which was not challenged by the appellant in cross examination, sufficiently proved the case. She therefore prayed for the appeal to be dismissed for being baseless.

In his brief rejoinder, Mr. Mtewele reiterated his earlier submissions and prayed for the appeal to be allowed because the case against the appellant was not proved to the hilt.

Having dispassionately considered the ground of appeal and the arguments for and against the appeal, we are of a settled view that the determination of this appeal centres on the credibility and reliability of the two prosecution witnesses particularly on PW1. We find it settled

that the fact that the deceased died from the stab wound he had sustained has never been in dispute. The only contentious issue has been on who stabbed the deceased hence causing the death. This is where PW1's sole evidence comes into play. It should be borne in mind that it is only PW1 who claimed to have seen the appellant stabbing the deceased the fact which is strongly denied and contested by the appellant. It is from these circumstances that we find that basically, the determination of this appeal hinges on the credibility and reliability of PW1. The issue for our determination is therefore whether PW1's evidence was credible, reliable and hence sufficient to support the conviction.

In our endeavour to answer the above posed issue, we are alive of the settled position that it is the trial court which is best placed to assess the credibility of a witness. However, we are also mindful that when it comes to the witness's coherence and consistency an appellate court has the mandate of assessing the credibility of such a witness. See- **Abuu Ramadhani @ Kicheche v. Republic**, Criminal Appeal No. 364 0f 2014 and **Heleniko Ndimki @ Kaleji and Another v. Republic**, Criminal Appeal No. 443 of 2018 (both unreported). In the former case, the Court stated thus:

"We are mindful of the fact that the trial court was best placed to assess the creditworthiness of the witnesses who testified before it. However, being a first appellate court, we have a duty of carefully examining and re-evaluating the evidence tendered at the trial before confirming the findings of the trial Judge and the correctness of those findings."

In regard to how the credibility of a witness can be assessed by an appellate court, guidance was given by the Court in the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported) which was cited with approval in the cases of **Aloyce Mgovano v. Republic,** Criminal Appeal No. 182 of 2011 (unreported) and also in **Raphael Mhando** (supra) where it was stated that:

"The credibility of a witness can also be determined in two other ways: one, when assessing coherence of the testimony of the witness, two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court".

Before we proceed to determine the appeal in light of the above stated position of the law and without prejudice, we find it appropriate to point out at this very stage that, we have noted with great concern and disappointment that despite the fact that the case was on a serious offence which attracts the capital punishment, it was not shown that the case was subjected to any investigations by the police hence poorly prosecuted. We believe that had the case been given the seriousness it deserved, most of the complaints being raised in this appeal, as we are about to discuss hereunder, would have been avoided.

Turning back to the business of the day and being guided by the position of the law as above pointed out, we are now ready to consider whether PW1 was a credible and reliable witness and also whether her sole evidence sufficiently proved that it was the appellant who stabbed the deceased to death. First of all, we note that while it is only PW1 who was brought before the trial court to support the prosecution case that it was the appellant who stabbed the appellant to death, the record shows that there were other people who witnessed the incident. According to PW1, the deceased was stabbed in the presence of Daudi Sangari, Makuru Chacha and the appellant's uncle one Mwita Magige.

We also agree with both counsel that in her evidence PW1 did not tell that when she got in the bar the deceased was in the bar. PW1 did not also tell at what time the deceased got in the bar and joined those who were there. The deceased came into the picture only when PW1 allegedly heard the appellant conversing with his uncle about him and when she allegedly saw him being stabbed by the appellant. We have also observed that, at page 95 of the record of appeal, PW1 is on record, when being cross-examined by the appellant's advocate, stating that there were many people in the bar. This is not only contradictory to her evidence which is to the effect that when she got in the bar and when the incident was happening, there were only three customers but, as correctly argued by Mr. Mtewele, it also casts some doubts on her credibility and reliability. Further, PW1's evidence that there were many people in the bar raises the issue of whether, under those circumstances, PW1 could clearly see who stabbed the deceased.

The record of appeal is also clear on the fact that while according to PW1 the deceased body was medically examined by the medical doctor at the scene before the same could be handed over to the relatives for burial, the evidence from the said doctor who examined the deceased body, PW2, the medical examination on the deceased body and the handing over to the relatives was done at Nyangoto Health

Centre. It is also not disputed that while according to the particulars of the charge the murder in question was committed at 17:00 hrs, PW1 is on record telling the trial court that it was at 16:00 hrs when she explained to the villagers, her husband and to the OCS of Gibaso Police Station about what had happened. We have noted Ms. Mwaseba's argument that these contradictions and inconsistencies are minor as they do not go to the main issue which is on who stabbed the deceased and also that the fact that the two witnesses were testifying after the lapse of six years from when the offence was committed has to be taken into account. We have also observed the trial court's decision on those issues. With respect, we think that under the circumstances of this case, though the contradictions and discrepancies look to be minor as argued by Ms. Mwaseba and as found by the trial court, in their totality, the contradictions and inconsistencies, do raise some reasonable doubts on the truthfulness and reliability of PW1. We are of a considered view that the discrepancy regarding time could be minor had not been for those other contradictions and discrepancies in the prosecution case.

The most disastrous blow on PW1's reliability in respect of her lone evidence on the issue of whether it was the appellant who stabbed the deceased to death, is not only the failure to give the case the seriousness it deserved as we have alluded to earlier but also the failure

by the prosecution to call a number of witnesses whose evidence would have cleared and or filled the gaps in the evidence given by PW1. While we agree with Ms. Mwaseba that under the law there is no particular number of witnesses required to prove a fact and also that conviction can be based on the evidence from a single witness, with respect, we do not agree with her that under the circumstances of this serious case of murder, there was no need of calling any other witness to support PW1's sole evidence. We insist that each case must be considered according to its circumstances. On this point, we subscribe to what it was said by this Court in the case of **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 351 of 2008 (unreported) also quoted in the case of **Raphael Mhando** (supra) that:

> *"So, before invoking section 143 of the TEA regard must be had to the facts of a particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on the section. It is thus now settled law 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".*

It is our considered view that, under the circumstances of this case, where there is no evidence that PW1 named the appellant at the earliest opportunity as the person who had stabbed the deceased and where there is no clue on when, why and how the appellant was arrested except for the appellant's own and uncontroverted evidence that he was arrested after more than a month from the date of the incident for unlawfully entering in a game reserve, then the following witnesses, who could at least have supported PW1's porous evidence that it was the appellant who stabbed the deceased to death, were material witnesses; **one**, Daud Sangari, Makuru Chacha and the appellant's uncle who according to PW1 were present in the bar at the material moment and who witnessed the incident happening; **two**, PW1's co-wife who could have cleared the doubts on who were in the bar before the happening of the incident and also who could have told the trial court if on her return to the bar after the incident, PW1 named the appellant as the one who had stabbed the deceased to death; **three**, the villagers who responded to PW1's alarm who could have cleared the doubt whether the appellant was named as the person who had stabbed the deceased; **four**, PW1's husband and OCS of Gibaso Police Station to whom the incident was firstly reported by PW1 who could also have told the trial Court if the appellant was named to them

by PW1; **five**, the police officer who received the report from PW1 at the police station and who recorded her statement; and **six,** the case investigation officer, if any, who could have among other things explained why the appellant who was allegedly known to have committed the murder from day one and who had not escaped from his village, could not be arrested till after almost two months and on a different offence.

As we have earlier alluded to, under the circumstances of this case, the above listed persons were material witnesses who we believe were within reach but who were not called without sufficient reason being shown. In his defence evidence the appellant uncontroverted evidence is to the effect that he was informed about the deceased death at 08:00 hrs on 12/12/2012 and that he, as other villagers did, went to the scene of crime and actively participated in the burial of the deceased. He further testified that after the burial of the deceased he peacefully stayed in the village till on 08.02.2013 when he was arrested for grazing his cattle in the game reserve and that it is when he was taken at the police station where he was surprised by the charge of murdering the deceased.

In the instant case there was therefore an unexplained delay to arrest the appellant of almost two months and even when the arrest was effected, it was not for the offence in question. The delay in arresting the appellant and the fact that there is no evidence not only that PW1 named the appellant at the earliest opportunity to anyone raises some reasonable doubts on PW1's evidence that she witnessed the appellant stabbing the deceased to death. The witnesses we have listed above but who, for unknown reasons, were not called by the prosecution could have cleared some of the doubts we have pointed out above. This is a fit case in which the High Court ought to have drawn an adverse inference against the prosecution.

It is for the above reasons that we agree with Mr. Mtewele that PW1's evidence was not sufficient to support the conviction. We cannot say in certainty that PW1 saw the appellant stabbing the deceased to death. Under the circumstances of this case, we find it very unsafe to rely and sustain the conviction on PW1's lone evidence. The case against the appellant was not proved to the hilt.

We note that, in its judgment, the trial court warned itself on basing the conviction on PW1's sole uncorroborated evidence. However, it is our settled view that had the trial court properly directed its mind to

the gaps in PW1's sole evidence, as we have amply demonstrated above, it could have sensed the danger of basing the conviction on that evidence.

In the upshot, and for the above reasons, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We also order that the appellant be set at liberty forthwith unless otherwise held for any other lawful cause.

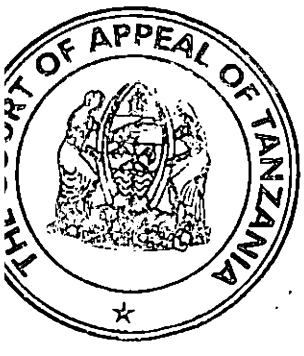
DATED at **MWANZA** this 11th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 12th day of July, 2022 in the presence of the appellant in person, and Mr. Deogratius Richard Rumanyika, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL