

**IN THE HIGH COURT OF TANZANIA**  
**AT GEITA**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SESSIONS CASE NO. 137 OF 2016**

**THE REPUBLIC**

**VERSUS**

**EMMANUEL S/O NENGO ..... 1<sup>ST</sup> ACCUSED**

**DOTTO S/O ELIAS .....2<sup>ND</sup>ACCUSED**

**JUDGMENT**

**24 & 25/03/2021**

**RUMANYIKA, J.:**

Emmanuel Nengo and Dotto Elias herein (the 1<sup>st</sup> and 2<sup>nd</sup> accused) respectively they stood charged with an offence of murder C/s 196 of the Penal Code Cap 16 RE. 2019 that on 2/12/2013 at about 20:00 hours at Isulwabutundwe village, district and region of Geita they murdered Anastazia Kabadi (the deceased).

Messrs J. Palangyo learned state attorney appeared for the Republic. Messrs L. Rwabuhanga and Bugoti learned counsel appeared for the 1<sup>st</sup> and 2<sup>nd</sup> accused respectively.

Messrs Anna Mussa, Rebeca Kasidye and Mussa Samson ladies and gentleman assessors they sat with me.

Pw1 Amos Luhemeja (48) an auxiliary police of Isulwabutundwe village he stated that as was around at the centre, following the incident and one lady had reported it to him and the place was unusually noisy, together with others, inclusive of Adam and Yoyela they rushed to the scene (say 2 paces away) where they saw two bicycles around and met the suspicious 2<sup>nd</sup> accused run away for that reason they put him under arrest and shortly found the lady slashed with pangas and brutally murdered in the multipurpose house (a bar and residence). That now that it was no longer at ease as people were hungered, he did not interrogate them, instead he handed the accused to policemen his fellows also had apprehended the equally suspicious – 1<sup>st</sup> accused around (copy of the statement Pw1 made before the latter - Exhibit "P1")

Pw2 Adam Doyela (born in 1974) a peasant of Isulwabutundwe village he stated that as he was in the material night together with Pw1 at the centre and following it a lady having reported the incident and they heard a lady scream for help, at the Pw1's request they rushed to the scene (say 15 paces away) but as on the way they met the suspicious 2<sup>nd</sup> accused ran away they apprehended him so was another man instantly apprehended. That only Christina could have recognized the two men.

Pw3 Christina Migeka (30) formerly a resident thereof she stated that just as at the material time she was having supper with her mother (the deceased) and sister one Rahel Migeka, two culprits, one in a whitish shirt (instantly apprehended) stormed in and flashed a torch light at her but cut the deceased with a panga in the head that she escaped and took a hide at a neighbour one Faida then two people including Pw1 arrived only now back to the scene of crime to find the deceased having been slushed with a panga to death.

Dw1 (the 1<sup>st</sup> accused) stated that just as, together with the 2<sup>nd</sup> accused at the material time having had an evening walk beer were around for some and as he visited one Frola his lover, the 2<sup>nd</sup> accused remained behind drinking some coffee, thereafter they heard some public alarms around, but as they ran thereto say a group of six (6) people put them under arrest they assaulted and accused them for murder then they were for that reason in the next morning produced to Kasamwa police post. Still he was in his blue T – shirt and a jeans trouser he was just like that arraigned in court.

Dw2 (the 2<sup>nd</sup> accused) (47) stated that as, by that time he was peasant and resided at Nyakadua village but with the 1<sup>st</sup> accused having

had walked to Isulwabutundwe for some beer and also the former paid a visit to his lover around, just as he was seated drinking some coffee but having had heard some public alarms and just rushing thereto, some 6 people apprehended them and later were as accused for murder as today charged. That is all.

The ladies and gentleman assessors unanimous opined in the the accused's favor that the accused were not properly identified and therefore the prosecution case wasn't beyond reasonable doubts proved.

In fact through evidence of Pw3 on one hand and that of pw1 and pw2 on the other hand the prosecution case was only built on evidence of visual identification at night and suspicion respectively. Pw3 may have identified the culprits yes, but the central issue is whether she made it mistakes free much as the source of and light intensity it was clearly and sufficiently stated leave alone distance and time that the culprits took under Pw3's observation (case of **Waziri Amani v.R** (1980) TLR 250 CA) given the long settled principle of law that unless possibilities of mistaken identity were all eliminated and the conviction was water tight evidence of visual identification at night it was the weakest kind of it ever. There is no wonder if at all, Pw3 did not at the earliest possible opportune name


the 1<sup>st</sup> accused whom with respect to her sister Rahel she recognized as brother in law be it to a neighbor one Faida where for a while, she took a hide during the tragedy or immediately thereafter to those who responded to the material alarms.

It is trite law that failure of the eye witness to name accused at earliest possible opportunity it lowered credence of the prosecution case. (see the case of **Marwa Wangiti Mwita & another v.R**, Criminal Appeal No. 6 of 1995 quoted with approval in the case of **Khatib Hamis & Another v.R**, Criminal Appeal No. 90 of 2016 (CA) unreported. In other words the accused were not properly identified by Pw3.

As said, the other question is whether there was, against the accused enough circumstantial evidence namely such evidence which one, from the evidential series of events it irresistibly led to no conclusion other than the accused's guilty ( case of **Gody S/o Katende @ Godfrey Katende v.R**, Criminal Appeal No 399 of 2018 (CA) unreported. Much as the evidence it was not such inferior to some other kind of evidence. Whether immediately after incident Pw1 and Pw2 they saw the accused suspiciously ran away from the material vicinity it wasn't that material because for the reason only known to the investigations officers no one

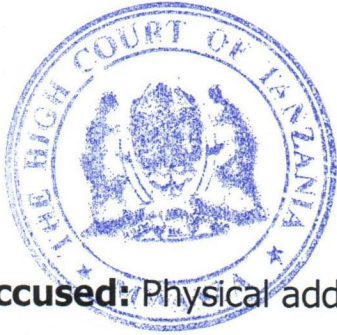
of the bicycles alleged so abandoned by the accused if at all was produced in court. At least it wasn't the prosecution evidence that the accused ran away from the deceased's material room leave alone, if at all the accused's suspicion had nothing to connect them to the offence charged nor was anything seized from the accused or agents thereof. If anything, it wasn't circumstantial evidence at all. The law is well settled that however strong might be suspicion alone cannot be proof of the case against the accused (see the case of **Mwingulu Madata & Another v.R**, Criminal Appeal No. 257 of 2011 (CA) unreported).

It is very unfortunate that the accused were even charged. Now that the prosecution case it has not been proved beyond reasonable doubts, the accused are acquitted unless they were detained for some other lawful cause both accused be released immediately from remand. It is so ordered. Right of appeal explained.



**S.M. RUMANYIKA**  
**JUDGE**  
**24/03/2021**

The judgment is delivered under my hand and seal of the court in court this 25/3/2021 in the presence of Mr. Kato state attorney, Mr. Liberatus and Mr. Bugoti defence counsel.



**S.M. RUMANYIKA**  
**JUDGE**  
**25/03/2021**

**1<sup>st</sup> accused:** Physical address Nyakadua village, Kasamwa Geita.

- Formerly – James Jongo Kabaruka cluster the cluster chair.

**2<sup>nd</sup> accused:** Physical address Nyakadua village, Kasamwa Geita.

Buyunge Buzari the local 10/10 formerly.