IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: WAMBALI, J.A., KITUSI, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL. 458 OF 2020

LEONCE EVARIST MARO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Moshi with Extended Jurisdiction at Moshi)

(Mazengo, PRM Ext. Jur.)

dated the 28th day of August, 2020

in

Ext. Jur. Criminal Sessions Case No. 02 of 2019

.....

JUDGEMENT OF THE COURT

24 April & 9th May, 2024

NGWEMBE, JA.:

The appellant, Leonce Evarist Maro, was arraigned before the Resident Magistrate Court of Moshi at Moshi, presided over by Hon. Mazengo – Principal Resident Magistrate with extended jurisdiction and found him guilty of the offence of murder of Samson Taliwawa contrary to section 196 of the Penal Code, Cap 16.

According to the particulars of the information, it was alleged that on 12th June, 2014 at Uru Mwasi area within the District of Moshi in Kilimanjaro Region the appellant did murder the deceased.

When the information was read over and explained to the appellant, he unequivocally denied the offence, prompting the prosecution to call four witnesses to support the case. Those were: the medical doctor, Isaria Ansonsiona Maruchu (PW1) who performed autopsy of the deceased body at KCMC Hospital; the younger brother of the deceased, Damian Taliwawa Temba (PW2); the first-born of the deceased, John Samson Temba (PW3); and the police investigator, WP 5539 D/CPL Redemta (PW4). The appellant was the sole witness in his defence.

To appreciate the genesis of this appeal, it is on the record of appeal that, on the eventful date of 12th June, 2014 at around 19: 45 hours, the deceased while moving from a shop to his house, Reginald Temba and Leonce Evarist Maro attacked him by inflicting a heavy blow of iron bar on his head. Upon hearing their father screaming for help, Godfrey Samson Temba and John Samson Temba (sons of the deceased), rushed to the scene of crime. With a help of bright moonlight, they saw both Reginald Temba and Leonce Evarist Maro assaulting the deceased with iron bar and

fist in various parts of his body. The two managed to arrest Reginald Temba while the appellant ran away.

Following the deceased alarm, more people appeared at the scene of crime, including PW2 who thereafter went to call Lucian Temba (Hamlet chairman). PW3 recalled how the event unfolded on 12th June, 2014. He testified that upon arrival at the scene of crime, he and his younger brother Godfrey Temba found their father screaming while being beaten by the culprits. He managed to recognize the culprits because he knew them as they were born in the same area and grew together.

After a while, the deceased was taken to Mawenzi hospital after Majengo Police Station issued Police Form No. 3 (the PF3). Later on, the deceased was transferred to KCMC for further treatment. However, the deceased could not survive the blow in his head, hence on 17th June, 2014 he passed away.

Upon conducting autopsy, PW1 formed an opinion that the cause of death was due to heavy external force, which broke the skull and its bones penetrated to the brain which torn apart the brain including blood vessels. At the trial it was a common fact that the deceased died unnatural death.

In short, the substance of the prosecution case was that the appellant caused the death of the deceased on the fateful date.

On 18th June, 2014, the appellant was arrested at Miwaleni area which is within Uru Kishimundu village. According to the record of appeal, Reginald Temba had by then escaped to unknown place.

When put to his defence, the appellant stoutly denied committing the offence. He recalled how, he went to the scene of crime after he heard an alarm where he found the deceased lying down while PW3 and his brother Godfrey were beating the culprit, Reginald Temba. He advised them to release him. He added that he remained within the same locality from the eventful date to the date he was arrested. He thus, associated his arrest and the charge to the fact that he told the two brothers to stop beating Reginald Temba. At the end of trial, the learned trial Principal Resident Magistrate convicted the appellant for the offence of murder and subsequently, sentenced him to suffer death by hanging.

Aggrieved, the appellant timely lodged a notice of appeal to the Court followed by a memorandum of appeal comprised of ten grounds of appeal. However, at the hearing it was agreed that the determination of the appeal depended on four compressed grounds as follows: **first**, identification of

the appellant; **second,** contradictions in the evidence of the prosecution witnesses; **third**, failure to call material witnesses; and **four**, whether the case was proved beyond reasonable doubt.

At the hearing of the appeal, the appellant was represented by Mr. David Shilatu, learned advocate, while the respondent Republic was represented by Ms. Grace Madikenya assisted by Mr. Philbert Mashurano, learned State Attorneys.

At the outset and prior to inviting the learned counsel to address the Court on those grounds of appeal, we noted some minor discrepancies apparent on the record of appeal. It was noted that the place of trial of the case was at the Resident Magistrate Court of Moshi at Moshi, while the notice of appeal to the Court had reference to the Court of Appeal at Arusha. At the same time, the memorandum of appeal had reference to the Court of Appeal at Tanga, although it was filed and stamped at Moshi sub-registry of the Court of Appeal. Moreover, the record of appeal indicated to have been lodged at Arusha sub-registry of the Court. Upon engaging the parties and considering the interest of justice we ordered rectification of the relevant documents and allowed the appeal to proceed to hearing.

Mr. Shilatu commenced his submission by arguing the first ground on identification. He strongly contended that the appellant was not properly identified at the scene of crime due to unfavourable conditions of light which was not adequately explained by the prosecution witnesses. He further challenged the evidence of PW3 and argued that he failed to describe properly the person he saw at the scene of crime. He supported his argument with the cases of **Said Chaly Scania Vs. R,** [2007] T.L.R. 100 [CA] and **William Ntumbi Vs. Director of Public Prosecutions,** (Criminal Appeal No. 320 of 2019) [2022] TZCA 72 (25 February 2022, TANZLII) and **Waziri Amani Vs. R,** [1980] T.L.R. 250.

Arguing on contradictions, Mr. Shilatu, pointed out that, according to the information, murder was committed on 12th June, 2014 while the evidence by the prosecution indicated that the death of the deceased occurred on 17th June, 2014. Equally important was the testimony of PW4 who stated that, the deceased died on 14th June, 2014. He supported his submission with the case of **Awadhi Abrahamani Waziri Vs. R,** (Criminal Appeal No. 303 of 2014) [2015] TZCA 274 (24 February 2015, TANZLII). He thus concluded by inviting the Court to declare that the date

of death of the deceased was not ascertained by the prosecution witnesses.

Moreover, Mr. Shilatu, submitted that according to PW3, the death of the deceased was associated with Reginald Temba who is at large, while the appellant was a good Samaritan who went to the scene of crime upon hearing an alarm like anyone else. He pointed out that, failure to arrest the appellant from 12th to 18th June, 2014 while he was at his home place was an indication that he was innocent and that he was not recognized at the scene of crime as alleged by PW3. Above all, he insisted that the investigation conducted by PW4 did not connect the appellant with the death of the deceased.

With regard to the third ground of appeal, Mr. Shilatu argued that failure by the prosecution to call material witnesses, including Godfrey Temba and the hamlet chairman who allegedly wrote a letter to notify the police on the incident, weakened its case. In his view, the trial court was required to draw an adverse inference against the prosecution case as the said persons were material witnesses. He also argued that the iron bar which was allegedly used to injure the deceased was not tendered at the trial.

Submitting on the fourth ground, Mr. Shilatu, strongly argued that, due to apparent discrepancies and the failure to summon material witnesses, the prosecution failed to prove the offence against the appellant beyond reasonable doubt. He supported his argument by the case of **William Ntumbi Vs. the DPP,** (supra) and invited the Court to allow the appeal and order the release of the appellant forthwith.

Mr. Mashurano, opposed the appeal on behalf of the respondent. Responding to the first ground, he argued that the appellant was properly identified by being recognized at the scene of crime as testified by PW3, that there was bright moonlight which assisted him to recognize the appellant who he knew before as they were neighbours. He argued further that, PW3 testified that he was born in the same area as the appellant lived, grew and schooled in the same school. Therefore, it was easy to recognize him by the aid of moonlight. He supported his argument by relying on a case of **Masamba Musiba @ Musiba Masai Masamba Vs. R,** (Criminal appeal No. 138 of 2019) [2021] TZCA 270 (28 June 2021, TANZLII) where the Court insisted that, identification by recognition is more reliable. He thus prayed that the first ground be dismissed.

On the second ground, Mr. Mashurano, firmly submitted that there is no contradiction on the date of the death of the deceased. He argued that, there is no dispute that the offence was committed on 12th June, 2014 which led into death of the deceased on 17th June, 2014. However, he admitted that PW4 mistakenly mentioned 14th June 2014 as the date of death. Nonetheless he invited the Court to treat it as minor error which is curable under section 388 of Criminal Procedure Act (the CPA). He proceeded to refer the Court to section 205 of the Penal Code which provides that the causation of death within a year is termed as the date of death.

Submitting on failure to arrest the appellant on the date the offence was committed or soon thereafter, he argued that the appellant ran away to an unknown place immediately after the incident until on 18th June, 2014 when he was arrested.

With regard to the third ground on the failure by the prosecution to call material witnesses, Mr. Mashurano referred the Court to section 143 of the Evidence Act, and argued that a particular number of witnesses is not material, rather it is the contents and reliability of that evidence which matters. In his view, the hamlet chairman and Godfrey Temba were not

material witnesses and thus, the prosecution had no obligation to summon them to testify at the trial. He backed his argument by the case of **Hamadi Mzamiilo Marafya Vs. R,** (Criminal Appeal No. 603 of 2021) [2023] TZCA 18016 (21 December 2023, TANZLII).

On the fourth ground, Mr. Mashurano responded that PW3 was an eye witness who saw the appellant attacking the deceased. He further stated that considering the kind of weapon, the iron bar which was used to hit the deceased on his head and the kind of injuries inflicted on him as shown in the post mortem report, and the conduct of the appellant after the event, that is, he went into hiding, proved both *mens rea* and *actus reus* . Thus, he urged the Court to uphold the trial court's conviction and sentence because the prosecution proved the case beyond reasonable doubt.

In brief rejoinder, Mr. Shilatu, reiterated his submission in chief and insisted that the appellant never left his home place until he was arrested on 18th June, 2014. On failure to call material witnesses, Mr. Shilatu, insisted that the hamlet chairman and Godfrey Temba were material witnesses and therefore section 143 of the Evidence Act could not apply in

the circumstances of the case at hand. Thus, he pressed the Court to draw adverse inference for the said failure.

In determining this appeal, we propose to begin by deliberating on the first ground. It is well established that a court should not rely on the identification evidence unless it is satisfied not only that the conditions for proper identification were favourable to the identifying witness, but also taking into account all other prevailing circumstances in order to eliminate the possibilities of mistaken identity. A comprehensive consideration of this principle has been made by the Court in several decisions, including **Mafuru Manyama & Others Vs. R,** (Criminal Appeal 256 of 2007) [2011] TZCA 129 (18 February 2011, TANZLII), **Jaribu Abdallah Vs. Republic,** [2003] T.L.R 271 and **Anthony Kigodi Vs. R,** Criminal Appeal No. 94 of 2005 (unreported). In the latter case, after a critical review on the prerequisites for proper identification, the Court held *inter alia* that:

> *"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in Abdallah bin Wendo and Another Vs Rex (1953) EACA 116 and followed by this Court in the celebrated case of Waziri Amani Vs Republic (1980) T.L.R. 250 regarding evidence of visual identification. The principle laid down in these cases*

> *is that* ***in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight****"* [Emphasis added].

However, when identification is by recognition, it is more reliable than an identification of a stranger. This position was previously considered by the Court in **Philimon Jumanne Agala @ J4 Vs. R,** (Criminal Appeal No. 187 of 2015) [2016] TZCA 278 (22 October 2016, TANZLII) and **Jumapili Msyete Vs. R,** (Criminal Appeal No. 110 of 2014) [2015] TZCA 234 (12 August 2015, TANZLII). In the latter case, we observed that:

> *"Of these types of identification, it has been held that identification by recognition is more reliable than that by strangers or by voice; although even in recognition cases mistaken identification may be made."*

The rationale of having strict proper identification of the accused and the reliabilities of the witness is to avoid possibilities of an innocent person being implicated and punished mistakenly, while leaving the true perpetrators at large.

In respect to this appeal, the identification of the appellant was that of recognition. PW3 stated and it was not disputed that he knew the appellant for a long time. PW3 was firm that he recognized him at the scene of crime. The appellant himself did not dispute to have reached at the scene but he stated that it was in response to the alarm which was raised. He even stated that they had a sort of conversation at the scene of crime.

The appellant went further to justify his innocence in respect to the delay to arrest him. While the offence was committed on 12/06/2014, he was arrested on 18/06/2014. He maintained that he did not flee anywhere and that if he was really the first suspect, he would have been arrested on the same date at the scene of crime as he was readily available.

It is a principle of law that where the accused is available, unexplained delay to arrest him raises reasonable doubt on his involvement. See **Juma Shabani @ Juma Vs. R**, Criminal Appeal No. 168 of 2004; **Chakwe Lekuchela Vs. R**, Criminal Appeal No. 204 of 2006 and **Samuel Thomas Vs. R**, Criminal Appeal No. 23 of 2011 (all unreported).

In this appeal, the learned State Attorney argued that the appellant fled to an unknown place that is why he was not arrested in time. This fact

was never found in the testimony of witnesses before the trial court. Besides, the allegations that the appellant went into hiding is not supported by the evidence on record. We therefore, agree with Mr. Shilatu that the issue of proper identification by recognition raised in the testimony of PW3 when considered together with the unexplained delay to arrest the appellant, depict reasonable doubt on involvement in the commission of the offence.

It is settled principle of law as stated earlier that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made. [See **Shamir John Vs. R,** Criminal Appeal No. 166 of 2004 (Unreported)]. We therefore, allow the first ground because in view of the evidence on record the alleged identification of the appellant at the scene of crime was not watertight.

With regard to the appellant's complaint in the second ground on uncertainty of the date of death of the deceased, we agree with the submission by Mr. Mashurano that according to the evidence on record, while the offence was committed on 12th June, 2014, death occurred on

17th June, 2014. Therefore, the evidence of PW4 during cross examination which mistakenly indicated 14th June, 2014 as the date of death of the deceased cannot displace the other prosecution witnesses' evidence, particularly PW3 and exhibit P1 which shows that the deceased died on 17th June, 2014. In the event, we take the evidence of PW4 on this matter as a minor error which did not vitiate the authentic date of death of the deceased.

It is equally a settled law that a person may cause injury to another person on a particular date and when that other person dies later, he shall still be liable for the death. In this regard, section 205 of the Penal Code provides thus:

> *"205. (1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.*
>
> *(2) For the purpose of reckoning the period referred to in subsection (1)-*
>
> *(a) the period shall include the day on which the last unlawful act contributing to the cause of death was done."*

The reproduced provision states in clear terms that a person who commits a wrongful act or omission to any person and that act or omission

results on the death of the victim within the period of a year and a day, the person will be deemed to have killed the other. As between the date of wrongful act and the date of death, it is clearly settled in our law that the date of a wrongful act is the date of committing the murder even if the death may not have occurred instantly. In the case of **Mwita Nyamhanga Vs. R,** [1992] T.L.R. 118, the perpetrator had inflicted a grievous cut wound to the deceased on 14/4/1986 who later died after eleven days, that is, on 25/4/1986. Erroneously, the charge indicated the date of committing the offence as 25/04/1986. The Court remarked as follows:

> *"Now, 25/4/1986 was the date the deceased died but that was not the date when the appellant inflicted the injury on the deceased. That was 14/4/1986, as already said. It has been established long time ago by R. v. Lujo s/o Mgombe (1946) 13 EACA 156 that the date of the charge is that of the unlawful act and not that of the death."*

In the circumstances, we hold that the contradictions among the prosecution witnesses on the date of death of the deceased is minor and did not go to the root of the case. Consequently, we dismiss the second ground of appeal.

In regard to the third ground on the failure by the prosecution to call material witness, we are aware of the submission of the learned State Attorney on the importance of the provisions of section 143 of the Evidence Act and the decision of the Court in **Hamadi Mzamilo Marafya Vs. R,** (Supra). We also, agree with Mr. Mashurano that the number of witnesses do not matter, but the weight and reliability of the evidence to prove the offence.

We are also alive to the position that in law, no specific number of witnesses is required to establish a fact as even a single witness may suffice so long as the contents of his testimony proves the alleged offence and that the prosecution has the liberty to choose witnesses to prove the case as stated in **Tafifu Hassan @ Gumbe Vs. R,** (Criminal Appeal No. 436 of 2017) [2021] TZCA 436 (27th August 2021, TANZLII). However, the said position is never absolute but it is subject to another principle of law that, failure by a party to call an important or material witness who is within reach without any reason may entitle the court to draw an adverse inference against that party on a particular fact. For this stance, see for instance, the case of **Aziz Abdallah Vs. R,** [1991] T.L.R. 71 among many.

At this juncture, a question may be, who is a material witness. The answer is subjective to the scenario of each case based on flow of events. It may be a victim, or a first person to reach at the scene of crime, or any person according to whose knowledge every other witness refers back to him. In other words, such person should be without whose testimony, the material facts and a flow of events breaks in and raise unanswered questions. **The Black's Law Dictionary, Eighth Edition** at page 1634 defines the term 'material witness' to mean; *"A witness who can testify about matter having some logical connection with the consequential facts".*

In the case at hand, since the evidence of PW3 and PW4 leave no doubt that the hamlet chairman and Godfrey Temba were among the persons who were at the scene of crime, they were material witnesses. Godfrey would have helped to support the evidence of PW3 that they recognized the appellant as among the suspects who inflicted injury to the deceased which caused his death. This would have disarmed the appellant's defence that he went to the scene of crime in response to the alarm and his proposition that he was charged because he told the two brothers to release Reginald who is at large. Godfrey Temba would also have shaded light on whether together with PW3 they reported the

incident to the police and the hamlet chairman and whether they mentioned the appellant's involvement in inflicting injury to the deceased and why he was not arrested immediately while they had recognized him.

The hamlet chairman could also have assisted the prosecution on whether he was told about the involvement of the appellant in the commission of the offence and if in his letter to the police, which was not tendered at the trial, he noted that fact as he was the first person in authority to be notified of the incident after he went to the scene of crime. Accordingly, we draw an adverse inference against the prosecution case and hold that the third ground is merited.

With regard to the fourth ground of appeal, we are of the settled view that since the evidence of identification by recognition was not watertight and that material witnesses were not summoned, then the offence of murder was not proved against the appellant beyond reasonable doubt.

It is acknowledged that always the burden of proof in criminal trials rests on the shoulders of the prosecutor and the standard is beyond reasonable doubt. For clarity, see sections 3 (2)(a) of the Evidence Act and the decisions of the Court in **Makolobela Kulwa Makolobela and Eric**

Juma alias Tanganyika Vs. R, [2002] T.L.R. 296 and **Akwino Malata Vs. R** (Criminal Appeal No. 438 of 2019) [2021] TZCA 506 (21st September, 2021, TANZLII), among many.

In **Samson Matiga Vs. R,** Criminal Appeal No. 205 of 2007 (unreported) which was followed in the case of **Daimu Daimu Rashid @ Double D Vs. R,** (Criminal Appeal No.5 of 2018), [2019] TZCA 366 (4th November, 2019, TANZLII), the Court held:

> *"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence."*

As a matter of principle therefore, reasonable doubt should ordinarily be resolved in favour of the accused.

In the circumstances of the appeal before us, we are settled that had the trial court seriously scrutinized the evidence on record, it would have arrived to a conclusion we have reached that the prosecution case was not

proved beyond reasonable doubt. We thus, allow the fourth ground of appeal.

In the end, save for the second ground of appeal which we have dismissed, we find merit in the appeal and hereby allow it. We quash the conviction and set aside the sentence of death imposed on the appellant. Consequently, we order that the appellant should be immediately released from custody unless he is otherwise lawfully held.

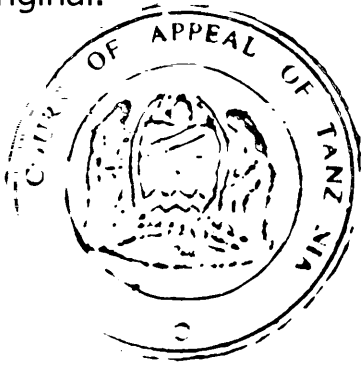
DATED at **MOSHI** this 8th day of May, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Judgment delivered this 9th day of May, 2024 in the presence of the Appellant in person and Mr. Ramadhani Kajembe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL