

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINIAL SESSION CASE NO. 1 OF 2019

THE REPUBLIC

-VERSUS-

NYALE S/O NGOME @ NIGER

JUDGMENT

Date of last order: 16/08/2021
Date of Judgement: 16/08/2021

AGATHO, J.:

The accused Nyale S/O Ngome was charged with Murder Contrary to Section 196 of the Penal Code [Cap 16 R.E 2002]. It was alleged that on the night of 03rd February, 2015 at Perani village Maili nane Ward, within Mkinga District in Tanga Region the accused murdered one Kalimbo S/O Nyawa.

Briefly, the facts were that that on 3rd day of February 2015 at night the deceased and his lover met at the bush area within Perani Mailinane village to spend the night. That around 02:00 AM that is on the 4th day of February 2015 the accused person went to the place where the deceased

and his lover slept while being armed with an axe. When the accused reached at the place he invaded the deceased who was asleep and attacked him by cutting him on his head by the axe and then ran away leaving the said axe in the head of the deceased. The incident was reported to Mtandikeni Police Station and investigation mounted. Later the accused was arrested and taken to Mtandikeni Police Station, and he was interrogated and charged with this offence of murder.

The accused who was represented by Erick Akaro, assisted by Abubakari Omary and Frida Akaro learned Advocates pleaded not guilty to the charge. The Prosecution was conducted by Ms. Tussa Mwaihesya, assisted by Mr. Joseph Makene learned State Attorneys.

It is not in dispute that Kalimbo S/O Nyawa is dead and that he met a violent death. This is confirmed by testimony of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 who told the Court that the deceased body was found with severe and deep head cut wounds that broke his skull and brain could be seen. This is further confirmed by the postmortem examination report which is exhibit P1 and constitute one of the matters not in dispute.

The exhibit P1 states that death was due to excess bleeding caused by the deep cut wounds that broke the deceased's skull and damaged the brain. The blood circulation was affected, and the respiratory system was

damaged leading to organs failures and ultimate death of the deceased. There were three severe and deep cut wounds on the deceased's head caused by a sharp and heavy object that broke the skull, and blood and brain could be seen oozing.

The cut wounds were: one in the middle of the head extending to the right side and there was a small wound close to back of the head, and a third wound was on the left side between the ear and the eye. There is no doubt that the deceased met a violent death. Whoever is responsible must have intended to cause death.

The only issue in this case is as to whether it was the accused who caused the death of the deceased Kalimbo S/O Nyawa.

The Prosecution summoned seven (7) witnesses: PW1 – Mwanakesi Hussein@Michekesi; PW2 – Godo Mangale; PW3 - Mrinji Munga@Kalulu; PW4 – Hussein Mrisa@ Bezuma; PW5 – Dr Selemani Mgoya; PW6 – WP 2770 Sargeant Longage; PW7 – G 4907 D/CPL Richard) and produced two (2) exhibits (sketch map of the crime scene and postmortem report) to prove that it was the accused person who killed the deceased Kalimbo Nyawa. The defence side had three (3) witnesses (DW1 – Nyale Ngome, the accused himself, DW2 – Rumanzi Mwanzige, and DW3 – Ngome Nyale Mwalewa) to support the innocence of the accused and tendered five (5)

exhibits. The latter were: D1 – PW1 witness statement; D2 – PW2's witness statement; D3 – PW3's statement; D4 – DW4's witness statement and D5 – PW6's statement.

The prosecution opened its case with the evidence of PW1, Mwanakesi Hussein @ Michekesi, adult female. She is the eyewitness. She resides at Perani. Her testimony in essence is that on 03/02/2015 she was at home at her restaurant located Perani area Maili nane, when she phoned her lover Kalimbo who was in Mombasa Kenya to come because his sister is sick. At around 12:00 am he came back with medicine to see his sister. He then left and promised to come back later as PW1 was baby at the restaurant. Later in the evening at 20:00 pm Kalimbo came back with his brother Kalulu (PW3). They took tea and continued with conversation. At around 21:00 they (PW1, Kalimbo, PW3 and the child (aged 6 months) and a bicycle left via a footpath to the farm. They passed PW1's parents' house. They crossed the farm and reached the cattle passage to grazing and watering place, and thereafter they went into the bush. After reached the bush Kalulu (Kalimbo's brother) said he wanted to go home, and he left the bicycle with Kalimbo. After he had left PW1, Kalimbo and the baby went into the bush where PW1 put her kanga on the ground and Kalimbo took off all his clothes and PW1 took off her blouse and her bra and they

continued with conversation and slept there. PW1 while asleep at around 02:00 pm she heard and was abruptly awakened by a heavy bang on the ground. Something heavy fell on the ground, it was Kalimbo falling with an axe stuck on his head. She went on testifying that she then saw the accused (Nyale Ngome) standing two steps away. Then the accused started fleeing. After ten steps at the footpath, he stopped, and two persons (Tsuma and Lugwe) emerged from the bush. PW1 then stood up and saw Kalimbo with an axe struck on his head. He was screaming while lying on the ground. She thereafter took the child, the phone, and a bed sheet and went to Kalulu. She stated further that when she reached Kalulu's home, Kalulu took his phone and checked the time it was 03:00 am, PW1 told Kalulu that it was Nyale Ngome who killed Kalimbo.

PW1 further testified that they phoned the chairperson and told him and Ally Njale what happened, and after that the PW1 was left home, the village Chairperson Mwanzige Chombo and Kalulu went back to the crime scene Kalimbo was already dead. They found him lying on his stomach and his head had severe head cut wounds. She added that the axe which she saw earlier struck on deceased head was not there. It was PW1's testimony that she saw everything clearly at the crime scene because there was bright moonlight. It was not cloudy as it was not rain season. The PW1

added that the village chairperson phoned the Police who came in the morning of 04/02/2015. On that day she was taken by the Police to the Police Station at Mkinga, later charged and was released in 2018.

Godo S/O Magale a bodaboda rider (PW2) when called upon to testify he testified that on 04/02/2015 in the morning 06:00 pm he heard that Kalimbo has been murdered in the bush. He testified further that after hearing that news he went to the crime scene. He saw many people there and the deceased body with head cut wounds. PW2 states that PW1 and himself took his motorcycle and then the village chairperson (Chombo) went to follow up on the Police, who later came at about 08:00 am. They met the Police motor vehicle at Mwakibula after Maili nane village. Then they got back together to the crime scene. PW2 testified that they after Police and doctor completed their investigation/examination of the deceased body and the crime scene, they took the body to Godo village (border of Tanzania and Kenya). They buried the deceased on 05/02/2015 at 10:00 am. He then got back to Perani village Maili nane. At around 16:00 pm on 05/02/2015 PW1 went to Maya village which 20 minutes away by motorcycle he said. At Maya he went to the Bar (Pombe shop). At the Bar he met the accused (Nyale Ngome), Lugwe Mwanzige and the bar owner. At the Bar he (PW2) heard Nyale Ngome talking in

duruma language about the deceased Kalimbo that "***Huyu bwana Kalimbo Nyawa anajifanya mpiganaji mbona nimemuua***". PW2 said this was saddening shocking he decided to record him in his phone. After the alcohol finished at the first bar, they went to another, but the accused did not talk about killing Kalimbo again. Thereafter, they went to Maya village. He testified that he took the record to village chair and later the Police took it (mobile phone).

Mrinji Munga @ Kalulu (PW3) testified that he is the brother of the deceased (Kalimbo). On 03/02/2015 he and deceased went to PW1 (Michekesi) home and then had tea there at around 20:00 pm. From there at around 21:00 pm they (PW3 and Kalimbo and Michekesi and a baby) and left her home and went to the bush PW3 said that he took his bicycle with him. When they reached the bush that night at a footpath before going into the bush he told them he would like to return home. But before he left the deceased asked he could remain with he bicycle. He left it with him. Then the PW3 went back home, and it was around 22:00PM. He further testified that at midnight Michekesi came to his house and woke him up with the news that Kalimbo has been cut on his head with an axe. PW3 stated that he then asked PW1 who did it. She replied that it was the accused (Nyale Ngome). PW3 said thereafter they (PW3 and PW1) went to

Ally Njae and later to Mzee Kengo and he checked the time it was around 3:00 am. The PW1 and PW3 informed Mzee Kengo about Kalimbo's murder. Then they went to the crime scene. It was PW3's testimony that when they reached the crimes scene Kalimbo was naked, and he was lying on his stomach. The face facing on the ground. He had severe head cut wounds. One in the middle of the head, another at the back of the head. The witness stated that he did not know what followed thereafter as in the morning of 04/05/2015 he and PW1 were taken by the police.

Hussein Mrisa @ Bezuma (PW4) in his testimony testified that on 03/02/2015 when he returned home at around 21:00 pm from his mother and auntie's homes where he went to visit them, he found people sitting at Mjohoro tree and restaurant. Among those he recognized there was Juma Mwenda, Nyale Ngome and Lugwe Mwenzige, he greeted them. He then went to the restaurant, but he could not find Michekesi and Mashaka. He then decided to go to sleep. The next day on 04/02/2015 in the morning he was told by Mzee Kengo, Haidi, Mbengalo, and Mwayana that Kalimbo has been murdered. He went with him to crime scene, where he saw many people. He testified further he saw Kalimbo body lying on his stomach and there are head cut wounds. These were deep and broke the skull as brain was oozing out. He further testified that the Police come and the doctor.

They did the examination of the body and examined the crime scene. He also testified that he was told by Mwanakesi (PW1) that it is Nyale Ngome who killed Kalimbo. He added that he (PW4) knows Nyale Ngome. He pointed his finger at the accused at the docket. He testified that as for the crime scene. It is a bush.

Dr. Selemani Mgoya (PW5) testified that on 04/02/2015 he was by OC CID Mushi and was informed that there is murder incidence in Mail inane ward, Mwakijembe. He said he testified that the Police come to his office Mkinga Health Centre and they started to go to the crime scene. After reaching there he examined the deceased body. He found he had severe cut wound. The cut wounds were deep. He testified that according to the examination he conducted the deceased was hit by a sharp and heavy object on his head three blows (times). The force used was strong because the weapon used broke the skull and the brain was oozing and could be seen. He testified that the cut wounds incision was straight. He also stated that the deceased died due severe bleeding, and also damage to the brain. The blood circulation and respiratory system were damaged leading to their failure to function hence caused his death. He wrote his postmortem report providing these details and he tendered it and was admitted as exhibit P1.

PW6 was WP 2770 Sergeant Longage she testified that at Mkinga Police Station she was called by OC – CID Mushi and was informed that there was murder incidence at Perani village Mail inane. She testified that she was among the Police Officers (OC CID Mushi, D/C Nuru and D/C Richard) and Dr. Selemani Mgoya who went to the crime scene.

After reaching the crime scene and according to her testimony, they (Police Officers) were told that the deceased is one Kalimbo Nyawa @ Majaji. She told the Court that the deceased body was lying on the ground the face facing the ground. She saw three severe head cut wounds, and the back of his head was covered with blood. She also saw deceased and the clothes of a woman (bra and blouse) lying on the crime scene. Referring to the cut wounds she said, they were cut by a sharp object. The cut wounds were three; one on the left side, two were on the right side (one of them was at centre of the head it went down to the right side). The third one was close to the back of the head. She stated further that after the doctor completed examination of the deceased body and then, the relatives took the deceased body from burial arrangements, PW6 further told the Court that, she took Michekesi (PW1) and Kalulu (PW3) to the Police Station. She wrote her statement in which she said Kalimbo was killed by Nyale Ngome and she saw Nyale (accused) hitting accused with

an axe on his head at the crime scene on the night of 03/02/2015, and that he was fleeing. PW6 also testified that during interrogation she also had a statement of Godo (PW2) who heard the accused at the Bar uttering words that "*huyu Kalimbo alijidai kuwa ana ngumi mbona nimemuua*". PW6 testified that PW2 recorded in his phone the accused uttering these words and it was PW6 testimony that the recording is at the Police Station. She told the Court that she could not bring it or tender before the Court because there certain technical problems. The words were explained in kiduruma language and there is no voice recognition technology. The PW6 told the Court that the voice recording did not satisfy the criteria for tendering it as exhibit before the Court. The PW6 also testified that she was told by Kalulu (PW3) that his house was on fire when PW1 came to give him the news about Kalimbo's murder. PW6 further told the Court that she heard Lugwe S/O Mwenzige had sexual relationship with PW1 (Michekesi).

The PW7 was G. 4907 D/Cpl. Richard. His evidence was that on 04/02/2015 at 06:00 am he was phoned by OC – CID to go join him and other Police Officers (OC – CID), WP. Longage and Nuru and medical doctor to go to Maili nane there murder incidence. He stated that after reaching Mwakijembe they parked the vehicle, and walked to the crime scene, we saw people standing in the crime scene. It was a bush. It close

to a footpath where people go to prepare charcoal, and also there was cattle passage to grazing and water. He testified that at the crime scene he saw deceased body on the ground lying on the stomach. He further told the Court that the body had two head wounds one on the right side and the other in the middle/centre of the head; and the third one close to the back of the head. These cut wounds were deep one could see brain. The deceased body was naked.

After the doctor completing examination of the body the PW7 stated that he drew the sketch map of the crime scene. The crime scene is separated by a bush and footpath and cattle passage. He used the tape to measure the distance. He testified that the deceased body was lying on the right side. In the sketch map the PW7 stated that he marked body a letter "A" and the deceased clothes as letter "C", cattle passage was marked "EF". From the deceased body was at his clothes it was 0.5 metres. When the deceased body was lying to the footpath it was about 70 metres. The PW7 prayed to tender the crime scene sketch map which was received and marked as exhibit P2. PW7 testified that when a person is at the crime scene, he/she can be seen because the bush was not dense, and the grasses were short. The PW7 stated in his sketch map he did not show the

three footpaths at the crime scene. He also did not show the blood on the ground at the crime scene.

The Defence side called three witnesses: DW1 Nyale Ngome@Niger, the accused person; DW2 Umenzi Mwenzige; and DW3 – Ngome Nyale, the father of the Accused.

Nyale S/O Ngome @ Niger, the accused (DW1) on his testimony he stated that he lives at Maya area Mbuta village, Mkinga District. He lives with his family, her father and mother's sister, and in his family he has his wife and 3 children. He also stated he doing charcoal business and he is a peasant also. He stated that he has a motorcycle. He further added that on 03/02/2015 he was at his home the whole day. He testified that day his youngest child was sick. He left at 17:00 and come back home at 18:00 with child medicine, beans, saladies, vegetables and some sugar. The DW1 also stated that he knew Kalimbo Nyawa because he is his wife's uncle and he had fight with young brother Tsuma Nyale. The DW1 also said he knows Michekesi because she is wife's sister. The DW1 further testified that on 03/02/2015 he saw Musinda and Lugwe Mwenzige fighting. He managed to reconcile but Musinda's t-shirt was torn. He therefore gave his t-shirt to him, and he remained with his vest. When he went to the shop in same area where he lives, he used his vest to carry food stuff he brought

(vegetable, dagaa, vegetables, and sugar). And when he was going home he was with Tsuma Nyale who borrowed his motorcycle.

DW1 told the Court that after returning home at 18:00 pm of 03/02/2015 he was at home; he did not go anywhere. At 21:00 pm that day he ate dinner with his family (his father and siblings). Then he went to sleep. He did not wake up at night. He testified further that on 04/02/2015 he was told by his brother-in-law (Mrisa Mwanzige) that Kalimbo has been murdered. Thereafter they sat as a family and decided that Nyale's father, Nyale's wife, Nyale mother, and his sister will go to the funeral at Godo in Kenya. He testified that, his family members went to the funeral on 04/02/2015 and came back on 05/02/2015.

DW1 went on testifying that on 07/02/2015 he went to Horohoro for hitma. He was arrested at Horohoro on 08/02/2015 at 14:39 pm. According to his testimony Police took him to Duga Maforoni Police Stations. At the Police Station he found Hussein Mbezuma Mrisa and in the next cell at the Police Station was Kalulu also known as Mrinji Munga. Later that day Lugwe Mwenzige Baya was brought at the station. DW1 testified further that at the Police Station he heard someone being tortured (and he knew it was Lugwe because he heard his voice). The witness stated that when the police asked him (DW1) to confess killing Kalimbo he told them that it was

not true. He continued to tell the Court that on 20/02/2015 his statement was recorded by D/C Nuru. After recording the statement D/C Nuru asked DW1 to sign it. He further stated that on 25/02/2015 they (himself, Michekesi and Lugwe) were taken to the Resident Magistrate's Court at Tanga. They were charged for murder. He further added that on 26/02/2016 Lugwe was released, and that in 2017 the Police brought them before High Court facing murder charge of Kalimbo Nyawa.

On 24/11/2016 there was committal proceedings in Criminal Session No. 6 of 2017 two persons were charged (Michekesi and Nyale Ngome). He stated that on 06/12/2018 they were taken to High Court and the Prosecution said that the D.P.P has no interest to prosecute the case. They were discharged. On the same day at the Court premise he was rearrested, and charged for murder of Kalimbo Nyawa. He further testified that what Michekesi (PW1) testified is false. He also stated that what Godo (PW2) said is untrue because he (DW1) was at home. He protested that the Prosecution should have brought the recording in which he uttered the alleged incriminating words. The DW1 also stated that his house has a toilet outside. He further stated the distance between Maya and Maili nane is 20 Kilometers. That Lugwe is not his friend.

The defence also brought DW2 Umanzi Mwanzige to testify. It was her testimony that, she is the wife of the accused, and they have 3 children. She stated that she lived with the accused (Nyale Ngome) at his father's compound, and within it he has his house. The DW2 testified that on 03/02/2015 their youngest child was sick. She asked the accused to buy medicine. He went to buy medicine 17:00 pm and went back at 18:00 pm. Thereafter he did not leave home. DW2 testified that when he (Nyale) came back he came with medicine, soap, and some sugar. She testified that thereafter they ate dinner. She added that normally boys (youngest) eat with their father (Nyale's father). According to DW1, they ate dinner at 21:00PM, and after that she went inside. She left the accused conversing with his father and later he joined her to sleep.

DW2 testified that the accused did not wake up at night. He slept till 06:00 am on 04/02/2015. It was her testimony that on that day came Mrisa Mwenzige who told her that Kalimbo had been murdered. She testified further that they had a family meeting where it was decided that Nyale (the accused) will stay home with children, his father, wife, mother and her sister will go to the funeral. The DW2 stated that the funeral was conducted on 04/02/2015 at 16:00 pm at Godo village, Kenya. In her testimony she stated that Nyale is a peasant, mason and sales charcoal

though not much. She added that her husband (Nyale) takes charcoal to Kenya. The witness testified that Nyale Ngome is a Master of Ceremony (MC) and they have their gang (crew) entertaining in parties and wedding ceremonies. That is where he named himself Niger. She went on testifying that the accused had no sexual relationship with Michekesi (PW1) and he also had good relation with the deceased who is her uncle. She stated that the accused sometimes comes home late night or in the morning as he is involved in disco/music activities. She added in her testimony that Maya and Maili nane are not very close, we can use a half a litre of petrol by motorcycle to reach Maili nane from Maya. She testified that Nyale was arrested on 08/02/2015 while he was attending hitma at Horohoro. She also said the Police has never been to her home to conduct investigation.

The defence brought a third witness Ngome Nyale (DW3). In his testimony he told the Court that the accused (Nyale Ngome) is his second born son. They all stay at Maya area, Mbuta village, Mwakijembe ward in Mkinga District. DW3 testified that Nyale is involved in transporting charcoal but it is not his business. The owner of charcoal business is in Kenya. Nyale also is a peasant. He is further involved in music, they have their crew involved in disco and entertainment in wedding ceremonies. The DW3 stated that on 03/02/2015 evening at 17:00 pm and 18:00 pm Nyale

was at home having conversation with him. DW2 added that they had dinner and thereafter he (Nyale) went inside at 21:00 pm. The witness said he went to sleep at 22:00 pm. He continued to testify that the accused did not go out the night of 03/02/2015 because the motorcycle was in DW3's house. The witness said if he could go out, he would know and would have been told. DW3 stated that on 04/02/2015 while milking the cattle Mrisa came and told them that Kalimbo has been murdered in the bush at Maili nane village. DW2 told the Court that since the accused lived in his house it is possible, he could go out without him knowing. But if he goes far he would need a motorcycle which was in his house. DW3 stated that after getting the news about Kalimbo's death they conducted family meeting and they agreed that DW3 himself, his wife, sister-in-law, DW3's brother and DW2 will go to the funeral. The accused will stay home with children and taking care of the livestock. The witness added that the motorcycle is big could carry six people. DW3 testified that he bought it from Kenya. It has four shock absorbers. DW3 went further stating that he went to the crime scene. It is a bush. He added that when a person is in the footpath it is not possible to hear someone talking at the crime scene because they are far apart. He testified further that on 03/02/2015, the accused was at home. He did not leave to anywhere. From Maya to Perani it is a long distance.

There are also elephants and other wild animals crossing as the village is close to Game reserve. It is risk to walk or ride a motorcycle at night.

After both sides had closed their evidence, the learned Counsel for the defence and learned State Attorneys were invited to make final submissions. In general Mr. Abubakary Omary learned Counsel for the accused submitted that the Prosecution had failed to prove the case against the accused, He pointed out contradictions, inconsistencies in the Prosecution witnesses. Some of them e.g., PW1, PW2, PW3, PW4 and PW6 the oral testimony they gave on oath contradicts their statements they recorded at the Police station in 2015 (the statements were D1, D2, D3 and D4 and D5). He also faulted the Prosecution failure to bring the voice recording or the phone used to record the alleged words uttered by the accused at Pombe shop confessing to have killed the deceased. On the other hand, Ms. Tussa Mwaihesya learned State Attorney submitted that the Prosecution had proved the case against the accused beyond reasonable doubt. She invited the Court to find him guilty of murdering the deceased and sentence him accordingly. I appreciate the learned counsel and state attorney's submissions. Frankly, while writing the judgment I have referred their submissions.

As stated earlier the main issue for determination in this case is as to whether the Prosecution has proved the case against the accused beyond reasonable doubt. This is so because in criminal proceedings the burden of proof is always on the Prosecution and the standard of proof is beyond reasonable doubts as it was held in cases of **Said Hemed V. R [1987] TLR 117; Mohamed Matula V. R [1995] TLR 3**. Indeed, the Prosecution relied heavily on direct evidence adduced by PW1, the eyewitness. They also relied on circumstantial evidence of PW2, PW3, PW4, PW5, PW6 and PW7. PW5, the medical doctor wrote and tendered the postmortem report. PW6 was the investigator who testified on the investigation and evidence she gathered. And PW7 the Police Officer is the one who drew the sketch map of the crime scene.

Let us begin our evaluation of the evidence adduced before this Court by analysing the testimony of PW1, the eyewitness. While the Prosecution strongly argued that the witness is credible as she was at the crime scene at the night of 03/02/2015 and the morning of 04/02/2015 when the deceased was murdered. She testified that while asleep she was awaked by heavy bang on the ground and saw Kalimbo on the ground with the axe stuck on his head. And next to him, two steps away she saw Nyale Ngome standing wearing yellow t-shirt and light blue jeans pair of shorts.

He (the accused) ran away and stopped at the footpath. The PW1 said she could recognize him because there was sufficient and bright moonlight. Also, she knows him well. She observed him at the crime scene for about 5 minutes. The law on identification of accused at the crime scene especially at night is governed by the guide given in the case of **Waziri Amani V. R [1980] TLR 250**. It was held in that case that the following are important issues to be considered:

- i) Whether the accused and the witness knew each other before.
In the case at hand PW1 and the accused know each other well because the accused's wife is the sister of PW1.
- ii) Whether there was sufficient light to see and recognize a person. The PW1 testified that there was bright moonlight, and it was not rain season. The sky was clear. She could recognize the colour of clothes the accused was wearing the yellow t-shirt, and light blue jeans pair of shorts.
- iii) Distance between the accused and witness, the PW1 stated in her testimony that the accused was standing two steps from the deceased body. This is close to the PW1 because she was sleeping with the deceased.

iv) Time is another factor to be considered. How long was the accused under the witness' observation. The PW1 said she observed him for about 5 minutes, which is sufficient time to recognize a person.

Although Ms. Tussa Mwaihesya, the State Attorney submitted that the PW1's testimony was credible and was not shaken by the defence, with respect that may not be true. I am of that view because the defence Counsel did show the contradictions in PW1 testimony especially the variation between the statement she wrote on 04/02/2015 at the Police Station and her oral testimony before this Court on 09/08/2021. In her statement which was tendered by the Defence as exhibit D1, PW1 said that when the accused hit the deceased with an axe, she was not there. She went for a short call. And when she came back, she saw the accused hitting or smashing the axe on the deceased head. This statement contradicts what she stated before the Court where she said she was sleeping when she heard a bang on the ground and saw the deceased body on the ground with an axe stuck on the deceased head. She added that then she saw the accused standing next to the deceased body. The PW1 recorded statement was tendered by the defence as exhibit D1. In

the case of **Jeremiah Shematu V. R [1985] TLR 228** it was held that the inconsistencies in the testimonies make such testimonies doubtful.

“discrepancies in various accounts of the story by the Prosecution give rise to some reasonable doubt about the guilty of the accused”

The defence counsel pointed to another contradiction to shake the credibility of PW1, making her testimony doubtful as it varies with the statement of PW3, Kalulu which was tendered by defence as exhibit D2. The PW1 is cited to have told PW3 that the deceased was hit by a wood/log and not an axe as testified before the Court.

It is uncontroversial that the Court may convict the accused basing on a testimony of a single eyewitness if the evidence is credible and true. This was stated in the case of **Hassan V. R [1992] TLR 120**. The defence further submitted that the PW1 was jointly charged with the accused in 2017 in Criminal Session No. 6 of 2017, on account of the almost similar facts as the present case the D.P.P entered nolle prosequi. They were discharged in December 2018 and the accused was rearrested and the PW1 was made the witness. It is the defence's submission that the PW1 has incentive to tell lies against the accused person to exonerate

herself from criminal liability or to avoid being damaged as she was the last person to be seen with the deceased. From the above evaluation with respect to direct evidence (under Section 62 (1) of the Evidence Act, Cap 6 R.E 2019) we can conclude that PW1's testimony is doubtful. In the case at hand the contradictions and inconsistencies shown are not minor.

In **Lucas Kapinga V. R [2006] TLR 106.**

"...Prosecution witness who changes his story on an important aspect of the case is not a credible and truthful witness"

This is true of PW1. Looking at her oral testimony and her witness statement she changed her story.

The Prosecution did not end with the eyewitness PW1, they also banked on circumstantial evidence, that sought to corroborate the testimony of the PW1. They brought PW2, Godo Mangale. His testimony was that he took the accused and Lugwe to Pombe shop where the accused uttered words "***Huyo Kalimbo anajifanya mpiganaji mbona nimemuua.***" The PW2 testified that he recorded the voice of the accused in his phone when he uttered these words. This testimony could have corroborated the PW1's evidence but then again, the Prosecution did not tender that recording before this Court. Therefore, verification of such recording and alleged words uttered by the accused is difficult. Even PW6

[Sergeant Longage] testified that the mobile phone of PW2 is still in the hands of the Police (OC CID). And she said they could not tender the recording because it did not meet certain criteria for tendering it before the Court. She mentioned that they do not have voice recognition technology. It is my considered view that the recording was essential, failure to tender it makes the testimony of PW2 highly suspicious. In the case of **Rex HKA UBRLE [1938] EACA No. 5** the Court stated that:

"the Court is entitled to presume that evidence which could be and is not produced would if produced be unfavorable to the person who withhold it"

Referring circumstantial evidence which is independence evidence to corroborate with testimony of PW1, there is another testimony of PW3, Mrinji Munga@Kalulu, whose statement in 2015 differs from his testimony given before the Court and under oath. In his statement at the Police Station, admitted as exhibit D2, he said that he was told by PW1 that the deceased was hit by a log/wood. But, in the testimony he gave before this Court he stated that PW1 told her that the accused killed the deceased by hitting him with the axe on the head.

Surprisingly, PW3 did not tell anyone else that the deceased was murdered by the accused. Just like PW1 he was unable to name the

accused to village Chairperson and to the Police. In **Marwa Wangiti V. R [2002] TLR 39** the Court stated inter alia that:

"Failure on the part of the witness to name a known suspect at earliest possible opportunity renders the evidence of that witness highly suspect and unreliable."

The defence tendered the statement of prosecution witness (PW3) that was admitted as exhibit D3 to contradict and discredit his testimony before the Court.

Another piece of circumstantial evidence in the Prosecution case relates with the testimony of PW4, Hussein Mrisa@Bezuma. He is PW1's father. He testified that on 03/02/2015 when returning home, he found Nyale Ngome and Lugwe there. They were at his compound at the restaurant. This witness also said, he was told by PW1 that the deceased was murdered by the accused. However, in his statement recorded at the Police Station, he said he is suspecting the accused because they (accused and deceased) had fights before. PW4 is an incredible witness. Although in the case of **Goodluck Kyando V. R [2006] TLR 367** the Court held that *"any witness is credible and entitled to be believed unless there is a reason to disbelieve him."* The above witnesses PW1, PW3 and PW4 all have given

inconsistent stories. Their testimonies can hardly be credible and believable.

PW5 is yet another witness to testify in order corroborate the testimonies of other Prosecution witnesses. PW5 – Dr Seleman Mgoya tendered the postmortem report (exhibit P2). The exhibit showed the cause of death to be excessive loss of blood, and the nature wounds that is severe cut wounds on the head. The PW5 stated that the deceased was cut on his head three times with sharp object, and he also added that the assailant used force. The said force was strong because the wounds were deep and broke the skull and brain was seen. Nevertheless, the PW5 could not tell who murdered the deceased. It is also unclear why fingerprints on deceased body were not checked. The evidence of PW5 did not do much to build prosecution case.

PW5 D/Cpl. Richard drew sketch map of the crime scene but he did neither take a picture of the deceased body nor of the crime scene. This was against PGO 229. As for PW6 (Sergeant Longage) she testified that she was in charge of investigation. But she admitted that they have not interrogated the accused person's family and she did not tender the Godo's phone alleged to have contained record of Nyale's voice brought to the police station. She also did not see if it is important to tender the recording

because there are certain criteria that were not met. She also admitted that she heard the accused saying he was not at the crime scene, but she said she thought he was defending himself.

Regarding circumstantial evidence the law is that in the case where circumstantial evidence is vital the Court must find before deciding on a conviction that the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis, than of guilty. This was stated in the case of **Bahati Makeja V. R, Criminal Appeal No. 118 of 2006**. From the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 the inculpatory facts are not consistently gathered. There are several inconsistencies that are left on the prosecution case. The learned State Attorney referred this Court to the case of **Deus Josias Kilala v R Criminal Appeal No. 191 of 2018 Court of Appeal of Tanzania** at Dar es Salaam, where the Court held that there may be inconsistencies and contradiction and that may be caused by normal errors in observation, shock, or horror at the time of scene of incidence. It was also stated in **Issa Hassan Uki v Republic, Criminal Appeal No. 129 of 2017 Court of Appeal of Tanzania at Mtwara pages 18-19 (unreported)** that the Court has to determine whether the inconsistencies and contradictions are minor, or they go to the root. They are minor if they do

not prejudice the accused person. If they lead to miscarriage of justice the inconsistencies are said to go to the root of the matter. In this case, I am of view that the inconsistencies go to the root of the matter and create doubts as to whether the prosecution proved its case beyond reasonable doubt.

The Prosecution brought to attention of the Court the accused's attitude before, during and after the incidence. That according to PW4 the accused previously had a fight with the deceased. Also, PW1 testified that in January 2015 the accused uttered abusive words against the deceased, and PW4 also stated that on the material date 03/02/2015 he saw the accused at his compound. It means the accused saw the deceased and PW1 (Michekesi) that night. But the testimony of PW1 and PW4 are doubtful because they gave inconsistent and contradictory account of facts. Again their testimonies were not corroborated by evidence from other witnesses. What is more is that they both did not name the accused to the village chairperson or to the police.

The Defence had three witnesses (DW1, DW2 and DW3). The defence started with the defence of alibi. They complied with law, as per Section 194 of the CPA [Cap 20 R.E 2002] as they gave notice to the prosecution of intention to rely on alibi. In the case of **Kibale V. R [1969] EA No. 148** it was held that "*a genuine alibi is expected to be revealed to*

the Police investigating case on to the Prosecuting during trial. When it is so given the Prosecution has an opportunity to investigate genuiness". The defence witness DW1, DW2 and DW3 all of them stated that the accused was home on 03/02/2015 when the deceased was murdered. However, the alibi was challenged by the prosecution as PW1 testified that he saw the accused at the crime scene. Nevertheless, that testimony was uncorroborated by any other evidence. Also, PW1 did not name the accused to the police or village chairperson early.

On cross examination the DW2 and DW3 also told the Court that the accused is involved in music and entertaining during wedding ceremonies. And they said in such music and entertainment the accused can stay up to late midnight or came back home in the morning. But DW2 and DW3 insisted that the accused was home that night. The Prosecution on its side had two witnesses who said they saw the accused on the night of the incidence. PW4 who said he saw the accused at his home compound at Perani and the PW1 who saw him at crime scene. No other witness who supported such testimony.

The Prosecution also directed the questions towards the defence which was intended to confirm whether it is possible for the accused to go out at night without the knowledge of DW2 and DW3. But the defence

evidence that the accused house has a toilet built outside the house, and the accused's music activities was not disputed by the prosecution.

The DW2 stated that the accused was at home the whole night of 03/02/2015. The DW3 testified that Maya and Perani are far apart. Moreover, the accused motorcycle was on the DW3's house that night. There was no prosecution evidence to contradict such defence. Further, DW3 testified that there is game reserve nearby and animals including elephants cross at night which is dangerous for anybody at Maya and making it difficult for someone to go out at night. That evidence was challenged by the prosecution.

As for the defence of alibi the prosecution right submitted that the alibi can be negated where there is evidence showing that the accused was clearly identified at the crime scene. This was held in **Abdalla Mussa Mollel @ Banjoo V. R Criminal Appeal No. 31 of 2008 Court of Appeal of Tanzania** (unreported). But as pointed out earlier the identification of the accused was by the PW1 whose evidence is incredible and contradictory. Again, the circumstantial evidence that PW4 saw the accused at his compound was uncorroborated by any other evidence.

The prosecution rightly submitted that from the defence evidence it is clear that the accused did not attend the deceased funeral, and when he

heard the deceased was murdered, he did not go to the crime scene. The DW1 testified that he was left home with a child and taking care of livestock. The fact that he did not go to the funeral and to the crime scene gives rise to suspicion. But a Court cannot convict a person basing on suspicion. As it was held in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v R, [2006] TLR 395.**

In conclusion I should restate that the Prosecution is duty bound to prove the case beyond reasonable doubt. In the case at hand there are doubts remaining, the inconsistencies and contradictions of Prosecution witness [PW1, PW2, PW3, PW4 and PW6] are immense making the prosecution case highly suspicious. The inconsistencies and contradictions in their testimonies are not minor they go to the root of the case [as it was held **R V. Sendama**]. The Prosecution also failed to call a material witness namely Lugwe S/O Mwezige who was seen by PW1 talking to the accused at the crime scene. The PW4 also said he saw Lugwe with the accused before the commission of the crime in the same night. Moreover, Godo Mangale (PW2) testified that he took Lugwe and the accused to the pombe shop. PW2 testified that Lugwe was present when he (PW2) was recording the accused saying he killed the deceased. Therefore, Lugwe was a key witness. Failure to call such witness is fatal.

The defence is only required to raise doubts on prosecution case. The accused may be a lie or may tell lies but he cannot be convicted merely on suspicious. This was stated in the case of **Richard Mtangule & Another V. R [1992] TLR 9**. It is the law as held in **Christian Kale and Rwekaza Benard V. R [1992] TLR 302** that the accused cannot be convicted due to the weakness of his defence.

From the foregoing I find that while the defence had raised reasonable doubts, the Prosecution have failed to prove the case beyond reasonable doubts that it was the accused Nyale Ngome who murdered Kalimbo S/O Nyawa @ Majaji. I therefore concur with the opinion of assessors and find him not guilty of the offence of murder. I order his immediate release unless otherwise lawfully continue to be detained in custody.

DATED at TANGA this 16th Day of August 2021.



U. J. AGATHO

JUDGE

16/08/2021

Date: 16/08/2021

CORAM: U.J. Agatho, J

Accused: Present with his advocate Abubakary Omary

Republic: Tussa Mwaihesya, State Attorney

Court: Judgment delivered today this 16th day of August, 2021 in the presence of Accused and his advocate, Abubakar Omary, and Tussa Mwaihesya, State Attorney for the prosecution.



U. J. AGATHO

JUDGE

16/08/2021



Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

16/08/2021