

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 92 OF 2015

REPUBLIC

VERSUS

1. MARIO CLINTON @ GALABAWA

2. ADAM HUSSEIN @ KIONGOZI

1/3/2018 & 7/3/2018

RULING

I.P.KITUSI, J.

MARIO CLINTON @ GALABAWA and ADAM HUSSEIN @ KIONGOZI the first and second accused respectively are charged under section 196 of the Penal Code Cap 16 for allegedly murdering one ARISTIDES MEDARD RWEYEMAMU on 23rd April, 2012 at Mwananyamala area, within Kinondoni District in Dar es Salaam Region. They denied the charges.

There is no doubt that Aristides Medard Rweyemamu died on 23rd April 21012 and according to the prosecution, this is how he met his death. The deceased had an affair with one Fatuma Hassan Manzi(Pw1) an attendant at a drinking place commonly referred to in

this country as Grocery. That Grocery was at a place known as Goba Mwisho which the deceased visited on 23rd April 2012.

At around 8.00 P.M the deceased and Pw1 decided to leave by public transport to Mwenge area. At Mwenge Pw1 withdrew money from her Account using Automated Tell Machine (ATM), and she kept it in her handbag. When the two were at Mwananyamala area within Kinondoni District walking home, three things took place. First, a motorcyclist knocked her and she fell into a trench by the road side. After the deceased had picked her up and as they resumed their walk, Pw1 was nearly hit by a rickshaw (bajaji). Then a small car with two passengers stopped in front the deceased and Pw1, and one of the passenger alighted and approached them. He grabbed Pw1's handbag which the deceased had been holding. There ensued a tag of war over the handbag with the two Youngman from the car pulling while the deceased clang to it.

When this was happening all Pw1, could do was raise alarms of Thieves! Thieves! but no one offered assistance. At some point, one of the youngmen got into the car as the other one held on to the bag on one hand and the deceased on the other. The other assailant got into the driving seat and the one dinging to the bag also got in. The vehicle was driven off as a result of which the deceased was dragged on the hard surface causing injuries on his body. Some steps ahead the assailants threw the deceased out into a trench by the road side.

Finally Pw1's alarms were responded to by people who went to the point where she was, they helped the deceased out and took him to Mwananyamala Hospital which was nearby, according to the sketch

map of the scene (Exhibit P1). The deceased died shortly after being admitted at the hospital.

Pw1 testified that she identified the villains during the scuffle by their physical appearance, one as being short and the other being a bit brown. She said she was able to identify them with the aid of lights that illuminated the scene from neighbouring houses. She also described the duration of the scuffle as brief, that lasted for about 30 minutes. Dr Julius Riwa (PW4) testified that he did a Postmortem examination on the deceased and formed an opinion that death resulted from internal bleeding caused by multiple fractures, as per his report, Exhibit P3.

On 24/4/2012 D/CPL Morris (PW3) a police investigator was assigned to investigate the case. He prepared the sketch Plan (Exhibit P1). Then on 21 October 2012 Pw3 was told by the OC- CID to interview a suspects who, having been arrested in connection with other offences had intimated that he took part in the murder of the deceased in this case.

However this statement purported to have been made by that accused could not quality to be admissible for offending procedural laws.

On 27 October 2012 Pasensi Kishura (PW2) a police officer who was instructed by the OC- CID to conduct a parade of identification which he said he conducted according to Police General Orders. PW2 testified that the two accused persons were identified by Pw1. During cross - examinations Pw1 denied to have been pre tutored on who to identify. Pw2 denied the allegation by the defence counsel that the

suspect had been placed on positions that were easy for Pw1 to memories.

The Identification Parade Registrar or PF 186 was admitted as Exhibit P2 and it shows at the back that twelve people including one Dicky Musa had participated.

When Pw3 was being cross examined by Mr. Gibril Mnyele one of the three advocates for the accused persons, he conceded that he had called the said Dicky Mussa two days before the date he testified in court. It was apparent from Pw3's stunners that he had been in communication with the man who is recorded to have stood next to the second accused during the parade. The other advocates for the accused persons were Mr Jebra Kambare and Peter Madaha, learned advocates. The public was represented by Ms Republic was represented by Ms Lilian Rwetabuha and Ms Clara Charwe, learned State Attorneys.

The prosecution has closed its case after which I called upon the learned State Attorneys as well as the learned defence counsel to address the court under section 293(1) of the Criminal Procedure Act (CPA) if the evidence has established a case against the accused persons.

In his submissions, Mr Mnyele learned advocate for the accused persons submitted that the deceased died and unnatural death but there is no proof that the accused persons caused the death. He submitted that the court should find Pw1 to be and untruthful witness as she purported to have been operating an ATM (Automated Teller Machine) while she had no bank Account, and impossible

suggestion. The learned counsel's point is that Pw1's evidence as to identification must also be taken to be untrue .

The learned counsel submitted that the circumstances under which Pw1 met the assailants were unfavorable and cited the case of **Richard Shirima & Another Vs Republic**, Criminal Appeal No. 283 A of 2015(CAT) (unreported) which discusses what the courts should consider in eliminating mistake in visual identification.

Mr Mnyele submitted on the parade of identification as testified to by Pw2 and submitted that it did not meet the requirement of the law as stipulated in the Police General Orders No. 232 and case law such as **Consius Mwita Mara V. Republic** T.L.S Report 2016.

For the Republic Ms. Clara Charwe, learned State Attorney submitted that the case depends on the evidence of Pw1 regarding visual identification. She submitted that the time, quality of light, and the distance between Pw1 and the assailants were factors that militate a finding that the witness adequately identified the accused persons. The learned State Attorney went on to cite the case of **Scapu John & Another Vs Republic**, Criminal Appeal No 167 of 2008 CAT (unreported) in which the case of **Waziri Amani V. Republic** [1980] T.L.R was referred.

On the parade of identification it was the learned State Attorney's submission that it was conducted as per the letter of the law citing the case of **Juma Nyamakinana & Another V. Republic** Criminal Appeal No. 133 of 2011 CAT at Mwanza (Unreported).

I will now proceed to consider the evidence and the submissions of the learned attorneys. There is no doubt and I am firmly of the settled view that the case for the prosecution rests on the evidence of Pw1 who alleges that she identified the two accused. Mr Mnyele's point that Pw1 lied in her testimony regarding the bank is attractive but I decline the learned counsel's invitation to discredit Pw1's entire testimony because if that was a lie, it was not on a material point.

The law as regards visual identification is long settled, that it is the weakest type of evidence with possibilities of mistake even when it involves recognizing a known person. The cases of **Said Chaly Scania V. Republic**, Criminal Appeal No. 69 of 2005 CAT (unreported), **Mohamed Shaban , V Republic** Criminal Appeal No. 41 of 2009 CAT (unreported) ; **Nhembo s/o Ndal V. Republic** Criminal Appeal No. 33 of 2005 CAT (unreported) and ; **Issa Mgara @ Shuka V Republic**, Criminal Appeal No. 37 of 2005 CAT (unreported) are but among the many that pronounce that position.

In **Said Chally Scani**(supra) the Court of Appeal held, inter alia;

" We think that when a witness is testifying about identifying another person in unfavourabel circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable

It has to be appreciated and it is my finding that the circumstances under which Pw1 claims to have identified the accused persons were very unfavourable for the reason that it was at night and the intensity of the light not described and also because at best Pw1 only had glimpses of the assailants. Pw1 herself had barely recovered from a knock by a motorcyclist and a near miss by a rickshaw, it cannot be expected that she had the requisite calm to identify her assailants. There is, therefore nothing to eliminate the possibility that Pw1 mistook the accused for the assailants. That would be sufficient to bring this case to its logical end without discussing the identification parade and its effect.

It is fair however to pronounce myself on the identification parade. Apart from the fact that Pw3 admitted during cross examinations that he was in unofficial communications with a person who was standing next to one of the accused during the parade which suggests manipulation, there is nothing in the evidence of Pw2 and Pw3 to show that the said parade was conducted as per the letter of the law. The case of **Juma Nyamakinana & Another Vs. Republic**(supra) traced the jurisprudence of identification parades from the case of **Rex V. Mwangi Manaa** [1936] EACA followed by our Court of Appeal in **Raymond Francis V. Republic** [1994] TLR 100 and listed down eight steps which must be followed .

These are;

- *“At a reasonable time prior to parade the officer – in – charge of the case will inform the suspect that he will*

be put for identification. Any objection raised by the suspect will be noted and communicated by the officer-in-charge of the case to the officer conducting the parade before it is held.

- *If the suspect desire the attendance of a solicitor or friend, arrangements must be made for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing.*
- *There should be eight or more person on the parade for one suspects; ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held, with different personnel being used to form each parade.*
- *When the officer conducting the parade has arrived and has taken charge of the proceedings, the*

suspects will be brought on to the parade. The officer conducting the parade will explain the purpose of the parade and will ask the suspect if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the identification parade Register and immediate steps taken to replace those person to whom the suspect objects. The suspect will then be invited to stand where he please in the line. The position he selects will be noted in the register.

- *The first witness will be called to the parade by the officer conducting it, who will explain the purpose of the parade and invite him or her to point out by touching any persons he or she identifies. Under no circumstances shall the witness be touched or led during his or her examination of the parade.*

- *If the witness requires any person on the parade to walk, talk, see him with his hat on or off, this may be done but the whole parade must be asked to do likewise.*
- *The officer conducting the parade will note carefully in his identification or degree of identification made and any material circumstances connect therewith including any wrong identification, and any remark or objection made by the suspect. He shall ask the witness who make the identification ;m " In what connection do you identify this person?" and shall similarly record précises details of the witness's reply. No other questions are permissible.*
- *Subsequent witnesses will be brought into the parade and handled in accordance with the same procedure set out in sub- paragraphs (q) – (t) above.*

- *The officer conducting the parade will finally check his entries in the Identification Parade Register and will sign in the space provided. The original copy will remain in the Register and the duplicate removed and filed in the case File"*

For the reason that the evidence of visual identification by Pw1 did not meet the required standards and for the fact that the parade of identification did not comply with the laid down rules, I find the two accused persons not guilty and acquit them under section 293(1) of the CPA.



I.P. Kitusi

I.P.KITUSI

JUDGE

7/3/2018