

IN THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MBEYA)  
AT MBEYA  
CRIMINAL SESSIONS CASE NO. 58 OF 2015  
  
REPUBLIC  
  
VERSUS  
  
NOAH MWASAMBOSA

JUDGEMENT

**MONGELLA, J.**

The accused, **Noah Mwasambosa** stands charged with the offence of murder contrary to Section 196 of the Penal Code, Cap 16, R. E. 2002 of the laws. It is alleged in the information that on the 21<sup>st</sup> day of November 2014 at Lupando Masoko Ward within Rungwe District in Mbeya Region, the Accused person did murder one Abdalah son of Swebe.

The prosecution mounted a total of seven (7) witnesses and two documentary exhibits, that is, the sketch map of the crime scene and the postmortem report of the deceased, for purposes of proving its case. Through these witnesses, the prosecution adduced evidence as follows:

The deceased's wife one Elizabeth Masenjele (PW1), told this Court that his husband was murdered in November 2014 by being hit with a machete at the back of his head. She stated that the incident occurred on a Friday around 21 hours at the living room of their house. She said that

the murderers were three, but she only knew one of them called NOAH, who is the accused person. PW1 said she knew the accused person because he is their neighbour. She further stated that when the accused entered their house, she and her husband were sleeping in their room. The accused then, while standing at the door of their bedroom, called her husband by his name "Abdalah" and her husband responded. The accused then told her husband that "today is today" and then he entered into their bedroom. Upon witnessing the accused entering their room, PW1 ran outside the room.

PW1 stated that she saw the accused with the help of a bulb light which had four (4) batteries that lighted the room like electricity light. She stated that while she was running outside the house, another person who was on the outside door hit and injured her on the head. However, she managed to run to the neighbours for help. She said she did not recognize the person who injured her, but it was a man. PW1 stated that she went and reported the incident to a woman named Samasaka (PW3), whom they went together back to PW1's house with some other neighbours. However, the accused and his co-criminals threw bricks on them to prevent them from going to the scene of crime. By then they were stranded not knowing what had happened to her husband. After sometime, they managed to go to her house and found her husband lying dead at their living room. They also noted that five bags of fertilizer out of ten which were in the house were stolen.

PW1 further stated that their three children Aliko Abdalah, Omari Abdalah and Nisile Abdalah were sleeping in another room when the incident was happening. When they woke up and saw the scene of crime they ran to

their neighbours as well. The neighbours then came to the crime scene on the same night and in the morning they informed the police through phone call. PW1 was then taken to hospital at Rungwe for treatment. At the hospital, she got admitted for three days. Thereafter she went back home and found people mourning the death of her husband who was already buried.

PW1 also stated that the deceased and the accused were living as neighbours, but they were not friends and that they never conflicted or abused each other before. She also stated that the accused was holding a machete when he entered their room. She stated that the bulb lights were in their bedroom and the children's room and they used to leave them on throughout the night, but she destroyed the light in their room when she was running outside for help.

Aliko Abdalah (PW2), the first son of the deceased, testified that on that fateful day he was sleeping with his siblings in their room when they heard a knock on the door. They then heard the voice of their mother shouting that robbers have invaded their house. There was light in their room and he managed to see three robbers. The source of light was from batteries and produced good light. He said that the bulb light is usually put on when they go to sleep and remains on through the night. PW2 further stated that the three robbers entered into their room and took five (5) bags of fertilizer. Among the three he discovered one of them, that is, the accused. The accused was known to him prior to the event and he recognized him by face and his leg which was a bit disabled. The accused person took the fertilizer bags and went out. At first the accused took three bags and then came back and took two bags.

PW2 then took his young brothers and ran to their neighbours leaving his father already dead at the living room. He also said that when the neighbours went to their house the accused and the other two robbers threw bricks on them while carrying the fertilizer bags. The accused and the other robbers were just walking, they had no transport. The deceased was bleeding as he was cut on the back of his head. PW2 further stated that on one Saturday, his father, the deceased and the accused person had a conflict. That he was told about the conflict by the deceased.

PW3 Laisa Samasaka who is a close neighbour of the deceased told this Court that on that fateful date she was at her home when she heard PW1 crying that robbers have invaded their house. PW1 was crying while running to the house of PW3. When they went to the scene of crime the robbers threw bricks on them. Since it was night they did not recognize the robbers. PW3 then wrote a message using her mobile phone to one Pilati Mwamwaja, the deceased's uncle, telling him that the deceased has been invaded. The deceased's uncle and his children went to PW3's house and thereafter they went together to the deceased's house. At that time PW1 was together with PW3.

Upon arriving at the deceased's house they found the deceased dead at the living room. They started crying and mourning for the deceased. It was around 21 hours and they continued mourning till morning. The police came to the crime scene on 22<sup>nd</sup> November 2014, the next day, and the deceased was buried on the same date. PW3 also said that the accused is known to her as he is her neighbour. She further stated that the accused was of good behavior throughout and had no conflict with any person. The relationship between the accused person and the deceased

is not known, but they had no conflict. PW3 also said that she did not see the robbers who invaded the deceased's house and does not remember if the accused went to the deceased's house on that fateful date and that PW1 did not mention to her who invaded their house and participated in killing the deceased.

Hadija Mkanege (PW4), the ten cell leader at Lupando Village testified that on 21/11/2014 at around 21hours, she heard cries from the deceased's house who was her neighbour. She went to the deceased's house and found other people there and the deceased already dead. Thereafter she went home to sleep, but later, the Village Executive Officer (VEO), one Tedy Mwasomola and a militiaman one Mpoki Mwakalukwa woke her up. The VEO asked her to take them to the house of the accused for purposes of arresting the accused for being involved in the killing of the deceased.

They went together to the accused and they were six of them, that is, herself as a ten cell leader, the VEO and four (4) militiamen. The accused refused to open his door, even after knocking for some time. The accused and PW4 exchanged some words whereby the accused was in his room and they were outside the house. Later the accused stood at the door holding a machete. They then decided to leave, but while on the way the accused threw stones on them. PW4 then went back to her home and the rest remained around the accused's house watching. In the morning, PW4 went to the deceased's house and later to the VEO's office and found the accused already arrested by the militiamen. PW4 stated that she and the accused had known each other for many years and the accused was

of good behavior. It was the first time the accused behaved like that towards them.

PW5 Mpoki Mwakalukwa, a militiaman in Lupando village, almost had a similar story with PW4. He told this Court that on 21/11/2014 while he was at his home sleeping, the VEO called him around midnight and informed him of the death of Abdalah and that the accused was involved in the death. He then went to the village office together with three other militiamen named Hosea Mwaipopo, Zakaria Mwakabelele and Anyelwisye Mwaikombe. Thereafter they went to the ten cell leader, one Hadija together with the VEO and thereafter to the accused's house. At the accused's house, the ten cell leader called the accused, but he refused to get out and ordered them to leave his house. Thereafter, the accused opened the door holding a machete and a torch. The accused then started shouting and calling for help saying that robbers have invaded him. They then had to live and hide in the nearby bush while the accused continued to call for help. The accused then started throwing stones on them using a catapult.

PW5 further said that they then heard the accused calling and communicating to his uncle, one Zabron Mwankusye who had a car asking him to take the accused to the police station. They could hear the communication between the two because they were closer to the accused's house. The said Zabron came to the accused's house at around 5 hours in the morning. The militiamen were around the accused's house all this time while the VEO was communicating with the police. Upon his uncle entering the accused's house, the militiamen also entered in. The VEO explained on the death of the deceased and the

involvement of the accused in that death. The said Zabron pleaded with the accused for him to go to the village office and to the police. At around 6 hours the accused accepted and went with them to the village office. Immediately thereafter, the police arrived and took the accused to the station.

PW6, XD4534 Muhibu Mwaigogo who was a police officer by the time the incident happened testified that on 22/11/2014 he was in his office and was called by OCCID who gave him a file related to a murder that had occurred in Lupando village. He was assigned to investigate on the incident and together with other police officers and a medical doctor they went to Lupando village. At Lupando village they went to the deceased's house and found the deceased's body lying in the living room with wounds on the head. There was also blood around the living room.

The medical doctor examined the deceased's body while the police officers wrote statements of the wife of the deceased, PW1 and the child of the deceased, PW2. They then drew a sketch plan of the scene of crime and went to the village office and took recorded statements of the VEO, the militiamen and the ten cell leaders. Thereafter they officially arrested the accused person and took him and the deceased's wife to the police station. Since the deceased's wife was injured, she was given PF3 at the police station for hospital treatment. The accused recorded a caution statement in which he denied to have committed the offence. PW6 completed the investigation by having the sketch plan, post mortem report and statements and returned the file to the OCCID. On 02/07/2015, he recorded a second statement of the deceased's wife.

Tedy Fred Mwasomola (PW7), who was then the VEO of Lupando village testified that on 21/11/2014 at around 23hours at Lupando village, he heard a knock on his door. When he opened, two people entered his house, one of them was a woman named Huruma. The two told him that there was a serious problem at Abdalah Swebe's house whereby Abdalah has been killed. PW7 then went to the scene of crime at the deceased's house. He found the deceased dead due to wounds on his head and neck. In the bedroom he saw a bulb connected to four batteries hanging on the roof. The light was intense enough to observe anything in that small room. There were many people in that room. He saw the deceased's wife who was also injured on her head and she told him that the door was broken and one person said "today is today."

PW7 said that the accused was identified on the scene of crime. PW7 then called militiamen, one Mpoki, Zakaria, Hosea and Anyelwisye. On the same night they went to the ten cell leader, one Hadija and informed her on the death of the deceased. Then together they went to the house of the accused. The ten cell leader knocked the door at the accused's house, but he refused to open. After that the militiamen guarded the house of the accused while he left with the ten cell leader. When he went back to the accused's house, the militiamen told him that the accused had shouted for help saying he was invaded by robbers and that one of his relatives came to his house.

PW7 then called the police who promised to arrive at the scene of crime in the morning. On 22/11/2014 the accused accepted to go to the village office under escort of militiamen. PW7 then locked the accused in one of the offices. At around 8hours in the morning the police arrived at the



village office and they went together with the police to scene of crime. The police then recorded statements of the witnesses including that of PW7. The police then arrested the accused and took him to the police station at Tukuyu. PW7 also stated that he never heard any complaints against the accused person except a conflict with one of the militiamen named Hosea Hadson. The testimony of PW7 marked the end of the prosecution case.

The accused person gave sworn evidence in his defence. He also mounted four witnesses in his defence. At first during the preliminary hearing, the accused filed a notice of defence of alibi, but prayed to withdraw it during the hearing of the defence case. The prosecution demanded for explanation on the change of that defence and the accused through his advocate, Mr. Kyando withdrew the prayer and said the same shall be explained in the course of adducing his evidence.

In his defence, the accused, Noah Mwasambosa told this court that he used to be a church elder at the Seventh Adventist Church before being arrested and charged. He said he well knew Abdalah Swebe, the deceased, who lived at a neighbouring village and died on 21/11/2014. He stated that on 21/11/2014 from morning to 13hours he was building his house, he then went to his farm which surrounds his house and worked in the farm till 15hours when he was informed of church visitors who came to his house. He left the farm, took a shower and left with the visitors to church for preparation of the Sabbath day. The visitors were one Steven Mwankyuse and another one whom he did not remember his name as he lives at the border to Malawi. They prayed until 20hours whereby he went

back to his home and the visitors went to spend the night at one Zebron Mwankyuse's house (DW5).

At home he found his children cooking and told them not to put food for him as he wanted to sleep. He slept for some time until his children came to his window, called him and told him that he was called by his neighbour one Maria Sampete (DW2). He then woke up and followed her outside whereby the said Maria Sampete told him that she heard cries from the other side. After asking why were they crying, the said Maria told him that she heard them saying Abdalah is dead. He then told Maria that Abdalah just passed at this home on his way to a local pub and they greeted each other. He then called one Faida Mwakyaka, a neighbour of the deceased who told him that Abdalah was invaded and cut with machetes. He then woke up his two neighbours one Henule Mwenyekule and one Franco Mwifiusi and went with them to the scene of crime. That was around 21hours. The accused said that his relationship with the deceased was good and that he talked with the deceased in the morning of 21/11/2014 when the deceased went to bid him farewell as he was planning to move to his land of inheritance.

At the crime scene, the accused said that they found the VEO who told them that no one is allowed to enter the house until police procedures are completed. Outside the house there were women gathered and men were gathered under a tree. He then went and offered his condolences to the women and the deceased's wife. The hamlet chairperson was also present. After a while he went back to his home to sleep. He left with Henule and left Franco Mwifiusi at the crime scene.

At 01hours he heard sounds calling him multiple times by the name "baba Cecy." After asking who was calling him, he heard a reply that it was one "mama Semeni" also known as Hajida Mkanege. Then he felt calm after knowing that it was his ten cell leader. He then opened the door while holding a lump. Out there he was shocked to see his enemies one of them being one named Hosea. The accused said he calls them enemies as they had injured his leg within the same month whereby they just invaded him thinking he had money, but did not get anything. The said Hosea was even arrested on the said incident, but was freed when he decided to forgive him after learning that he might spend thirty years in jail. On that night Hosea started throwing stones on him and the accused decided to shout calling them robbers and calling for help. Thereafter his neighbours came, one Loina Kisyala and her grandson one Franco Mwifiusi. The accused then said that those people who came to his house told him that the VEO had sent for him, but was never told the reasons as to why the VEO sent for him. He told them that he was with the VEO, but he did not tell him anything. He then called one Zebron Mwankusye (DW5) who is his uncle and informed him that he has been invaded by robbers.

When Zebron arrived at around 01hours, those people ran away. The accused then told Zebron to take him to the police. Instead Zebron called the police and told them about the incident. They then waited for the morning and in the morning the VEO and one Mpoki Mwakalukwa came to his house. They found the accused and his family and told him that he was needed at the village office. The VEO told the accused that he was the one who had sent the militiamen, but did not know that they were after him before. The VEO then told the accused that he told the deceased's wife that if she won't mention anyone involved in the killing

then the police will punish the whole village. The deceased's wife then told the VEO that she saw a person with an injured leg who looked like Noah Mwasambosa. The VEO then told the accused to wait for the police. When the police came they arrested him, handcuffed him and took him to the police station. The police then searched his house and the outside surroundings of his house but did not find anything. There was no catapult, machete or fertilizer bags found at his house.

The accused further stated that one of his leg was injured and the other one was disabled therefore there is no way he could carry a bag of fertilizer weighing almost fifty kilograms. He also said that he does not know who killed Abdalah Swebe and that his relationship with other villagers was very good. He had never quarreled with anyone in the village. He also said that when he said he was not at the crime scene in the notice of alibi he meant he was not involved in the act, but he later went to give his condolences to the deceased's family.

Lastly, the accused said that when the deceased went to bid farewell to him he told him that he was going to remove by force people who were living at his land of inheritance. That he later came to realise that the deceased had bid farewell to the whole village including the VEO, therefore he does not know what was going on in the village the deceased was planning to move to.

The accused's neighbour, one Maria Sampeta (DW2), testified before this Court that the accused is her close neighbour. Their houses are so close to the extent that she could call or talk to him from her house. She said she knew the deceased person and that she heard that he died in 2014. She said that on the night Abdalah was killed, she heard noises of people

saying that Abdalah was dead. She then decided to call the accused from her house. The accused's daughter named Cecy replied and she told her to tell her father that Abdalah is dead. That by then the accused was at his home because he later replied to her after his daughter did. Thereafter she did not do anything she just remained at her house. She further stated that the distance from the accused's house to that of the deceased involves passing through a valley and a hill. Her relationship with the accused is good and she has never heard the accused quarreling with anyone. She does not know who killed Abdala Swebe. On cross examination, DW2 stated that she does not know the time Abdalah was killed or the cause of his death and that she does not know the exact distance from Abdalah Swebe's house to Noah's house. She just heard noises from Abdalah's house.

The accused daughter one Cecy Noah (DW3) gave almost a similar story to that of DW1, the accused and DW2. She testified that, in 2014 killings of one Abdalah Swebe happened in their village. She got news of the said killings on a Friday and that it happened at night. That she was called by one Maria, who is their neighbour who told her to tell her father that Abdalah is dead. By that time her father was asleep. She said that even an hour had not elapsed since her father had gone to sleep after coming from church when the news came. She said that on Fridays, her father usually goes to church to prepare for Sabbath. That day he went to church at 18hours after some church members came to pick him up, but she does not know them. After hearing the news his father called one of the deceased's neighbours and asked him as to who had died. That neighbour replied that it was Abdalah. Her father then called his fellows one Franco and one Henule. He then went to them physically and told,

DW3 and her siblings that he was going to the funeral. Later he came back and woke them up telling them that he was back and went to sleep.

DW3 then said that at night some people came to their house, called his father's name and knocked. His father replied by asking them who were they. They replied that they were militiamen. He then asked them what have they come for. They replied they have come to take him. His father then asked them why have they come to take him and what wrong has he done. They replied that the VEO has sent them. His father then replied that he met the VEO, but he did not tell him anything. They then started to force him to get out. His father told them to go get the VEO. The militiamen then started throwing stones on them. DW3, his father and siblings started shouting that they have been invaded by robbers so that they could get help.

Then one old woman whom DW3 used to call "*bibi Mmaluse*" came with his grandson one named Franco. Her father then called their relative to come. The said relative came and saw the stones that were thrown to them. In the morning at 18hours the VEO came and took his father and left. DW3 and her siblings were inside by then. She said that the VEO came in a civilized manner and her father agreed to go with them. DW3 stated further that his father was in good relationship with other villagers. She knew Abdalah Swebe and they were friends with his father. She said further that later his father came back with police officers in their car. The police searched the whole house and their farm as well, but did not take anything. Then they left with her father. DW3 stated that when all this was happening her mother was admitted in hospital. She said she does not

know who killed the deceased and sees that his father has been wrongly accused of the crime because they were with their father from morning to the evening. On cross examination, DW3 stated that she did not go with her father to church and she does not know what her father did when she was not with him. She also did not see the militiamen who threw stones at their house.

DW4, Amos Kasekwa, a member of the Seventh Adventist Church and a church leader, stated before this Court that he was ordained to conduct spiritual services by his church and he usually conducts religious seminars in various parts within Mbeya region such as Masoko, Border, and Ipinda areas. At Masoko ward he has offered services at Busisya Hamlet whereby the leaders of that church were Noah Mwasambosa, the accused and Zebron Mwankusye (DW5). DW4 said he knows the accused and that on Friday 21/11/2014 he visited the church at Masoko area with his fellow church man. They went to the house of the assistant of the church leader one Zebron Mwankusye, but did not find him. Then they had to go to the church elder's house, (who is the accused) which was a bit far. That was around 15hours. They found him working in his farm which was surrounding his house. They asked him to go with them to the church to prepare for the Sabbath at 18hours. They started with prayers which took between thirty to forty five minutes whereby they finished praying at around 19hours. After the prayers they remained at the church with the accused person planning for the Sabbath service on the next day. That meeting took another one hour whereby they finished at around 20hours. After that the accused went to his home and they went to spend the night at the church elder's assistant's (Zebron Mwankusye) house. He said they did not sleep at the church elder's house because their hosts had arranged it

that way. DW4 stated that from the church to Noah's place the distance is about one kilometer.

DW4 also stated that during the night, their host was called by the church elder, Noah Mwasambosa (the accused). Their host told them that the church elder has been invaded. They then went to his home. It was around 01 hours. Their host had a car so he took them to the church elder, (the accused), in his car. When they arrived they found the accused inside his house and his family and one old woman and her grandson. The accused told them that he has been invaded. They also saw stones and bricks that were thrown inside and outside the accused's house. They did not find the invaders. They talked with the accused for a while and left leaving the accused, with the old woman and her grandson. In the morning they went back to the accused's house. Later there came the village leaders who wanted the accused to go with them to the village office. They did not use force on the accused person. DW4, his fellow visitor and their host also went to the village office. At the office they found many people. He said that at home and at the village office it was said that the accused person was involved in the killings that happened in the next village.

DW4 further stated that he believes the accusations against the accused person have been fabricated given the fact that they were together, also taking into account the time they left each other and the distance from the church to the accused's place and to the next village where the killings occurred. In cross examination DW4 stated that he was told that the accused person had been invaded, but the stones and bricks they found inside the house made him believe that he was invaded. He also



stated that he does not know the distance between the accused's house and deceased's house. He was only told that it was in the next village. He then left the accused person at the village office.

DW5, Zebron Alifu Mwankusye who is the uncle of the accused person and an assistant of the accused in the church leadership testified that an incident of murder happened in Masoko area where one Abdalah Swebe was murdered. He said that he does not know the killers and does not remember the exact date of the said killings, but heard the deceased was killed at 20:30hours.

DW5 said that on that fateful date he was attending to his duties, when church elders from Ipunda and Border called him. The one from the Border church named Amos Kasekwa (DW4) called him at 12hours. He told him that they were coming to visit their church at around 14 to 15 hours on that afternoon. They arrived at 14hours, but did not find him. They communicated over the phone and DW5 connected them to the church elder, who is the accused person. DW5 said by then he was at Tukuyu doing his work of carrying passengers in his car. He went back to the village at 18hours and started locating his visitors through phone. They told him that they were still at the church. That was almost 19hours. Then they met at around 20hours when they came to his house to spend the night. DW5 stated that the visitors had to stay at his house because the house of the church elder was still under construction and he could not host the visitors under such environment.

DW5 stated that at around quarter to one (00:45), the accused phoned him and told him that he was invaded and called him for help and told him to call the police. He did not tell him who invaded him. DW5 called

the police who told him that they have received information on another incident and promised to go there in the morning. He then woke up the visitors and went with them to the accused's home in his car. When approaching the accused's house, he switched on the full lights of his car and saw people running into a nearby bush. Then they entered the accused's house and found stones and bricks inside the house. They also found an old woman, who is now deceased and his grandson named Franco, who were the accused's neighbours. The stones and bricks were scattered in the house. He was then told that the stones and bricks were used to attack the accused. DW5 was also informed that Abdalah was dead and the accused went to the funeral and came back. After talking for a while DW5 and the visitors left leaving the old woman and his grandson behind. They did not look for the invaders. The accused told DW5 that the invaders were ordering him to get out of his house.

In the morning DW5 and his visitors went back to the accused's house and found him with his neighbours. Then the VEO came and later came the police. The VEO then said that he has been told that the accused was involved in the killings. The accused was asked of the said crime and he denied being involved. DW5 said no force was used in taking the accused that morning. The accused was calm after seeing the police. They also went to the village office where they found many people. The police then told them to go to the crime scene. From the crime scene, the police went to the accused's home for search. DW5 remained at the crime scene. Later the police came back and said they did not find anything at the accused's home.

DW5 also stated that he does not understand why the accused has been charged with that offence. That he knows the accused to be a good person and had not quarreled with anyone in the village. He knew that the accused and the deceased had good relations because at one time the accused even invited the deceased and his family to his church. DW5 inquired about that gesture and the accused told him he once visited the deceased's family and convinced them to go to their church. On cross examination, DW5 stated that he did not go to church on the date the death of Abdalah occurred. That the accused did not inform the village leaders that he was invaded and instead he called DW5 who is his uncle and his assistant in the church leadership. The testimony of DW5 brought the defence case to closure.

After closure of the defence case both counsels made their final submissions by highlighting on relevant pieces of evidence adduced and provided case law in support of their arguments. The prosecution through learned State Attorneys, Mr. Ofmedi Mtenga and Ms. Kause Kilonzo was convinced that their case has been proven beyond reasonable doubt. Particularly, Mr. Mtenga argued that the prosecution through the evidence of PW1 and PW2 has proved the involvement of the accused and other people not yet arrested into the crime. These two witnesses knew the accused very well. He was their neighbour and the distance between their houses was about 150 metres. DW3, the daughter of the accused even said that one can be heard from their house to that of the deceased. The accused also said that he grew up seeing the deceased something which proves they were close. Mr. Mtenga argued that the relevance of this closeness between the family of the deceased and the

accused is to prove evidence of PW1 and PW2 who testified to have seen the accused.

Mr. Mtenga proceeded by arguing that the closeness and upbringing between the accused and the deceased and also the intensity of light mentioned by PW1, PW2 and PW7 makes the identification made by PW1 and PW2 proper. He argued further on the issue of identification because it was central to this case. He submitted that PW1 explained about the intensity of light in the room where she was sleeping with the deceased. She said the lamp had four batteries which provided enough light in the whole room. PW1 saw three men entering and among them she identified the accused. PW1 identified the accused first by his movement and then by his voice because the accused talked to them. The accused grabbed her husband and pulled him, a situation which shows that the identification was proper. PW1 also said he identified the accused who is their neighbour and he knew him even before the event. Mr. Mtenga argued that the identification by PW1 and PW2 is that of recognition. To this effect he cited the case of **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 whereby the Court of Appeal (CAT) at page 16 to 17 ruled that identification by recognition is stronger and proper than the one on the unknown person. He also cited the case of **Jackson Kihili Ruhanda and Another v. Republic**, Criminal Appeal No. 139 of 2007 whereby the CAT ruled that in identification there is no need of describing in detail the person you already know. He argued that even though this is the position of case law, PW1 and PW2 still described the accused person. Mr. Mtenga also argued that PW1's testimony is reliable as she mentioned the accused at the earliest possible time. He cited the case of **Bakari Abdallah Masudi v. Republic**, Criminal Appeal No. 126 of 2017 whereby at

page 12 and 13 the CAT ruled that the ability of the witness to mention the accused at the earliest possible opportunity is an all-important assurance of his reliability.

Mr. Mtenga was also concerned with the conduct of the accused after the death of the deceased. First, he argued that when the accused got information about the funeral of the deceased, he went at the funeral and spent very little time despite the close relationship he had with the deceased's family. That the accused had no reason to leave the funeral so early contrary to customs and traditions as he had a 16 years old daughter who could take care of the house. That he could even be going to his house to check up on his children and then going back to the funeral. In his view, the act of the accused not staying for long at the funeral indicates that he was afraid.

Second, that when the ten cell leader and the militiamen went to the accused's house on that night he refused to get out of his house. He argued that after hearing the sound of the ten cell leader, he should have gone out to find out what they were calling him for. The conduct of the accused created doubts as to the accused's innocence. Mr. Mtenga also submitted that there is an interval of three hours between when the accused went to church at 18hours and when he went back to his house at 20hours. The visitors who went with him to church did not go back with him to his house. He was of the view that in between the three hours the accused could have gone out to commit the crime.

Lastly, Mr. Mtenga submitted on the change of the defence of alibi by the accused person. During preliminary hearing when the accused was represented by Mr. Mushokorwa, learned advocate, he gave notice to

rely on the defence of alibi that he was not at the crime scene. However, during the hearing of the defence case, whereby the accused was represented by Mr. Kyando, advocate, the defence of alibi was changed. Mr. Mtenga concluded that the accused contradicted himself by changing his defence of alibi and this shakes the credibility of his testimony.

Mr. Kyando for the defence submitted that there are a lot of questions rising from the prosecution witnesses which leaves a lot of answers desired. He started by saying that among the seven witnesses brought by the prosecution, there is no single witness except PW1 and PW2 who testified to have witnessed the accused committing the murder.

Mr. Kyando argued that the issue of light is very crucial in this case. PW1 and PW2 said that they identified the accused with a help of a small bulb connected on used batteries which were either given by neighbours or picked up after being used by neighbours on their radios. PW1 and PW2 said that the batteries were obtained three days before the fateful date and they used to put them on throughout the whole night, which means the batteries were on for more than twelve consecutive hours. The murder of the deceased occurred on a third day, which means the batteries had worked for not less than twenty four hours consecutively. That the bulb light coming from the batteries which were already used by the neighbours and then used by the deceased's family for more than twenty four hours is the one mentioned by PW1 and PW2 to have enabled full illumination in the room to identify the accused person.

He also argued that there is doubt on the issue of light taking into consideration the evidence of PW1 and PW2 which contradicts that of <sup>of</sup>

PW7. He argued that there is a contradiction because while PW1 alleged that the bulb was on the wall and that it fell down while she was running outside the house, PW7 alleged that when he arrived at the deceased's house he found enough light coming from the same bulb. When PW7 was asked about the position of the bulb he said it was at the middle of the roof. Mr. Kyando argued that the doubt is centred as to who went and assemble the bulb which was at the wall and fixed it at the middle of the room. There is no witness who told the court about reassembling the destroyed bulb and fixing it at the middle of the roof.

Mr. Kyando further argued that it is important for this Court to consider the credibility of the evidence and who among the witnesses said the truth since the evidence against the accused is pegged on evidence of visual identification. He invited the Court to consider the case of **Waziri Amani v. Republic** (1980) TLR 250 which gives directions on admission of evidence by identification. At page 252 the CAT stated that:

*"Evidence of visual identification is of the weakest and most unreliable. No court should act on evidence of visual identification, unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."*

The CAT proceeded to explain that the court is supposed to consider on record a carefully and considered analysis of all the surrounding circumstances of the crime being tried such as:

- "1. The time the witness had the accused under observation;*
- 2. The distance at which he observed;*
- 3. The condition in which such observation occurred, that is, whether it was day or night time; whether there was good ..*

*or poor lighting at the scene; whether the witness knew or had seen the accused before or not."*

Mr. Kyando argued that the defence does not have problems regarding the distance between the witness and the accused in the room and also on whether the witness knew the accused. However, he was of the argument that the requirements in the case of **Waziri Amani** (supra) were not fulfilled. On the requirement regarding time, he argued that PW1 told this Court that when the robbers entered their room and started pulling his husband, she was busy finding a way to escape. PW1 said she dropped the bulb which means when the robbers were entering she was busy saving herself and thus had no time to recognise the accused. PW1 had also just woken up, meaning she was not sober and was only thinking of going out. PW2 alleged to have recognised the accused, but just like PW1, PW2 had also just woken up from sleep. Therefore taking into consideration the circumstance of invasion and PW2 being a child, it is obvious that he must have been in a state of horror. Under such circumstances the only thing to do was to hide or escape and not to concentrate looking at the robbers who invaded them. Mr. Kyando further argued that the testimony of PW2 is full of doubts especially where he alleged that the accused was the one carrying the fertilizer bags while both PW2 and PW1 confessed that the accused could not walk properly due to having a disability on his leg. The accused also testified before the Court that one of his legs had a disability and the other leg was injured by the militiamen.

Mr. Kyando argued that the three robbers were adults and thus under normal circumstances they could not have allowed the one who is disabled to carry the fertilizer bags weighing fifty kilograms each. There



was also no evidence that the robbers went with a motorcycle or a car. PW2 also said that the distance from the deceased's house to that of the accused's house is 150 metres and that each house is on the opposite side of the hill separated by a river. Thus under such circumstances it would not have been easy to move the fertilizer bags without being caught in the act.

On the requirement regarding the circumstances in which the identification was done, Mr. Kyando argued that the murder happened at 21 hours when it was dark already thereby raising doubts on the accuracy of the identification done. He argued that the light was not enough because the source of light was from batteries already used for more than twenty four hours. He said even if the batteries were new since they were used for more than twenty four hours before the event the power would have been low because batteries usually lose power after being used for more than twenty four hours. Mr. Kyando was concerned about the rights of the deceased and his family to obtain justice, but was of the view that the said right cannot be paid by the blood of a person who has no hand in the matter. He requested this Court to be satisfied first on the available evidence pertaining to the accused. He called for the Court not to give weight on the evidence of PW1 and PW2 because they failed to give description of clothes of the accused person when asked to do so. He cited the case of **Chacha Mwita and Two Others v. Republic** (2016) TLS 359 where the CAT said:

*"Since PW1 did not give any description on the appearance or type of clothes worn by any of the appellants at the scene of crime and did not state the source of light which enabled her to visually identify the appellants and the intensity of such light. In the circumstances, it cannot be said that the evidence*

*of PW1 was conclusive, that it was the appellant who had robbed the complainant on that material night."*

Mr. Kyando further argued that, considering the conditions set in the case of **Waziri Amani** (supra), it is obvious that the accused did not participate in the killings of his neighbour and had no reason to do that. He said that the prosecution has failed to prove the motive. He said further that the reasons advanced by the prosecution that the accused was after the fertilizer should not be taken into consideration. There is no evidence on the accused being found with the fertilizer. PW1 stated they had ten bags of fertilizer and have a half acre farm. PW1 failed to prove what the fertilizer in their house was for because the ten bags could not be used in a half acre farm.

Mr. Kyando further submitted that PW1 testified to have run to her neighbour who was near. It is thus obvious that it took a short time for PW1 to call the neighbours. It is the same time whereby PW1 and other neighbours shouted for help which went simultaneously with the robbers throwing stones at them. It is also the same noise that reached DW2 who took the action of calling the accused, who was woken up by his daughter. He argued that looking at all these events the accused could not be at two places at the same time, at one point throwing stones to the witnesses and at another point sleeping at his house to be awakened by DW2. He further submitted that the same accused person was at church preparing for Sabbath with his visitors and walked to his house about one kilometer from 20hours as proved by DW4. DW3 stated that her father came home from church and went to sleep in his room. DW2 also proved that the accused was at home as she called him from her house. Mr. Kyando was of the view that under such circumstances it shall be, a

mistake to think that the prosecution has proved that the accused was at the crime scene and committed the said offence.

Mr. Kyando was convinced that the accusations against the accused came as an afterthought because after the accused got information on the killings that had happened he called one of the deceased's neighbours to confirm what had happened. DW1 and PW1 confessed before this Court that the accused was among those who went to give his condolences and that PW1 and the accused saw each other that night at the funeral. Mr. Kyando wondered as to why PW1 and PW2 did not see it important to report the accused there and then for him to be arrested. He was of the opinion that if the accused had really committed the crime PW1 would not even shake hands with him when he offered his condolences. The accused stayed at the funeral for more than half an hour before peacefully going back to his home, but surprisingly came to be mentioned to be involved in the killings at 00hours. Mr. Kyando was of the view that by mentioning the accused so late PW1 and PW2 were guessing on who was involved in the killings. They even did not tell this Court the reasons behind the late mentioning of the accused. He also urged this Court to consider the credibility of PW1's testimony as she testified to have been confused when all that was happening.

Mr. Kyando also challenged the evidence of PW2 and argued that it is full of doubts and either he must have been coached or he must have lied before the Court. Mr. Kyando argued that he was of this view because while eleven witnesses among the twelve testified that the accused was of good character and had no quarrels with the accused, PW2 alone said his deceased father had quarrels with the accused. His evidence

contradicts even that of his mother, PW1. Mr. Kyando argued that this raises doubts as the deceased only told PW2 and not his wife of such quarrels if they existed.

On the conduct of the accused after the killings, Mr. Kyando argued that the prosecution has failed to prove that the accused misbehaved after the death of the deceased. He said that the argument built by the prosecution as to the little time spent by the accused at the funeral is baseless. First, he argued that it is not true that the accused alone left the funeral that night, but other villagers including the VEO did as well. Second, he argued that that night can be called "a night of bad luck" because the village was invaded and someone was killed. Thus the whole village was in a panic state and therefore it would not have been easy for a sensible father who has left little children at home, their mother is hospitalized, the house is unfinished, the windows and doors are not yet fixed, not to go back home to be with his children.

Mr. Kyando also challenged the argument that the accused attacked the ten cell leader and the militiamen with stones and catapult. He argued that it was very important to bring those weapons to court to prove those allegations, but the prosecution did not bring them. He further argued that PW7 told this Court that the militiamen guarded the accused's house the whole night after they failed to arrest him that night. He wondered as to what made the militiamen not to seize the machete and the catapult and find out whether the machete had blood from cutting the deceased. The VEO and police officers also did not find the catapult and the machete when they searched the accused's house and its outside surroundings. He was of the view that since the accused's house was

guarded the whole night and nothing was found after the search, it shows that the testimony given was full of lies.

Mr. Kyando further argued that the accused had good reasons not to cooperate with the militiamen because there is evidence they were the ones who attacked him by throwing stones at his house. He said the environment was dangerous for him to come out of his house. He further argued that DW4 and DW5 testified that the accused called DW5 informing him of the invasion and asked him to call the police and inform them of the event. Mr. Kyando argued that for a criminal who has killed, the best option would be to escape and not to ask his relative to call the police. If the accused had bad intentions he would have escaped even through the windows. The accused's reaction was normal of any human being given the circumstances and there was no any bad intention of concealing the truth. That the accused had good reasons to doubt those militiamen who told him the VEO had sent for him because he had met the VEO at the funeral and he did not tell him anything.

Mr. Kyando further argued that the accused did not escape or attempt to escape. He called his neighbours and relatives for help and asked them to call the police as well. Even when things got calm the accused still remained at his house till morning whereby he cooperated and went with them to the village office. He never tried to escape on the way to the village office from his house or from the village office to the police station. The accused well behaved all this time.

Mr. Kyando also addressed the change of the defence of alibi by the accused person and submitted that the accused in his testimony clearly explained that when he stated that he was not at scene of the crime he

meant that he was at his home when the killings happened and not that he was not at the village when the killings happened. He concluded by submitting that the prosecution evidence is full of doubts and unreliable as well and pleaded for the Court to find the accused not guilty of the alleged crime due to the said doubts.

I have carefully considered the evidence and submissions of both parties and come to a conclusion that there is no dispute as to the unnatural death of the deceased, one Abdalah Tweve and that he died out of being hit by a machete on his head. Both sides have adduced enough evidence as to this fact. The issue therefore to be determined by this Court is whether the accused, Noah Mwasambosa is the one who killed the deceased and if he did that with malice aforethought.

All the three assessors opined that the accused is not guilty of the offence he is charged with. Their opinions are centred on the fact that the issue of light was not clearly proved by the prosecution witnesses to warrant conviction against the accused person. All of them were convinced that there has been a mistaken identity in respect of the evidence adduced by PW1 and PW2.

As it has been pointed out by the counsels of both sides, the issue of identification is very crucial in the determination of this case. PW1 and PW2 claimed to have identified the accused by help of a bulb light which was connected to four batteries. The prosecution was convinced that the said bulb produced enough light to enable one to see clearly. The defence however, challenged the prosecution argument and raised doubts as to whether the batteries supplied enough power to the bulb to enable it produce enough light. The defence raised concerns as to the

type of batteries used whereby PW1 and PW2 stated that the batteries were either given by neighbours or picked after being used by the said neighbours. PW1 and PW2 also said that the day the killing occurred the batteries had already been used for three days from the day they got them from the neighbours. They also said that the bulbs used to be switched on the whole night, which means the batteries were used for more than twenty four hours. I find the doubt raised by the defence as to the power of the batteries to produce enough light under the circumstances to be very relevant. Batteries in their nature fade out power as they become used day by day. Since the batteries were already used by neighbours as testified by PW1 and PW2, it is obvious that on the date the deceased was killed, the said batteries had already been used for more than three days. It is thus not possible for such batteries to have produced enough illumination as claimed by the prosecution.

The court is required to be careful in admitting evidence of visual identification, particularly when the same was done at night. In doing so all possibilities of mistaken identity must be ruled out and the evidence must appear to be watertight. The CAT in **Waziri Amani (supra)** ruled that:

*"No court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight."*

In **Mwalimu Ally & Another v. Republic**, Criminal Appeal no. 39 of 1991 (unreported), the CAT also stated:

*"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."*

The witness therefore must give detailed description of the accused or of the light that enabled him to identify the accused. Mr. Mtenga for prosecution argued that the evidence given by PW1 and PW2 is that of recognition whereby detailed description of the accused was not necessary as the witnesses knew the accused prior to the event. As much as I agree with this position as set by the CAT in the case of **Jumapili Msyete** (supra) I am still of the view that an explanation on the level of intensity of the light must be given since the incident occurred at night. In **Issa S/O Mgara @ Shuka v. Republic**, Criminal Appeal no. 37 of 2005 (unreported) the CAT stated:

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

In the case at hand PW1, PW2 and PW7 said that there was enough light in the room coming from the bulb. However, none of them explained as to the level of intensity of the light. In my view it does not suffice to state that the light was like that of electricity lights because electricity lights also differ in the intensity of light depending on the voltage/watt capacity and type of a bulb used. None of these witnesses explained the type of bulb used and the voltage/watt capacity thereof. Again taking into consideration the fact that the batteries used as source of energy were already used for some days, I agree with the argument advanced by the



defence counsel that there are doubts as to whether the accused was properly identified by PW1 and PW2.

This Court has also taken into account the contradiction among witnesses, PW1 and PW7 in particular, regarding the position of the bulb in the room as raised by the defense. While PW1 stated that the bulb was on the wall and she destroyed it while running outside, PW7 stated that he found the same bulb hanged at the middle of the roof and was showering enough light in the room. In **Mohamed Said Matula v. Republic** (1995) TLR no. 3 the CAT stated:

*"Where the testimony by the witnesses contains inconsistencies and contradictions ... the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

The CAT in this decision also ruled that to uphold the inconsistencies and contradictions in evidence in favour of prosecution would amount to injustice on the accused person. As pointed out from the outset, the issue of identification is central to this case. In determining the identification of the accused person made by the witnesses, the question of light becomes paramount as the event occurred at night. I therefore find the contradictions by the witnesses on the issue of light going to the root of the matter and basing on this, the evidence of these witnesses in respect of light loses credibility.

The prosecution also argued that PW1 and PW2 mentioned the accused at the earliest possible time which makes their identification credible as ruled in the case of **Bakari Abdallah Masudi v. Republic**.

Criminal Appeal no. 126 of 2017 (unreported). In my opinion however, I do not agree with the prosecution's argument that the accused was mentioned at the earliest possible time by PW1 and PW2. If we can recall the facts adduced in evidence by PW1 and PW3, after the robbers had invaded the deceased's house, PW1 ran to PW3 for help. Under the circumstances one would expect PW1 to have mentioned the accused to PW3 whom she ran to first for help if she had really identified the accused. PW3 testified that PW1 did not tell who the invaders were. Even when they went together to the deceased's house and the invaders threw bricks on them, PW1 did not mention the accused to PW3 or to the neighbours whom they were together. Instead PW1 mentioned the accused almost at midnight to PW7 and did not state the reasons for the delay in mentioning the accused. In my view the delay casts doubts as to the credibility of the visual identification evidence adduced by the witnesses. In **Ahmad Seluke and 9 Others v. Republic**, Criminal Appeal no 131 of 2009 (unreported) the Court stated:

*"...unexplained delay by a witness who claimed to have identified an offender at an earliest opportunity casts doubts on the credibility of the witness."*

The prosecution also raised concerns on the conduct of the accused to the effect that the accused stayed for a short time at the funeral and that when the ten cell leader and the militiamen had gone to arrest him the accused refused to open the door and attacked them with stones and a catapult. The defence gave reasons for such conduct to the effect that the accused had small children at home and the condition of his house was not safe as it was still under construction and thus as a responsible

father he had to go back to his home to be with the children. The accused also claimed to have been attacked by the same militiamen previously thus he was shocked to see them again at his house that night. I in fact find the arguments by the prosecution on the conduct of the accused person to be built on speculations. Such speculations would be relevant if there was some other watertight collaborating evidence. Murder is a serious offence and the punishment thereof is severe as someone's life can be taken in the event he is found guilty. The court therefore has to base its conviction on evidence which is watertight and not on speculations lacking watertight collaborating evidence. Since the evidence on identification is full of doubts I find no other watertight collaborating evidence to back up the argument by prosecution on the conduct of the accused person.

The accused filed a notice of defence of alibi during preliminary hearing and prayed to change it during the hearing of the defence case, but after the prosecution demanded further explanation the defence withdrew the prayer and said the explanation shall be given in the course of hearing. The prosecution argued that this change of defence of alibi shows that the accused was not true from the heart, the accused contradicted himself and therefore the credibility of his testimony is shaken. In defence, the accused stated what he meant in that notice is that he was not at the scene of crime when the murder happened and not that he was not in the village as he even went to the funeral to offer his condolences. I have gone through the notice and considered the arguments by both sides on this issue. The notice specifically states that the accused was not at the scene of crime at the time of commission of the offence and that is what the accused has maintained throughout

and brought witnesses to prove the same. The defence witnesses testified that the accused was either at his home or at the church at the time the offence was committed. I therefore find this is a case of misguidance of the accused by his advocate in filing the said notice. In my view, the notice should not have been filed as it had no effect at all in the case.

In proving the motive, I agree with the defence argument that the prosecution has failed to prove the motive behind the accused murdering the deceased. The prosecution advanced an argument that the stealing of the five fertilizer bags was the motive behind. I find this was not proved at all. There is no evidence of the deceased resisting the robbers from taking the five bags of fertilizer. The testimony of PW1 suggests that the deceased was murdered before the fertilizer bags were taken as they noted the same missing after she came back from the neighbours where she ran for help. The testimony of PW2 also indicated that the fertilizer bags were taken after the deceased was already murdered. PW2 stated that he heard her mother crying that they have been invaded and then saw the accused carrying the fertilizer bags from their room and when he ran out from the room he found his father already dead. The testimony of PW2 also indicates that the deceased was dead before the fertilizer bags were taken. Taking all this into consideration I am of the view that the motive was not proved by the prosecution beyond reasonable doubt.

Lastly, the prosecution argued that the distance between the deceased's house and that of the accused is about one and a half football pitch, that is, about 150 metres. The prosecution argued that the distance was short enough for the accused to have committed the offence and gone back to his house to sleep. I am of the view that this would have been

possible if the accused was physically fit. Both the prosecution and the defence witnesses testified as to the physical disability of the accused whereby one of his legs had a disability and the other was injured. Under such circumstances I do not think that the accused would have managed to move from the church, to the deceased's house, murder the deceased and steal five bags of fertilizer, then go to his house to sleep within a span of one hour. The accused in his physical condition could not have managed to walk hurriedly carrying five bags of fertilizer. Besides, PW1 testified that the event occurred at 21hours; PW3 testified that they went to the deceased's house at 21hours and the robbers were throwing stones at them. DW2 and DW3 also testified that the accused was woken up and given the news of the murder at 21hours. Considering these testimonies, I agree with the defence argument that the accused could not have managed to be in these two places at the same time and in the physical condition he was in.

Following the above observations it is my finding that the prosecution has failed to prove its case beyond reasonable doubt. I therefore find the accused person **NOAH MWASAMBOSA NOT GUILTY** of the offence of murder he stands charged with under section 195 of the Penal Code, Cap 16, R. E. 2002 and consequently **acquit** him from the same charge.

Dated at Mbeya this 12<sup>th</sup> day of July 2019

  
**L. M. MONGELLA**

**JUDGE**

**12/07/2019**

**Court:** Judgement delivered at Mbeya this 12<sup>th</sup> day of July 2019 in the presence of the accused person and Mr. James Kyando, Advocate for the defence and Mr. Godwin Kihaka and Mr. Davice Msangi learned State Attorneys for the Republic.

  
**L. M. MONGELLA**

**JUDGE**

**12/07/2019**

Right of Appeal duly explained



  
**L. M. MONGELLA**

**JUDGE**

**12/07/2019**