

Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.6 OF 2007 – COURT OF APPEAL OF TANZANIA AT ARUSHA. Coram: KAJI J.A, KILEO J.A AND KIMARO J.A	ABURAHAM DANIEL VS THE REPUBLIC – Appeal from the decision of the High Court of Tanzania at Babati – High Court Criminal Sessions case No 42 of 2001 (Mussa, J.)	Identification – Waziri Amani Vs Republic (1980) TLR 250 Poor representation by advocate: Tumaini Moleli@John walker and others Vs The Republic – Criminal Appeal No.40 of 1999 (Unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: KAJI, J.A., KILEO, J.A. AND KIMARO, JA.

CRIMINAL APPEAL NO 6 OF 2007

ABURAHAM DANIEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Babati)**

(Mussa,J)

dated the 20th day of July 2006

in

High Court Criminal Sessions Case No 42 of 2001

JUDGMENT OF THE COURT

22nd & 25th April 2008

KILEO, J. A.

The High Court of Tanzania, sitting at Babati (Mussa, J.) in Criminal Sessions Case No. 42 of 2006 convicted the appellant of the murder of one Shabani Mohamed Baha and sentenced him to the mandatory sentence of death by hanging. From that decision the appellant has come to this Court.

The appellant's conviction was largely based on the evidence of a single identifying witness, one Athumani Ramadhani whose testimony the trial court found to be worthy of belief.

The appellant was represented by Mr. Loomu- Ojare, learned advocate, at the hearing of the appeal. Mr. John Mapinduzi, learned State Attorney, represented the Respondent Republic. The decision of the trial court is attacked on three grounds:

- 1) **THAT** the learned trial judge grossly erred in law and fact in finding and holding that PW1 sufficiently identified the appellant at the scene as the killer of the deceased.
- 2) **THAT** the learned trial judge grossly erred in law and in fact in holding and in finding that there was other credible evidence to corroborate the evidence of **PW1**.
- 3) **THAT** the learned trial judge grossly erred in law and fact in basing the appellant's conviction on the weakness of the defence rather than on the strength of the prosecution's case.

According to **PW1**, on the material date at around 9.00 pm, he heard a sharp cutting sound and he figured it could be a matchete or panga cutting on some object. As he was curious to know what it was, he got out and walked towards the direction of the sound. He stopped at about seven paces from

the spot of the incident and he claims that with the help of moonlight he could see the appellant hacking the deceased with a panga. Standing by was another person who was charged together with the appellant but was subsequently acquitted. The witness further informed the trial court that he heard the appellant tell the deceased that he was killing him because he had not returned his bicycle, which he had borrowed. After witnessing what was happening, the witness claimed that he decided to report to the Kitongoji Chairman (PW2) whom he met on the way, himself having got out in response to an alarm that he had heard. Villagers were organized to pursue the culprits. At around 2.00 am or thereabouts the appellant and his companion who were said to have just returned home were arrested. It was also in evidence that a panga was retrieved from the appellant's house. PW3 mentioned that the panga, which was retrieved, was bloodstained though none of the other witnesses mentioned that fact. The deceased's wife testified as PW4 at the trial. Her evidence was to the effect that the appellant and another person had visited them on the day of the incident demanding for his bicycle and that after some time the duo left together with the deceased for the residence of the appellant.

The appellant denied any involvement in the killing and attributed PW1's testimony against him to have been

prompted by some grudges allegedly harbored by PW1 after he had repossessed from him a bicycle, which PW1 had failed to pay for its full price. The appellant stated in his defence that he briefly saw the deceased at around 4.00 pm on the day of the incident and left after a greeting and that at 9.00 pm he was at Babati town.

Starting with the first ground of appeal, Mr. Loomu- Ojare who was quite vigorous in his arguments submitted that the conditions for identification pertaining at the time the offence was committed were not adequate for positive identification. In support of his arguments on identification he made reference to **Waziri Amani v. Republic** (1980) T.L.R. 250 which is a renowned authority on ingredients necessary to establish positive identification where the case against an accused depends on visual identification. Pointing to a number of inconsistencies in the testimonies of the witnesses, which we will make reference to later, the learned counsel argued that if the evidence of PW1 had been properly evaluated the trial court would not have found it credible to the extent of founding a conviction.

On the second ground, Mr. Loomu- Ojare argued that contrary to the finding of the trial court, there was no other credible evidence to corroborate the evidence of PW1 and that if any

thing, the evidence available left more questions than answers, questions which ought to have been answered in favor of the appellant.

Submitting on the third ground, Mr. Loomu-Ojare argued that in arriving at a conviction much reliance was based on the weakness of the defence case while the appellant had no duty to prove his innocence but on the other hand it was the duty of the prosecution to prove the charge against the appellant beyond any reasonable doubt.

In support of the conviction Mr. Mapinduzi argued that identification of the appellant by PW1 was watertight, as he knew him well prior to the incident. The learned State Attorney was of the view that the ingredients set out in **Waziri Amani** case (supra) were well established in this case particularly considering the fact that the witness prior to the incident knew the appellant. As for contradictions in the witnesses's statement he submitted that they were minor contradictions, which are normal in any case and did not affect the case for the prosecution. While conceding that the panga tendered in court might not have been the murder weapon, nevertheless he was quick to point out that the panga was not the basis for appellant's conviction.

This case revolves around the question of identification of the person who killed the deceased. Alongside the above issue is the question whether the witness's evidence was properly evaluated.

Admittedly, PW1 was the only eyewitness to the commission of the crime. The offence was committed at night. PW1 claimed that he was able, at seven paces from the spot where the deceased was hacked to death, to identify the appellant who was known to him before, as there was moonlight. The question that we must ask ourselves is whether, at that distance, the witness was in a position to make positive identification. Needless to mention, the intensity of the moonlight was not explained. In **Waziri Amani v. R.** (supra) it was held *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.* The Court went on to state that the time the witness had the accused under observation, the distance at which the witness had the accused under observation, the intensity of the light and whether the witness knew the accused before are all factors that must be taken into account in determining whether an accused has been

positively identified. Discussing the intensity of light, the Court stated:

"On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as visual identification made in poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit."

Applying the above principles to the present case, we can say for certain that the conditions of identification pertaining at the material time were not conducive for positive identification. The distance of seven paces at which the witness claimed he was able to identify the appellant was not so close in the circumstances of the case as to rule out the possibility of mistaken identity. Intensity of the moonlight was not explained and in such circumstances extra care should have been taken prior to making a decision to rely on the evidence of identification to found a conviction. It was also said that the witness recognized the appellant's voice, however someone's voice could be imitated and it is important to have other sufficient evidence connecting an accused to the crime before finding that the voice which was heard was no other but the accused person's.

Mr. Loomu-Ojare also argued, and we agree with him, that the evidence of PW1 was not properly evaluated. We are of the settled mind that had the trial judge properly weighed the evidence of PW1 he would no doubt have found that it was not worthy of believe after all. We say so for the following reasons:

First, there were some inconsistencies between the evidence of the witness in court and his statement to the police (Exhibit D1), which we do not think were so minor, as the learned State Attorney would like us to believe. For example, in his statement to the police the witness said that while the appellant was hacking down the deceased his companion who was standing by was imploring him not to do that. In court the witness was certain that the appellant's companion uttered no word. In another part of his testimony in court the witness said that he could see that the deceased had sustained cut wounds on the neck, his back and one of his fore arms. In his statement to the police there was no mention of what parts of the body that the deceased was cut. Also, though in court the witness said that he was able to identify the assailant by moonlight he did not mention this fact in his statement to the police, which was made while the incident was still so fresh in his mind compared to the time he gave his evidence in court, which was almost six years later. Such inconsistencies should have been resolved in favor of the appellant.

Secondly, though the learned trial judge found that there were certain material aspects, which strengthened and lent assurance to the evidence of PW1 however, there were some gaps in the testimonies of the other witnesses that needed to be filled in as well as inconsistencies between their testimonies and that of PW1. The testimonies of PW2 and PW3 are testimonies in point. PW1 did not mention that there was moonlight on the night of the incident. PW1 claimed that he had gone to the scene of crime in the company of his brothers, yet PW2 did not mention that he met PW1 with his brothers. PW2 whose house was also close to the scene of crime testified that he went out in response to an alarm raised, PW1 claimed that he got out in response to a sharp cutting sound. Why didn't PW1 hear the alarm, which PW2 heard? One wonders, as did Mr. Loomu- Ojare, as to who raised the alarm that PW2 heard? Then we have the evidence of PW3 who claimed that he retrieved a fresh blood stained panga from the house of the appellant while there was no mention of a blood stained panga from any of the other witnesses. Could the other witnesses have missed such an important thing as a blood stained panga? We think that there were some serious and fatal exaggerations in the testimonies of some of the prosecution witnesses. Mr. Mapinduzi tried to convince us to find that the panga was not important in the case, however,

"To begin with, the alleged hostility was raised by the accused for the first time in his defence. It was, so to speak, not put to PW1 as he was testifying. One would have expected and; certainly it was in the best interests of the accused to put the matter to PW1 during cross-examination. It was odd that in the face of such accusations against him the accused did not remember to put the grudge to PW1. It seems to me that the alleged hostility by PW1 towards the accused was an afterthought which would not deserve any serious consideration."

It should be noted that the appellant was assigned an advocate by the court to represent him at the trial. Sometimes advocates assigned dock briefs do not have enough time for consultation with their clients and this oftentimes results in poor representation. In **Tumaini Moleli @ John Walker and Others v. The Republic**- Criminal Appeal No. 40 of 1999 (unreported), this Court observed that some advocates on court briefs have an "*do not care attitude*". In such cases it would not be wise to blame an appellant for the shortcomings of his advocate. Moreover in this case it is not on record that the appellant was given an opportunity at any time to make an intervention. In any case the appellant had no duty to establish his innocence. Even if his defence was found to be weak, and even if he was found to be untruthful, the prosecution still had the duty to

prove his guilt beyond reasonable doubt. In this case we are satisfied that the prosecution failed in its duty. The case against the appellant was not proved beyond doubt and the benefit thereof should have been accorded to him.

For the foregoing reasons we find the appeal by Aburaham Daniel to have been filed with good cause. We accordingly allow it and order his immediate release from prison unless held for some lawful cause.

DATED At ARUSHA this 24th day of April 2008.

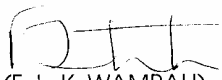
S. N. KAJI
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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




(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR