IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 297 OF 2019

TABU SITA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Shinyanga)

(Mkeha, J.)

dated the 10th day of July, 2019
in
Criminal Sessions Case No. 69 of 2016

JUDGMENT OF THE COURT

4th & 10th November, 2022

KEREFU, J.A.:

The appellant, Tabu Sita was arraigned before the High Court of Tanzania sitting at Shinyanga for the offence of murder contrary to section 196 of the Penal Code in Criminal Sessions Case No. 69 of 2016. The information laid by the prosecution alleged that, on 26th November, 2015 at Kidinda Street within Bariadi District in Simiyu Region, the appellant murdered one Milo d/o Ramadhani (the deceased). The appellant pleaded not guilty to the charge. However, after a full trial, he was convicted and sentenced to suffer death by hanging.

The brief facts of the case that led to the appellant's arraignment, conviction and sentence as obtained from the record of appeal are not

complicated. They go thus, the deceased was living at Kidinda Village with her family. Baraka Genge (PW4), the son of the deceased, testified that, on 26th November, 2015 at midnight around 01:00 hours, while asleep in one room with his mother, two young brothers and his sister-in-law, they were awakened by a sound of something that knocked on a certain door of a room where family guests were sleeping. His mother wondered and asked '*Kuna nini huko nje.*' Literary translated in English to mean, '*what is happening outside.*' It was PW4's testimony that, when they were preparing to get out to see what was happening, suddenly, something knocked on the door of their room and two male persons in black coats, trousers and shoes stormed in the room.

PW4 testified further that, the first person who entered the room was holding a machete (*panga*) and the other one was holding a torch which illuminated the entire room. PW4 said that, through the aid of the torch light, he managed to identify the person who was holding a *panga* to be his uncle, the appellant and the husband of his aunt as he stood at a distance of about three meters from where he was sleeping. He, however stated that he did not manage to identify the other person who was holding the torch.

PW4 went on to state that, he saw the appellant cutting the right part of his mother's neck by using a *panga* and the other person warned

them not to raise an alarm, lest they would be killed. Having accomplished their mission, the duo left the room and went away. Thereafter, PW4 sought assistance from the neighbours who came and reported the matter to the police who arrived at the scene around 04:00 hours. Upon being interviewed by the police, PW4 mentioned the appellant to be responsible with the death of his mother.

No. F.1143 D/CPL Vedastus (PW2) the investigation officer testified that he was involved in the investigation of the incident. That, on 26th November, 2015 around 08:00 hours, together with other police officers, they went to the scene where they found the deceased body with a cut wound on the neck that appeared to have been caused by a sharp object. PW2 prepared a sketch map of the scene of crime (exhibit P1), interviewed different people on the incident and recorded their statements. Through the said interview, they detected that the appellant together with two other people, namely, Buluda Sita and Mwinula Nkilya, were responsible with the death of the deceased. Later, the deceased body was taken to the hospital.

Subsequently, on 27th November, 2015 the appellant was arrested at Bunamala Village and brought to Bariadi Police Station. Upon being interviewed by PW2, the appellant confessed to have murdered the deceased after being informed by his traditional doctor that he was

being bewitched by his wife's family members for purposes of inheriting his wealth as he had lived with his wife for about fifteen (15) years without having a child.

Thereafter, No. H.8296 D/C Revocatus Makoye (PW1) took the appellant to Kezia Gerald Manyama (PW3), the Justice of Peace and a Principal Primary Court Magistrate who was stationed at Somanda Primary Court, to record his extra-judicial statement (exhibit P2). In her evidence, PW3 affirmed that the appellant confessed, before her, to have killed the deceased.

In his defence, the appellant, apart from admitting that he knew the deceased as his sister-in-law and that she resided in his house for a considerable time, he denied to have committed the offence. He stated that he was arrested on 26th November, 2015 around 10:00 hours at Nsima and brought to the police station. He denied to have confessed and recorded any statement before the police. He however, admitted to have been taken to PW3, though, he also denied to have confessed and recorded the extra-judicial statement. He admitted that he knew PW4 who also resided at his house for a long time and that he paid for his school fees from standard one to seven. That, they knew each other very well and no way PW4 would have made mistakes in identifying him.

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 three assessors unanimously returned a verdict of guilty against the appellant. In his final verdict, the learned trial Judge agreed with the assessors and found that the case against the appellant was proved to the required standard through the testimony of PW4, the sole prosecution eye witness, whose evidence was corroborated by PW2 and PW3 together with the appellant's own confession. Thus, the appellant was found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant has preferred the current appeal raising the following five grounds of appeal which can conveniently be paraphrased as follows; **first**, that, the postmortem report, which is an important document to establish the cause of death was not tendered in court; **second,** the appellant's extra judicial statement (exhibit P2) was unprocedurally admitted in evidence contrary to the mandatory provisions of the law; **third,** the visual identification of the appellant by PW4 at the scene was not watertight to eliminate all possibilities of mistaken identity; **fourth,** the evidence adduced by PW4 was doubtful, unreliable and untruthful to mount the appellant's conviction; and **fifth**, the prosecution case was not proved beyond reasonable doubt.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Audax Theonest Constantine, learned counsel whereas the respondent Republic was represented by Mr. Shabani Mwigole assisted by Ms. Verediana Mlenza, both learned Senior State Attorneys.

Upon taking the floor, Mr. Constantine sought and was granted leave to abandon the first ground of appeal. He then, intimated that, he will argue the third and fourth grounds conjointly and the second and fifth grounds, separately.

Starting with the third and fourth grounds, Mr. Constantine argued that the visual identification of the appellant at the scene, which was relied upon by the trial court to convict him was not watertight to avoid any mistaken identity. He argued that PW4, the only prosecution's eye witness at the scene of crime, though he testified that he managed to identify the appellant with the aid of torch light, he did not explain its intensity, the size of the room and the duration of the incident. He contended that, since the incident happened at night under unfavorable conditions, including the terrifying situation obtained at the scene, all conditions of visual identification ought to have been met. To bolster his argument, he cited the cases of **Lubinza Mabula & 2 Others v. Republic,** Criminal Appeal No. 226 of 2016 and **Isdory Cornery @**

Rweyemamu v. Republic, Criminal Appeal No. 230 of 2014 (both unreported).

The learned counsel argued further that, although, PW4 testified that at the scene of crime he was with his two young brothers, his aunt and neighbours, none of them was summoned to testify before the trial court. Mr. Constantine further challenged the credibility of PW4 for failure to immediately mention the appellant to the neighbours who came at the scene at that night. As such, Mr. Constantine implored us to find that PW4 was incredible and unreliable witness. To buttress his proposition, he cited **Isdory Cornery @ Rweyemamu** (supra).

In his response, Mr. Mwigole challenged the submission of his learned friend by referring us to page 40 of the record of appeal where PW4 testified that he knew the appellant all the time as his uncle and the husband of his aunt. He added that, even the appellant himself at pages 47 to 48 of the same record admitted to that fact as he testified that PW4 knew him very well and no way he would have made a mistake in identifying him. That, appellant also admitted to have lived with PW4 for a long time in his home where he took care of him and paid for his school fees. It was therefore the submission of Mr. Mwigole that, since PW4 and the appellant were familiar to each other prior to the incident and taking into account that at the scene there was torch

light which illuminated the whole room, there is no doubt that the appellant was positively recognized by PW4. To support his argument, he cited the case of **Lazaro Felix v. Republic,** Criminal Appeal No. 41 of 2003 (unreported).

On the claim that PW4 did not mention the appellant immediately at the scene of crime, Mr. Mwigole referred us to page 42 of the record of appeal where PW4 testified that he mentioned the appellant to the police during the same night. On the failure by the prosecution to summon other witnesses who were said to be at the scene of crime to testify before the trial court, Mr. Mwigole cited section 143 of the Evidence Act and the case of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148 and argued that there is no legal requirement for the prosecution to call a specific number of witnesses as even the evidence of a single witness is adequate to prove a case. As such, the learned Senior State Attorney urged us to find that the third and fourth grounds of appeal have no merit.

Having heard the contending arguments by the learned counsel for the parties and our re-evaluation of the evidence on record, we find that this is a straight forward issue as in their evidence, both, PW4 and the appellant clearly indicated that they knew each other for a long time

prior to the incident. For instance, in his evidence found at pages 40 to 43 of the record of appeal, PW4 testified that:

> *"The one I managed to identify was my uncle 'Mume wake na Mama Mkubwa.' His name is TABU SITA. The one I identified started cutting my mother at her neck. He stood at a distance of about three meters from where I was sleeping. He cut my mother at the right part of her neck using a machete... I saw by my own eyes the way my mother was being cut...I knew the accused at all times. He was my aunt's husband."*

On his part, the appellant, at pages 46 to 48 of the same record, testified that, *'Yes, I knew PW4. He used to reside at my own home. I paid for his education from standard one to seven.'* Again, and upon being cross examined by Mr. Sakafu, the appellant testified that, *'Yes, I and PW4 knew each other. In no way he can fail to identify me. He is my own child.'*

From the above extracts, it is clear that, there was no dispute that the appellant was familiar to PW4 as he was his uncle married to his aunt, the elder sister of his deceased mother. The appellant himself admitted those facts and clearly stated that PW4 is his own son, who resided at his home for a long time and he was the one taking care of him as well as paying for his education. In **Nicholaus Jame Urio v.**

Republic, Criminal Appeal No. 224 of 2010 (unreported), the Court quoted with approval the decision of the Court of Appeal of Kenya in **Kenga Chea Thoya v. 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 identification of a stranger."*

We made corresponding remarks in **Athumani Hamis @ Athuman v. Republic**, Criminal Appeal No. 288 of 2009; **Revocatus Luhega Kisandu v. Republic,** Criminal Appeal No. 195 of 2019 and **Masamba Musiba @ Musiba Masai Masamba v. Republic,** Criminal Appeal No. 138 of 2019 (all unreported).

Similarly, in the case at hand, in view of the evidence of PW4 which was corroborated by the appellant himself, we are settled that, this is a clear case of recognition rather than identification as both, PW4 and the appellant knew each other very well prior to the incident. This fact is further cemented by the fact that, PW4 mentioned the appellant to the police, in the very night, at the scene of crime. We therefore

agree with Mr. Mwigole that, the act of mentioning the appellant at the earliest opportunity, adds credence to the reliability and assurance of the PW4's evidence.

It is also on record and as intimated above, in convicting the appellant, the learned trial Judge relied mostly on the evidence of PW4 which was corroborated by PW2, PW3 and the appellant himself. This can be evidenced at page 78 of the record of appeal, where the learned trial Judge concluded that:

> *"PW4 saw the accused cutting the deceased onto her neck using a machete. That, the accused was the first person to enter the room being followed by the other person, who held a torch whose light spread in the whole room thereby enabling PW4 to identify the accused without difficulties at a distance of about three meters from where PW4 was sleeping to the place where the accused stood while perpetuating the killing. The accused is on record to have told the court that, having lived with the witness (PW4) for a long time, in no way PW4 would have made mistake in identifying him (the accused)...The witness (PW4) told the police the very night, after almost three hours, that it was the accused whom he identified killing the deceased. The police timely recorded PW4's statement. I find PW4 as a reliable eye witness of the event."*

We are however mindful of the fact that, when challenging the visual identification of the appellant at the scene, Mr. Constantine relied on our previous decisions in **Lubinza Mabula & 2 Others** (supra) and **Isdory Cornery @ Rweyemamu** (supra) which reiterated the principle on the quality of the evidence of visual identification required to ground an accused person's conviction. We agree with him on that principle. However, and with profound respect, we are unable to go along with his argument that the appellant's visual identification was not watertight. Having made our finding that, the appellant was positively recognized by PW4 at the scene, we see no reason to fault the learned trial Judge on that aspect. We are increasingly of the view that, even the cases cited by Mr. Constantine on this matter are distinguishable with the facts of this appeal. As such, we find the third and fourth grounds of appeal devoid of merit.

On the second ground, Mr. Constantine attacked the extra judicial statement (exhibit P2) by arguing that it was recorded contrary to the Chief Justice's Guide for Justices of Peace (the CJ's Guide). To elaborate further on this point, he referred us to page 68 of the record of appeal and agued that, after recording exhibit P2, PW3 did not sign on it and/or explained how she handled the entire process including certifying that the appellant gave the statement voluntarily. In addition, Mr.

Constantine referred us to page 65 of the same record and argued that, PW3 did not indicate the name of the person who took care of the appellant after being left by PW1 in her office. According to him the pointed-out omissions are fatal irregularities which had rendered exhibit P2 inadmissible. As such, he invited us to expunge exhibit P2 from the record. He was positive that, after expunging exhibits P2 from the record, the remaining evidence is insufficient to sustain the appellant's conviction. In conclusion and based on his submission, Mr. Constantine urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him free.

In his response, Mr. Mwigole blamed his learned friend for raising new issues apart from the one indicated by the appellant in that ground. He clarified that, the appellant's complaint, under that ground was on the procedure adopted by the trial court to admit exhibit P2 in evidence and not otherwise. As such, Mr. Mwigole invited us to find that the submission made by Mr. Constantine before the Court was an afterthought. It was his argument that, since the issue of involuntariness or invalidity of exhibit P2 was not raised by the appellant at the point when it was admitted in evidence, Mr. Constantine cannot contend at this appellate level that the appellant made the said statement involuntarily.

On the complaint that exhibit P2 was not signed and certified by PW3, Mr. Mwigole referred us to page 68 and argued that the said statement was properly signed by both, the appellant and PW3 and finally, dated and stamped by PW3. Although, he conceded that there was an omission to indicate the name of a person who took care of the appellant after being left by PW1, he argued that the said omission is not fatal and could not have rendered exhibit P2 invalid or inadmissible, as not every contravention of the CJ's Guide leads to the exclusion of the evidence in question. He added that, the said omission did not occasion any miscarriage of justice to the appellant as, before and after recording the statement, he clearly indicated that he recorded it at his own free will and what was recorded was read over to him, in Kiswahili language, which he understood. To buttress his proposition, he cited the case of **Japhet Thadei Msigwa v. Republic,** Criminal Appeal No. 367 of 2008 (unreported), and insisted that PW3 properly complied with the CJ's Guide and there is nothing to fault the learned trial Judge in admitting exhibit P2 in evidence. On that basis, the learned Senior State Attorney urged us to dismiss the appeal for lack of merit.

In a brief rejoinder, Mr. Constantine reiterated his prior submission and added that, the list of factors enumerated in **Japhet Thadei**

Msigwa's case is not exhaustive and, as such, he insisted that each case should be determined from its own facts and circumstances.

Starting with the appellant's initial complaint on the unprocedural admission of exhibit P2 in evidence, we have revisited the testimony of PW3 who tendered the appellant's extrajudicial statement before the trial court. It is apparent, at page 37 of the record of appeal that during the trial, when PW3 tendered the said statement for admission, the advocate, who represented the appellant then, did not object to its admission in evidence and/or raise an issue that the same was invalid or involuntarily made. It is also clear that, even the appellant who was as well before the trial court, did not complain or indicate that he involuntarily recorded the said statement. In the case of **Emmanuel Lohay and Udagene Yatosha v. Republic,** Criminal Appeal No. 278 of 2010 (unreported), when faced with an akin situation, the Court held that:

> *"**It is trite law that if an accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted** and not during cross-examination or during defence - **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case, the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. **Objections, if any,***

ought to have been taken before they were admitted in evidence. *" [Emphasis added].*

Being guided by the above authority, it is our considered view that, even in this appeal, the appellant has missed the boat long before he came before us. Therefore, the appellant's complaint of objecting the admissibility of his statement at this eleventh hour offends the above stated principle.

On the compliance with the CJ's Guide, there is no gainsaying that the requirements as stipulated in the said Guide, being part of our laws imported by section 62(2) of the Magistrate Court's Act have to be followed by Justices of the Peace when recording the suspects' statements. The importance of the CJ's Guide was restated in **Japhet Thadei Msigwa** (supra), where the Court stated:

"So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms."

The Court went on to state that:

"The Justice of the Peace ought to observe, inter alia, the following:

(i) The time and date of his arrest;

(ii) The place he was arrested;

(iii) The place he slept before the date he was brought to him;

(iv) Whether any person by threat or promise or violence has persuaded him to give the statement;

(v) Whether he really wishes to make the statement on his own free will; and

(vi) That, if he makes a statement, the same may be used as evidence against him."

On the reasons and justification as to why the Justices of the Peace have to abide to the CJ's Guide, the Court stated that:

> *"We think the need to observe the Chief Justice's instructions are twofold. One, if the suspect decided to give such statement, he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily."*

In the instant appeal, having examined the contents of exhibit P2, it is clear that PW3 filled and signed in all the relevant parts. It is also apparent at page 68 of the record of appeal that the appellant signed it immediately, after he stated that, he recorded the statement out of his own free will and the same was read over to him in Kiswahili language, which he understood. Then, at the end, PW3 signed, dated and stamped it. In the circumstances and taking into account that, the appellant

himself had clearly indicated that he recorded the statement voluntarily, we are in agreement with Mr. Mwigole that the omissions pointed out by Mr. Constantine are minor defects which had not occasioned any injustice to the appellant.

It is on record that, in the said statement, the appellant clearly narrated on how he planned and actively participated in the killing of the deceased. For the sake of clarity, we have found it apposite to reproduce the relevant part of the said statement herein below:

> *"Mimi nakumbuka siku za nyuma nilienda kwa mganga wa kienyeji aitwaye Yunge Pigili. Mimi huwa naishi salunda (W) Bariadi-Simiyu. Baada ya kuugua nilienda kwa huyo ...mganga nikamwambia naumwa na huyo maganga alikuwa akinipa au kuniagua mimi nikiwa dereva wa gari ill nisipate ajali barabarani au kufukuzwa kazi. Hivyo nilipoenda huko nikiumwa, ndipo mganga huyo ...alianza kunipigia ramii kwa njia ya maji na akanieleza kwamba narogwa na familia ya mke wangu anayeitwa Hollo Ramadhani na mama yake mzazi anayeitwa Mpagi Magembe na mdogo wa mke wangu anayeitwa Milo Ramadhani ili wakishaniua wachukue mali zangu zote kwa vile mke wangu Hollo hajawahi kupata mtoto tangia tuoane miaka 15. Ndipo nilichukia sana na kwenda kuwaambia ndugu zangu ambao ni Buluda Sita, Mwinula Nkilya. Ndipo sote tulikubaliana na tukapanga tarehe 31/10/2015 muda 8:30 usiku tulienda nyumbani kwa*

mama mkwe Mpagi Magembe kwa kumkatakata mapanga hadi akafa. Na tarehe 26/11/2015 muda was saa 7:01 hivi usiku tukaenda kwa familia hiyo hiyo tukaenda kumkata na kumuua Milo Ramadhani ambaye naye ni mtoto wa Mpagi Magembe. Ndipo mimi nilirudi tena kwa mganga wangu ili nipewe dawa nisikamatwe. Na muda huo sikujua hao ndugu zangu walikoenda yaani Buluda Sita na Mwinula Nkilya. Hayo ndio maelezo yangu, nimesomewa na kuona sahihi kabisa kwa lugha ninayoelewa ya Kiswahili."

In the circumstances, and taking into account that the appellant did not challenge the admissibility of the said statement during the trial, we agree with Mr. Mwigole that challenging it at this stage of an appeal, is nothing but an afterthought. In the case of **Mohamed Haruna Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported), the Court observed that: *"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."* Likewise, in the instant appeal, it is our settled view that, what is contained in the appellant's confessional statement is the best evidence, we can have on what happened on that fateful night.

Consequently, and looking at the totality of the evidence, we entertain no doubt that with the available evidence, the trial court correctly held that the case against the appellant was proved beyond reasonable doubt.

For the foregoing reasons, we find the appeal devoid of merit and hereby dismiss it in its entirety.

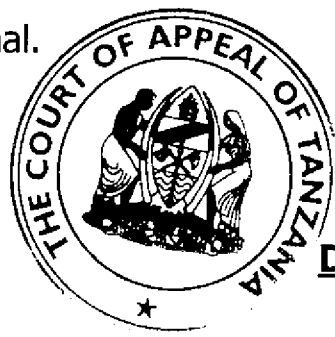
DATED at **SHINYANGA** this 10th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 10th day of November, 2022 in the presence of appellant together with Mr. Audax Constantine, learned Counsel for the Appellant and Ms.Edith Tuka, learned State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL