IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MKUYE, J.A., MAKUNGU, J.A. And MDEMU, J.A.:)

CRIMINAL APPEAL NO. 256 OF 2021

REVELIAN CONSTANTINE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Bukoba Registry at Karagwe)

(Kairo, J.)

dated the 12th day of May, 2021

in

Criminal Sessions Case No. 55 of 2017

JUDGMENT OF THE COURT

13th & 22nd March, 2024

MDEMU, J.A.:

In the High Court of Tanzania at Bukoba, the respondent Republic charged the appellant and two others for the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap. 16 R.E 2002 (the Penal Code). According to the particulars of offence, the appellant, who was the first accused person in that criminal case, was charged jointly and together with Andrew Kawamala @ Tinkamanyile and Mugisha Sylivester, the then 2nd and 3rd accused persons respectively, to have been involved in

the murder of Dominick Gorodian. The incident is reported to have occurred in the night of 7th October, 2015 at Kagutu Village in Karagwe District. However, Andrew Kawamala died while in prison, thus his case abated in terms of section 284A of the Criminal Procedure Act, Cap. 20 (the CPA). The trial therefore proceeded in respect of the appellant and the then 3rd accused person after having pleaded not guilty to the charge of murder.

The prosecution case involving Rosemary Dominick, Jasinta Jessy and Nurdin Sadik Tunutu, PW1, PW2 and PW3 respectively, is to the effect that the deceased was assaulted and ultimately succumbed his death at his residence. In that material night PW1, the deceased, Jusinta (the housemaid) and Mutalemwa (the houseboy), while at home asleep, bandits who gained access through breaking the door using a big stone commonly referred to as "fatuma", invaded them. In that fracas, the assailants demanded money from the deceased while assaulting him using a panga. In the course, the deceased then directed PW1 to give some money to the said bandits, instructions which she duly obeyed. On that account, PW1 thus gave them TZS 900,000.00. It is alleged that, the bandits covered PW1's face with a piece of cloth and commanded her to lie down while having her back facing upward.

It is alleged further that, PW1 identified the appellant and the then 3rd accused person using solar lights illuminating from three bulbs fixed in the residential house. According to the record of appeal, PW1 was able to make that identification while peeping through a hole which was in the piece of cloth used to cover her. It was alleged further that, the appellant was recognized by PW1 as a village mate. PW2 who was also at the crime scene, using that same solar energy light, identified three people, the appellant inclusive, holding an iron bar, a panga and an axe. The invaders then, according to PW2, hacked the deceased using a panga. Both PW1 and PW2 alleged that, the incident took almost 4 hours, that is, from 0200 hours to 0400 hours.

The incident was thereafter reported to the police station which in essence led to the arrest of the appellant. Later, on 3rd December, 2015, PW3 conducted identification parade in which PW1 identified the then 3rd accused person among those invaded their residence in that material night. As said, though denied, the High Court convicted the appellant for the murder of Dominick Gorodian and sentenced him to suffer death through hanging. On the other hand, the then 3rd accused person (2nd accused person in the judgement) was acquitted. This was on 12th May, 2021.

Aggrieved, the appellant has preferred this appeal which is grounded on seven (7) grounds of grievance, namely: -

1. *That, the trial Judge erred in law and fact to convict the appellant without evaluating the evidence of prosecution witnesses which led to the arrest, arraignment, conviction and sentencing the appellant.*
2. *That, the trial Judge erred in law and fact to convict the appellant basing on visual identification as the evidence of PW1 Rosemary Dominick was not sufficient and cogent to warrant a conviction against the appellant.*
3. *That, the evidence of PW1 involved inconsistencies and contradictions which sufficiently rendered that evidence unreliable and completely worthless which goes to the root of the case and cannot be cured.*
4. *That, the appellant was wrongly convicted in the absence of corroboration evidence as the only evidence which the trial Judge based to convict the appellant was the evidence of Rosemary Dominick PW1 which was not straight enough to implicate the appellant to be the one who murdered Dominick S/o Gorodian.*
5. *That, the trial Judge misdirected herself for failure to note that, PW1 was not a credible witness and her evidence was tainted with discrepancies regarding the amount of money she stated to have given. The said*

discrepancies shake the identification of the appellant as well the root of the case.

6. *That, the weapons which the prosecution side mentioned in the trial to have been used in the offence were not tendered in Court as exhibit. The investigator and the village leader were not called and did not appear in Court for cross – examination also the exhibits tendered in Court did not link the appellant in murdering the deceased.*

7. *That, the trial Judge incurably and grossly erred in matter of law and fact for failure to evaluate and consider the defence of appellant whereas the evidence adduced by prosecution side failed to prove their case beyond reasonable doubt against the appellant.*

At the hearing of the appeal, in appearance was Mr. Ibrahim Mswadick learned counsel representing the appellant whereas Ms. Edina J. Makala, Mr. Erick Mabagala and Ms. Matilda Assey, all learned State Attorneys teamed up to represent the respondent Republic.

Arguing all grounds of appeal as one, Mr. Mswadick submitted that, the conviction of the appellant is based on the evidence of visual identification offered by PW1. He cited to us the case of **Waziri Aman v. Republic** [1980] T.L.R. 250 emphasizing that, for evidence of visual

identification to ground conviction, that evidence must be watertight and all possibilities towards mistaken identity have to be eliminated. He also stressed that, all criteria stated in **Waziri Aman v. Republic** (supra) such as description of identification aiders and the culprit; duration and distance the witness was during observation have to be considered. Having reminded us such principles, he submitted that, there is no specific duration which PW1 stated to have observed the assailant. Importantly to him is the argument that, much as PW1 stated to have been aided by solar power light, intensity of that light has not been described all together.

He further pointed out regarding contradiction in the evidence of PW1 on account that, at one time, PW1 stated to be at a one pace distance from where the appellant was while she also accounted for three paces distance during her visual identification. In either case, the learned counsel was hesitant to commend PW1's visual identification credence because, to him, the possibility of a correct identification by peeping through a blanket hole is far beyond imagination. In certain instances, the witness denied existence of a hole in a blanket while pressing to be able to identify through a regular uncovering of the blanket. To the learned counsel, this is none but a contradiction in real sense. He yet, on contradiction argued regarding

variation in exact number of invaders because whereas PW1 said they were 10, but only two managed to gain access, PW2 stated to have seen only three assailants. In such a contradiction, his argument was that, the learned trial judge misapprehended and misinterpreted the evidence, and more so, never retrieved and resolved the extent of that contradiction in the prosecution case as directed in **Mohamed Said Matula v. Republic** [1995] T.L.R. 3.

Another point submitted by the learned counsel for consideration on visual identification is in respect of identification parade. His argument on this hinge on the fact that, had PW1 visually identified the appellant, then identification parade would have been organized to let her identify the person she identified at the crime scene. In this one, he referred us to the case of **Juma Marwa & Others v. Republic**, Criminal Appeal No. 91 of 2006 (unreported) insisting that, failure to conduct identification parade, renders the evidence of PW1 untenable in law. In all therefore, he argued, the prosecution case was not proved beyond reasonable doubt, thus urged us to allow the appeal and set the appellant free by quashing conviction and setting aside the death sentence.

The respondent Republic in reply did not resist the appeal. Adding on want of proof of the prosecution case submitted by Mr. Mswadick, Ms. Makala argued that, PW1 being the only eye witness, her evidence of visual identification basing on undescribed intensity of light sourced from solar power, cannot establish beyond reasonable doubt that the appellant was at the scene of crime. This was her reason for declining to support conviction and sentence of the trial court.

To begin with, as argued by the counsel for the parties, the grounds of appeal, the record before us and the submissions made by either party, boil down to mainly one issue, that is, whether the learned trial judge rightly convicted the appellant basing on evidence of visual identification of PW1. What is rightly at stake is that, the murder of Dominick Gorodian occurred at night and the only evidence as per the record is that of visual identification by PW1. As submitted by the learned counsel for the appellant when referring us to the case of **Waziri Aman v. Republic** (supra), which we entirely associate with, the evidence of visual identification is of the weakest kind and most unrealisable and in essence, no court should act on that evidence unless it eliminates all possibilities of mistaken identity. The courts also have to be satisfied that, such evidence is watertight. See also

Director of Public Prosecutions v. Mohamed Said & Another, Criminal Appeal No. 432 of 2018 (unreported). As we raised above, conviction of the appellant herein rests solely on the evidence of visual identification of PW1.

Essentially, the trial court trusted PW1 in her evidence of visual identification being aided by light sourced from solar energy bulbs. Did PW1 described the intensity of that light? The trial Judge's findings regarding the intensity of that source of light is grounded on the following as at page 148 through 149 of the record of appeal:

> *"As earlier indicated, the evidence of visual identification is of the weakest kind. When testifying, the prosecution witness told the court that when entered, the* ***bandits switched on the solar energy bulbs which were three in the house (PW1) and (PW2), thereafter, they switched off their torches they had (PW2). In the circumstances, I have no doubt that the intensity of light was enough for proper identification".*** [Emphasis ours]

Our interpretation in the above findings of the learned trial Judge is that, after the assailants had gained access to PW1's residence, they had

their torches on but the solar light bulbs were off. They then switched on the solar light bulbs and had their torches switched off. With the solar light bulbs being on, according to the learned Judge, then the light was bright enough for PW1 to identify the appellant. We think this is the message the learned trial Judge envisaged to be communicated. However, with much respect to the learned trial Judge, a mere mentioning of a source of light without describing its brightness aiding visual identification, is not evidence that the witness made a description pertaining the intensity of that light. We find this to be rather an opinion of the learned trial Judge and not the contents of the evidence of PW1. We are saying so because there is nowhere in the evidence of PW1 a description towards the intensity of that light was ever made. At page 53 of the record of appeal regarding would be description of intensity of light, PW1 testified that:

> *"They ordered me to lie on my stomach with my face facing the floor to which I obeyed. I saw the people who invaded us using the solar energy, i.e. electricity from solar using the bulbs which was inserted in our bedroom and another bulb was near the bedroom".*

From the foregoing extract in PW1's evidence, this is all of what PW1 testified regarding the light aided her to make visual identification. As it is, we find nothing in that piece of evidence indicating or even suggesting to indicate description of the intensity of that light as observed by the learned trial Judge. This is **one** and **two,** conditions and circumstances surrounding the crime scene, in our view, dispossessed PW1 ability to make unmistaken identity. We are saying so because according to PW1 and PW2, the assailants were armed, violent and assaulting the deceased and also PW1. More specific to PW1, a command was made by the assailants for her to lie down having her stomach facing down, while her face is covered with a piece of cloth. It may not be possible under the circumstances for PW1 to make a correct identification. The circumstances were horrible, terrifying and frightening to both PW1 and PW2 for an unmistaken identity. In **Rahim Isaka & Another v. the Republic**, Criminal Appeal No. 229 of 2010 (unreported) regarding evidence of visual identification in such horrible circumstances, the Court observed at page 8 of the judgment that, we quote:

> *"In the case under consideration, it cannot be gainsaid that the forgoing guidelines were hardly met. More particularly,* ***there was no elaboration***

as to the location as ***well as the intensity of the electricity light, through which the witness, purportedly, identified the appellants.*** *Assuming, for the sake of it, that Mashaka had reference to street lights, it is still incomprehensible that the lights would have lit beyond the main street to the alley as well. To add to that light ailment,* ***is the fact that the attack was made in the circumstances of traumatic surprise and that it was so outrageous to the extent of having the victim dispossessed of his seven teeth.*** *Thus, upon our re-evaluation, we are, respectfully, of the view that the prevailing conditions and circumstances at the scene of the crime cannot be said to have been ideal for an unmistaken identification".* [Emphasis supplied]

Given that position, we are satisfied that the evidence of PW1 on visual identification is weak for want of description of the intensity of light which aided her to correctly identify the appellant herein. Under the circumstances, the route we take is that taken by this Court in **Waziri Aman v. Republic** (supra) where it was held that:

"On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer

observation made in difficult conditions such as ***visual identification made in a poorly lightened street, we are of the considered view that in such cases, the judge would be perfectly entitled to acquit".*** [Emphasis supplied]

Armed with the foregoing position, as we alluded to earlier on, description regarding the intensity of light is wanting. Equally, we demonstrated that, PW1 was in a difficulty, frightening and terrifying condition such that she was dispossessed of any possibility to make an unmistaken identity. This ground alone suffices to dispose of the whole appeal. The appellant in his grounds of appeal complained also regarding contradictions and discrepancies in the prosecution case, want of corroboration and failure to tender weapons deployed in assaulting the deceased. We will not deliberate on these. We have taken that stance because, if any existed, would be a direct consequence of want of enough bright light, the intensity of which was not described by PW1.

Having all these in the end add up to one obvious outcome that, the prosecution case was not proved beyond reasonable doubt. We hold so and accordingly, we allow the appeal of the appellant. The conviction of

murder is thus quashed and the capital sentence imposed thereat is accordingly set aside. The final consequence is for the release of the appellant from custody, which we order accordingly, else held for some other lawful causes.

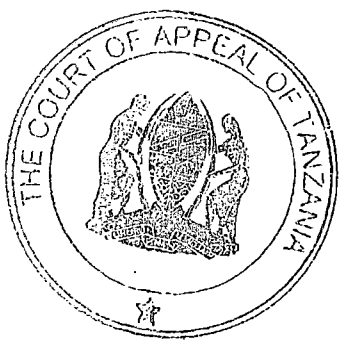
DATED at **BUKOBA** this 21st day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on this 22nd day of March, 2024 in the presence of Mr. Ibrahim Mswadick, learned counsel for the appellant and Ms. Gloria Lugeye, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL