IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: KEREFU, J.A., RUMANYIKA, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 318 OF 2021

NURUDIN ABASI NAMPALA ..... 1ST APPELLANT

RASHIDI AMIRI @ CHILI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 20th day of May, 2021
in
Criminal Sessions Case No. 05 of 2019

JUDGMENT OF THE COURT

27th & 30th May, 2024

KEREFU, J.A.:

The appellants, NURUDIN ABASI NAMPALA and RASHIDI AMIRI @ CHILI were arraigned before the High Court of Tanzania at Mtwara for the offence of murder contrary to section 196 of the Penal Code, Cap. 16 (the Penal Code) in Criminal Sessions Case No. 05 of 2019. The information laid by the prosecution alleged that, on 13th December, 2015 about 01:00 hours at Mpeta Village within Masasi District in Mtwara Region, the appellants murdered one Yahaya Lazima Binamu (the deceased). The appellants pleaded not guilty to the charge. However,

after a full trial, they were convicted and each was sentenced to suffer death by hanging.

The brief facts of the case that led to the appellants' arraignment, conviction and sentence as obtained from the record of appeal are not complicated. They go thus: On 12th December, 2015 at 23:00 hours, Iddi Swedi Lazima (PW1) and Lazima Yahaya Lazima (PW2), who were sales persons at a shop (mini supermarket) belonging to their father (the deceased), were busy filling water in containers to be sold to customers on the next day. Suddenly, they were ambushed by two armed men. One was holding a gun, and the other one was carrying two machetes. It was the testimony of PW1 that, one of the culprits, demanded money from them and he told him that there was no money as all proceeds of the day were with the deceased who by that time was already at home.

Upon receiving that information, the two culprits tied PW1 and PW2 together on their shirts and made them lead the way to their father's house. At the house, they found the deceased with their uncle one Jafari Lazima Binamu (PW3), the elder brother of the deceased. PW1 stated further that, the culprits ordered them to kneel down and others to lie down, which they obeyed. Then, one of the culprits,

slapped the deceased by using the side of a machete while the one with the gun was standing aside. They demanded money from the deceased who told them that the money was at the shop. As such, the culprits went back to the shop with the deceased, PW1 and PW2 while leaving PW3 behind.

At the shop, PW1 and PW2 tried to confront one of the culprits who was holding a machete, but their attempt was not successful as the other culprit started firing shots on the air to scare them together with the villagers who had started to approach the scene of the crime and throwing stones at the culprits. PW1 stated further that, the fired bullets injured him on the hands and legs while the deceased was injured on the abdomen and they both fell down. Seeing what had happened, the culprits took to their heels.

A moment later, the victims (the deceased and PW1) were taken to Mkomaindo hospital where they were attended by Dr. Sadick Ally (PW5) who found that the deceased had already died but PW1 was still alive but seriously injured on his knee. PW5 conducted an autopsy on the deceased's body and concluded that the cause of death was excessive internal bleeding caused by a penetrating wound on his iliac bone. A post mortem report to that effect was admitted in evidence as

exhibit P1. PW1, being seriously injured, was referred to Ndanda hospital and then to Muhimbili National Hospital where he was hospitalized for almost four months.

PW1 went on to state that, he managed to identify the culprits at the scene of the crime with the aid of electricity tube lights which were illuminating inside and outside the shop and also at the deceased's house. That, one of the culprits, who demanded for money inside the shop, was short and black while the other, who was outside armed, was tall. They both wore black jackets, trousers and shoes. He also added that the culprits were strangers to them as they were not residents in that village. Lazima Yahaya Lazima (PW2) and Jafari Lazima Binamu (PW3) supported the narration made by PW1. PW2 added that, one of the culprits was white, slender and tall while the other one was black, a bit slander and tall. The one with machetes was black. PW3 stated that, when the culprits returned to the shop, he raised an alarm to alert neighbours and he also went to the shop. According to him, one of the culprits, who was holding a gun, was tall and white while the other one with machetes was tall and black. Specifically, at the trial, both, PW1, PW2 and PW3 testified that, at the scene, they only managed to identify

the first appellant as the other culprit, who was holding the machetes was not brought before the trial court.

