IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

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

CRIMINAL APPEAL NO. 112 OF 2020

WARYOBA ELIAS ..... APPELLANT

VERSUS

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

(Appeal from the judgment of the High Court of Tanzania at Musoma)

(Kahyoza, J.)

dated the 26th day of February, 2020

in

Criminal Sessions Case No. 33 of 2019

.....

JUDGMENT OF THE COURT

31st May & 9th June, 2023

MWANDAMBO, J.A.

The appellant Waryoba s/o Elias stood trial and was convicted before the High Court sitting at Musoma of the offence of murder of the deceased; Chacha s/o Isenye which occurred on 1/11/2017 at a village called Kibubwa within Butiama District, Mara Region. He was in consequence sentenced to the mandatory death sentence. He is now appealing before the Court against the decision which convicted him.

The facts from which the appellant was charged, convicted and sentenced can be briefly stated thus: on the night of 1/11/2017, a group of

people invaded the home of the deceased and his wife; Wamkuru Chacha Isenye (PW1). The deceased and PW1 were alerted of the intrusion by noises of barking dogs whereupon, the deceased got outside his bed room to find out the reason behind the noises. However, lucky was not on his side for, no sooner had he got out than he was allegedly invaded by bandits who attacked him by machetes by cutting him on several parts of his body. The deceased's yelled to his wife that he was dying which forced PW1 to get outside the room to rescue her husband only to be met by a group of five people armed with machetes and clubs ordering her to go back inside the house. At that time, there was, according to PW1, a bright moonlight which enabled her to see the armed bandits even though he could not identify them as she was far away from them. Three of the assailants, the appellant included, forced PW1 back into the house where they demanded to be given money.

PW1 had it that, the appellant who was related to the deceased and staying in the neighbourhood in the same village, had a machete and torch so was the other person along with him while the third one had a club in his hands. She recounted that the bandits flashed their torches which illuminated the rooms in the process of their pursuit for money from which she was able to identify them as the light was sufficient spreading all over places in the room. Thereafter, she gave the bandits TZS. 1,000,000 a

mobile phone and a thermos before they disappeared locking the door from outside which made it difficult for her to go outside for her husband's rescue. In the end, PW1 managed to exit through a window to a neighbour one Magori Waryoba who happened to be a ten-cell leader to report the incident mentioning the appellant, Mikalas Tembo and Shangwe as the persons who had invaded the deceased. With the help of another neighbour called Ginguri Wambura (PW3), PW2 accompanied PW1 to the scene of crime where they found the deceased had woken up and returned into the house but bleeding from the injuries he had sustained. The deceased was taken to Bugando Hospital but died later in the day.

The appellant was arrested on 27/03/2018 somewhere in Sirosimba village in Serengeti District and subsequently charged with the murder of the deceased and stood trial in which the prosecution called five witnesses. However, the case for the prosecution was anchored on the evidence of identification through PW1.

The appellant predicated his evidence on the defence of alibi he raised in the course of giving his evidence but the trial court found that defence too wanting to be given weight capable of raising any reasonable doubt in the case for the prosecution and rejected it. Based on the evidence of PW1 whom it found to be a credible and truthful witness, it

convicted the appellant as charged. It is significant that, although the incident occurred during the night, PW1 was found to have positively identified the assailants who were familiar to her and mentioned them to other people including PW2, and thus all possibilities of mistaken identity were eliminated.

The appellant lodged a memorandum comprising six grounds of appeal. However, at the hearing of the appeal, Mr. Edison Philipo, learned advocate who represented him abandoned all grounds except ground two. That ground faults the trial court for convicting the appellant on PW1's weak evidence of identification in unfavourable conditions for a positive identification.

Mr. Philipo began his onslaught of the trial court's findings on the source and intensity of torch light flashed by the assailants in the room. He argued that since the light was flashed towards PW1, it was impossible for her to have seen and identified the appellant. On the other hand, the learned advocate attacked the trial court's finding in its reference to size of the room arguing that, it was not supported by any evidence from PW1 be it small or tiny as a basis for finding that the light shone from torches was sufficient to enable a positive and unimpeded identification at such hour of the night.

The learned advocate reinforced his submission on the Court's unreported decision in **Makonyo John @ Kibuka & 2 others v. Republic**, Criminal Appeal No. 305 of 2018 to argue that, despite PW1's claim that she properly identified the assailants, she made no description of their physical appearance and attire they wore. He thus contended that; the trial court should not have believed PW1's evidence to be sufficient to prove positive identification regardless of her familiarity with the appellant. Besides, the learned advocate attacked the credibility of PW1 arguing that her evidence was contradictory to what she told PW2 despite mentioning the culprits immediately after the incident and thus it could not have supported the finding for a positive identification. On the whole, counsel invited the Court to re-evaluate the evidence and come to its own inferences of fact resulting into a finding that PW1's evidence was clouded with doubts for a positive identification grounding conviction.

Resisting the appeal, the respondent Republic was represented by Messrs. Tawabu Yahya Issa, Isihaka Ibrahim Mohamed and Ms. Agma Agrey Haule, all State Attorneys. It was Ms. Haule who addressed the Court in reply to the appellant's submissions. Ms. Haule was emphatic that in terms of section 143 of the Evidence Act, the case against the appellant was proved by a single witness through PW1 who was found to be credible and truthful by the trial court. Supporting the trial court's finding, the learned

State Attorney pointed out that PW1's evidence of identification was sufficient because, (1) the source of light came from two torches illuminating enough light spreading all over the rooms (2), the distance between PW1 and the assailants was three paces which was favourable for unimpeded visual identification (3), the appellant was very familiar to PW (4) and mentioned the appellant to PW2 immediately after the incident thereby assuring her credibility which eliminated possibilities of mistaken identity. The Court's unreported decision in **Chacha Jeremia Murimi & Others v. Republic**, Criminal Appeal No. 551 of 2015 was cited to support the argument that, PW1's evidence of identification by recognition was not only reliable but also credible considering her mention of the assailants to PW2 immediately after the fateful incident.

Advancing her argument, the learned counsel submitted that, PW1's evidence was neither shaken in cross examination nor through the appellant's evidence in defence which was based solely on the defence of alibi rejected by the trial court as an afterthought. At the Court's prompting, Ms. Haule conceded that the trial court's remarks on the size of the room was not founded on evidence but argued that PW1's evidence on the distance of three paces between her and the appellant was sufficient to explain that the conditions were favourable for a positive identification. Like the learned advocate for the appellant, Ms. Haule invited the Court to re-

evaluate the evidence on record which will result in sustaining the trial court's finding of the appellant's guilt. She prayed for an order dismissing the appeal.

In his short rejoinder, the learned advocate for the appellant contended that **Chacha Jeremia Murimi**'s case was not helpful to the respondent in so far as PW1's evidence is silent on the length of time the appellant was under her observation.

We shall begin our deliberation with the obvious on the issue for our determination; whether PW1's evidence was watertight to prove appellant's positive identification capable of grounding conviction challenged in this appeal. It is trite law from decided cases that the evidence of identification is an exception to the general rule against its reliance as articulated by the Court in its seminal decision in **Waziri Amani v. Republic** [1980] TLR 250. This is so because, such evidence has been held to be of the weakest kind which should only be acted upon if all possibilities of mistaken identity have been eliminated. That means that, before the court acts on such evidence, it must be satisfied that all conditions for its reliance have been met by a watertight evidence. Reiterating, in **Raymond Francis v. Republic** [1994] T.L.R. 100, the Court stressed the utmost importance of existence of evidence proving conditions favouring a correct identification where

determination of a criminal case depends largely on identification. Nevertheless, mindful that surrounding circumstances are not identical in each and every case, in **Jumapili Msyete v. Republic,** Criminal Appeal No. 110 of 2014 (unreported), the Court remarked:

> *"But it is equally true that no hard or fast rules can be laid down as to the manner a trial judge should determine questions of identity, provided that in each case there should be a careful and considered analysis of all the surrounding circumstances of the crime being tried (**Waziri Amani v R** (supra). Essentially therefore this means each case will have to be decided on its own peculiar surrounding circumstances" [at p. 13]*

Later in the judgment, the Court made the following pertinent observations in relation to the type of evidence required to prove each category of identification; visual, recognition and identification by voice thus:

> *".... Accordingly, the type of evidence required to prove identification, might differ in some aspects, but some may be common in all types of identification. Foundation and assistive evidence, for instance, is necessary in all types of identification, but corroborative*

may not be. For instance, in visual identification, identification parades, or recent possession, has invariably been used to corroborate, but it may not be so in recognition cases. In visual identification, description of the suspect built or attire may be necessary but in recognition cases, naming the suspect would be sufficient" [At p.16].

It is trite that except where identification is by voice, in visual and recognition identification light, is a critical prerequisite. Accordingly, the Court has been resolute regarding its source and intensity stressing their proof beyond reasonable doubt that such light is bright enough to see and positively identify the assailant – see: **Said Chaly Scania v. Republic** [2007] T.L.R 100 and **Juma Hamad v. Republic**, Criminal Appeal No. 141 of 2014 (unreported). Equally important is credibility of the identifying witness. In **Jaribu Abdallah v. Republic** [2003] T.L.R. 271, the Court stressed that:

"... In matters of identification, it is not enough merely to look at the factors favouring accurate identification. Equally important is the credibility of witnesses. Favourable conditions for identification are no guarantee against untruthful evidence...."

See also: **Chacha Jeremia Murimi & Others** (supra). Not oblivious of the possibility of mistakes in recognition of relatives and friends, in **Issa s/o Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court stressed the condition for clear evidence of the source of light and its intensity even in cases where evidence of recognition may be more reliable than identification of a stranger.

The position in the instant appeal is that the evidence was largely of recognition of the appellant by PW1. The trial court relied on PW1's evidence of recognition after finding that she was a credible and truthful witness. The appellant's advocate criticised the trial court for its reference to the size of the room as tiny and small as favourable for a positive identification. Ms. Haule was agreeable that the remark was not supported by PW1's evidence. With respect, we agree with both counsel that reference to the size of the room be it small or tiny did not feature in PW1's evidence and thus uncalled for. Nevertheless, we are satisfied that it was an innocuous embellishment because PW1's evidence that she was three paces away from the assailants was not controverted. We are thus far from being persuaded that the trial court's remark on the size of the room influenced its overall finding on her evidence of identification of the appellant.

Having scanned the evidence on record, it is plain that the source of the light that enabled PW1 to identify the bandits was illuminated by torches flashing light all over places in the room. The trial court believed her as a credible and truthful witness. We have seen no reason to fault the trial court alive to the principle that credibility is the domain of a trial court which has the opportunity of observing and hearing a witness in a witness box. See for instance: **Ali Abdallah Rajab v. Saada Abdallah Rajabu** [1994] T.L.R. 132. See also: **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 (unreported). After all, as we held in **Goodluck Kyando v. Republic** [2006] TLR 363, every witness is entitled to credence, unless his evidence is improbable or implausible or materially contradicted by the evidence of another witness or witnesses. In the absence of any such contradictory evidence denting PW1's credibility, the trial court's finding in that regard must stand. It is plain that such a finding was supported by the trial judge's remark at page 16 of the record of appeal that PW1 was confident when giving her evidence pointing the appellant in the dock.

Needless to say, since credibility of an identifying witness is just one of the factors in determining whether the evidence of identification was watertight, we shall examine whether the finding of the trial court was supported by the evidence on record. Guided by the guidelines set in various cases, in particular, **Waziri Amani**, the trial court found the

following conditions established for a favourable identification. First and foremost was the source of light from two torches held by the appellant and his colleague; Mikalas Tembo flushing light all over the places in the room as they were searching for more money after PW1 had given them TZS 1,000,000. The trial court accepted PW1's evidence which was to the effect that, the two torches flash light directed at different places in the room and its reflection from the walls was sufficient to identify the assailants, the appellants included. Secondly, discounting the reference to the size of the room, the trial court accepted PW1's evidence on the proximity between her and the assailants; three paces away as ideal for a positive identification.

The third condition was the time PW1 spent under observation of the assailants. The trial court accepted that PW1 had ample time with the bandits considering that the ordeal began with demand for money to which PW1 obliged giving them TZS 1,000,000. This was followed by demand for more which could not be met due to PW1's inability to meet it which led to the search for more all over places in the room but to no avail. Fourthly, trial court accepted PW1's uncontroverted evidence that the bandits were very familiar as they were residents in the same village and hence her ability to mention their names. Besides, the appellant was the deceased's nephew and neighbour who was well known to PW1. Fifthly, the trial court took into

account PW1's ability and fearlessness to mention the culprits to PW2 and to other people who gathered at the scene of crime and later to the police.

Given the evidence on record relative to the circumstances, we endorse and agree with the respondent Republic's counsel that the trial court's findings were supported by the evidence and sufficient to ground the appellant's conviction. In doing so, we have also taken note of the following: One, apart from the rejected defence of alibi, the appellant did not shake PW1's evidence in any manner whatsoever. If anything, PW1's answers to questions in cross-examination strengthened her evidence. For instance, PW1 stated at page 17 of the record that the bandits were lighting all over places in the room and going around as if it was their house. In re-examination, PW1 is recorded to have said that there was refection of light from the walls which means that such light enabled her to identify her assailants. This evidence negates Mr. Philipo's argument on the direction at which torch light was flashed thereby hindering PW1's ability to identify the bandits. Indeed, the trial court addressed itself to this aspect at page 72-73 of the record and we share similar view. The second aspect relates to PW1's credibility. We have already said that we are bound by the trial court's finding on this aspect but we feel compelled to say something more. Although PW1 stated that there was a bright moonlight outside, she was candid that apart from the number of armed assailants she saw outside, she

could not identify them because she stood away from them. In our view, that added credit to her credibility for, she could as well have embellished her version and said that she was able to identify the appellant through the bright moonlight. It is not surprising that the trial judge found PW1 a truthful and credible witness. Thirdly, we are not oblivious of the fact that, unlike in **Makonyo John Kibuna**'s case (supra) where the identifying witness gave description of the assailants and attire, PW1 did not do that much and Mr. Philipo would want to make a mountain out of mound.

With respect, consistent with our decision in **Jumapili Msyete**, we do not think that that was necessary in the circumstances of the case having named the appellant to PW2 immediately after the incident. There is no dearth of authorities that, mentioning a culprit to the next person immediately after the incident assures the witness's credibility and credence favouring an unmistaken identity. See for instance: **Wangiti Marwa Mwita and Others v. R.** [2002] T.L.R 39. In our view, while description may add value to the evidence as was the case in **Makonyo John Kibuna**'s case (supra) relied upon by Mr. Philipo, failure to do so did not relegate PW1's evidence by recognition to a dock identification which the Court has held to be worthless.

On the whole, we are satisfied that, the trial court rightly convicted the appellant upon a water tight evidence of identification from PW1. We have seen no reason to differ with the trial court's findings and we thus find no merit in the sole ground canvassed by the appellant. We accordingly dismiss the appeal for lack of merit.

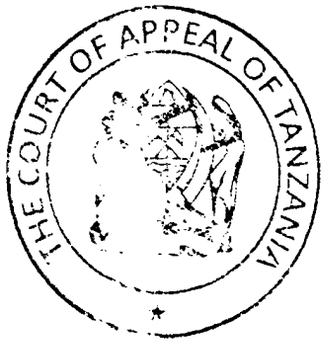
DATED at **MUSOMA** this 8th day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2023 in the presence of the appellant in person and Ms. Natujwa Bakari, 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