

RAMADHANI, J. A.:

Seven people were charged with the murder of Dotto William Makungu at Gerezani Railway Quarters, Dar es Salaam, on 9th January, 1995. LUANDA, J. was satisfied beyond reasonable doubt that the three appellants: Abdallah Ali Chande @ Deda, John Peter Sichone @ Champande, and Hussein Singano Manara, killed the deceased when the robbers stormed into his house and disturbed him and his wife, Elizabeth Makungu, PW 3, in their sleep.

The deceased, after being awakened by PW 3 and being told of the invasion, got out of the bedroom and he was fatally shot. Then a couple of the invaders got into the bedroom and demanded some money from PW 3. She complied after first lying that they had none. The people took also a number of items of property. When those people left, PW 3 went out of the bedroom for her husband who received her with a heart rending sentence: "Mama Emi wameniuwa, unarudi nyumbani". The hospital could not save his life and the deceased passed away in the early hours of that morning.

The first appellant made a cautioned statement before PW 1 (Exh. P2) and also an extra judicial statement before Elizabeth Ngenda, PW 2, (Exh. P9). In both statements the first appellant owned to have participated in the robbery which resulted in the death of the deceased and mentioned the two other appellants as his accomplices.

To crown it all, the first appellant led PW 1 and Sgt Abdallah, PW 7, to where the murder weapon was hidden and to the persons who bought items of stolen property. PW 3, on the other hand, pointed out the three appellants at an Identification Parade staged by ASP Sikitiko Amani (PW4) assisted by Inspector Barnabas (PW 1).

The appellants are aggrieved by the conviction and the punishment of death meted out to them. They were advocated for by Mr. Majura Magafu, learned counsel, who had a memorandum of appeal containing five grounds which he reduced to three: First, that the offence was not proved beyond reasonable doubt. Second, the learned trial judge failed to evaluate the evidence properly. Third, the appellants were not properly identified. The learned advocate spent the entire time on the third ground, that is, improper identification, in its various forms, and after that he merely concluded that he had proved the remaining two grounds as well.

Mr. Magafu pointed out that visual identification is the weakest kind. He then attacked the conduct of the identification parade. He said that the procedure as outlined in Ssentale v. Uganda, [1968] E. A. 365, was violated in a number of ways. First, he said that the suspects were not given their right of calling their advocates and/or relatives to be present at the parade. Then he claimed that the suspects were paraded while they were very dirty and that made them conspicuous. He also said that the second appellant had met

PW 3 at the Railway Hospital before the parade and worst still, the *Mzalendo* news paper, of the same day the parade was conducted, splashed a photograph of the three appellants with a gun and a caption that they were robbers.

Mr. John Mapinduzi, learned State Attorney, appeared for the respondent/Republic. He conceded that it has been authoritatively said that visual identification is of the weakest kind. However, Mr. Mapinduzi, added that if some other factors are taken into account fears of mistaken identity are allayed. He pointed out that visibility was quite good: There was electric light in the bed room, in the verandah and also outside the house and then PW 3 was with the robbers for about half an hour talking to them. The learned State Attorney submitted that the duration coupled with visibility enabled PW 3 to be in a position to identify properly the appellants as the people who disturbed their silent night.

Mr. Mapinduzi conceded that a picture of the three appellants appeared in the *Mzalendo* newspaper (Exh D 5) in the morning of the day the parade was conducted. He said that the issue is whether that picture aided PW 3 in the identification of the appellants. He contended that that was not the case. Apart from that Mr. Mapinduzi argued that there was no proof that Police were involved in publishing that picture on that day. He also pointed out that the

appellants did not raise that objection at the trial and so, he argued, they should not do so at the appellate stage.

We may state it here that we have no difficulty in dismissing the appeal by the first appellant, Abdallah Ali Chande @ Deda. Even disregarding the identification by PW 3 at the identification parade, the first appellant himself had confessed to have participated in the crime. There is the extra-judicial statement (Exh. P9) and the cautioned statement (Exh P2) which were admitted by the learned Judge after subjecting them to trial – within – trial. In addition the first appellant led PWs 1 and 7 to where the weapon which they had used was hidden. So, we are satisfied that his conviction was beyond reasonable doubt and, therefore, he was properly sentenced.

We now come to the second and the third appellants. There is a dispute whether or not these two were arrested at the same time and the same place as the first appellant, that is, at a beer shop in Kiwalani. PW 7 said he did so on 16th January, 1995. This was denied by both the first and the second appellants in their evidence. They claimed that each was arrested separately but on the same day. But in our decided opinion this matter should not detain us.

The two other appellants were mentioned by the first appellant in his confessions (Exh. P2 and Exh. P9). It is trite law that there is a need

for corroboration. The learned Judge found corroboration in the identification by PW 3. He said:

I have seen PW 3 when giving evidence. She was straight forward. I am satisfied that PW 3 was a truthful witness. And I accept as the truth that she was able to identify the 1st, 2nd and 3rd accused.

Was that so: Did PW 3 provide that corroboration? As this if the first appeal we are entitled to re-appraise the evidence and draw inferences of fact under Rule 34(1)(a). We have already pointed out that a photograph of the three appellants appeared in the *Mzalendo* newspaper (Exh. D5) of 22nd January, 1995, that is, the day the identification parade was held. The learned trial judge said:

In my considered view that is a speculation. In any case the explanation words attached to the photograph has nothing to do with the Gerezani incident. I am not prepared to accept that story. I reject it.

Admittedly, the caption words did not have anything to do with the robbery in Gerezani but it was all the same incriminating enough and it read as follows:

Watu wanaotuhumiwa kuwa majambazi wakiwa na bunduki aina ya shot gun, mapanga na namba bandia za magari ...

Then the names of the three appellants were given. We have been asking ourselves whether that was a coincidence or a calculated move. Then we have also asked ourselves whether it is normal to

hold an identification parade on a Sunday morning. These are nagging doubts.

Mr. Mapinduzi argued that there was no proof that Police were involved in publishing that picture on that day. But proof of that would be a property of the Police alone and not available to the appellants. Then it was also argued that the objection was not raised at the trial. Our simple answer is that the newspaper page was produced at the trial and the learned judge made a ruling on this complaint which we have already reproduced above. It is palpably clear to us that the objection is not an afterthought at all.

Can we, without any reasonable doubt, hold that PW 3 properly identified appellants 2 and 3 in view of the fact that there was this picture displayed in the newspaper that very morning when the identification parade was held? We find it difficult to hold so. We, therefore, find that the identification of appellants 2 and 3 not to be according to the standards required in criminal proceedings. So, the only evidence against them is the confessions of a co-accused person. We, therefore, acquit them of the charge of murder and set aside the punishment of death. We order their immediate release from custody unless they are held for other lawful cause.

DATED at DAR ES SALAAM this 19th day of April, 2007.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

E. M. RUTAKANGWA
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