IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 168 OF 2022

YOHANA FILIPO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 15th day of March, 2022

in

Criminal Session Case No. 19 of 2029

.....

JUDGMENT OF THE COURT

30th May & 2nd June, 2023

MUGASHA, J.A.:

The appellant, **Yohana S/O Filipo**, was charged before the High Court of Tanzania with Murder contrary to sections 196 and 197 of the Penal Code (Cap. 16 R.E. 2002). It was alleged by the prosecution that the appellant on the 23rd day of October 2017 during the evening hours at Rungwe Mpya village within Kasulu District in Kigoma Region, did murder one **Scholastika D/O James**. He denied the charge. The prosecution paraded a total of five witnesses namely; DR. Mageni Pondamali (PW1), Shamimu Moshi (PW2), Tumaini Anthony (PW3), James Fupi (PW4) and Bakweli Lucas (PW5) whereas the appellant was the sole witness for the defence.

In a brief account, the facts leading to the appeal at hand are that; the appellant and the deceased previously cohabited and lived as husband and wife. They were blessed with one issue namely Corode S/O Yohana. Following a series of quarrels as stated by the deceased's father, PW4, they parted ways and in September 2017 the deceased was married to PW5 Bakweli Lucas as a second wife. On the 22/10/2017, while the deceased, PW5, and PW3 were at the farm, the appellant visited them accompanied by a child and the deceased introduced him as her former husband. The appellant intimated about leaving the child with the deceased which was not opposed by both PW5 and the deceased.

Then on the following day, that is on 23/10/2017 the appellant brought the child to the farmlands, however, the deceased declined to be handed the child at the farm. Thus, they had to go together to PW4, where the appellant handed the child to the deceased. While the appellant remained at Rugwe Mpya, the deceased and PW5 went back to the farm. On the same day in the evening, the deceased and her friend one Shamimu Moshi (PW2) went to fetch water at the nearby river. When they had already fetched water, on their way back home, while the deceased was ahead of PW2, suddenly the appellant surfaced holding a knife and stabbed the deceased. Having observed the incident for about three minutes, PW2 fled while shouting *"tusaidie tusaidie"*. Those who heeded to the alarm raised and

rushed to the scene found the lifeless body of the deceased lying down and it had cut wounds on the neck, shoulder, and left hand. The PW2 who was scared fell down and was rescued by some unknown boys who upon being told on what had transpired they were scared and left the scene of crime. PW2 further narrated what had befallen the deceased to PW4, PW5 and mentioned the appellant to be the one who hacked the deceased to death. She made a similar account to the village leaders and the police including PW6 who went to the scene of crime accompanied by the Doctor who conducted the autopsy of the deceased and established that, the cause of death was Asphyxia secondary to air hunger and hypovolemia due to bleeding. Then, PW6 drew the sketch map of the scene of crime which was tendered as exhibit P2. The deceased's body was then taken by the relatives for the burial ceremony. Subsequently, PW6 unsuccessfully traced the appellant at Uvinza and at his residence which remained locked. On 13/2/2018 during morning hours, the appellant was arrested at Rungwe Mpya village.

In his defence, the appellant distanced himself from the accusation involving the murder of the deceased. Besides, testifying that he had earlier married the deceased before she remarried to PW4 and thereafter went back to Burundi and returned back in February 2018. He claimed to have visited PW5 and PW4, and was told that his former wife had died and that he should

take his child. He obliged, went to the market and thereafter moved to Ostabai where he met one Maneno who inquired as to where the appellant was taking the child. Upon indicating that he was going to Burundi, Maneno adviced him to go back to Rugwe Mpya and while at Nyakafyeke, he was arrested and beaten accused to have murdered the deceased.

The appellant stated further that, he once worked in the farm of PW2 for an agreed amount of TZS. 70000/= but he was not paid his dues and instead, she offered sex to the appellant but he declined. He claimed this to be the source of grudge which made PW2 to fabricate that he had killed the deceased. That apart, he claimed to have been teased by the father that he was poor and that he could not get married to the deceased and he had to move to Kasulu.

At the end of the trial, following the summing up of the evidence as per the dictates of section 298 (1) of the Criminal Procedure Act (the CPA), the assessors returned with a unanimous verdict of guilty. The learned trial Judge relied on the evidence of PW2, PW3, and PW4 to ground the conviction of the appellant having reasoned that, PW2 being an eye witness, her evidence was corroborated by the evidence of PW3 and PW4. Aggrieved, the appellant is before the Court challenging his conviction on the following grounds of appeal:

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*

2. *That, the circumstance obtained at the scene of the crime could not enable unimpeded observation because the scene of the crime was not open space per se as it was a valley and the passway where the deceased's body was found was surrounded by farms and bushes.*

3. *That, PW2 did not see the attacker's face since the latter come from behind and no evidence was forthcoming from her that she saw the attacker face to face and considering that the time under observation was very brief before she took her heels.*

4. *That, PW4 the deceased's father was not explicit in his testimony, on the presence of the appellant at the camp (the scene of the crime) on the 22nd and 23rd day of October 2017 which was necessary in order to lend credence to the evidence of PW3 and PW5 that the appellant, the deceased and her husband went to PW4 in the morning of 23rd day of October 2017 for the appellant to hand over the child to the deceased.*

5. *That, there was an unexplained delay to arrest the appellant despite being mentioned by PW2 to be a person whoEaffected the killing of the deceased and no evidence was led that he escaped after the commission of the crime which creates doubt about whether the appellant was positively identified by PW2.*

At the hearing, the appellant who was present in Court had the services of Mr. Thomas Matatizo Msasa, learned counsel. The respondent

Republic was represented by Ms. Sabina Silayo, learned Senior State Attorney.

In prosecuting the appeal Mr. Msasa argued together the 1st, 4th and 5th grounds and the 2nd and 3rd grounds. He submitted that, the charge was not proved beyond reasonable doubt considering the following which leaves a lot to be desired: **one,** the unexplained delayed arrest of the appellant on 13/10/2018 which was after almost a year from the date of the killing of the deceased; **two**, the inaction of the police to trace the appellant, in particular, the investigator who testified as PW6; **three**, the learned trial Judge's failure to consider that the appellant had grudges with PW2 and the deceased's father who testified as PW4; **four,** evidence to ground the conviction of the appellant was procured from close relatives without giving room for independent witnesses; **five**, insufficient evidence on visual identification by PW2 in the wake of insufficient time utilized to observe the culprit; and **six**, failure to consider the defence of alibi.

It was further argued that, since the appellant is alleged to have killed the deceased, it is unimaginable that he surfaced at the premises of relatives, which renders the prosecution account doubtful. Mr. Msasa further raised an issue surrounding the date on which the autopsy report (ExhibitP1) dated 20/12/2017 was filled whereas the autopsy was conducted on 24/10/2017 and urged us to expunge it from the record. Upon being probed if the death

of the deceased is disputed, he maintained that the autopsy report is not proper on account of the pointed-out delay. With this submission Mr. Msasa urged the Court to allow the appeal, quash and set aside the conviction and sentence and set the appellant at liberty.

On the other hand, Ms. Silayo strongly opposed the appeal. She submitted that the charge of murder was proved against the appellant at the required standard. On this she pointed out that, the conditions were favourable for the positive identification of the appellant by PW2 the eye witness who happened to be at the scene of crime when the appellant hacked the deceased to death. She submitted that, the incident occurred during broad day light and the appellant was yet not a stranger to the identifying witness who knew him for the past four years as he was married to the deceased who was her friend. That apart she added, she described the alter worn at the scene of crime and mentioned the appellant at the earliest opportunity to the others inclusive of the village authorities and the police which is an assurance to the reliability of the evidence of PW2.

As to the reason for the delayed arrest of the appellant, it was submitted that, although since the appellant was in Burundi the arrest could not be effected at the earliest despite efforts to trace him at Uvinza and his residence which remained closed as per the evidence of PW6. She added that the complaint on existence of grudges between the appellant and PW2

and PW4 were baseless because PW4 denied to have earlier employed the appellant. Similarly, she pointed out that the appellant's claim that he had a love affair with PW2, are an afterthought for not being raised during cross examination.

Pertaining to the complaint on evidence adduced by close family members, Ms. Silayo challenged the same arguing that, the law does not bar close family members to adduce evidence on the incident witnessed. Moreover, Ms. Silayo argued that the appellant's defence of alibi was properly rejected considering the evidence of PW2 and PW5 who confirmed that on the fateful day the appellant was in the vicinity and had come to pick his child and he was placed at the scene having been identified by PW2 as the one who hacked the deceased. Finally, Ms. Silayo reiterated his earlier submission that the credible account of PW2 who is the eye witness is entitled to credence because she mentioned the appellant at the earliest opportunity as the one who hacked the deceased to death.

In rejoinder Mr. Msasa reiterated his earlier submission and maintained that the charge of murder was not proved against the appellant.

Having carefully considered the contending submissions the grounds of appeal and the record before us the issues for our determination are: **one,** whether the trial was flawed with a procedural irregularity relating to the

postmortem report completed two months after the incident; and **two** whether the charge of murder was proved to the hilt against the appellant.

The issue on the propriety of the autopsy report cropped up in the course of hearing the appeal and it need not detain us. While it is true that the autopsy report is dated 20/12/2017 which is more than two months after the autopsy was conducted, apparently, it is on record that since the RCO had no forms and as such, the Doctor had to initially record the findings in the Diary and later author the report in the prescribed form. That said, even if the report was delayed; it is inconsequential considering that it is not disputed that the deceased died due to unnatural cause as per the evidence of the Doctor, PW2 and her father PW4. We say no more.

Moreover, a query has been raised by the appellant's counsel that the prosecution witnesses were all relatives of closely related and this should make the court to suspect their evidence. Indeed, it is not a requirement of the law that the evidence of relatives or family members cannot be relied upon to ground the conviction of the accused person. Such evidence must be weighed according to the law as was emphasized in the case of **PAULO TARAYI VS REPUBLIC,** Criminal Appeal No. 216 of 1994 (unreported) as the Court stated that:

> *"We wish to say at the outset that it is, of course not the law that wherever relatives testify to any*

event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility of relatives many choose to team up and truthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should the totality of the story told by them... that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence..."

See also: **MUSTAFA RAMADHANI KIHIYO VS REPUBLIC** [2006] T.L.R 323, **REPUBLIC VS LULAKOMBE MIKWALO AND ANOTHER** [1936] EACA 43, **HAMISI ANGOLA VS REPUBLIC**, Criminal Appeal No. 442 of 2007, **DEO BAZIL OLOMI VS REPUBLIC,** Criminal Appeal No. 245 of 2007 and **FESTO MGIMWA VS REPUBLIC,** Criminal Appeal No. 378 of 2016 (all unreported).

In the premises, in the present case, we are satisfied that the evidence of PW2, PW3 and PW4 cannot be discredited as there is no indication that they teamed up to promote the untruthful account against the appellant. They all gave a credible account as to what had transpired on the fateful incident and as such, their evidence was correctly believed and acted upon to ground the conviction of the appellant.

As to whether the charge was proved to the hilt, the it is the complaint of the appellant in the 2nd, 3rd and 5th grounds of appeal is that he was not

properly identified which culminated into the delayed arrest and as such, the trial judge wrongly acted on such evidence to ground the conviction. In the present case, according to the testimony of PW2, the incident took place in the evening when there was still sun light. It is settled law that courts should closely examine the circumstances in which an identification of any witness is made and have consistently held that where evidence of visual identification is disputed and/or is otherwise problematic, the courts should be cautious to act on such evidence before convicting an accused solely on the basis of the correctness of such identification. In this regard, the courts have prescribed some salient common factors to be considered which include, the duration under which the witness observed the accused; the distance; if at night time, what was the source and intensity of the light, whether the observation was obstructed in any way; whether the witness was familiar with the accused before and if yes, how often; whether the witness named or described the accused to the next person he saw and whether those other persons gave evidence to confirm it; see **WAZIRI AMANI VS REPUBLIC**, [1980] T.L.R 250, **RAYMOND FRANCIS VS REPUBLIC** [1994]TLR 100, **AUGUSTO MAHIYO VS REPUBLIC**, [1993] TLR 117, **SHAMIR JOHN VS REPUBLIC,** Criminal Appeal No. 166 of 2004, **DADU SUMANO @KILAGALA VS REPUBLIC** Criminal Appeal No. 222 of 2013.

The situation is different where the evidence of identification is by recognition; which has been held by courts to be more reliable than the identification of a stranger. But caution should as well, be taken when a witness is purporting to have recognized someone known from before, mistakes cannot be ruled out; see: **ISSA S/O MGARA @SHUKA VS REPUBLIC** Criminal Appeal No 37/2005; **MAGWISHA MZEE SHIJA PAULO VS REPUBLIC,** Criminal Appeal No 465 and 467 of 2007 (both unreported).

Guided by the stated position of the settled law, the evidence on visual identification is testified by PW2 and what transpired is reflected at pages 48 and 49.

> *"We picked water and came back. She was ahead and I was behind. It was a space of four footsteps. We were carrying buckets of water. I suddenly saw a person behind me holding a knife. He held Scola on the neck (kukaba) and stubbed her with a knife. He held her this way (pulls her gown near the neck). I can identify him. He was her old husband, Yohana. He was the husband of Scolastica. His name was Yohana Philipo. I knew him earlier because he was the husband of my friend Scolastica. He was also renting near our home. I knew him for more than for years. He turned to me, looking at me as he was holding Scola. I*

stayed in observation for two minutes. I was in a distance of 3 meters. There was nothing in between. It was open. There was a bright light from the sun.

He stubbed her on the neck. I run away to look for help saying "Tusaidie, tusaide". I fell down in the well. I proceeded to shout. I could not get out because it was deep. Three boys came and helped me to get out of the well. I told them that the old husband of Scolastica had stubbed her with a knife. They were afraid and left. I never knew them. I proceeded to shout saying "Tusaidie, tusaidie". Many people came. I gave the story to them. We moved to the scene of crime. We found that Scolastica was already dead. She was laid on the ground. She had wounds on the neck shoulder and left hand".

In the instant case, PW2 testified to have identified the appellant by recognition because he was initially married to the deceased who was her friend and also that the he had rented a house near PW2's home and was known to her for more than four years. That apart, PW2 stated to have observed the incident for about two minutes. This piece of evidence was not challenged by the appellant. Further, there was evidence of unimpeded observation by PW2 from a distance of four meters which was impeccable, due to the close proximity she had with the deceased when the appellant

attacked the deceased. Under the circumstances, the complaint that PW2 could not identify the attacker who surfaced from behind is neither here nor there because the deceased was in front of PW2 when he was hacked by the appellant and as such, PW2 managed to see the fateful incident. The issue of the scene of crime being surrounded by farms which is claimed to have obstructed clear observation is as well without basis because it is in the evidence of PW2 that, they were passing through a path while carrying buckets of water on the way to their homesteads. That said, it is on record that, on the same day PW2 went to the husband of the deceased and narrated the episode to PW3 the co wife of deceased, the village leaders and the Police and mentioned the appellant to be the culprit.

Thus, mentioning of the appellant to be the culprit at the earliest opportunity rendered PW2's account reliable and it enabled the police to initiate investigation to trace him at his residence and as far as Uvinza as per the testimony of PW6, the appellant could not be arrested at the earliest because he was in Burundi and came back in February, 2018. This was acknowledged by the appellant himself in his evidence. In the premises, the delayed arrest was justified and his arrest after he surfaced from Burundi was in the circumstances the earliest opportunity to do so. Thus, the 2nd, 3rd and 5th grounds of appeal are not merited.

On the 4th ground, it is the appellant's complaint that PW4 the deceased's father was not clear in his testimony, on the presence of the appellant at the camp on the 22 and 23 /10/2017 in order to lend credence to the evidence of PW3 and PW5 that the appellant, the deceased and her husband went to PW4 in the morning 23/10/2017 so that the appellant could hand over the child to the deceased. We found this complaint wanting having considered the credible account of PW2 who managed to identify the appellant as the one who hacked the deceased to death. The testimonial account of PW2 reveals that she was present at the scene of crime when the deceased was hacked to death by the appellant. Such evidence is direct as it was held in the case of **COMMONWEALTH VS WEBSTER** 850 Vol. 50 MAS 255 where Shaw CJ stated:

> *"The advantage of positive evidence is that it is direct testimony of witness of a fact to be proved who if speaks the truth so it done. The only question is whether he is entitled to belief."*

That said, even the defence of alibi was in our considered view, rightly rejected in the wake of the direct and credible account of PW2 which placed the appellant at the scene of crime and that he did hack the deceased to death. Thus, the 4th ground is without merit.

Given what we have endeavoured to demonstrate there is no cogent reason to vary the verdict of the trial court as the charge of murder was proved against the appellant to the hilt rendering the appeal not merited and it is hereby dismissed in its entirety.

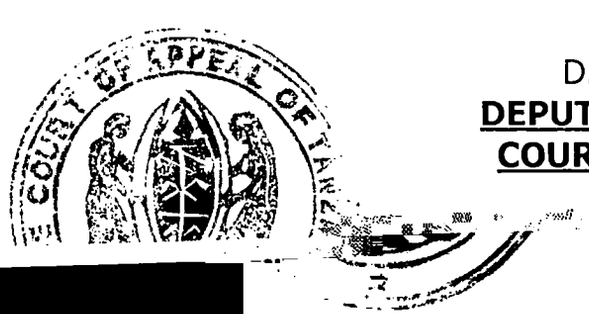
DATED at **KIGOMA** this 1st day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of June, 2023 in the presence of Mr. Yohana Filipo, learned counsel for the Appellant and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Edina Makele, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL

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