IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A. SEHEL, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 298 OF 2018

ADINARDI IDDY SALIMU..... 1ST APPELLANT

JOSEPH EVARIST @ MSOMA.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Moshi, J.)

dated the 13th day of July, 2018

in

Criminal Session Case No. 91 of 2016

JUDGMENT OF THE COURT

7th & 11th February, 2022

MUGASHA, J.A.:

The appeal is against the decision of the High Court of Tanzania, Arusha Registry in which the appellants were charged and convicted with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE 2002. It was alleged by the prosecution that, on the 8/12/2015, during midnight hours at Magugu village within Babati District in Manyara Region, the appellants did murder one ABDALAH S/O ATHUMANI. They

all pleaded not guilty. Subsequently, in order to establish its case, the prosecution paraded six (6) witnesses and tendered in evidence four documents namely: the dying declaration of the deceased (Exhibit P1); the sketch map of the scene of crime (Exhibit P2) and the Postmortem Examination Report (Exhibit P3) and the cautioned statement of the 2nd appellant (Exhibit P4).

From a total of six prosecution witnesses, the prosecution account was to the effect that: at the material time, the deceased and Seleman Hassan who testified as PW1 were friends and happened to reside in the same house, each with his own bedroom. On the fateful day, during midnight hours at around 12:00 to 02:00 hours, while PW1 was sleeping in his room, heard a bang on the only door of the house. He woke up and called the deceased to inquire on what was wrong. However, no reply came from the deceased and suddenly, PW1 saw people flashing torchlight moving towards his room and they ordered him to remain there. After the bandits were satisfied that PW1 was not the one they were after, some of the bandits kept a watch on PW1 ensuring that he could not move, while others proceeded to the room where the deceased was sleeping. Then, PW1 heard a commotion as if people were

struggling, fighting and pushing down each other and subsequently, the bandits heard the deceased lamenting *"Adinard unaniua"?* Ultimately, Adinard walked out and dissapeared.

Thereafter, PW1 went to the deceased's room and found him wounded on the ribs and the intestines had protruded and hanging out. This made PW1 to raise an alarm which was heeded to by neighbours who rushed at the scene. He asked a bodaboda rider to collect Athumani Jumanne (PW2) the deceased's father and bring him at the scene of crime. Upon reaching there, PW2 as well found the deceased badly injured and disclosed to him, earlier on the 1st appellant made a phone accusing the deceased on having an extra marital affair with his wife. The matter was reported to the Police and since the deceased was still alive, it is alleged that he made a dying declaration and mentioned the appellants to be the assailants. This is contained in the recording made by DC G 334 Tibe (PW3) and tendered in the evidence as Exhibit P1. Ultimately, the deceased was issued with the PF3, taken to Magugu Health Center and was later referred to Babati District Hospital where he succumbed to death on the same day at around 5.00 pm. According to the autopsy report, death was caused by hemorrhagic shock and injury

of the internal organs. The investigator No. G. 6894 Detective Ndula (PW6) the investigator, recounted to have drawn the sketch map of the scene of crime exhibit (P2), was involved in the examination of the deceased body and recorded the 2nd appellant's caution statement (exhibit P4). Mariamu Ngalawa (PW4) the 1st appellant's wife was among the prosecution witnesses. Besides, stating on the status of the marriage and the problems she faced in the matrimonial home, testified about her husband leaving the homestead on 5/12/2015 and returned on 8/12/2015 putting on a different attire and that he was taken to Arusha Central Station. This recount is in our considered view not connected with the fateful incident which occurred at midnight of 8/12/2015 and thus, we shall not consider it.

In their defence, the appellants denied each and every detail of the prosecution accusations. It was the 1st appellant's account that in 2003, he moved from Magugu and since then, had never returned there. Besides, he denied to know the deceased and that he was not aware of the death. He claimed to have been arrested at kwa Mromboo on 9/12/2015 and taken to Arusha central police station where he was beaten, tortured and transferred to Babati Central Police station.

On the part of the second appellant who testified as DW2, he alleged to have been arrested by the police on 10/12/2015, put into the lock up until 11/12/2015 and was later taken into the investigation room where he was forced to sign a statement with a thumb print. He also told the trial court that, since he did not know how to read and write, he could therefore not understand the contents of the statement.

After a full trial, the learned trial Judge summed up the case to the assessors who all returned a unanimous verdict of guilty. Then, on the whole of the evidence, the trial court was satisfied that the prosecution case against all the appellants was proved to the hilt and as a result as earlier stated, they were convicted and sentenced to suffer death by hanging. Undaunted, the appellants have preferred the present appeal against the decision of the High Court on the following five grounds contained in the Memorandum of Appeal and Supplementary Memorandum of Appeal as conveniently combined hereunder:

1. *That, the trial Court erred in law and fact to admit the statement made by the deceased under section 34B (1) and (2) (a) of the Evidence Act, Cap 6 RE 2002 without considering that the appellants were*

surprised with those statements as they were not given the 10 days' Notice.

2. *That, the trial Court erred in law and fact to convict the appellant without the prosecution proving the offence of murder beyond reasonable doubt.*
3. *That, the trial Court erred in law and fact to convict the appellant basing on weak visual identification which was corroborated by dying declaration.*
4. *That, the trial Judge erred in law and fact in not finding that the purported cautioned statement was recorded outside the period stipulated under section 50 (1) (a) of the Criminal Procedure Act (CAP 20 R.E 2002).*
5. *That, the trial Judge erred in law and fact for failure to comply with the requirement under the provisions of section 291 (3) of the Criminal Procedure Act, CAP 20 R.E 2002 by not informing the appellants rights to require the medical doctor who made the Post Mortem (Exhibit P3) to be summoned to court.*

At the hearing of the appeal, the appellants had the services of Mr. Kelvin Kwagilwa and Mr. Joshua Minja, learned counsel, whereas the

respondent Republic was represented by Ms. Rose Sule, learned Senior State Attorney and Ms. Upendo Shemkole and Ms. Naomi Mollel, both learned State Attorneys.

At the outset, following a brief dialogue with the Court, Mr. Kwagilwa abandoned the 5th ground of appeal. This was followed by his submission in respect of the 4th and 1st grounds of appeal contending that, the trial was flawed with procedural irregularities on account of the improper admission of the 2nd appellant's cautioned statement and the dying declaration of the deceased. Beginning with the cautioned statement, he submitted that its recording was delayed considering that while the 2nd appellant was arrested on 10/12/2015 the statement was recorded on 11/12/2015 which is beyond the prescribed time and no extension was sought and obtained to warrant the delayed recording and as such, the omission contravened the requirements of section 50 (1) of the Criminal Procedure Act CAP 20 R.E.2002 (the CPA). Moreover, upon being probed by the Court, Mr. Kwagilwa pointed out that, since the 2nd appellant did not know how to read and write, failure by the recorder to read out the statement to him was contrary to the provisions of section 57 (4) of the CPA. In the circumstances, it was the learned counsel argument that on

account of the said flaws, the cautioned statement was wrongly admitted and relied upon by the High Court to convict the appellant and as such, it deserves to be expunged from the record.

As for the dying declaration, Mr. Kwagilwa submitted that, the dying declaration was wrongly admitted in the evidence and relied upon to convict the appellant while prior notice to rely on it was not given to the appellants. He argued this omission to have offended the provisions of section 34 B (2) (e) of the Evidence Act CAP 6 R.E.2002 (the Evidence Act) and urged us to expunge the dying declaration from the record. To back up his propositions, the learned counsel cited to us the cases of **RAYMOND JOHN @ KAKAA** and **JOSEPH JOHN VS REPUBLIC,** Criminal Appeal No. 47 of 2015 and **WILLY JENGELA VS REPUBLIC,** Criminal Appeal No. 17 of 2015 (both unreported).

In addressing the 3rd ground of appeal, Mr. Kwagilwa faulted the trial court in having convicted the appellants basing on weak visual identification. He pointed out that although, the learned trial Judge concluded that the appellants were identified by recognition, the proposition is not supported by the evidence on the record. On this, he pointed out that, it is glaring on record that PW1 did not identify anyone

at the scene of crime let alone PW2 who was not present at the occurrence of the fateful incident as he came later and found the deceased lying down injured while the bandits had already left. In this regard, it was Mr. Kwagilwa's contention that in the absence of the cautioned statement of the 2nd appellant and the dying declaration of the deceased, the remaining oral prosecution account is weak because the appellants were not positively identified. With the said submission, Mr. Kwagilwa urged us to allow the appeal, and set the appellants at liberty.

Mr. Joshua Minja, learned counsel for the 2nd respondent supported the stance taken by Mr. Kwagilwa and urged the Court to allow the appeal and set the appellants at liberty.

On the other hand, Ms. Sule supported the conviction and sentence. In her reply submission, she contended that although the recording of the cautioned statement was delayed, reasons thereto were stated including the circumstances surrounding the arrest in Arusha and investigation of the offence which occurred in Babati and as such, in terms of section 50 (2) of the CPA the delay was explained. Having readily conceded that the omission to read out the cautioned statement of the

2nd appellant offends the provisions of section 57 (4) of the CPA, she as well, urged us to expunge the 2nd appellant's cautioned statement.

Regarding the dying declaration, Ms. Sulle was of the view that it was properly admitted considering that at the end of committal proceedings it was earlier on listed to be among the exhibits to be relied upon by the prosecution which suffices as prior notice envisaged under section 34 B (2) (e) of the Evidence Act. Thus, she argued that notwithstanding the absence of evidence on description of the 1st appellant and the intensity of the torch light, the learned trial Judge was justified to rely and act on the dying declaration to conclude that the 1st appellant was properly identified at the scene of crime as he was familiar to the identifying witness namely, the deceased. Further she contended, the dying declaration of the deceased is further corroborated by PW1 who testified to have heard the deceased lamenting that *"Adinard unaniua"*. In addition, she argued, PW2 recalled that it is the deceased who mentioned to him that he was attacked by the 1st appellant which was the earliest opportune moment on the part of the deceased to mention the culprit. To back up her argument he cited to us the case of

MAKENDE SIMON VS THE REPUBLIC, Criminal Appeal No. 412 of 2017 (unreported).

The learned Senior State Attorney concluded her submission by urging the Court to dismiss the appeal in its entirety as the charge against the appellants was proved to the hilt.

In rejoinder, Mr. Minja submitted that the case of **MAKENDE SIMON VS REPUBLIC** (supra) is distinguishable in this case because it is PW1 who first met the deceased soon after the attack and yet, PW1 all along stated that he did not identify any body and was not told by the deceased as to who were the culprits. He thus maintained that the appellants were not positively identified in the wake of weak prosecution account.

Having considered the record before us and the submissions of the respective counsel for either side, we shall dispose of the appeal beginning with grounds 1, 4 and 5, in which the appellants fault the trial court on the procedural flaws and ultimately, grounds 2 and 3 whereby the major complaint by the appellants is that the charge was not proved to the hilt.

As stated above, the appellant is faulting the trial court on the irregular admission and reliance of **one,** the delayed recorded cautioned statement of the 2nd appellant which was not read out to him after it was recorded considering that he did not know how to read and write and **two,** the omission to give notice to the appellants before tendering at the trial the dying declaration of the deceased.

We agree with the learned Senior State Attorney that though the 2nd appellant's cautioned statement was recorded beyond the prescribed time; reasons thereto were explained by PW6 as reflected at page 57 of the record of appeal in the following terms:

> *"On 10/12/2015 at 10.00 p.m. I was at the police station at Magugu. While there, I was called by one person at Maweni village. He informed me that Joseph Evarist was arrested at Maweni and a mob of angry people wanted to kill him. They said that they have arrested him in connection with the murder that took place a Magugu. We went to the village, we got there at around 11.30 a.m. While on the way going to the police at around 1.00 a.m. we received a call from police Arusha. They [said] that Adinardi was arrested at Arusha and one police was already there. I informed*

the head of investigation. He gave me a car. I went to Arusha, at around 1.00 a.m. I got at Arusha at 3.00 a.m. There, I saw the accused with E. 1112 CPL John. We signed, took the suspect and returned with him to Babati Central Police. By then Joseph Evarist was at Police Magugu we arrived at Babati Police at 5.45 a.m.

I then went back to Magugu.

Joseph Evarist (2nd accused) was brought to Magugu Police at around 4.45 a.m.; on 11th December 2015.

I came back to Magugu. I recorded the statement of Joseph Evarist statement at around 7.45 a.m. I found him in the lock-up. I took him out for the interrogations. I interviewed him in the investigation room, Magugu Police. We were the two of us in the investigation room. Me and Joseph Evarist."

In view of the above circumstances surrounding the delayed recording of the cautioned statement, provisions of section 50(1) and (2) of the CPA categorically stipulate as follows:

"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence–

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of–

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer."

In view of the cited provision and the account given by PW6, we agree with Ms. Sulle that, reasons for the delayed recording of the 2nd appellant's cautioned statement were sufficiently explained.

Still on the 2nd appellant's cautioned statement, it is glaring that he did not know how to read and write. This is cemented by the account of PW6 as reflected at page 58 of the record of appeal which goes thus:

".... I asked him if he knew to read and write, he said he did not know to read and write and I informed him

that he was charged with murder of Abdalla Athumani."

Moreover, in his own account the 2nd appellant stated at page 68 of the record of appeal that, he did not know how to read and write and could not identify the statement. However, and as readily conceded to by the learned Senior State Attorney, the recorder of the statement did not read it to the 2nd appellant. This was an omission which contravened the provisions of section 57(4) of CPA which gives the following directions:

> *" 57 (4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3) the police officer shall-*
>
> > *(a) Read the record to him, or cause the record to be read to him;*
> >
> > *(b) Ask him whether he would like to correct or add anything to the record;*
> >
> > *(c) Permit him to correct, alter or add to the record, or make any corrections, alterations*

or additions to the record that he requests the police officer to make;

(d) Ask him to sign the certificate at the end of the record; and

(e) Certify under his hand, at the end of the record, what he has done in pursuance of this subsection."

The omission to comply with mandatory requirement prejudiced the appellants considering that the respective cautioned statement which was illegally obtained was acted upon to wrongly ground their conviction. In the result we expunge the cautioned statement of the 2nd appellant.

Next is the dying declaration. It is on record that the trial court placed heavy reliance on it to conclude that the 1st appellant was mentioned by the deceased to be the attacker which was viewed by Ms. Sule to constitute positive identification of the 1st appellant at the scene of crime. Parties locked horns on the propriety or otherwise of the dying declaration.

The law regulates the manner in which a witness who cannot be found, his recorded statement can be admitted in evidence and acted upon by the trial court subject to certain conditions. This is prescribed

under section 34 B (1) and (2) (e) of the Evidence Act which stipulates as follows:

> *"34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written or electronic statement may only be admissible under this section-*
>
> *(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*
>
> *(b) If the statement is, or purports to be, signed by the person who made it;*

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(e) ***if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence."***

[Emphasis supplied]

The Court has on several occasions emphasized on the mandatory requirement of the law that, for a statement to be admitted in lieu of oral direct evidence, the conditions stipulated under the cited provision must cumulatively be complied with. (See: **WILLY JENGELA VS REPUBLIC** (supra), **MHINA HAMIS VS REPUBLIC,** Criminal Appeal No. 85 of 2005

and **FREDY STEPHANO VS REPUBLIC,** Criminal Appeal No. 65 of 2007 (both unreported).

In the light of the stated position of the law, the question to be answered is whether or not the dying declaration met the threshold of reception in the evidence. The answer is in the negative and we are fortified in that account because prior to tendering of the dying declaration at the trial notice was not served to the appellants so as to enable them to exercise their statutory right to object to its being tendered in the evidence against them.

In view of the said circumstances, the appellants were convicted on the basis of the evidence (dying declaration) they were not made aware of which was a serious omission. That said, we decline Ms. Sulle's suggestion that the listing of the dying declaration as an exhibit during committal proceedings sufficed as notice envisaged under section 34 B (2) (e) of the Evidence Act and that the appellants were aware of the statement. We are fortified in that account because what is listed as an exhibit in committal proceedings is not a substitute of notice envisaged under section 34 B (2) (e) of the Evidence Act which categorically requires prior notice to be given to the other party so as to enable

him/her to exercise the right to oppose the statement to be relied upon by the prosecution. In addition, the omission to comply with the mandatory statutory requirement cannot be remedied by the failure by the appellants to object the same because it was incumbent on the trial Judge to ensure that the law is complied with to the letter before acting on the dying declaration. In the premises, since the dying declaration of the deceased was improperly admitted in evidence and acted upon to convict the appellants, we accordingly discount it. – See - **TWAHA S/O ALI AND 5 OTHERS VS REPUBLIC,** Criminal Appeal No. 78 of 2004 (unreported). Therefore, grounds 1 and 4 are merited.

Finally, having expunged the dying declaration and the cautioned statement of the 2nd appellant the remaining evidence is the oral account of PW1 and PW2 which takes us to determining as to whether or not the appellants were properly identified at the scene of crime and if the charge was proved to the hilt. This constitutes the 2nd and 3rd grounds of complaint.

It is trite law that the evidence of visual identification must be water tight to support a conviction. This Court has decided so in numerous occasions the most cited being **WAZIRI AMANI VS REPUBLIC**, TLR

250 that evidence of visual identification is easily susceptible to errors, especially where the conditions obtaining are not favourable to correct unmistaken identity. Utmost care must be taken when acting on evidence of visual identification to eliminate all possibilities of errors. In the cited case, the Court held that:

> *"The evidence of visual identification is the weakest kind and most unreliable. It follows therefore that no Court should act on the evidence of visual identification unless all possibilities are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight."*

The record reveals that the identifying witness was PW1, who told the trial court that, the bandits flashed a torch light towards him and confined him to his room. It is our considered view that at that stage, the torch light flashed on him had a blinding effect as he was not in a position to see the assailants properly. Subsequently, as the assailants were leaving the scene PW1 is on record to have testified that neither did he know the number of assailants who were at the scene of crime nor identified anyone. This account in a nutshell, speaks volumes that

PW1 did not identify the appellants considering that the conditions in the dark night were unfavourable for a proper identification.

The other person is PW2 who went at the scene of crime after the bandits had left. He testified that, it is the deceased who told him about being attacked by the 1st appellant. Relying on this proposition by PW2, Ms. Sulle viewed this to have been the earliest opportune moment when the deceased mentioned the 1st appellant. We found this argument wanting because, what PW2 claimed to have been told by the deceased is not supported by the evidence of PW1 who apart from being present when the attackers stormed into their house, he was the first person to meet the deceased following the attack. This in our considered view, was the earliest opportunity for the deceased to mention the attackers so as to necessitate belief of his account. That apart, during cross examination, PW2 who initially seemed to rely on what he was told by the deceased, shifted goal post having stated before the trial court what is reflected at page 41 as follows:

> *"The deceased told me that Adinard had phoned him and alleged that the deceased was having an affair with his (accused's wife). I didn't take any action.....I*

did not know of the allegations before that.....The deceased said that Adinard had attacked him as he had alleged that he was having an affair with his wife.....″

Apart from the said account being an afterthought, it dents the credibility of PW2 and it is glaring that his second version was probably based on suspicion that the killing was precipitated by the alleged extra marital affair between the deceased and 1st appellant's wife. It is settled law that suspicion however strong is not enough to find the accused guilty of an offence charged. Instead, suspicion entitles an accused to an acquittal, on a benefit of doubt. See: **MT 60330 PTE NASSORO MOHAMED VS REPUBLIC,** Criminal Appeal No. 73 of 2002; **AIDAN MWALULENGA VS REPUBLIC,** Criminal Appeal No. 207 of 2006; **HALFAN ISMAIL @ MTEPELA VS REPUBLIC,** Criminal Appeal No. 38 of 2019 and **MASOUD MGOSI VS REPUBLIC,** Criminal Appeal No. 195 of 2018 (all unreported).

Finally, we found the conclusion by the trial Judge that the deceased was familiar with the 1st appellant which enabled positive identification

not to be supported by the record as none of the prosecution witnesses testified to the same effect.

In view of what we have endeavoured to discuss, the charge of murder against the appellants was not proved to the hilt and the appeal succeeds. We therefore allow the appeal, quash and set aside the conviction and sentence respectively and order the immediate release of the appellants unless if held for other lawful cause.

DATED at **ARUSHA** this 9th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 11th day of February, 2022 in the presence of Mr. Kelvin Kwagilwa and Mr. Joshua Minja, learn counsel for the Appellants and Ms. Rose Sule, learned Senior State Attorney and Ms. Upendo Shemkole, Ms. Blandina and Ms. Naomi Mollel, both learned State Attorneys.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL