

IN THE HIGH COURT OF TANZANIA

AT NJOMBE

ORIGINAL JURISDICTION

(IRINGA DISTRICT REGISTRY)

CRIMINAL SESSION CASE NO. 6 OF 2017

THE REPUBLIC

VERSUS

1. JUMA S/O MADUNDA

2. AMOS S/O MADUNDA

JUDGMENT

KENTE, J

The accused persons namely Juma Madunda and Amosi Madunda are jointly and together charged with two counts of murder contrary to sections 196 and 197 of the Penal Code, Chapter 16 Revised Edition 2002. The court has been informed that on the 29th day of April 2016 at Kiyombo Village within the District of Ludewa in Njombe Region the accuseds murdered Marco Madunda. That is in respect of the first count. With regard to the second count, the particulars of the charged offence allege that on 5th May 2016 the accuseds murdered one Agnes Mtwewe. Likewise, this

incident is said to have occurred at Kiyombo Village in the District of Ludewa Njombe Region. The accused persons pleaded not guilty to both counts.

During the preliminary hearing when the prosecution stated in detail the facts of the case, the accused persons appeared to admit, only one fact, that is their personal particulars. However, during the full trial, it was common ground that indeed Marco Madunda and Agnes Mtwewe who were respectively a husband and wife are deceased. The court was told and this is happily conceded by the accuseds that the deceaseds were hacked by the hitherto unknown persons who broke into their home during the nocturnal hours on 29th April 2016 and viciously assaulted them in a violent attack. The deceaseds were rushed to Lugalawa Hospital where unfortunately, however, Marco Madunda succumbed to death on the following day. His body was consequently returned home at Kiyombo Village for burial purposes. In the meantime as the general medical condition of Agnes deteriorated, she was referred to Ikonda Hospital in Makete District where she died eventually on 5th May 2016. The

postmortem examination report which was admitted in evidence showed that the death of Marco Mdunda was due to multi organ failure secondary to severe loss of blood and head injury following multiple cuts. On the other hand, as per exhibit P2, the death of Agnes Mtwewe was due to Hypovolaemic shock due to severe bleeding caused by multiple wounds.

Notably, the prosecution case is silent with regard to the question as to why and when the accuseds were suspected and arrested in connection with these charges. However, I would in surmisation say that they were arrested and made the subjects of these charges after the deceased's son one James Madunda (PW1) who was attacked and slightly wounded along with his parents on the fateful day had probably mentioned them as the deceaseds' assailants.

The prosecution's evidence was to the effect that at about 2:00 am on 29th April 2016 James Madunda (PW1) who was the deceaseds' son was at home in deep sleep. He then heard his deceased parents raising the alarm and crying for help. He quickly woke up and went to his parents'

bedroom to find out what was wrong; he found them in a vicious attack. According to PW1 it is the first and second accused who had broke into their home and were busy ruthlessly hacking the deceaseds. PW1 told the court that he flashed them with the torch but they quickly seized it from him. He said that when he confronted the second accused, the first accused quickly moved towards them and attacked him whereupon he sustained an injury on the neck. Immediately thereafter the accused are said to have escaped. PW1 then went to see his parents who as it turned out, had been severely wounded. As he helped his father the late Marco Madunda allegedly remarked in anguish, thus "Amosi na Juma mnaniua nimekosa nini". After the relatives who included Philip Kitulile (PW2) and Robert Mgeni (PW3) and some neighbours came, the deceaseds together with PW1 were quickly taken to Lugalawa Hospital where, unfortunately however, Marco Madunda died on the following day. His wife Agnes Mtwewe died while undergoing treatment at Ikonda Hospital, on 5th May 2016.

Another prosecution witness is Philip Kitulile (PW2). He told the court that on the 29th April 2016 at about 2:00 am, he heard someone raising an alarm after which the late Agnes Mtwewe arrived at his home to wake him up. He then asked her and she told him she had not identified their assailants. Thereupon PW2 went to the home of the late Marco Madunda and he found him laying in bed. He was in a critical condition as he had been seriously wounded on the head, arms and leg. According to PW2, when he asked him as to who had attacked them, at first, the late Marco Madunda could not give any answer. When he asked him the same question for the second time, the deceased allegedly told him they had been attacked by some members of the family of Fiyenje. Notably, the accused persons in this case are indisputably some of the members of the said family.

After PW2 arrived at the crime scene, he raised an alarm. Among the persons who responded is Robert Mgeni (PW3) who was then a Village Executive Officer. PW3 told the court that he started by going to the home of PW2 where he found the late Agnes Mtwewe seated at the door. She

was bleeding profusely on the head and abdomen. According to PW3, the late Agnes only made a remark apparently in lamentation thus “sijala cha mtu” which simply translates into I have wronged no-one. From there PW3 went to the home of the deceaseds. He was accompanied by PW2. He then asked the late Marco Madunda what had happened to them whereupon the late Marco told him that it was “Amosi na jeshi lake” who had attacked them. PW3 then phoned the police who advised for the victims to be rushed to Lugalawa Hospital. On the following day, PW3 was informed that Marco Madunda had passed away and that Agnes Mtwewe had been referred to Ikonda Hospital where she eventually succumbed to death almost one week after the day of the attack.

As expected, the accuseds put up the common defence of alibi. They told the court that on 29th April 2016 at 2:00 am they were at the home of their parents attending their father who was suffering from cancer and was then in the home-based care. The first accused told the court that they were informed about the attack of the deceaseds together with PW1 on the following day whereupon he (1st accused) quickly went to Lugalawa

Hospital to render his assistance. He left behind the second accused to continue looking after their ailing father. He told the court that when he arrived at Lugalawa Hospital, he was informed by PW2 that his paternal uncle Marco Madunda had already passed on. He said that by that time, the late Agnes Mtweve and PW1 were still undergoing treatments. He then talked to PW1 who told him that some unknown persons had invaded their home and viciously attacked his parents. The first accused went on to telling the court that he fully participated both in the burial of the late Marco Madunda and in the transfer of the late Agnes Mtweve from Lugalawa to Ikonda Hospital. He also said that when he was still at Lugalawa Hospital, he talked to PW1 who told him that when he wake up, he sought to assist his parents but as it was very dark, he was kicked by the assailants whereupon he fell down. It was the first accused's further evidence that he also talked to the late Agnes Mtweve who told him that she had not identified any of their attackers. He finally told the court that he was arrested along with the second accused on 2nd May 2016 after he had returned home from mourning the late Marco Madunda. All in all, he

protested his innocence and urged this court to find him not guilty and acquit him.

The second accused was relatively brief in his defence. He told the court that on 29th April 2016 at about 2:00 am he was together with the first accused attending their ailing father. He said that after receiving information regarding the deceaseds' and PW1's attack by some unknown persons, he himself remained behind looking after his sick father as other relatives went to arrange for the funeral of the late Marco Madunda. He went on telling the court that sometimes later, on 29th April 2016, he went to the deceaseds' home to join the mourning relatives but he could not be there on the day of the burial as he had to remain behind caring his father who was quite unwell. Moreover, the second accused told the court that when he was at the home of Marco Madunda on 29th April 2016, some police officers went there and vainly sought to establish if there were any suspects in connection with this horrendous crime. He said that he was arrested along with one Peter Madunda on 2nd May 2016 at the home of their parents. He strongly denied to have been involved in the deceased's

murder saying that the charge against him had been cooked up. He thus implored this court to find him not guilty and bring him back to his liberty.

After both parties had presented their evidence and closed their respective cases, I summed up and gave guidance to the assessors who sat with me, whereupon they returned a verdict of not guilty in respect of both accused persons. They based their respective opinions on the fact that the identification evidence of PW1 who was the only eye witness to the horrific incident was not free from human errors. They also doubted the identification and recognition of the accused persons by the late Marco Madunda who is said to have mentioned them to PW1, PW2 and PW3 immediately after the culprits had left and before he was rushed to hospital where succumbed to death.

For my part, I will start with the evidence of PW1. On this, it is now part of our jurisprudence that in order to base a conviction solely on evidence of identification such evidence must be watertight. (See **Republic V. Eria Senwato [1960] EA 1974**. Subsequently, it was held

in the most celebrated case of **Waziri Amani V. Republic [1980] TLR 250** that, such evidence should only be acted upon after all the possibilities of any mistaken identity have been eliminated and the court is satisfied in full that the evidence before it is unquestionable.

In order to establish if the visual identification evidence is watertight or not the Court of Appeal of Tanzania in the case of **Waziri Amani (supra)** gave the following guidelines which must be considered and determined by the trial court.

- i). The amount of time the identifying witness had the accused under observation.
- ii). The distance at which he observed him.
- iii). The conditions in which the observation was made, for instance if it was day or night time and whether there was sufficient or poor lightning.
- iv). Whether the identifying witness knew or had seen the accused before.

Notably, in the instant case, the incident leading to the deceaseds' murder occurred during the nocturnal hours. According to PW1, it was very dark and he had to take a flashlight with a view to illuminating the place where the attackers were busy hacking the deceaseds. As PW1 sought to confront and fight the accuseds, the first accused allegedly attacked him cutting him on the neck before he took to his heels along with the second accused.

As it will be recalled however, the accuseds were not strangers to PW1 as they are his full cousins. To that end PW1 claimed to have seen and undisputably recognized them. With regard to such evidence of recognition, courts were guided in the cases of **Shamir s/o John V. The Republic, Criminal Appeal No. 166 of 2004** and **Frank Joseph Sengerema V. The Republic, Criminal Appeal No. 378 of 2015** both of which are reported, that:-

"..... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to

recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made”.

While it is common ground that in the present case the accuseds were well known to PW1 who is their close relative, I am not persuaded that in view of all the unfavourable conditions obtaining at the place where the charged offence was committed, he cant be said to have unmistakably seen and recognized them. Moreover, PW1’s recognition evidence is further weakened by his failure to mention the accuseds to the relatives and neighbours who responded to the alarm and went to the scene of the crime immediately after the culprit had fled. Unhappily also is the lack of a sufficient evidentiary foundation from the arresting officer in this case who could have told this court why and when the accuseds were suspected and arrested in connection with these charges and if it is PW1 who had told them (the police) that he had seen and identified the accuseds at the scene of the crime. In the absence of such evidence, and in view of the unfavourable conditions obtaining at the deceaseds’ home during the

commission of the offence, I am of the final view that PW1's recognition of the accuseds as the culprits in this case was not without flaws. And if I may add, it appears to me that rather than seeing and recognizing the accuseds by himself, PW1 appears to have relied on what he was told by his father thus: "Amosi na Juma mnaniua nimekosa nini". For if he had seen and recognized them why did he wait for his father to tell him the names of their assailants?

With regard to the statements made by the late Marco Madunda to PW1, PW2 and PW3 in which he allegedly mentioned the accuseds to be the culprits, I have the following to say, albeit very briefly.

In the first place it goes without saying that the said statements amounted to dying declarations as the late Marco Madunda appears to have known well that his death was imminent and he believed the accuseds to be the ones who had attacked him along with his wife and son.

In general, a dying declaration is considered to be credible and trustworthy evidence and this is based on the general human belief that a person who is terminally ill on his deathbed will never lie hence the principle thus ***nemo mariturus presumuntur mentri*** which translates into, a man will not meet his creator with a lie on his mouth.

However, as it will be noted at once, the law in Tanzania does not insist on the requirement for the maker of a dying declaration to be in a sense of impending death. To that end, section 34 (a) of the **Evidence Act (Cap 6 RE 2019)** which deals with dying declarations and is relevant to the present case provides that:-

Dealing with a situation where the prosecution case is based on a dying declaration made by the deceased, the Supreme Court of Uganda citing with approval the case of **Oketh Okale and Others V. R (1965) EA 55** had the following to say in the case of **Tindigwihura Mbahe V. Uganda, Criminal Appeal No. 9 of 1987 (unreported)**, thus:-

"..... evidence of a dying declaration must be received with caution because the test of cross-examination may be wholly wanting; and it might have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised **when an attack takes place in darkness when identification of the assailant is usually more difficult than in daylight.** The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the cause. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. **But it is, generally speaking, very unsafe to base a conviction solely on**

the dying declaration a deceased person, made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration."

(The underlined is mine for purposes of emphasis).

In the instant case, the late Marco Madunda is said to have made three dying declarations. The first one was made to PW1 who told the court that when he went to his parent's room immediately after the assailants had fled, he heard his father the late Marco Madunda as saying "Amosi na Juma mnaniua nimekosa nini?" the second dying declaration was made to PW2 who Marco Madunda told that the attackers were members of the family of Fiyenje. The last declaration is the one in which the late Marco Madunda told PW3 that he was attacked by "Amosi na jeshi lake".

In all declarations the deceased is said to have allegedly implicated the accused persons. With due respect to the prosecution side, as I will

hereinafter demonstrate, the said dying declarations are not enough to ground the accuseds' conviction. As it will be noted, Marco Madunda was more hazy than consistent in implicating the accuseds. For whereas he is said to have told PW1 thus: "Amosi naJuma mnaniua nimekosa nini", he thereafter told PW2 that those who had attacked him were the family members of one Fiyeje. Yet, when PW3 kept on pestering him with the same question, the late Amosi Madunda is said to have told PW3 that, that was the work of "Amosi na jeshi lake".

Now, assuming *arguendo* that the late Marco Madunda had made the above dying declarations; can it be said, with any degree of certainty, that he had persistently and flawlessly implicated no any other person than the accused persons in this case? The answer to the above-posed question is I think in the negative. In the first declaration which he made to PW1, I would say that the late Marco Madunda would be implicating the accused persons and not any other person if there was sufficient evidence showing that he had correctly and impeccably identified them and that the accused persons were the only persons whose names are respectively Amosi and

Juma in their community. With regard to the declaration which was made to PW2, that in fact goes further to enlarge and increase the number and identity of the persons who might have attacked and killed the deceaseds. It is undisputed that the family of Fiyenje constitutes several family members including the accused persons. According to PW2 who was Marco Madunda's brother, the family of Fiyenje had about eight adult children including the accused persons. In that situation it would be both hard and dangerous to say that it is only the accused persons and not anyone else from the said family who could have, for any reason, attacked the deceased. The last declaration which the late Marco Madunda allegedly made to PW3 is even worse for being much more ambiguous and therefore open to more than one interpretation. For instance one could, just out of curiosity, ask as to who were the members of the "force" that was under the commandment of Amosi? Were they the first accused and others or the first accused only together with the "commander" Amosi?

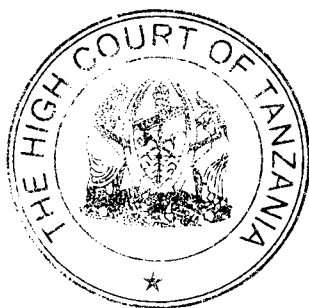
Given the various interpretations which could be ascribed to the dying declarations made by the late Marco Madunda, one is tempted to say


in the end that, he could have been honestly mistaken in his belief that the accused persons were the ones who had attacked him. In my view and on this I should say that I concur with the assessors who sat with me and opined that the naming of his assailants by various names that is "Amosi na Juma" "Familia ya Fiyenje" and "Amosi na jeshi lake" is the description which could fit a lot of people and not necessarily and exclusively the accused persons in this case. As stated before, this is not enough to avert the danger of any mistaken identity on the part of the accuseds and on that account, I find it rather unsafe to rely upon such declaration to find the accuseds as having been correctly identified by the late Marco Madunda. In saying this, I also take into account the undisputed fact that given the evidence on record, the conditions favouring a correct identification of the accused by the late Marco Madunda were quite difficult.

It is for the foregoing reasons that, in fine, I join hands with the assessors and find that the case against the accuseds has not been proven to the required standard. I find then not guilty and proceed to acquit them.

It is directed that unless they are being held on some other lawful cause,
they should be set at liberty forthwith.

It is so ordered.




P. M. KENTE
JUDGE
16/10/2020