

- Visual & voice identification
- witness to report the matter immediately after occurrence.
- Torch in moonlight an inference of moonlight weakness.

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

(CORAM: MROSO, J. A., NSEKELA, J. A. AND MSOFFE, J. A.)

CRIMINAL APPEAL NO. 101 OF 2003

BETWEEN

JAMES CHILONJI..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

**(Appeal from the Conviction and Sentence of the High
Court of Tanzania at Iringa)**

(Mshote, J.)

dated the 5th day of April, 2001

in

Criminal Sessions Case No. 37 of 1995

J U D G M E N T

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MROSO, J. A.:

The appellant, James Chilonji, was one of two persons who were jointly prosecuted in the High Court at Iringa for the murder of

— voice identification
— visual identification

Dr. J. A. Mshote

one Raphael Kibiki. The co-accused was acquitted but the appellant was convicted of murder, contrary to Section 196 of the Penal Code, as charged. He was sentenced to suffer death by hanging as is usual for people convicted of murder. He was convinced that the conviction was not justified and has appealed to this Court. Mr. Mkwata, learned advocate, filed three grounds of appeal on behalf of the appellant and appeared at the hearing of the appeal to argue it. The respondent Republic was represented by Mr. Boniface, learned State Attorney.

The three grounds of appeal are, in substance, as follows:- First, that the trial judge erred in law in relying on the evidence of PW1 – Daria Raphael Kibiki and PW2 – Anastazia Lutindi, all of which was unsatisfactory. Second, that the unsatisfactory evidence of those two witnesses could not have provided needed corroboration as the trial judge believed. Third, that the trial judge should have accepted as true the defence evidence instead of rejecting it without assigning any reasons. Mr. Boniface on the other hand supported

the conviction which he considered to have been well justified by the evidence which was adduced.

The deceased was killed by people, believed to be three in number, during the night of 29th May, 1994. Before he met his death he was sleeping in a house with his two young daughters and a young son. Apparently, the deceased was in his own room separate from that of his children. According to one of the girls, PW1 – Daria, at about midnight she heard someone knock on the door to the house and as the deceased opened the door he was attacked and dropped down. He, however, managed to rise from the ground and went outside. PW1 claimed she was able to recognize the voice of the intruder to be that of the appellant. PW1 also went outside and hid in a nearby kitchen. As there was moonlight she was able to recognize again the appellant and another who became the second accused before the trial court. The appellant was said to have put on blue short trousers and a traditional ^{Hele} Masai cloth "mgolole". She was not able to know the kind of clothes which the second accused put on. A little later she heard the appellant who had entered the house

ask her younger sister to surrender money to him, which she could not do. The bandits left the home carrying with them a bicycle from the main house. One of the bandits had a torch with him.

PW2 – Anastazia Lutindi, was a ten cell leader and said she lived in a house which was only six paces away from the house of the deceased. She said that on the night of 29th May, 1994 she was awakened by alarm from outside. When she went outside she saw three people assaulting a person who she came to learn was the deceased. One of those three people had a torch which he shone at her and she identified him to be the appellant who frequented her home to drink pombe. The appellant was wearing a pair of blue short trousers and a traditional "maasai" ^{heine} cloth. She was unable to identify the other two bandits. Subsequent to the incident the appellant continued to go to the home of PW2 to drink pombe. The witness said she did not report to the police or to any one in authority the incident in which the deceased was attacked and died. The truth, however, was that in her statement to the police she mentioned the appellant.

Mr. Mkwata has argued that the evidence of PW1 and PW2 was not as reliable as the trial judge believed it to be and on which he based the conviction of the appellant. He says that the claim by PW1 that she recognized the appellant by voice is doubtful. No ground was laid to show how the young witness could have gained familiarity with the voice of the appellant. In fact she said she had never talked with the appellant. At any rate, criminals can disguise their voices to hide their true identity. As for the claim by both PW1 and PW2 that they were able to recognize the appellant by appearance, the learned advocate contended that the claim was not persuasive because if the claim was that the moonlight facilitated easy identification, that could not be true. If in fact there was moonlight, it must have been so weak that the bandits had to use a flashlight (torch). If PW2's claim was that it was the flashlight which enabled her to identify the appellant, that could not be because a flashlight (torch) enables the person using it to see the object or person lit on and not the other way round.

We think Mr. Mkwata has a valid argument., Voice identification is inherently unreliable because of the ease with which it can be disguised. As for PW1, there was no reliable evidence which could give assurance that the young girl – Daria – had gained such familiarity with the voice of the appellant as to be able to recognize it unmistakably. The mere fact that she had known him in the same year of the incident and had been seeing him in the village was not enough. It would have been different if PW2 had made the claim of recognizing the appellant's voice, taking into account that he used to frequent her home to drink pombe. But she did not hazard that claim.

voice
is not
reliable

We also agree with Mr. Mkwata that physical identification was doubtful as well. There would have been no point for the bandits to use a torch if there was sufficient moonlight. The inference is that the moonlight was poor and a torch was needed. Such poor light from the moonlight would not be considered sufficient for accurate identification. No reliance, therefore, should be placed on identification made in such a condition. The dangers of relying on

moonlight
is not
sufficient
for
identification

visual identification were well explained in the **Amani Waziri v. R.**
[1980] TLR 250 case.

The credibility of PW2 is further weakened by her conduct subsequent to the death of the deceased. As a neighbour of the deceased and also as a ten cell leader it is baffling that she would keep in the closet of her heart the knowledge about the murderers of the deceased without informing the police at the earliest opportunity. Instead, the supposed murderer felt safe enough to continue going to her home to drink 'pombe'. As a result the person she claimed was the murderer was arrested two weeks after the event. We think that is not the conduct of a truthful witness.

Although it was said by both PW1 and PW2 that the person who fatally attacked the deceased wore blue short trousers and a traditional "maasai" cloth (mgolole), there was no evidence that the appellant had such clothes or used to put on such clothes. So, there was no evidential connection between those clothes and the appellant.

*clothes
wore
belonged
to the
appellant*

*never a Maasai but
a Punda Uhe cloth!!*

We are persuaded, therefore, that it is not correct, as stated by the trial judge in his judgment, that "there is more than enough evidence to connect" the appellant with the murder of the deceased. We hold that there is merit in the first and second grounds of appeal.

Finally, although the trial court gave a brief summary of the defence evidence, it did not discuss it and or give reasons for rejecting it. In his defence the appellant said in effect that if he had been identified by PW1 and PW2 as the person who killed the deceased, there could be no reasonable explanation why it took the period from 29/5/1994 until 13/6/1994 to be arrested on suspicion that he was the murderer. Furthermore, if he knew that PW1 and PW2 had recognized him at the scene of crime it would have been extremely foolhardy for him to continue visiting the home of PW2 which was only six paces away from the house of the deceased where PW1 lived.

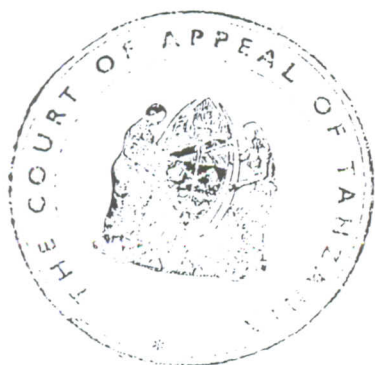
The trial judge did not advert to those aspects of the defence case as he should have done. It is our considered opinion that had

the trial judge evaluated the evidence for the prosecution and for the defence critically he would not have been so settled in his mind that the guilt of the appellant had been established beyond a reasonable doubt. We think there are serious doubts if in fact it was the appellant who committed the murder and it will be unsafe to sustain the conviction.

We allow the appeal and the appellant is to be set free forthwith unless he is held for some other lawful cause.

DATED at MBEYA this 21st day of May, 2004.

J. A. MROSO
JUSTICE OF APPEAL



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

P. H. Mafuru


S. N. MAFURU
Ag. DEPUTY REGISTRAR