

**IN THE HIGH COURT OF TANZANIA**

**DISTRICT REGISTRY OF BUKOBA**

**AT BIHARAMULO**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 68/2015**

**REPUBLIC**

**VERSUS**

**1. SABATO THABITI**

**2. BENJAMIN THABITI**

**JUDGMENT**

***05/11/2018 & 07/11/2018***

**Kairo, J.**

The above named accused namely Sabato Thabiti and Benjamin Thabiti stand charged with Murder c/s 196 of the Penal Code, Cap 16 RE 2002. It was alleged that on 22/12/2013 about night hours at Mkalinzi Village within Ngara District in Kagera Region, the duo murdered one Japhet Thabiti. Both of the accused pleaded not guilty to the charge. The prosecution case was conducted by Mr.

Grey Uhagile, the learned State Attorney while both of the accused were receiving legal services of Mr. Matete, the learned Advocate.

It is not disputed that Japhet Thabit is no more and he met a brutal death. This is confirmed by the evidence of Pw1 – Pw4 together with Dw1 and Dw2 who told the court that the deceased's body was found with a cut throat, deep knife stab on the chest and his left testicle was completely cut and removed. This is further confirmed by the report on Post Mortem examination (exhibit P2) which states that the death was due to severe internal and external hemorrhage. The report further states;

*“death caused by a neck cut deep to the vertebrae column with a sharp instrument involving the major blood vessels (jugular) and trachea. Also a deep lower chest cut with a sharp object making inner organs visible and the left scrotal cut (testicle) with a sharp instrument with complete removal altogether resulting to severe internal and external hemorrhage and definitely death”.*

Therefore there can be no doubt that, the deceased met a violent death and whoever is responsible must have intended to cause death or grievous harm. The issue for determination before the court therefore is whether it were the accused persons who caused the death of the late Japhet Thabit and further whether they had the intention of causing his death.

The prosecution has summoned for witnesses and tendered two exhibits which were a postmortem examination report (exhibit P2) and a sketch map of the scene of crime (exhibit P3) in order to prove that it were the accused persons who

murdered the deceased. Exhibit P1 a statement of Pw1 was tendered by Pw1 at the request of the defense counsel.

Pw1 was Felister w/o Kateragi. The essence of her testimony was that, on the material day that is 22/12/2013 while at home around 5:00pm, he saw Sabato @ Miburo, Benjamin @ Nyandwi and Segwenda chasing Japhet @ Bigirimana. All of the four were the sons of Thabit. She told the court that they were running towards her home and Sabato held a knife and the other two; Benjamin and Segwenda were holding eucalyptus sticks. The witness went on that; she knew all of the four people as they were her neighbor for 19 years. Pw1 told the court that the three chased Japhet and when they reached her home, they started attacking him using the sticks and knife. They cut his neck and stab his chest. The witness shouted for help and the assailants run away but they had already killed him. She went on that the people gathered following her shouts and she told them that it was Sabato Thabiti @ Miburo, Benjamin Thabit @ Nyandwi and Severine Thabit @ Segwenda who have killed the late Japhet @ Bigirimana.

Pw1 went on that the Police then came at the scene and she gave her statement into which she told the Police that the incident occurred at 5:00 pm. When cross examined she stated that if the Police wrote 19:00hours it was their mistake. She further stated that the deceased body was about 5 paces from her house and that the first person to come was Balizi (Pw3). She insisted that when the accused persons were attacking the deceased, she was there shouting and they cut and stab him around 6:00pm.

The second prosecution witness (Pw2) was Victor Peter, the doctor who conducted the postmortem examination of the late Japhet Thabit. He told the

court that on 23/12/2013 while at his work station at Murusagamba Ward, he was requested by the police to go and conduct a postmortem on an his body so as to know the cause of death. He went on that when reached at the scene, they found the deceased's body lying on the grass but near a residential house and that the body had a lot of injuries particularly on the neck, chest area and private parts. Pw2 clarified that the neck had a deep cut to the extent of being able to see the spinal cord; the stab at the chest was also deep such that internal organs such as lungs were visible. He went on that the other big wound was on the private parts whereby the left testicle was cut and completely removed. The body has other small cut wounds as well on the face, left eye and the stomach caused by a sharp object. The witness further stated that he then filled the postmortem examination report and handed it to the police. According to his report, the cause of death was severe bleeding due to the observed cut wounds. The postmortem examination report was admitted as exhibit "P2".

During cross examination, Pw2 conceded that he has omitted to fill No. 4 and 5 on the report which according to the key therein, he was to fill the race and whether the deceased was a child or adult respectively. On further cross examination, Pw2 conceded that he didn't fill No. 7 of the report either which requires time of the occurrence of the death prior to examination of the body. The witness attributed the omission to human error and not negligence. However in re examination he stated that the purpose of the postmortem examination was to know the cause of death, the goal which he stated to have been achieved.

The third prosecution witness (Pw5) was Police Officer with No. G. 5681 D/C Evarist. He was an investigator of this case. He told the court that on 23/12/2013

they got information of the murder incident at Mkalinzi Village. He went together with the OCS, a doctor and another Police Officer to the scene of incident. He went on that when they reached there they found the deceased body lying on his back having three big wounds and other small injuries of swollen stick marks. Pw3 told the court that the big wounds were; a deep cut throat which nearly reached the back skin, another one was a deep stab on the lower chest (diaphragm) and the third one was on the private parts whereby one testicle was completely cut and removed.

The witness went on that they found the suspects of the killing to have been roped. He drew the sketch map of the scene which was admitted in court as exhibit P3. The doctor then conducted the postmortem examination on the deceased body. He went on that the suspects' statements were written by the OCS and Pw3 later took them to the Justice of Peace at the WEO's office where they gave their extra judicial statements. The witness also told the court that in his investigation he discovered that the accused persons and the deceased were related and the motive behind the killing was a quarrel over land, among them.

The fourth and last prosecution witness (Pw4) was Stephano Gwasa Muhanuka. He told the court that he was a Ten Cell Leader (Balozi) when the incident occurred. He testified that he remembers on 22/12/2013 evening hours and a little darkness had already started, he was returning back home from the market. As he went closer, he heard shouts of many people coming from the direction he was heading to. He went on that he met one; Frederick Balitunya and went together to where the shouts were coming from and noted that it was the house of Katerage. When asked why the said shouts, Katerage told him that he wasn't

there either but when he asked his wife Felister (Pw1), she told him that there was a murder incident whereby Japhet @Bigirimana was killed. Pw4 went further that Felister told her husband that the deceased was killed by Sabato, Benjamini and Severine, all being sons of Thabit. He was further told that the incident occurred around 5:00pm but the deceased died around 6:00pm. The witness went further that, when he found the body of the deceased near Katerage house he noted that the deceased was slaughtered and almost the neck would have been removed. He further told the court that they then went to Mzee Thabit to search for those who have been mentioned by Felister w/o Katerage to have been killed Bigirimana, adding that the house of Mzee Thabit was not far from where the incident occurred and even one can hear when called. Pw4 further told the court that when reached there, they managed to get Sabato and Benjamin in the house of Benjamin but Severine was already at large. They took the two; (Sabato and Benjamin) to the scene area and roped them waiting to hand them over to the Police. The witness also told the court that the Police came in the morning of 23/12/2014 and Pw4 was involved in the conduct of Postmortem examination of the body of the deceased. He told the court that he observed that the deceased was slaughtered, he was further stabbed with a knife on the lower chest area and one of his testicles was cut and completely removed. He further told the court that the police then took the accused and went with them. P4 also stated that when they went to the house of Mzee Thabit, they found him but he was too drunk.

That marked the end of prosecution witnesses.

The defense side had two witnesses and tendered no exhibit. The first witness (Dw1) was Sabato Thabit. He told the court that he knew Japhet Thabit but he doesn't know where he is currently. He denied to have killed Japhet with Benjamin. Dw1 went on that on 22/12/2013 he was at home for the whole day with Benjamin and when both were asleep around 9:00pm, they heard a knock. That they opened up the door and found the Ten Cell Leader (Balozi) and other four people. He went on that, they asked them why were they asleep while there were shouts outside and answered that they didn't hear the said shouts. They were then taken to where the shouts were and noted it was Katerage's house. Dw1 went further that when they reached there, they were told that there was a murder incidence and the one who was killed was Japhet Thabit. He went on that, he witnessed his body but didn't know who has killed him. He went on that later Felister w/o Katerage mentioned him and Benjamin to have been involved in the killing. They were apprehended and roped. He further stated that they were then taken to the village office and slept there. That Police came on the next day and took them to Murusagamba Police Station where he gave his statement. He went on that he denied to have killed the deceased. He also denied to have been taken to Justice of Peace as testified by Pw3.

Dw1 told the court that they didn't hear the shouts as their house was a little far from the scene area, besides there was a valley in between which made hearing difficult and also they were inside the house and asleep.

When cross examined, Dw1 conceded that Felister was their long time neighbor but he has a boundary dispute with her that is why she mentioned their names. He also conceded to have written his statement at the Police. When he was first

shown the statement he agreed the signature to be his, but later he denied it though he agreed that he has given his statement at the Police. He also conceded to have seen the body of the deceased having injuries but denied to know anything concerning neither his death nor the time when the deceased died.

Dw2 was Benjamin Thabiti. He conceded to know Sabato who is the 1<sup>st</sup> accused and further conceded to know Japhet Thabit but he denied knowing where he was. He told the court that he remembers on 22/12/2013 he was at home and that he was arrested around 9:00pm together with Sabato by the Ten Cell Leader and other persons who followed them when asleep at home. He went on that they were then taken to the house of Felister w/o Katerage where his relative Japhet Thabit was murdered. He went on that he saw his body having various cut wounds and a knife stab at his chest and a lot of people were gathered. Dw2 went on that he was roped together with Sabato and taken to the office of Mkalinzi village and the next day around 10:00am they were taken to Murusagamba Police Station. He denied to have killed the deceased together with Sabato and Severine adding that he knows nothing concerning the said incident. The witness told the court that Felister w/o Katerage has mentioned their names due to the dispute over land. He added that Felister claims that he has encroached her land, which was not true.

During cross examination, Dw1 stated that he heard Sabato when giving his defense that Dw2 had no land boundaries dispute with Felister and conceded that to be true but also what he testified (Dw2) that there is land boundary dispute with Felister is equally true. He further stated that he met Japhet for the last time on 22/12/2013 in the afternoon at his home when Dw2 went to send him a gallon



but didn't talk to him. He further agreed that they were 10 children in their family but only two of them were arrested adding that they don't have any quarrel with the Balози. When asked why they were the only one apprehended, he didn't answer.

Dw2 also admitted to have given his statement at the Police into which he denied to have killed the deceased. When showed the statement he denied not to be the one he gave. He also admitted that Felister was their long time neighbor and knows them well. He also stated that each of them (Sabato and Dw2) has a distinct area of a shamba and each share a boundary with Felister. When asked by the 1<sup>st</sup> assessors as to where do dead people go, Dw1 answered that they are buried after dying but he repeated that he doesn't know where Japhet Thabit is.

After both sides had closed their cases, the defense counsel and the Learned State Attorney were invited to make their final submissions. Generally Advocate Matete representing both of the accused submitted that the prosecution has failed to prove the case beyond reasonable doubt against the accused. On the other hand, Mr. Grey Uhagile, the learned State Attorney submitted that, the accused has proved the case beyond reasonable doubt and enjoined the court to convict the accused and sentence them accordingly.

After summing up notes to gentlemen assessors, they were unanimously with a common opinion that it was both of the accused who have caused the death of the late Japhet Thabit and the killing was with malice afore thought, thus both of the accused were guilty of murder as charged.

I will keep on referring to the submission of the learned counsels together with the opinions of the gentlemen assessors in the course of writing this judgment.

In a murder charge, the prosecution is required to prove the following elements:-

- a. that the deceased is indeed dead.
- b. that the death of the deceased was caused by unlawful act or omission.
- c. that is the accused person who did the unlawful act or omission.
- d. that the killing was done with malice afore thought.

As stated earlier, Japhet Thabiti is dead and his death was unnatural. The issue for determination is whether it was the accused persons who have caused his death and further whether they caused the said death with an ill intention to kill him.

It is the cardinal principle of law that the above listed elements are to be proved beyond reasonable doubt. In the case of **Mohamed Said Matula vrs R [1995] TLR 3** the Court of Appeal held as follows among other holdings;

*“Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused (emphasis mine)*

Admittedly in the case at hand, the prosecution has hinged its case on visual identification which goes together with the credibility of the witness, corroboration by other witnesses and common intention of the accused persons.

I will start my analysis with visual identification. In this aspect the issue to be addressed is whether the accused persons were properly identified or rather the conditions prevailed at the scene were conducive for correct identification. Generally the courts are required to be cautious to ground its conviction basing on visual identification unless it is satisfied that all possibilities of mistaken identity have been eliminated and the evidence before it is absolutely watertight

**[Refer the case of Waziri Amani vrs R [1980] TLR 250 and Kazimili Mashauri vrs R Criminal Appeal No. 252/2010 CAT Mwanza (unreported). Further to that in the case of Raymond Francis vrs R [1994] TLR 100, the court insisted on ensuring that there were favorable conditions for correct identification of an assailant as it held:-**

*“It is elementary that in criminal case whose determination depends essentially on identification, evidence on conditions favoring correct identification is of utmost importance”.*

The court through the case of Kazimili Mashauri (supra) has recapitulated factors to be considered when determining as to whether the evidence was watertight and all possibilities of mistaken identity have been eliminated. The factors are as follows:-

- i. whether the witness knew the accused person before the incident*
- ii. the amount of time the witness had the accused under observation*
- iii. the distance between the witness and the accused during the commission of the offence.*
- iv. the kind and intensity of light at the scene*
- v. Whether there was any material impediment affecting the correct identification of the accused by the witness.*

In the present case, the eye witness was Pw1 who told the court that the incidence occurred around 5:00pm at her home and she was there. Needless to say by that time there was enough light having in mind that it was evening hours. Pw1 also stated that he knew all of the assailants (accused persons) and the deceased as they were her neighbors for 19 years, the fact which was also

conceded by Dw1 and Dw2. The witness also told the court that she witnessed from when the accused were chasing the deceased towards her home while holding sticks and a knife. That when they reached her home they start attacking the deceased using the said sticks and knife.

She also witnessed when the accused throat was cut and stabbed at his lower chest adding that the incident took about 1-2hours. Analyzing the above facts, I am convinced that Pw1 correctly identified the accused person and there was no possibility of mistaken identity as was opined by all assessors.

Further to that Pw1 told the court that she was shouting when the accused were attacking the deceased and after killing him they run away. She went on that when the people gathered following her shout; she told them the names of the assailants who were Sabato, Benjamin; the accused persons and Severine who is still at large. It was after she named them, Balozi and other people went to apprehend the accused at their home. Her ability to name the accused right away to the people including the Ten Cell Leader (Balozi) when they gathered at her home strengthen her evidence and her credibility that she is a witness of truth. I am fortified in this stance by the case of **Marwa Wangiti Mwita and Another vrs R [2003] TLR 39** which was quoted with approval in the case of **Isdory Cornery @ Rweyemamu vrs R; Criminal Appeal No. 230/2014 CAT Bukoba** (unreported) wherein it was observed

*“It should be borne in mind that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.....”.*

I am aware that Advocate Matete has attacked the credibility of Pw1 for what he termed as inconsistencies in her testimony. The learned Advocate clarified that in

the statement Pw1 gave to the Police, she indicated the incidence to have occurred at 19:00hours (7:00pm) while in her oral testimony she said the incidence occurred at 5:00pm. The Learned State Attorney on his part dismissed the contention arguing that the incidence occurred around 5:00pm up to 7:00pm thus no inconsistencies as it is within the time stated in the statement. According to Pw1 the incident started 5:00pm and took about 1 – 2 hours, I thus subscribe to the State Attorney's argument. But further to that, the law is settled that minor or slight differences in the witness testimonies that do not go to the root of the case are acceptable in evidence. In my view the issue is whether the incidence had occurred. Thus the difference of one or two hours in stating exact time of its occurrence in my view is minor and doesn't go to the root of the matter.**[Refer the case of Mohamed Said Matula (supra) and Dimitrive Kosya and Another Or. Vrs R; Criminal Appeal No. 7/2002 CAT Zanzibar (unreported)]**. On top of that the court has also ruled out that a rural girl or (woman in our case) cannot be expected to tell the exact hour an incident occurred **[Refer the case of Tunutu Mnyasula vrs R (1980) TLR 204]**.

Advocate Matete also in his submission has argued that another contradiction was also observed in the charge sheet which stated that the incidence occurred night hours. Suffice to state that, since the incidence prolonged up to 7:00pm from 5.00pm, there was no inconsistencies for the charge to state *night hours*. Besides, even if it would have been an inconsistency, section 234 (3) of the CPA would have taken care of the same as rightly submitted by the State Attorney. The section provides that the variance between the charge and the testimony to prove it with respect to the time when the alleged offence was committed is not material provided the case was instituted within time (where there is time limit).

Further to that Pw1's evidence has been corroborated by Pw2-Pw4 and exhibit P2. All the said witnesses have echoed the nature of the wounds and areas of deceased body where the said wounds were inflicted in the same way as testified by Pw1 save for the wound at the private parts which Pw1 seemed not know about it. The law provides that even the evidence of a single eye witness is adequate to convict the accused where the court is satisfied with its reliability. **[Refer the case of In Anil Phukan vrs state of Assam 1993 A R 1462** quoted with approval in the case of **Ahmed Omari vrs R Criminal Appeal No. 154/2005 CAT Mtwara** (unreported) into which the justices held

*"a conviction can be based on the testimony of a single eye witness and there is no rule of law which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone".*

However in this case Pw1's testimony was also corroborated by other witnesses. I thus agree with the opinion of the 2<sup>nd</sup> assessor on that aspect.

On top of that, the law is settled that every witness is entitled to credence unless there are good and cogent reasons to the contrary **[Refer the case of Goodluck Kyando vrs R [2006] TLR 363**. I wish to confess that I have neither observed nor heard anything to fault the credibility and reliability of Pw1.

I am further aware that Advocate Matete has also attacked the omission to fill some spaces provided for specific information in the postmortem report. The omission was admitted by Pw2 and he explained it to be human error. I posed to ask whether the said omission has prejudiced prosecution case and answered negatively. I agree with Pw2 that despite the observed omissions, the goal to

conduct a postmortem examination of the deceased body which is to know the cause of death of the deceased has been achieved in the matter at hand.

It is also imperative to ascertain as to whether the two accused had common intention to cause the death of the late Japhet. According to Pw1, both accused chased the deceased; they were all armed with stick and knife which were used to kill him; none of them disassociate with the attack which caused the death of the deceased. It is the stance of law that common intention may as well be inferred by the actions or omissions of the accused persons. In the case of **Godfrey James Ihuya and Another vrs R [1980] TLR 197**, the court spelt out guidance as at to what time accused persons can be said to have formed common intention to commit the offence and the following was observed;

*“.....to constitute common intention to prosecute an unlawful purpose, eg. beat a so called thief as a result of which he died, it is not necessary that there should have been any concerted agreement between the accused prior to the attack of the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the assault”.*

Applying the cited case to the facts as above stipulated together with the analysis of other evidence, I am of the firm view that the two accused had a common intention to kill the late Japhet as rightly opined by the 1<sup>st</sup> assessor.

Having found that it were the accused persons who have caused the death of the deceased; the court as earlier hinted has to determine whether the killing was with malice afore thought.

The law has spelt out the factors that would assist to infer malice on the accused person as normally the attacker or assailant would not declare his ill intention [Refer the case of Enock Kipela vrs R: Criminal Appeal No. 150/1994 CAT Mbeya wherein the factors were listed to be:-

- 1. The type and size of weapon if any used in the attack*
- 2. The amount of force applied in the attack*
- 3. The part or parts of the body the blows were inflicted*
- 4. The number of blows though one may suffice depending on the facts of the case.*
- 5. The kind of injuries inflicted*
- 6. The attackers' utterance if any made before, during or after the attack.*
- 7. The conduct of the attacker before or after the killing.*

In the case at hand, the accused used sticks and a knife which is a lethal weapon (Pw1).

The big cut wounds observed in deceased body were;

- 1. at the neck;** whereby the neck had a deep cut to the extent of being able to see the spinal cord; (Pw1, Pw2, Pw3 Pw4 exhibit P2).
- 2. at the chest;** the knife stab which was also deep such that internal organs like lungs were visible (Pw1, Pw2, Pw3 Pw4 exhibit P2).
- 3. At the private parts;** whereby a left side testicle was cut and completely removed (Pw2, Pw3, Pw4 and exhibit P2).



The inflicted wounds above stated explains the force used to be excessive, the parts of the body where the wounds were inflicted that is the chest and neck are dangerous thus the death outcome was a must and unavoidable consequence.

According to the nature of the wounds, one blow sufficed to cause death. With regards to the accused conduct before the killing; they chased the deceased until they got him and killed him. After the killing they all went to sleep at their house as if nothing happened despite the shouts that were being made outside.

It is from the foregoing and the analysis of the evidence in its totality that I have come to the conclusion that the prosecution has proved beyond reasonable doubt that it was the accused persons namely Sabato Thabit and Benjamin Thabit who have caused the death of the late Japhet Thabit with malice aforethought. I therefore enter the conviction for the offence of murder against them as charged.

  
L.G. Kairo

**Judge**

07/11/2018

### **SENTENCE**

The only punishment for the murder offence in our contrary is death sentence. That is the law to which I am constrained to apply it as it is.

In that regard therefore, having in mind the conviction I entered, I hereby sentence the accused person namely Sabato Thabit and Benjamin Thabit to death which shall be suffered by hanging.

  
L.G. Kairo

**Judge**

7/11/2018

Right of Appeal explained.

  
L.G. Kairo

**Judge**

7/11/2018

**Court:** Gentlemen Assessors are thanked and discharged.

  
L.G. Kairo

**Judge**

7/11/2018

