**IN THE COURT OF APPEAL OF TANZANIA**
**AT TABORA**

**(CORAM: MUGASHA, J.A., KEREFU, J.A., And MWAMPASHI, J.A.)**

**CRIMINAL APPEAL NO. 443 OF 2019**

**SAYI JALUCHA.....1ST APPELLANT**
**PETER SHIJA.....2ND APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

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

**(Bongole, J.)**

**dated the 14th day of June, 2019**
**in**
**Criminal Sessions Case No. 07 of 2018**

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## JUDGMENT OF THE COURT

*13th & 16th March, 2023*

**KEREFU, J.A.:**

The appellants, SAYI JALUCHA and PETER SHIJA were arraigned before the High Court of Tanzania sitting at Tabora on three counts for the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E 2022] now R.E 2022 (the Penal Code) in Criminal Session Case No. 07 of 2018. The information laid by the prosecution alleged that, on 20th March, 2015 at 21:00 hours at Ntobo Village within Igunga District in Tabora Region, the appellants murdered HOLLO MTAMLA, HAMISI NDILA and RASHIDI HAMISI (the deceased). The appellants pleaded not guilty to the charge. However, after a full trial, they were convicted and each was sentenced to suffer death by hanging.

The brief facts of the case that led to the appellants' arraignment, conviction and sentence as obtained from the record of appeal are not complicated. They go thus, Ngolo Ndila (PW1) testified that she was living at Ntobo Ward with her father, mother (Hollo Mtamla, the deceased) and siblings. That, on 20th March, 2015, at 20:00 hours while at home standing at the window, she saw one man, who covered his head and legs with plastic bag (*sandarusi*), entering into their house and assaulted her young sister one Nyamate who was seated at the sitting room. That, upon seeing her, the said man also followed and struck her with a machete (*panga*) at her neck and she ran away. She stated further that, since they were very close when he struck her, she identified him to be Sayi, their neighbour whom she knew prior to the incident. That, she managed to identify him through a solar light from a tube light which was illuminating the entire compound outside.

PW1 went on to state that, while running, a light of a torch was directed towards her, and they chased her but then returned. PW1 ran to the neighbours and informed them that they were invaded by bandits. The said neighbours went back to the scene of crime with PW1 and found PW1's mother (Hollo Mtamla) and two children (Hamisi Ndila and Rashidi Hamisi) already killed. They raised an alarm (*mwano*) and people gathered at the scene of crime. PW1 added that, during that

night she did not mention Sayi to the neighbours as she was worried that he could return and kill her.

Emmanuel Ndila (PW2), the PW1's young brother who was also at the scene of crime at the fateful night, supported the narration by PW1, and he added that, he was in his room when he heard the door being broken, then, his mother ran into his room and he immediately took cover under the bed. Then, his mother sat on his bed and some people lighted a torch from the door where he saw a person, whom he knew as Mwilima, who covered his head with plastic bag (*sandarusi*), entering in that room. PW2 heard a sound of a *panga* and then those bandits went out, after three minutes, he came out and found his father who removed him from that room and locked him in another house. A moment later, his father came with people and when he opened the door, he saw his mother, his young brother and his niece being cut with the *panga* and they all died.

In his testimony, Corneli Bukwimba (PW3), a Village Executive Officer of Ntobo at that time, stated that he was informed about the murder incident on the material night and he went to the scene of crime where he found the bodies of the deceased. PW3 reported the incident to the police. He convened a meeting with family members of the deceased and he was informed that, prior to the incident, on 17th March,

2015, one woman who was a witchdoctor accused the deceased to be a witch and after three days, the incident happened. That, the family members suspected the first appellant to be responsible as it happened that he was not at the scene of crime when other neighbours gathered and when they inquired from his mother, she told them that he had gone to the neighbouring village to his mother-in-law. They tried to trace him but in vain. PW3 stated further that the police arrived at the scene of crime with a doctor who examined the bodies of the deceased and thereafter, they were allowed to bury them. PW3 testified further that, after one year, he was informed by hamlet members that the first appellant was seen in the village. PW3 informed the police who came on 17th May, 2016 at night and arrested the appellants.

No. D.7997 D/SSGT Erasmus (PW5) the investigation officer testified that he was involved in the investigation of the incident. That, on 21st March, 2015 together with other police officers and a doctor, they went to the scene where they found the body of the mother of the family with multiple cut wounds at the head and the body. The child had his neck cut off and another child of about two years was cut at his stomach. PW5 ordered WP Silvia to prepare a sketch map of the scene of crime (exhibit P1) and the doctor examined the deceased bodies and prepared postmortem reports (exhibits P2, P3 and P4, respectively).

Then, PW5 interviewed different people on the incident. Through the said interviews, the appellants together with one Mwilima Nepo were mentioned to be responsible with the death of the deceased. However, they failed to arrest them as they were not around. PW5 testified that they continued to trace the suspects through their informers and on 17th May, 2016 he was informed that the two suspects had returned in the village and they pursued and arrested the appellants and brought them to Igunga Police Station. PW5 stated that he recorded the first appellant's cautioned statement which was admitted in evidence as exhibit P6. Then, No. F. 4137 D/SGT Madata Makoye (PW6), recorded the cautioned statement of the second appellant which was also admitted in evidence as exhibit P7.

Subsequently, on 20th May, 2016, No. G. 5968 D/C Bazil brought the second appellant to Leornard Nkolla (PW4), the then Justice of Peace and a Senior District Magistrate who was stationed at Igunga District Court, to record his extra-judicial statement (exhibit P5). In his evidence, PW4 testified that the second appellant confessed to have participated in the killing of the deceased. He stated that the second appellant told him that the reason for killing was the death of the two children of the first appellant who were said to have been bewitched by the deceased.

In their respective defence, both appellants denied any involvement in the alleged offence. The first appellant, who testified as DW1, apart from admitting that he also resides at Ntobo Village and that he knew the deceased as their neighbours, distanced himself from the offence charged. He contended that on that fateful date he was at Mwaludebe Village where he went on 17th March 2015 after being called by his father-in-law. While there, on 22nd March, 2015 he was phoned by his mother who informed him about the funeral of Hollo Mtamla who was cut with a *panga*. That, he rode his bicycle and went back home to attend the funeral but found that they had already buried the deceased. He however, stayed at the funeral for two days. The first appellant also admitted to know the second appellant as his neighbour who knows well his family, though he contended that he had only one child. He stated further that he was arrested on 17th May 2016 at Ntobo Village.

On his part, the second appellant, who testified as DW2, contended that on 20th March 2015 he was at Shinyanga town where he went on 18th March, 2015 to sell scrapers. That, he returned to Ntobo Village on 23rd March, 2015 and found his wife missing. Upon inquiry, DW2 was informed that she went to a neighbour's funeral. He sent a woman to inform his wife that he needed the house keys and that after sometimes his wife came back home, and he was informed of the incident. Then,

they went together to the funeral and inquired from the deceased family as to who was being suspected and they replied to him that they were not suspecting anybody. DW2 also admitted that they were living in the same village with DW1 whom he knew as Yohana. He however, disputed to have any business with him. DW2 stated further that he was arrested on 16th May, 2016 at his home and charged with the offence of murder. He also admitted to have been taken to PW4 to record extra-judicial statement, though he stated that he did not confess to have committed the offence.

When the respective cases on both sides were closed, the presiding learned trial Judge summed up the case to the assessors who sat with him at the trial. In response, the assessors unanimously returned a verdict of guilty to both appellants on account of their own confessions. In his final verdict, the learned trial Judge agreed with the assessors and found the appellants guilty and convicted them as indicated above.

Dissatisfied, the appellants are now before us challenging the High Court's finding, conviction and sentence. In their separate memoranda lodged on 13th December, 2019 and a supplementary memorandum of appeal lodged by the second appellant on 8th March, 2023, the

appellants have raised a total of seventeen (17) grounds which raise the following main grounds: **first**, the appellants' cautioned statements (exhibits P6 and P7) were recorded out of time contrary to the requirement of the law; **second**, the first appellant's cautioned statement (exhibit P6) was made in the presence of other police officers; **third**, the second appellant's extra judicial statement (exhibit P5) was unprocedurally admitted in evidence contrary to the mandatory provisions of the law; **fourth,** the visual identification of the first appellant by PW1 at the scene of crime was not watertight to eliminate all possibilities of mistaken identity; **fifth,** the evidence of prosecution witnesses was tainted with contradictions and inconsistencies hence incapable to mount the appellants' convictions; and **sixth**, the prosecution case was not proved to the required standard.

When the appeal was placed before us for hearing, the first and second appellants were represented by Mr. Kanani Chombala and Ms. Flavia Francis, both learned counsel, respectively, whereas the respondent Republic was represented by Mses. Hannarose Kasambala and Veronica Moshi, both learned State Attorneys.

Upon taking the floor, Mr. Chombala indicated that he will start with the grounds of appeal which touches on procedural irregularities and thereafter, he will argue the grounds related with evidence. We

shall therefore determine the grounds of appeal, in the same manner as indicated above and the related grounds will be determined conjointly.

However, before doing so, it is crucial to state that, this being the first appeal, it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own conclusion of fact - see **D.R. Pandya v. Republic** [1957] EA 336 and **Demeritus John @ Kajuli & 3 Others v. Republic,** Criminal Appeal No. 155 of 2013 (unreported).

Starting with the first and second grounds, Mr. Chombala argued that, the first appellant's cautioned statement was unprocedurally received in evidence as it was recorded out of four hours prescribed by section 50 (1) (a) and (b) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) and there was no extension of time sought contrary to section 51 (1) (a) and (b) of the same law. To clarify, he referred us to page 111 of the record of appeal where PW5 testified that they arrested the appellants on 17th May, 2016 at Ntobo Village at 02:00 hours. He also referred us to page 213 to 2016 where it was indicated that the said statement was recorded on 17th May, 2016 at 08:00 hours which was beyond the prescribed time of four hours.

Upon being probed on the period of two hours stated by PW5 at page 118 of the record of appeal that was spent to transport the appellants from Ntobo Village to Igunga Police Station, Mr. Chombala insisted that, even if that time is subtracted, still the said cautioned statement was recorded out of prescribed time of four hours.

In addition, Mr. Chombala pointed another irregularity on the first appellant's cautioned statement that, at the point of recording the said statement, the first appellant was not a free agent as he was interviewed in the presence of other police officers. To justify his submission, he referred us to page 117 of the record of appeal where PW5, who interviewed the first appellant and recorded the statement testified that when he recorded the first appellant's cautioned statement other police investigators were in the room performing their own duties. The learned counsel relied on our decision in **Friday Mbwiga @ Kameta v. Republic,** Criminal Appeal No. 514 of 2017 (unreported) to argue that the said statement is inadmissible in evidence as the right to privacy on the first appellant was infringed. As such, the learned counsel urged us to expunge exhibit P6 from the record.

On her part, Ms. Francis supported the submission made by her learned brother on the first and second grounds of appeal and she added that, even the second appellant's cautioned statement was also

recorded out of time as he was as well arrested on 17th May, 2016 at Ntobo Village at 02:00 hours and his statement was recorded on the same date at 09:30 hours beyond the prescribed time of four hours.

As for the third ground, Ms. Francis contended that the same was also unprocedurally acted upon as there was non-compliance with section 246 (1) and (2) of the CPA which stipulates that the information and/or the evidence of the intended witnesses and documentary exhibits which the Director of Public Prosecutions (DPP) intended to be relied upon during trial, should be read out and explained to the accused person during committal proceedings. She referred us to pages 41 to 44 of the record of appeal and pointed out that, the committal proceedings in respect of this appeal were conducted on 11th January, 2018 where the information, statement of witnesses and documents intended to be used by the DPP were read over and explained to the appellant but the second appellant's extra-judicial statement (exhibit P5) was not among the list of the intended documents and as such, was not read over and explained to the appellants. On that omission, the learned counsel urged us to also expunge exhibit P5 from the record. It was her argument that, after expunging the documentary exhibits P5, P6 and P7 from the record, the remaining evidence would not be sufficient to ground the appellants' conviction as the evidence of PW1 and PW2 was full of

contradictions on the identification of the appellants at the scene of crime.

Responding to the first, second and third grounds, Ms. Moshi, after having stated categorically that the respondent Republic is supporting the appeal, she readily conceded that exhibit P5, P6 and P7 were unprocedurally admitted in evidence as P5 was not part of the committal proceedings and its' contents were not read out to the appellants, so as to properly marshal their defence, exhibit P6 was recorded in the presence of other police officers and exhibit P7 was recorded out of the prescribed time of four hours. She thus also urged us to expunge them.

Having closely considered the parties' submissions and examined the record of appeal in respect of exhibits P5, P6 and P7, we agree with both parties that the same were unprocedurally admitted in evidence as, indeed, the record of appeal bears it out at page 42 that exhibit P5 was not part of the committal proceedings contrary to the provisions of section 246(3) and (4) of the CPA. Exhibit P6 was recorded in the presence of other police officers hence the first appellant was not a free agent and his right to privacy was infringed and exhibit P7 was recorded out of time contrary to sections 50 (1) and 51 (1) of the CPA. We thus outrightly discount them and find the first, second and third grounds meritorious.

Having discounted the said exhibits, the next question is whether the remaining oral evidence on record is sufficient to mount the appellants' convictions which takes us to the fourth and fifth grounds of appeal.

On these grounds, Mr. Chombala argued that the visual identification of the first appellant at the scene of crime, which was relied upon by the trial court to convict him was not watertight to eliminate the possibility of any mistaken identity. He argued that, although, PW1, the only prosecution's eye witness at the scene testified that she managed to identify the first appellant with the aid of solar light, she failed to give proper description of him. He referred us to page 61 of the record of appeal where PW1 testified that '*...one man came having covered his head and legs with plastic bags (sandarusi) he entered into the house and found my young sister at the sitting room and assaulted her.*' It was his argument that, since the record is silent as to whether the said man uncovered his head and legs, PW1's vision was obstructed and could not have a clear vision of the said assailant. He contended further that, although, PW1 testified that the said assailant who covered his head and legs with *sandarusi* bag was the first appellant, PW2, who was also at the scene of crime, testified at page 70 of the same record that she saw one Mwilima who covered his head with

the *sandarusi* bag. PW2 also added that, the first and second appellants were not among the bandits who killed the deceased. He said that, on that aspect, PW1 and PW2 were incredible and unreliable witnesses as it is not clear from their testimonies who exactly entered the scene while covering his head with the said *sandarusi* bag.

The learned counsel also challenged the credibility of PW1 for failure to immediately mention the appellant to the neighbours whom she claimed to have reported the incident and those who responded to the *mwano* and came at the scene of crime at that night including PW3 the VEO and later, PW5 who investigated on the incident. As such, Mr. Chombala implored us to find that PW1 and PW2 were incredible and unreliable witnesses. He added that, since the incident happened at night under unfavorable conditions, including the terrifying situation obtained at the scene of crime, all conditions of visual identification ought to have been met. To bolster his argument, he cited the case of **Frank Joseph @ Sengerema v. Republic**, Criminal Appeal No. 378 of 2015 (unreported) and urged us to find that the first appellant's visual identification at the scene was not watertight. In conclusion and based on his submission, Mr. Chombala urged us to allow the appeal, quash the convictions and set aside the sentences imposed on the appellants and set them free.

On her part, Ms. Francis associated herself with the submission made by Mr. Chombala and added the case of **Malula Chemu @ Malula and 2 Others, v. Republic**, Criminal Appeal No. 188 of 2019 (unreported) and also prayed for the appeal to be allowed and the appellants to be set at liberty.

Likewise, in her response, Ms. Moshi also conceded that the visual identification of the appellants at the scene of crime was not watertight. She cited the case of **Daniel Severine and 2 Others v. Republic**, Criminal Appeal No. 431 of 2018 (unreported) and insisted that PW1 and PW2 were unreliable witnesses. Finally, she also prayed for the appellants' appeal to be allowed.

Having considered the submissions made by the parties on the fourth and fifth grounds in the light of the record of appeal before us, it is clear to us that all learned counsel for the parties are at one that the visual identification of the appellants at the scene of crime was not watertight. It is also on record that in convicting the appellants the trial court, among others, believed the oral account of PW1 and PW2 that they positively identified the appellants at the scene of crime. We wish to remark that, a proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identification is eliminated. In this regard, the Court has

established principles in considering favourable conditions for identifying the accused. For instance, in a landmark case of **Waziri Amani v. Republic** [1980] TLR 250 the Court has set out guidelines on visual identification which the courts in this jurisdiction have uninterruptedly followed, that:

> *"...evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.****" [Emphasis added].*

Then, the Court went on to state the following conditions to be taken into account: -

> *"...****the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial Judge*

*should direct his mind before coming to any definite conclusion on the issue of identity." [Emphasis added].*

Following the above conditions, it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give detailed description of such a suspect to a person whom he first reports the matter to, before such a suspect is arrested. In **Mohamed Alhui v. Rex** [1943] 9 EACA 72 the erstwhile East African Court of Appeal stated categorically that:

> *"In every case in which there is a question as to the identity of the accused, the fact of there, having been a description and terms of that description, are matters of the highest importance of which evidence ought always to be given first of all, of course, by the person who gave the description or purports to identify the accused and then by person to whom the description was given."*

In the case at hand, since the incident took place at night under unfavorable conditions, including the terrifying situation obtained at the scene, all conditions of visual identification ought to have been met. Having scrutinized the evidence adduced by PW1 and PW2 before the trial court as found at pages 61 to 70 of the record of appeal, we are in agreement with the learned counsel for the parties that the appellants

were not positively identified. We shall demonstrate. In her testimony found at page 61 of the record of appeal, PW1, the only prosecution eye witness, did not give any description of the appellant to indicate that she positively recognized him. She testified that:

> *"On 20/3/2015 at 20:00 hrs one man came having covered his head and legs with plastic bags (sandarusi) he entered into the house and found my young sister at the sitting room and assaulted her. I was aside the window. I knew that person who entered by the name SAYI. It was at 20:00 hrs and I managed to see him as there was solar light outside. The window was open and it had no mosquito net. I saw SAYI outside and it was the same SAYI who entered in the house. I knew him as he is our neighbour."*

Then, PW2 who was also at the scene of crime testified at page 70 of the same record that: -

> *"On that day when my mother lighted the torch, I saw Mwilima. He had put at his head sandarusi bag. I did not see what he carried. Mwilima is not in court and I don't know where he is. Peter Shija is the 2nd accused and Sayi is the 1st accused. Among these two, none of them cut my mother with panga."*

From the above extracted excepts, it is clear that PW1 and PW2 gave contradictory evidence on the man who covered his head with *sandarusi* bag and both of them did not give descriptions of the person who entered at the scene of crime. As argued by the learned counsel for the parties, since the said person covered the head with that *sandarusi* bag and the record is silent as whether the same was removed, no doubt that their clear visions were obstructed. This is substantiated by the fact that, in all scenarios, PW1 and PW2 completely failed to describe the physique, size and/or the appearance of the said assailant. Their evidence was in general terms hence it was not certain as to whether the said assailant who entered the scene while covering his head with the said *sandarusi* bag was the first appellant or one Mwilima. Therefore, given the discrepant evidence on visual identification by PW1 and PW2, we are in agreement with the learned counsel for the parties that the appellants were not properly identified at the scene of crime to rule out the possibility of mistaken identity.

Likewise, there was no dispute that, although, PW1 testified that she identified the first appellant at the scene of crime as they were familiar to each other, she did not name him at the earliest possible moment to the neighbours whom she first reported the incident and/or to the people who responded to the *mwano*. Time without number this

has been insisted. See, for instance the cases of **Marwa Wangiti & Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported) and **Jaribu Abdallah v. Republic** [2003] T.L.R. 271. Specifically, in the former case, we categorically observed that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

In this appeal as intimated earlier, PW1 did not mentioned the first appellant to anyone and waited until she gave her statement at the police when she named the first appellant to be among the assailants.

On the basis of the reasons stated above, we are of the settled view that had the trial court properly scrutinized the evidence of PW1 and PW2 on the identification of the appellants at the scene, it would have found that such evidence was not watertight. In the circumstances, and based on the insufficient evidence of visual identification, we agree with the learned counsel for the parties that the case against the appellants was not proved beyond reasonable doubt. We thus find merit in the fourth and fifth grounds of appeal.

In view of what we have demonstrated above, we allow the appeal and accordingly quash the convictions and set aside the sentences

imposed against the appellants. Consequently, we order for immediate release of the appellants from prison unless they are being held for some other lawful cause.

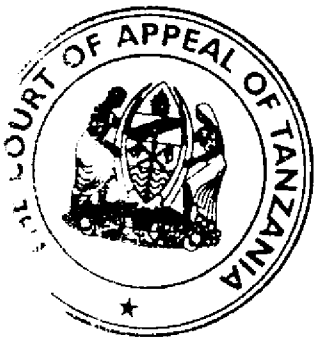
**DATED** at **TABORA** this 15th day of March, 2023.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

The Judgment delivered this 16th day of March, 2023 in the presence of Mr. Kanani Chombala, counsel for the 1st Appellant, Ms. Flavia Francis, learned counsel for the 2nd Appellant and Ms. Veronica Moshi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**