

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**



(CORAM: MUNUO, J.A., KAJI, J.A., And KIMARO, J.A.)

CRIMINAL APPEAL NO. 207 OF 2006

**AIDAN MWALULENGAAPPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

**(Appeal from the decision of Principal
Resident Magistrate's Court
(Extended Jurisdiction) at Dodoma)**

(M.C. MZUNA, PRM E/J)

in

PRM Criminal Session NO. 39 Of 2006

JUDGMENT OF THE COURT

15TH & 22ND JUNE, 2007

KIMARO, J. A.

On 25th December, 2000, a Christmas day, one Adam Malingumu, (PW4) a Village Executive Officer then, of Singonali Village, Mpwapwa District, Dodoma Region, hosted a party for Christmas celebrations. Among the people who attended the

celebrations were Silvano S/O Malendo, (PW1), Samora S/O Nzala(PW2), Shida S/O Ngwada (PW3) and Elia Malendo who is now a deceased. At the neighborhood of PW4, a fight occurred between persons identified as Petro Lulenda and Gilgert Ngwada while the celebrations were going on. Bahati Ngwada, a brother of Gilbert Ngwada also joined the fight to assist his brother. Fortunately people intervened and the fight was quelled.

The deceased, PW1, PW2 and PW3 left for their homes at about 7.00 p.m. and by then it was dark. On their way, the deceased wanted to get views about the fight between Peter Lulendo and Gilbert Ngwada and so a discussion on the fight started among them and they talked loudly. PW2's views were that the fight was a balanced one as it involved persons from rich families. The deceased on the other hand thought that Peter was to blame for instigating the fight. PW2 said he was positive that those involved in the fight would settle the matter themselves. The deceased doubted that likelihood taking place given the position occupied by the appellant who was the Village Chairman. The deceased thought that the appellant's position would make Peter who was his son emerge a winner.

While the discussion was still on, the four of them heard someone asking; who are you? They all stopped and the deceased replied by another question, who is asking that question? The

person also asked another question; why are you not answering the question? From the testimony of PW1 he identified the person who was raising the questions as the appellant who was their Village Chairman and he did so by visual and voice identification. The question of the identification of the appellant will feature prominently in this judgment later. At the moment it suffices to say that it was alleged that the deceased was shot dead in the process of the questions and answers that ensued between the deceased and his group and the person who intervened in their discussion. It was in that process the appellant was arrested and arraigned for the information of murder of Elia S/O Malenda contrary to section 196 of the Penal Code. The post mortem examination report which was admitted in court as exhibit P2 showed that the cause of the death of the deceased was a ruptured lung due to bullets that lead to severe bleeding.

Apparently, at the trial, the only issue was the identification of the appellant. The prosecution relied substantially on the evidence of identification given by PW1, PW2 and PW3. All the witnesses testified that when the deceased was shot dead, it was dark but they were able to identify the appellant by voice because he was a person known to them before, he was their Village Chairman for a long period and they had heard him talking on several occasions when he conducted meetings. PW1 in particular, said he was very near to the appellant, about five footsteps and he was able to make visual

identification as well. The trial magistrate with extended jurisdiction after cautioning himself on a conviction based on visual identification made under unfavourable conditions, was satisfied that the identification of the appellant was water-tight and was corroborated. The appellant was then convicted and sentenced to death.

Being aggrieved by the conviction and sentence, the appellant has appealed to the Court. He has two grounds of appeal:

1. That the Hon. Principal Resident Magistrate (Ext. Jurisdiction) erred in law in failing to properly direct the assessors wherein he mixed matters of facts and law which negatively influenced their opinions in the case generally.
2. That the Hon. trial Principal Resident Magistrate (Ext. Jurisdiction) erred in fact and in law in not holding that the prosecution side had failed to prove the case against the appellant at the required standard of law.

At the hearing of the appeal, Mr. Paul B. Nyangarika learned counsel appeared for the appellant. The respondent Republic was represented by Mr. Mr. Vicent Tangoh, Learned State Attorney.

Mr. Nyangarika opted to start with the second ground of appeal. While he agreed that the case for the prosecution in the trial court rested on the identity of the appellant, he vehemently argued that the conditions for identification were very unfavourable to the extent that it was wrong for the trial magistrate with extended jurisdiction to convict the appellant on such evidence because it was not water-tight and there was no corroboration. He contended that PW1 was the only witness, among the three identifying witnesses, who said he was able to make visual identification of the appellant. Yet, the same witness admitted that it was dark. At the same time, PW2 and PW3 admitted in their evidence that it was very dark and they were not able to make visual identification of the appellant. Mr. Nyangarika wondered how the evidence of the witnesses who were together could contradict itself.

The learned counsel pointed out that visual identification is of the weakest kind and most unreliable unless all possibilities of mistaken identity are ruled out and there must be corroboration which was not the case in the appeal before the Court. He cited the case of **Waziri Amani Vs R** [1980] TLR 250 to support his argument.

As regards voice identification, which all the identifying witnesses relied upon as a way of identifying the appellant, the

learned counsel submitted that identification by voice per se cannot form a basis for conviction. He cited the case of Nuhu **Selemani Vs R** [1984] TLR 93 to bolster his point.

Mr. Nyangarika traversed the prosecution evidence to see whether there was corroborative evidence to the identification purported to have been made by the identifying witnesses. (See **Jumane Omary @ Karikenye Vs Republic** CAT Criminal Appeal No. 142 of 1999). He said the evidence of Assistant Inspector Godfey, (PW6) a firearm examiner, confirmed that the pellet removed from the body of the deceased, tendered in court as exhibit P1, and relied upon by the trial magistrate as corroborative evidence, was of no help to the prosecution case. PW6 said there was no certainty that it was fired from the appellant's firearm which was seized during the investigation of the case and admitted in court as exhibit P3.

Another weakness in the evidence of the identifying witnesses pointed out by Mr. Nyangarika was their failure to mention the name of the appellant to the Village Executive Officer (VEO) (PW 4), at the time the matter was reported to him. The matter was reported to PW4 by one Syprian Malenda a brother of the deceased. PW4 went to the scene of crime where other villagers gathered. At the same time, the appellant, to whom PW4 reported the death of the deceased in his capacity as the Village Chairman also went to the scene of crime. The learned counsel was of the opinion that the

explanation given by the witnesses that they feared PW4 and the appellant because they were both administrators, and PW4 was likely not to take any action, was far from convincing. His conclusion was that the whole of the prosecution case was based on mere suspicion and he prayed that the suspicion be resolved in favour of the appellant, and the appeal be allowed.

The learned State Attorney supported the conviction and sentence. He too, admitted that the prosecution case rested on the identification of the appellant. Although he agreed with the decision of **Waziri** (supra), Mr. Tangoh argued that the trial magistrate took the necessary precaution before making a finding that the appellant was correctly identified, meaning that the trial magistrate made a correct analysis of the evidence for the prosecution and arrived at a correct conclusion.

According to the learned State Attorney, PW1 was at a distance of five paces, a conversation took place before the shooting hence there was a time lapse before the commission of the offence, the appellant was well known before as a Village Chairman, his voice was heard several times in meetings and none of the witnesses had any grudges with the appellant. He contended that all these factors made the identifying conditions favorable.

On voice identification and the case of **Nuhu Selemani** (supra), the learned State Attorney submitted that the facts in the two cases can be distinguished. Unlike in this case where the identifying witnesses had time to identify the voice of the appellant, in the case of **Nuhu Selemani** the identifying witness did not have that advantage. He prayed that the appeal be dismissed or else any suspicion noted in the prosecution evidence should be taken to be a minor contradiction which should not affect the outcome of the case.

Both Mr. Tangoh, learned State Attorney for the Republic and Mr. Nyangarika, learned counsel for the appellant submitted correctly that the case for the prosecution rested on the identification of the appellant.

The question before us is whether the identification of the appellant could be said that it left no doubt or that there could be no mistaken identity. With greatest respect to the learned State Attorney, we are very far from being convinced that the evidence of the identification of the appellant left no room for mistaken identity. Among leading authorities on identification is the case of **Waziri Amani Vs Republic** (supra). The Court while deciding on the question of identification said:

The first point we wish to make is an elementary one and this is that evidence of identification, as

Courts in East Africa and England have warned in a number of cases, is of 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 water-tight.

The Court in underscoring what conditions should be considered said:

We would for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters which the trial judge should direct his mind before coming to a definite conclusion on the issue of identity.

The learned trial resident magistrate with extended jurisdiction properly addressed his mind to the precaution which should be taken

before convicting on evidence of visual identification but then, he failed to make a correct analysis of the evidence. One element which features prominently in the evidence of the three witnesses is the contradiction between PW1 and both PW2 and PW3 on the state of light when the offence was committed. PW1 said there was moonlight which was mixed with clouds but both PW2 and PW3 said **it was dark**. For instance when PW2 was cross examined by the Court on the state of light he replied;

It was dark....Due to darkness, I could not even identify which colour of cloth one had put on.

PW3 gave the same answer when he was cross examined by one of the assessors:

I failed to identify him by shape because **it was very dark** not that it was due to some bushes.

The trial magistrate made a finding that the identification of the appellant was water-tight, the apparent contradiction in the three identifying witnesses notwithstanding. We are of a considered opinion that the contradiction in the evidence of the three witnesses, who were at the scene of crime at the same time, cannot be explained. It is elementary that light is the primary source of help in seeing. In this respect, we do not agree with the learned State

Attorney that under the circumstances where there is such apparent contradiction in the prosecution evidence, mistaken identity could be ruled out.

Moreover, when PW4 and other villagers gathered at the scene of crime, the witnesses were present. Surprisingly, none of them came forward to name the appellant as a culprit when PW4 made a call for those who knew the culprits to come forward. It is very doubtful to believe that the witnesses who claimed to be at the scene of crime and saw the appellant committing the offence could keep quite under pretext that they feared that no action would be taken against the appellant by PW4 simply because they both performed administrative duties in the local government. This is more so when given the fact that PW1 was a brother of the deceased. Looking at the evidence of PW2 and PW3 closely, we are inclined to agree with Mr. Nyangarika that their evidence appear to suggest that PW2 and PW3 said they identified the appellant simply because PW1 mentioned **Mwenyekiti** at the time they were exchanging questions and answers with the person who shot the deceased.

The trial magistrate also erred in holding that the pellet which was removed from the body of the deceased corroborated the evidence of identification. The learned counsel for the appellant pointed out, correctly in our view, that the evidence of PW6 confirmed that there was no certainty that the pellet was shot from

the shotgun of the appellant. In this regard, the fact that the appellant had a gun was not conclusive that he was the one who shot the deceased. The evidence showed the appellant was not the only person in the village with a gun.

Indeed, the prosecution evidence was mere suspicion. The prosecution has a duty to prove the charge against the accused beyond all reasonable doubt. See the case of **Christian s/o Kaale and Rwekiza s/o Bernard Vs R** [1992] TLR 302 where the Court held that an accused ought to be convicted on the strength of the prosecution case. It is not true, as suggested by the learned State Attorney, that the discrepancy in the prosecution evidence is slight. The discrepancy is a big one. A suspicion cannot sustain a conviction. It entitles an accused person to an acquittal, on a benefit of doubt. Since the identification was not sufficient to sustain the appellant's conviction, we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant.

As the second ground of appeal is sufficient to dispose of the appeal, there is no need to go into the first ground of appeal.

The trial court, upon conviction of the appellant, also forfeited his shotgun with serial No. 213442L which was admitted in court as exhibit P3. Since the appeal has been allowed, the forfeiture order is equally quashed and set aside. The shotgun should be restored to

the appellant. The appellant is to be released from prison forthwith, unless he is held there for another reason. It is so ordered.

DATED at DODOMA this 22nd day of June, 2007.

E.N. MUNUO

JUSTICE OF APPEAL



S.N.KAJI

JUSTICE OF APPEAL

N.P.KIMARO

JUSTICE OF APPEAL

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


S. M. RUMANYIKA
DEPUTY REGISTRAR