N THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 43 OF 2020

THE REPUBLIC

VERSUS

1. **THOBIAS S/O CHACHA @GAINI**
2. **KANGA S/O NYAMANCHE @ GAINI**
3. **TINI S/O NYAMANCHE @ GAINI**
4. **MANG'ERA S/O NYAMANCHE @ GAINI**

JUDGEMENT

13th November and 11th December, 2020

KISANYA, J.:

The accused persons, Thobias Chacha @Gaini, Kanga Nyamanche @Gaini, Tini Nyamanche @Gaini and Mang'era Nyamanche @Gaini have been charged with offence of murder under sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2002]. It is alleged that on 24.07.2018 at Kenonkwe Village within Serengeti District in Mara Region, all accused murdered one, Zabron Turuka.

The accused persons pleaded not guilty to the information of murder. Therefore, the prosecution was called upon to prove the accused persons' guilty. In so doing, they called six witnesses and tendered one exhibit. On their part, the

accused person defended themselves on oath. Save for the fourth accused, each accused called one witness to supplement his testimony.

The prosecution case was based on evidence deposed by Sumahi Zabron (PW1), the deceased's wife; Mwita Ryoba (PW2), the Kenonkwe Village Chairman, Albert Kusanga Mnalimi (PW3), a clinical officer who examined the deceased's body and tendered the Post Mortem Examination Report (Exhibit PE1); the deceased' sons namely; Bosco Zabron Turuka (PW4) and Julius Zabron Turuka (PW5); and G.8118 D/C Washa (PW6), a police officer who investigated the case and participated in the arrest of the accused.

The brief facts leading to arraignment of the accused went thus: The deceased house was invaded on 22/07/2018 around 11.45 pm. The persons therein were Zabron Turuka (the deceased), his wife Sumahi Zabron Turuka (PW1) and their two children aged 6 and 4 years. With aid of a solar light illuminating from the lamp/torch fixed on the wall inside the house, PW1 identified three persons who entered the house. These were Mang'era Nyamanche @Gaini (fourth accused) who had an axe in his hands, Tini Nyamanche @Gaini (third accused) who was armed with panga and Kanga Nyamanche @Gaini (second accused) who was not armed. All were in black jackets attire. PW1 saw the third and fourth accused stabbing the deceased on different parts of his body. When she tried to flee the house, she was stopped by Kanga Nyamanche Gaini (second accused) who stood on the door inside the house. However, PW1 managed to get out. Again, when PW1 tried to raise an alarm for help, she got stopped by a person from her back. That person covered her mouth to stop her from raising the alarm. When the second, third and fourth accused accomplished their mission, they uttered "Thobias twende tumemaliza". The person who was holding PW1' left her. Hence, PW1 knew that, Thobias Chacha Gaini (first accused) was together with

the second, third and fourth accused. PW1 testified that he knew all accused before the incident on account that, they were her neighbours.

As the deceased assailant left, PW1 raised an alarm for help. It was responded first by Julius Thobias Zabron (PW5), the deceased son who was in the same compound commonly known as *boma* but in another house. He was told by PW1 that, the deceased had been stabbed by the accused persons. The said PW5 entered the deceased's house. He found the solar light still lighting. At that time, his father still breathing. The deceased told PW5 that he had been attacked by Nyamanche's sons. DW5 and his sibling took the deceased to Mugumu DDH Hospital immediately. However, Zabron Turuka met his demise on the way to the hospital. His body was returned home and placed inside the house.

At the same time, the alarm raised by PW1 got a positive response from her fellow villagers, and a good number of them gathered at the deceased home place. This included, Thabani Nyamhanga (hamlet chairman) and Mwita Ryoba (PW2) who reported the matter to the police. Since the accused persons were named by PW1, the villagers led by PW2 traced the footsteps which led them from the deceased's house to the accused persons' houses. However, the accused persons were not found at their respective houses. It was deposed by PW2 that the accused persons did not respond to the alarm and that, they did not participate in the burial of Zabron Turuka. When cross examined, PW2 reiterated that his names were Mwita Ryoba Marwa Gekonge. His statement before the police was admitted in evidence as Exhibit DE1. PW2 conceded that there was difference on the time of receiving a call about the deceased's death. While he deposed before the court that it was 11.45 pm, Exhibit DE1 was to the effect that it was 2.00am.

The deceased' body was examined by PW3 on 24/07/2018. He found several cut wounds on different parts of the deceased body. His examination revealed the cause of death as excessive bleeding. The report on post mortem examination was admitted in evidence as Exhibit PE1. PW3 read over the contents of Exhibit PE1 to the accused.

The next prosecution witness was Bosco Zabron Turuka (PW4). He went to the scene of crime from Tarime upon receiving information from Julius Zabron (PW5) that his father had been attacked. He arrived at the deceased house around 6.00 am of 23/07/2018 and found the solar light still lighting. According to PW4, the accused persons' houses were about 300metres from the deceased house. PW4 deposed further that he was present when the police traced the footsteps to the accused persons at 11.00 am and when the deceased body was being examined at Nyerere DHH Mugumu. He claimed that, the accused persons did not attend the burial ceremony and that, the deceased had a civil case against the accused.

Another witness called by the prosecution was Julius Zabron Turuka (PW5). He was the first person to respond to the alarm raised by PW1. He also participated in tracing the footsteps to the accused persons' houses whereby only the accused persons' father one, Nyamanche Gaini was found. He went on to depose that, the police and other villagers found one *panga* and axe with blood stains in the third accused's house. He also stated that the accused persons had grudges with his father whereby the accused persons were alleged to have been stealing cattle and brought before the deceased who was the chairman of *litonge* (security) committee. He also stated that, the deceased had a civil case arising from cattle theft against the accused.

The last prosecution witness was G8118 DC Washa (PW6) who investigated the case. He deposed that on 23/07/2018, PW1 named the accused persons as the

person who stabbed the deceased and that, the police traced them to their houses but in vain. He went on to state that, the villagers found an axe and panga with blood stains in the third accused person's house. The said weapons were of no useful purposes on the account that the chain of custody and handling were not maintained. PW1 deposed to have arrested the first accused on 24/07/2018 when he was escaping from Nchuli Village by using motor cycle. He alluded that, the first accused was with the third accused who escaped after being stopped by the police. He went on to adduce that, the second and third accused were arrested on 02/12/2018 at Makore area, Korogwe District, Tanga Region where they went to hide and brought back to Serengeti on 31/03/2019. As to the fourth accused, PW6 stated that, he was arrested on 03/05/2019 at Itununu village within Serengeti District. It was also stated that, all accused denied to have committed the offence.

In the light of the evidence adduced by the prosecution, the accused persons were found with a case to answer. The Court addressed them in terms of section 293(2) of the Criminal Procedure Act [Cap. 20, R.E. 2019) (the CPA). Each accused opted to give evidence on oath and call one witnesses save for the fourth accused who called no witness.

The first accused, Thobias Chacha Gaini (DW1), deposed on oath that he did not commit the offence. He stated that he was residing at Kenyana Village, Serengeti District and that, he was at his home place at Kenyana Village on the material date and time. He deposed further that, the last time to visit other accused and Nyamanche family was 2013. The first accused summoned his mother namely, Ghati Gaini (DW2). In her sworn evidence, DW2 told the Court that, the first accused person slept at Kenyana village on the fateful day. She went on to state that, the first accused visited Nyamanche's family for the last time in 2013.

The second accused, Kanga Nyamanche Gaini (DW3) testified on oath that, he did not murder the deceased. He told the Court that on the fateful day he slept with his wife at his house which is not far from the deceased's house. He deposed that he heard the alarm for help raised at the deceased's house. However, he did not go the deceased' house. He sent his brother Mwita Nyamanche (DW4) to report him to *wanayowe* that, he was sick. DW3 went on to adduce that, upon waking up in the morning, he went to hide nearby his house after learning that, the Nyamanche's sons had been named as the one responsible for the deceased's death. He also told the court that, this case was fabricated against him and that, PW2 was not the village chairperson. DW3 went on to state that, he decided to move to Korogwe District in August 2018 to start a new life. He deposed that, he reported himself to the police in order to clear himself only to meet the third accused at the police station in Tanga.

The second accused called his brother, Mwita Nyamanche Gaini (DW4) to support his defence. DW4 told the Court that the second accused who was inside his house on the fateful day. He was told by the second accused to report to *wanayowe* that, he was sick. DW4 proceeded to the scene of crime. He deposed that Nyamanche's sons were named to have killed the deceased. DW4 stated further that, Tini and Kanga's houses were set on fire on 23/7/2018.

On his part, the third accused, Tini Nyamanche Gaini (DW5) raised the defence of alibi. He told the Court under oath that, he spent the night at his father's in law with his wife on the material date. He called his wife Christina Tini who testified as (DW6). Both witnesses adduced that, there was a vigil at DW5's father in law who resides at Kenonkwe Village. However, while DW5 stated that, 6 persons attended the vigil held in Luka Mwita's (his brother in law house), DW6 testified that, about 17 persons attended and that it was held outside the house

at *kavero (mat)*. DW5 stated that he returned at his home place on the 23rd July, 2018 around 10:00 am and found his house set on fire. He was told by his elder wife that the house was set on fire by Turuka's family and that he took his elder wife to report the incident to the Police Station. DW6 went on to state that, upon reporting the incident to the police, he lived at the house of Mwikwabe Bhoke house for three months. Thereafter, he joined the second accused who was in Tanga and got arrested together with the second accused on the date of his arrival. Thus, the third accused denied to have committed the offence. He claimed that PW1 had grudges against him.

The last defence witness was the fourth accused, Mangera Nyamanche Gaini (PW7). He also raised the defence of alibi that, he was not at Kenonkwe Village on the fateful night. He deposed that his last time in Kenonkwe village was 2016. He further stated that he had no grudges with ZABRON TURUKA and that, the deceased was a good person. However, he alluded that PW1 had grudge against him after deserting her sister. DW7 deposed that he was arrested at Itununu village where he had gone to obtain a permit to sell his cattle.

In this case the Republic was represented by Mr. Frank Nchanila, learned State Attorney. On the other side the accused persons enjoyed the legal services of Mr. Onyango Otieno (for the first accused), Mr. Tumaini Kigombe (for the second accused), Ms. Mary Samson (for the third accused) and Rebecca Magige (for the fourth accused). Both parties made their respective closing submissions. I will consider their submission in the course of determining the issues pertaining to this case.

From the foregoing, this Court is duty bound to determine whether the prosecution has proved its case beyond all reasonable doubts. To be specific, the issues for determination are:

1. Whether Zabron Turuka was killed;
2. Whether the said Zabron Turuka was killed by the accused person;
3. Whether the accused person had malice aforethought.

Further, from the evidence and submission made by both parties, it is common ground that the offence was committed during the night and that, the prosecution relies on evidence of visual identification. Therefore, in addressing the second issue, this Court will have to determine whether the accused persons were properly identified. Lastly, we shall consider the defence raised by the defence to see whether the same raised doubt on the prosecution case.

It is pertinent to state that, initially this case was tried with the aid of three assessors namely Laurent Ochieko, Esther Nyigega and Hadija Haji. However, Laurent could not participate to end. He fell sick when the defence had not closed its case. Therefore, in terms of section 286 of the CPA, the hearing proceed with the remaining two assessors. Upon summing up the case to them and when invited to give their opinions, both assessor were of the unanimous opinion that the first accused was not properly identified on the material date. They therefore opined that, he should not be found guilty of the offence. On the other hand, the lady assessors were of the view that, the second, third, and fourth accused were properly identified by PW1 and that they killed Zabron Turuka maliciously. Thus, their opinion was to the effect that, the second, third and fourth accused should be found guilty of offence of murder.

Now, the first issue is whether Zabron Turuka was killed. All prosecution witnesses deposed that Zabron Turuka is dead. According to PW1, the deceased was attacked and stabbed with a panga. Such acts are not justified by law. It was not disputed by the defence that Zabron Turuka is dead. Further, pursuant to PW3 who examined the deceased body and as per Exhibit PE1, the cause of

death was internal bleeding. Thus, he died unnatural death. Again, the said evidence on the cause of death was not disputed or challenged by the defence. I therefore find that the first issue is answered in affirmative that, Zabron Turuka was killed.

I prefer to consider the third issue on whether, the persons who killed the deceased had malice aforethought. Thereafter, I will address the second issue whether the deceased was killed by the accused persons in the case at hand. According to section 200 of the Penal Code (supra), malice aforethought is an intention to cause death or grievous harm to a person whether such person is actually killed or not or where a acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence. The attacker may not express his intention of causing death or grievous harm to a person. Such intention is determined basing on the circumstances of each case. This position was stated in **Enock Kipela v Republic,** Criminal Appeal No. 150 of 1994 (unreported) where the Court of Appeal held that:

> "*Usually an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following*
> *(1) the type and size of the weapon if any used in the attack;*
> *(2) the amount of force applied in the assault;*
> *(3) the part or parts of the body the blows were directed at or inflicted on;*
> *(4) the number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose;*
> *(5) The kind of injuries inflicted;*

(6) The attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.

(7) The conduct of the attacker before and after the killing."

In their submissions, all counsel for the defence did not address the Court on malice aforethought. On the other part, the learned State Attorney contended that, the persons who killed the deceased had malice aforethought. Having reviewed the evidence on record, I agree with the learned state attorney that, the above factors set out in **Enock Kipera** (supra) were proved by the prosecution. Evidence to prove this element of murder is deduced from PW1 who deposed that, the deceased's assailants used a *panga* and an axe. These are lethal weapons which can cause death. Further, according to PW1, PW3 and Exhibit PE1, the said weapons were inflicted at the head, face, chest, at the back and waist which are sensitive parts of the body. Furthermore, the deceased's body was found with multiple cut wounds and in terms of Exhibit PE1, the injuries inflicted were grievous. This implies that excessive force was employed. Not only that, the words uttered by the assailants that "*Thobias twende tumemaliza*" depict that the assailants had malice aforethought. Lastly, the accused person's conduct shows that they had malice. They fled from the village whereby the second and fourth accused were arrested in Tanga Region. Such conduct was inconsistent with an innocent person. Thus, I find that the prosecution beyond reasonable doubt that the persons who killed the deceased had malice aforethought.

Reverting to the second issue, this Court is required to determine whether the deceased was killed by the accused at hand. As rightly submitted by the learned counsel for both parties, the offence was committed during the night, around

11.45 pm. I am in agreement with the counsel for both parties this case is founded on the evidence of visual identification by a single witness (PW1). In that regard, the Court was reminded of the settled principle stated in the case of **Waziri Amani vs R** (1980) TLR 250 that, the evidence of visual identification is one of the weakest kind of evidence and that, the Court cannot act on such evidence unless the possibility of mistaken identity has been eliminated.

It was submitted by the learned counsel for the defence that the accused were not properly identified. As regards the second, third and fourth accused, the learned counsel argued that, the solar light was not sufficient for PW1 to identify them; three seconds were not sufficient for PW1 to identify the said accused; there was a curtain inside the room which prevented PW1 from identifying the 2nd, 3rd and 4th accused; and that, PW1 did not state whether the 2nd accused stood at the door inside or outside the house. In relation to the first accused, Mr. Onyango Otieno submitted that, PW1 did not identify him and that, she failed to state whether the first accused was called by the second, third or fourth accused. Furthermore, the Court was moved by Mr. Kigombe to disregard the evidence of PW5 on the account that, it was hearsay evidence.

Reacting, Mr. Nchanila was of the firm view that the evidence of visual identification adduced by PW1 was watertight against all accused persons. In addition to the case of **Waziri Amani** (supra), the learned state attorney cited the case of **Chacha Jeremia Mrimi and 3 Others vs R**, Criminal Appeal No. 53 of 2015 (unreported) which restated the factors to be considered on whether the evidence of visual identification is watertight as:-

(a) The time the witness had the accused under observation.

(b) The distance at which he observed him.

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

(d) (iv) Whether the witness knew or had seen the Accused person before or not

Mr. Nchanila contended that, all of the above factors were favourable for PW1 to identify the accused persons and that, there was no possibilities of mistaken identity. He submitted further that, evidence of PW2, PW4, PW5 and PW6 was not hearsay on the reasons, their evidence was relevant and admissible to prove the persons were named by PW1 immediately after the commission of offence.

Therefore, I have to determine whether there was no possibility of mistaken identity in the evidence of PW1 and whether her evidence is watertight. In so doing, I will consider the factors stated in **Waziri Amani vs R** (supra) and **Chacha Jeremia Mrimi and 3 Others vs R** (supra).

Starting with the time under which the witness remained under observation of the accused person, PW1 deposed to have observed the second, third and fourth accused persons who entered the house for three seconds. Having considered further that PW1 explained how the third accused was armed with a panga, fourth accused armed with an axe and second accused stood on the door facing her; the curtain inside the house was cut down by the accused person, I am the considered view that, PW1 had time to identify them. This is so when it is taken into account that, the second, third and fourth accused persons were known to the PW1 before the event.

The second factor is the distance at which the witnessed identified the accused. PW1 testified that the house was round in shape with five meters each side. She

went on to depose that, the third and fourth accused stood at the distance of 2 to 3 meters from her sight. As to the second accused, PW1 was precise that, he was at the door inside the house. He came closer to her and stopped her from fleeing outside the house.

The third factor is intensity of the light which aided the witness to identify the accused. In this case, PW1 told us that she recognized and identified the 2nd 3rd and 4th accused with aid of solar light which was illuminating from the solar rechargeable bulb/lamp fixed at the wall inside the house. According to PW1, the intensity of light was sufficient. Further, evidence as to the intensity light inside the house was stated by other prosecution witnesses. For instance, PW4 arrived at the crime scene about six hours after the incident but found the solar light still on.

The next factor relates to the issue whether the observation was obstructed in anyway. It was adduced by PW1 upon entering the house, the curtain inside the room was cut down by the accused persons. Therefore, she was not obstructed from identifying the second, third and fourth accused who entered the house.

Another factor is whether the witness knew the accused persons before. It is in evidence that PW1 knew all accused before the event. They were her neighbors. This fact was not disputed by the second, third and fourth accused.

The last factor is whether the witness named the accused person immediately after the commission of offence. The law is settled law that the ability of a witnesses to name the suspect without delay assures his or her reliability. See **Marwa Wangiti Mwita and Another vs. Republic**, [2002] TLR 39 where it was held that:

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

In the case at hand, evidence adduced by PW2, PW4, PW5 and PW6 shows that, PW1 named the accused person immediately after the commission of offence. Therefore, she is a reliable witnesses. I also observed her demeanour at the time of adducing her evidence and found her credible and reliable witness. Her evidence was not contradicted by other prosecution witnesses or the defence. I find no reason to disbelieve and not rely on her evidence. The third and fourth accused contended that, PW1 had grudges against them. However, such issue was not raised to her when she was testifying before the Court. It was therefore an afterthought.

In view of the above, I am satisfied that the conditions were favourable for PW1 to identify the second, third and fourth accused persons. I understand that it is not safe to rely on evidence of single eye witness of visual identification. In the circumstances of this case, I am of the humble opinion that of PW1 can be relied upon. As stated herein she is a reliable witness. However, as far as the first accused person is concerned, PW1 was honest. She did not identify him. I find that he was implicated in the charge laid against him because his name "Thobias" was mentioned by other accused. It was not proved as to whether there was no other person by the name "Thobias" in that village or nearby village. The fact that the first accused is relative of the co- accused does not irresistibly imply that he was with the second, third and fourth accused on the material date and time. In the circumstances, I am in agreement with Mr.

Onyango and the lady assessors who were of the view that, evidence on identification of the first accused was not watertight.

Apart from the evidence of PW1, there is evidence adduced by PW2, PW4, PW5 and PW6 that, the accused person fled immediately after committing the offence. The second and third accused was found in Korogwe District, Tanga Region while the fourth accused was found in another village. In his evidence on oath, the second accused conceded that, he went to hide nearby the house upon learning that, Nyamanche's sons had been named as assailants of the deceased. On his part, the third accused stated that he went to live at his friend (Mwikwabe Bhoke) in the same village. DW4 was one of the sons of Nyamanche. He responded to the alarm at the deceased house and was not harmed. It is not known as to why the accused went on hide if they did not commit the offence. Further, they deposed that their house were set on fire and their father attacked by the deceased' family. However, none of the prosecution witnesses was asked question on that fact. Further, it was not proved that, the fire incident and attack of Nyamanche Gaini were reported to the police.

The next issue is whether the Court should accord weight to the defence of alibi raised by the accused persons. The defence counsel urged the court to consider the accused defence that they were not near the scene of crime on the material night. Citing the case of **Masoud Amlima vs R** (1989) TLR 25. Mary Samson asked the Court to consider that the 3rd accused called his wife to supplement his the defence of alibi. In reply to this issue, the state attorney attacked the accused's defence of *alibi*. He urged Court to accord no weight to the defence of alibi on the ground that, the accused persons were identified by PW1 at the scene of crime and that, they did not prove the defence of alibi on a balance of probabilities as held in the case of **Kubeza John vs R**. Criminal Appeal No. 488

of 2018 (unreported). His argument was based on the fact that, the accused failed to give a notice of his intention to raise such a defence as required by section 194(4) of the CPA; the 1st, 2nd and 4th accused person did not call the witnesses who were with them on the material night; and the 3rd accused (DW5) and his witness (DW6) contradicted each other on where the overnight event was spent at his father in law, the number of people present and the source of light used.

I agree with Mr. Nchanila that, in terms of section 194 (4) and (5) of the Criminal Procedure Act (supra), an accused person who intends to rely on the defence is alibi is required to give to the Court and the prosecution, a notice of his intention to rely on such defence before the hearing of the case or furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case. The rationale for issuing the notice of alibi was stated in **Kibale vs Uganda**, (1999) ERL volume I (EA) 148 as follows:

> *"A genuine alibi is expected to be revealed to the police investigating the case or to the prosecution before the trial on hearing. Only when it is so done, can the police or the prosecution have opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused person is more likely to be an afterthought other than a genuine one."*

Consequently, the Court has discretion under section 194 (6) of the CPA to accord no weight the defence of alibi given in contravention of the law. The accused is required to demonstrate the defence of alibi on the balance of probabilities. In so doing, the accused person is expected, among others, to bring a person who was with him at the material time the offence was committed. If that is not done the defence of alibi cannot be considered. See the case of **Masoud Amlima vs R** (supra).

In the instant case, the first, second and fourth accused deposed that they were with their wives on the material date and time. However, their wives were not called to support their defence. The first accused marshaled his mother Ghati (DW2) who was not with him at 11.45 pm when the offence was committed. On his part, the second accused called his brother Marwa (DW4) to support his defence of *alibi*. According to the evidence on record, DW3 and DW4 were not together at the material time the offence was committed. Further, they contradicted each other. While DW3 deposed to have talked to DW4 outside the house on their material night, DW4 stated that, the second accused was inside his house at the time of talking to him.

On the other hand, the fourth accused alleged that his wife died when he was in custody. However, that fact was not proved in evidence. He named her as witness during the preliminary hearing. He also named her immediately before giving his defence when the Court addressed to him in terms of section 293 (2) of the CPA.

As regards the third accused (DW5), he called his wife Christina Tini (DW6). They deposed that, on the fateful day, they spent the night at the third accused' father in law. However, as stated earlier, these witnesses contradicted each other in their evidence. While DW5 stated that, 6 persons attended the vigil held in Luka Mwita's (his brother in law house), PW6 testified that about 17 persons attended the vigil which was held outside the house at *kavero* (mat). Further, DW5 stated that source of light during the vigil was hurricane lamp while DW6 told the Court that, they used a torch. Such contradictions are not minor as argued by Counsel Mary Samson for the third accused. In my opinion, the contradictions raise doubt on the defence of alibi raised by the third accused.

Therefore, the alibi raised by the accused was not demonstrated on the balance of probabilities. Having considered that the accused persons were properly identified by PW1, their defence of alibi cannot stand. From the foregoing, the Court accords no weight on the alibi raised by the second, third and fourth accused who were identified by PW1

The last issue is whether the deceased was killed by all accused persons. As rightly argued by Mr, Nchanila, matters related to principal offenders are provided for section 22(1) of the Penal Code [Cap. 16 R. E. 2002] which reads:

> *"22.-(l) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely,*
> *(a) every person who actually does the act or makes the omission which constitutes the offence*
> *(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
> *(c) every person who aids or abets another person in committing the offence;*
> *(d)...;*

According to the evidence of PW1, the second, third and fourth accused entered the house on the fateful day during the night. The third and fourth accused stabbed the accused. Therefore, they actually did the act which killed the deceased. On the other hand, the second accused stopped PW1 from going outside the house to yell for help. He aided the third and fourth accused to commit the offence. Therefore, in terms of section 22 of the Penal Code, the second, third and fourth accused are principal offenders.

In addition to the above, section 23 the Penal Code provides that where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the course executing that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. As rightly argued by Mr. Nchanila, prior agreement between the accused persons is not required to form a common intention. It can be ascertained from the presence of the offender at the crime scene and their conduct thereto. This position was stated in **Damiano Petril and Another vs Republic**, [1980] T.L.R 260 where it was held that:

> *"The form action of a common intention does not require prior agreement, it may be inferred from the presence of the offender their actions and commissions if any"*

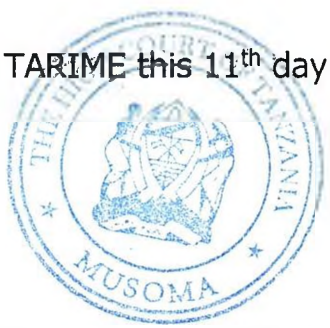
In the case at hand, the accused person broke and entered the deceased's house during the night time. The third and fourth accused person were armed with panga and axe. They assaulted the deceased. The second accused was with the third and fourth accused on the material night. He stood on the door to ensure that, PW1 does not get outside to scream for help. It is my considered view that, the presence of the second, third and fourth accused in the deceased's house in the material night and their conducts thereafter depict that, they had a common intention.

In the result, this Court holds that the prosecution case was proved against the second, third and fourth accused. On the other hand, the case levelled against the first accused person was not proved. He was not properly identified at the scene of crime. Therefore, I agree with the two lady assessors who opined that the first accused is not guilty of the offence and that the second, third and fourth

accused are guilty of offence of murder as charged. They are all liable for offence committed in the course of attacking the deceased.

In the final analysis, the Court finds Thobias Chacha @Gaini not guilty of the offence of murder and acquits him. Unless he is lawful held for other lawful cause, the Court orders his immediate release. On the foresaid reasons, the Court finds Kanga Nyamanche @Gaini, Tini Nyamanche @Gaini and Mang'era Nyamanche @Gaini guilty and convicts them of offence of murder contrary to sections 196 and 197 of the Penal Code (supra).

DATED at TARIME this 11th day of December, 2020.



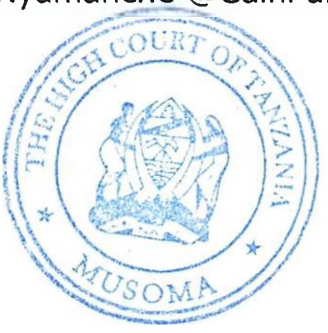
E.S. Kisanya
JUDGE

Court: Judgment delivered in open Court this 11th December, 2020 in the presence of the accused persons and Mr. Tumaini Kigombe, learned counsel for the second and holding brief for Mr. Onyango Otieno learned counsel for the first accused, Ms. Mary Samson, counsel for the third accused, Ms. Rebecca Magige, learned counsel for the fourth accused and Mr. Frank Nchanila learned State Attorney for the Republic.

E.S. Kisanya
JUDGE
11/12/2020

SENTENCE

Having heard the submissions by both parties on the appropriate sentence, and in terms of section 197 of the Penal Code (supra) and section 322 of the Criminal Procedure Act (supra), Kanga Nyamanche @Gaini, Tini Nyamanche @Gaini and Mang'era Nyamanche @Gaini are hereby sentenced to suffer death by hanging.



E.S. Kisanya
JUDGE
11/12/2020

COURT: (1) The right of appeal to the Court of Appeal explained. It should be filed within thirty (30) days from the date of this judgment.

(1)Assessors thanked and discharged.

E.S. Kisanya
JUDGE
11/12/2020