



**IN THE HIGH COURT OF TANZANIA
AT BUKOBA**

**ORIGINAL JURISDICTION
(BUKOBA REGISTRY)**

CRIMINAL SESSIONS CASE NO. 13 OF 2013

THE REPUBLIC

VERSUS

**CROSPERY S/O GABRIEL
ERNEST S/O MUTAKYAWA
MUSTAPHA S/O KIHANGA
CHRISTIAN S/O TRYPHONE
ISSA S/O SAID
MATHIAS S/O NESTORY**

27.6.2014 AND 03.7.2014

JUDGMENT

MJEMMAS, J.

This is a case in which the accused persons namely Crospery s/o Gabriel, Ernest s/o Mutakyawa, Mustapha s/o Kihanga, Christian Tryphone, Issa s/o Said and Mathias s/o Nestory jointly stand charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E.

2002. It was alleged that the six accused persons on the 5th day of April, 2009 at Rutoro Village, within Muleba District in Kagera Region did murder one Muktari s/o Twaha. The accused persons who were represented by Mr. Kabunga, learned advocate have pleaded not guilty to the charge. The prosecution was conducted by Ms. Mrema, learned Senior State Attorney.

The Republic/Prosecution summoned five witnesses and produced two exhibits to prove that it was the accused persons who murdered the late Muktari s/o Twaha. The exhibits which were admitted as matters not in dispute during the Preliminary Hearing are sketch plan of the scene of incident, exhibit P1 and report on post mortem examination exhibit P2. The report shows that the cause of death was due to "severe bleeding due cut wound (L) lateral scalp."

The first prosecution witness (PW1) was Twaha Abdullatiff who told the court that on the fateful night, that is on 5th April, 2009 at around 1.00am or 2.00am a group of people or rather bandits came to his home. That the bandits ordered him to get out of the house and he told them to

get inside the house. As they were arguing the rear door of his house was hit by a big stone which forced open two pieces of wood from the door. When all that was happening, the witness said, he was with his son Jabili Twaha [PW2]. According to PW1 the bandits could not get inside because the open space on the door could not allow a person to pass through. PW1 went on to state that the bandits shot four bullets through the open space on the door but they (PW1 and PW2) were not hit because they stood against the wall and the door was between them. The witness said that his son and himself managed to escape through the rear door when the bandits went to the front door. He was cut on the arm and stabbed with a spear on his buttocks by one of the bandits. He however managed to run away to seek assistance from the neighbours. He left behind his wife and children. The witness further told the court that he went to the "Centre" and managed to get some people to help him. They went back to his house but they did not meet the bandits nor his family. He went on to state that one of the rooms and to be specific he said his bedroom where his wife and children were had a lot of blood. With the assistance of the people from the "Centre" they searched for his family and they found them

at the house of one Mzee Petro. The wife and the children had injuries but it was his wife and one of the children (deceased) who were in very bad condition. The following morning they were taken to the Government Hospital in Bukoba where they were admitted. The child who was in critical condition (Muktari) passed away on the same day i.e. 5.4.2009. The witness Twaha Abdullatiff (PW1) further told the court that he managed to identify/recognize the bandits as Crospery Gabriel (first accused) Ernest Gabriel (second accused) Christian Tryphone (fourth accused) and Mathias Nestory (sixth accused). He said that he recognized them by their voices and also he saw them through the broken part of the door. The witness further stated that he had a torch as well as his son (PW2). That torch light from their (PW1 and PW2) torches and also torch light from the torches of the people who were outside the house helped him to see them (bandits). He insisted that he knew them well because they were his neighbours and that they used to do casual jobs at his home.

The 2nd prosecution witness (PW2) was Jabili Twaha. His evidence was not quite different from that of his father (PW1). He told the court

that on the material night he was at home sleeping in the lounge (sitting room). That he woke up after he had heard his father exchanging words with people who were outside the house. That one voice from outside was saying "Leo ni leo" while another one was saying "Toka nje". He said that he recognized two people by their voices and he also saw them through the opening on the door after it had been hit by a big stone. That he (PW2) had a torch and also the light from torches held by the accused persons helped him to recognize two of them. He mentioned the people he had recognized as Crosperry Gabriel (first accused) and Ernest Gabriel (second accused). He said that he knows them for a long time as his neighbours and that they were sometimes employed to do casual labour at their (PW2) home.

) PW3 was Abdallah Twaha. The essence of his evidence was that in the material night he saw Crosperry Gabriel (first accused) cutting his mother with an axe and machete. That Crosperry Gabriel cut his (PW3) mother on several parts of her body. The witness also told the court that Crosperry Gabriel also cut him (PW3) on the head and also cut his young

brother Mukhari (deceased). The witness also stated that Ernest Gabriel cut his sister Fatna. According to the witness the attacks were done inside his mother's bedroom where they were gathered after the bandits came. Explaining how he recognized the two accused persons the witness said that he knew them before and they were neighbours. He also said that inside the room there was a big wicklamp which produced sufficient light to recognize a person.

The 4th prosecution witness (PW4) was Safina w/o Twaha. The essence of her evidence was that during the material night she heard their dog barking and suddenly the rear door of their house was hit by a hard object. Her husband went to the door and she heard him arguing with some people who were telling him "get out" (Toka) while he was telling them "ingia ndani" (get inside). She then opened a window and screamed for help. She went on to state that she saw some people outside and about four torches. She managed to recognize two of them who she mentioned as Crosperry Gabriel (first accused) and Ernest Gabriel (second accused). She said that she managed to recognize them because they

were neighbours and that they used to do paid jobs (casual labour) at her home. The witness went on to state that her husband brought the children into her bedroom. She mentioned them as Seif, Shakiri, Fatna, Abdallah and Muktari. She went on to state that after the children had been brought to the bedroom she heard gunshots. She looked at the window and saw her husband and son running away. She further said that suddenly two people entered into her bedroom and she recognized them as Issa Said (5th accused) and Mustapha Kihanga (3rd accused). That Issa Said and Mustapha Kihanga ordered her to give them money and she gave them Tsh.14,000/=. They took away her cell phone. The witness went on to state that suddenly Crosperry (first accused) and Ernest (second accused) entered the bedroom and Issa Said and Mustapha Kihanga left the bedroom. That Crosperry demanded to be given money. He hit the witness with a heavy object and continued to cut her with a machet. The witness became unconscious. When she regained consciousness they went to their neighbour one Mzee Petro where they were given first aid. The following morning they were taken to the Government Hospital in Bukoba and later on she was informed that her son Muktari Twaha had died.

The 5th prosecution witness (PW5) was Ismail Jafari. The essence of his evidence was that in the night of 5.4.2009 he heard screams from Twaha's (PW1) house. He went to the "Centre" and woke up some people in order to go and assist Twaha. The witness went on to tell the Court that while at the "Centre" Twaha and his son Jabili appeared. He [Twaha] told them that they had been attacked and he had recognized the attackers. That he mentioned them as Crosperry, Ernest and Mathias. That they tied his injured arm with a piece of cloth and went to the scene of incident. He further said that when they reached at the scene of incident they did not find any person inside the house. They found a lot of blood in one of the rooms. They started to search for Twaha's family and they found them at Mzee Petro's house. According to his evidence the victims were taken to the Government Hospital in Bukoba.

All six accused persons gave evidence under oath/affirmation in their defence. During the Preliminary Hearing the 1st, 3rd, 4th and 6th accused persons notified the court that they would rely on a defence of alibi under

section 194(4) of the Criminal Procedure Act, Cap 20 R.E. 2002.

The first accused person (DW1) Crospery Gabriel testified that in 2009 he was a resident of Rutoro village, Ngenge Ward within Muleba District but on 27.2.2009 he moved away from Rutoro village. He said that he emigrated with his family to Kyota village, Kiziramuyaga Ward within Muleba District. This witness told the court that he was forced to leave Rutoro village after his house had been set on fire and one of his children Colostina Crospery had died in the incident. He also said that his banana plants were cut down. He further said that there was a conflict between livestockkeepers who were Rwandese and farmers. The witness acknowledged to know Twaha and his family but he denied to have committed the offence. He said that he came to know about the death of Twaha's son on 20.2.2010 when he was arrested. The witness stressed that he had not returned to Rutoro village since he left there on 27.2.2009.

The second accused person (DW2) Ernest Mutakyawa testified that he was a resident of Rutoro village but he moved away on 10.3.2009 and

went to settle in Nsambya village, Kiziramuyaga Ward within Muleba District. He said that he moved away from Rutoro village because the villagers were killing people who they suspected to be cattle rustlers. The witness said he was one of the suspects. He however denied to have been involved in the killing of the deceased Mukhari Twaha. Like the first accused person, this witness stated that he came to know about the death of Mukhari Twaha on 20.02.2010 when he was arrested.

The third accused person (DW3) Mustapha Kihanga testified that he was a resident of Choboheke Hamlet, Ngenge village, Ngenge Ward within Muleba District until November, 2009 when he shifted (moved) to Kitwechenkura village in Karagwe District. He said that on the material day, that is, on 5.4.2009 he was at his home in Choboheke Hamlet. He went on to state that at around 1.00pm he received information about the incident and that the victims had been sent to the Government Hospital in Bukoba. He also received information that one victim (child) had passed away. That the burial ceremony was held at Twaibu's place. The witness denied to have been involved in the commission of the offence. He further

said that he was arrested in connection with the incident on 27.2.2010 at Kitwechenkura village.

The fourth accused person (DW4) Christian Tryphone denied to have committed the offence. He said that he did not know the family of Twaha nor the other accused persons. He said that he did not know that there is a village called Rutoro. This witness told the court that in 2009 he was a resident of Katobago village, Birabo Ward in Muleba District. That he was arrested on 11.3.2010 at Kakarabo Hamlet, Bubale village within Missenyi District. He said that he went to Kakarabo village because he has a farm there. This witness said that PW1 – Twaha did not tell the court the truth.

The fifth accused person (DW5) Issa Said denied to have committed the offence. He told the court that he was born in Rutoro village Muleba District but he moved away on 13.11.2008 and went to Kyaka, Missenyi District where he was employed as a herdsman. He further said that he moved from Kyaka to Omukakarabo Hamlet, Bubale village within Missenyi

District where he was arrested on 11.3.2010. He challenged the evidence of Safina (PW4) as untrue.

The sixth accused person (DW6) Mathias Nestory denied to have participated in the commission of the offence. He testified that he was a resident of Rwigembe village, Ngenge Ward within Muleba District but on 13.3.2009 he shifted to Bunazi in Missenyi District where he had a "Pombe Shop" selling local brew. The witness acknowledged to know PW1 (Twaha) because he (PW1) was a councillor of Ngenge Ward and he (witness) used to see him in public meetings. He however said that he had never been in Rutoro village. He further said that he did not know any of the accused persons and that he met them in prison. That he was arrested on 19.6.2010 at Bunazi Kyaka, Missenyi District. The witness challenged the evidence of PW1 as false. He said how could he hold a torch, spear and a machete and injure him (PW1). He denied to have been involved in the incident.

That is, in summary, the evidence given by both the prosecution and the defence sides.

The major issue to be determined in this case is that of identification (recognition) of the accused persons at the scene of incident vis a vis defence of alibi (for those who raised it). The law with regard to the evidence of visual identification is now settled. In the case of **WAZIRI S/O AMAN V R [1980] TLR 250, the late Mwakasendo, J.A** had the following to say on evidence of visual identification; I quote him –

"Evidence of visual identification is of the weakest kind and most unreliable. No court should act on the 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 case of **Waziri Aman** and other authorities have laid down some guidelines or factors which a witness of visual identification has to show before the court can be satisfied that the evidence is watertight; the conditions at the scene, whether it was night or day; and if it was during

night, whether there was sufficient light to enable the witness see clearly what was happening; the distance of the witness from the accused person when he made the identification; the time the witness had the accused person under observation. Whether the witness had a conversation with the accused person, whether there were many suspects around, and whether the atmosphere was charged. And whether the witness knew the accused person before the incident. It was further stressed by the Court of Appeal of Tanzania that in cases of identification particularly in unfavourable conditions evidence on the source of light and its intensity is of paramount importance. That was stated in the case of **ISSA S/O MGARA @ SHUKA V REPUBLIC, Criminal Appeal no. 37 of 2005** (unreported). The court stated –

"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone who he

knows, as the case here, mistakes in recognition of close relatives and friends are often made."

The issue of credibility is also important to consider. In the case of **William Kitonge @ Mwita and 2 others V Republic, Criminal Appeal No. 185 of 2010 Mwanza, CA** (unreported) the Court of Appeal referred to the case of **Jaribu Abdallah V R Criminal Appeal no. 220 of 1994** (unreported) where it was held inter alia that –

"...in matters of identification it is not enough merely to look at factors favouring accused identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

Of course I am alive to the principle that every witness is entitled to be believed unless there are good reasons not to believe him; refer to **GOODLUCK KYANDO V REPUBLIC [2006] TLR 363.**

As stated before some of the accused persons gave notice during the preliminary hearing that they would raise the defence of alibi per section 194(4) of the Criminal Procedure Act, Cap 20 R.E. 2002. Others did not give notice but they relied on the defence of alibi. The first accused person Crosperry Gabriel stated in his defence that at the material time he had moved away from Rutoro village and settled in Kyota village, Kiziramuyaga Ward in Muleba District. The second accused person Ernest Mutakyawa stated in his defence that at the material time he had moved away from Rutoro village to Nsambya village. The third accused person Mustapha Kihanga stated in his defence that at the material time he was at home in Choboheka Hamet, Ngenge village. The fourth accused person Christian Tryphone said that in April, 2009 he was at Katobago village and that he had never been to Rutoro village. The fifth accused person Issa Said stated that in April 2009 he was living in Kyaka in Missenyi District. The sixth accused person Mathias Nestory stated that in April, 2009 he was in Bunazi, Missenyi District. Perhaps I should hasten to state that I am alive to the principle that where an accused person relies on the defence of alibi he does not assume the burden of proving it, it is sufficient for him or them

if the alibi raises reasonable doubt on the prosecution case [Refer to **ALI SALEHE MSUTU V THE REPUBLIC [1980] TLR 1**]. Having stated the relevant legal principles applicable in issues of identification (recognition) and the defence of alibi let us now look at the facts of the case and apply them to the above mentioned legal principles.

I should like to start with the evidence of PW1 (Twaha) and PW2 (Jabili). PW1 stated in his evidence that he recognized some of the bandits by their voices and also he managed to see them. Let him speak for himself.

"On 5 April, 2009 at around 1.00am and 2.00am my dogs started barking outside the house. I woke up and heard people ordering me to open the door. I recognized the voices as those of Crospery s/o Gabriel Ernest s/o Gabriel, Mathias s/o Nestory and Christian s/o Tryphone Kasenene. I recognized their voices because they are my neighbours and all of them had been doing casual labour at my home."

He went on to state –

"Suddenly I heard a heavy sound of stone and the door broke into two parts...

They could not get inside because there was small space in the broken door which could not allow a person to pass through. The broken part was small. Two pieces of wood (timber) out of four were broken.

Apart from the voices I also managed to see them through the broken part of the door. I had a torch and my son also had a torch. The torch light helped me to see and recognize them. Similarly there was torch light outside. The intruders also had torches, about four of them. They were on. I saw and recognized Crospery Gabriel, Ernest Gabriel, Mathias Nestory and Christian Tryphone. Crospery Gabriel was wearing a long black coat and a black trouser. Ernest Gabriel was wearing a white shirt and a black trouser. I recognized them because of the light from my torch

and from their touches.”

I have seriously considered the evidence of PW1 as quoted above but with respect I am unable to agree with him that he properly and unmistakably recognized Crosperry Gabriel, Ernest Gabriel, Mathias Nestory and Christian Tryphone as alleged. There is no dispute that the incident took place in the midnight (1.00am – 2.00am) so the conditions of identification were unfavourable. The people or rather the bandits were outside. There is no doubt that he knew them before but voice identification has been held to be one of the weakest kinds of evidence and) great care and caution must be taken before acting on it, refer to **STUART ERASTO YAKOBO VS THE REPUBLIC, Criminal Appeal No. 202 of 2004 (CA)** Dsm (unreported) **JACKSON ZEPHERINE V REPUBLIC Criminal Appeal No. 186 of 2005, Mwanza** (unreported). The rationale is not far to seek. There are some people who are capable of imitating another person’s voice. The witness (PW1) claimed that light from his torch and also light from torches held by the bandits helped him to identify the accused persons he had mentioned. Again this piece of

evidence raises doubts because of two reasons. One, it is now settled that where torch light is flashed at a person that person is temporarily blinded by the light; refer to **MOHAMED MUSERO V REPUBLIC [1993] TLR 290**. If the bandits were flashing the torch light at the witness (PW1) then he could not clearly see them. Two, the witness said that he used the small opening at the door to flash his torch light to see the accused persons. That was quite unlikely because it was dangerous for him to face that small opening knowing that the bandits were outside watching. Besides, the witness himself stated that the bandits fired about four gunshots through that same small opening at the door. During cross examination he stated:-

"After the door had been hit by a large stone I stood at one side of the wall near the door and Jabili stood at the other side near the door. We were hiding behind the wall in order to prevent them from getting inside and to see them clearly in case they managed to get inside. Four bullets were fired at the area where the door was broken."

Answering a question by one of the gentlemen assessors PW1 stated:

"I know the accused persons. For ten years we have lived as neighbours. The distance between me and the accused persons when I recognized them was six (6) metres. I recognized them after gun shots had been fired."

I have no doubt that the witness was either deliberately lying or "adding salt" to impress the court that he definitely recognized the accused persons. This is essentially so because one wonders where did he get the courage to stand up and look directly at the open space on the door after the bandits had just fired four shots through the same open space on the door. I therefore hold that the evidence of PW1 has not passed the test for upholding evidence of visual and aural identification as discussed above. In short the evidence is not watertight.

As stated before in this judgment the evidence of PW2 (Jabili Twaha) is not quite different from that of his father (PW1). Let him (PW2) speak for himself:-

"On 5 April, 2009 at night hours I was at home asleep. I was sleeping in the sitting room (sebuleni). I woke up in the night when I heard my father arguing with some people who were outside. My father was saying come inside and two people outside were saying "come out, today is today". I recognized the voices. It was Crosperry Gabriel who said "Leo ni leo" while Ernest Gabriel was saying "toka nje". I recognized their voices because they are our neighbours and sometimes they used to do paid jobs at our home. I know them for a long time."

For sure, from the evidence on record even the said Crosperry Gabriel and Ernest Gabriel did not dispute that they were neighbours of PW1 and PW2. They also did not dispute that they knew each other. However as I have already stated before evidence of voice identification is of the weakest kind and great care and caution have to be taken before acting on it.

Like his father the witness (PW2) went further in his evidence and stated that he saw and recognized Crosperry Gabriel and Ernest Gabriel.

Again let him speak for himself:-

"I saw the people who were outside. There were two people who were in front and other people were behind them and they had torches. The torches were on. I saw Crosperry Gabriel and Ernest Gabriel who were in front. The people who were outside with torches were directing the beams towards the broken part of the door. Crosperry Gabriel and Ernest Gabriel were trying to get inside so I saw them because of the torch light from their colleagues and I had my own torch too which helped me to see them."

Again as stated before it is now settled that where torch light is directed at a person, that person would not be able to clearly see the one holding the torch because the eyes are dazzled by torch light [MOHAMED MUSERO

CASE SUPRA]. Again as stated before how could the witness get the courage to look through the open space on the door where the bandits had thrown a big stone and broke part of the door and also where gun shots had been fired through. How could he expose himself to such a great danger although they were already in danger. His (PW2) testimony creates doubt.

Perhaps two things are worth pointing out with regard to these two witnesses. One, PW1 stated that he had a torch which helped him to see the accused persons but during cross examination by Mr. Kabunga PW2 stated that his father (PW1) did not have a torch. Two, PW1 stated during cross examination that he met Mathias Nestory outside but PW2 did not see Mathias Nestory as they were running to seek assistance. Those contradictions might appear to be minor but they go a long way to show that the recognition/identification made by those two witnesses was not free from mistake. In otherwords it was not watertight as required by the law.

Having said that we remain with two witnesses who claimed that

they recognized Crospery Gabriel, Ernest Gabriel, Issa Said and Mustapha Kihanga though at a different setting and under different circumstances from those of PW1 and PW2. The witnesses are Safina w/o Twaha (PW4) and Abdallah s/o Twaha (PW3). PW4 told the court that after the bandits had invaded the house but while they were outside her husband (PW1) brought the children to their bedroom. She mentioned the children as Seif, Shakiri, Fatna, Abdallah and the deceased Muktari. She further said that after the exchange of words and the gun shots she saw her husband (PW1) and her son Jabili running away. This witness went on to tell the court that suddenly she saw two people who entered in the bedroom. She recognized them as Issa Said (5th accused) and Mustapha Kihanga (3rd accused). That the said accused persons demanded to be given money and she gave them Tsh.14,000/=. The said accused persons took also her (PW4) cell phone. Let me quote her:

*"After the children had come inside the bedroom
I heard gun shots. They were about four gun
shots. I looked at the window and saw my son
Jabili and his father running away. After that two*

people entered my bedroom. One had a torch and another one had a machete. I quickly recognized them. They were Issa Said and Mustapha Kihanga. I recognized them because they were my neighbours. Their appearance was not known to me. Besides, there was light in the room. There was a big wick lamp (koroboi) on the table. It had a large wick and produced bright light. You could see each other. Issa was wearing a shirt and jacket while Mustapha had a coat. They commanded me to give them money. There was Tsh.14,000/= on the table. They took the money and ordered me to produce more money. They also took my cell phone."

This witness (PW4) also told the court that while Issa Said and Mustapha Kihanga were inside the bedroom suddenly Prosper Gabriel and Ernest Gabriel appeared. According to her, Issa Said and Mustapha Kihanga

slowly left the bedroom. That Crosperry demanded to be given money while holding a machete and an axe. He then started to attack the witness with a machete. He cut her on various parts of her body and she eventually became unconscious. That she later on regained her consciousness and went to the house of Mzee Petro.

The evidence of PW4 is supported or corroborated by the evidence of PW3 who was among the children brought to the bedroom of PW1 and PW4. The witness told the court that while in the bedroom he heard someone saying "Wamekwisha tuacha tuingie ndani tuchukue pesa" [They have already left us lets get inside and collect money] He (PW3) then saw two people who entered into the bedroom and took money and cell phone which were on the table. The witness clearly stated that he did not recognize/identify the two persons who entered the bedroom. The witness further stated that after a while he heard someone from the sitting room saying "Hamjui kazi". He then saw Crosperry Gabriel, Ernest Gabriel and another person whom he did not recognize. What happened next is better explained by the witness himself. I quote him -

"Crospery Gabriel cut my mother on the head with the axe. My mother fell down and he started to attack her with the machete. He cut her on various parts of her body but she was seriously cut on her arms. The small baby was not injured because she was trying to protect him by keeping close to the wall. My young brother Mukтари (deceased) said "Ta Koro umemuua mama ukachukua simu yake." Crospery stopped to cut our mother and followed us. He started to cut us with the machete. He cut me on the head. He also cut my young brother Mukтари Twaha. Ernest Gabriel was cutting my sister Fatna. We then heard a voice from outside saying "Afande tuondoke." After that they left the bedroom."

Although there are some few discrepancies in the evidence of PW3 and PW4 I was impressed by his credibility. PW4 stated that after Issa Said

and Mustapha Kihanga had taken money and cell phone then came Crosperry Gabriel and Ernest Gabriel. She did not say that there was a third person. Although he was about ten years old when the incident happened he was able to explain it thoroughly and candidly. For instance where he saw a person who he did not recognize he frankly said he did not recognize him. Whereas PW2 and PW4 broke into tears in the course of giving evidence this one (PW3) was calm, honest and well composed even during cross examination. In giving their opinions the honourable assessors remarked:-

"Hon. Judge, the evidence of PW3 proves the offence because he gave a very good evidence on the incident although he was about ten years old when the incident happened."

In examining their evidence I am satisfied that the following accused persons were correctly recognized; Crosperry Gabriel, Ernest Gabriel, Issa Said and Mustapha Kihanga. Both witnesses said that there was sufficient light from the wick lamp which was in the bedroom. During his final

submission Mr. Kabunga, learned counsel for the accused persons challenged the evidence of PW3 and PW4 particularly on the source of light and intensity. The learned counsel submitted that various authorities of the Court of Appeal have held that light from a wick lamp (Koroboi) is not sufficient enough to make correct identification and he cited the case of **Maselo Mwita and Another V R Criminal Appeal no. 63 of 2005, Mwanza** (unreported). With respect to the learned counsel, I had the opportunity of reading the case. The Court of Appeal of Tanzania through His Lordship Rutakangwa, J.A. stated that – “Different lamps produce light of different intensities. Light from a wick lamp is incomparable to that from a lantern, or a pressure lamp.” They did not say light from a wick lamp is not sufficient to make correct identification. Another thing is that the witness who claimed to have identified the appellants in the case of **Maselo Mwita @ Maseke and Another** did not say clearly what type of lamp was in the bedroom. In my humble opinion whether or not a wick lamp produces or produced sufficient light to correctly recognize or identify a person would depend on the circumstances of each and every particular case. I am saying so having in mind cases where identification by candle

light, wicklamp, firelight etc. was held to be perfectly correct. See for instance **JEREMIAH MADEBELE V R, Criminal Appeal No. 64 of 2004 (CA) Mwanza** [unreported] where identification by candle light was accepted; **JOHN LAZARO V THE REPUBLIC, Criminal Appeal No. 230 of 2010, (CA) Mwanza** [unreported] where identification by wicklamp was accepted; **STUART ERASTO YAKOBO V THE REPUBLIC Criminal Appeal No. 202 of 2004 (CA) Dar es Salaam** (unreported) where identification by firelight was accepted etc.

During cross examination by Mr. Kabunga PW4 stated –

"The bedroom had a bed, table and small space remaining. My bed's size was four feet by six feet."

During cross examination by Mr. Kabunga PW3 stated –

"I do not know the measurement of my mother's bedroom. In the room there were three suit cases, one big wooden case, table and the bed."

What one can gather from the above explanation by PW4 and PW3 is that the bedroom was not too big. I therefore find that the light from the wick lamp which was described as big and having a long and large wick was enough to enable PW3 to see and recognize Crospery Gabriel and Ernest Gabriel. It was also sufficient to enable PW4 to see and recognize Crospery Gabriel, Ernest Gabriel, Issa Said and Mustapha Kihanga.

Apart from the issue of light and its intensity I am satisfied that the accused persons were correctly recognized because PW4 was standing on the bed and PW3 was standing near the table in the bedroom so they were close enough to those accused persons and after all PW3 and PW4 knew before Crospery Gabriel and Ernest Gabriel. Even those accused persons acknowledge that they were neighbours of PW3 and PW4. Issa Said and Mustapha Kihanga were well known by PW4. In his defence (DW5) Issa Said admitted to know PW4 and her husband (PW1). DW3 also admitted to know PW1 and PW4. He said during his defence:-

*"I know Twaha Kaiza because he was our
councillor and we used to pray in the same*

mosque. I also know his wife Safina Twaha

because she had a hotel at the market (mjajaro)."

With regard to the issue of time which the witnesses spent in observing the accused persons PW4 clearly stated in cross examination that she could not estimate the time when the accused persons came in and when she became unconscious, however, PW3 who said that he saw Crosperry Gabriel cutting the deceased with a machete before cutting him said during cross examination that they took about forty five minutes. I have considered that evidence and am satisfied that although PW3 was merely estimating the time he had sufficient time to observe the accused persons. He had time to observe the first two people who he could not recognize and then he had time to observe Crosperry Gabriel and Ernest Gabriel when they entered the bedroom and started to attack his mother first and later on attacked his young brother Muktari (deceased) and finally attacked him (the witness – PW3).

As stated before, the accused persons raised the defence of alibi.

The first accused person Crosperry Gabriel stated in his defence that when the incident happened he had already moved away from Rutoro village. He said that he had never returned to Rutoro since he had left there on 27.2.2009. He said he shifted to Kyota village within Muleba District. The second accused Ernest Gabriel said that he moved away from Rutoro village on 10.3.2009 and settled in Nshamba village, Kiziramuyaga Ward within Muleba District. The third accused Mustapha Kihanga stated in his defence that on the material day i.e. 5.4.2009 he was at his home in Choboheke Hamlet and that he came to know about the incident in the afternoon at 1.00pm. The fifth accused person Issa Said stated in his defence that he moved away from Rutoro village on 13.11.2008 and went to settle in Kyaka Missenyi District. He insisted that when the incident happened he was at Kyaka.

There is no dispute that the defence of alibi by the accused persons was not rebutted by the prosecution side. However Ms Mrema, learned Senior State Attorney complained in her final submission that they (prosecution) were not given the particulars of the defence of alibi by the

accused persons so they could not follow up the matter. To that complaint I say that the prosecution were not vigilant enough to get the particulars. If they wished they could have easily got the particulars from the accused persons.

I have seriously considered the accused persons defence of alibi vis a vis the evidence of visual identification and with respect, I accord no weight to their alibi. I have taken that decision on the basis of what was stated by the Court of Appeal of Tanzania in the cases of **TONGE NI-NAATA V REPUBLIC [1991] TLR 54** and **LUSABANYA SIYANTEM I V REPUBLIC [1980] TLR 275**. In the latter case, the Court of Appeal of Tanzania cited with approval the decision of the East African Court of Appeal in the case of **LULATIKWA S/O KABAILE @ RUTAHABA S/O KASASE V R (1941) 8 EACA 46** where it was stated that –

*"If a person charged with a serious offence
alleges that at the time when it was committed
he was in some other place where he is well known,
and yet makes no effort to prove that fact, which,*

if true, could easily be proved, the Court must necessarily attach little weight to his allegation, particularly in the face of such definite evidence of identity as there was in this case."

In the present case none of the accused persons who raised the defence of alibi directly or indirectly brought any evidence to support his claim. It should not be taken that I have shifted the burden of proof to the accused persons, no! As stated before I am alive to the principle that where an accused person relies on a defence of alibi he does not assume the burden of proving it, it is enough if it casts reasonable doubt on the prosecution case. The burden of proof remains to be on the prosecution.

Having found that the following accused persons to wit Crosperry Gabriel, Ernest Mutakyawa @ Gabriel, Issa Said and Mustapha Kihanga were seen and recognized at the scene of incident the next issue which arises for determination is whether they had a common intention to murder the deceased Mukhari Twaha. Section 23 of the Penal Code, Cap. 16 R.E.

2002 provides –

S. 23 "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In the case of **REPUBLIC VS ACP. ABDALLAH ZOMBE AND 12 OTHERS, Criminal Sessions Case No. 26 of 2006 (HC) Dsm,**

(unreported) it was observed as follows:-

- (i) For section 23 to apply it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged.

- (ii) The offence committed must be a probable consequence of the prosecution of the unlawful purpose.
- (iii) To constitute a common intention it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence. Common intention may be inferred from their presence, their actions, and omission of any of them to dissociate himself from the offence.
-)(iv) Mere presence at the scene of crime is not enough to infer common intention.

From the evidence adduced by both PW3 and PW4 the four accused persons who entered the bedroom were armed with machetes. It cannot be disputed therefore that all the four accused persons intended to prosecute an unlawful purpose in conjunction with one another. In

otherwords by invading the said house in the night while armed with machetes and stealing Tsh.14,000/= and a cell phone that constituted the offence of armed robbery. Again, there is no doubt that what happened, that is, killing the deceased Muktari Twaha was a probable consequence of the prosecution of such purpose i.e. committing armed robbery.

I however, find that the third accused person Mustapha Kihanga and the fifth accused person Issa Said had no common intention with the other accused persons, namely Grosperry Gabriel and Ernest Mutakyawa because of the following reasons. One, although they were part of the original idea to prosecute an unlawful purpose and were at the scene of incident they did not harm the witnesses. That was stated by the witnesses themselves [PW3 and PW4].

Two, according to PW4 (During cross examination) before the first accused Grosperry Gabriel started to attack her he (Crosperry Gabriel) told his colleagues (Issa Said and Mustapha Kihanga) "Nye hamjui kufanya kazi."

Three, according to PW4 when Crosperry Gabriel and Ernest Mutakyawa @ Gabriel came to the bedroom Issa Said and Mustapha Kihanga slowly left

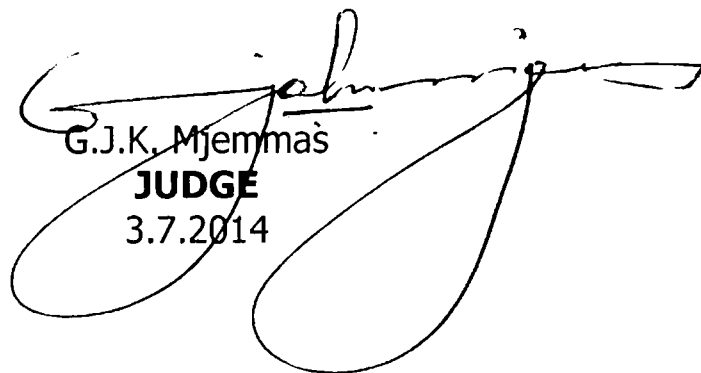
the bedroom.

What I want to say is that although Issa Said and Mustapha Kihanga were in the bedroom or rather at the scene of incidence their conduct somehow showed that they tried to dissociate themselves from the offence of murder.

Before I conclude let me add something about malice aforethought. As stated above Crosperry Gabriel and Ernest Mutakyawa @ Gabriel had a common intention to cause death of the deceased. They shared a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence of murder was committed. They were armed with machetes which they used to attack their victims including the deceased Mukhari s/o Twaha. As stated before in this judgment the report on post mortem examination of the deceased's body shows that death was due to "Severe bleeding due to cut wound (L) lateral scalp". There is no doubt therefore that the accused persons intended to cause grievous harm or death.

I therefore find that the prosecution had not proved their case against the 3rd accused person Mustapha Kihanga, the 4th accused person Christian Tryphone, the 5th accused person Issa Said and the 6th accused person Mathias Nestory. I enter a verdict of not guilty in respect of all those four accused person i.e. the 3rd, 4th, 5th and 6th. It is ordered that they should be set at liberty immediately unless held for some other lawful cause.

On the other hand I find that the prosecution has proved beyond reasonable doubt the case against the 1st accused person Crospéry Gabriel and the 2nd accused person Ernest Mutakyawa @ Gabriel. I therefore convict Crospéry Gabriel and Ernest Mutakyawa @ Gabriel of the offence of murder as charged.



G.J.K. Mjemmas
JUDGE
3.7.2014

MITIGATION

1st Accused: I was not at the scene of incident and I do not know what happened there. I have left my six children alone. My wife has passed away.

2nd Accused: I request the court to have mercy on me because at home I have orphans who depend on me. I did not commit the offence. I have my own children who depend on me. Two of them are students.

SENTENCE

Let me comment on the sentence which I am going to give the accused persons. Section 197 of the Penal Code, Cap 16 R.E. 2002 provides that –


S. 197 *"A person convicted of murder shall be sentenced to death."*

In other words the only punishment for murder is death sentence. This kind of sentence has been a subject of criticism by many people including lawyers, human rights groups etc. I do not need to say much about it but as the country is in the process of having a new constitution, I think it is the right time to think of an alternative punishment for those who commit offences which attract the sentence of death.

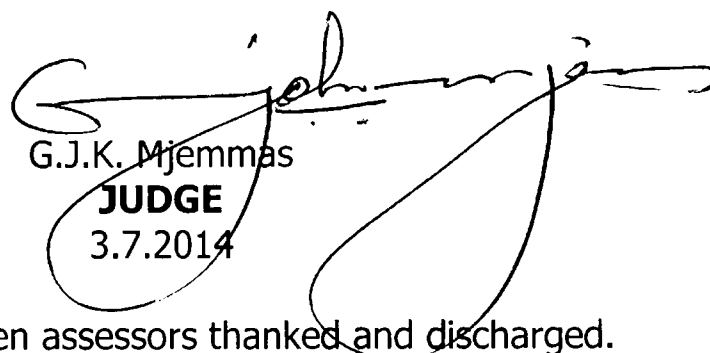
However, as far as this case is concerned now, my hands are tied by

my oath of office to uphold the constitution and to respect the laws of the country.

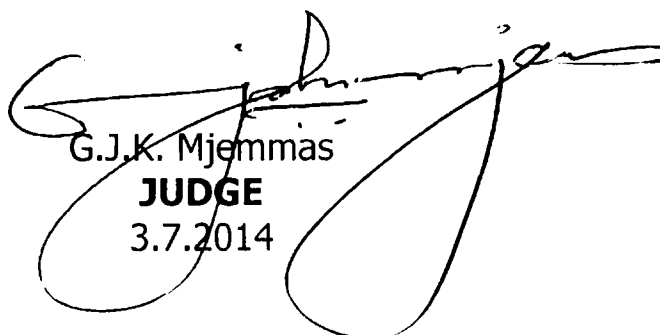
From the premises of the conviction entered, I sentence the accused persons, namely Crosperry Gabriel and Ernest Mutakyawa each to death, which shall be suffered by hanging.


G.J.K. Mjemmas
JUDGE
3.7.2014

Court: Right of appeal explained

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G.J.K. Mjemmas
JUDGE
3.7.2014

Court: Lady and Gentlemen assessors thanked and discharged.


G.J.K. Mjemmas
JUDGE
3.7.2014

AT BUKOBA
3.7.2014