

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MUSOMA

**CONSOLIDATED CRIMINAL SESSIONS CASES NO. 18 AND 61 OF
2020**

THE REPUBLIC

VERSUS

MAGUCHU S/O JULIUS GORYO.....1ST ACCUSED
MUUNDA S/O MATIKU MGABO.....2ND ACCUSED
STEPHANO S/O MATIKU @ KIKUNGU3RD ACCUSED
JACKSON S/O RAPHAEL DAUDI @KIBAGO.....4TH ACCUSED

JUDGMENT

15 Feb & 11th March, 2021

Kahyoza, J.

Kelvin s/o Juma died a violent death on the 27th day of October, 2018 at Songambe village within the District and Municipality of Musoma in Mara Region. The police arrested and arraigned the accused persons for murdering **Kelvin s/o Juma**. The accused persons denied to commit the offence. The accused persons stated that they nowhere near the crime scene that night. The offence was committed at night. The prosecution's witnesses alleged that the identified the murders.

The issue is whether the prosecution's witnesses did properly identify the murders at night.

The accused persons **Maguchi s/o Julius Goryo, Muunda s/o Matiku s/o Mgabo, Stephano s/o Matiku Kikungu** and **Jackson s/o Raphael Daudi @ Kibago** stand charged with the offence of murder contrary to section **196** and **197** of the **Penal Code [Cap. 16 R.E 2019]** (the **Penal Code**). It is alleged that on 27th day of October, 2018 at Songambe village within the District and Municipality of Musoma in Mara Region, the accused persons murdered one **Kelvin s/o Juma**. The accused persons pleaded not guilty to the charge.

There is no dispute that **Kelvin Juma** is dead. The prosecution and the accused persons agreed upon this fact during the preliminary hearing. It is the principle of the law that matters agreed upon by both parties during the preliminary hearing do not require proof. **Kelvin Juma's** death was an unnatural one. The post mortem examination report (Exh. P. 1) shows that **Kelvin Juma's** death was due intracranial hemorrhage as a result of severe head injury. **Pw1 Dr. Regina** described in the post mortem report that the deceased sustained a wound on the occipital area 1cm long and 0.5 cm deep. **Pw1 Dr. Regina** tendered the post mortem report as exhibit P.1 and read its contents in Kiswahili.

The prosecution summoned five (5) witnesses to prove that the accused persons killed the deceased with malice forethought. The witnesses were **PW1, Dr Regina Bernard Msonge, PW2 Juma Rusili , Pw3 Chales Juma, Pw4 Mwanaharusi Toro Mwasi** and **PW5, D/C Shida**.

The prosecution's case is that on the 27/10/2018 at 09:00 **PW2, Juma Rusili, Pw3 Charles Juma, Nyabitala** and **Kelvin Juma**, the

deceased person went to attend a party at one **Mama Saida's house**. They danced the music up to 11:00 pm and decided to return to their respective home place.

On their way home, **PW2 Juma Rusili** and **Pw3 Charles Juma**, deposed that a group of bandits waylaid them and ordered them to squat. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that the group of bandits hid on either side of the road, in other words, the bandits hid on **PW2, Juma Rusili's** and **Pw3 Charles Juma's** left and right hand sides. They deposed that assailants on the left-hand side lit two torches with such intensity, that they were able to see objects 50 metres away. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that they identified four assailants who were on their right-hand side. They added that the assailants on the right-hand side were three paces away from them.

PW2, Juma Rusili, Pw3 Charles Juma and **Nyabitala** obeyed the bandits order to squat. According to **Pw3 Charles Juma** the deceased **Kelvin Juma** disobeyed. He remained standing. One of the assailants, hit the deceased on the occipital area with the club. **PW2 Juma Rusili** testified that the bandits on the right-hand side he recognized were **Kibago, Maguchi, Muunda, Defao and Magesa**. Whereas, **Pw3 Charles Juma** deposed that by help of torches' light and the moonlight, he recognized **Muunda, Maguchi, Stephano and Kibago**. Both **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that Kibago, one of the bandits, went closer to **Kelvin Juma** hit with a club.

PW2 Juma Rusili escaped after the assailants hit Kelvin. **Pw3 Charles Juma** remained at the crime scene for a while before he escaped.

He witnessed the Stephano taking a panga and cutting Nyabitala on the head. Later, he escaped and went back to the party to seek for assistance.

PW2 Juma Rusili and **Pw3 Charles Juma** deposed that they knew the assailants, the accused persons before the incident. **PW2 Juma Rusili** deposed that he used to prepare brick kiln with Muunda and Maguchi. **PW2 Juma Rusili** added that Kibago was residing at Songambe area, close to his relatives' place. Muunda was a resident of Lwamulimi. **PW2 Juma Rusili** added that he recognized their voices and that he identified them due the clothes they used to wear. He was assisted by the torches' light lit by the bandits on the left-hand side. He identified the first accused person as Maguchi, the second accused as Muunda and the fourth accused as Kibago.

Pw3, Chales Juma deposed further that he saw Maguchi and Muunda at the scene of the crime. He identified Maguchi and Muunda as the first and second accused persons. He stated that he knew the accused persons before the incident, Muunda used to work with him in preparing brick kiln and Maguchi used to play football with him. He added that he knew Stephano as a footballer, a DJ and a *bodaboda* rider (meaning a motorcyclist ferrying people). He knew Kibago as he was residing in his grandfather's house, a motorcyclist for gain (*bodaboda rider*). He deposed that they identified people on the right-hand side as people on the left-hand side lit torch. He deposed that the torches' light had high intensity and was intended to stop them from walking. He added that people on the right-hand side stood three paces away from them while those on the left-hand side were about six paces away from them.

Pw3, Chales Juma after he escaped he went back to the party where he sought for help in vain. Finally, he got assistance from his cousin. They went to towards the area they were ambushed and found no one. **Pw3, Chales Juma** and his cousin went around the area and met the assailants who ordered them to stop. They escaped. **Pw3, Chales Juma** in fear of attack, decided to spend night at his cousin's place.

PW2 Juma Rusili testified after he escaped he went home and slept. He woke up the following morning took out the herds of cattle for grazing. Later on, he heard an alarm. **Pw3, Chales Juma** deposed in the morning that he found people crying. They testified that they went to the place where people had assembled. They saw Kelvin's body lying on its stomach, hands tied from behind and mouth and nose filled with sponge.

After **PW2 Juma Rusili** found out Kelvin was dead, he narrated to the deceased's mother, **Pw5 Mwanahamisi**, what happened the previous night. He told her that they were ambushed and that he identified some of their assailants.

Pw3, Chales Juma deposed that after sometime police arrived at the area and **he** narrated what took place resulting to Kelvin's death. Police took the body and he went with the police to give his statement.

During the cross-examination **PW2 Juma Rusili** deposed it was Kibago who hit the deceased with a club. He stated that the assailants hid on the sisal plantation on either side of the road or way. They emerged from the plantation and ambushed them.

On being cross-examined, **Pw3, Chales Juma** deposed he saw Maguchi, Kibago and Stephano at the party. He added that Kibago had

club. He hid the club on the back and wore a red cap, shirt, and pair of trousers. Stephano wore a white shirt and Maguchi wore a black shirt and pair of trousers. He deposed he led the police to arrest Kibago and Stephano. He added that after the incident Kibago (Jackson) disappeared. He was not at his home place. He deposed that Kibago was arrested in 2020.

Pw4 Mwanaharusi Toto Mwasi deposed that on the 28/10/2018 at 7:00am got news that her son Kelvin was dead. She went to the place where Kelvin's body was lying. Kelvin was lying to his stomach, died and his hands tied from behind and his nose and mouth filled with sponge. Whilst at that place, **Pw3 Charles Juma** told her that they were ambushed at 11.00pm by people he recognized. She deposed that **Pw3 Charles Juma** told her that he recognized Maguchi, Muunda, Stephano and Kibago. She deposed that **Pw3 Charles Juma** informed her that it was Kibago who hit the deceased with a club. She added that **Pw2 Juma Rusili** confirmed what **Pw3 Charles Juma** told her.

PW5, D/C Shida, the last prosecution witness, deposed that he was assigned to investigate a case of murder of one Kelvin Juma on the 30/10/2018. He interrogated the accused persons Maguchi and Muunda who were already arrested. He identified Maguchi and Muunda as the first and second accused person in that order. He deposed that Maguchi and Muunda were arrested on the 28/10/2018. He added that later Stephano and Jackson were arrested on the 26/1/2019 and 20/2/ 2020 respectfully. He deposed that it took time to arrested them as they kept hiding and it was **Pw3 Charles Juma** who was tracking Stephano and Jackson. It was

Pw3 Charles Juma who led to the arrest of Stephano and Jackson by informing the police.

The defence summoned seven witnesses. All the accused person raised the defence of *alibi* and adduced evidence to supported it except the second accused person.

Dw1 Maguchi Julius Goryo, the first accused person, deposed that he is *bodaboda* rider (a motorcyclist) ferrying people from one place to another. He started working as *bodaboda* rider from 2010 up to the date he was arrested. On 27/10/2018 he went to his wokrk place and returned home at 1:30 pm. He took bath, ate his dinner, and slept. He denied to attend a party at Mama Saida's home. **Dw1 Maguchi Julius Goryo** testified that the police arrested him on the 28/10/2018 at 08:00 hours at his home place at Songambebe.

Dw1 Maguchi Julius Goryo refuted to know Pw2 **Juma Rusili** and Pw3 **Chalres Juma**. **Dw1 Maguchi Julius Goryo's** evidence was supported by his father **Dw5 Julius Goryo**. **Dw5 Julius Goryo** deposed that **Dw1 Maguchi Julius Goryo** on the 27/10/2018 went to his work of riding a *bodaboda* and came back at around 1.30 pm and went on bed at 09.00pm. He deposed that he occupied one house with **Dw1 Maguchi Julius Goryo**. He added that on the 28/10/2018 **Dw1 Maguchi Julius Goryo** left to his work in the morning as usual when he returned from his business and the police arrested him.

Dw2 Muunda Matiku Mgabo, the second accused person, deposed that one Emmanuel Mwita employed him to graze his herds of

cattle. He deposed that on 27/10/2018 he grazed his employer's herds of cattle, returned herds of cattle, and took his dinner. He took a rest. On the 28/10/2018 he grazed his employer's herds of cattle, returned them and on his way home police arrested him. He deposed that the police took him to police station and tortured him. He told the court that he did not know **Juma Rusili** and **Charles Juma**.

Dw3, Stephano Matiku Kikungu, the third accused person deposed that he was a resident of Songambe and disco joker (DJ). He testified that on the day of 27/10/2018 he was engaged to perform his work at Hellena Makoli's home. Helena Makoli had a party. He stopped the music at midnight and spent a night at Hellana's place as he could not get transport back to his home place.

He deposed that police arrested and took him to central police station on 25/01/2019, where they interrogated. He denied to attend a party held by Mama Saida. He testified that he knew **Dw1 Maguchi Julius Goryo** who a rider of *bodaboda* and that he knew the fourth accused person because they lived in the same street. He refuted to know **Juma Rusili (Pw2)** and **Charles Juma (Pw3)**. He denied to have been engaged in the business of making brick kiln or to play football.

Dw3, Stephano Matiku Kikungu summoned **Dw6 Helena Makoli** who deposed that she had function at her home place on the 27/10/2018 and hired DJ **Stephano Matiku Kikungu**, the third accused. She added that **Dw3, Stephano Matiku Kikungu** remained at that place until the party came to an end at mid-night.

During cross-examination, **Dw3 Stephano Matiku Kikungu** deposed that his host allocated him a room where he slept that night after the music stopped.

Dw6 Helena Makoli told the Court during cross-examination that after the party ended **Dw3, Stephano Matiku Kikungu** spent a night outside guarding his music system. She denied to give a room to **Dw3, Stephano Matiku Kikungu** as she had no such a room. She added that **Dw3, Stephano Matiku Kikungu** and her other guests slept outside her house.

Dw4 Jackson Daudi Raphael Kibago, the fourth accused person, deposed that he was a *bodaboda* rider from 2008/2009 up to the date of his arrested. At first, he conducted his business at Majengo later moved to Bweri bus stand. He owned motorcycle with registration number MC 601AZX, Rifan. He deposed that on the 27/10/2018 at 7:00 am he went to Bweri Stand and return to his home place at Songambebe at around 8:30pm. He took bath, ate food and he slept. On the following day, Dw4 Jackson Daudi Raphael Kibago deposed that he woke up, went to his business place, and returned home for lunch. He testified that when returned home for lunch, his wife told him that there was a person found dead. He took lunch and went back to his work.

Dw4 Jackson Daudi Raphael Kibago denied being a mason or knowing **Juma Rusili** and **Charles Juma** before they testified.

Dw4 Jackson Daudi Raphael Kibago's evidence was supported by his wife, **Dw7 Elizabeth Naftari**. **Dw7 Elizabeth Naftari** deposed that her husband, the fourth accused person, went on his daily activities on

the 27/10/2018 and returned home at around 7:30 pm. He had his dinner and slept. She deposed her husband did not go out that night. She added that on the 28/10/2018 **Dw4 Jackson Daudi Raphael Kibago**, her husband, left in the morning as usual and return in the afternoon for lunch. She stated that during lunch she notified there was a person found dead at Songambele. She testified further that her husband left after lunch for his work.

In a case of murder the prosecution is required to establish that the accused person killed the deceased with malice aforethought and to do so beyond reasonable. See section 196 of the Penal Code. It stipulates that-

196. "Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

In the case at hand, there is no dispute is Kelvin Juma is dead. He died a violent death on the 27/10/2018. Before I embark on determining the issue as to whether the accused person killed the deceased, I will determine whether the assailants had malice aforethought or not.

To begin with, I will reproduce the provision of section 200 of the Code, which states the circumstances under which malice aforethought can be deemed to be established. It reads:

"200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

*(a)**an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

(b)knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; whether that person is the person actually killed or not, although

that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused;

(c)an intent to commit an offence punishable with a penalty which is greater than imprisonment for three years;

(d)an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence". (Emphasis is added)

The undisputed evidence depicted by the Exh.P1. shows that Kelvin sustained a deep cut would 2cm long and 0.5 cm deep. According to **PW2 Juma Rusili** and **Pw3 Charles Juma**, the assailant inflicted the wound with club with sharp points. Those facts establish the fact that the assailant intended to cause grievous harm to Kelvin or his death. The facts establish the conditions under section 200(a) and (b) of the **Penal Code**. Thus, the assailant killed Kelvin with malice aforethought.

In addition to the above, the Court of Appeal had an opportunity to discuss the issue of malice aforethought in the case of **Enock Kipela Vs Republic**, Criminal appeal No. 150 of 1994 (Unreported), it stated 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.***
"

The evidence in this case revealed that Kelvin Juma, the deceased a deep wound in the occipital part of the head. The wound was 2 cm long and 0.5 cm deep. Those facts proved that Kelvin's assailant applied massive force to pierce the skull and penetrate it that deep. I do agree with the prosecution that the perpetrator intended to kill as he hit the head a sensitive part of the human body. I have no scintilla of doubt that applying the holding in the case of ***Enock Kipela Vs Republic***, the conclusion that Kelvin's assailant had malice aforethought is inevitable. I so find.

That done, I now consider the difficult part of this trial, whether the accused persons are responsible with Kelvin's death.

The prosecution's evidence dangles on the recognition evidence of **PW2 Juma Rusili** and **Pw3 Charles Juma**. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that they saw and recognized the accused persons at night by help of the torches' light. They testified that the assailants where in two groups, **one** group on each side of the road. The group of bandits the on left-hand side lit torches to stop **PW2, Juma Rusili, Pw3 Charles Juma, Kelvin Juma** (the deceased) and **Nyabitara**. The torches' light assisted them to identify the group of bandits on the right-hand side, who were close and ready to give and implement orders. The defence relied on the defence of *alibi*. The

prosecution lead by Mr. Byamugu, state attorney and the defence, which represented by Mr. Wambura advocate agree that the offence was committed at night. It is trite law that visual identification evidence at night is the weakest evidence. The Court must warn itself before it relies on such evidence to convict the accused person. See the case of **John Balngomwa & Two Others V. R.**, Criminal Appeal No. 56/2013 CAT (unreported), where the Court of Appeal held that-

"..we take to be settled law to the effect that "evidence of visual identification is of the weakest kind and most unreliable." As such, she held rightly, "courts are not expected to act on "such evidence "unless all possibilities of mistaken identity are eliminated and that the evidence is absolutely watertight."

It is clear from above that the Court must be fully satisfied that the evidence clearly shows the conditions favoring a correct and watertight identification. (See **Raymond Francis v. R.** (1991) TLR 100). The Court of Appeal discussed conditions favoring a correct and watertight identification in the case of **Waziri Amani v. R.** [1980] T.L.R. 250. It is very vital to note that it is not enough for the court look at factors favoring correct identification but also the credibility of the witness has to be considered as well. See the decision in the case of **Jaribu Abdallah v. R.**, Criminal Appeal No. 220 of 1994 CAT (unreported).

The conditions favouring a correct and watertight identification discussed in the case of **Waziri Amani v. R** (supra) include-

- 1. the time the witness had the accused under observation;*
- 2. the distance at which he observed him;*

- 3. the conditions in which such observation occurred, for instance, whether it was day or night time;*
- 4. whether there was good or poor light at the scene; and*
- 5. further whether the witness knew or had seen the accused before or not".*

In the case at hand **PW2 Juma Rusili** and **Pw3 Charles Juma** spent very little time. **PW2 Juma Rusili** deposed he escaped immediately after one of the bandits hit **Kelvin Juma**. It was at that time he realized that the bandits were in business. The defence submitted that the time **PW2 Juma Rusili** spent with assailants was not enough to identify the culprits. The prosecution contended that it was enough. On my part, I am of the view that the time spent was enough to enable **PW2 Juma Rusili** to properly recognize the assailants if he knew them prior to the commission of the offence and the depending on the intensity of light. The evidence is that the culprit ordered them to stop, followed by the order to squat. They obey and squatted. They assailants were three paces from **PW2 Juma Rusili**. They were close. One of the assailants approached the deceased and hit him with a club. All the events **PW2 Juma Rusili** narrated did not happened in a fraction of a second. They happened within such time to allow him to recognize a person who was familiar to him.

Unlike **PW2 Juma Rusili**, **Pw3 Charles Juma** had enough time to identify or recognize the assailant. He escaped after **PW2, Juma Rusili**. He witnessed another assailant inflicting a cut wound to Nyabirata.

Another condition favouring a correct and watertight recognition or identification to consider is the distance *at which the witness observed the*

assailant. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that the distance between them and the bandits on their right-hand side was three paces. The distance of three paces favoured a correct identification or recognition. Not only that but also **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that the assailant hit the deceased with a club. It is obvious that in order to hit a person with a club they must be close each other.

It is on record, regarding the issue *whether there was good or poor light at the scene*, that the light was enough. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that a group of bandits lit two torches. They described the intensity of the light to be such that it enabled them to observe things 50 paces away. The defence submitted that the prosecution did not describe the intensity. I differ with the defence advocate. Much as the **PW2 Juma Rusili** and **Pw3 Charles Juma** did not use the words high intensity, their account was enough to tell explain the intensity. They deposed that the bandits intended to scare and stop them using the torches' light. The light enabled them to see things 50 metres away.

I am of the firm view that there was enough light. During cross-examination **Pw3 Charles Juma** described the assailants' attire. He deposed that he saw Maguchi, Kibago and Stephano at the party before they assailed them. He saw Kibago at the party with a club. He hid it on the back and wore a red cap, shirt, and pair of trousers. Stephano wore a white shirt and Maguchi wore a black shirt and pair of trousers.

The last but not least condition favouring a correct and watertight recognition or identification to consider is *whether the witnesses knew or had seen the accused before or not*". **PW2 Juma Rusili** and **Pw3**

Charles Juma deposed that they knew the assailants before the material date. The accused person refuted to know the **PW2 Juma Rusili** and **Pw3 Charles Juma** in their defence. **PW2 Juma Rusili** deposed that he used to prepare brick kiln with Muunda and Maguchi. **PW2 Juma Rusili** added that Kibago was residing at Songambe area, close to his relatives' place. Muunda was a resident of Lwamulimi. **PW2 Juma Rusili** added that he recognized their voices and that he identified them due the clothes they used to wear.

Dw1 Maguchi Julius Goryo and **Dw2 Muunda Matiku Mgabo** strongly opposed that evidence of making or arranging brick kilt with **PW2 Juma Rusili**. **Dw1 Maguchi Julius Goryo** deposed that he was riding a *bodaboda* for gain. **Dw2 Muunda Matiku Mgabo** testified that one Emmanuel employed him to graze his herds of cattle. There is one fact which is evident is that the accused persons and **PW2 Juma Rusili** were residents of the same neighboring hamlets or the same hamlets. I do not rule out the possibility of seeing each other before. The Court of Appeal in the case of **Waziri Amani v R.** (supra) pointed out that the witness ought to prove that he *knew or had seen the accused before or not*. In this case, I have no doubt that **PW2 Juma Rusili** *knew or had seen the accused before*.

Pw3 Charles Juma, gave evidence that he knew the assailants very well. **Pw3, Chales Juma** deposed that he saw Maguchi and Muunda at the scene of the crime. He knew the accused persons before the incident, Muunda used to work with him in preparing brick kiln and Maguchi used to play football with him. He added that he knew Stephano as a footballer, a

DJ and a *bodaboda* rider (meaning a motorcyclist ferrying people). He knew Kibago as he was residing in his grandfather's house, a motorcyclist for gain (*bodaboda rider*). **Dw3, Stephano Matiku Kikungu**, deposed that he was a resident of Songambele and disco joker (DJ). He testified that on the day of 27/10/2018 he was engage to perform his work at Hellena Makoli's home. He confirmed **Pw3, Chales Juma's** evidence.

Dw4 Jackson Daudi Raphael Kibago, deposed that he was a *bodaboda* rider from 2008/2009 up to the date of his arrested. Thus, confirming the evidence of **Pw3, Chales Juma**.

Given the above evidence I have no doubt in mind that **PW2 Juma Rusili** and **Pw3 Charles Juma** knew the accused persons the assailants before the incident, which resulted into Kelvin's death.

Before, I conclude whether prosecution witnesses correctly identified the accused persons I have to appraise the accused persons' defence of *alibi*. I agree with the defence counsel that once the accused person raises the defence of *alibi* he assumes no duty to prove it. The accused person's duty is merely to cast doubt in the prosecution's evidence. It is enough for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. The Court of Appeal held in **Jumanne Juma Bosco & Mohammed Jumanne v. R**, Criminal Appeal No. 206/2012 CAT (Unreported) that-

"When an accused person puts forward an alibi as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution."

In the case at hand, the defence **Dw1 Maguchi Julius Goryo** deposed that he did not go to the party on the material night. He went to his daily work and returned home at 7:30 pm ate his dinner and went to bed. **Dw1 Maguchi Julius Goryo's** evidence was supported by his father **Dw5 Julius Goryo**.

Dw2 Muunda Matiku Mgabo, refuted to attend a party on the material night. He deposed that after he came from grazing his employer's herds of cattle he too rest.

Dw3, Stephano Matiku Kikungu deposed that on the 27/10/2018 **Dw6 Helena Makoli** hired his services as a DJ. He spent a night at that place. **Dw6 Helena Makoli** supported **Dw3, Stephano Matiku Kikungu's** evidence. **Dw3, Stephano Matiku Kikungu** and **Dw6 Helena Makoli** differed on the place where the **Dw3, Stephano Matiku Kikungu** spent a night after the function came to an end. **Dw3, Stephano Matiku Kikungu** deposed that **Dw6 Helena Makoli** offered him a room where he slept where **Dw6 Helena Makoli** testified that **Dw3, Stephano Matiku Kikungu** spent a night outside guarding his music instruments as she had no room to offer him. This contradiction is fundamental. It weakens the credibility of both **Dw3 Stephano Matiku Kikungu** deposed that **Dw6 Helena Makoli**. For that reason, **Dw3 Stephano Matiku Kikungu's** defence of *alibi* is too weak to raise doubt in the prosecution's identification evidence.

Dw7 Elizabeth Naftari supported **Dw4 Jackson Daudi Raphael Kibago's** evidence that he did not go to the party on the 27/10/2018.

Dw4 Jackson Daudi Raphael deposed after he closed his business he went home and slept with his wife, **Dw7 Elizabeth Naftari**.

Having considered the evidence of identification and the accused person defence evidence of *alibi*, my duty is to determine whether the accused persons' defence raised a reasonable doubt. As shown above **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that there were conditions favouring proper, correct recognition the assailants, the accused persons. There was sufficient light, time spent was sufficient to identify the culprit, the distance between the witness and the accused persons three paces and finally that they knew the assailants before. The remaining question is whether there are grounds for me to disbelieve **PW2 Juma Rusili** and **Pw3 Charles Juma**. To answer the question, my starting point is the decision of the Court of Appeal Court of Appeal in **Goodluck Kyando v. Republic**, (2002) TLR 363 that-

"every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness."

I was unable to find the reason why **PW2 Juma Rusili** and **Pw3 Charles Juma** would lie against the accused persons. They had no grudges against the accused persons. Not only that but also immediately after **PW2 Juma Rusili** and **Pw3 Charles Juma** discovered that Kelvin Juma is dead, they informed **Pw4 Mwanaharusi Toto Mwasi** persons responsible with the death. The evidence shows that Kelvin's body was found on the 28/10/2018, that same day **PW2 Juma Rusili** and **Pw3 Charles Juma** reported to **Pw4 Mwanaharusi Toto Mwasi** and **Pw3 Charles Juma**

made statement to police. In **Marwa Wangiti and another v R.**, [2002] T.L.R 39 the Court of Appeal held that

"The ability to a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained or complete failure to do so should put a prudent Court to inquiry.."

The defence tried to impress on me that the **PW2 Juma Rusili** and **Pw3 Charles Juma** delayed to report the incident. The defence was of the view that **PW2 Juma Rusili** and **Pw3 Charles Juma** must have reported that very night. I was not moved by the submission as **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that they did not know that Kelvin met his demise that night. They realized that Kelvin is dead on the following morning and that very morning they disclosed to **Pw4 Mwanaharusi Toto Mwasi** and police. **PW2 Juma Rusili** and **Pw3 Charles Juma's** report enabled the police to arrest the **Dw1 Maguchi Julius Goryo**, the first accused and **Dw2 Muunda Matiku Mgabo**, the second accused, on the date Kelvin's body was recovered. I am of the view that **PW2 Juma Rusili** and **Pw3 Charles Juma** named the accused person timely. **PW5, D/C Shida** deposed police did arrested the third and fourth accused persons on time as they were hiding. It means police had information that the participated in the commission of the offence.

I find that the **PW2 Juma Rusili** and **Pw3 Charles Juma** sufficiently identified the accused persons as the assailants. They also properly identified the first accused **Jackson Daudi Raphael Kibago** as the person who hit the deceased with a club resulting to his death. The

accused persons' defence of *alibi* did not raised a reasonable doubt to the prosecution's evidence of recognition.

All Ladies and gentleman assessors opined that the prosecution evidence was short of establishing that the accused persons committed the offence beyond reasonable doubt. The first Lady Assessor opined that the prosecution's evidence was too weak, to support the accused persons' conviction.

The second Gentleman assessors opined that the prosecution identification evidence is weak. One witness identified the accused persons using the torches' light and another witness identified them by use of the moonlight. The prosecution witnesses did not report the incident that very night. One of the witnesses was the deceased's blood brother failed to report. He opined that that the accused persons were not guilty.

The last assessor, opined that the accused persons were not guilty for reasons that Pw3 Charles Juma, the deceased's brother saw the incident, escaped and spent a night without reporting anywhere. Pw5 police did not witness the commission of the act. He did not collect the club and tender it as evidence. Pw5 did not write down the confessions statement (ungamo) of the accused persons. There was no proof from the police that the accused persons committed the offence.

I differ with the Ladies and Gentleman assessors, I find the prosecution proved the accused person's guilty beyond reasonable doubt. I demonstrated above how the prosecution's evidence of recognition passed the test in the case of **Waziri Aman V R.** (supra). **PW2 Juma Rusili** and **Pw3 Charles Juma** sufficiently identified the accused persons as the

assailants. They recognized the accused persons as they knew them before, they were closed to each other, time spent was sufficient to support a correct and watertight recognition or identification. To cup it all I demonstrated that there was sufficient light. **PW2 Juma Rusili** and **Pw3 Charles Juma** deposed that there was light from the bandits on the left-hand side which enabled them to identify the bandits on the right-hand side, who were three paces away. They explained the intensity of the light. It is true that **Pw3 Charles Juma** deposed there was moonlight, but he did not say he only identified the accused person due the moonlight only. I did not see any contradiction. In actual fact **Pw3 Charles Juma's** evidence of identification was more watertight than that of **PW2 Juma Rusili**.

It is true that **PW2 Juma Rusili** and **Pw3 Charles Juma** did not report the incident that night. They gave sounding reasons for not reporting, which I accepted. They stated that on that night they did not know that **Kelvin Juma** met his demise. **Pw3 Charles Juma** deposed that he did not go home. He spent night at his cousin's place for fear of being attacked by the bandits that very night. It is on record that **PW2 Juma Rusili** and **Pw3 Charles Juma** reported in the morning following the fateful night after **Kelvin Juma's** body was discovered. It is their report that precipitated police to arrest the first and second accused persons.

It is for the above reasons, I differ with Ladies and Gentleman assessors.

It is on record that only the fourth accused person hit the deceased person with a club. Section 22 of the **Penal Code** provides -

***22.-(1)** 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);

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

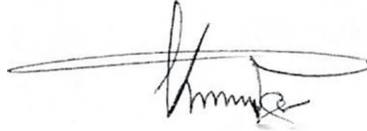
(c) every person who aids or abets another person in committing the offence;

(d);

The first, second and third accused persons accompanied **the fourth accused person, Jackson Daudi Raphael Kibago**, who hit Kelvin Juma, the deceased causing his death. They did not extend a helping hand to Kelvin Juma or prevent **Jackson Daudi Raphael Kibago**, to hit the deceased. For that reason, I find that they aided **Jackson Daudi Raphael Kibago** to hit the deceased to death. They conspired to murder Kelvin.

In end result, I find that the accused persons hit Kelvin causing his death and they did so with malice aforethought as shown above. I, therefore, find all the accused persons, **Maguchi Julius Goryo, Muunda Matiku Mgabo, Stephano Matiku @Kikungu, Jackson Rafael Daudi**

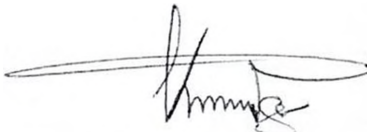
@ **Kibago** guilty and convict them with the offence of murder c/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2019].



J.R. Kahyoza
JUDGE
15/02/2021

Mr. Niko Malekela: I have nothing I pray the accused to be sentenced as per the law.

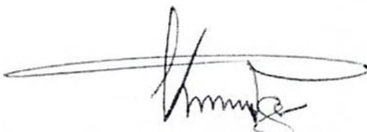
Mr. Wambura Advocate: Your Lordship give the nature of the sentence of the offence have been convicted with, I leave it to the Court.



J. R. KAHYOZA
JUDGE
11/3/2021

SENTENCE

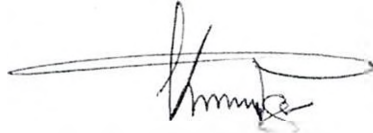
Court: The accused persons, Maguchi Julius Goryo, Muuda Matiku Mgabo, Stephano Matiku @ Kikungu and Raphael Daudi@ Kibago are sentenced to suffer death by hanging contrary to section 196 and 197 of the **Penal Code**, [Cap 16 R.E. 2019] read together with section 322 of the **Criminal Procedure Code**, [Cap. 20 R.E 2019].



J. R. KAHYOZA
JUDGE

11/3/2021

Court: Right of appeal after lodging a notice of appeal 30 days from today explained.



J. R. KAHYOZA

JUDGE

11/3/2021

Court: Judgment delivered and sentence passed in the presence of Mr. Malekela, the State Attorney for the Republic, the accused persons, and their advocate Mr. Wambura. The Ladies and gentleman Assessors, Mrs. Bahati Ntalima, Mr. Aloyce Masatu and Mrs. Perusi Masokonya were also present. B/C Ms. C. Tenga present.



J.R. Kahyoza

JUDGE

11/3/2021

Court: Ladies and Gentleman assessors thanked and discharged.



J. R. KAHYOZA

JUDGE

11/3/2021