IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 557 OF 2021

GERVAS GERVAS COSMAS @ CHAMBI.....1ST APPELLANT

OSCAR PETER MKUTWA @ JAJI.....2ND APPELLANT

SILAJI ISMAIL MBUYU..... 3RD APPELLANT

MUSSA HASHIMU NANGUKA..... 4TH APPELLANT

TAISI HAMIDU TAISI..... 5TH APPELLANT
CHARLES ABDELEHEMANI CHINYANG'ANYA..... 6TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara

(Dyansobera, J)

dated the 23rd day of September, 2021

in

Criminal Session Case No. 40 of 2019

.....

JUDGMENT OF THE COURT

14th & 29th March, 2023

RUMANYIKA, J.A.:

The appellants were charged and convicted of murder contrary to sections 196 and 197 of the Penal Code. It was alleged before the trial High Court sitting at Mtwara that, on 14/08/2017 at Mtandi area in Masasi District, Mtwara region, they murdered Halfan Said Ulaya (the deceased). The evidence on which the trial court grounded conviction came from eight

prosecution witnesses and two exhibits. The appellants were defence witnesses in themselves.

Blandina Chebby Mrope (PW1), was the wife of the deceased who testified that with her, there were some tenants in the house they stayed when the appellants stormed in looking for the deceased who was at that time away but within the vicinity. According to PW1, the appellants demanded money from her and got TZS. 20,000/=. She further testified that, shortly after the deceased's arrival, the culprits rushed outside and PW1 heard a fracas because the deceased was attacked and screamed for help. PW1 found the deceased slashed with machetes by the culprits in the head, arms and abdomen and ran away. He was rushed to Mkomaindo Hospital and the incident was reported to police. The deceased was subsequently referred to Ndanda Mission Hospital for further medication and later to Muhimbili National Hospital but was reported dead on 08/09/2017. Yusuph Chibwana Choyo (PW2) was the deceased's neighbor in whose presence the deceased was assaulted but he could not identify the culprits. He further stated that, he escaped from the fracas but shortly learnt that the deceased had been seriously injured. Detective Corporal Amandus (PW3) told the trial court that, the first appellant was arrested on 08/09/2017 on a tip from an informer. Corporal Humphrey (PW4) is the one who interviewed the first

appellant and recorded his cautioned statement but it was successfully objected and its admission rejected by the trial court. Detective Sargent Robert (PW5) supervised the post mortem report examination on 08/09/2017. Inspector Edwin (PW6) conducted the identification parade on 11/09/2017 in which the 1st and 2nd appellants were allegedly identified by PW1 and tendered a parade identification register (Exhibit P1). Detective Corporal Hamdun (PW7) drew a sketch map of the crime scene on 15/08/2017. Dr. Paul Makoye (PW8) a professional pathologist conducted an autopsy on the deceased's body and tendered a Postmortem Report (Exhibit P2).

In his defence, the 1st appellant denied the charge. He disowned the alleged confession and averred that, if anything, it was because he was severely tortured by policemen and that, the purported identification parade was improper and prejudicial to him. The 2nd appellant also denied the charge and involvement in the commission of the offence charged. The rest of the appellants took similar course.

After a full trial, the High Court convicted the appellants as charged and sentenced them to death by hanging. Aggrieved, they are before us appealing against that decision on seven grounds. They are reproduced as hereunder:

1. *That the High Court erred in law and fact in convicting the Appellants while the offence was not proved beyond reasonable doubt.*
2. *That the High Court erred in law and fact in relying on the evidence of identification parade which was conducted in breach of the laid down procedure.*
3. *That the High Court erred in law and fact in convicting the appellants basing on the oral statement of the 1st appellant without corroboration.*
4. *That the High Court erred in law and fact in holding that the PW1 properly identified perpetrators of murder while the offence occurred during dark moment.*
5. *That the High Court erred in law and fact by convicting the Appellants while there was a variance between charge sheet and the evidence presented.*
6. *That the High Court erred in law and fact in convicting the appellants herein basing on the testimony of PW1 who failed to identify the 1st and 2nd Appellants at the dock.*
7. *That the High Court erred in law and fact by failure to consider the inconsistencies in the testimony of PW1.*

At the hearing of the appeal, Mr. Rainery Norbert Songea learned Counsel and Ms. Jacqueline Werema leaned State Attorney represented the appellants and respondent respectively.

At the outset, Mr. Songea proposed to argue the above grounds of appeal in three clusters: **firstly**, the issue of improper visual identification of the 1st and 2nd appellants by PW1 covered by the 2nd, 4th, 6th and 7th grounds, **secondly,** the appellant's claim about the prosecution's failure to prove their

case beyond reasonable doubt covered by the 1st and 5th grounds, and **thirdly,** the 2nd ground regarding the manner the identification parade was mounted. The learned advocate abandoned ground five in the course of his address to the Court and we marked it as such.

To start with, Mr. Songea asserted that, it was undisputed that, the deceased was murdered in the dark at night, as testified by PW1 and PW2 at pages 49 and 53 of the record of appeal respectively. He further argued that, PW1, the sole eye witness did not, in her evidence describe the source of light and its intensity or any other tool which aided her identify the 1st and 2nd appellants properly. He urged us to hold that the 1st and 2nd appellants were not identified. To support his proposition, he cited our decisions in **Waziri Amani v. R** [1980] T.L.R. 250 and **Raymond Francis v. R** [1994] T.L.R. 100. Additionally, Mr. Songea contended that, as appearing at page 50 of the record of appeal, PW1 initially told the trial court that, the electricity was off in the house except the solar lamp. However, upon being cross examined by Mr. Songea she said that there was no solar lamp.

Concerning the culprits' torches allegedly shone in the sitting room, dining room and kitchen to aid PW1 identify them, Mr. Songea contended that, even if that story was to be believed, the said torches could assist the appellants only and not PW1 to whom the torches were flashed. To support

his point, he cited our decision in **Michael Godwin & Another v. R,** Criminal Appeal No. 66 of 2002 (unreported). He further contended that, it is no wonder that, in the identification parade which was subsequently mounted by police, PW1 singled out the 5th appellant and not the 1st and 2nd appellants as previously alleged. Mr. Songea further argued that, the evidence of PW1 was not reliable for want of corroboration. To back up his point, he cited our decision in **Francisco Daud and 2 Others v. R,** Criminal Appeal No. 430 of 2017 (unreported).

He further urged that the evidence regarding the alleged solar light be discounted for being unreliable. He cited the Court's decisions in **Christopher Ally v. R,** Criminal Appeal No. 510 of 2017 and **Mgara Shuka v. R,** Criminal Appeal No. 37 of 2005 (both unreported) to fortify his point. To wind up on the issue of visual identification of the appellants by PW1, Mr. Songea contended that, it was not watertight because she did not give their description such as any peculiar physical features before the identification parade was mounted. Instead, she stated the general attire of the culprits. Further, he argued that, the 1st and 2nd appellants were arrested not because they were named by PW1, but because they were reported by an informer, as testified by PW3.

Next, Mr. Songea addressed the Court on the 1st and 8th grounds of appeal which concerned the prosecution's failure to prove its case beyond reasonable doubts. He argued that, PW3 and PW4 arrested the 1st appellant on the basis of circumstantial evidence, on account of the fresh wounds on the 1st appellant allegedly sustained at the scene in the fracas. However, the report on DNA analysis and profile of the 1st appellant proved them wrong creating such a reasonable doubt which ought to have been resolved in the 1st appellant's favour. He further argued that, upon the trial court rejecting the appellant's cautioned statement, the oral evidence of PW4 who recorded it should also have been discounted on the same ground.

As regards the 3rd ground of appeal, Mr. Songea contended that, the identification parade mounted by police was irregular as it contravened Police General Order 232. Expounding his point, he argued that, PW1 who purported to have identified the 1st and 2nd appellants should not have participated in the identification parade because she did not give the latters' physical descriptions before the identification parade was mounted. More importantly, he argued, no other independent co- participant in the parade appeared at the trial to testify about its propriety. He contended that, the above material irregularity reduced the probative value of the alleged identification parade and rendered it worthless. To support his point, he cited

our decision in **Hamis Ally & 3 Others v. R,** Criminal Appeal No. 596 of 2015 (unreported).

In reply, Ms. Werema readily supported the appeal by citing the Court's decision in **Waziri Amani** (supra) to show that, indeed PW1 did not properly identify the 1st and 2nd appellants. Expounding her point, he stated that, two main facts were undisputed: **one;** that, the deceased was brutally murdered in the dark night of 14/08/2017 and **two**; that, PW1 was the sole eye witness. She further averred that, PW1 did not describe the culprits she allegedly identified by giving their peculiar physical features such as colour, morphologies, heights or attire etc. Additionally, she contended that, PW1 may have been aided by solar lights or torches flashed around by the culprits but she could not disclose the intensity of the lights illuminated, given the fact that, different lamps and torches emit different light intensities. She further contended that, if anything, PW1 identified the 1st and 2nd appellants in the dock which is the most unreliable evidence of visual identification and it is no wonder that, their arrests were not because they were reported by PW1 but because of some clues from an informer, according to PW4. Additionally, Ms. Werema argued that, in any event, the identification parade was carried out in violation of PGO 232 and so it was ineffectual.

Upon hearing both learned attorneys submit and having dispassionately read the record, for our determination two issues arise, namely: **one,** whether PW1 identified the 1st and 2nd appellants properly at the crime scene and **two,** whether the prosecution proved the case beyond reasonable doubt.

It is trite law that, for an effective and proper visual identification to stand, the laid down criteria articulated by the Court in **Waziri Amani** (supra) have to be proved beyond reasonable doubt. The Court has reiterated in a number of cases that the evidence of visual identification is of the weakest kind and most unreliable which cannot be acted upon solely to convict unless all the possibilities of mistaken identity are eliminated and the evidence before it is absolutely watertight.

Applying the above legal principle to the present case, it is our view that, PW1 may have been aided by a solar lamp or appellant's torches within such a range and proximity to identify the 1st and 2nd appellants. However, she did not describe them before or state the intensity of the light illuminated, with a view to eliminating any mistaken identity of the said appellants. Holding so, we are guided by a principle occasionally stated by the Court including in **Christopher Ally v. R.** (supra) and **Mgara Shuka v. R.** (supra) where we stated that, different lamps or torches emit different

light intensity because they range from the most dim, to the brightest ones. In the present case therefore, it was not enough for PW1 to state that, at that material time the solar lamp illuminated the room without describing its intensity.

With regard to the appellant's torches allegedly flashed at PW1 be it in the sitting room, dining room or in kitchen, with respect, we agree with both learned attorneys that however strong and effective that the torches may be, they could not have assisted PW1 identify the appellants but only the latter see the victim. Faced with situations similar to the present case, we have observed so in a number of cases including; **Michael Godwin and Another v. R.**, Criminal Appeal No. 66 of 2002, **Venance Nuba and Another v. R**, Criminal Appeal No. 425 of 2023 and **James Chilonji v. R**, Criminal Appeal No. 101 of 2003 (all unreported). For instance, in **Venance Nuba** (supra) we stated that:

> *"More often than not, the flash of a torch tends to dazzle the person who is shone at rather than enable such person to see the person who wields the torch."*

On account of the foregoing reality therefore, the said evidence of visual identification by PW1 fell far too short of being watertight. She could not have identified the appellants properly being aided by their torches.

Moreover, as argued by Mr. Songea and rightly agreed by Ms. Werema, PW1 did not know the 1st and 2nd appellants before and that explains her failure to describe their physical features such as colour, complexion, size, height or any other peculiar body features at the earliest, at a later stage to lend credence to her evidence. After all, it is trite law as the Court reiterated in **Marwa Wangiti v. R** [2002] T.L.R. 39 which we quoted in **DPP v. Chibago Mazengo and 2 Others**, Criminal Appeal No.109 of 2019 (unreported) that, failure of a witness to name the accused at the earliest opportunity, shakes his credibility. PW1's failure to describe the 1st and 2nd appellants at the earliest opportunity lowered the credence of the prosecution case. Therefore, it cannot be said that PW1 identified them at the scene, except later in the dock, which is worthless form of identification and should be discounted in line with unbroken chain of authorities of the Court. See- **Wambura Mniko Bunyige v. R.**, Criminal Appeal No. 256 of 2010 and **Francis Majaliwa Deus and 2 Others v. R.,** Criminal Appeal No. 139 of 2005 (both unreported). Moreover, PW4 cut the long story short that the 1st appellant was arrested not because he was reported by PW1 but following an informer's report. It is no wonder she did not single out him out at the identification parade which was subsequently mounted by the police.

The foregoing apart, the prosecution sought to establish the 1st appellant's connection with the murder of the deceased but, as alluded to earlier, the analysis of his DNA cleared him.

All the above said, with respect, the trial court should not have found that, PW1 properly identified the 1st and 2nd appellants. In the result, the 2nd, 4th, 6th and 7th grounds of the appeal are allowed.

As regards the appellant's claim that the prosecution did not prove its case beyond reasonable doubt, the issue of improper identification of the first two appellants apart, we agree with Mr. Songea, as rightly conceded by Ms. Werema that, there was nothing probable, be it circumstantial or direct evidence which led to the arrest of the 1st appellant. His arrest may rightly have been due to some clues given to PW4 by an informer. However as above said, several efforts which were made to connect him with the charge, including the futile DNA examination were unsuccessful. We feel highly compelled to remark that, however strong the clue offered to police by an informant might be, such clue by itself cannot be a basis for founding the accused's conviction. It cannot be said in the present case, that the prosecution proved its case beyond reasonable doubt. We find merits in the 1st and 8th grounds of appeal.

Another point we were invited to consider is on the efficacy of the identification parade mounted by police on 11/07/2017 as indicated at page 122 of the record of appeal. As it was alluded to before, we are settled in our minds that the said parade should not have been carried out in the first place. The bottom line has to be that, if such evidence was taken casually, then it could be simple for a witness to assert that he identified the accused. He could be cheaply believed more than the accused can challenge it. It is prudent and most desirable therefore, that, in order to eliminate possibilities of mistaken identity, diminished memory, confusion, fabrication of the evidence, gambled evidence and or internal prejudice of the witness which may lead to victimization of the accused, *ejusdem generis*, visual identification has to be real. This means that, an identification parade to single the allegedly spotted accused needs to be preceded with the witness naming or describing the accused if he recognized or spotted him at the crime scene. It always has to be so because of the occasionally said weak and unreliable nature of the evidence of visual identification. See- **Mengi Paulo Samwel Lahana and Another v. R.,** Criminal Appeal No. 222 of 2006 **John v. R.**, (unreported) and **Waziri Amani** (supra). In **Mengi Paulo** (supra), the Court stated that:

"It has been repeatedly held that eye witness testimony can be devastating when false witness identification is made due to honest confusion or outright lying."

For the above stated reason, we discard the evidence of PW1, the eye witness in this case.

When all is said, we have found the appeal to be merited and hereby allow it entirely. In the result, we quash the High Court's order of conviction and set aside the resultant death sentence. Consequently, we order immediate release of the appellants from the prison unless they are held there for other lawful cause.

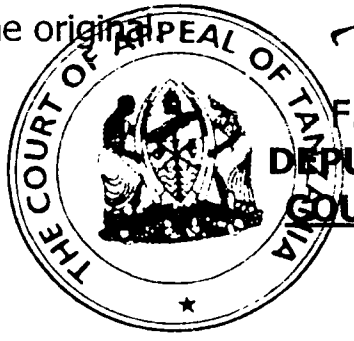
DATED at **MTWARA** this 28th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of Mr. Alex Msalengi, learned counsel for the Appellants and Mr. Enoshi Gabriel Kigoryo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL