

TANZANIA / JUDGMENT

abel orua matiku others vs republic

2024 tzca 78 21 february 2024

COURT
TZCADECIDED
21 February 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CRIMINAL APPEAL NO. 441 OF 2020
fCORAM: JUMA, CJ., MWAMPASHL J. A. And MLACHA, J.A.I ABEL ORUA @ MATIKU..... .1st
APPELLANT MAKARANGA ABEL..... 2 nd APPELLANT ISSA RAMADHAN EMMANUEL 3rd
APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court
of Tanzania at Musoma) (MugetaJ.) dated the 11th day of September, 2020 in Criminal Sessions
Case No. 171 of 2017 JUDGMENT OF THE COURT 14th & 21st February, 2024 MWAMPASHL J.A.:
The appellants, namely; Abel Orua @ Matiku, Makaranga Abel and Issa Ramadhan Emmanuel,
hereinafter to be referred to as the 1st, 2nd and 3rd appellant respectively, were charged and
convicted of the offence of the murder of Karega Stephen (the deceased) contrary to section 196
of the Penal Code [Cap 16 R.E 2002, Now R.E. 2022] (the Penal Code) by the High Court of
Tanzania sitting at Musoma (the High Court). It was the Prosecution's case that, on 21.09.2016, at
Mmahare Village, within the District of Musoma in Mara Region, the appellants jointly and
together murdered the deceased. Upon conviction, whereas the 1st appellant was sentenced to
suffer death by hanging, the 2nd and 3rd appellants, whose age at the commission of the offence
was below 18, were sentenced to detention during the President's pleasure in terms of section 26
(2) of the Penal Code. The evidence in support of the charge came from four prosecution's
witnesses, namely> Deborah Hamis (PW1) the wife of the deceased, Dr; Andrew Rweyendera
(PW2), Albinus Mato (PW3) and Chacha Msafiri (PW4). The prosecution also relied on one
exhibit, that is, the post mortem report (Exhibit PI). On their part, the appellants defended
themselves as DW1, DW3 and DW5 respectively. They also called two witnesses on their side
namely; Ruwa Buganga Musira (DW2) and Julius Orua (DW4). The material factual background
that led to the prosecution and the eventual appellants' conviction, is not complicated. According
to PW1 and PW4, on the material evening, at about 19:00 hours, the deceased who, on the next
day, had to attend a criminal trial of Criminal Case No. 56/ 2016 in the Resident Magistrate's Court
at Musoma, in which the 2nd and 3rd appellants were being charged with an offence of assaulting
and causing grievous harm to him, left for Musoma on a hired motorcycle (bodaboda) ridden by
PW4. Upon reaching at Mmahare (hereinafter to be referred to as the first scene of crime), at
about 20:00 hours, PW4 and 2 the deceased were intercepted and stopped by six men who were
armed with machetes. By the light from the motorcycle head and side lamps, I PW4 claimed to
have managed to identify four of the men including the appellants who were not strangers to

him. The 1st appellant ordered the deceased to alight from the motorcycle while attacked him with a machete. Thereafter, PW4 was ordered to turn around and disappear from the first scene of crime. He obeyed the order and rode back to where he had earlier picked the deceased. However, before doing so he saw the deceased being attacked and dragged by the 1st Appellant and his fellows towards the 1st Appellant's house (hereinafter to be referred to as the second scene of crime) which was not far from the road or first scene of crime, while yelling and raising an alarm. Upon getting at the house of the deceased, PW1 reported the incident and named the appellants to PW1 and to the mother of the deceased, one Monja Mkata. About two hours after PW4 had been ordered to get away from the first scene of crime, that is, at 22:00 hours, the Chairman of Mmahare Village (PW3) received a phone call from the 1st appellant who informed him that a thief of his goats had been apprehended at his homestead. PW3 rushed to the 1st appellant's house where he found the deceased who was lying on the ground, profusely bleeding from cutwounds he had sustained all over his body. Over there, there were also two goats, each 3 tied by ropes to each of the legs of the deceased. At the scene, apart from the appellants, there were many villagers armed with traditional weapons. Later, the police came and fetched the 1st appellant and his two goats. The deceased who was rushed to the hospital did not survive, he succumbed to the injuries he had sustained. According to PW2 and the postmortem report (Exhibit PI), the cause of the death was excessive bleeding from the cutwounds resulting into hemorrhagic shock. In his defence, the 1st appellant denied to have been among the six men who allegedly intercepted PW4 and the deceased and who it is said physically assaulted and abducted the deceased at the first scene of crime. He, however, agreed that the deceased was fetched by the police from his homestead but denied to have assaulted and killed him. He claimed that he found the deceased stealing his goats and it was after he had raised an alarm that the mob/villagers responded, apprehended the deceased and physically attacked him. The 1st appellant did also tell the High Court that, the 2nd and 3rd appellants were not present at home at the material time. He maintained that the two were at their uncle's home (DW4) in another village where they had gone since 14.09.2016. This version of the story was supported by DW2 who testified that being the closest 1st Appellant's neighbour, he was one of the villagers who responded to the alarm raised by the 1st appellant and that when he got there, he found the deceased being attacked by a group of people but he did not see the 2nd and 3rd appellants around. In their respective defence evidence, the 2nd and 3rd appellants whose defence was an alibi maintained that on the material night they were at their uncle's place in another village where they had gone since 14.09.2016. They also told the High Court that they were apprehended at Musoma on 29.06.2026 by certain people on accusation that they were thieves. DW4 supported the 2nd and 3rd appellants. He testified that on the material day, that is, on 21.09.2016, the 2nd and 3rd appellants were at his home. He testified that the two had visited and stayed with him from 14.09.2016 up to when they were arrested at Musoma where they had gone to attend the trial of a different case they were facing. After a full trial, the High Court, basing mainly on the evidence from PW4 and PW3, found it proved beyond reasonable doubts that the appellants were the ones who intercepted the deceased and PW4 at the first scene of crime and who physically attacked him before they dragged him towards the 1st appellant's house (second scene of crime) where they continued to attack him hence causing his death. The defence of alibi raised by the 2nd and 3rd appellants was

rejected by the High Court. Having been satisfied that the case against the appellants had been proved to the hilt, the High Court convicted the appellants of the offence of the murder of the deceased as charged and sentenced them in the manner we have alluded to above. Aggrieved by the conviction and sentence, and in support of their appeal, the appellants filed three sets of memoranda of appeal. While the substantive joint memorandum of appeal containing 11 grounds of complaint was filed on 14.12.2020, the appellants filed the first joint supplementary memorandum of appeal consisting of 3 grounds of complaint on 18.04.2023. Yet again, on 02.02.2024, pursuant to rule 73

- (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Mr. Cosmas Tuthuru, learned advocate who had been assigned to represent the 1st appellant, lodged, for the 1st Appellant, the second supplementary memorandum of appeal containing 5 grounds of complaint. At the hearing of the appeal, Mr. Tuthuru, for the 1st appellant, abandoned all the grounds in the substantive memorandum of appeal as well as all the grounds in the first joint supplementary memorandum of appeal filed on 18.04.2023. He retained the second supplementary memorandum of appeal containing 5 grounds from which he also dropped the last two grounds remaining with the following three grounds of complaint:
 1. That, the learned Judge erred in law and fact in convicting the 1st Appellant relying on weak and poor source of light from the motorcycle of PW4, Chacha Msafiri, which was unreliable and unfavourable for proper identification of the 1st Appellant at the scene of the crime.
 2. That, the learned Judge erred in law to rely on PW1 and PW4 to convict the 1st Appellant on the offence charged while these witnesses were not credible enough to be believed by the trial court.
 3. That, failure by the prosecution to call an investigator of the case to testify and to tender a scene of Crime Registrar PF 129 (Appendix "C" to PGO 170) or a sketch map plan of the scene of the crime have drawn as adverse inference to the prosecution case by the trial court. On his part, Mr. Steven Kitale, learned advocate, who represented the 2nd Appellant, abandoned all the grounds in the substantive memorandum of appeal and those in the first joint supplementary memorandum of appeal except for the 5th ground in the substantive memorandum of appeal which was slightly amended by him to read as follows: "That the learned High Court Judge erred in law and fact in sentencing the 2nd and 1st Appellants contrary to the Law of the Child Act [Cap.13 R.E 2019] and the Penal Code [Cap. 16 R.E 2019]". Mr. Stephen Charles Kaswahili, learned advocate, who represented the 3rd Appellant, abandoned all the grounds in the first joint 7 supplementary memorandum of appeal. He also dropped all the grounds in the substantive memorandum of appeal except for the 5th ground which was adopted by him as amended by Mr. Kitale. From the substantive memorandum, Mr. Kaswahili did also retain the 1st, 2nd, 8th and 11th grounds of complaints which read as follows:

1. That, the learned Judge erred in law and in fact in convicting the appellants relying on weak and poor identification by .the light from the motorcycle of PW4 Chacha s/o Msafiri while the criteria o f the identification were not met as the law required.
2. That, the evidence of PW4 Chacha s/o Msafiri who alleged to be a star witness was doubtful, unreliable and not straight enough for the trial court to attach to it much weight in convicting the appellants o f the murder o f Karega s/o Stephen.
8. That, the trial Judge erred in law and in fact in failing to give sufficient consideration and weight to the defence evidence adduced by the appellants including the defence of alibi of the 2ndand J dAppellants.
11. That, the learned Judge erred in law and in fact in convicting and sentencing the appellants while the prosecution side failed to prove the case beyond reasonable doubt Having examined the appellants' grounds of complaint in their totality as demonstrated above, it is our considered view that, in determining this appeal and on the basis of the said grounds, it will be convenient if we adopt and follow the following road map; One, because 8 the 1st ground by both the 1st and 3rd Appellants complain about visual identification by PW4, then the said two common grounds will be dealt with conjunctively as ground one. Two, the complaint on the credibility of PW1 and PW4 which has been raised in common by both the 1st and 3rd Appellants as their 2nd ground of appeal respectively, will also be determined conjunctively as ground two. Three, is the 3rd ground raised by the 1st Appellant that, the case investigation officer was not called to testify or tender the scene of crime register and the sketch map of the scene of crime. Four, will be the defence of alibi as raised by the 3rd Appellant which will be dealt with as ground four. Five, we will deal with the 11thground on the general complaint that the case was not proved to the hilt as ground five. Six and lastly, it will be on the lone ground of complaint raised by the 2nd Appellant questioning the propriety of the sentence imposed on the 2nd and 3rdAppellants which will be determined as ground six. Beginning with the 1st ground of complaint on the PW4's visual identification evidence, Mr. Tuthuru vehemently argued that the evidence as given by PW4 in that respect was not watertight and that the High Court erred in concluding that there was no possibility of mistaken identity. Mr. Tuthuru contended that, in his evidence, PW4 neither gave particulars of his motorcycle and the source of the light nor did he give 9 particulars of the intensity of the light. To cement his argument, Mr. Tuthuru referred us to our decision in Abubakari Hemedi and Another
- v. Republic, Criminal Appeal No. 86 of 2016 (unreported) where we stated that failure by the witness to disclose the source of light and to give particulars of the intensity of the motor vehicle's interior light had disquieting effect on the quality of the visual identification claimed by the witness. It was further argued by Mr. Tuthuru that taking into account the fact that PW4 testified that the incident at the first scene of crime frightened him then the duration of three minutes within which PW4 allegedly, had the culprits in his observation, was not enough for positive identification. He also submitted that PW4 did not even describe the physical appearance of the persons he allegedly identified at the first scene of crime in

terms of their body build, attire or complexion. On the points of PW4 being frightened and failure to describe the physical appearance of the culprits, Mr. Tuthuru relied on our decisions in *Tagara Makongoro and 2 Others v. Republic*, Criminal Appeal No. 126 of 2015 and *Samwel Nyamhanga v. Republic*, Criminal Appeal No. 70 of 2017 (both unreported) respectively. He thus concluded by arguing that the identification evidence by PW4 was not watertight, the criteria for positive identification were not met, and that there were possibilities of mistaken identity. He insisted that the appellants were not positively identified. Mr. Kaswahili subscribed to the submissions made by his learned friend on the first ground of appeal. He however added that PW4's identification evidence was poor as the only source of light at the first scene of crime was the motorcycle from which the intensity of light was not described. He was doubtful if the head lamp of the motorcycle was switched in full. He contended that if it was on lower light then PW4 could not have positively identified the culprits. Placing reliance on our decision in *Chacha Jeremiah Murimi and 3 Others v. Republic*, Criminal Appeal No. 551 of 2015 (unreported), Mr. Kaswahili insisted that the prevailing conditions at the scene of crime was poor for positive visual identification. Mr. Frank Nchanila, learned State Attorney, assisted by Messrs. Evance Kaiza and Sileo Mazullah, also learned State Attorneys, who represented the respondent/Republic, began by expressing his stance that he was strongly resisting the appeal. He then responded to the ground that the identification evidence by PW4 was not watertight by arguing that as it was correctly found by the High Court, the appellants were positively identified at the first scene of crime. He pointed out that according to the testimony by PW4, as it can be seen at page 56 of the record of appeal, ii PW4 gave particulars not only of the source of light but also of its intensity. He contended that PW4's evidence that his motorcycle had three lamps including the head lamp that could light up to 100 metres and the two side lamps that could go up to 20 metres, amounted to description of the intensity of the light. He also insisted that by telling how powerful was the light from the lamps of his motorcycle, PW4 described the intensity of the light. Mr. Nchanila distinguished the case of *Abubakari Hemedi and Another* (supra) and the instant case by pointing out that while in that other case the source of light was not disclosed and the intensity of light was not described, in our case the source, that is, the motorcycle, was disclosed and the intensity was described by PW4. As regards to the argument that PW4 could not have positively identified the culprits within the duration of three minutes, Mr. Nchanila submitted that because the appellants were not strangers to PW4 as he used to know them before, the duration of three minutes was enough for PW4 to recognise the appellants. On the same vein, he discounted the argument that PW4 was frightened to the extent of not being able to positively recognise the appellants. He insisted that PW4 did not tell that he was that much frightened. We were referred to page 57 of the record of appeal where PW4 is on record stating that despite the fact that the 12 appellants were brandishing machetes, he did not run away when he and the deceased were intercepted and stopped at the first scene of crime. Regarding the argument by Mr. Tuthuru that PW4 failed to give the description of physical appearance of the culprits he had allegedly identified at the first scene of crime, it was contended by Mr. Nchanila that as PW4's identification was by recognition because the appellants were not strangers to him,

there was no importance of him describing them by their physical appearance. He referred us to the case of Chacha Jeremiah Murimi and 3 Others (supra) wherein the Court stated that description of physical appearance is important in identification of strangers. Mr. Nchanila did therefore urge us to dismiss the ground of appeal for being baseless because the appellants were positively identified at the first scene of crime. In his brief rejoinder to the submissions made by Mr. Nchanila, Mr. Tuthuru reiterated his submissions in chief insisting that the fact that the identification was by recognition does not mean that factors for positive visual identification should not be met. Relying on the case of Tagara Makongoro and 2 Others (supra) he contended that even in recognition cases mistakes in recognition of familiar persons are often made. 13 Having considered the arguments for and against the first ground of complaint from both sides as demonstrated above, it is our observation that the finding by the High Court that the appellants were positively identified at the first scene of crime by PW4, is being challenged based on the complaints that, PW4 did not give particulars of the source of light and its intensity, the duration of three minutes was not enough for positive identification, PW4 did not describe the physical appearance of the culprits and that PW4 was in a frightened state hence incapable of positively identifying whoever were the culprits. We would, firstly, restate the settled position on visual identification evidence that, where conviction has to be found on visual identification, such evidence must be subjected to deep scrutiny to ascertain that the identification was really positive and that all reasonable possibilities of mistaken identification are eliminated. See *Kenedy Owino Onyachi and 2 Others v. Republic*, Criminal Appeal No. 48 of 2006 (unreported). Reliance on visual identification evidence is thus conditional. As we have alluded to above, for such evidence to be relied upon it must pass the test enunciated in the case of *Waziri Amani v. Republic* [1980] T.L.R. 250 and expounded in other subsequent decisions of the Court including the decision in the case of *Alfredy Kwezi @ Alfonse v. Republic*, Criminal Appeal No. 216 of 2021 (unreported) where the Court stated that: 14 "...before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In such cases the court is required to consider, among others, the following matters; one, the time the witness had the accused under observation; two, the distance at he observed him, three, the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; four, whether the witness knew or had seen the accused before or not; and five, all factors on identification considered, it should be also be plain that were any material impediment or discrepancies affecting the correct identification of the accused person by the witness". Guided by the above stated guidelines but mindful of the fact that the factors listed are not exhaustive and that they must not be accumulatively met for visual identification evidence to be relied upon, we should now subject the identification evidence by PW4 to the required scrutiny to test whether his evidence was watertight or not. Regarding the source and intensity of light, we agree with Mr. Nchanila that PW4 disclosed and gave particulars of the source of light and its intensity. In his evidence PW4 testified that he saw and identified the appellants at the first scene of crime by using the light from the head and side lamps of his motorcycle.

Admittedly, in doing so, PW4 disclosed what was the source of the light. As for the intensity of the light we again agree with Mr. 15 Nchanila that, under the circumstances of this case, by stating that the light from the head lamp of his motorcycle could light up to 200 metres and that the side lamps could go up to 20 metres, PW4 described the intensity of the light. By telling how powerful was the light from the head and side lamps of his motorcycle, the intensity of the light was described by PW4. The case of Abubakari Hemedi and Another (supra) cited by Mr. Tuthuru, is, as rightly argued by Mr. Nchanila, distinguishable from the instant case as in that case the description of the source of the light and its intensity was not given. As regards to the complaint that the duration of three minutes was not enough for positive identification by PW4, it is our finding, as it was also the case for the High Court, that bearing in mind that the appellants were not strangers to PW4 and considering the fact that after PW4 and the deceased had been intercepted and stopped at the first scene of crime and when the deceased was being pulled down from the motorcycle and being attacked, the appellants came closer to him, the duration of three minutes cannot be said to be not enough for positive identification. We are satisfied that PW4 had the appellants under his observation for the duration enough for positive identification. The complaint that PW4 did not describe the appellants' physical appearance is also, under the circumstances of the instant case, baseless. 16 So long as the appellants' identification by PW4 was by recognition as PW4 very well knew the appellants beforehand and further as he even knew them by their names, failure to give their description, had no effect of diminishing the credibility and reliability of PW4's identification evidence. There was also an argument that because PW4 is on record, when responding to questions in cross-examination, stating that the incident frightened him then his identification evidence could not be positive. On this, we again agree with Mr. Nchanila that regardless of PW4's statement that the incident threatened him, there is no evidence on record that, he was much threatened to the extent of losing his mind and not being able to identify the appellants. Not every witness subjected to threats or horrifying incident will always not be able to identify his assailant. In the case of Kenedy Owino Onyachi and 2 Others (supra), where the Court was confronted with the similar complaint, it was observed that: "Further, we are very much aware that it is not always impossible to identify assailants, even very violent ones, and even where the victims are terrorized and terrified" It is also our observation that since PW4 named the appellants to PW1 at the earliest moment then the credibility and reliability of his identification evidence is impeccable. This position is settled and it has 17 been restated by the Court in a number of its decisions including Jaribu Abdallah v. Republic [2003] T.L.R. 271, Marwa Wangiti Mwita & Another v. Republic [2002] T.L.R. 39 and Swalehe Kalonga & Another v. Republic, Criminal Appeal No. 45 of 2001 (unreported). In Marwa Wangiti Mwita & Another (supra), the Court observed that: "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 unexplained delay or complete failure to do so should put a prudent court to enquiry" It is on the totality of what we have demonstrated above that we find the 1st ground of complaint baseless. We find no reason to fault the finding by the High Court. After properly applying the guidelines of visual identification, the High Court rightly found it established that, PW4 positively

identified the appellants at the first scene of crime. Mindful of the fact that even in identification by recognition cases, mistaken identity often happens, we are still, regard being to the circumstances of this case, satisfied that the conditions prevailing were favourable for positive identification of the appellants by recognition and the appellants were so identified. There were no possibilities of mistaken identity. That being the case, the first ground fails and it is accordingly dismissed. 18 On the second ground where the credibility and reliability of PW1 and PW4 is being questioned, it was submitted by Mr. Tuthuru that the two witnesses were not credible and impeccable as it was found by the High Court. He pointed out that PW4's statement made to the police (Exhibit D1) was not detailed as it was his testimony in court. This, he contended, meant that pieces of evidence added by PW4 in his testimony in court which are not reflected in Exhibit D1, were nothing but cooked stories. For instance, Mr. Tuthuru referred us to Exhibit D1 and PW4's testimony in the record of appeal arguing that while in his testimony PW4 gave evidence on his motorcycle and on how far the lamps could light, there is no such statements in Exhibit D1. He further submitted that while in his testimony PW4 claimed that it was the 1st Appellant who stopped him and further that the appellants were armed with machetes there were no such statements in Exhibit D1. Mr. Tuthuru did also discredit PW4 because he did not report the incident to one Makaro Chalamba who was the first person he allegedly met when freeing from the first scene of crime. He thus concluded that what PW4 testified in court was inconsistent with what was stated by him to the police and therefore that he was not credible and reliable. To cement his argument, Mr. Tuthuru cited the case of Issa Sima v. Republic, Criminal Appeal No. 158 of 1991 (unreported) where the Court cited with approval the decision in the case of Kibwana Salehe v. Republic (1968) HCD 391 in which it was stated that whenever a witness is proved to have made a statement on oath inconsistent with a statement previously made by him, the credibility of that witness is completely destroyed. As for PW1, it was argued by Mr. Tuthuru that, because after being informed by PW4 about the incident and what had befallen her husband, PW1 did not take any action, then her credibility and reliability is questionable. On his part, in addition to the submission made by Mr. Tuthuru on the 2nd ground, Mr. Kaswahili argued that PW4 was not credible because most of what was testified by him in court was not reflected in Exhibit D1 which was not detailed as it left out a lot of key issues. He also submitted that while PW4 claimed that he and the deceased were intercepted and stopped by six young men, the 1st Appellant was not young as by then he was 53 years old. Mr. Kaswahili insisted that the discrepancies in PW4's testimony in court saw his statement in Exhibit D1 leaves a lot to be desired in as far as his credibility is concerned. Responding to the submissions made in support of the 2nd ground, Mr. Nchanila supported the finding by the High Court that PW1 and PW4 were credible and reliable. He argued that there was no any inconsistency 20 between the statement made by PW4 to the police (Exhibit D1) and his testimony in court. He argued that though Exhibit D1 was not detailed as it was the testimony in court, they both contained the same message. It was also pointed out by him that what was contained in Exhibit D1 was based on questions put to PW4 by the police officer who recorded the statement. On this, Mr. Nchanila concretized his point by referring us to the case of Abdallah Rajabu Waziri v. Republic,

Criminal Appeal No. 116 of 2004 (unreported). He submitted further that PW4's testimony in court was an elaboration of what was stated in Exhibit DL. Regarding the argument that PW1 did not report the incident to one Makoro Chalamba, it was argued by Mr. Nchanila that since PW4 immediately reported to PW1 and named the appellant, the fact that he did not do so to Makoro Chalamba was immaterial. As regards the argument that PW1 was not credible and reliable because after PW4 had reported the incident to her, she took no action, it was explained by Mr. Nchanila that according to the evidence on record, PW1 remained home with her little children while her motherinlaw rushed to the scene of crime. 21 In rejoinder, the counsel for the 1st and 3rd Appellants reiterated their submissions that the High Court erred in finding PW1 and PW4 credible and that their evidence ought not to have been relied upon. It is our considered view that the 2nd ground of appeal that challenge the credibility and reliability of PW1 and PW4 and which faults the finding by the High Court that the two witnesses were credible and reliable should not detain us. In finding the witnesses credible and reliable, the High Court had an advantage of observing the demeanour of the said two witnesses. Credibility of witnesses is in the monopoly of trial courts. This is however, only in so far as demeanour is concerned. The credibility of a particular witness can be determined on appeal by assessing the coherence of his testimony or by considering his testimony in relation to the testimonies of other witnesses. See Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2000 (unreported). In the instant case, PW4's credibility is being questioned by comparing his testimony in court and the statement he made to the police (Exhibit DL). It is complained that most of what PW4 testified in court is not reflected in Exhibit DL. To our considered view, this does not render PW4 inconsistent and not credible and reliable as suggested by Mssers. Tuthuru and Kaswahili. As rightly argued by Mr. Nchanila, which was also the finding by the High Court, PW4, in his testimony in court, elaborated 22 and gave more details of what he had stated to the police in Exhibit DL. What is contained in Exhibit DL is limited to the questions PW4 was asked by the police officer who recorded the statement. Further, what PW4 testified in court did not deviate from the contents of Exhibit DL. We have examined PW1's testimony and Exhibit DL and we have not been able to find any significant inconsistency in them. r Mr. Tuthuru did also argue that PW4 was not credible and reliable because he did not report the incident to one Makoro Chalamba whom he first met before he got at the house of the deceased where he reported the incident to PW1. It is common ground that in his testimony, PW4 told the High Court that in his way back to the house of the deceased from the first scene of crime, his motorcycle ran out of fuel and that he had to buy fuel from Makoro Chalamba before proceeding to the house of the deceased. On our part, we agree with Mr. Nchanila that the fact that PW4 did not report the incident to Makoro Chalamba, does not, under the circumstances of this case, render him not credible. His failure to do so does not mean that the incident had not happened. Regarding the complaint that PW1 was not credible because she did not take any action after being informed of the incident by PW4, we find the complaint baseless because as rightly argued by Mr. Nchanila, PW1 23 let her motherinlaw rush to the scene of crime because she had little children to look after. The 2nd ground is thus, for the above reasons, accordingly dismissed. Turning to the 3rd ground of complaint

that the prosecution failed to call, as a witness, the case investigation officer who could have tendered the Crime Register PF 128 or the sketch map of the scene of crime, Mr. Tuthuru argued that the failure to do so was fatal and an adverse inference ought to have been drawn by the High Court. It was further argued by Mr. Tuthuru that bearing in mind that PW4 claimed that the deceased was attacked by the appellants at the road (first scene of crime) while according to the 1st Appellant, the deceased was attacked at his homestead (second scene of crime) by the mob, the sketch map could have enabled the High Court to ascertain the distance from the first scene of crime to the second scene of crime and tell where exactly was the murder committed. Mr. Tuthuru stressed that the sketch map was one of material evidence as it was for the case investigation officer who was a material witness who ought to have been called as a witness. Mr. Nchanila did not agree that failure to call the case investigation officer as a witness or tender the sketch map was, under the 24 circumstances of this case, fatal. He argued that not every case is proved by evidence from a sketch map and further that under section 143 of the Evidence Act [Cap. 6 R.E. 2022] (the Evidence Act) no particular number of witnesses is required to prove a fact. Mr. Nchanila pointed out that the decision on who is to be called as a witness or what exhibit should be tendered to the court, depends on each particular case. He also submitted that in the instant case the evidence was clear to the effect that the attacks on the deceased started at the road (first scene of crime) and continued to the 1st Appellant's house (second scene of crime). Having considered the submissions made for and against the 3rd ground of appeal, we again find that under the circumstances of this case, the complaints that the case investigation officer was not called as a witness and that the sketch map of the scene of crime was not tendered in evidence, are the complaints that should not detain us at all. As correctly argued by Mr. Nchanila the omission to call the case investigation officer and tender the sketch map did not, in any way, leave the prosecution case against the appellants porous. From the evidence on record, the issue of at what particular place the deceased was physically attacked, was not in dispute. According to PW4, the attacks on the deceased started at the road (first scene of crime). There is also evidence from PW1 confirming that the 1st Appellant's house (second scene of crime) was near to the road, that is, to the first scene of crime. PW4 did also witness the deceased being physically attacked over there and saw the deceased being dragged towards the 1st appellant's house (second scene of crime) where, as it can be discerned from PW3, DW2 and from the 1st Appellant himself, the attacks on the deceased continued. The place the deceased was attacked was thus not in issue and the missing evidence from the case investigation officer or the sketch map of the scene of crime had no evidential detriment to the prosecution case against the appellants. The 3rd ground of appeal thus, fails and it is accordingly dismissed. Submitting in support of the 4th ground of appeal on the defence of alibi, Mr. Kaswahili argued that, the 2nd and 3rd Appellants properly raised the defence of alibi and substantiated it, but the High Court attached no weight to it and rejected it. He contended that there was more than enough evidence proving that the 2nd and 3rd Appellants were at DW4's home in another village since 14.09.2016 up to 29.09.2016 when they were arrested at Musoma where they had gone to attend the trial of another different criminal case. He further argued that, the contradictions on the time the

2nd and 3rd Appellants arrived at DW4's home or whether the 2nd Appellant had started attending tuition classes or not, were not serious or material. Mr. Kaswahili insisted that the defence of alibi by the 2nd and 3rd Appellants was strong because as testified by the 1st Appellant (DW1) and DW2, the 2nd and 3rd Appellants were not present at both scenes of crime. Mr. Nchanila had no problem with the fact that the defence of alibi was properly raised. He however supported the findings by the High Court that, on balance of probabilities, the 2nd and 3rd Appellants failed to substantiate the defence. He argued that the defence by the two appellants did not cast any doubt on the evidence given by PW4 that he saw and recognized them at the first scene of crime and that of PW3 who told the High Court that the two appellants were among the villagers who were present at the second scene of crime, that is, at the 1st Appellant's house. Mr. Nchanila further submitted that the inconsistency and contradiction in their defence on the time they arrived at DW4's home and on whether the 2nd Appellant had started attending tuition classes or not, were not minor but very material. He thus concluded that the contradictions diminished the defence of alibi raised by the two appellants and that the High Court did not err in rejecting it. Rejoining, Mr. Kaswahili reiterated his stance that the 2nd and 3rd Appellants' defence of alibi was substantiated as the said two appellants were not positively identified at the scene of the crime. 27 On this ground, we think we should begin by restating a cardinal principle that an accused person is not required to establish that his alibi is reasonably true. All what he is required to do is to create doubts as to the strength of the prosecution case against him. Where the prosecution case is accepted as nothing than the truth or where the case was on visual identification and the identification is found positive, the defence of alibi is diminished. See Kenedy Owino Onyachi & 2 Others (supra) and. Kubezya John v. Republic, Criminal Appeal No. 488 of 2015 (unreported). The issue for our consideration in regards to this ground on alibi is therefore whether a reasonable doubt in the prosecution case that the 2nd and 3rd Appellants were present at both two scenes of crime and that they participated in attacking the deceased, was created by the defence of alibi. In determining the issue, it should be borne in mind that since we have already found that the two appellants were seen and identified at the first scene of crime by PW4 and then at the second scene of crime by PW3, then our task here is to revisit the relevant evidence in support of the alibi and see whether it created any reasonable doubt on the relevant evidence from PW3 and PW4. In his defence evidence the 2nd Appellant claimed that he and the 3rd Appellant went to Mabuimerafuru at his uncle's home (DW4) on 28.09/2016 and that they arrived there at 13:00 hours. He also testified that he had gone there for the purpose of attending tuition classes but he could not do so because his father (1st Appellant) had not paid tuition fees. However, the evidence from DW4 is to the effect that the two appellants arrived at his home at 17:00 hours as it was for the 3rd Appellant who did also state that they arrived there in the evening hours. Most significantly, while the 2nd Appellant claimed that he could not start attending tuition classes because his father had not paid the tuition fees, DW3 said he had paid Tshs. 20,000/= as tuition fees and that the 2nd Appellant had started and was attending tuition classes under the tutorial of one Jacob Chagaravye. That the 1st Appellant had started attending tuition classes was also the version from the 3rd Appellant.

While to Mr. Kaswahili the inconsistency in regards to the time the two appellants arrived at DW4's home and the contradiction on whether the 2nd Appellant had started attending tuition classes or not, were minor and immaterial, to Mr. Nchanila, the inconsistency and contradiction were not minor but very material going to the root of the alibi defence raised by the two appellants. It is trite law that, it is only contradictions or inconsistencies which affect the central story which are to be considered to be material and adverse to the party in whose favour the evidence is given. Such 29 contradictions or inconsistencies should not be those that are of an insignificant nature. See *Mukami w/o Wankyo v. Republic* [1990] T.L.R. 46, *Shamari Athuman @ Mwanja & Another v. Republic*, Criminal Appeal No. 650 of 2021 and *Dickson Elia Nsamba Shapwata & Another v. Republic*, Criminal Appeal No. 92 of 2007 (both unreported). Guided by the above position of the law and having considered the inconsistency and contradiction in the 2nd and 3rd Appellants' 5th evidence as demonstrated above, we have no grain of doubt in our mind that, the central story by the two appellants that on the material date and time they were not at the scenes of crime but were at DW4's home since 14.09.2016, was significantly affected by the said inconsistency and contradiction in question. If the two appellants had gone and stayed at DW4's home so that the 2nd Appellants could attend tuition classes, the 2nd Appellant and DW4 could not have sharply contradicted themselves on whether the former had started attending classes or not. The only obvious answer to the said contradiction is that the two appellants were not and had not stayed at DW4's home and thus the High Court cannot be faulted in rejecting the two appellants' alibi. For the above reasons, the 4th ground of appeal fails. 30 As regards to the 5th ground of appeal, it was submitted by Mr. Kaswahili that the case against the appellants was not proved beyond reasonable doubt as required by the law. He pointed out that the appellants were not positively identified by PW4 due to unfavourable prevailing conditions at the scene of crime. He further contended that PW4's evidence was not straight on what really transpired and his evidence was not credible and reliable. He further argued that in the material evening, the 2nd and 3rd Appellants were far away in another village and there was no reliable evidence to prove that they were at the scene of the crime, that they were armed and if they were, with what type of weapons, no evidence that they attacked the deceased and if they did, on which part of the deceased body. It was also pointed out by Mr. Kaswahili that material exhibits like the sketch map and the machetes or weapons the appellants were allegedly armed with, were not tendered in court hence tainting the prosecution case with reasonable doubt. Here, Mr. Kaswahili placed reliance on the decision of the Court in *Mashaka Juma @ Ntatula v. Republic*, Criminal Appeal No. 140 of 2022 (unreported). He thus urged us to allow the appeal because, to him, the case against the appellants was not proved to the hilt. Mr. Nchanila responded to the 5th ground of appeal by arguing that all the ingredients of the offence of murder were proved. He submitted 31 that there is enough evidence proving that all the appellants physically attacked the deceased with a common intention to kill or cause grievous harm to him. He insisted that the nature of the injuries the deceased sustained showed that the appellants intended to kill the deceased. The appellants had a common mission to accomplish, he contended. It was lastly submitted by Mr. Nchanila that, under the circumstances of the case, failure to tender in

evidence the sketch map or murder weapons was not fatal. He pointed that, unlike in Mashaka Juma @ Ntatula (supra) where the relevant physical exhibits had been recovered but not tendered, in the instant case, the relevant murder weapons were not recovered. Mr. Nchanila did thus, insist that the case against the appellants was proved to the hilt and that the ground be dismissed for being baseless. In the light of what we have found on the preceding grounds of appeal, the 5th ground of appeal that the case against the appellants was not proved to the hilt, is automatically rendered baseless. The case against the appellants was proved to the required standard. It is a settled position of the law that in proving the offence of murder under section 196 of the Penal Code, it must be established that the death of a human being occurred, that the death was unnatural and was caused by an unlawful act or omission, that it was the accused person who did the unlawful act or omission leading to the death of the deceased and finally that the death was caused with malice aforethought. In the instant case, as we have alluded to earlier, all the ingredients of the offence of murder were proved against the appellants. There was evidence proving that the appellants intercepted and physically attacked the deceased with machetes at the first scene of crime before they dragged him to the second scene of crime where they continued attacking him while yelling and raising an alarm claiming that they had caught the deceased stealing their goats. There was also undisputed evidence from PW2 that the death was caused by the injuries the deceased had sustained from the attacks. Again, the weapons the appellants used to attack the deceased, that is, the machetes, and the nature of the wounds inflicted to the deceased left no doubt that the appellants intended to kill or cause grievous harm to the deceased. That the appellant killed the deceased with malice aforethought was thus proved beyond reasonable doubt and the High Court did not err in so finding. We thus find the 5th ground of appeal baseless and dismiss it. The case against the appellants was proved to the required standard, that is, beyond reasonable doubt. Finally, it is on the 6th ground of complaint raised by the 2nd Appellant challenging the sentence of detention during the President's pleasure imposed by the High Court on the 2nd and 3rd Appellants under section 26 (2) of the Penal Code. On this it was submitted by Mr. Kitale that the High Court erred in refusing to sentence the 2nd and 3rd Appellants, who were below the age of 18 at the commission of the offence, under section 119 (2) of the Law of the Child Act (Cap. 13 R.E. 2019). He argued that sentencing them to detention during the President's pleasure under section 26 (2) of the Penal Code, was not only unfair to the two appellants but it was also illegal and in contravention of the Law of the Child Act which is a specific legislation when it comes to children in conflict with the law. Mr. Kitale submitted that it is a settled principle of interpretation of laws that a specific law prevails over a general one, that is, "lexspecialis derogatfeglgeneral!". He thus insisted that the Penal Code being a general law ought not to have prevailed over the Law of the Child Act. Mr. Kitale argued further that having sentenced the two appellants under section 26 (2) of the Penal Code, the High Court ought to have instantly complied with the provisions of section 26 (3) of the Penal Code by forwarding to the Minister responsible for legal affairs a copy of the notes of evidence taken at the trial, with a report in writing containing such recommendation or observation on the case. Failure to do so, prejudiced the two appellants and it was against their best

interest, Mr. Kitale lamented. He thus, prayed that should the Court confirm the 34 conviction of the two children, the sentence imposed by the High Court should be set aside and replaced by the sentence in accordance with section 119 (2) of the Law of the Child Act. In response to the submissions by Mr. Kitale on the 6th ground of appeal, Mr. Nchanila contended that the High Court rightly and properly sentenced the 2nd and 3rd Appellants. He argued that, as it was rightly stated by the High Court, since the two appellants were charged with and convicted of murder under sections 196 of the Penal Code and as murder is not punishable with imprisonment but with death, section 119 (2) of the Law of the Child Act whose scope is confined and limited to offences punishable with imprisonment, was not applicable. As regards to the complaint that section 26 (3) of the Penal Code was not complied with, it was Mr. Nchanila's argument that the provision does not require that the report should instantly be forwarded to the Minister once the sentence is pronounced. He argued that such a requirement is more administrative and it has to be complied with after the sentence has been pronounced. It was also Mr. Nchanila's position that, since immediately after the pronouncement of the sentence, the appellants lodged a notice of appeal, meaning that the matter had not come to an end, then the requirements under section 26 (3) of the Penal Code could not be complied with until when the intended appeal is finally 35 determined. Mr. Nchanila did therefore pray for the dismissal of the ground for being baseless. In his brief rejoinder, Mr. Kitale submitted that the procedure under section 26 (3) of the Penal Code is not administrative and that its violation is fatal. He contended that the best interest of the child is paramount and that the report to the Minister should be forwarded instantly or even before the pronouncement of the sentence and that the notes and report should be part of the trial court proceedings. In determining this ground of appeal and for ease of reference, let us first reproduce the relevant provision of law beginning with sections 119 of the Law of the Child Act under which it is provided that: "119. (1) Notwithstanding any provisions of any written law, a chiid shaii not be sentenced to imprisonment

- (2) Where a chiid is convicted o f any offence punishable with imprisonment, the court may, in addition or alternative to any other order which may be made under this Act
 - (a) discharge the child without making any order;
 - (b) order the child to be repatriated at the expense of Government to his home or district of origin if it is within Tanzania; or
 - (c) order the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care" 36 Then it is section 26 (2) and (3) of the Penal Code, which state that: "26.(2) The sentence o f death shall not be pronounced on or recorded against any person who at the time o f the commission of the offence was under eighteen years o f age, but In lieu of the sentence o f death, the court shall sentence thatperson to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affairs may direct, and whilst so detained shall be deemed

to be in legal custody.

- (3) When a person has been sentenced to be detained under the President's pleasure under subsection (2), the presiding judge shall forward to the Minister for the time being responsible for legal affairs a copy of notes of the evidence taken at the trial, with a report in writing signed by him containing such recommendation or observation on the case as he may think fit to make" It is plainly clear from the above reproduced provisions of the law that, both the Law of the Child Act and the Penal Code operate for the best interest of the child. While section 119 (1) of the Law of the Child Act prohibits imposition of imprisonment or custodial sentence to children and whilst it also, under subsection (2), lists down orders that can be made as punishment to a child convicted of the offence punishable with 37 imprisonment, section 26 (2) of the Penal Code, on its part, prohibits the sentence of death to be pronounced or recorded against children. What is also clear is that the Law of the Child Act, under section 119 (2), apply only where the offence, a child is convicted of, is punishable with imprisonment. It does not apply to capital offences punishable with death sentence such as murder. Where a child is charged and convicted of murder, the applicable law is section 26 (2) of the Penal Code. The scope of application of the Law of the Child Act and in particular section 119 (2) of that Act, is limited to offences punishable with imprisonment. In that regard we do not agree with Mr. Kitale that the High Court erred in sentencing the 2nd and 3rd Appellants to be detained under the President's pleasure under section 26 (2) of the Penal Code. Regarding the application of section 26 (3) of the Penal Code, we entirely agree with Mr. Nchanila that the procedure under that provision is more administrative and as it is clearly provided under it, it cannot be applied before the conviction is entered and the sentence is pronounced under section 26 (2) of the Penal Act as Mr. Kitale suggested to us. Further, the notes and the written report by the presiding Judge to the Minister responsible for legal affairs need not necessarily be part of the proceedings as Mr. Kitale contended. We also share the same position with Mr. Nchanila that, once the appellants had filed their notice of appeal to manifest their wish to appeal against the decision of the High Court, the procedure under section 26 (3) of the Penal Code had to be halted to await the final determination of the appellants' appeal. The High Court can thus, in the instant case, not be faulted for not complying with the procedure under that provision. In the final analysis and on the basis of the above stated reasons, we find that the appeal is barren of fruits and we accordingly dismiss it in its entirety. DATED at MWANZA this 20th day of February, 2024. I. H. JUMA CHIEF JUSTICE A. M. MWAMPASHI JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Judgment delivered this 21st day of February, 2024 in the presence of the appellants appeared in person, represented by Mr. Cosmas Tuthuru, learned counsel for the 1st appellant also holding brief for Mr. Steven Kitale, learned counsel for the 2nd appellant and Mr. Stephen Charles Kaswahili, learned counsel for the 3rd appellant and Ms. Magreth Mwaseba, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original. C :rt DEPUTY REGISTRAR COURT OF APPEAL 39

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/308372/source_file/abel-orua-matiku-others-vs-republic-2024-tzca-78-21-february-2024.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/abel-orua-matiku-v-the-republic-murder-tzca-2024>

Prepared on 12 October 2026 · Esheria