IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 31 OF 1999

BETWEEN

JOHN GILIKOLA..... APPELLANT
AND
THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Bukoba)

(Lugakingira, J.)

dated the 27th day of May, 1998
in
Criminal Sessions Case No. 79 of 1991

J U D G M E N T

MROSO, J.A.:

The appellant, John Gilikola, and the deceased, Rashid Juma, were related through their respective mothers. They also lived near each other, only eight or so paces apart, at Kemondo Bay, Bukoba. During the late night of 30th August, 1986 the deceased was shot at by one of several bandits who broke into his house. He died at Kagondo hospital later at dawn. It was believed that the appellant was in the gang of armed robbers who killed the deceased. Just before he was shot, the deceased was heard saying – "John unaniua kwa ajili ya mali yangu!" The name John was supposed to refer to the first name of the appellant and "kwa ajili ya mali yangu" was supposed to refer to an ongoing dispute between the deceased and the appellant over the

land and house which the appellant was using. The deceased had claimed they belonged to him. According to the appellant, a civil case between them was pending in court. The widow of the deceased, Hidaya d/o Rashid (PW1), a son of the deceased, Rajab Rashid (PW3) and a watchman of the deceased, Ibrahim Salum (PW4) all claimed to have identified the appellant as a participant in the murderous robbery.

The appellant denied participation in the murder of the deceased. He said he was in his house, sleeping, and was not aware of the robbery in the house of his neighbour which led to the murder.

The trial judge very carefully reviewed the evidence of PW1, PW2 and PW3 and found it was all unreliable. He, however, found the watchman (PW4) credible and reliable. He dismissed the defence evidence and, relying on the evidence of the watchman, found the appellant guilty of the murder of the deceased and, accordingly, convicted and sentenced him according to law. The appellant believes he was wrongly convicted and, through Mr. Byabusha, learned advocate, has filed in this Court two grounds of appeal. In the first ground of appeal he complains that the trial judge erred in law in believing the testimony of PW4 – Ibrahim Salum and basing the conviction on it. The second ground of appeal is that the trial judge ought not to have drawn an inference that the appellant was a principal offender who

aided the commission of the offence.

At the hearing of the appeal Mr. Byabusha abandoned the second ground of appeal and argued the first ground only. He said that the trial judge failed to direct his mind to the fact that PW4 made his statement to the police on 22nd January, 1987, which was five months after the murder. He asks the question – if PW4 in fact knew that the appellant was party to the murder, why should it have taken so long before he could make his statement to the police? The witness had moved to his home district, Ngara, after the incident. Since the police did not know him, it must have been the family members of the deceased who looked for him in Ngara and there was the possibility that they discussed with him the evidence regarding the murder and may have influenced what the witness told the police when they recorded his statement. According to Mr. Byabusha, had the trial judge adverted to those circumstances relating to the evidence of PW4, he would not have placed such critical reliance on his evidence. He cited the case of **Swalehe Kalonga @ Sale v. Republic,** CA Criminal Appeal No. 16 of 2001 (unreported) as authority that a delay by a witness to name at the earliest opportunity the person he knows to have committed an offence casts doubt that the witness had identified the offender.

Mr. Feleshi, learned State Attorney, who represented

the respondent Republic said that although it was true that PW4 mentioned the appellant in his statement which he made five months after the event, the witness had said in his evidence that he talked with the police when they came to investigate the case and to arrest the appellant. The appellant was arrested on 31/8/1986 which was only a day after the deceased was killed. During the talk with the police the witness may have mentioned the appellant to the police but the police did not record his statement until five months later. The reason for the delay by the police to record his statement was not disclosed. As for the case of **Swalehe Kalonga** Mr. Feleshi submitted that it was distinguishable from the case now under appeal. He said that in the **Swalehe** case the witnesses who claimed to identify the bandits in that case did not immediately name them to the people who had come to the scene of crime. They named them after "quite sometime" and this Court in that case considered that the delay was an indication of uncertainty in their claim that they accurately identified the bandits.

We agree with the proposition that unexplained delay by a witness who claims to have identified an offender to name the offender to people who respond to an alarm or to investigating police or other authority, casts doubt on the credibility of the witness. The **Swalehe Kalonga** case relied on that kind of reasoning and in an earlier case, **Marwa Wangiti Mwita and Another v. Republic,**

Criminal Appeal No. 6 of 1995 (unreported), it was succinctly stated there as follows:-

> The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability; in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry.

We think, however, that PW4 should not be blamed for the supposed delay to name the appellant in his statement to the police. The claim by the witness was that when the police came to arrest the appellant the day after the murder he talked to them. It was not elicited from him what the talk was about. For unexplained reasons the police did not record his statement immediately but waited for some five months to do so. The only witness who testified at the trial and whose evidence was taken on the day the appellant was arrested was Hidaya PW1, the wife of the deceased. PW2 – Rajab Rashid, had also made statement to the police but the date of recording it is not indicated. The statement of Abdallah Swaibu (PW3) was recorded very briefly four days after the event but more elaborately in a later statement which was recorded over 14½ months later, on 16th April, 1988.

We have referred to these other witnesses to

demonstrate that the investigating officers were not acting promptly in recording the statements of potential witnesses and, therefore, it would be unfair to draw an inference that PW4 was unreliable because the investigating police took his statement five months after the event. We are also unable to accept the speculative observation by Mr. Byabusha that the relatives of the deceased may have prompted PW4 on what to tell the police who recorded his statement. We can find no valid reason for reaching such a conclusion. Indeed, that observation was not made to the trial judge whose duty was to make findings of fact based on the evidence which was adduced.

Mr. Byabusha also attempted to make an issue of the fact that PW4 made two statements to the police, the one he made on 22/1/1987 and the second one which was recorded on 17/5/89, 16 months later. Mr. Byabusha argued that if the original statement by the witness was satisfactory, why was it necessary to take an additional statement later from the witness? He pointed out that there were contradictions in the two statements and that the second statement was intended to cure unsatisfactory features of the first statement.

In the original statement PW4, in referring to the appellant and the events which led to the robbery and murder of the deceased, said –

> John wakati wote alikuwa amesimama nje ya nyumba yake akiangalia matukio yote ... Wale wezi walipoanza kusomba vitu John aliingia nyumbani kwake kulala.

In the additional statement which, as already mentioned, was made 14½ months subsequently, the witness said –

> Pia nakumbuka kuwa JOHN GIRIKORA wakati wenzake wanavunja milango na kuingia ndani na kumpiga risasi marehemu RASHID JUMA na kupora mali wakati wote alikuwa amesimama nje akiwa na tochi mkononi isipokuwa majambazi wengine walipochomoa tube light kukawa giza, mimi nilishindwa kumuona vizuri JOHN GIRICORA alipokuwa anaelekea maana naye alikuwa anachanganyika na kundi la majambazi waliokuwa wanasomba vitu toka ndani na kuvileta nje ... niliweza kumtambua vizuri wakati bado taa inawaka alipokuwa amesimama nje.

The obvious discrepancy is that while in the earlier statement the witness said that the appellant entered his house to sleep when the thieves started to take out the stolen things, in the later statement the witness said that

after some of the bandits removed the tube light it became dark and he (PW4) could not quite tell which way the appellant went because he had mixed with the group of bandits who were taking to the outside the stolen things. The question we need to ask ourselves is whether that discrepancy is so material as to render the witness unreliable.

We note that in both statements the witness said that during the material period the appellant stood outside his house observing all that was taking place – “akiangalia matukio yote” and “wakati wenzake wanavunja milango na kuingia ndani na kumpiga risasi marehemu RASHID JUMA ... wakati wote alikuwa amesimama nje”

The trial judge did not specifically deal with the discrepancies between the initial recorded statement of the witness and the later additional statement but dealt with discrepancies between the first caution statement of the witness and the evidence which the witness gave at the hearing of the case. He said –

> … whether the accused (now appellant) went to sleep or got lost in the confussion and darkness when the operation got under way, similarly does not contradict the evidence of his association with the bandits and his acts, which were already accomplished”

It was not the prosecution case that the appellant

actually and personally killed the deceased. The case was that after the band of bandits went to the appellant he came out of his house and directed them to the house of the deceased in the neighbourhood. He stood and watched as they broke into the house of the deceased and killed him. Subsequently the bandits stole from the house of the deceased. Both statements of PW4 and his evidence in court said so without contradiction. The discrepancies were on details and they may have been occasioned by the relatively long passage of time between the two statements and the giving of evidence in court and also by the frailty of human memory. Like the trial judge, we do not, with respect, consider the discrepancies in the two statements and the evidence of the witness material so as to affect the credibility and reliability of PW4.

Mr. Byabusha also sought to fault the credibility of PW4 by picking holes in every apparent weak areas of the evidence. He argued that the evidence showed that in the morning of the day after deceased was killed the appellant was seen working normally at his shop, suggesting that PW4 had not named him to any one, consequently weakening his credibility.

We do not think such an inference is inevitable. The appellant was arrested later in the day by the police, ostensibly after he was named by the wife of the deceased (PW1). But there is no evidence that PW4 failed to name the appellant when questioned. The prosecution of the case

in the trial court is silent on many things which ought to have been asked and answers, if any, given. We are reluctant to blame PW4 for the ineptitude of the investigating officers or of the prosecuting counsel.

Finally, there was the argument that although it was common knowledge that the appellant and the deceased were not on friendly terms and that there was bad blood between them, PW4 pretended he was not aware of such poor relationship between them. The lie by PW4 suggested he had something to hide and he was therefore unreliable.

The trial judge found that indeed there was bad blood between the appellant and the deceased. PW4 however explained that he was a mere employee of the deceased and "could not be privy" to his employer's private affairs.

We agree that the extent of the acrimonious relationship between the appellant and the deceased may have been common knowledge to the people at Kemondo Bay and that the chances are PW4 would have been aware of it. But it is also possible that the witness who was a night watchman and broke stones during daytime might not have been conversant with the actual relationship between the appellant and the deceased. In fact, during his evidence in court and in his two statements to the police there is no indication that the witness was aware of the hostile relationship between the appellant and the deceased.

There is no justification, therefore, to rate PW4 as an unreliable witness with any personal interest to serve.

The case of **Michael Maishi v. R** [1992] TLR 92 which was cited by Mr. Byabusha is not relevant to the circumstances of the present case. In **Maishi** all the prosecution witnesses came from a village which was hostile to that of the appellant and they contradicted themselves, rendering their evidence unreliable. That is not the case with the appeal before us. There was no question of PW4 being hostile to the appellant nor can it be validly argued that the witness was biased in favour of the family of the deceased. He had left the employment, moved back to his home in Ngara District and at the time he gave evidence he was living in Mwanza. He had no reason, therefore, to give unfavourable false evidence against the appellant.

We are satisfied that the trial judge was justified to rely on the evidence of PW4 and basing the conviction of the appellant on such evidence. There is no merit in this appeal which we dismiss in its entirety.

DATED at DAR ES SALAAM this 14th day of July, 2004.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR