IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., MSOFFE, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 49 OF 2003

1. **CLEMENT JOHN SAVIMBI]**
2. **HAJI SALUM SELEMANI LUKINGA] ..... APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kimaro, J.)

dated the 10th day of December, 2002
in
Criminal Sessions Case No. 25 of 2000

JUDGMENT OF THE COURT

KAJI, J.A.:

In this appeal, Clement John Savimbi and Haji Salum Selemani Lukinga, who are the 1st and 2nd appellants respectively, are appealing against the decision of the High Court (Kimaro, J.) in Criminal Sessions Case No. 25 of 2000 whereby they were charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16, and were sentenced to death.

Briefly, the facts giving rise to the case which were accepted by the trial court are as follows:-

During the night of 25.9.1996, the dwelling house of the deceased Kidege Ramadhani @ Rashidi Kidege @ Rashidi Jirani Kidege was invaded by a group of

bandits who were armed with machetes and one of them with a gun. The bandits broke the main door using a huge stone and stormed into a room where Masudi Hamisi (PW2) was sleeping. The room was dark, and so Masudi could not identify them at that stage. The bandits dragged him out and ordered him to show them where the money was.

PW2 showed them a wrong room where some bicycles and maize were stored. While the bandits were busy breaking the said room, PW2 sneaked stealthily and hid himself in a toilet which was dark but with an electric bulb just outside. The door of the toilet had an opening through which he peeped and saw whatever was taking place outside.

After breaking the store room, the bandits stole some bicycles and invaded the room where the deceased and his wife were sleeping. One of the bandits who had a gun shot the deceased on his chest. The deceased died instantly.

It is the prosecution contention that, through the opening on the door of the toilet, and electric light outside and inside the deceased's room, PW2 identified the appellants to be among the bandits who murdered the deceased.

The appellants denied the accusation, and the 2nd appellant raised a defence of an alibi. But at the end of the day they were found guilty, convicted and sentenced as above.

Before us the appellants are advocated for by Mr. Kweka, learned counsel.

The respondent Republic is represented by Mr. Magoma, learned Principal State Attorney.

Mr. Kweka preferred two grounds of appeal, namely:-

> That the learned trial judge erred in law in holding that there was proper identification of the first appellant.
>
> That the learned trial judge erred in law and in fact in holding that there was sufficient and credible evidence to link the second appellant with the death of the deceased.

Arguing the first ground of appeal, Mr. Kweka contended that, the event occurred at night, and PW2 was cut with pangas, and that under the circumstances PW2 was terrified and could not make a proper identification of the appellants among the five bandits he saw. Secondly, that PW2 could not have identified the appellants while emerging from the deceased's room because the deceased's room was adjacent to the toilet where he had hidden himself. Thirdly, that PW2 could not give any physical description of the appellants to the police and instead he simply described them by the garments they were wearing which were not tendered in court as exhibit. The learned counsel further contended that, some clothes with some blood stains which were found in the first appellant's room belonged to Mogella who admitted the same to the police. The learned counsel also wondered why the deceased's wife was not called as a witness.

Arguing the second ground of appeal Mr. Kweka contended that, since the conditions at the scene were not conducive for a proper identification, and that for that reason the appellants were not properly identified at the scene, the purported identification at the Identification Parade did not save any useful purpose. The learned counsel further contended that, the second appellant's defence of alibi was supported by Asante Mohamed Sultan (DW3) who testified that, on the material day, he was at Gairo on a business tour with the second appellant, and that, the learned trial judge erred in rejecting it.

On his part, Mr. Magoma, learned Principal State Attorney, did not support the conviction on the grounds submitted by the appellants' learned counsel.

The crucial issue in this case is that of identification, that is, whether the appellants were properly identified.

It is common ground that when the bandits invaded the deceased's house, it was late at night when PW2 and the deceased were asleep.
It is also common ground that, when the bandits invaded PW2's room, the room was dark, and so PW2 could not identify any of them at that stage.

It is equally common ground that, even up to the time when the bandits were breaking the door leading to the deceased's room, PW2 had not yet identified any of them, and that he could not identify them even at that stage because, according to his evidence, they were facing in the opposite direction. The only time when PW2 is alleged to have identified the appellants is when they emerged

from the deceased's room after killing the deceased, and that he identified them by peeping through an opening on the toilet door, and that he identified them through electric light which was in the deceased's room and outside. And further that, he identified them visually as by then they were facing where he was.

There are numerous decisions by this Court emphasizing that evidence of visual identification is of the weakest kind and most unreliable, and 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. Or in other words, it is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance. The following cases are just some of them. **WAZIRI AMANI v. R** (1980) TLR 250, and **RAYMOND FRANCIS v. R** (1994) TLR 100.

In the instant case, we ask ourselves: under the circumstances of the case as described above, were the conditions favourable for a correct identification, free from all possibilities of mistaken identity? And were the appellants properly identified?

We have carefully considered the conditions prevailing at the material time, and the position where PW2 was.

As we have already observed above, the only time when PW2 is alleged to have identified the appellants, is when the appellants emerged from the deceased'

s room, and that the deceased's room was just opposite to the toilet where he had hidden himself. But this statement appears to be far from the truth in view of the sketch plan of the scene Ref. No. MO/IR/6147/96 MURDER drawn by No. A.8350 D/Sgt Deus Mlay on 26.9.96 which shows the deceased's room to be adjacent to the toilet where PW2 was, with the doors facing westward. In that position, it was not possible to identify properly whoever emerged from the deceased's room facing westward. We note from the record that at some stage during the hearing, the trial court requested PW2 to draw a sketch plan of the scene. PW2 drew one which is quite different from the one drawn by No. A 8350 D/Sgt Deus Mlay. In his sketch plan, PW2 drew the deceased's room being on the opposite direction to the toilet where PW2 was, with the doors facing each other. It is this sketch plan which influenced the learned trial judge and held that the appellants were properly identified. In her judgment the learned trial judge said:

> "The sketch plan drawn by the witness (meaning PW2), and the explanation given, show that the circumstances for identification were favourable and there could not be any mistaken identity of the accused."

We are satisfied that, it is this sketch plan which misled and influenced the learned trial judge to hold that the appellants were properly identified.

In our view, we hold that the appellants were not properly identified for the following reasons;

One, that PW2 who had been cut with pangas, threatened and forced to show where the money was, was in a terrible horrified situation and could not make a proper identification of the killers. Two, according to the sketch plan of the scene drawn by No. A 8350 D/Sgt Deus Mlay it was impossible for PW2 to identify properly the appellants when emerging from the deceased's room. Three, the sketch plan, drawn by PW2, which was relied on by the learned trial judge in holding that the appellant were properly identified, did not properly form part of the record/evidence for the following reasons:-

Firstly, it was not proper to treat PW2 as a prosecution witness who witnessed the event and the investigator at the same time.

Secondly, PW2 was requested to draw the sketch plan after he had been cross examined by the defence counsel, and after being asked questions by assessors, and after being re-examined by the learned State Attorney. The record is silent whether after drawing the sketch plan the learned defence counsel, learned State Attorney and the assessors were given an opportunity to ask him questions. If the learned defence counsel was not given an opportunity to cross examine him on this, as it appears, this prejudiced the appellants, especially that it was the one which was heavily relied upon by the learned trial judge in holding that they were properly identified by PW2.

We are aware that the appellants were purportedly identified at the Identification Parade. But an identification at an Identification Parade

pre-supposes that the person to be identified there was identified at the scene of crime, which is not the case in the instant case.

In convicting the appellants, the learned trial judge considered also some other factors, such as some blood stained clothes found in the first appellant's house, and the defence of alibi by the second appellant which she dismissed. In our view, the explanation given by the first appellant how those clothes came into his house, and the allegation that Mogella admitted the same to be his, was reasonable for the following reasons:

One, the fact that the blood on those clothes was of group "A" the same as that of the deceased, is not conclusive evidence that the blood was that of the deceased, especially that Mogella's blood group was not examined.

Two, those clothes were found on the bed awaiting washing. There was an allegation by PW1 ASP Liberatus Sabas that they were found under a mattress. But as properly pointed out by Mr. Magoma, learned Principal State Attorney for the respondent Republic, that, since the police decided to search the first appellant's room in the absence of a civilian, the first appellant's explanation that they were on the bed awaiting washing should be believed.

Three, in our view, the defence of alibi raised by the second appellant and supported by DW3 was reasonable and should have been given the weight it deserved, although given without prior notice, as per section 194 (6) of the Criminal Procedure Act, 1985.

Since the condition were not favourable for a correct identification for the reasons we have already stated above, it is our holding that, the appellants were not properly identified. Also, since the other evidence is not strong enough to found a conviction for the reasons stated, the appellants' conviction cannot be left to stand. As observed earlier, Mr. Magoma, learned Principal State Attorney, pointed out that the Republic is not supporting the conviction, and, in our view, rightly so.

In the event, and for the reasons stated, we allow the appeal, quash the conviction and set aside the sentence. The appellants are to be released from prison forthwith unless lawfully held.

DATED at DAR ES SALAAM this 19th day of October, 2005.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTR

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AT DAR ES SALAAM

CRIMINAL APPEAL NO. 49 OF 2003

1. CLEMENT JOHN SAVIMBI]
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(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

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dated the 10th day of December, 2002
in
Criminal Sessions Case No. 25 of 2000
Between
The Republic..... Prosecutor
Versus
1. Clement John Savimbi]
2. Haji Salum Selemani Lukinga]..... Accused

In Court this 19th day of October, 2005

Before: The Honourable Mr. Justice A.S.L. Ramadhani, Justice of Appeal
The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal
And The Honourable Mr. Justice S.N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on the 12th day of August, 2005 in the presence of the Appellants AND UPON HEARING Mr. F.L. Kweka, Counsel for the Appellants and Mr. W.C. Magoma, Principal State Attorney, for the Respondent/Republic when the appeal was stood over for judgment this day;

IT IS ORDERED that the appeal be and is hereby allowed, conviction quashed and sentence set aside. The Appellants are to be released from prison forthwith unless they are otherwise lawfully held.

Dated this 19th day of October, 2005.

Extracted on the 19th day of October, 2005.

(S. M. RUMANYIKA)
DEPUTY REGISTRAR