IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

ORIGIONAL JURISDICTION

(BUKOBA DISTRICT REGISTRY)

CRIMINAL SESSIONS CASE NO. 83 OF 2014

THE REPUBLIC

VERSUS

MBALUSHIMANA JEAN-MARIE VIENNEY @ MTOKAMBALI

JUDGMENT

26/03/2020 & 30/03/2020

Mtulya, J.:

In the present case, soil bricks creator at Kihinda Village, Mr. Mbalushimana Jean-Marie Vienney @ Mtokambali (the accused) was arraigned before this court for allegedly murdered a *pombe* shop owner and seller, Mrs. Theodozia Ngezi (the deceased) on 16th July 2013 during night hours at Kihinda village within Kyerwa District in Kagera Region, contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Code).

It was alleged that on the fateful day, at around 21:00hrs the deceased was selling local brew known as *Rubisi* @ *Tonto* at her residence in Kihinda Village where the accused showed up and

requested for the local brew and was given one *Kibuyu* of *Tonto*. It was established by Kihinda community and during the hearing of the case that one *Kibuyu* of *Tonto* if swallowed cannot cause a person to be drunk, intoxicated or any kind faculty disorder.

It was allegedly further that after drinking his *Kibuyu*, the accused assaulted the deceased with a hammer on the head hence caused her death. It was also established during the hearing of this case that at the scene of the crime there were many people who witnessed the attack, including the brother of the deceased Mr. Tibechenjela Evarista Nyamamba, Mr. Abel, *Mkwe* of the deceased and two children.

Following the incident, the accused was arrested and brought before Murongo Police Station in Kyerwa District and interrogated on the attack incidence occurred on 16th July 2013. From the interrogation, the accused denied to have assaulted the decease and after completion of the investigation, the accused was prosecuted for murder of the deceased in this court. When the case was scheduled for Preliminary Hearing on 24th February 2015 and during the Hearing on 23th March 2020, and when the information was read over and

explained to the accused person, he pleaded not guilty of the charge of murder of the deceased.

In order to establish its case against the accused, the Republic represented by two learned State Attorneys, Mr. Nehemia John assisted with Mr. Joseph Mwakasege, summoned and marshalled a total of five (5) witnesses and tendered two (2) exhibits. On the other hand, the defense side under legal representation of learned counsel Mr. Joseph Bitakwate, presented its only witness, the accused himself and did not tender any exhibit in this court.

The prosecution side summoned and marshalled Mr. Deogratias Mathias, the son of the deceased, to appear in this case as prosecution witness one (PW1). PW1 testified that his mother expired on 16th day of July 2013 during night hours from an attack. PW1 stated that he was informed of his mother's attack by Mr. Karaudiani Ngezi who mentioned the accused being the assailant. It is from that news PW1 decided to rush to the scene of the crime where he found his mother already dead and had wound on her head.

PW1 testified further that upon arrival at the scene of the crime, he decided to call and inform the Village Executive Officer who called

the police. The police and medical doctor visited the scene of the crime on the next day, 17th July 2013 and the body was laid to rest on 18th July 2013. With regard to reason behind the attack, PW1 stated that the accused intended to grab coffee proceeds from his mother. According to PW1, the accused was living in a nearby house of Nsanze which is about ten human steps and was watching his mother selling coffee and collecting monies from Mr. Kadenge amounting to Tanzanian Shillings Two Thousand Sixty Five Thousand Only (265,000/=) in the afternoon of the day of attack.

To PW1, the accused was not involved either in the negotiation or sale of the coffee, but during night he demanded the money from his mother and assaulted her to death. Finally, PW1 testified that at the scene of the crime, apart from the deceased, he met Mr. Abel, Mr. Oliver and Mr. Tibechenjela, and slept at the scene of the crime until next morning, but never found the weapon used in the assault.

One of the mentioned persons, Mr. Tibechenjela Evarista Nyamamba, was summoned and marshalled in this case as prosecution witness number two (PW2). However, Mr. Abel and Mr. Oliver were not summoned. It was stated by Mr. Nehemia that Abel

cannot be found as his where-about is unknown and it is not known whether he is dead or alive. Nothing was stated concerning Mr. Oliver.

PW2, who is the brother of the deceased and eye witness of the attack against the deceased, testified that on 16th July 2013, he went to greet his sister, the deceased, and during the night hours, about 21:00hrs, he saw the accused attacking the deceased with the hammer three times on the head.

PW2 testified further that he managed to identify the accused from *mwanga mkubwa wa kibatari kama mwanga wa jua* (*Kibatari* light which was huge like sunlight). PW2 testified further that the accused appeared to the deceased and requested some money from coffee earnings and received refusal from the deceased hence assaulted her with the hammer. According to PW2, he tried to intervene and rescue the deceased from the assault, but he was threatened to be stabbed by use of knife of the accused.

PW2 also testified that he saw the accused in the afternoon of the first day of his arrival at Kihinda village when he was introduced by the deceased, but did not talk each other. PW2 testified further that he saw the deceased during night hours when he was entering in the

house, when he got seated at the bench and finally during the attack. PW2 stated that he has not seen the accused handling anything when entering in the house, but saw him assaulting the deceased with a small hammer made of steel attached with wooden handle.

According to PW2, at the scene of the crime there were other people who were living in the deceased's house and witnessed the incidence, namely: Mr. Abel, *Mkwe*, and two children, and that Mr. Abel and *Mkwe* were sitting next to him. However, PW2 failed to name the second name of Abel, and names of *Mkwe* and two children. With regard to coffee business on the 16th July 2013, PW2 stated that there was no any business and PW1 showed-up for greetings in the afternoon and after the attack during night hours he was not present and did not sleep at the scene the crime.

Mr. Issa Amri, a resident of Kyerwa, was summoned as prosecution witness number three (PW3). His testimony relates to the arrest of the accused. He briefly stated that he heard from the family members of the deceased that the deceased was killed by the accused on 16th July 2013 at Kihinda village and saw the accused in Kiborogota area in Uganda when PW3 was travelling from Rwanda to Tanzania. It

is from the allegation against the accused and identification of him in Uganda, he decided to inform the police at Kiborogota Station in Uganda who arrested the accused and took him to Kitagate Police Station in Uganda which is next to Tanzanian border. PW3 testified further that the police at Kitagate handled over the accused to police in Murongo Station in Tanzania in the name good cooperation and decent neighborhood.

With regard to documentations of the accused's transfer from Uganda to Tanzania or PW3 permit of his visitation in Rwanda and Uganda, PW3 stated that there was no any documents for the accused's handover and himself had only temporary permit which was seized by immigration officers at the border. PW3 believed that the accused was involved in the killing of the deceased because he escaped from Kihinda Village in Tanzania to Kiborogota area in Uganda.

The prosecution side also invited a police officer who went at the scene of the crime on 17th July 2013 as prosecution witness number five (PW5). The officer was named Detective Corporal Aidan numbered E. 7775 from Murongo Police Station in Kyerwa who investigated the

killing of the deceased and drew the Sketch Map of the Scene of the Crime at Kihinda Village (the Map). PW5 testified that on 17th July 2013 morning hours he was at his office, Murongo Police Station, and was informed of the killing of the deceased at Kihinda village and was commanded by his leaders to go and investigate the killing.

PW5 testified further that he went at the scene of the crime with medical doctor who examined the body and wrote the Report. PW5 stated to have seen the body of the deceased which showed wound at center of the head and blood in ears, eyes and nose. PW5 also drew the Map which was admitted in this case as exhibit P.2. At the scene of the crime, PW5 interrogated several people including PW1 who informed him of the killing event. PW5 stated further that he did not participate in the arrest of the accused, but found him in custody at Murongo Police Station on 30th July 2013 where he was brought from his arrest in Uganda.

With regard to cause of death and extent of injuries, the prosecution side summoned Dr. Vaileth J. Kaihula from Isingilo Hospital in Ishaka who was working at Kaisho Dispensary in 2013 as prosecution witness number four (PW4). PW4 testified that on 17th

July 2013 she was informed of the killing of the deceased by the police and requested her to examine the deceased's body at the scene of the crime. PW4 stated that she examined the body and prepared a Postmortem Examination Report (the Report) which was admitted in this case as P.1. In the Report, PW4 opined that the death occurred due to head injury associated with hemorrhagic shock. In the summary report, the following observation was printed:

> *Depth cut wound ant. Fontanel of the skull approx. 3cm width length 4cm. The bleeding its appear on the nose, ears and mouth. Eyes its stained blood (hemorrhagic eyes). Used sharp instrument. Upper & lower extr. Nothing abnormal detected.*

In the skull and its contents, the Report shows that there is a cut wound and its external appearance depicts all face and skull stained with blood. In her testimony, PW4 stated that the accused was attacked three times at exactly the same area on the head which depicted two teeth of the hammer and in professional name that is one wound in anterior fontanel. However, PW4 testified that he was told of the use of hammer in the attack by the deceased's relatives

who were present at the scene of the crime and in her additional observations, PW4 stated that the deceased was assaulted with a sharp side of the hammer and caused head injury associated with hemorrhagic shock. To PW4 the Report was confirmation of what she was informed by the relatives of the deceased and transpired on the day of killing of the deceased.

On the other hand, the defense side called one witness, the accused himself (DW1) and did not tender any exhibit before this court. DW1 testified that on 16th July 2013 in evening hours he was at his residence at Kihinda village and at night around 19:30hrs went to the neighboring bar for alcohol drink. DW1 stated that upon arrival at the bar, the bar owner and seller sold to him *Gongo* type of alcohol of Tanzanian Shillings One Thousand only (1,000/=) amounting to a single glass.

According to DW1, an hour later he left for his residence and slept. To DW1, in the bar there were like ten people who can be recognized their number from the voices heard, but could not identify any person as it was dark in the bar. DW1 testified that he was able to identify the bar seller, owner and server because there was little

light of *Kibatari* and she was the one who was serving drinks to people, including him.

On the next day, 17th July 2013, DW1 testified that he raised up very early in the morning and went for his activities of soil bricks making near Mfasha Market where Mr. Fredy was distributing work for bricks makers. In the evening hours of the same day, when DW1 was returning from Mfasha, along the way, he heard villagers stating that at Kihinda village the deceased was killed. According to DW1, after hearing of the news, he went to his residence and later at the scene of the crime. DW1 testified that he was not present in the afternoon of 16th July 2013 and at night during the killing of the deceased. To DW1, he was present at night on 16th July 2013, but he left before the incident of killing and did not know who killed the deceased.

With regard to distance between DW1 and deceased's residences, DW1 stated that the deceased is her neighbor, but their residences are separated by about two hundred and fifty meters (250). On his arrest, DW1 stated that he was arrested on 30th July 2013 at his working place at Kihinda village and not Uganda as is claimed by the prosecution and complained that the prosecution failed

to adduce any documents of his arrest in Uganda and transfer to Tanzania. To DW1, he was present at the village all the time and managed to attend burial activities of the deceased on 18th July 2013.

From the facts and evidences presented in this case, the accused is connected to the killing of the deceased at two levels, first he was seen at the scene of the crime attacking the deceased with hammer during night hours and secondly, to absent himself from his village, Kihinda immediately after expired of the deceased. In murder cases, like the present one, the Republic, which arrested and arraigned the accused before this court, is required to prove three important things existed, namely:

1. The death of the deceased;

2. The death of the deceased was caused by the accused; and

3. The accused caused the death of the deceased with malice aforethought.

In the present case, learned State Attorneys, Mr. Nehemia John assisted with Mr. Joseph Mwakasege for the Republic and learned Counsel Joseph Bitakwate for the defense did not dispute on whether

or not the deceased actually died. They all registered their acceptance that the deceased died from unnatural death. I also sat with Hon. Assessors in this case, and all acknowledged that the deceased is really dead. I have also gone through the testimonies of all prosecution witnesses and exhibit P.1 and I believe without any shadow of doubt that the accused died and her death emanated from an attack on her head which caused hemorrhagic shock.

The only disputes which this court is invited to determine are: whether the accused killed the deceased and if so, was there any malice aforethought. During defense final submission, Mr. Bitakwate submitted that it is the duty of the prosecution side to prove its case beyond reasonable doubt and cited the decision in **Hassani Rashid Gomela v. Republic, Criminal Appeal No. 27 of 2018** where at page 8 the Court of Appeal stated that in criminal cases the burden of proof lies squarely on prosecution side and is required to prove the case against the accused beyond reasonable doubt. According to Mr. Bitakwate the only responsibility of the accused is to raise a reasonable doubt.

Mr. Bitakwate faulted the evidences of three witnesses namely PW2, PW3 and PW5 whose evidences touched the accused during their testimonies. Mr. Bitakwate argued that PW2 testified lies in court for exaggerating that *Kibatari* can produce huge light like sunlight.

To Mr. Bitakwate the light of *Kibatari* cannot be relied to convict accused person as from the decision in **Jamila Mfaume Makanyila @ Mama Warda v. Republic, Criminal Appeal No. 383 of 2016**. Mr. Bitakwate also argued that PW2 was in the village for a day and did not see the accused before 16th July 2013. Again, Mr. Bitakwate submitted that PW2 mentioned people like *Abel* and *Mkwe*, but was incapable of mentioning their second names. Finally, Mr. Bitakwate argued that PW2 is not credible and trustworthy witness and adduced in this court cooked evidence and made it relate to the circumstances of the present case.

With regard to PW3, Mr. Bitakwate argued that he did not adduce any evidence, but explained his opinion without any proof. Mr. Bitakwate submitted that PW3 stated to have travelled to Uganda and Rwanda, but never produced any document to substantiate the

statement. The same to the arrest and transfer of the accused person from Kitagate area in Uganda to Murongo Police Station in Tanzania.

Mr. Bitakwate finally faulted the evidence of PW5 arguing that he was not involved in the arrest of accused person and therefore cannot testify before the court that the accused was arrested in Uganda. To Mr. Bitakwate the statement that PW5 found the accused person at Murongo Police Station corroborates the statement of the accused that he was arrested in Tanzania and taken to Murongo Police Station.

Mr. Bitakwate also touched briefly on the conduct of the accused from 17th July 2013 when he heard news of the death of the deceased to 30th July 2013 when he was arrested and stated that the evidence was not protested by the prosecution side. Mr. Bitakwate cited the decision in **Hassan Rashidi Gomela** (supra) and argued that failure to cross examine essential point leaves the evidence on that particular point unchallenged. Finally, Mr. Bitakwate stated that the prosecution failed to prove its case beyond any reasonable doubt.

Mr. Nehemia, on the other hand agreed with Mr. Bitakwate that it is the duty of the prosecution to prove its case beyond any reasonable doubt and the duty of the accused is to raise reasonable doubt. Mr.

Nehemia submitted that the dispute who killed the deceased is justified by the evidence of PW2 who stated the accused killed the deceased. According to Mr. Nehemia, PW2 saw the accused in the afternoon and at night identified him from a huge *Kibatari* light which was like sunlight. Mr. Nehemia submitted further that PW2 saw accused person attacking the deceased by use of hammer on the head and when wanted to rescue the decease, he was threatened by knife of the accused person and the accused escaped to Uganda.

With regard to the decision in **Jamila Mfaume Makanjila @ Mama Warda** (supra), Mr. Nehemia argued that there are criteria of identification of a person in darkness such as presence of light, intensity of light, proximity of the accused and familiarity of the accused person. In present case, he argued that there was *Kibatari* with large light like sunlight, the accused was two human steps from PW2, and they met in the afternoon.

Mr. Nehemia also submitted that PW2 reported to other people including PW3 and PW5 and mentioned the accused to have killed the deceased. To justify his argument, Mr. Nehemia cited the decision in **Paulo Makaranga v. Republic, Criminal Appeal No. 26 of 2006**

where it was stated that the ability of the witness to name a suspect at the earliest opportunity is an all important assurance of his reliability. Mr. Nehemia also invited the decision in **Richard Matangule and Another v. Republic [1992] TLR 5** and argued that PW2 stated details which were also stated by the accused which justifies that PW2 is reliable and trustworthy witness and in totality of the evidence, the accused must be convicted of murder.

Mr. Nehemia went a step further to submit on the important element of murder, malice aforethought. He indicated that the accused killed the decease with malice aforethought as is depicted from accused's conduct of assaulting the deceased on head by use of hammer in excessive force which damaged the head skull of the deceased. Mr. Nehemia stated further that the conduct of the accused to escape to Uganda shows that he is connected to the murder and cited decision in **Elias Paul v. Republic, Criminal Appeal No. 7 of 2004** where it was stated that the conduct of a person before or after the killing may also infer malice.

However, with regard to absence of document to show the accused was arrested in Uganda, Mr. Nehemia replied that the

accused was brought in Tanzania under good neighborhood of two countries of Tanzania and Uganda and that in any case absence of documents does not necessarily that the accused was not arrested in Uganda.

In conclusion of his final submission, Mr. Nehemia touched a bit on the issue discrepancies and defense of *alibi*. According to him, there are discrepancies, but minor and normally happen in cases like present one where the event occurred in 2013. With the defense of *alibi*, he contended that the accused pleaded the defense of *alibi* and therefore cannot be availed any other defense.

On my part I will start with the issues of discrepancies presented during the hearing of the present case, and see whether they are minor or major going to the root of the case. I will then state the law regulating identification of witnesses during night hours, suspicions levelled against the accused and *alibi* defense.

In the present case, PW1 stated during noon hours he was assisting his mother in selling coffee to customers, including Mr. Kadenge and the accused was watching the transaction from his residence which was about ten meters in the neighborhood at Nsanze

house. PW1 stated further that he called Village Executive Officer when he was at the scene of the crime on 16th July 2013 night hours. PW1 testimony contradicted with the evidence adduced by PW2 and PW5.

PW2 testified that PW1 was not present during the night hours of the attack and PW5 stated that there was no any other house within fifty meters neighborhood of the deceased's house. Again, exhibit P.2 which was tendered in this court also shows that there is no house within ten meters of neighborhood at the deceased's house. Still, during the hearing of the case, PW5 testified that the house of the deceased was surrounded with banana trees which make visibility impossible. The testimony which is substantiated by exhibit P.2 which depicts banana trees surrounded deceased's house. These facts and evidences place PW1's credibility into question.

PW3 testified that he was not present at the scene of the crime, but heard from family members, including PW2, Mr. Deo Mathias and Mr. Oliver, that the accused killed the deceased with the hammer. PW3 testified that he believed the statement to be true because the accused escaped immediately after the death of the deceased. PW3

further stated that he saw and contributed towards the arrest of the accused in Uganda when he was coming from Rwanda to Tanzania. According to PW3, he did not attend burial ceremonies held on 18th July 2013 as he left for Rwanda and returned on 30th July 2013 through Ugandan border.

However, during the hearing of this case, when PW3 was required to substantiate his statement on travelling to neighboring states of Uganda and Rwanda through travelling documents/permit or any other documents which transferred the accused from Uganda to Tanzania, PW3 stated that he had temporary permit which was retained by immigration officers in Tanzania. With the transfer of the accused, PW3 stated that it was based on good relations between the police of neighboring states of Uganda and Tanzania.

I think, even if that is the case, I am wondering how possible for a person who was not at Kihinda village from 18th July 2013 to 30th July 2013 to be able to testify the escape of the accused on the same period of his absence. It is also difficult to comprehend on how PW3, a Tanzanian Citizen, travelled in three East African States without any travelling document whatsoever. To my opinion, PW3 evidences have

not been substantiated to the required level and therefore cannot be relied to convict the accused in the present case.

PW5 testified that that the accused was arrested in Uganda but found him at Murongo Police Station. He stated that it was other police officers who arrested the accused person in Uganda. It is unfortunate that those other police officers who arrested the accused in Uganda were not summoned to substantiate the claim on the arrest of the accused. In any case, PW5 found the accused at Murongo Police Station and cannot state on the arrest of the accused in Uganda. Still, he failed to adduce before the court necessary documentations on the arrest and transfer of the accused from Uganda to Tanzania. I do not think if we have that practice of transferring assailants in our borders from one state to another under the name of good cooperation and neighborhood. Apart from the Map, tendered in this case, PW5 evidences are without justifications.

Witness PW4 testified in this court that the cause of death was due to head injury associated with hemorrhagic shock and prepared the Report. In her Report which was admitted as exhibit P.1, she

opined that the deceased was assaulted with a sharp side of the hammer and caused head injury associated with hemorrhagic shock.

To PW4 the report was confirmation of what transpired on the day of killing of the deceased. However, during the hearing of the case, PW4 admitted that she was informed of the use of the hammer by relatives who were present at the scene of the crime that is why she wrote sharp side of the hammer in her additional observation in the Report. PW4 also testified that there was one wound on the head and the attacks were landed three times exactly at the same place. From this evidence, in my opinion, it is not certain whether what was recorded by PW4 was from her observations of the body of the deceased or from statement of relatives present at the scene of the crime. Again, the level of precision of the attacker brings some doubt. Three attacks at exactly the same place on the head. The Report in the present case has little value.

In 1972, Spry V. P in the decision of **John Emitu v. Uganda EACA, Criminal Appeal No. 163 of 1972**, remarked that:

> *Some postmortem reports are of little value. When a doctor, merely concentrates on what he believed to be*

the cause of death and fails to examine the body carefully to see the injuries, we do not propose to rely on the postmortem report in this case.

In any case, expert opinion is only opinion evidence and it is for a trial judge to accept or reject it (see: **Haji Makungira v. Republic (1980) TLR 27 and Agnes Liundi v. Republic (1980) TLR 46**). I think I have to attached little value in the Report.

With regard to PW2, the law is very certain and settled. Section 62 (1) (a) of the Law of Evidence Act [Cap. 6 R. E. 2002] (the Evidence Act) require oral evidence to be direct and if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. In the present case, five (5) witnesses were brought by the prosecution before this court and testified. Apart from PW2, all other witnesses testified to have heard from the second or third person. Again their evidences do not corroborate each other. They depicted contradictions and discrepancies as I have shown inhere above.

It is the evidence of PW2 who testified to have seen the accused assaulting the deceased on head by use of hammer three times on the head. However, the law under section 143 of the Evidence Act

does not mention particular number of witnesses who are required for the proof of any fact. This provision has received judicial interpretation from our superior court, Court of Appeal, in **Yohanis Msigwa v. Republic (1990) TLR 148,** where at page 150 their Lordships stated that:

> *There was admittedly a lone eye witness in this case. Her evidence is not however detracted from because of that fact alone. As provided under Section 143 of the Evidence Act, of course, no particular number of witnesses is required for the proof of any fact. What were important here were PW1's* ***opportunity to see what she claimed to have seen*** *and* ***her credibility*** *(emphasis added).*

In our case, the PW2 testified to have seen the accused assaulting the deceased by use of a small sized hammer made of steel attached with wooden handle. The directives of our superior court in **Yohanis Msigwa's** decision (supra) is to test two things, viz: *one, whether a witness had the opportunity to see what he claimed to have seen, and two, credibility of witness.*

With regard to opportunity of a witness to see what he claimed to have seen depends on circumstances of each case. If it is during night hours, like in the present case, and the question of identification of assailant comes into dispute, practice of the courts shows that there are specific conditions which are certain and settled (see: **Jamila Mfaume Makanjila @ Mama Ward (supra), Yohana Chibwingu v. Republic, Criminal Appeal No. 117 of 2015, Muhidini Mohamed Lila @ Emolo & 3 Others v. Republic, Criminal Appeal No. 443 of 2015, Issa Mgara v.@ Shuka v. Republic. Criminal Appeal No. 37 of 2005, Philipo Rukandiza v @ Kichwechembogo v. Republic, Criminal Appeal No. 15 of 1994, Waziri Amani v. Republic [1980] TLR 250 and R v. Mohamed Alui [1952] EACA 72**).

The undisputed conditions extracted from the practice of the courts are as follows:

(i) Light at the scene of the crime;

(ii) Source of light at the scene of the crime;

(iii) Intensity of the light at the scene of the crime;

(iv) Proximity between the witness and accused;

(v) Description of the accused or matter involved;

(vi) Mentioning of the accused or matter the earliest possible; and

(vii) Familiarity between witness and accused.

In the present case, there was *Kibatari* as a source of light. PW2 stated it was huge light like a sunlight. The accused stated it was dark and could not even recognized other people present at the scene of the crime when he was taking his drink. To my opinion, I do not think a light from *Kibatari* can be such huge light like sunlight. That is impossible, unless there is electricity bulb of higher voltage or *Kandiri* type of light. There is always distinction between light emanated from *Kibatari* and *Kandiri* or bulb of high voltage.

I think, to my opinion the emphasis of the Court of Appeal in Philipo Rukandiza @ Kichwechembogo v. Republic, Criminal Appeal No. 215 of 1994 must be applied in the present case. The wording in **Philipo Rukandiza's** case are to the effect that:

> *The evidence in every case where visual identification is what is relied on must be subjected to 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 that every reasonable possibility of error has been dispelled.

In the present case, I am not convinced by the ability of PW2 to be sure to identify the accused correctly and every reasonable possibility of error was ousted.

I understand PW2 stated that the accused was introduce to him by the deceased in the afternoon hours of the day when the event occurred, but they did not have any conversation. PW2 also testified that he saw the accused entering in the house and when seated in the bench, but did not see if he handled anything.

This surprises me. I am asking how possible for PW2 to have such high level of concentration and memory in following up every move and step of the deceased as if he knew what was going to transpire. However, the same PW2 could not even remember or recognize names of *Mkwe* and second name of Mr. Abel who lived with them for a while in the same house and during the event they sat next to each other, than the accused who was just introduced to him in the

afternoon and thereafter left. They did not have any conversation, discussion or met before the day of the event. These circumstances brings doubt in my mind.

Mr. Nehemia at one point during his final submission stated that PW2 mentioned the accused at the earliest possible to PW2 and PW5. However, testimony of PW2 does not reflect that. PW2 stated that on the day of the attack, there was no any stranger showed up or slept at the scene of the crime, but on the second day a Muslim man came early in the morning.

However, it was not established during trial who was the Muslim man. Even if it was established, the record do not show PW2 stated any word to PW3 or PW5 who were the first persons to arrive at the scene of the crime. In his testimony, PW3 testified to have visited the scene of the crime early in the morning of 17th July 2013 whereas PW5 went on the same day and time.

Again, the Muslim man went at the scene of the crime in the morning of second day after the attack, 17th July 2013. From the proceedings of this trial, it was PW1 who testified that he called Village Executive Officer and informed of the incidence who in turn

called the police (PW5) who came with a medical doctor (PW4) on the same day, 17th July 2013. However, PW2 stated that PW1 was not at the scene of the crime and the first man to appear in the morning of the second day of the attack was the Muslim man. The question who was the Muslim man was never replied during the hearing of this case.

To my opinion, PW2 did not correctly identified the accused without any shadow of doubt. In law a person may be convicted of the evidence of a single witness if the court is fully satisfied that the witness is telling the truth (see: **Lusabanya Siyantemi v. Republic [1980] TLR 275**).

This goes to the second part of our case, the issue of credibility of the witness. The legal position is that if a witness says inconsistence statements on oath, his credibility is completely destroyed (see: **Bwana Salehe v. Republic (1968) HCD 391 and Surdeyi v Republic (1971) HCD 316**). In 1998 the Court of Appeal siting in Arusha in the decision of **Sahoba Benjuda v. Republic, Criminal Appeal No. 96 of 1989**, stated that:

Contradiction in the evidence of a witness effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.

In the present case, PW2 stated *Kibatari* light was lighting like sunlight hence he managed to identify the accused. I stated it is impossible for *Kibatari* to produce such light. Again, the evidence of such huge light of *Kibatari* was not supported by any other evidence and I do not think if it is minor. This evidence goes to the root of identification of the accused which is the base of prosecution case in the present case.

The importance of credibility of the witness in identification of accused is well explained in the decision of **Jaribu Abdallah v. Republic, Criminal Appeal No. 220 of 1994**. In that case, the Court of Appeal stated that:

In matters of identification, ***it is not enough merely to look at factors favouring accurate***

> ***identification. Equally important is the credibility of the witness.*** *The condition for identification might appear ideal but that no guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is, in our view, a reassuring, though not a decisive factor (emphasis added).*

The tests which were revealed from the practice of the courts and may be considered in the present case are: demeanor of the witness, level of voice, uniformity of his statement, and reporting to appropriate authority and/or facilitation of the arrest of the accused. In the present case, PW2 in some occasions, when he was testifying before the court, he was looking down, spoke at very low voices, his testimony in *Kibatari* contradicts with the well-known reality on ground, he did not report to the appropriate authority on the same day of the attack, and did not mention the accused in the earliest possible opportunity. To my opinion, PW2 cannot be credible and trustworthy witness to persuade this court to land conviction of murder in the present case.

I understand, during final submission of the prosecution side, Mr. Nehemia stated that the accused is telling lies in this court. I think the law is clear with regard to accused persons who tell lies in court. It is not proper to convict the accused on basis that he is found to be a liar (see: **Mushi Rajab v. Republic (1967) HC 384** or weaknesses of his defense (see: **Christian Kale and Rwekaza Bernard v. Republic (1992) TLR 302 and Rajwal v. State, AIR 1959 SCK 66**).

The burden of proof in criminal cases generally is on the prosecution side and the standard is beyond reasonable doubt. The prosecution must produce evidence to substantiate its case beyond any reasonable doubt, which I do not see that to have been done in the present case (See: **Said Hemed v. Republic [1987] TLR 117, Mohamed Matula v. Republic [1995] and Horombo Elikaria v. Republic, Criminal Appeal No. 50 of 2005).** The accused is only required to raise some doubts and I think in the present case that was done by the defence side.

I do not need to waste time on issues of suspicion or *alibi* defense as they were briefly stated by learned State Attorney

Nehemia. In this case PW1, PW3, and PW5 were very suspicious that the accused killed the deceased. PW1 was suspicious of the accused because of coffee money. PW3 was suspicious because he stated the accused was not present at the Village after the death of the deceased and PW5 stated the accused was arrested in Uganda.

All these are suspicions and the law is very well settled that suspicion alone, however strong is not enough to ground a conviction (see: **Shabani Mpunzu@ Elisha Mpunzu v. Republic, Criminal Appeal No. 12 of 2002** and **Benedict Ajetu v. Republic (1983) TLR 190**). There may be no much room for debate over the fact that there was fairly strong suspicion against the accused, but we are warned by practice of the court to avoid conviction based on suspicions and rumors (**B. Mapunda v. Republic, Criminal Appeal No. 2 of 1989**).

With *alibi* defense, I think it cannot be invited in this case. In the present case there was no such notice for an accused to rely on *alibi* defense. In his evidence the accused person stated to be at Kihinda village from 16th July 2013 to 30th July 2013 when he was arrested by the police at his working area. On the 16th July 2013, he stated to be

present at the scene of the crime, but took only an hour for his drink. He left before the killing incident occurred. On the 17th July 2013 he heard of the attack and participated in burial ceremony which was held on 18th July 2013. To my opinion, I do not see anything related to lies or alibi defense.

I sat with Hon. Assessors in this case and all entered the verdict of guilty of murder to the accused. However, after considering the advice of the Court of Appeal in **Ligwa Kusanja and other v. Republic, Criminal Appeal No. 133 of 1999**, that:

> *.... it is a basic principle in judgment that before reaching a decision a court has to consider, and demonstrate that it has considered, all evidences received. It will then accept or reject certain evidence as it considers appropriate.*

I think, I have considered the evidences of both sides adduced in this court and found that the evidences produced by the prosecution side in the present case are precarious and I reject them. I cannot base conviction of murder to the accused which leads to

Having said so and reasons adduced in this judgment, I am satisfied in my mind that the prosecution has failed to establish its case beyond reasonable doubt. It would be dangerous to land conviction of murder in cases like the present one where there are surprises and probabilities. This is not a civil case. It is a criminal case of murder species which its conviction attracts death penalty. I therefore find the accused not guilty of the offence of murder as charged and I hereby order the accused, Mr. Mbalushimana Jean-Marie Vienney @ Mtokambali, released from prison forthwith, unless further detained for another lawful cause.

It is accordingly ordered. Right of Appeal explained.

F.H. Mtulya

Judge

30/03/2020

This Judgment was delivered under the seal of this court in open court in the presence of learned State Attorney Mr. Nehemia John for the Republic, Mr. Joseph Bitakwate for the defence, and in the presence of the accused, Mr. Mbalushimana Jean-Marie Vienney @ Mtokambali.

Honorable assessors thanked and accordingly discharged.

F.H. Mtulya

Judge

30/03/2020