Stella George Kuonewa (PW4), the Ward Executive Officer was among the people who heard the gun shots and went to the scene of crime where she found a pool of blood. PW4 made some efforts to call the police who came at the scene of the crime and gathered two-gun cartridges. Nathanael Kyando SP (PW7), Insp. Iddi Omary (PW8), No. F.8982 DC Paul (PW9) and No. G.1562 DC Hemed (PW10) testified that they were involved in the investigation of the incident. Specifically, PW8 stated that they went to the scene of crime and found a pool of blood which signified that someone had been injured and were able to recover three cartridges which were admitted in evidence as exhibit P3 collectively. PW8 stated further that, they interviewed different people on the incident and recorded their statements. Through the said interview, they detected that the appellants were responsible with the death of the deceased. Thus, they started to trace them without success. PW10 prepared a sketch map of the scene of crime which was admitted in evidence as exhibit P2.

On 27th December, 2015 the second appellant was arrested in connection with the offence of assaulting his lover one Asumin Halifa

(PW6). PW6 informed PW9 that the second appellant was involved in the murder incident. It was the testimony of PW9 that, upon interrogation, the second appellant admitted to have participated in the crime but just as a getaway motorist. That, the second appellant also informed them that the first appellant, who was involved in that incident, had ran to Dar es Salaam and volunteered to assist them to arrest him. Subsequently, on 26th March, 2016, the first appellant was arrested in Dar es Salaam and brought to Masasi. No. H.4088 DC Zakayo (PW11), the fire arms and ammunition inspector, examined the retrieved gun bullets and prepared a ballistic report (exhibit P4).

In their respective defense testimonies, both appellants denied any involvement in the alleged offence. Specifically, the first appellant raised a defence of *alibi* that, on the fateful date he was not in Mtwara and was not identified at the scene of crime. On his part, the second appellant challenged the evidence of PW6, contending that she gave an untrue story before the trial court due to the existing grudges between them. He asserted that, he was not identified by anyone at the scene of crime.

At the end of the trial and when both sides closed their evidence, the presiding learned trial Judge summed up the case to the assessors who

sat with him at the trial. In response, the three assessors unanimously returned a verdict of guilty against the appellants. In his final verdict, the learned trial Judge agreed with the assessors and found that the case against the appellants was proved to the required standard through the testimonies of PW1, PW2 and PW3 who properly identified the appellants at the scene of crime. Thus, the appellants were found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellants are now before us challenging the High Court's decision. We shall not recite all grounds of appeal filed by the appellants for a reason to be detailed at a later stage of this judgment. Suffice to say that initially, the appellants filed a substantive memorandum of appeal, however later, when Mr. Rainery Norbert Songea, learned counsel was assigned by the Court the dock brief to represent the appellants, he lodged supplementary memorandum of appeal on 21st May, 2024 with the following two grounds:

1. *That, the trial court erred in law and facts by convicting the second appellant herein while the prosecution did not prove the case beyond reasonable doubt; and*
2. *That, the trial court erred in law and fact when it held that the second appellant was properly identified at the scene of the crime.*

When the appeal was placed before us for hearing, the appellants were represented by Messrs. Rainery Norbert Songea and Alex Msalenge, both learned advocates whereas the respondent, Republic was represented by Mr. Wilbroad Ndunguru, learned Principal State Attorney assisted by Messrs. Gredo Rugaju and Faraja George, both learned State Attorneys.

At the outset, the Court was informed by Mr. Rugaju that the first appellant passed away on 14th December, 2023 at Ligula Regional Hospital in Mtwara. To substantiate his submission, Mr. Rugaju referred us to the letter from the officer-in-charge of Lilungu Central Prison dated 17th May, 2024 informing the Court about the death of the first appellant together with the burial permit and postmortem report attached thereto. On that basis, Mr. Rugaju urged us to mark the first appellant's appeal to have abated under Rule 78 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

On his part, Mr. Songea did not object the prayer made by his learned friend as the appeal does not relate to a sentence of fine, costs and or compensation. In the circumstances and having considered the letter from the officer-in-charge of Lilungu Central Prison dated 17th May, 2024 together with the burial permit dated 14th December, 2024,

we granted the prayer sought. Consequently, and in terms of Rule 78 (1) of the Rules, we marked the appeal by the first appellant against the respondent, Republic to have abated. Therefore, this judgment is in respect of the surviving appellant.

Upon taking the floor and before advancing his arguments in support of the appeal, Mr. Songea prayed to abandon the substantive memorandum of appeal and intimated that he would start with the second ground of appeal in the supplementary memorandum followed by the first ground.

Starting with the second ground, Mr. Songea asserted that, it was not in dispute that the incident happened at night as testified by PW1, PW2 and PW3 the prosecution eye witnesses at the scene of the crime. He contended that the visual identification of the second appellant by the said witnesses, which was relied upon by the trial court to convict him, was not watertight. To clarify on this point, the learned counsel referred us to pages 57, 63 and 67 of the record of appeal, where the said witnesses categorically testified that they only identified the first appellant. It was therefore, the strong argument by Mr. Songea that the second appellant was not identified at the scene of crime.

The learned counsel argued further that, although, PW1, PW2 and PW3 testified that they managed to identify the culprits with the aid of electricity tube lights, they did not explain its intensity, the size of the

area illuminated by the said tube lights and the distance at which they observed the incident. He argued that, much as PW1, PW2 and PW3 seemed to suggest that they were able to identify the appellants through the said light, they failed to properly describe them. Instead, they only generally mentioned their attire. To justify his point, the learned counsel referred to pages 57, 61 and 67 of the record of appeal and insisted that, since the incident happened at night PW1, PW2 and PW3 were expected to give further descriptions on how they managed to identify the culprits to avoid any possibility of mistaken identity. To bolster his proposition, Mr. Songea cited the cases of **Gervas Gervas Cosmas @ Chambi & 5 Others v. Republic**, Criminal Appeal No. 557 of 2021 [2023] TZCA 156: [29 March 2023: TanzLII] and **Godfrey Lusian Shirima v. Republic**, Criminal Appeal No. 40 of 2021 [2022] TZCA 584: [29 September 2022: TanzLII] and emphasized that, since the visual identification evidence adduced by PW1, PW2 and PW3 was not watertight, the same could not have been relied upon by the trial court to ground the second appellant's conviction.

The submission of Mr. Songea on the first ground hinged on what he submitted in respect of the second ground above. He argued that, since the second appellant was not identified at the scene of crime then,

it was improper for the learned trial Judge to conclude that the case against him was proved beyond reasonable doubts.

Upon being probed on how the second appellant was arrested and connected with the murder incident, Mr. Songea, referred us to the testimony of PW8 at page 84 of the record of appeal, who testified that the second appellant was arrested in connection with the offence of assaulting his wife (PW6). He thus challenged the testimony of PW6 that it was recorded contrary to the provision of section 130 (1) and (3) of the Evidence Act, Cap. 6 governing the evidence of spouses. As such, he urged us to disregard the evidence of PW6. He was positive that the said omission had as well weakened the prosecution's case as the remaining evidence on record is insufficient to sustain the second appellant's conviction. On that basis, Mr. Songea urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the second appellant and set him at liberty.

In response, Mr. Rugaju expressed the stance of the respondent of supporting the appeal. Mr. Rugaju was in agreement with what was submitted by his learned friend in ali fours. He insisted that the evidence of PW1, PW2 and PW3 who were the only prosecution's eye witnesses at the scene of crime did not meet the conditions on visual identification

stipulated in the cases of **Waziri Amani v. Republic** [1980] TLR 250 and **Raymond Francis v. Republic** [1994] T.L.R. 100. He then insisted that, since the second appellant was not identified at the scene of crime, it was improper for the learned trial Judge to conclude that the case against him was proved to the required standard. On that basis, Mr. Rugaju also urged us to allow the appeal, quash the conviction and set aside the sentence imposed against the second appellant and release him from the prison.

In his brief rejoinder, Mr. Songea did not have much to say other than associating himself with what was submitted by his learned friend.

We have considered the submissions made by the learned counsel for the parties in the light of the record of appeal before us and the appellant's grounds of complaints. The main issue for our determination is the sufficiency or otherwise of the evidence of visual identification acted upon by the trial court to convict the second appellant. We shall therefore consider the grounds of appeal in the manner they have been argued by the counsel for the parties.

Before doing so, it is crucial to state that, this being the first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and

subjecting it to a critical scrutiny and, if warranted to arrive at its own conclusion of fact. See **D.R. Pandya v. Republic** [1957] EA 336.

Starting with the second ground on the visual identification, we wish to point out at the outset that, we agree with both learned counsel for the parties that, it is trite law that for evidence of visual identification to be acted upon by the court to ground a conviction, the same must be watertight to eliminate all possibilities of mistaken identity. In the case of **Waziri Amani** (supra), the Court gave the word of caution at pages 251 – 252, that: -

> *"...evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*** *[Emphasis added].*

Now, in the case at hand, it is on record that in convicting the appellants, the trial court relied mostly on the visual identification evidence by PW1, PW2 and PW3 the only prosecution eye witnesses at the scene of crime. This can be evidenced at page 173 of the record of appeal, where the learned trial Judge concluded that:

"Having evaluated the evidence on part of the prosecution, I am satisfied that the identification by PW1, PW2 and PW3 was correct, watertight and unmistaken. These witnesses identified the 2nd accused and his fellow who was armed...The evidence of identification by PW1, PW2 and PW3 that they identified the culprits at the crime scene was not their bare assertions but were assertions accompanied by a detailed description of the culprits."

In their submissions before us, both learned counsel for the parties, faulted the trial Judge for grounding conviction of the second appellant on the evidence by PW1, PW2 and PW3 as they argued that the said witnesses did not identify the second appellant. To verify this point, we have revisited the evidence of the said witnesses.

PW1 at pages 57 and 58 of the record of appeal, testified that:

*"I identified the person standing in the dock on the right side as he is the one who was demanding money from us. One was short and black. He wore black jacket, trousers and shoes...**I identified the 1st accused. He had a gun on that day... The short and black person is not in court."***

PW2 at page 61 of the same record testified that:

"One was white, slender and tall. The other was black a bit slander and tall. The white one was handling a gun. The black person had pangas."

Then, at pages 63 and 67 of the same record, PW2 testified that:

"I did not see and identify the other accused on that day. ***The second accused who handed the gun and he is the one who shot it.*** *The one who was handling pangas is not in court."*

Again, PW3 at page 67 of the record of appeal stated that:

"Among those two people, I identified the one who had a gun and is in court. He is the second accused in the dock.

From the above excerpts, it is clear that, PW1, PW2 and PW3 did not identify the second appellant at the scene of the crime as they all testified that, they only managed to identify the culprit who was holding a gun. They all, categorically testified that the other culprit who was holding the machetes was not before the trial court. In the circumstances, we agree with both learned counsel that the second appellant was not completely identified at the scene of crime.

It is also clear to us that, the visual identification by PW1 and PW2 was incredible and unreliable as the same was tainted with material contradictions on, who among the two culprits was holding a gun. While PW1 testified that the culprit who was holding a gun was the second appellant, PW2 testified that, it was the first appellant. Though, in another version, PW1 also testified that the one who was holding a gun was the first appellant. In **Mohamed Said Matula v. Republic** [1995] TLR 3 it was held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions the court has a duty to address the inconsistences and try to resolve them where possible or else the court has to decide whether the inconsistences and contradictions are only minor, or whether they go to the root of the matter."*

Unfortunately, in the case at hand, the trial court did not discharge its duty to address such contradictions and inconsistencies. Having examined and considered the said contradictions and inconsistencies, we are of the settled view that they are fundamental as they raise doubts to the extent that we are unable to eliminate the possibilities of mistaken identity. Since the said contradictions go to the root of the prosecution's case, we resolve them in favour of the second appellant.

We are also mindful of the fact that, the second appellant was implicated in this case by the evidence of PW9 who testified that he interviewed him and recorded his cautioned statement where he confessed that, on the fateful date, he participated in the crime but just as a getaway motorist who assisted the culprits to access the scene of crime. However, the said statement was not tendered before the trial court to ascertain those facts. Hence, the same remained to be hearsay evidence. It is also not in dispute that, the second appellant was arrested on 27th December, 2015 in connection with the offence of assaulting PW6, which again, had no any connection with the murder incident in respect of this appeal. All these leads us to find that the prosecution evidence against the second appellant was not proved to the required standard.

On the basis of the reasons stated above, we are of the settled view that, had the learned trial Judge properly scrutinized the evidence of PW1, PW2 and PW3, he would have found that the second appellant was not identified by the said witnesses at the scene of the crime. In the circumstances, we agree with both learned counsel for the parties that it was improper for the learned trial Judge to ground conviction of the second appellant on the visual identification evidence adduced by PW1,

PW2 and PW3. It was equally improper for the learned trial Judge to conclude that the case against the second appellant was proved beyond reasonable doubts. As such we find the first and second grounds of appeal to have merit.

In the event we allow the appeal. The conviction of the second appellant is hereby quashed and the sentence imposed on him is hereby set aside. Consequently, we order for immediate release of the second appellant from prison unless he is being held for some other lawful causes.

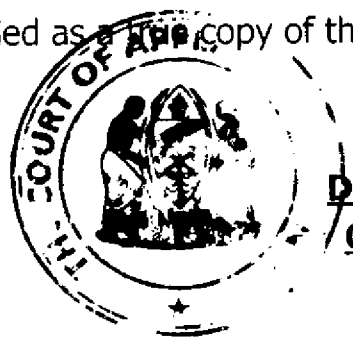
DATED at **MTWARA** this 29th day of May, 2024.

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of May 2024 in the presence of Mr. Alex Peter Msalenge, counsel for the Appellant and Mr. Alex Samata Kasela, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL