IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

SITTING AT TARIME

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 06 OF 2019

THE REPUBLIC

VERSUS

MOI S/O IKWABE MATIKO @ MOI S/O MOKONA

JUDGMENT

19th & 24th June, 2020

TIGANGA, J

In this case, the accused person Moi s/o Ikwabe Matiko @ Moi s/o Mokona stands charged with the offence of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019]. It is alleged that on the 9th day of September, 2017, at Kegonga village within Serengeti District in Mara Region, the accused person murdered one Nyamahemba s/o Gibita @ Wambura. The accused person was arraigned before this court and information for murder was read over to him to which he pleaded "not guilty".

During preliminary hearing, he admitted to his names and personal address, he also admitted to be arrested, interrogated, and charged. However, he disputed to be the one who killed the deceased.

Following that plea and the response to the facts, during preliminary hearing, the republic called three witnesses namely Chawari Nyakimori, Joseph Gibita Damian and G.3694 D/C Shabani to prove their case. These witnesses had their evidence recorded as PW1, PW2, and PW3. They tendered two exhibits the post-mortem examination Report, and sketch map of the scene of crime, which were admitted during preliminary hearing as exhibit P1 and P2 respectively.

This case proceeded under the assistance of the distinguished one lady and two gentlemen assessors whose names are as reflected in the proceedings.

A brief summary of the facts is that, on the fateful date both the accused and the deceased were attending a wedding ceremony at the house of one Wambura Gibita which involved both drinking and dancing. While dancing, there emerged a fight between the accused and the deceased, over a woman. The two were reconciled and after a brief moment of between three to five minutes, as the deceased turned and started walking away, the accused person took a knife from his socks and stabbed the deceased at the lower back. The deceased was rushed to the hospital where he was pronounced dead before even receiving any treatment. The accused person escaped, but was arrested at Kahama after about seven months, before he was charged with case.

As aforesaid, in an endeavour to prove the case the prosecution summoned a total of three witnesses. Out of them, two witnesses that is PW1 and PW2 were present at the scene, therefore their evidence is direct while PW3 is a police officer who did some investigation work. The evidence of PW1 and PW2 were that on 08.09.2017 they were invited to a wedding party by one Mzee Wambura Gibita whose son was getting

married. According to them, the ceremony started at 09:30hrs in the morning up to the evening hours when the music started and people started to dance.

The ceremony was held in the tent made hall well illuminated by lamps which were fixed at three positions; at the entrance, in the middle and at the end of the hall. Eating, drinking and dancing were done in there. It was their testimony that, when it reached 04:00hrs on 09.09.2017 they were still supplying drinks and people were still dancing, all of a sudden the accused person and the deceased entered into a quarrel over dancing with a girl.

They further testified that, the two stopped quarrelling after they were reconciled, by people who were there including PW2. At that point, according to PW1 and PW2, the deceased decided to leave the hall and as he was approaching the exit going out, these PW1 and PW2 saw the accused taking a knife from his sock and stabbing the deceased in the lower right side of the back. The accused then escaped through the hole on the tent. The quick arrangements were made and the deceased was taken to the hospital where he was pronounced dead. He was buried on 10.09.2017.

These witnesses further stated that, they were able to see everything which was happening because they were standing near the accused person and the deceased. They also said that, there was enough light from the generator which was on and which they were using in serving food and drinks. They also said the accused was very familiar to them as he is also the resident of that village. PW1 said although he resided in the nearby village of Koreli, the accused person is his age mate

and they grew up together, also that while going to town from his village, they normally pass through the village of the accused person. Therefore he said, he knew the accused person since 1997 since he lived in a nearby village.

As to what the accused person was wearing, PW1 stated that he had a shirt, jacket and trousers. PW2 on the other side stated that, he is the resident of Kegonga village in which the incident happened. He knew the accused since his childhood, and as the accused was also running the motorcycle transportation business commonly known as "bodaboda", he has been rendering him such service for more than two years. On further cross examination, PW1 stated that, there were many people in the hall but the accused and the deceased were dancing near the exit near to where he was, therefore he was able to see the accused stabbing the deceased as there was enough light from the bulbs

With regard to whether he knew the deceased, he replied that he knew the deceased before the incident as he was also his relative. When asked about what the accused person was wearing, PW2 replied that he wore a shirt, trousers and a coat.

PW3 testified to the effect that, being a police officer working as an investigator, on 09.09.2017 he was instructed by Inspector Kweka to go to Kegonga in the company of two other police officers. The three of them went over to the house of Wambura Gibita where a murder incident was reported. They found no one but the place appeared as if there was a ceremony. They then called the sub village chairman who narrated to them what had happened. A sketch map of the scene of crime was drawn and they went back to the police station.

It was his further testimony that, on 09.10.2017 himself and one WP Sijali were assigned to investigate that case. He then started searching for the accused person, on 17.04.2018 when he was informed that the accused person had been arrested in Kahama, in Shinyanga Regeion. He went over there, and the accused was handed to him on 18.04.2018 before he brought him back to Serengeti on 19.04. 2018.

On 20.04.2018 he was instructed to record the cautioned statement but the accused person disputed to have murdered the deceased. He testified further that apart from the accused person, he also interrogated Wambura Gibita and a few other witnesses who all stated that the deceased was murdered by the accused person.

That marked the end of the prosecution case, after which this court ruled that a *prima facie* case has been established as against the accused person, requiring him to defend himself. That was before he had been addressed in terms of section 293 of the Criminal Procedure Act [Cap 16 R.E 2019] of his right to defend himself.

The defence had only one witness, the accused person himself, who testified to the effect that on 08.09.2017 he was hired by Wambura Gibita, to do a number of activities from 09:00hrs morning. Those activities, included taking the groom to the salon and later to the home of the bride. He testified further that later on, he attended the ceremony together with others including PW1. He told this court that he left the ceremony at 00:00hrs and went home. In following morning, he heard that at Wambura Gibita's house there was a fight which resulted into the death of one person. He then phoned a sub village chairman who informed him that the person involved was not from their village. DW1 stated further

that, he remained at home until 22.10.2017 then he left to Kahama where he was doing petty businesses commonly known as "umachinga".

However, it was his testimony that on 15.03.2018, he went back to Kegonga for the funeral of his grandfather but all that time he was not arrested until on 14.04.2018 when he was arrested at Kahama by the police officers of Kahama. Responding to the cross examination questions he stated that he did not kill the deceased as alleged by the prosecution, but he admitted that PW1 was at the ceremony and that the hall had enough light.

That marked the end of the defence case as well and the same was followed by final closing submissions from counsel of both sides. In their submissions they extensively gave the details pertaining to the evidence adduced by both sides. For the purpose of brevity I will not reproduce their submissions in this judgment, but I will sufficiently consider them in this judgment. Generally, while the defence counsel submitted that the prosecution has failed to prove its case beyond reasonable doubts, the prosecution contended that the evidence submitted proved the case beyond reasonable doubt.

After having received the submissions from the learned counsel, this court invited the assessors to give their opinions whereby the first assessor opined that the accused should be found guilty of manslaughter. The second and the third had similar opinions that the accused person should be found guilty of murder.

The offence of murder with which the accused person stands charged requires the prosecution to prove mainly three ingredients which are, **one**; that the deceased died an unnatural death, **two**; that the death

was caused by the accused person, and **three**; that the accused person caused the said death intentionally. Those above will form main issues for determination.

In considering whether the case against the accused person has been proved beyond reasonable doubt, I will start with the first issue which is whether the deceased actually died unnatural death. The main evidence in support of this issue is found in the exhibit P1 which is a Post Mortem Examination Report, admitted during preliminary hearing, and which was admitted without any objection from the defence. The said exhibit shows that the deceased died from excessive blood loss following a stab wound by a sharp object.

There was also the evidence from PW1 and PW2 who testified to have seen the deceased being stabbed, taken to the hospital where he was pronounced dead instantly and lastly evidenced his burial. All these testimonies lead this court reach to a conclusion that it is proved beyond all doubts that the deceased died an unnatural death.

The second issue for determination is whether the accused person, Moi s/o Ikwabe unlawfully caused the death of the deceased person.

On this issue, the prosecution is relying on two types of evidence, **one,** the identification of the accused person at the time when the offence was committed, **two**, the circumstances surrounding the commission of the offence. The defence side mainly relied on the defence of alibi, and the allegation that the prosecution evidence is tainted with doubts due to discrepancies and contradiction.

Of these two, I will start with the issue whether the accused person was identified at the time when the offence was committed, this is because the evidence on record fall under the category of visual identification.

The Court of Appeal of Tanzania laid a principle which any court dealing with this type of evidence must observe before relying on the evidence of visual identification. The same was laid in the famous case of **Waziri Amani versus The Republic**, [1980] TLR 250 in which it was held that;

> *"The evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. Before relying on such evidence, the trial court should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there is any light then the source of light and intensity of light and whether the witness knew the accused person before"*

Also see **Gozibert Henerico Vs The Republic,** Crim. Appeal No. 114 of 2015. To be precise, the prosecution needs to bring evidence stating the following factors before the court has relied upon the evidence of identification;

(i) *The time the witness had the accused under observation,*

(ii) *The distance at which he observed him,*

(iii) *The condition in which such observation occurred, for instances whether it was day or night (whether it was dark, if so was there moon light or hurricane lamp etc) (the source and intensity of light),*

(iv) *Whether the witness knew or had seen the Accused person before or not,.*

Relying on the evidence of visual identification at night, the republic is supposed to make sure that the above factors have been satisfied if it wants the court to believe and rely on the evidence visual identification.

In this case, the crucial evidence in determining this issue is that of PW1 and PW2 who testified before this court that they witnessed the accused person stabbing the deceased, causing his death.

The issue that arises here which requires determination is whether there was proper identification of the accused person by the witnesses taking into consideration the fact that the incident happened during night hours.

Regarding the time used to observe the accused person and the incident, PW1 and PW2 testified to have been with the accused person for so long during the time the ceremony persisted, they served him food and drinks, they said to have seen him dancing, they also saw him quarrelling with the deceased and PW2 went as far as reconciling them and stopped them from fighting, witnessed the whole incident of stabbing the deceased. The fact that the accused person was at the party was not disputed in the defence evidence, as the accused admits to be present at the party and admits to be served by PW2. What he contends is that, he left four hours before the incident.

Further to that, PW1 and PW2 say that the incident occurred few minutes after the quarrel between the accused person and the deceased, which act in the normal circumstances must have raised attention of the of all people who were at the ceremony, the fact that the offence was committed less than five minutes later suggest the those people who observed were still around and still had fresh memory of the incident.

Regarding on whether the witnesses knew the accused person before, PW1 and PW2 were very clear in their evidence that they knew him before, Pw1 being an age mate, PW2 as a village mate and as his transport service provider "bodaboda". The accused person in his defence however denied to have been present at the time of the quarrel stating that he had already left the crime scene.

Now, looking at the evidence of both sides, and the issues raised in the final submissions by the counsel for the parties, it is clear that on this issue this case is bound to fail or succeed on the bases of the credibility of the witnesses. It means unless one believes what is said by the prosecution witnesses, cannot found the conviction basing on their evidence.

It is a principle in law in the case of **Shija Juma Vs The Republic,** Criminal Appeal No. 383 of 2015. CAT (Bukoba) (Unreporrted), that only a credible and reliable witness can be believed, for their evidence to form a base of the conviction in criminal cases.

That being the case, it means those witnesses who are not credible, their evidence must be disregarded. In law, any witness who is competent to testify deserves to be believed except those who are not credible.

To establish whether a witness is credible or not, there are factors to consider. In my considered view, there is a number of factors which affect the credibility of witnesses, few of them being the followings;

(i) Contradictions, discrepancies and the conflicting statement in the witnesses evidence,
(ii) Failure of the witness to mention the suspect at the earliest opportunity possible,
(iii) To give evidence basing on suspicion,
(iv) Evidence based on hearsay,
(v) Witness testifying as accomplice and
(vi) A witness with interest to serve.

Without the short comings caused by these factors and others certainly not mentioned here, a witness deserves to be believed, if he is competent to testify.

It is also a principle that, a trial judge is better placed to assess the credibility of witnesses as he is in the position to grasp the inconsistencies, to assess the demeanors and the flow of the evidence. See **Goodluck Kyando Vs The Republic,** Criminal Appeal No.118 of 2003 CAT- Mbeya (Unreported)

In the case at hand, I am a judge who heard and recorded the evidence of the all witnesses in this case, I was opportuned to assess their demeanor and credibility, I am satisfied that what the prosecution witnesses said were not lies. I see no any material contradiction in their evidence worth to affect their credibility.

In **Marano Slaa Hofu & and 3 others vs The Republic,** Criminal Appeal No 246/2011 (CAT) Arusha, it was held *inter alia,* that it is only

the major contradictions which goes to the root of matter which affect the evidence of the prosecution, those which are minor and do not go to the root, can be ignored. Having assessed the pinpointed contradictions, I am satisfied that they are minor and therefore ignored.

Regarding the second issue as to whether the witnesses mentioned the accused persons at the earliest opportunity possible, this is built on the principle enunciated in the case of **Jaribu Abdalla Vs The Republic**, Criminal Appeal No. 220 of 1994 (unreported) in which it was held *inter alia* that;

> *"..delay in naming a suspect at the earliest opportunity dents a witness's credibility especially where the identification of the suspect is in issue."*

Further to that, in the case of **Marwa Wangiti Mwita & another vs. The Republic,** [2002] TLR 39 in which it was held *inter alia* that;

> *"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

In this case there is enough evidence that the accused was mentioned at the earliest opportunity possible, I believe he was not arrested soon after the incident because he was not in the village. He was in Kahama where he was arrested from.

Regarding whether the evidence was suspicious or not, it is the principle of law as held in the case of **Jeremiah John & 4 others vs**

The Republic, Criminal Appeal No. 416 of 2013 CAT–Bukoba (unreported) that;

> *"It is trite law that a suspicion, however strong, cannot be a substitute for proof beyond reasonable doubt."*

In this case the evidence against the accused person is not based on suspicion, it is direct in the sense that the witnesses gave evidence of what they observed during the time when the offence was committed. That means also that, their evidence was not based on hearsay and they are not accomplices.

The next issue is whether, the prosecution witnesses had interest to serve in this case. The authority in the case of **Abraham Saiguran Vs Republic** (1981) T.L.R. 265 H.C is to the effect that evidence of witnesses with interest to serve must be approached with care and should not be acted upon unless corroborated by some other independent evidence. In this case there is no sign that the prosecution witnesses had any interest to serve. Since we agree that these witnesses had no interest to serve, I see no base as to why PW1, PW2 and PW3 can frame a case against the accused person.

That said, and done, it is proved that PW1 and PW2 identified the accused person, and clearly witnessed the accused person stabbing the deceased which act caused his death according to exhibit P1. This court is left without any shadow of doubt that there was no mistaken identity, that the witnesses were able to identify the accused person properly.

Although the accused person claimed in his defence that he had already left the crime scene at the time the incident is said to have happened, in other words he raised a defence of *alibi*, That defence was

attacked by the prosecuting State Attorney Mr. Byamungu, in that it did not follow procedure of giving notice in terms of section 194 (4) and (5) of Criminal Procedure Act [Cap 20 R.E 2019] and some other principle as contained in the case laws already cited.

As correctly submitted by Mr. Byamungu, the defence of alibi is provided under section 194 (4) of the Criminal Procedure Act (supra) which require an accused person who intends to rely upon an alibi in his defence, to give notice to the court and the prosecution of his intention to rely on such defence before the hearing of the case.

Under sub section (5) if he fail to give such a notice before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.

These provisions have been interpreted in the of **Hamis Bakari Lambani vs The Republic,** Criminal Appeal No. 108 of 2012, CAT

> *First, the law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case, section 194(4) of the Criminal Procedure Act, Cap 20. If the said notice cannot be given at that early stage, the said person is under obligation, then, under subsection 5, to furnish the prosecution with the particulars of alibi at any time before the prosecutions closes its case. Should the accused person raise the alibi much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence, section 194 (6)."*

It is the principle in the case **Richard Wambura vs The Republic**, Criminal Appeal No. 167 of 2012 CAT- Mwanza, that,

> *"It is established law that when the Accused raise on alibi he does not assume the duty of proving it, it will be sufficient to earn him an acquittal when compared to the prosecution evidence"*

Ordinarily the principle governing the defence of alibi was designed to enhance the rule of disclosure. It intended to disclose the defence to the investigator and the prosecutor, for them to investigate on the truthfulness of the defence and take appropriate action or prepare to counter it. Failure so to give notice at the appropriate stage denies the prosecution the opportunity to prepare to challenge it.

For that reason find that the alibi raised by the accused person was has not complied with section 194(4) and (5) for that reasons and on the strength of the evidence given, I find the accused person to have failed to call even witness to prove the alibi. Having considered all these factors and the weakness of the alibi, I decide to accord in no wait in terms of section 194(6) of the Criminal Procedure Act. (supra)

The second issue having been answered in affirmative, I will go on to the third and last issue, which is whether the killing of the deceased person by the accused was pre meditated. This is also termed as *malice aforethought,* which means the ill will or evil intention in the mind of the accused person when committing an offence. The law in relation to malice aforethought is settled that the same can be inferred from several factors.

The Court of Appeal of Tanzania in the case of **Enock Kipala vs The Republic**, Criminal Appeal No. 150 of 1994, stated that;

"..... usually an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertained from various factors including; (1) the type and size of weapon, if any, used in the attack. (2) the amount of force applied in the assault; (3) a part or parts of the body the blows were directed at or inflicted on; (4) the number of blows, though one blow may, depending on the facts of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during, or after the killing and (7) the conduct of the attacker before and after the killing"

In the case at hand, it is evidenced that the accused person stabbed the deceased person just once. According to PW1 and PW2's evidence, the deceased was stabbed at his lower back, just under the ribs, with a knife. It was not testified whether the accused uttered any words after the incident. Also that just after stabbing the deceased he ran away.

The defence submitted that the incident occurred as a result of a fight so the same be reduced to manslaughter. The prosecution however has strongly submitted that since the incident occurred after the quarrel had already been settled, then the same cannot be reduced into manslaughter but should remain to be murder.

The incident happened as people were drinking and dancing. It has however not been proved that the accused had prior knowledge that the deceased will also be attending the ceremony so as to form the intention to kill him. It is clear from the evidence that the two had quarrelled over dancing with a girl, but they stopped after being reconciled and at that

very same moment the deceased turned to walk away and it was when the accused stabbed him.

That all happened in a very short instance to enable the accused to form intention of killing the deceased. He probably was still angry with the deceased so he thought he would reduce it by stabbing him at his back. As was stated in **Moses Mungasiani Laizer @ Chichi vs The Republic**, [1994] TLR 222 that;

> *"it has been said times without a number, and we would like to reiterate, that where death is caused as result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder"*

With much respect to the other two assessors, I share the same view with the dissenting assessor for the reasons stated above, I find the accused person one **Moi s/o Ikwabe Matiko** not guilty of murder as he was charged before this court. I however, under section 300(2) of the Criminal Procedure Act [Cap 20 R.E. 2019] enter a substituted conviction for the offence of manslaughter contrary to section 195 and 198 of the Penal Code [Cap 16 R.E 2019].

It is so ordered

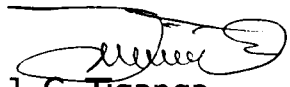
DATED at **TARIME** this 24th day of June, 2020.

J.C. Tiganga

Judge

24/06/2020

Judgment delivered in open court in the presence of the Accused person, his Advocate and Mr. Byamungu State Attorney as well as the Assessors as to per coram.



J. C. Tiganga
Judge
24/06/2020

SENTENCE

Having considered, the facts that the accused is given a benefit of being the first offender, and having considered the way the offence was committed, this case is on the borderline of Murder and Manslaughter, if the court has to take all the factors especially the aggravating factors, the accused deserves severe punishment as opposed to the lenient punishment as prayed by the defence counsel.

It is because the death resulted from fight that is why he was convicted of manslaughter. However, the conducts of the accused person after the incident show his guilty mind. This is therefore an aggravated Manslaughter which deserves him severe sentence. Having considered all these, I hereby sentence the Accused person to serve 25 (twenty five) years in jail.

It is so ordered.

J. C. Tiganga
Judge
24/06/2020

Sentence pronounced in open court in the presence of the parties as indicated above.

J. C. Tiganga
Judge
24/06/2020

Right of Appeal explained and guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. TIGANGA
JUDGE
24/06/2020