IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 242 OF 2019

REPUBLIC

VERSUS

1. **JOSEPH MERAMA MACHECHO**
2. **JACKSON ZEBEDAYO @ WAMBURA**

JUDGEMENT

Date of Last Order: 14.07.2020

Date of Judgement: 17.07.2020

Ebrahim, J.:

Joseph Merama Machecho and Jackson Zebedayo @ Wambura **("the accused persons")** have been jointly arraigned in this court charged with three counts of murder **c/s 196 and 197 of the Penal Code, Cap 6, RE 2002**. It is alleged by prosecution that the duo had on 13th July 2010 at Salasala Mbezi Beach area, Kinondoni District within Dar Es Salaam Region murdered Professor Juan Timoth Mwaikusa, Gwamaka Daud Mwaikusa and John Mtui (**"the deceaseds"**).

Both accused persons pleaded not guilty on all three counts.

The three (3) Reports on Post-Mortem Examination **(exhibits PE4, PE5 and PE6)** established that all three deceaseds' death were due to haemorrhagic shock caused by gunshot wounds.

To prove their case, prosecution called a total of six (6) witnesses and tendered six exhibits. The defense side called two witnesses, the accused persons themselves and they did not tender any exhibit.

The first prosecution witness was Assistant Commissioner of Police Daniel Mollel Shilla **(PW1).** He testified that he was the one who responded to the 1st radio communication on the robbery incident at Salasala around 1900hrs on 13th July 2010. At the crime scene he saw three bodies. He said two bodies were inside the fence of the house; and they were of Professor Mwaikusa and his nephew called Gwamaka Daudi. The 3rd body which was outside the fence was of John Mtui. PW1 testified further that the next day i.e. 14.07.2010 he sketched two maps of the crime scene. One map pertaining to crime scene of Prof. Mwaikusa and Gwamaka Daudi

(**exhibit PE1).** The other map was of the crime scene of the late John Mtui (**exhibit PE2).**

The second prosecution witness was Mr. Nehemiah Samuel Lufatie **(PW2).** He said that he owned a shop which was near a bar. He testified to have heard the gunshots at their area coming from Prof. Mwaikusa's residence on 13.07.2010 around 2000hrs to 2100hrs when he was at his shop with friends. Then one Tokeni from Professor's house ran to where they were and told them that Professor and Gwamaka have been shot. He testified further that suddenly two young men emerged from the side of Professor's house and put them under arrest and told them to lay down. Some people managed to run away but PW2 and three other people laid down on their stomach – face down. The bandits ordered them to surrender their phones and money where one went to mama Sabi's shop and another one searched them. He said the bandit started to search a person laying in-front of him and ordered him to surrender his phone. PW2 later came to known the name of that person as John Mtui. John refused and the bandit shot him at the back. John stood up and fought with the bandit but the bandit shot him again

on the chest and John ran away. He said he managed to see the bandit because there was tube light. He said the bandit asked him to surrender his phone but he did not have any. The bandit was then called by his friend so that they can leave. Testifying on how he identified the suspects he said the incident took like 7 to 10 minutes and the area was well lit with the light from the his shop. He explained that the bandits were of similar heights and one carried a gun which was cut and another one had a pistol. He later went to the crime scene where he saw the bodies of Prof Mwaikusa, Gwamaka and outside there was a body of John holding a pistol. He testified also that on 17th July 2010 he was taken by police to Oysterbay Police where he identified the first accused. He was taken again on 22nd July 2010 where he identified the second accused.

Responding to cross examination questions he said he did not describe to the police the features of the 1st accused before the identification parade. He identified the 1st accused first then he recorded his statement where he recorded to have identified the 1st accused as tall, slim, has a gap between his teeth and has fair complexion. He said he saw the gap on the 1st accused teeth

because he replied to the 2nd accused when he told him that they should go. Responding further to cross examination questions he said that he laid face down facing south side. He said he recognised the jacket and the trouser of the accused but could not tell the colour. He could also not tell which shoes the accused was wearing. Responding further he said at the police all witnesses were put in one room together and they were like seven of them. As for the 2nd accused he said he was also wearing a jacket and a beret but could not tell the colour of the jacket, trouser, beret or shoes. He said he recognised him by face and jacket. He admitted to have been shaken by the incident. He said later he collected the pellets and bullets at the crime scene; but upon being shown his statement recorded at the police he admitted to have also picked the calculator and phones. Responding to the questions put by the court he responded that people who were lined up at the parade did not speak and that all seven witnesses for this instant case were put in the same room.

The third prosecution witness was Superintendent Alinanuswe Reuben Mwakyembe **(PW3)** who explained at lengthy on how he

arrested the accuse persons after being tipped by an informer on the armed robbery incidents. He testified that they searched the house of the 1st accused but did not find anything. However after arresting the 2nd accused they searched his room and found 2 weapons one being Mark 4 gun and a pistol together with various bullets. He said they filled in the certificate of seizure as required. He identified both accused persons at the dock. He explained that at different dates both accused persons were collected by a team of Police from Kinondoni Police Region for further interviews.

He said he handed over the exhibits found at the 2nd accused's house to the custodian of exhibits at the police.

ASP Gilbert Sostenes Kalanje (PW4) arranged and conducted identification parades for both accused persons. He tendered in court **"exhibit PE3"** being an Identification Parade Register of Jackson Zebedayo Wambura. He testified to have informed the 2nd accused of his right to change clothes and call a friend or relative to witness the parade. He testified further that the witness were outside the building and when Nehemiah was called he recognised Jackson Zebedayo by touching him on the shoulder.

Responding to cross examination questions he explained one of the reasons to identify the culprit is for that person to be present at the crime scene and his memory of the incident. He admitted that Nehemiah did not tell him the features or reasons for recognizing the second accused. Responding to further cross examination questions he said he could not remember how many identification parades he conducted on the instant case but upon being shown his own statement he remember to have conducted a second identification parade. He was made to read **Order K and S of GPO** which was read to him by his legal Counsel which required people at the parade to be of similarity of age, appearance, height, dressing and social stance. The Order also required the police officer to ask the witness what connection he has to the suspect and the police should diligently and precisely record the answer in the identification register. PW4 said he adhered to the Orders in items A and B of the Form but did not record any remarks in the Form as directed by Order S of GPO.

Responding to re-examination question he said that he did not write the remarks because the information is put in the statement and not in the register.

The 5th prosecution witness, **Dr. Ahmed Makata (PW5)** performed postmortem examination of the body of John Mtui. He explained his observations on the body of the deceased that there was broken bone at the shoulder and the collar bone was also broken. He observed 8 holes measuring 0.8 cms. Inside the neck there was a Ward and he also found 8 pellets. He said the blood vessels were also damaged. He confirmed that the deceased died from severe hemorrhage caused by wounds inflicted by a short- gun. He tendered **"exhibit PE4"**.

Dr. Innocent Justine Mosha **(PW6)**, was the last prosecution witness who performed the postmortem examination of the late Prof Juan Mwaikusa and Gwamaka Daudi Mwaikusa. He tendered "**exhibits PE5 and PE6"** respectively. He observed that Prof Mwaikusa died of haemorrhagic shock caused by severe blood loss from the wounds on the neck as there were three holes on his neck measuring between 0.5cms to 0.8 cms. As for the late Gwamaka, he had a

large wound on posterior chest on the right side of 3cms and four of his ribs were broken and crashed. He also observed that the big vessels on the lungs were wounded and they collected 2 pellets (gololi) like 8 millimeter – 0.8 cms. He also observed that the late Gwamaka died of haemorrhagic shock caused by gun- shot wound.

The first accused **Mr. Joseph Merama Machecho (DW1)**, completely disassociated himself with the death of all three deceaseds. He said he was arrested on 15th July 2010 around 1600hrs from his home by three people whom he only knew his neighbor Chacha Marwa Selakwa. The other two people introduced themselves as police officers from Sitaki Shari Ukonga. Those police officers searched his house but could not find anything. He was then committed at the High Court vide Criminal Session. No 53/2012 of which in 2018 prosecution side entered nolle but he was arrested again. He prayed to be acquitted. Responding to cross examination questions he said he was beaten at Oysterbay police and lost his tooth but admitted to have no PF3 to prove the same. He denied to have known the second accused before the arrest.

Jackson Zebadayo Wambura (DW2) equally denied any involvement with the murder of the deceased. He said on the incident date from 0700hrs to 1000hrs he was at his work place and later in the evening he was at home until 0400hrs when he normally leaves for work. He said he was arrested on 20.07.2010 around 1700hrs going to 1800hrs where he was taken to Sitaki Shari police station and interviewed in armed robbery. He denied to have been found with a gun and that he had never shown the police where the guns were. He challenged the fact that the police could not bring the guns alleged to have found at his room as exhibits. He urged the court to accord no weight to the testimony of PW3 because he could not bring to court the weapons or bullets that he said DW2 was found with. He also challenged the fact that prosecution has not brought the sub-ward chairman who evidenced the search or tender search and seizure certificates. He denied to have been identified by PW2 because he was not at the crime scene. He prayed to be set to liberty. Responding to cross examination questions he admitted to have not given notice of Alibi nor did his

advocate. He said he saw Nehemiah for the 1st time here in court hence had no bad blood with him.

All three assessors who sat with me in this case were of the unanimous opinion that prosecution's case has doubts hence the both accused person be acquitted.

In light of evidence adduced in court, the basic question which calls for determination of this Court is whether the accused persons did commit the offences of murder which they stand charged with.

Abreast of the position of law in a criminal case like the instant one, the burden of proof is always on the prosecution and it never shifts (**Section 3(2) of the Evidence Act, CAP 6, R.E. 2002**); and the standard of proof is beyond reasonable doubt. Also in a murder case prosecution has to establish two things, **Actus Reus** and **Mens-Rea with Malice aforethought**. It was held in the case of **Mohamed Matula V Republic** [1995] T.L.R 3, that:

> *"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; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence"

Indisputably is the fact that Professor Juan Timoth Mwaikusa, Gwamaka Daudi Mwaikusa and John Mtui died unnatural death as evidenced by PW1, PW2, PW5 and PW5 being witnesses who saw the bodies of the deceased. It was also documented in exhibits PE4, PE5 and PE6 respectively. Then the first issue is whether **actus reus** was committed by the accused. Another issue that would spring from the first issue is if it was the accused persons who murdered the deceased; whether they did so with malice aforethought.

Basing on the evidence of PW1, PW2, PW3, PW5 and PW6, none of those witnesses has evidenced to have seen the accused persons murdering the deceaseds. PW2 said that the second accused shot John Mtui and John Mtui ran away to be found dead later hold a pistol. From his testimony alone it is not known as to whether the shooting by the 2nd accused caused his death.

The evidence implicating the accused persons to the charged offence is circumstantial evidence on the basis that they were identified by PW2 at area near the house where the murder occurred, PW2 identified the 1st accused at the identification parade and that PW3 found a gun, pistol and bullets inside the room of the 2nd accused.

The position of the law regarding circumstantial evidence is that circumstances must be incapable of more than one interpretation than the guilty of the accused. This principle was enunciated by the Court of Appeal in the case of **Mathias Bundala V R,** Criminal Appeal No. 62/2004 where it was held that;

> *"In a case depending conclusively on circumstantial evidence the court must before deciding on a conviction, find that the* ***inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than of guilty***". (emphasis is added).

Now, would the above pieces of evidence by prosecution witnesses suffice to form unbroken chain in such a way that the inculpatory facts are incompatible with the innocence of the accused?

As intimated earlier prosecution case greatly relies on the evidence of visual identification by PW2 and identification parade. Therefore his evidence is crucial.

Court of Appeal had in the case of **Salim S/O Adam @Kongo @Magori V Republic**, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that:

> *"(a) Evidence of visual identification is of the weakest character and most unreliable which should be acted upon cautiously when court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated (**Waziri Amani V Republic** (1980) T.L.R 250 and **Nhembo Ndalu V Republic**, Criminal Appeal, Criminal Appeal No. 33 of 2005 (unreported));*
>
> *(b) In a case depending for its determination essentially on identification be of a single witness or more than witness. Such evidence must be watertight, even if it is evidence of recognition (**Hassan Juma Kanenyera V Republic** (1992) T.L.R 100 and Mengi P.S. Luhanga & Another V Republic (supra)) and,*
>
> *(c) In identification cases, witness must clearly state in their evidence conditions favouring a correct identification or recognition of the accused (**Raymond Francis V Republic** (1991) T.L.R. 100, **Issa Mgara @ Shuka V***

Republic, *Criminal Appeal No. 37 of 2005,* ***Mathew Stephen @ Lawrence V Republic***, *Criminal Appeal No. 16 of 2007,* ***James Kisabo @ Mirango & Another V Republic***, *Criminal Appeal No. 261 of 2006 (all unreported))."*

Both PW1 and PW2 testified that the incident occurred between 1900hrs to 2100hrs. PW2 said that when they were invaded they were put under arrest and told to lay down. He admitted in court that he laid facing downward meaning on his stomach. He stated that the 2nd accused remained with them and the 1st accused went inside the shop of Mama Sabi. The second accused interrogated the late John Mtui who was in-front of him. When asked how he identified the accused persons he said there was light coming from his shop and they were both of similar heights and one carried a gun and another had a pistol. When cross examined by advocate Hitu he admitted that when he was put under arrest he laid facing down. He also admitted that he was frightened. He said however he managed to identify the accused persons and he managed to identify both accused persons at the identification parade. He said he identified the 1st accused because he had a gap and both accused persons

wore a jacket but the 2nd accused wore a beret. The question that arises is whether the evidence given by PW2 conclusively establishes that he identified the first and the second accused persons on the fateful night.

The law as it stands, when relying on the evidence of visual identification; all conditions for positive identification must be strictly met. This means therefore that following the weakest nature and unreliability of evidence of visual identification particularly for the incidence that occurred at night; the witness must explain to the court the intensity of light, proximity, the time the incident took and descriptive features of the accused persons so as to remove elements of mistaken identity – See the Court of Appeal case of **Raymond Francis VR, [1994] TLR** page 100. Again the witness must mention and/or describe the accused person at the earliest stage- This principle was also well articulated by the Court of Appeal in the cases **Ahmad Sekule and 9 others VR,** Criminal Appeal No 131/2009, CAT and **Wangiti Mwita & Another VR**, Criminal Appeal No 6 of 1995).

Going by the testimony of PW2 much as he said there was tube light outside his shop he could not tell how intense or how far the light could get considering they were outside the shop. He said the accused persons stayed for about 7 to 10 minutes hence he managed to identify them. However it is surprising for a person who managed to clearly see a person on an incident for almost 10 minutes to fail to state the colour of the jacket or trouser or even a beret. He respondent that he could not even tell the shoes they were wearing. More-so he testified in court that he did not tell the police the descriptive features of the accused persons on the date of incident and even when he called them to collect the pellets and the bullets. He admitted that he gave the description of the first accused when recording his statement after the identification parade. This fact was also admitted by PW4 that PW2 did not state beforehand the features of the accused persons. PW2 said that he was terrified. As a shocked person who was forced to lay facing down; did he really managed to identify properly those two accuseds considering it was already dark and the only source of light was the tube light from PW2's shop? Again, it does not add up

that a person scared of his life told to lay down would have time to glance at another person. He said he identified the 1st accused because he had a gap and he responded to the 2nd accused that they should leave. Having a gap between teeth is a very conspicuous feature that would not wait for a witness to say on his second statement after the identification parade. At this juncture I subscribe to the principle illustrated in the case of **Philipo Rukaiza @ Kitchwechembogo Vs. Republic**, Criminal Appeal No. 215 of 1994 CAT(unreported), which was cited with authority in the case of **Francis Fernand Mwacha** where the Court said:-

> *"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."*

Tailoring the guidance provided by the Court of appeal and as per the evidence adduced by PW2, I hesitate to say with certainty that

PW2 positively identified the accused persons due to the following reasons; first, the incident occurred at night which was already dark save for the tube light from PW2's shop; secondly, PW2 admitted that he was told to lay down facing downward of which he heeded ; thirdly, coupled with the state of fear and panic, it would not have been easier for him to raise his head and identify the accused persons properly that is why he could not manage to give descriptive features of the accused persons immediately after the incident when he recorded his first statement; or notice the colour of jackets or berets that the accused persons were wearing.

Another piece of evidence on identification is the identification parade which was conducted by PW4. The said identification parade leaves a lot to be desired. First as admitted by PW4 that the witness identifies a person by having described him earlier or by being at the crime scene; PW2 did not state those descriptive features of the accused persons prior to the parade. He narrated them after the parade in additional statement. PW2 admitted that the day of the parade all 7 witnesses were put in one room before the parade and after identification a witness went back to the same

room. PW4 said that the witnesses were called from outside the police. This is a contradiction which goes to the root of the matter in showing the flouting of procedures in conducting identification parade.

Identification parades are conducted according to **PGO 232** issued by the Inspector General of Police. The order stipulates among other things the rights of the suspects, and maintaining of the records of the whole exercise. The need to comply with the procedure has been emphasized in the case of **Kanisius Mwita Marwa V R**, Criminal Appeal No. 306 of 2013, where a number of authorities on the subject have been cited.

As already pointed out, identification parade was organized and conducted by PW4. Going by **exhibit PE3,** identification parade register, there are a number of flaws to mention a few that PW4 did not ask the accused persons if they were satisfied with the way the parade was conducted in a fair manner and made a note of their reply. **Order K and S of GPO** requires the police conducting the parade among other things to diligently and precisely record in the register the answer by the witness on what connection he has to the

suspect. Those remarks are conspicuously missing in exhibit PE4 (Identification Parade Register – PF 186).

Furthermore, in law identification parade is done to lend assurance to the identification of an accused person/ suspect whose identification is not certain. The identification parade has corroborative value only and on its own has no probative value where the accused has not been previously identified. Court of Appeal in discussing the value of identification parade in the case of **Yusuf Abdalla Ally V DPP**, Criminal Appeal No. 300 of 2009, CAT, Zanzibar alluded that:

> *"An identification parade, on its part, is not substantive evidence. It is admitted only for the collateral purposes and usually is used for purposes of corroboration. The outcome of such parade is by itself of no independent probative value. It is for the purpose of ascertaining whether a witness can identify a suspect of the offence".*

As stated earlier, it is obvious that PW2 did not positively identify the accused persons as there were no prior descriptive features relayed to the police or any person at the earliest opportunity the witness got. Thus, the identification parade had no any probative value as the witness did not even have a pictorial image of a person that he

was going to identify. It is even possible that by being in the same room with other witnesses he could gather that one of the suspects had gap between his teeth! Ultimately prosecution case on identification flops.

Another piece of evidence relied by prosecution is the evidence of PW3 that he searched and found the second accused with a gun, pistol and various bullets. PW5 and PW6 testified before the court that the deceased person death were caused by severe haemorrhage caused by gunshot wounds. They testified further that they found pellets and wards in deceased bodies which is a clear indication that the deceaseds were shot. However neither the said gun, pistol, bullets, search warrant, seizure certificate nor a ballistic report were tendered in court to show that the guns alleged to have been found with the second accused person matches with the pellets and wards or bullets found inside the bodies of the deceaseds or those which were collected by PW2 at the crime scene. This piece of evidence was indeed a mockery to prosecution. Again prosecution could not prove that the second accused was

found with a gun and pistol and they were the same weapons used to end the life of the deceaseds.

As stated earlier both accused persons denied their involvement with the murder of the deceaseds. The second accused advanced the defence of alibi. Of course I would have no difficult to accord no weight to his defence considering that he had enough time to give his notice as the law requires if he had wished to do so – **Section 194(4)(5) and (6) of the Criminal Procedure Act, Cap 20 RE 2002.**

However, as the law requires, the accused persons would not be convicted on the weakness of his defense but on the strength of prosecution evidence. Looking at the circumstances of the case before me and as intimated earlier that this is a case that depends on circumstantial evidence and visual identification prosecution had a duty to fill in all the gaps that would allow the rays of other hypothesis to emerge. Unfortunately the law pertaining to circumstantial evidence in this case does not give room for this court to find that there is only one capable explanation of the guilty of the accused persons.

Evidently, this is one of the scenarios that prosecution case fails for their failure to discharge their duty of proving the case beyond reasonable doubt.

Having said that, I join hands with the assessors and find that the case against the accused persons, Joseph Merama Machecho and Jackson Zebedayo @ Wambura has not been proved beyond reasonable doubt and I accordingly acquit them from the charged offence of murder.

Accordingly ordered.

R.A Ebrahim

Judge

Dar Es Salaam

17.07.2020

Court: Right of Appeal explained. In terms of **Section 312(4) of the CPA**, the accused person shall avail their permanent address and the same shall be coordinated by the Deputy Registrar In charge.

R.A. Ebrahim

Judge

17.07.2020