IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 306 OF 2020

MWITA CORNEL PHILIMON @ GAUCHO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Musoma District Registry at Tarime)

(Kisanya J.)

dated the 3rd day of July, 2020

in

Criminal Sessions Case No. 64 of 2019

.....

JUDGMENT OF THE COURT

1st & 10th November, 2023

GALEBA, J.A.:

In Criminal Sessions Case No. 64 of 2019, the appellant, Mwita Cornel Philimon @ Gaucho, was arraigned before the High Court of Tanzania, sitting at Tarime (the trial court), to answer a charge of murder, contrary to sections 196 and 197 of the Penal Code. He was charged for having killed Rhobi Mwita Mang'enyi (Rhobi Mwita) and Bracia Mahende (Bracia Mahende) (both to be referred to as the

deceased persons). The deceased persons were residents of Kemange Village within Tarime District in Mara Region. Upon the appellant's trial, he was found guilty on both counts and was convicted accordingly. Subsequent to his conviction, the appellant was sentenced to death under sections 197 of the Penal Code and 322 (2) of the Criminal Procedure Act, [Cap 20 R.E. 2022] (the CPA). His conviction and sentence aggrieved him, and hence this appeal.

The brief facts of the case before the trial court were that, around 20:30 hours in the evening of 10th February, 2019, the compound of Mang'enyi Ngosira, Bracia Mahende's father at Kemange Village in Tarime District, was invaded by four bandits. The compound was surrounded by five houses, which were joined by a surrounding fence, with one gateway leading to the outside. Two of the houses were a kitchen and another was for Nyanchama Mang'enyi Ngosira (PW3). As the gateway was closed at the time of the invasion, two of the thugs entered the compound by jumping over the fence, while the other two smashed timber in the kitchen's window and through it, they entered into the compound. Two of the aggressors armed with a matchet, a sword and an iron bar, entered in the house of PW3 and

launched brutal simultaneous attacks on Rhobi Mwita and Bracia Mahende. The other pair remained outside fighting Charles Wambura (PW2), the husband of Rhobi Mwita. After the deadly violence on the deceased persons, the four invaders, quickly withdrew and disappeared from the scene of crime. Following the ruthless assault on Rhobi Mwita and Bracia Mahende, the duo, were found dead in PW3's house, immediately after the departure of the aggressors. According to undisputed evidence, whereas Bracia Mahende was hit and pierced with a sharp metal in her left ear, penetrating five inches deep in the head, Rhobi Mwita died of haemorrhage, secondary to severely cut wounds on her posterior parts of the neck, and the left shoulder.

According to the prosecution, the thugs who entered in PW3's house and murdered the deceased persons, were the appellant and Tanu Chacha, the former husband of Bracia Mahende. As Tanu Chacha was not arrested, the charge was instituted against only the appellant. In this appeal, although the appellant defended himself particularly by raising the defence of *alibi,* he was all the same, convicted and was sentenced as indicated above.

To challenge the decision of the trial court, initially the appellant lodged a memorandum of appeal on 29th September, 2020, containing 8 grounds of appeal. Later, on 9th January, 2023, he lodged a supplementary memorandum of appeal containing three more grounds of appeal, making a total of 11 grounds. However, when the matter was called on for hearing on 1st November, 2023, Mr. Leonard Elias Magwayega, learned advocate, who was assisted by Mr. Paul Kipeja also learned advocate, abandoned three of the initial grounds of appeal, such that the appeal remained predicated on the following 8 grounds of appeal; **one,** that, the appellant was convicted in the absence of any credible evidence to prove that he murdered the deceased persons; **two,** that, the appellant was entitled to benefit from the inconsistencies in the statements of PW1, PW2 and PW3 that were made before the police; **three,** that, the appellant was convicted on the evidence of visual identification without the prosecution proving all essential elements of such evidence; **four,** that, the prosecution did not disprove the appellant's defence of *alibi*; **five,** that, the prosecution did not prove the case beyond reasonable doubt; **six,** that, the evidence of PW1 and PW3 in court, was different from their statements which were read out during

committal proceedings; **seven,** that, the trial court convicted the appellant by relying on contradictory evidence of visual identification of PW1, PW2, and PW3 and **eight,** that, the appellant was subjected to an unfair trial by not being informed of his right as provided for under section 291 (3) of the CPA.

In this appeal, the respondent Republic had the services of Mr. Abel Mwandalama, learned Principal State Attorney, Ms. Monica Hokororo, learned Senior State Attorney, Ms. Janeth Kisibo and Mr. Yese Krita Temba, both learned State Attorneys. In arguing the appeal, Mr. Magwayega grouped the grounds of appeal in three clusters. He argued grounds 1, 2, 3, 6 and 7 together, and grounds 4 and 8 were argued independent of each other.

In respect of grounds 1, 2, 3, 6 and 7, Mr. Magwayega beseeched us to adopt the appellant's written arguments submitted to the Court on 27th October, 2023. He also sought to elaborate a few aspects on the above grounds of appeal. He submitted that the critical point he wanted this Court to make a decision upon, is the fact that the appellant was not properly identified at the scene of crime, and

also that the evidence of PW2 which was the sole evidence upon which his conviction was based, was not watertight or reliable.

He contended that, the evidence of PW2 was shaken by the defence at pages 18, 19, 20 and 21 of the record of appeal, but the trial Judge still held the evidence of PW2 to be credible and used it to convict the appellant. He challenged the evidence of PW2 because, at the beginning, the witness testified that he was attacked by the appellant and Tanu Chacha but later on, he changed his position and testified that he did not identify the two persons who attacked him. The learned advocate argued that, at page 35 of the record of appeal, No. E. 7050 DC Mohamed (PW4) testified that PW2 could not have known the time of the invasion because he was injured. The iearned counsel's point was that, if the appellant could not even know the time of the invasion because of the injuries, then how would he be in a position to identify the appellant or any other person at the scene of crime.

As for the 4th ground of appeal, Mr. Magwayega, strongly argued that although the appellant gave a notice of *alibi* under section 194 (4) of the CPA, the prosecution failed to disprove that defence.

With respect to the 8th ground above, the learned advocate submitted that the appellant was not advised of his right to call a medical expert who prepared the reports on postmortem examination, exhibits P2 and P3, for purposes of cross examining him under section 291 (3) of the CPA. Based on the above submissions the learned advocate moved the Court to allow the appeal and set the appellant free from prison.

In reply to the above submissions, Ms. Hokororo submitted that the appellant was properly identified, and that reliance on the evidence of PW2 was lawful, because there was enough light which was bright and the witness knew the appellant well as he was a close friend of his brother-in-law, Tanu Chacha. Essentially, according to the learned Senior State Attorney, there was nothing alarming on the conviction of the appellant because his identification met all the criteria set by this Court. He added that the evidence of PW2 was sufficient to prove the case because the prosecution was not compellable to call any other witnesses. She urged us to dismiss grounds number 1, 2, 3, 6 and 7, because they have no merit.

On the issue of the *alibi*, she submitted that, the same does not arise because the appellant was proved by PW2 that he was at the scene of crime at the time he alleged to be elsewhere.

As for the complaint of non-compliance with section 291 (3) of the CPA, the learned Senior State Attorney argued that, the right provided under that provision is available to the appellant only if he, or his advocate had applied for it. Otherwise, exhibits P2 and P3 were admitted without objection, and there was no prejudice occasioned on the part of the appellant. Thus, the learned Senior State Attorney implored us to dismiss the appeal.

On our part, having carefully considered the complaints of the appellant, arguments of both counsel for and against the appeal, we think three issues arise for determination, namely; **one**, whether, PW2 was a credible witness; **two**, whether, the prosecution was duty bound to disprove the appellant's *alibi* and; **three**, whether section 291 (3) of the Criminal Procedure Act, (the CPA), was violated in relation to the appellant.

We propose to start with the first issue of whether PW2 was a credible witness, but before we do that, we wish to observe that at

the trial, the prosecution called a total of four witnesses, Joyce Paul Chacha (PW1), PW2, PW3 and PW4. The evidence of PW1 on the issue of visual identification was discarded by the trial court because, the witness failed to prove that she properly identified the appellant. The same fate befell the evidence of PW3 at the High Court because, although she was the only eye witness of the attacks on the deceased persons, being 76 years old, the witness testified that she was short sighted and failed to affirmatively state the direction she was facing at the time when the assailants were assaulting the deceased persons. PW4 was a police officer who was not at the scene of crime, so his evidence would not at all prove identification of the bandits. Having eliminated the evidence of PW1, PW3 and PW4, what remained was that of PW2, the evidence upon which the trial court based the conviction of the appellant. It is this evidence which, by and large, is challenged in grounds 1, 2, 3, 6 and 7, the subject of the present discussion.

It is also opportune at this point to highlight the major principle necessary in disposing of this appeal. It is that, where the conviction is based on the evidence of visual identification of a single witness, in

unfavourable circumstances to the human sight like night time, the law does not end with the principles in **Waziri Amani v. R** [1980] T.L.R. 250. It imposes even more stringent conditions. In **Mereji Logori v. R**, Criminal Appeal No. 273 of 2011 (unreported), this Court observed:-

> *"This Court has always insisted that great care should be taken before relying solely on identification evidence. In NELSON GEORGE @ MANDELA (supra) we said that in matters of identification, it is not enough merely to look at factors favouring accurate identification.* ***Although evidence of a single witness can sustain a conviction, the law is all the same clear, that utmost caution is needed before convicting where the evidence of identification is that of a single witness."***
>
> [Emphasis added]

See also the cases of **Ramadhani Said Omary v. R,** Criminal Appeal No. 497 of 2016 and **Masero Mwita Maseke and Another v. R,** Criminal Appeal No. 63 of 2005 (both unreported). Therefore, a lot more care is needed where, conviction is to be based on the

evidence of visual identification of a single witness, like in this case. That means factors favouring accurate identification in **Waziri Amani** (supra) and many other cases, must all be satisfied first. But in addition to that, utmost caution, care and judicial restraint must be exercised by the trial court. Although it all depends upon the circumstances of the case, we think one of the means of exercising utmost caution, is to strictly ensure that the sole witness was a credible witness, and the evidence he adduced was tested in every aspect, and the same was found to be not only credible, but also very watertight.

We must confess that, there is no one formal methodology, procedure or rules of court establishing the modality of determining the credibility of any witness and reliability of his evidence. However, assessment of the witness' demeanour is one of the techniques which the court, particularly the trial court, may employ to assess the credibility of a witness and therefore, the reliability of his evidence. As indicated above, determination of the credibility of the witness based on his demeanour, in law, is exclusively the domain of the trial court; – see **Yasin Ramadhani Chang'a v. R** [1999] T.L.R. 489. The

obvious reason for that, is because the trial magistrate or judge, is the one with the advantage of observing the appearance of the witness physically at the hearing, hence the ability to assess his credibility based on the body language and the manner the witness behaves in respect of the facts he seeks to prove.

There are however, two more common approaches that the trial court and even the appellate court may deploy in determining the reliability of the evidence. These, according to this Court's decisions in **Shabani Daud v. R**, Criminal Appeal No. 28 of 2001 and **Nyakuboga Boniface v. R**, Criminal Appeal No. 434 of 2016 (both unreported), are; **one**, to determine whether the witness was coherent, consistent and logical by evaluating his evidence and; **two**, to assess the coherence and consistence of the evidence of one witness by comparing it with the evidence of other witnesses.

Now, this not being a trial court, considering PW2's demeanour as a means of assessing his credibility is naturally impossible, so that approach, gets automatically eliminated. Likewise, we cannot also assess coherence and consistence of PW2's evidence with the evidence of other witnesses on the issue of identification, because the

evidence of PW1 and PW3 on that aspect, as indicated above, was discarded by the trial court.

By elimination therefore, that leaves us with only one tool to use in reassessing the credibility of PW2. This will be to reevaluate the evidence of PW2 and assess its coherence. This Court being the first appellate court, has mandate to do so, and it may end up with a completely different finding. In doing so, we find comfort in this Court's decisions in **Kaimu Said v. R,** Criminal Appeal No. 391 of 2019 and **Siza Patrice v. R,** Criminal Appeal No. 19 of 2010 (both unreported). This therefore, takes us to the evidence of PW2, because the appellant was convicted based on the evidence of that sole witness.

That evidence, is contained in the record of appeal from page 16 to page 23. According to PW2, at the time of the invasion, he was at home, and the following quoted parts are of particular relevance to the first issue we framed in respect of whether PW2 was a credible witness. At page 16 to 17 the witness stated:-

> *"It was around 08:28, I was searching for a football channel. I heard my daughter calling*

'Baba baba kuna watu'. So, I went outside the house. ***I met a group of people who were running after my daughter Joyce.*** *They ordered me, 'hapo hapo kaa chini'. My house had a solar llght which was lighting every place in my compound. Every house had a tube light which can light up to 5 meters to 10 meters. The tube light's capacity was 12w.* ***They produce sufficient and enough iight. 'hata sindano unaweza kuiona.' Therefore, I started to fight them. They were four.*** *Two of them overpowered me. They assaulted me on the neck, head and elbow. They used a matchet (panga). I did not identify the two people who fought me. I identified the face of the persons who entered my mother's house. These were Cornel Mwita Gaucho and Tanu Chacha Mahende."*

[Emphasis added]

A careful study of the above text from the evidence of PW2, clearly reveals three significant facts; the **first** is that, at the time the assailants were entering the compound there was very bright light, lighting the entire compound. The **second** fact, according to PW2, is that he saw all the four assailants using the same bright light when he

met them outside in the compound and; the **third** is that, before two of the four invaders were to enter his mother's house, all of them attacked him and he fought them.

In order to determine the coherence and consistence of the above evidence of PW2, we will compare it, with the evidence of the same witness at pages 21 and 22 of the record of appeal, when he was responding to questions put to him by the defence side when cross examining him. He stated:-

> *"I was able to identify Gaucho and Tanu despite being assaulted.* ***It is true, I was first assaulted before identifying Gaucho and Tanu Chacha.*** *I identified them by face...I saw them when they were leaving."*
>
> [Emphasis added]

A keen consideration of this second text from the evidence of the same witness, shows that; **one**, at the time he was fighting all the four invaders at first sight as testified earlier on, PW2 was unable to identify the appellant and Tanu Chacha, and; **two**, the witness was only able to identify them after he had been injured by the unidentified assailants. According to this evidence, it appears, PW2

identified whoever he identified, at the time that the invaders were withdrawing from the scene of crime.

The point we want to drive home is this; if at first sight PW2 saw all the four assailants, (which means including the appellant and Tanu Chacha), as they were running after her daughter and advancing towards him, in a well illuminated compound where he fought them, it is not clear, why the witness had to wait to be assaulted before he could identify the appellant and his colleague. It is key to note that, in this case, there was no evidence that any invader when entering the compound had his face covered. So, PW2 could have identified the appellant at the first sight, but there is no evidence to that effect. According to him, he identified the appellant much later, after the witness had been assaulted by the unidentified attackers. In this context, two questions, cast a strong doubt on the evidence of PW2. **First**, why is it that the witness could not identify the appellant when, along with other assailants, was running after her daughter, in the first few minutes of their arrival at the scene of crime? **Second**, why did PW2 still fail to identify the appellant at the time he met him along with other invaders and when he was fighting

them, if the appellant was a man he knew before and there was bright light? These questions cannot leave the credibility of PW2 intact, and his evidence reliable.

In this case, the evidence of PW2 in the first quotation, is incoherent and very inconsistent with his evidence in the second quotation. Thus, the evidence of PW2 as a single witness was not that watertight. It was not coherent, logical or consistent.

Thus, we agree with Mr. Magwayega that the appellant's identification by PW2 was not free from reasonable doubts to the extent we have endeavoured to discuss. The first issue therefore, is answered in the negative, namely that, PW2 was not a credible witness upon whose sole evidence a sound conviction could be found. In the circumstances, we allow the 1st, 2nd, 3rd, 6th and 7th grounds of appeal, and hold that the case was not proved against the appellant beyond reasonable doubt. As the prosecution did not prove the case against the appellant, a discussion on the second and third issues, relating to his defence of *alibi*, and a complaint of non-compliance with section 291 (3) of the CPA, would have no relevance.

For the above reasons, we allow the appeal and direct that the appellant be released from prison unless he is held there, for some other lawful cause.

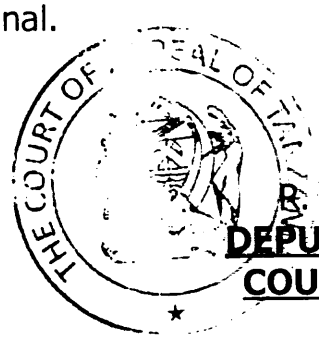
DATED at **MUSOMA** this 09th day of November, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered this 10th day of November, 2023 in the presence of the Appellant in person and Mr. Tawabu Yahya Issa, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL