

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CRIMINAL SESSIONS CASE NO. 109 OF 2016

THE REPUBLIC

VERSUS

ANDREA JOHN MULUNGU

JUDGEMENT

Date of Hearing: 04/11/2020
Date of Judgment: 24/11/2020

MONGELLA, J.

The accused, **Andrea John Mulungu** stands charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, Cap 16, R. E. 2002 of the laws. It is alleged in the information that on the 29th day of February 2016 at Nyimbili village within the District of Mbozi in Songwe Region, the accused person did murder one Bahati son of Mwampamba, his father in law.

During the trial the death of the deceased was not in dispute as all the witnesses from both sides testified as to his death. It was also not disputed that the deceased died an unnatural death resulting from severe

bleeding from head and body injuries. All witnesses, particularly PW6, one Ilekezemba George Khalfan, a medical doctor who conducted the postmortem examination and tendered exhibit PE2 (the postmortem report), testified that the deceased was cut with a sharp object on the head, near the ear, on the forehead, on the face between the nose and eye, and on the backside of both arms.

Given the facts as narrated above, the prosecution had only one issue to prove before this Court. The issue is whether the accused, Andrea John Mulungu did murder the deceased, Bahati Mwampamba. The prosecution strived to prove this issue through six witnesses and one exhibit, being the sketch map of the crime scene.

PW1, one Michael Bahati Mwampamba, the deceased's son, was the main prosecution witness. He testified that the accused is his brother in law, married to his sister named Jenifer. On 29th February 2016 at around 21 hours at night, he was at home with his mother, father (the deceased), and nieces (his brother's children named Violet and Samia), having dinner in their kitchen.

He said that when they finished eating, he headed to the toilet with his father while his mother and nieces headed to the main house. The toilet is located behind the kitchen. He said that since it was dark his father carried a torch for lighting. At the toilet, his father lightened the torch and saw the accused standing beside the kitchen holding a machete. His father asked the accused "*umefuata nini hapa? Au unataka kuniua.?*" Meaning that the deceased asked the accused as to what he had followed there or he wanted to kill him. PW1 said that the accused did not

reply, but instead grabbed the torch from the deceased and cut him with the machete on the head, that is, on the left side of the head, and on the forehead near the eye. PW1 then grabbed a stool that was at the door of the kitchen and hit the accused with it on his back. The accused then laughed and vanished in the dark.

PW1 continued to testify that he managed to see the accused through the torch light. He said that the torch showered intensive light as it was new, being bought on the same day of the event. He added that it also had new batteries bought on the same day by the deceased. Explaining about the distance, PW1 stated that the distance between him and the accused was so near about three paces. He as well explained his familiarity to the accused person whereby he stated that the accused being his brother in law is very well known to him and has known him for years.

PW1 continued to testify that he raised an alarm after the accused had ran away. Then came at the scene his brother named Israel Mwampamba, who lives nearby their home. All this while, he said, his mother was at the door of the main house waiting for the torch so that she could enter inside. When her mother heard the alarm, she went to the scene area and asked the deceased as to what had happened. The deceased replied *"John's son has cut me"* *"Andrea Mulungu has cut me."* The neighbours arrived and assisted to take the deceased to the hospital, leaving him at home. Later, he was informed of the death of the deceased.



On cross examination, PW1 stated that between the kitchen and the toilet is like four paces. He said that the torch and the batteries were new being bought on the same day. When asked about proof of the torch and batteries being new, he said he did not have the receipts with him. He said that the distance between their house and that of the accused is about fifty (50) paces. When asked about the time spent before the deceased was cut, he replied that it took about three minutes. He said, when the deceased was asking the accused questions, he was standing at the corner of the kitchen, but moved closer to them about one pace.

When asked as to why he did not raise an alarm after seeing the accused with a machete, he replied that he did not expect that the accused will attack his father as he thought the accused had come for his daughter, one Neema, who was also with them at their house. When asked to describe the accused, he said that the accused was only holding a machete and was wearing white shorts and short sleeved shirt. When asked about the distance, he replied that his mother was standing about two paces from where they were, that is, from the main house to the toilet is two paces. He then said that from the kitchen where he picked the stool to where they were is also two paces. When asked about his sister, the accused's wife, he replied that he saw his sister in the morning of the event.

The second prosecution witness was one Enitha Jackson Kandonga (PW2), the deceased's wife. She also gave a sworn statement to the effect that until the date of the event, she lived with his husband (the deceased) and his son Michael Bahati Mwampamba (PW1) at their

house. She said that on 29th February 2016 at 21 hours she was at home with his son Michael, his husband, and grandchildren named Violet and Samia. After taking dinner in the kitchen they went out heading to the main house. His husband and son went to the toilet to ease themselves on short call. She said, the toilet was near the house, close to the kitchen. His husband, the deceased, was holding a torch for lighting as it was dark.

After she went out of the kitchen, she stood at the door of the main house waiting for the torch. While standing there, she heard an alarm "*we mama Huruma nakufa. Andrea Mulungu ananiua.*" She said she also heard a sound like something falling. She noted the voice of the alarm being of his husband. She as well raised an alarm while heading to the crime scene. There she found her son Michael and her husband, the deceased. Her husband was lying down. She then saw wounds on his forehead, his left side of the head and on his hands. His husband told her that it was Andrea who cut him.

PW2 continued that she heard the accused laughing before she arrived at the crime scene. She said that she knew the laughter was his because she knows him very well as he is her son in law, married to her daughter Jenifer Mwampamba, and had heard the laughter before. She then joined her husband in raising an alarm calling for neighbours. The neighbours arrived whereby the first to arrive was their son named Israel Bahati Mwampamba. Then followed one Adam Kamwela and another named Luka. By then the deceased was still alive, thus they started the process of taking him to hospital whereby his son Israel and one named Josail Kayange took him to hospital. She concluded by saying that there

was no any quarrel between her family and the accused, but the accused used to quarrel with his wife, their daughter Jenifer.

On cross examination, she said that she did not know the reason behind the accused killing her husband as they used to live in harmony and visiting each other. She said that she personally did not see the accused from where she was standing as it was dark. However, she said she could see her son and her husband as the distance between them was like five paces. She said that she saw her son Michael taking the stool at the side of the kitchen. When asked about her daughter Jenifer (the accused's wife) first she said that her daughter was around, then she changed and said that Jenifer came to the house in the morning. She said that she has no quarrels with her. When asked about the torch, she said that her husband bought the torch the day before the incident occurred, that is, on Sunday and the incident occurred on Monday.

PW3, was one Israel Bahati Mwampamba, the deceased's son. He testified that he lives near his parents' house in Nyimbili village. He said that on 29th February 2016 while at his home he heard an alarm from the direction of his parents' house "*jamani tumevamiwa.*" He thus ran towards his parents' house and upon arrival he saw his father, the deceased, wounded on his head near the ear, on his forehead near the eye, and on both hands.

PW3 said that his father told him that it was Andrea Mulungu (the accused) who attacked him. He said that the accused is his brother in law, married to his sister named Jeni Mwampamba. He continued to testify that shortly the neighbours arrived at the crime scene. These were

one Adam Kamwela and Luka Kamwela who advised that the deceased be taken to hospital. But before going to hospital, they covered the deceased's head with clothes to stop the bleeding. At first they used a bicycle whereby it was him, and the said Adam and Luka Kamwela. Then, on the way, they called one Josail Kayange, who owned a motorcycle, to assist them in taking the deceased to hospital. The said Josail arrived with his motorcycle whereby they shifted the deceased to the motorcycle. From there, it was him and Josail Kayange who took the deceased to the hospital. They took the deceased to Vwawa District Hospital. On arrival at the hospital reception, the deceased was carried to a room for treatment, but later he was pronounced dead.

PW3 proceeded to testify that, thereafter they reported the matter to Police Station for a case file to be opened. He said that while they were on the way to the hospital, his father told Josail in Ndali language that "*his cows have killed him.*" He said that the statement means that "*the cows his father received from Mulungu for marrying his sister have killed him.*"

On cross examination, he said that he did not witness the accused cutting his father with a machete. He said that when he arrived at the crime scene he heard his father saying that it was Andrea Mulungu who cut him. That those present when his father stated that were him, Luka Kamwela, Takuja Michael Mwampamba (PW1), Enitha Kandonga, his mother (PW2), Adam Kamwela, and Josail Kayange.

He testified as to the behavior of the accused saying that his behavior was good before the event. That, the accused changed in behavior the

day he attacked the deceased. He said that he was close to his father thus his father confided in him that the accused quarreled with his father because of his sister. He said that he was told that there was a quarrel between his father, the accused and his sister Jenifer because the accused beat his sister on 28th January 2016. Following this incident, his sister reported to his father. His father and sister reported the incident to Nyimbili village authority. When asked about the distance between his father's house and that of the accused he replied that it is about 50 metres.

The fourth prosecution witness was one Josail Jackson Kayange (PW4). He testified that he assisted in taking the deceased to Vwawa District Hospital on the night of the incident on his motorcycle. He said that he was phoned by one Adam Kamwela and informed of the incident and called to offer his help. While he was on his way to the crime scene, he met PW3, Adam Kamwela, Luka Kamwela and the deceased. The three were pushing a bicycle carrying the deceased. They thus shifted him to his motorcycle and he left with the deceased and Israel (PW3) to the hospital.

He added that while they were on the way to the hospital, the deceased told him in Ndali language that "*his cows have killed him.*" The deceased then stated that "*Andrea has killed him.*" PW4 explained that the meaning of the statement "*my cows have killed me*" is that "*my in law gave me cows and then killed me.*" He said that after that statement from the deceased, he did not ask him further questions and the deceased did not say anything more. On arrival at Vwawa hospital the doctors told them

that the deceased had already died. He thus called the Village Executive Officer (VEO), one named Neema Kibona and informed her of the death. They then took the deceased's body to mortuary.

The prosecution also brought one, Lamon Mwazembe (PW5), a ten cell leader of Mtukula Cell at Nyimbili village. PW5 also testified that on 29th February 2016, their fellow villager, Bahati Mwampamba was invaded, cut with machetes and injured. He said that he got the information at around 22 hours at night after being phoned by one Josail Kayange (PW4). The said Josail informed him that they had taken the deceased to hospital after the incident. PW5 thus went to the crime scene and found the deceased was already taken to hospital. He said that at the scene he interrogated some of the people who remained at the house as to why other people, that is, other neighbours, were not present. He specifically did not see the accused person, Andrea Mulungu, thus asked for him.

PW5 thus decided to go look for the accused at his house whereby he found him chatting with his two wives in the kitchen. He asked him if he had heard anything. He replied that he only heard a dog barking. PW5 then asked the accused to follow him to the crime scene as his father in law has been cut with machetes. He said that the accused was so surprised and saddened by the news. When they arrived at the crime scene, the accused never went closer to where the deceased was attacked. He stayed behind PW5 who showed him the place where the deceased was attacked, but the accused remained standing with his wives. PW5 thought maybe the accused was afraid after seeing the blood on the ground.

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PW5 continued to state that as a leader, he gathered all the people present at the scene and told them to go back to their homes and ponder on the crime committed so that the culprit is found. Then people dispersed including the accused, but his wives remained. At 02 hours at night, on 01st March 2016, PW5 was called from the VEO's office and told that he should meet them on the way to the accused's house. He went and waited on the way for the village leaders to arrive. When they arrived they went to the accused's house. On arrival they knocked the door whereby the accused opened and came out. Then the militiamen arrested the accused following him being mentioned by the deceased as the culprit. He was then taken to the village office and later in the morning to Vwawa police station by the police officers who arrived there.

On cross examination, PW5 stated that he had never solved any dispute between the accused, the accused's wife and the deceased. He said that no case of any kind was ever reported to him concerning the accused person. He added that the accused's behavior has always been good. When asked if all the villagers were present at the crime scene, he replied that some of them like, one James Mlawo and William Mlawo were not present. He said that he also went to their homes, but they told him that they never heard anything. Regarding the distance between the accused's house and the deceased's house, he replied that the two houses are a bit far from each other whereby there is a river between. He also said that at first he went to the accused's house at 22 hours and found him in good condition talking to his wives, but when they went for the second time to arrest him they found he was asleep.

On re-examination, he said that it is not normal for someone whose father in law has died to leave the house. That, that behavior gave them the strength to arrest him. When questioned by one of the assessors about the information he obtained from the people he interrogated he replied that he interrogated family members but they could not clearly explain as they were crying.

The police officer who investigated the crime was also among the prosecution witnesses. This was one E5150 Detective Corporal Steven (PW7). He testified that on 01st March 2016, while at work, he was informed by his supervisor that a murder incident had occurred in Nyimbili village. He thus accompanied his supervisor to the scene of crime about 08 am hours. On arrival he inspected the crime scene whereby he discovered blood on the ground. He also interrogated some of the witnesses and recorded their statements and drew a sketch map, exhibit PE1.

He said that they were informed that the suspect was already arrested and was kept at Nyimbili village office. They went to the said office and found the accused. The VEO handed him over to them and they took him to Vwawa Police Station. At the Police Station, he was handed the case file to continue with investigation whereby he worked on collecting evidence. Upon completion he took the case file back to the RCO office for further action.

PW7 also explained the features of the sketch map as containing the place where the deceased was beaten (A); palm trees (Mwanzi) (D);

Kitchen and a place for drying dishes (C); the main house (B); and a neighbour's house of one Israel Bahati (E). He explained further that the area is surrounded by trees. He also explained the distance saying that from the place the deceased was beaten to the main house is about 17 feet; from the crime scene to the kitchen is about 5 feet; from the scene to the toilet is about 10 feet; and from the scene to the neighbour's house (Israel's house (PW3)) is about 130 feet.

On cross examination, PW7 stated that the evidence he gathered, which includes that of an eye witness, reveals that the accused was involved. When asked about the torch he said that he does not remember collecting the torch. He said it must be at the police station. He said that the deceased died of being cut by a sharp object, considering the wounds and the medical examination report, but he did not manage to see the machete. He added that he interrogated the accused, but he denied committing the offence. When asked about the distance between the buildings at the deceased's house, he said that the main house is near to the toilet than the kitchen to the toilet. He said that the toilet is behind the main house.

On the other hand, the defence mounted two witnesses, being the accused himself (DW1) and his wife Jenifer Bahati Mwampamba (DW2). DW1 testified that the deceased is his father in law as he is married to his daughter named Jenifer Bahati Mwampamba who he is blessed with six children. He said that he also had a second wife named Mariana Misheki Mwashiozia whom he has three children with.



Explaining the events as happened on 29th February 2016, he said that in the morning on that day he went farming on his sugarcane farm with his second wife, Mariana and two children namely, Deborah and Anna. They worked on the farm until afternoon at around 4:30 hours and went back home. At home they found his first wife Jenifer, who stayed back due to sickness, had prepared food. They ate and thereafter they started chatting while doing other house chores until evening. At around 22 hours at night, their ten cell leader, named Lamon Mwazembe (PW5) arrived at his house with other four people. He knocked the door and DW1 opened it for them. Then the ten cell leader asked him as to why they have not been seen at his father in law's house. DW1 replied that he has not heard anything and asked the ten cell leader as to what had happened there. The ten cell leader gave him the news that his father in law has been invaded and cut with machetes. He said that the news surprised and saddened him so much.

Thereafter, he left to the scene of crime with the ten cell leader, the four people the ten cell leader came with, and his two wives. On the way they told other neighbours and went with them to the scene. Upon reaching the scene, the ten cell leader showed them, by pointing fingers, the specific area where his father in law was cut with machetes. However, they did not find the deceased there and were told that he was already taken to hospital. He then went inside to greet his mother in law and to offer his condolences. They asked her what had happened but were never given any explanation.



DW1 continued to testify that they stayed there up to about 01am hours when they were advised by the ten cell leader to go back to their homes and leave the women at the scene and to think about who might be involved in the crime. Given that advice, he went to his wives and told them that he was going back home as they had left the children alone. He also told them that he shall be back there early morning on the next day so that they go and check up on their father at the hospital.

He said that early morning at around 05hours when he was preparing to go pick his wife so that they go to the hospital, the ten cell leader knocked his door and he opened. The ten cell leader came with militiamen. The militiamen started beating him and told him to follow them and shall be informed on what has happened. Then they told him that they have heard that he has been involved in the event of cutting the deceased with machetes. They thus took him to the village office at Nyimbili village for interrogations whereby he denied all the allegations.

At noon police officers arrived and took him to the police station. At the police station he was taken to a room for interrogation whereby the interrogating police officer asked him as to whether he was aware of what brought him there. He replied to him that he did not understand what was going on. The police officer informed him that he was being accused for the murder of Bahati Mwampamba. He denied the allegations telling the police officer that the deceased was his father in law. The interrogations did not proceed and he was taken back to the lock up room.

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DW1 insisted that on the material day he was at his home with his two wives and nine children and knows nothing about the murder of the deceased. He claimed that the allegations and evidence leveled against him are fabricated. He said that before the deceased's death they used to live in harmony and they are living in harmony with the deceased's family to date.

On cross examination, DW1 said that he was told that the event happened at 21 hours, but insisted that he was at home at that time. When asked as to why he did not go early to the scene of crime, he replied that there is a river between blocking the sound from easily reaching the other side thus they could not hear the alarm being raised. He said that information in the village is usually conveyed through phone calls or physical visits. He was informed of the incident by his ten cell leader, one Lamon Mwazembe who went to his house. When asked as to why he left the scene of the crime that evening leaving his wives behind, he replied that he had to go back home to be with the children whom they had left alone in the house.

When questioned about his relationship with PW1, at first he said that he first met him in September (but did not mention the year) then he said he met him one month before the event. He also said that he got married to his wife Jenifer in the year 2000.

DW2, Jenifer Bahati Mwampamba, the accused's wife testified that, on 29th February 2016 in the morning, his husband, co wife and three children went to farm leaving her at home as she was sick with fever. They came back between 14 and 15 hours in the afternoon. Then his co wife

prepared food. They ate the food and started chatting until 19 hours when the whole family entered her kitchen to eat dinner. They ate and talked until 22 hours when the ten cell leader came to their house and other 4 people. The ten cell leader asked them if they have heard anything and they replied that they have not heard anything. He asked again if they have not heard any alarm and they replied 'no.' Then his husband, the accused, asked as to what had happened. They were informed that the deceased had been cut with machetes something which surprised all of them.

DW2 continued testifying that they then left to the crime scene with the ten cell leader and the four people. It was her, the accused, and her co wife. On arrival they met a lot of people. She then proceeded to the kitchen and found her mother seated there. She asked her as to what had happened to her father. Her mother replied that she had no idea, but only heard alarm from the deceased that he was being cut with machetes. She stayed with her for a while and the ten cell leader called all of them and informed them that there is still no information as to who did the act. The ten cell leader then told them to disperse back to their homes, but she remained at the crime scene with her co wife. She said that her husband told them that he was going back home to be with the children who were left alone and shall be back early morning.

She said that all this while they had no idea as to who had done the act. At 02 hours at night, they were informed that the deceased has passed away. In the morning she learnt that her husband has been arrested in connection with the murder. She said that she was still at her parent's house that morning and she stayed there until the funeral was over. She

also said that her family and that of her parents used to live in harmony. She insisted that her husband was not involved as she was with him and their children on the night of the event.

On cross examination she said that her father's death has and is still paining her. She said that after the funeral she kept visiting her parent's house and the last time she visited was on 29th October 2020, which was about two weeks to the date of the trial of this case. She admitted that Michael (PW1) is her little brother and had studied his primary education at Nyimbili primary school. She said that while PW1 was studying, she was already married to the accused thus the accused and PW1 are familiar to each other since PW1's childhood.

When asked about the distance from her house to that of her parents she said that it takes about 20 minutes' walk. When asked about what her husband, the accused, was doing after coming back from the farm till evening, she replied that between 15 and 19 hours the accused was doing house chores including putting manure on the farm surrounding their house and thereafter rested.

She also stated that, at the scene of crime, she stayed inside the kitchen with her mother and her husband stayed outside. Later they were called by the ten cell leader and thereafter she went back to the kitchen and then her husband, the accused, called her. She said, at the scene of crime her husband stayed for about 2 hours before he went back home. When asked by the court as to whether she met PW1 that night, she

replied that on that night when she reached her parent's house she did not see PW1. However, she met him in the morning and PW1 did not tell her anything regarding the event.

The counsels for both parties made final submissions to strengthen their cases. Mr. Saraji Iboru, Senior State Attorney started addressing the court. He submitted that, in discharging its duty of proving the case beyond reasonable doubt the prosecution provided evidence clustered in three categories. The first is that of eye witness, the second is evidence on dying declaration, and the third is evidence proving that the deceased died out of wounds suffered.

In relation to eye witness, Mr. Saraji referred to the evidence of PW1, Michael Bahati Mwampamba. He submitted that PW1 was with the deceased at the time of the attack. He heard the deceased, who was holding a torch for lighting talking to the accused asking him "*Andrea Mulungu umefuata nini? Umekuja kuniua?*" Then he saw the accused grabbing the torch from the deceased and started cutting him with the machete. Then PW1 grabbed a stool and hit the accused on his back whereby the accused ran away laughing. Mr. Saraji argued that PW1 knew the accused very well before the incident, that is, for more than six years because the accused is his brother in law.

Mr. Saraji added that PW1 described the light saying that it was enough light coming from a torch which was new and had new batteries. PW1 also explained the distance between where he stood and where the deceased was as being three paces, thus near. He argued that there was

nothing in between to obstruct him from seeing the accused. He contended that the accused was clearly identified as all the elements set out in the case of **Waziri Amani v. Republic** [1980] TLR 250 were met. He mentioned the elements to be: the time spent in observation, the distance between the two, which was three paces; the condition of light and that there was no any obstacle; and lastly, whether the witness knew or had seen the accused before. He added that PW1 also identified the accused person's clothes being white shorts. He was of the position that the evidence of PW1 was not shaken by the defence.

With regard to the dying declaration, Mr. Saraji referred to the testimony of PW1, PW2, PW3 and PW4 who testified to have heard the oral dying declaration of the deceased. He referred to the case of **Crosperry Ntagalinda @ Koro v. The Republic**, Criminal Appeal No. 312 of 2015 (CAT at Bukoba, unreported) and that of **Hamisi Mchana v. Republic** [1984] TLR 319 in which the Court ruled that dying declaration can be oral or written. He further submitted that these witnesses testified that the deceased explained to them that it was the accused that injured him. He reiterated the evidence of PW1 that he heard the deceased asking the accused that "*Andrea Mulungu umekuja kufuata nini? Umekuja kuniua?*" Mr. Saraji's position was that the evidence of PW1, who also witnessed the event, corroborated the dying declaration. Referring to the evidence of PW1, PW2, PW3 and PW4, he submitted that these are credible witnesses as they throughout maintained their evidence that the deceased told them that the accused cut him with machetes.

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Mr. Saraji further submitted on the conduct of the accused person after the event. He submitted that after being informed, the accused went to the scene, but stood far from the scene as testified by PW5. He argued that the defence side did not shake this evidence. Citing section 3 (a, b, c & d) of the Evidence Act, Cap 6 R.E. 2019 and the case of **Patrick Sanga v. The Republic**, Criminal Appeal No. 213 of 2008 (CAT at Iringa, unreported) he argued that this conduct is interpreted under the provision as admission to the offence. He challenged the accused's defence that he went to greet his mother in law saying that it is an afterthought and was also contradicted by DW2 who said that the accused never entered the house to greet her mother. He argued that the accused lied before the court and the court should consider it as corroborating the prosecution case. To buttress his point he referred the court to the case of **Hamidu Musa Timotheo & Another v. Republic** [1993] TLR 125.

Mr. Saraji also urged the court to consider as well the fact that the defence failed to cross examine on material issues. He submitted that the issue that PW1 saw the accused at the scene was not shaken. That PW1 hit the accused with a stool was not cross examined, and also that the accused was standing beside the kitchen holding a machete was not cross examined. Citing the case of **George Maili Kemboge v. The Republic**, Criminal Appeal No. 327 of 2013 (CAT at Mwanza, unreported) he argued that failure to cross examine means acceptance of the fact.

Lastly, Mr. Saraji urged the court to find all the prosecution witnesses credible as they were firm in their testimonies and were not shaken by the defence. Referring to the case of **Goodluck Kyando v. Republic** [2006] TLR

363, he argued that every witness is entitled to credence unless there are good and cogent reasons for not believing so. He added that even if the court finds contradictions in the prosecution witnesses' testimonies, the said contradictions did not go to the root of the matter. He was convinced that the prosecution has proved its case beyond reasonable doubt.

The accused was represented by Ms. Mary Gatuna and Ms. Beatrice Lukamirwa, learned advocates. The defence counsels also made their final submissions whereby they clustered the submission into four points. The first point was on identification of the accused person. On this, the learned counsels submitted that the prosecution witnesses failed to establish that the accused was identified at the crime scene. Particularly, they challenged the testimony of PW1 and PW2. They argued that the incident occurred at 21 hours whereby it was dark and PW1 did not explain how he identified the accused. They doubted the statement by PW1 that it took three minutes before the accused attacked the deceased. On this, they argued that it does not make sense as to how a person can wait for three minutes to be identified if he really intended to do harm.

They as well challenged the torch PW1 claimed to have shed light on that night. They argued that the said torch is not known and was never brought in court. That PW1 and PW2 claimed the torch to be new, but they never produced any receipt to prove the allegation. Referring to the case of **Michael Godwin & Another v. Republic**, Criminal Appeal No. 66 of 2002 (unreported), they argued that even though PW1 and the accused

knew each other from before, the court still has to consider if the identification was proper. In the alternative they urged the court to consider the defence evidence that the accused was not at the crime scene and thus could not be identified.

Submitting on the second point regarding dying declaration, they argued that the prosecution has failed to provide any tangible corroborating evidence. They challenged the testimony of PW1 on the ground that PW1 failed to report seeing the accused to PW5, the ten cell leader, when he went to the crime scene and interrogated them as to what had happened. They argued that this indicates a mistaken identity on the accused. They as well challenged the voice identification by PW2 whereby she claimed to hear the accused laughing. They argued that laughter can no way identify a person.

Third, they argued that there were contradictions on the prosecution witnesses. First was with regard to the distance where the deceased was and PW1 and PW2 were. They submitted that PW1 said that he was standing at three paces from where the deceased was and PW2 said that she was standing at two paces from where the deceased and PW1 were. Considering these statements they argued that if the same were true and the torch had intensive illumination then PW2 should have seen what PW1 claims to have seen. The defence counsels pointed another contradiction in relation to the position of the toilet building. They submitted that while PW1 and PW2 stated that the toilet was behind the kitchen, PW7 while describing the sketch map (exhibit PE1) stated that the toilet is located beside the main house.



The counsels argued that these contradictions prove that the accused was not identified and the evidence is fabricated. In their view, these contradictions go to the root of the matter. Referring to the case of ***Ridhiwani Nassar Gendo v. The Republic***, Criminal Appeal No. 201 of 2018, they argued that the prosecution case is affected as the contradictions go to the root of the matter.

On the last point, the defence counsels addressed doubts on the prosecution evidence. The first doubt they argued regards the time spent by the accused at the crime scene before he was arrested. On this, they argued that PW1 testified to have seen the accused committing the offence and PW2 stated to have heard the accused laughing. They argued that if this was really the case then PW1 and PW2 ought to have mentioned the accused and got him arrested when he went to the crime scene that night. Instead the accused was arrested later at his house.

Second, they argued that the evidence as to the torch and batteries being new is also doubtful as no evidence was tendered to prove that they were new. The torch was also not brought to court. The third doubt they pointed regards the machete claimed to be used in injuring the deceased. On this they argued that the prosecution did not bring the machete in court and failed to explain its whereabouts. Lastly, they challenged the testimony by PW3 and PW4 that the deceased said "ng'ombe wangu ananiua" meant "Andrea ananiua." They challenged the statement arguing that the interpretation thereof was provided by the PW3 and PW4 and not the deceased.

Considering the contradictions as pointed above, they argued that the prosecution has failed to prove the case beyond reasonable doubt. They invited the court to be guided by the principles set in the case of **Isack Mathayo Macha v. The Republic**, Criminal Appeal No. 24 of 2017 and that of **Issa Mwanjiku @ White v. The Republic**, Criminal Appeal No. 175 of 2018.

After considering the testimonies of both prosecution and defence witnesses and the final submissions of the counsels for both sides, I am left with the obligation to determine on whether the prosecution has proved its case against the accused beyond reasonable doubt. In doing that I shall specifically look into three crucial areas being: identification of the accused at the crime scene, mentioning the accused at the earliest possible opportunity, the deceased's dying declaration, and the conduct of the accused. However, before I embark on that I wish first to start with the opinion of the wise assessors provided after the summing up.

In essence, all the three wise assessors reached a conclusion that the accused is not guilty of the offence charged as the prosecution failed to prove its case. The first assessor, one Sife Mwakalyele opined that the prosecution evidence was full of doubts. Particularly she considered the fact that PW2 stated to have stood two paces from where the deceased was attacked, but could not see what was happening. PW2 did nothing when PW1 went to pick the stool he claimed to have hit the accused with. Both PW1 and PW2 kept quiet when the torch was grabbed from the deceased by the attacker. PW1 waited for the attacker to finish what he was doing and run away for him to start raising the alarm. She as well took

into consideration the fact that PW1 and PW2 never mentioned the accused when the ten cell leader (PW5) went to the crime scene and interrogated them.

The second assessor, one Ruth Mwampunga opined that the prosecution failed to prove that it was the accused that did the act and also failed to prove the motive in killing the deceased. Just like the first assessor, she as well doubted the act of PW2 who was also near, just two paces, not taking any action when the deceased was being attacked. She added that the witnesses stated that there was no any quarrel between the deceased and the accused thus no motive proved. She as well found no reason for DW2 testifying in defence of the accused who murdered her own father. She as well considered the fact that the incident happened at night where it was dark and the torch was grabbed. She was thus of the opinion that PW1 must have reported what he heard from his father and not what he saw.

The third assessor, one Aron Halioka, also opined that the testimonies of PW1 and PW2 are doubtful. He as well considered the fact that PW2 who was two paces away from the scene never saw anything and took any action. Also that PW1 did not raise any alarm until when the attacker ran away and the fact that PW1 did not mention the accused to PW5 who went to the crime scene as their leader and asked them questions. Just like the second assessor, he also found no reason for DW2 to defend the killer of her own father.



After providing in summary the opinion of assessors, I proceed to determine as follows:

From the evidence adduced, it is no doubt that the incident occurred at night specifically, at 21 hours. PW1 and PW2 without hesitation testified that it was so dark at that time. This fact is also cemented by exhibit PE1, the sketch map which shows that the area is surrounded by trees. It is obvious that an area with trees gets even darker at night. Under the circumstances, the question of proper identification of the accused becomes very crucial. The court is required to be careful in admitting evidence of visual identification, particularly when the same was done at night. In doing so all possibilities of mistaken identity must be ruled out and the evidence must appear to be watertight. The CAT in **Waziri Amani (supra)** ruled that:

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

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

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

The witness therefore must give detailed description of the accused or of the light that enabled him to identify the accused. The identification of PW1 and PW2 is basically that if recognition as the witnesses knew the

accused prior to the event. This is regarded as the strongest and the witnesses might no need to thoroughly provide details of the accused person in identifying him. See: **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014, (CAT at Mbeya, unreported) and **Jackson Kihili Ruhanda and Another v. Republic**, Criminal Appeal No. 139 of 2007 (CAT, unreported).

However, as much as I am alive at the position of the law as set by the CAT in the case of **Jumapili Msyete** and **Jackson Kihili** (supra), I am still of the settled view that an explanation on the level of intensity of the light must be given since the incident occurred at night. In **Issa S/O Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported) the CAT stated:

"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made." [Emphasis added].

In the case at hand, PW1 claims that the deceased was using a torch which was new and had new batteries for lighting. He said that the torch showered intensive light. In my considered view however, I find this testimony insufficient in describing the light. No details were provided as to the type of the torch and the batteries, the size of the torch and the batteries and the level of intensity of the light it showered. In my settled view, it does not suffice to state that the torch and batteries were new

thus showering intensive light. This is because the intensity in light can differ depending on the type and size of the torch and batteries. In **Issa Mgara** (supra) the court held:

"... It is common knowledge that lamps be they electric bulbs, wick lamps, fluorescent tubes, hurricane lamps, lanterns etc. give light with varying intensities... Hence, the overriding need to give in evidence sufficient details on the intensity and size of the area illuminated."

See also: **Kamuri Mashamba v. Republic**, Criminal Appeal No. 325 of 2013 (CAT, unreported). In addition, though the prosecution claimed that there was nothing obstructing PW1 from seeing, I find the same being contradicted by the testimony of PW1 himself. PW1 stated that he was behind the deceased when heading to the toilet. The fact that he was behind the deceased, shows that he was already obstructed by the deceased himself from clearly seeing what was happening in front of the deceased. PW1 as well stated that the torch was grabbed from the deceased. There was no explanation offered as to what transpired after the torch was grabbed. Was it thrown away? Did the attacker switch it off or did it remain on and continued to shower light and to what extent? I find these questions important in describing the light in continuation of observation of the accused claimed by PW1.

PW1 claimed that after the torch was grabbed, he went for the stool near the kitchen and hit the accused on his back with the said stool. I however, find this testimony so doubtful. This is because it should be remembered that by the time PW1 went for the stool the torch was already grabbed

from the deceased. I therefore ask myself questions as to how PW1 managed to see that he was hitting the accused on his back with the said stool in the middle of the heavy darkness. No explanation was provided as to how PW1 managed to see the accused after the torch was grabbed from the deceased. I thus agree with the wise assessors that PW1 must have been influenced by what was stated by the deceased that "*Andrea umefuata nini hapa? Umekuja kuniua?*" if at all the deceased stated that, and not from his own visual identification of the accused.

PW2 identified the accused through his voice whereby she stated to have heard the accused laughing while running away from the scene. It is settled law that voice identification is the most unreliable. See: **Nuhu Selemani v. Republic** [1984] TLR 93. It can only be relied upon where it is established that the witness is very familiar with the voice in question as being the same voice of the person at the scene of crime. See: **Stuart Erasto Yakobo v. Republic**, Criminal Appeal No. 202 of 2004 (CAT, unreported). PW2 claimed to be familiar with the accused's voice as she had known him for a long time being her son in law. In my considered view however, I still find it dangerous to rely on the testimony of PW2 in the absence of other tangible corroborating evidence.

Just like PW1, PW2 must have as well been influenced by what she was told by the deceased that it was the accused that attacked him. PW2's testimony that she saw PW1 picking a stool to hit the accused is also so unreliable. This is due to the fact that by the time PW1 went for the stool, the torch was already grabbed from the deceased by the attacker

meaning that there was no light. PW2 did not explain how she managed to see PW1 picking the stool in that darkness.

I agree with Mr. Saraji's contention that every witness is entitled to credence. This has been settled in a number of cases such as **Goodluck Kyando v. The Republic**, Criminal Appeal No. 118 of 2003 (CAT, unreported). However, the court cannot blindly accord credence on the testimonies of witnesses without scrutinizing them. Apart from the observation I have made above concerning the testimony of PW1 and PW2, I also wish to scrutinize the time the accused was mentioned. The law is settled to the effect that mentioning the accused at the earliest possible opportunity increases worth in the credibility of the witness. In the case of **Bakari Abdallah Masubi v. The Republic**, Criminal Appeal No. 126 of 2017 the CAT ruled that the ability of the witness to mention the accused at the earliest possible opportunity is an all-important assurance of his reliability. See also: **Marwa Wangiti Mwita v. Republic** [2002] TLR 39 and **Swalehe Kalong & Another v. Republic**, Criminal Appeal No. 45 of 2001 (CAT, unreported),

In the matter at hand, PW1 and PW2 who claim to have identified the accused at the scene of crime failed to mention the accused at the earliest possible opportunity. PW5 testified that when he arrived at the scene of crime, he interrogated the family members being PW1 and PW2 however, these two never mentioned to PW5 that it was the accused that attacked the deceased. PW5 then went to the accused's house and they together went back to the crime scene and spent some hours. With them was DW2, the deceased's daughter. DW2 also asked her mother (PW2) as

to what had happened, but she never mentioned to DW2 that it was the accused involved in the act. She told DW2 that she had no idea what had happened. All these facts lead me to a conclusion that the mentioning of the accused person as the attacker came as an afterthought and was influenced by the deceased who supposedly mentioned the accused to be his assailant.

PW1, PW2, PW3 and PW4 testified that the deceased mentioned the accused as his attacker before he passed away. The evidence is therefore that of dying declaration. The law as developed under case law requires dying declaration to be corroborated before it can be acted upon. The CAT in the case of **Crosperry Ntagalinda** (supra) while quoting a decision in the case of **Republic v. Joseph Ngaikwano** [1977] LRT No. 6 stated that:

"The rule of practice is that, evidence of a dying declaration falls under the category of evidence in which material corroboration is necessary before it can be accepted and relied."

A similar holding is found in the case of **Adrian Masongera v. Republic**, Criminal Appeal No. 77 of 1990 (CAT, unreported) in which the Court stated that though corroboration is not a rule of law, it is unsafe to base a conviction on an uncorroborated dying declaration. See also: **Pius Jasunga Akumu v. Republic** (1954) 21 EACA 331, and **Republic v. Marwa** (1971) HCD 473.



The question therefore is whether the deceased's dying declaration has been corroborated. PW2, PW3 and PW4 stated that the deceased mentioned the accused to be his assailant. In my view, these testimonies prove consistency, but do not guarantee accuracy in the deceased's declaration. There has to be some other tangible evidence connecting the accused to the dying declaration. See, **Pius Jasunga Akumu** (supra) and **Adrian Masongera** (supra).

The prosecution relied heavily on the testimony of PW1 as corroborating evidence on the deceased's dying declaration. However, as I have discussed earlier, the testimony of PW1 is not reliable for failure to properly identify the accused at the scene of crime. Under the circumstances, it is my finding that the deceased's dying declaration remains uncorroborated and thus unsafe for this court to act upon it.

Mr. Saraji in his final submission argued that the conduct of the accused person incriminates him. He specifically considered the act of the accused standing far from the scene of crime. As much as I am alive to the position of the law that the conduct of the accused after the act can be adversely interpreted against him, with all due respect, I do not subscribe to Mr. Saraji's line of argument. This is because PW5 stated that the accused was behind him whereby he showed him the area where the deceased was attacked by pointing fingers. The accused as stated by PW5 did not wish to go near as he was uncomfortable seeing blood on the ground. Where he remained standing there were also other people.



In my considered view, if the conduct of the accused is to be taken into consideration then I wish to consider other conducts which can give the accused benefit of doubt. The accused went to the crime scene with PW5, the ten cell leader and his wife DW5. PW5 together with other militiamen went to the accused's house twice whereby at first it was to inform him of the incident and second it was to arrest him. In both occasions, the accused opened the door of his house without hesitation. In my view, if the accused was indeed the assailant he would not have easily visited the crime scene or opened the door of his house to PW5 and the militiamen while knowing that PW1 eye witnessed him attacking the deceased. These conducts of the accused carry heavy weight in portraying his innocence than the act of standing far from the scene of crime with other people as claimed by Mr. Saraji.

The accused's main line of defence was that he was not present at the scene of crime when the deceased was attacked. He maintained throughout that he was at his home with his two wives and children. His testimony was supported by that of DW2, his wife, who stated that the accused was at home from 14:30 hours after he returned from farming. She stated that in the afternoon after having lunch the accused engaged in house chores including putting manure on their farm that surrounds their house. Then they sat together as a family to have dinner at 19 hours. After having dinner they started chatting in the kitchen of their home until around 22hours when PW5 went and broke the sad news to them.


The testimony of DW2 shows that between 14:30 hours and 22 hours when PW5 went to their house, the accused had not left the house. The

evidence by prosecution shows that the deceased was attacked at 21 hours. At this time the accused was with DW2, his other wife and children talking after having dinner.

My assessment finds DW2 to be a credible witness. It should be recalled that DW2 is the daughter of the deceased and testified to have been pained by the death of her father. Just like the wise assessors opined, I also do not see any reason why DW2 would defend the murderer of her own father. There is no evidence presented showing that DW2 had any interests in defending the murderer of her own biological father. The motive in the murder was also not proved as evidence revealed that there were no any hard feelings between the two families or between the deceased and the accused.

Following the observations I have made hereinabove, it is my finding that the prosecution has failed to prove its case beyond reasonable doubt. I therefore find the accused person **ANDREA JOHN MULUNGU NOT GUILTY** of the offence of murder he stands charged with under section 196 and 197 of the Penal Code, Cap 16, R. E. 2002 and consequently **acquit** him from the same charge.

Dated at Mbeya on this 24th day of November 2020.


L. M. MONGELLA
JUDGE

Court: Judgement delivered at Mbeya in open court on this 24th day of November 2020 in the presence of the accused person and Ms. Mary Gatuna, learned Advocate for the defence and Mr. Joseph Tibaijuka, learned State Attorney for the Republic.


L. M. MONGELLA

JUDGE

Right of Appeal to the Court of Appeal duly explained.


L. M. MONGELLA

JUDGE

