IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 117 OF 2023

NDARO SUMUNI MABUSE @ AMIRI RONALDO.....1st APPELLANT

MSIBA MAREGERI @ MBOROGOMA.....2nd APPELLANT

ABED KAZIMILI @ FIDELISI MGEWA.....3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mdemu, J.)

dated the 16th day of January, 2023

in

Criminal Sessions No. 189 of 2013

.....

JUDGMENT OF THE COURT

14th July & 18th October, 2023.

FIKIRINI, J.A.:

Ndaro Sumini Mabuse @ Amiri Ronaldo, Msiba Maregeri @ Mborogoma and Abeid Kazimili @ Fidelis Mgewa in this appeal referred to as the 1st, 2nd and 3rd appellants were jointly charged and convicted in the High Court of Tanzania, at Musoma, of the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R. E. 2002] (the

Penal Code) and sentenced to suffer death by hanging pursuant to section 197 of the Penal Code. The prosecution claimed that, on 21st December, 2012, at Kwibara village within Bunda District in Mara region, the trio murdered one Tabu Makanya.

The appellants, being aggrieved by the trial court finding preferred an appeal to this Court. They were heard in Criminal Appeal No. 358 of 2015 and Criminal Appeal No. 547 of 2019, and eventually a retrial was ordered. This is the third time the appellants are approaching the Court. Whereas this is brought as a joint appeal challenging the decision vide a Memorandum of Appeal lodged on 31st March, 2023, later the 2nd and 3rd Appellants also filed separate Supplementary Memoranda of Appeal.

In determining the appeal, we shall therefore consider the grounds of appeal in their joint Memorandum of Appeal and those filed separately by 2nd appellant and 3rd appellant in their Supplementary Memoranda of Appeal.

A narration of facts, albeit briefly of the evidence that led to the appellants' conviction and sentence, is apt and is as follows: on 21st December, 2012, a family of six (6) people was sleeping in the house.

Those present were Nyasinde Marubira-PW1, Mwajela Marubira-PW2, Julius Masasi (12 years), Peter Samson (7 years), Maria Magesa (6 years) and Tabu Makanya, a mother to PW1 and PW2, who was terminally ill and now deceased.

On the fateful night, PW2 woke PW1, who shared a bedroom with her mother, so that she administer medication to their mother. She put on the wick lamp "koroboi" and administered the medication. Shortly, she heard a bang on the door. The suspects stormed into the room and demanded money from the deceased. The deceased got up and sat on the bed and responded that she had no money. The 1st appellant, using a machete and a stick, which has sharp edges on both ends, commonly known as "mambo' hit and cut the deceased on the head.

PW1 claimed identifying the 1st appellant and one Chegenge Nyakubondya using the wick lamp. She knew them before, describing the 1st appellant as his former schoolmate and a famous footballer named "Ronaldo", and having been previously employed as a motorcycle rider, commonly known as "bodaboda," by his cousin brother Masonyi Marubiri. She described the attire worn by 1st Appellant's that night as

black trousers and a black coat. Fortifying her account, she stated that she spent almost thirty (30) minutes having the appellants under her observation. PW1's further evidence was that she identified Chegenge Nyakubondya, as her co-student, and on that night, he had put on black trousers and a jacket. Besides the light illuminated by the wick lamp, PW1 stated to have been standing about two steps away from the suspects and the room was 5 x 5 in width and length.

Narrating on what exactly took place, she stated that at some point, she was ordered to cover herself with a bed sheet given by the 1st appellant or else she could be killed. She obliged and later heard the 1st appellant asking for a bag from the other suspect. After they had left, she realized that her mother had been killed and her head severed from her body. She raised the alarm and neighbours gathered, including Joseph Mathayo. Neighbours went after the suspects but could not arrest them. They, however, returned with the deceased's head in the bag. The Village leaders and Police Officers went to the scene after being informed. She told the Police who recorded her statement that she identified the 1st appellant and Chegenge Nyakubondya.

In cross-examination by Mr. Philipo, counsel for the 1st appellant, PW1 stated that she was the one who informed the Police; however, she did not say how and when she did that.

PW2's account was slightly different. Hers goes as follows: after attending to their mother, she returned to her room. Shortly later, a bang on the door was heard and the door went open. Four (4) people stormed into PW2's room, demanding a cellular phone and money. Two of the suspects, namely the 1st appellant and one Chegenge Nyakubondya not part of this appeal, moved to where the deceased was while the other two went outside the house. PW2 followed them to the sitting room where a lantern lamp "chemli," was placed on the cupboard to illuminate the room. PW2 told the court that, though ordered to go back to her room, she disobeyed and it was at this point she identified two of the suspects by face and name and the others by looks. She identified the 1st appellant with whom they had gone to the same school, that he was a footballer nicknamed "Ronaldo," and that he used to ride his cousin's brother Masonyi Marubiri's motorcycle. Describing his attire, she stated he had black trousers and a black jacket, holding nothing in

his hands. She also stated that while in the living room, she identified Chegenge Nyakubondya. From the living room, they proceeded to where PW1 and the deceased slept. Chegenge Nyakubondya is said to have held PW2 by the wall, while the 1st appellant used a machete and a long knife drawn from his waist and slaughtered the deceased's neck. The severed head was put in a bag supplied by Chegenge to the 1st appellant upon his request and disappeared. The alarm was raised, and PW2's brother's son, Makanya Masonye, and other neighbours, including Joseph Mathayo, responded. PW2 and other neighbours unsuccessfully pursued the suspect but were able to retrieve the deceased's head in a bag. Kilemba Marubiri carried the bag back home.

Police from Kwibala and Musoma arrived at the scene of the crime within thirty (30) minutes. PW2 told the police what happened and that she identified two suspects' faces and names: the 1st appellant, Ndaro Sumuni and Chegenge Nyakubondya. She described the other two as follows: one was short, black and disabled in one of his legs and he was dealing with fish business at Kwibala. The other suspect was described as a little bit shorter than the other and a fisherman from Kwibala.

On 22nd December, 2012, D. 6122 D/Sgt Obeid-PW4, accompanied by the Officer Commanding Criminal Investigation District (OC-CID), visited the scene of the crime, where they were informed about the suspects by the Officer Commanding Station (OCS) Mugango. He named Ndaro Sumuni @ Ronaldo and Chegenge Nyakubondya, both residents of Mugango.

PW4 drew a sketch map of the crime scene, which was admitted as exhibit P3, and interviewed PW1 and PW2. He later arrested the 1st appellant and took him to Mugango Police Station. Upon interrogation, he named four (4) people, Juma Mwanajeshi and Khamis Muhoja, both residents of Kamgegi, Musiba Maregeri and Abeid Kazimili (the 2nd and 3rd appellants), both residents of Mugango. The 1st appellant admitted that all those mentioned had been hired by one Wandwi Magulu, a Councilor for Mugango ward, to kill the deceased on the promise of being paid TZS. 1, 500,000/=. According to PW4, the 2nd and 3rd appellants were arrested on 8th January, 2013 at 15:00 hours.

A few days after the incident, PW2 attended an identification parade conducted by ASP Nelson Sumari – PW3 so that she could

identify the 2nd and 3rd appellants. On that day, PW3 organized an identification parade of twelve (12) males who appeared alike. PW2 was able to identify the 2nd and 3rd appellants. An identification register (PF. 186) was tendered and admitted in evidence as exhibit P2.

The 1st appellant's cautioned statement was recorded by D. 6298 D/Sgt Rabiel-PW5 on 21st December, 2012 from 9:10 am up to 11:48 am. However, the court rejected the statement because it was recorded outside the prescribed time. E. 938 D/Cpl Peter-PW6 recorded the 2nd appellant's cautioned statement, which was admitted in evidence as exhibit P4, while E. 2636 D/Cpl. Deusdedit-PW7 interviewed and recorded the 3rd appellant's cautioned statement, which the court rejected on account of being recorded in contravention of section 57 (3) of the CPA.

When called upon to mount their defence after the court found that they had a case to answer, all exonerated themselves from the allegations. The 1st appellant, in challenging PW2's evidence, declined to have gone to the same school with her and queried why PW2 lied to the court that she could not read if she went to school. Adding to his

defence, the 1st appellant pointed out that PW1 and PW2's account of the light in the room was contradictory. While PW1 stated the deceased asked her to light the wick lamp when the suspects stormed in, PW2 stated the lantern lamp was on all along.

The 2nd appellant, on his part, was of the account that he was arrested on 8th January, 2013 and taken to Mugango Police Station on a cattle theft allegation. Later, he was taken to Musoma Central Police Station, accused of killing the deceased Tabu Makanya, an allegation he refuted. Further, in his defence, he urged the court to disregard exhibit P4 because he was associated with the charge simply because he was a resident of Mugango and also declined to mention the 1st appellant linking him to the offence.

The 3rd appellant had a different account. Besides refuting the charges leveled against him, he informed the court that after the incident, he went to the deceased's house and mourned with the family, including PW1 and PW2, and took part in the burial ceremony. He stated to have been in the village since the incident occurred until he was arrested on 8th January, 2013. Countering his identification at the

identification parade, he acknowledged that PW2 knew him as a fellow villager, which is why she could identify him at the identification parade, albeit incorrectly.

After a full trial, the assessors unanimously opined that all the appellants were not guilty. Despite the assessors' position, the court found all the appellants guilty. It convicted them accordingly, relying on visual identification made by PW1 and PW2, identification parade outcome which the trial Judge considered relevant since the visual identification made that night was by face and not names and cautioned statement made by the 2nd appellant and admitted in evidence as exhibit P4, in which he implicated the 1st and 3rd appellants. According to the trial Judge, the identification parade evidence (exhibit P2) corroborated PW1 and PW2 visual identification evidence. On the contrary, the trial Judge dismissed the appellants' defence of *alibi*, and that the appellants' arguments that PW1 and PW2 evidence was a fabrication holding that it was an afterthought and could not shake the prosecution case.

Aggrieved, the appellants jointly challenged the decision vide a joint Memorandum of Appeal lodged on 31st March, 2023. Later on, 4th

July, 2023, counsel for the 3rd appellant lodged a separate Memorandum of Appeal, followed by a Supplementary Memorandum of Appeal lodged on behalf of the 2nd appellant.

The initial Memorandum of Appeal jointly filed on 31st March, 2023, contained nine (9) grounds, which are paraphrased as follows:- **one**, that the visual identification made under unfavourable condition and failure to name the suspects at the earliest opportunity was questionable, **two**, failure by the trial Judge to caution himself before acting on DW2's cautioned statement against DW1 was contrary to section 33 of the Tanzania Evidence Act, Cap. 6 R.E 2002 (the TEA), **three**, the amended charge was not read to the appellants, **four,** that DW2's cautioned statement was unlawfully procured and assessors were not discharged before commencing trial within a trial, **five,** that identification parade was of no value since PW1 and PW2 knew DW2 and DW3 before, and **six,** the prosecution case was not proved beyond all reasonable doubt.

Mr. Anthony Nasimire, learned counsel for the 2nd appellant, lodged a Supplementary Memorandum of Appeal on 10th July, 2023. The

following paraphrased complaints were raised:- **one,** that the learned trial Judge erred in convicting the 2nd appellant based on the identification parade (exhibit P2) which had no evidential value. **Two,** it was unsafe for the learned trial Judge to consider the cautioned statement (exhibit P4) of the 2nd accused in convicting him without independent corroboration and **three,** PW2's visual identification under unfavourable condition was not watertight.

The 3rd appellant, through his counsel Mr. Cosmas Tuthuru lodged another set of Memorandum of Appeal on 4th July, 2023 comprising three (3) grounds summarized as follows: **one,** it was erroneous to rely on identification parade (exhibit P2) which was of no evidential value to convict the 3rd appellant, **two,** the procedure of conducting identification parade was in breach of the Police General Order (PGO) No. 232, and **three**, the trial court erroneously relied on the 2nd appellant's cautioned statement (exhibit P4) wrongly recorded and admitted in evidence, to convict the 3rd appellant.

During the hearing, Mr. Constantine Mutalemwa, Mr. Anthony Nasimire and Mr. Cosmas Tuthuru, all learned advocates, appeared for

their respective parties, the 1st, 2nd and 3rd appellants. Ms. Revina Tibilengwa, learned Principal State Attorney, assisted by Ms. Mwanahawa Changale, Mr. George Ngemera and Mr. John Simon Joss, all learned State Attorneys, appeared for the respondent/ Republic.

In arguing the appeal, Mr. Mutalemwa, relied on the substantive Memorandum of Appeal from which he argued the 1st, 4th and 5th grounds jointly after combining them into one ground that reads:

> *"The conviction of 1st appellant was based on visual identification by PW1 and PW2 whose testimonies were not credible and reliable in law".*

The 7th ground was to be argued separately. Apart from that, he prayed to add three (3) additional grounds, though only two (2) were formulated and argued, namely: one, the cautioned statement of the 2nd appellant was recorded in contravention of section 50 (1) (a) of the CPA, and two, that the prosecution case was not proved beyond reasonable doubt for failure to call a material witness one Joseph Mathayo.

Mr. Mutalemwa dropped the 2nd, 3rd, 6th, 8th and 9th grounds. Submitting on the 1st, 4th and 5th grounds on visual identification, he

contended that the identification was made under unfavourable conditions, the light of the wick lamp used was not stated, and the distance between PW1 and PW2 and the suspects were not explained. Even though PW2 stated knowing the 1st appellant prior to the incident as they attended the same school and that he was a footballer was not a guarantee that there could not be an unmistakable identity, he argued.

In furtherance of his submission, he submitted that neither PW1 nor PW2 mentioned or named the 1st appellant at the earliest opportunity available, which would have added credence to their testimonies. The learned counsel referred us to pages 133 - 134, where one Joseph Mathayo was named among the first neighbours to respond to the alarm raised. Mr. Mutalemwa admitted that section 143 of the TEA did not require a specific number of witnesses to prove a fact, but crucial witnesses like Joseph Mathayo, who had been left out, raised doubt for the prosecution case and that it called for the court to draw an adverse inference on PW1 and PW2's evidence.

On the 7th ground which related to the 2nd appellant's cautioned statement (exhibit P4), he argued that the statement was unlawfully

procured as it was recorded in contravention of section 57 (2) (e) of the CPA and also was not read before the assessors. It was nonetheless used in convicting the 1st appellant.

He also challenged the time of recording the cautioned statement (exhibit P4), which was not reflected in the recorded statement. Both these two points were later accepted as not controverted after Ms. Changale's reply submissions and revisit of the record of appeal.

Submitting on the 3rd ground, which is the 1st ground in the additional grounds that the 1st appellant was convicted based on the 2nd appellant's cautioned statement (exhibit P4) recorded in contravention of section 50 (1) (a) of the CPA, Mr. Mutalemwa pointed out that at page 197 of the record of appeal it is shown that, the 2nd appellant stated to have been arrested at 4:00 hours. In contrast, on page 240 of the record of appeal the cautioned statement is indicated to have been recorded from 16:40 hours to 18:50 hours. In the absence of who and when the 2nd appellant was arrested, the certainty that it was recorded in compliance with section 50 (1) (a) of the CPA is unlikely. Similarly, he submitted that there was also no evidence that extension of time under

section 169 (3) of CPA nor was on the exclusion of time, was sought and granted.

Mr. Mutalemwa concluding his submission, implored us to find the prosecution case not proved beyond all reasonable and therefore pleaded that the conviction against the 1st appellant be quashed, sentence set aside and he be released from prison.

Taking up from Mr. Mutalemwa, Mr. Nasimire, on his 1st ground challenging reliance on the identification parade to convict the 2nd appellant, outrightly argued that the evidence had no evidential value. Although PW2, on page 134, identified the 2nd appellant as fat and wore black trousers, she did not give those descriptions to anyone or PW3 who conducted the identification parade. Cementing his argument, he cited the case of **Muhidini Mohamed Lila @ Emolo and 3 Others v. R,** Criminal Appeal No. 443 of 2015 (unreported).

He also argued that section 60 (1) of the CPA had not been complied with since the proper person to conduct the identification parade was PW4-D/Sgt Obeid and not PW3-ASP Nelson Sumari. Probed by the Court on the effect of the identification parade once the suspect is

known to the witness before, Mr. Nasimire responded that such evidence becomes of no evidential value.

On the 2nd ground, Mr. Nasimire submitted that in the absence of independent corroborative evidence, the 2nd appellant's conviction is unsupported. Attacking this part of the evidence, he contended that the cautioned statement was recorded contrary to section 51 (1) (b) of the CPA and without extension of time being sought and granted. Moreover, PW1 did not see the 2nd appellant at the scene whereas PW2 alleged seeing and identifying him, but the light's intensity was not given. Since it was at night, the conditions were unfavourable and thus unsafe to rely on the evidence, which was not watertight.

Disapproving the identification parade and the cautioned statement evidence, Mr. Nasimire reiterated that the statement was recorded out of time and could not corroborate the identification parade, which was also of no evidential value. As such, there was no independent evidence to warrant the 2nd appellant's conviction. Adding to the submission, he urged the Court to expunge exhibit P4 from the record. After that, there

would thus be no remaining evidence to implicate the 2nd respondent, stressed Mr. Nasimire.

For his 3rd ground on the 2nd appellant's visual identification, Mr. Nasimire associated himself with Mr. Mutalemwa's submission. Asked by the Court what was his position on retrial in case the need arise. Mr. Nasimire was disfavourable to the idea or suggestion, pointing out that it would be the third retrial, which to the appellants', would be akin to persecution rather than prosecution. Discouraging the move, he stated that the retrial would be an abuse of the court process.

Closing his submission, he prayed for the Court to find the appeal meritorious and consequently quash the conviction, set aside the sentence and set the 2nd appellant at liberty.

Mr. Tuthuru, learned counsel, was the last to address us on the grounds of appeal raised by the 3rd appellant. He commenced his address by acknowledging Mr. Mutalemwa and Mr. Nasimire's submissions on the identification parade and associated himself with the submissions. Adding to what they had submitted, Mr. Tuthuru argued that since PW2 stated that she knew the 3rd appellant before, organizing

an identification parade was uncalled for. Fortifying his position, he cited the case of **Siasa Benard @ Kasenga v. R,** Criminal Appeal No. 22 of 2010 (unreported), where the Court underscored that an identification parade is conducted where the suspect or person sought to be identified is not known to the witness[es]. And in this case, since PW2 knew the 3rd appellant before, there was no need for the identification parade - exhibit P2.

He equally challenged non-compliance to rule S in the PGO, on recording how the suspects were identified in the identification parade register. Supporting his proposition, he referred to the case of **Elias Mtaju Torokoko v. R,** Criminal Appeal No. 149 of 2012 (unreported) and **Muhidini Mohamed Lila @ Emolo** (supra). He thus implored us not to give weight to exhibit P2 and prayed for the same to be expunged from the record.

Besides all the above regarding the identification parade, Mr. Tuthuru also argued that PW3 organized and conducted both sets of the identification parade, while the procedure required him not to participate in the second organized parade.

On his 3rd ground regarding recording the 2nd appellant's cautioned statement, he aligned himself with Mr. Mutalemwa's submission on the point that the statement was recorded in contravention of section 50 (1) (a) of the CPA. Adding to the submission, he submitted that the provision of section 57 (4) (a) (e) of the CPA, read together with section 10 (3) (c) of the CPA, were equally not observed. Reinforcing his submission, he cited the case of **Chamuriho Kirenge @ Chamuriho Julius v. R,** Criminal Appeal No. 597 of 2017 (unreported), that the provision of section 57 (4) (a) (e) of the CPA has to be complied with cumulatively. Under the circumstances, the 2nd appellant's cautioned statement has been relied on by the Judge incorrectly, submitted the learned counsel.

On visual identification, Mr. Tuthuru, acknowledged that Mr. Mutalemwa and Mr. Nasimire's submissions had covered his client appropriately.

Responding to the general question regarding retrial, it was his submission that the option would not be in the best interest of the 3rd

appellant, who was not named anywhere and this would permit the prosecution to fill the gaps.

Like his two colleagues, he beseeched the Court to allow the appeal, quash the conviction, set aside the sentence and set free the 3rd appellant.

Ms. Changale addressed the Court on behalf of the respondent's team. She prefaced her submission by informing the Court that she supports the conviction and the sentence metted hence contested the appeal lodged. As for the rest of the reply submission, she divided hers into three categories: (i) visual identification, (ii) 2nd appellant's cautioned statement and (iii) the identification parade.

Starting with visual identification, Ms. Changale argued that the visual identification was adequately made and was watertight. Supporting her assertion, she referred us to pages 126-127 of the record of appeal where PW1 testified that she identified the 1st appellant, whom she knew before, as a footballer using light from a wick lamp. In addition, the room they were in was simply 5 x 5 in width and length. And that this account was bolstered by PW2 testimony on pages 132-133

of the record that she identified the 1st appellant, with whom they attended the same school, as a football player and was at some point a motorcycle rider for their cousin brother, who had a motorcycle business commonly known as "bodaboda." Besides, the distance between them also allowed her to identify the 1st appellant thoroughly. Giving weight to her submission, the learned State Attorney cited to us the famous case of **Waziri Amani v. R** [1980] T. L. R 250, in which the Court set out guidelines for the watertight visual identification, namely:- (i) light used in the identification process, (ii) if the person was known before, (iii) time taken under observation of the person being identified, (iv) distance between the identifier and the identified, (v) size of the room or area and (vi) naming or mentioning of the suspect at the earliest available opportunity.

The learned State Attorney, asserted that PW1 named the 1st appellant to the Police and could not do so to one Joseph Mathayo or neighbours who were the first to assemble at the scene because she did not want to destroy the evidence. More to the above, the learned State Attorney submitted that PW1, also on page 133 of the record of appeal,

stated to have identified two suspects by names and faces, namely Ndaro, the 1st appellant and Chengenge. The other two, as indicated on page 128 of the record of appeal, were identified by faces only. According to the learned State Attorney, there was no need in calling Joseph Mathayo as a witness, as he knew nothing.

As for the 3rd appellant, Ms. Changale was resolute that he had been appropriately identified, first from PW2's description on page 128 of the record and second, the 2nd appellant's cautioned statement implicated him and corroborated by visual identification made during the identification parade.

Touching on the cautioned statement, she refuted the contention that exhibit P4 was recorded out of time, which was in contravention of section 50 (1) (a) of the CPA and not in compliance with section 57 (4) (a) (e) of the CPA and was not read in the presence of the assessors. She submitted that the 2nd appellant was arrested on 8th January, 2013 and taken to Mugango Police Station, arriving at 15:00 hours and the statement recorded from 16:40 hours up to 18:50 hours. There was certification by the 2nd appellant, who appended his right thump print as

his signature. Mr. Mutalemwa conceded to this submission in his rejoinder.

The 3rd ground on the identification parade and register exhibit P2, according to the learned State Attorney, rule N was complied with as the requirement is the number of participants should be eight or more for two suspects and in the parade conducted, there were twelve (12) people. Responding to the challenge that there was no explanation on how the suspects were identified, she referred the Court to page 235 of the record of appeal, in which it was indicated that PW2 identified the 2nd and 3rd appellants.

On compliance with section 60 (1) of the CPA, she argued that there was compliance. According to her, an investigator and investigating officer were the same and PW3 on page 139 stated that being an investigating officer was the proper one to conduct an identification parade.

Probed by the Court on the need for the identification parade, while PW2 admitted knowing the suspects prior to the incident, she, without mincing words, admitted the exercise was redundant and that

such evidence was of no evidential value. She was ready and conceded for the evidence on the identification parade, which resulted in the identification of the 2nd and 3rd appellants to be discounted.

On the retrial issue, the learned State Attorney contested the claim that the prosecution would use the opportunity to fill gaps since there were none. Based on her submission on visual identification and 2nd appellant's cautioned statement, she invited the Court to dismiss the appeal for lacking merit and uphold the High Court conviction and sentence.

Briefly rejoining, Mr. Mutalemwa insisted that the credence and reliability of PW1 and PW2 were questionable for failing to name the 1st appellant at the earliest opportunity. The earliest opportunity in the circumstances of the present case presented itself as shown on page 128, when one Joseph Mathayo and neighbours responded and went to the scene of the crime. He went on to submit that whereas PW2 mentioned the other suspects, PW1 said nothing. He also resisted PW2's defence of not mentioning the suspects' names because she feared destroying evidence.

Mr. Nasimire had no rejoinder to make. On his part Mr. Tuthuru, picked on the arrest of the 3rd appellant, arguing that PW4, who was referred to as the arresting officer, was not, as on page 154, he stated to have found he had already been arrested. Because the police who arrested him has not been called as a witness, it is not known who arrested both the 2nd and 3rd appellants and when. Adding to the submission, he referred to the 2nd appellant's defence on page 197 of the record of appeal on account of when he was arrested, the evidence which was never challenged. He thus urged the Court to conclude that the 2nd appellant's cautioned statement was recorded out of time.

We thank the counsel for the parties' industrious input in arguing this appeal. We shall thoroughly consider their rival submissions in light of the record of appeal, list of authorities and grounds raised. As the first appellate court, this appeal is a form of re-hearing and in essence we are called upon to re-evaluate and re-analyze the entire evidence and come up with our conclusion. Therefore, in taking up our obligation, we shall re-evaluate and re-assess the evidence to satisfy ourselves one way or the other. See, **Okeno v. R** (1972) E. A. 34, **Martha Michael Wejja v.**

The Attorney General & 3 Others [1982], **Alex Kapinga and 3 Others v. R,** Criminal Appeal No. 252 of 2005, **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd**, Civil Appeal No. 15 of 2016 and **Registered Trustees of the Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016 (all unreported).

Delving into determining the appeal before us, we have opted to group our examination into three areas: oral evidence on visual identification, identification parade and the 3rd appellant's cautioned statement, which were the basis of grounding the appellants' conviction.

Visual identification has been covered thoroughly and widely in our jurisdiction. Such evidence is considered to be of the weakest kind and most unreliable. Therefore, as a settled principle, courts can only act upon it after eliminating all possibilities of mistaken identity and satisfying itself that the evidence is absolutely watertight. Admittedly the case of **Waziri Amani** (supra) has been a point of reference in visual identification cases and from which, as rightly relied on by Ms. Changale, the following guiding features were illustrated, namely: (i) time under

which the witness had the suspect under observation, (ii) the distance between the witness and the suspect, (iii) source of light and its intensity particularly at night, (iv) did the witness knew the suspect before?, (v) was there any obstruction which could have hindered the witness from clearly identifying the suspect, (vi) any reason to remember the suspect.

See also, **Raymond Francis v. R** [1994] T. L. R. 100, **Omari Iddi Mbezi & 3 Others v. R**, Criminal Appeal No. 227 of 2009, **John Balagomwa Hakizimana Zebedayo & Deo Mhidini v. R**, Criminal Appeal No. 56 of 2013 (both unreported)

Other cases that followed enhanced the list. For example, in **Marwa Wangiti Mwita & Another v. R** [2002] T. L. R. 39, the Court expounded on the subject when it held:-

> *"**The ability of a witness to name a suspect at the earliest opportunity is an 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".*
> [Emphasis added]

See also, **Jaribu Abdallah v. R** [2003] T. L. R. 271, **Issa Mgara @ Shuka v. R,** Criminal Appeal No. 35 of 2005, **Deo Amos v. R,** Criminal Appeal No. 286 of 2007, **Omari Iddi Mbezi & 3 Others v. R,** Criminal Appeal No. 227 of 2009 (all unreported).

In **Anael Sambo v. R,** Criminal Appeal No. 274 of 2007 (unreported), the Court had, in augmenting the principle in visual identification, held thus:

> *"That the fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident, say by his distinctive clothing, height, voice..."*

From the scanned evidence on record and banking on the illustration from the above referred cases, there is no dispute that the trial court based its conviction mainly on the visual identification made by PW1 and PW2. Whereas the prosecution strongly contends that the visual identification made by these two star witnesses was watertight, the appellants, through the advocates, think the contrary.

It is undisputed that the incident occurred at night and the identification was based on a wick lamp placed on the cupboard in the room and a lantern lamp in the living room. Although both PW1 and PW2, who were in two separate rooms, alleged to have well identified the appellants, we are not convinced. We shall demonstrate and give reasons for our observation. *First and foremost*, both PW1 and PW2 acknowledged that they heard a bang on the door. PW1 heard it once, while PW2 heard it twice. However, neither PW1 nor PW2 or even the record expressed how they reacted to the bang, whether frightened, terrified, shocked, or scared. Although there is no standard way of responding to the attack or invasion, in most cases, there is a period under which those invaded find themselves in shock, fear and terror. Considering that the initial reaction hugely affects the witness's ability to correctly identify the suspects, particularly under stressful situations in which we believe the two witnesses were, we shall thus assess their evidence cautiously. In the case of **Wamalwa & Another v. R** (1999) 2 E. A. 358, faced with almost the same challenge giving a warning, the Court held that:

> *"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of the offence fleetingly and* ***under stressful circumstances.***" [Emphasis added]

Evaluating the evidence on the record wholly, we earnestly believe that the two witnesses must have been shocked, stressed and traumatic when the door went ajar after a bang. It must have taken them a few minutes to adjust and face the situation in their separate room. While we agree the commission of the offence might have taken a while, there is still no clear evidence that the two witnesses went beyond that state of shock, stress, or traumatic condition. Unlike in **Hassan Juma Kanenyera & Others v. R**, [1992] T. L. R 100, where the Court accepted visual identification made under traumatic situation by stating thus:

> *"However, horrifying a situation is, there is a watershed mark and if that is reached, then a victim overcomes his or her fear and measures up to the occasion. We believe PW4, after such languish sojourn with her persecutors, she surpassed fear and as she said "despite the*

torture I remained alert in mind and observed the bandits closely".

We did not get that feel or their reaction as neither PW1 nor PW2 had revealed their state after the bang and storming into the room of two (2) suspects as per PW1 and four (4) as per PW2. Although both witnesses claimed they had ample time to correctly identify the suspects, especially the 1st appellant and Chegenge Nyakubondya, as the incident took about thirty (30) minutes, we are still hesitant to accept their visual identification evidence wholly.

Comparing the situation in **Hassan Juma Kanenyera** (supra) and that in the present appeal, we find no persuasive evidence on how PW1 and PW2 perfectly identified the suspects. Even though the former conditions were stressful, in analyzing PW4's evidence, the trial court and later the appellate court considered several factors, according to PW4's account. For example, apart from the fact that the 1st appellant was their watchman a few months before the incident, the bandits killed PW4's husband on the unfortunate night while PW4 was watching. What is more, is that they raped her. These actions must have given PW4 the

courage and as the first appellate court put it, she surpassed fear and "despite the torture," she remained alert in mind and observed the bandits closely. Such compelling evidence is missing from PW1 and PW2's accounts. In the absence of evidence that they went past the horrifying or stressful condition and became solid and able to identify the suspects, we find the visual identification evidence inadequate.

Secondly, the record is silent on the intensity of light or lights used to identify the suspects. With the wick or lantern lamp, the light can be enough to do other things but not enough to securely identify a suspect, particularly under horror, fear, and panic, which we presume the two witnesses were in. More so, the record is silent if there was light in PW2's room and/or if the suspects had any lighting, which might have added to the wick and lantern lamp lights' intensity, allegedly permitting PW1 and PW2 to identify the suspects correctly. Going by the record, the only lights depended on were the wick and lantern lamps placed in two separate rooms. Under the circumstances, it was essential to explain the intensity of light from each lamp relied on. Failure to provide that

evidence leaves the source light used to identify the 1st appellant uncertain. This is because the illuminating lamp lights vary in intensity.

In the case of **Hamisi Hussein & 2 Others v. R,** Criminal Appeal No. 86 of 2009 (unreported), underscoring the significance of elaborating on the source and intensity of light even when the suspect is allegedly recognized, the Court had this to say:

> "*We wish to stress that even in recognition cases, when such evidence may be more reliable than the identification of a stranger,* ***clear evidence on the sources of light and its intensity is of paramount importance.*** *This is because, as occasionally held, even when the witness purports to recognize someone he knows, as was the case here, mistakes in recognizing close relatives and friends are often made.*" [Emphasis mine]

In our view, despite knowing the suspects prior to the incident, the source and intensity of light relied on in identification is insufficient to pass the identification made by PW1 and PW2 as irrefutably.

Thirdly, despite both PW1 and PW2 knowing the 1st appellant and Chegenge Nyakubondya before the incident, nevertheless, as cautioned in the **Anael Sambo** (supra), a witness knowing the suspect before that date of the incident is not enough and warned that such evidence should be taken with caution. In the present appeal, PW1 and PW2 listed a number of things, such as the 1st appellant's attire, that he was a footballer nicknamed "Ronaldo", they both went to the same school with him and the 1st appellant was at some point a "bodaboda" rider employed by Makanya Masonyi who happened to be their cousin brother. Yet, we find that it did not suffice to conclude that there was unmistaken identification. In addition, we have consistently taken the view that familiarity is, by no means, a guarantee that there could be no chances of mistaken identification. This is more so even in identification by recognition, as it does not necessarily eliminate the chances of mistaken identity. See, **Maselo Mwita @ Masele** and **Another v. R,** Criminal Appeal No. 63 of 2005 and **Shamir John v. R,** Criminal Appeal No. 166 of 2004 (both unreported).

Fourthly, the trial Judge considered the two witnesses credible and relied on their evidence. We are aware that the credibility of a witness is the trial court monopoly, as stated in **Goodluck Kyando v. R** [2006] T. L. R. 367, we stated:-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are goof and cogent reasons not believing a witness."*

Having brought to the fore the principle in the above referred cases, as alluded earlier in this judgment, we firmly feel PW1 and PW2's evidence would have gained more credence had they named those they identified, particularly the 1st appellant, at the earliest opportunity, something they did not. From their account they said they raised the alarm after the incident and neighbours responded. PW1, on page 128 of the record of appeal, mentioned one Joseph Mathayo, while PW2, on page 133, named Joseph Mathayo, Makonyi Masonye, and Kilemba Marubira as individuals who came to their aid. Neither PW1 nor PW2 mentioned the suspects' names to the neighbours or the three (3) individuals. Insisting on the importance of early naming of the suspects,

the Court, in the case of **Marwa Wangiti Mwita & Another** (supra) upheld the position that the earlier the suspects' names are mentioned, the more reliability and assurance are established. Failure to name the suspects to Joseph Mathayo, Makonyi Masonye, and Kilemba Marubira had caused us discomfort. It raised suspicion if PW1 and PW2 identified the 1st appellant, who they claim to have known before and correctly identified him at the scene.

Furthermore, PW2's response during cross-examination by Mr. Phillipo, then counsel for the 1st appellant, was that she did not disclose the names for fear that they might be related to the 1st appellant. Assuming that was the reason, which we sadly do not buy, we still have been asking ourselves what about Makonyi Masonye and Kilemba Marubira, who are cousin brothers to PW1 and PW2, were they also being suspected or not trusted? Moreover, none of them had given a reason for failing to mention the identified suspects' names to these two cousin brothers. This was irrespective of the fact that Kilembe Marubiri, besides going after the suspects and being able to retrieve the head severed from the deceased, was also present during the autopsy

procedure at Musoma Hospital mortuary. To us, this did not add up and we are confident no well-judged person in their right mind would take PW2's explanation as it is as credible.

Fifthly, we are aware of the fact that, that two or more people who witnessed an event, may not later tell it exactly the same way. This can on the one hand be considered as contradiction or inconsistence and on the other as evidence that the witness did not rehearse the story. See **Yusuph Sayi & 2 Others v. R,** Criminal Appeal No. 589 of 2014 (unreported).

However, in the present appeal we find PW1 and PW2 accounts variations have blemished and raised doubts about the truthfulness of their evidence. PW1 in her account never indicated the presence of PW2 in the room when the 1st appellant and Chegenge Nyakubondya were hacking their mother to death. We think this was significant to be mentioned if, indeed, PW2 was present in the room when the 1st appellant and Chengene Nyakubondya were accomplishing their evil mission.

Furthermore, presumably they were in the same room, these two witnesses had a different account of what the 1st appellant held. PW1 on page 127 stated that the 1st appellant assaulted her deceased mother using a "panga" and stick "mambo." PW2, on pages 132-133 of the record of appeal, stated that the 1st appellant used "panga" and a long knife drawn from his waist and slaughtered their mother in the neck. Also, neither PW1 nor PW2 stated when PW2 was released from the wall bondage. Was it when the 1st appellant asked to be supplied with a bag, or was it right after the killing had been accomplished?

Lastly, whereas PW1 mentioned the presence of Joseph Mathayo and other neighbours only, PW2 at page 133 of the record of appeal besides Joseph Mathayo, she also named Makanya Masonye and Kilemba Marubira as present at the scene after the alarm was raised. We think the pointed out inconsistencies are significant and goes to the root of the case.

From the above re-evaluation of evidence, we find the visual identification of the 1st appellant purported to have been made by PW1 and PW2 and relied on by the trial Judge to ground conviction was not

watertight to pass the visual identification test under unfavourable conditions. As a result of our reservations, we resolve them in favour of the 1st appellant. Consequently, the conviction against him is quashed, a sentence set aside.

Our next point of consideration is on identification parade evidence which should not detain us. Aside from the learned State Attorney's concession that the identification parade becomes superfluous once the suspects are known to the witness, this Court, in several of its decisions, had deliberated on the issue that the identification parade is, in principle, conducted where a suspect is not known to the witness and not otherwise. This is because if the suspect is known to the witnesses, the chances are likely they would pick that person. See: **Hassan Juma Kanenyera** and **Siasa Bernard** (supra).

And even when an identification parade had to be conducted, the identifying witness must describe the suspect before the exercise is carried out. Short of that, the process becomes of no value and in contravention of rule L of the PGO, which states:

"(L) *The persons selected for the parade must not be known to the complainant or the identifying witnesses as identification would then have little value".*

This position has been echoed in various Court decisions such as **Mohamed bin Allui v. R** (1942) 19 E.A.C.A 72, **Francis Majaliwa Deus & Others v. R,** Criminal Appeal No. 139 of 2005, **Ahmad Hassan Marwa v. R**, Criminal Appeal No. 264 of 2005, **Athumani Buji v. R,** Criminal Appeal No. 118 of 2008, **Emmillian Aidan Fungo @ Alex & Another v. R**, Criminal Appeal No. 278 and **Fiano Alphonce Masalu @ Singu v. R,** Criminal Appeal No. 366 of 2018 (all unreported), in which the Court stressed on a prior description by the witness. In **Muhidin Mohamed Lila @ Emolo** (supra), the Court underlined the significance of the suspect's description before the identification parade. The Court held that:

"*that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of 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".

That was unfortunately not the case in the present appeal. PW2, on page 132 of the record of appeal, she described the 2nd and 3rd appellants seemingly by their looks, attire and business undertakings. Conversely, the record is silent as to whom those descriptions were given, as neither PW3 nor PW4 indicated to have been given the description or that they described the suspects for ease of comparison with the outcome of the parade conducted. Failure to observe that basic principle regarding identification parade rendered the exercise futile. No wonder the learned State Attorney conceded to the omission without wasting Court's precious time. The identification parade evidence is of no value and the identification parade register admitted in evidence as exhibit P2 is thus disregarded.

The last component in our determination is the cautioned statement of the 2nd appellant, which implicated the 1st and 3rd appellants. This aspect should also not detain us long. It was the

prosecution case through PW4 on page 151 of the record of appeal that the 2nd and 3rd appellants were arrested on 8th January, 2013, but his evidence does not disclose who exactly arrested them. If indeed, PW4 was the one who arrested the 2nd and 3rd appellants he would have forthrightly, said so. Instead, what we gathered from the record in our firm view does not resonate with his participation in arresting the 2nd and 3rd appellants. At this point we find it appropriate to let his evidence speak for itself as revealed at page 151 of the record of appeal:-

> *"...On 8th of January, 2013 in the morning, I received information that Abeid Kazimili and Musiba Malegeri appear to be around in Mugango.* ***We had to go to Mugango. I met with OCS Cpl. Wilson. We formed a team of two so that we arrest the accused persons. I was also at Mugango. The two accused were arrested and referred to police station at about 15.00hrs****....I handed the two accused persons to a lock up. It was about 15:30 hours."*

From the excerpt there is no indication that PW4 took part in the arrest of the 2nd and 3rd appellants as the Learned State Attorney was trying to convince us. The narration by PW4 suggests that the 2nd and 3rd

appellants were arrested by someone else, even though that arresting officer was not disclosed or summoned to come and testify at the trial. In addition, even how he came by the 2nd appellant is not demonstrated clearly. This becomes more complicated and problematic as even PW6-E. 938 Sgt. Peter on page 171 of the record of appeal, did not disclose who arrested the 2nd and 3rd appellants to enhance PW4's assertion that he was on the team which effected the arrest of the 2nd and 3rd appellants. PW6, in his evidence simply stated that on 8th January, 2013 while at the Musoma Police Station at about 16:40 hours he was assigned to record the 2nd appellant's cautioned statement.

Given that, there is no precision as to when the 2nd appellant was arrested and by who, the only version we are left with is that of the 2nd appellant that he was arrested early hours of the morning at 4:00 hours. With that piece of evidence, it becomes difficult for us to resolve without a flicker of doubt that the 2nd appellant's cautioned statement was not recorded within four (4) period prescribed under section 50 (1) (a) of the CPA. The evidence of PW4 leaves more questions than answers considering, he was testifying in this case for the 3rd time. In the case of

Emmanuel Malabya v. R, Criminal Appeal No. 212 of 2004, in which the Court referred to the case of **Salim Petro Ngalawa v. R,** Criminal Appeal No. 85 of 2005 (both unreported), the Court stated that:-

> *"...Then there is the issue of the cautioned statement of the appellant, exhibit P4. Was it recorded within the provided statutory time? The appellant was arrested on 26 February, 2000 at 13: 00 hours, and the statement was recorded on 28th February, 2000, that is after more than twelve hours and that contravened section 50 of the Criminal Procedure Act, Cap. 20 R. E. 2002, which prescribes the basic period available for interviewing a person who is in the custody of the police. The cautioned statement was inadmissible as the Court stated in* ***Janta Joseph & 3 Others v. R,*** *Criminal Appeal No. 95 of 2005 (unreported) wherein the Court acquitted the appellants. We followed that case in this case in this sessions in* ***Tumaini Mollel @ John Walker and Another v. R,*** *Criminal Appeal No. 40 of 1994 (unreported)."*

Against that background, we find the cautioned statement of the 2nd appellant which was recorded after four (4) hours after the 2nd

appellant had been placed under police custody illegally and unlawfully procured. Since it has no evidential value could thus not ground the appellants' convictions. We thus expunge it from the record. After expunging exhibit P4 there is no any other credible evidence sufficient to uphold the 2nd and 3rd appellants' conviction.

Coming to the issue of whether ordering a retrial is the right approach. Considering our above analysis and re-evaluation of evidence we shall take up this in passing.

The three defence counsel discouraged the idea. It was their argument that it will be providing the prosecution with an opportunity to fill the gaps in their case. On the contrary, Ms. Changale vigorously discounted the assertion.

Admittedly, retrial is not a new phenomenon in our jurisdiction. Courts have been ordering retrial where it finds the proceedings have been blemished with irregularities but had it not been for that, the available evidence would have secured conviction. This case is a good example where the Court twice ordered retrial, after considering the irregularities involved. In Civil Appeal No. 358 of 2015, the irregularities

noted were: (i) inadequate summing up to the assessors, (ii) no indication that witnesses took oath and (iii) trial within trial was not properly conducted. And in Civil Appeal No. 547 of 2019 the issue was failure to direct the assessors on the vital points of law. This time around we find ordering retrial is not the best option. This is because retrial is meant, for correcting the omissions caused or experienced during trial and not otherwise. Therefore, if there is a possibility that the intended retrial will permit the prosecution to perfect its flawed case, the court has in most cases refrained from doing that. The rationale behind is if the availed opportunity will allow the prosecution to reorganize its case and filing the gaps then there is a possibility or likelihood of causing injustice to the accused person and that is not what courts who are temple of justice are for. Guided by the decision in **Fatehali Manji v. R** [1996] E.A. 341, the decision of our predecessor the East African Court of Appeal, who provided the following guidance:

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the*

gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessary follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require".

See also: **Selina Yambi & Others v. R,** Criminal Appeal No. 94 of 2013, **George Claud Kasanda v. R,** Criminal Appeal No. 376 of 2017, **Omary Salum @ Mjusi v. R,** Criminal Appeal No. 125 of 2020 (all unreported).

We certainly associate ourselves with the defence counsel's position that retrial should not be the proper way forward. Considering the visual identification evidence offered by PW1 and PW2, the identification parade, which we have declared redundant and the 2nd appellant's cautioned statement implicating all the appellants, unlawfully obtained after the failure to bring the arresting officer, relied on in grounding the conviction lacking. Under the circumstances, ordering a

retrial would pave the way for the prosecution to straighten up its already fragmented case.

For the reasons stated above, we allow the appeal, quash the convictions and set aside the sentences imposed on the appellants. In the event, we order an immediate release of the appellants from prison unless otherwise lawfully held. It is so ordered.

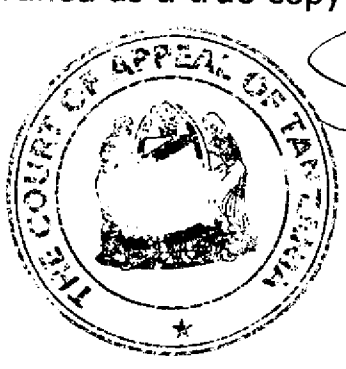
DATED at **DAR ES SALAAM** this 17th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of October, 2023 in the presence of 1st, 2nd and 3rd Appellants in person and Ms. Mwanahawa Changale, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL