

IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

CRIMINAL SESSION NO. 88 OF 2020

THE REPUBLIC

VERSUS

WANDELA S/O HINDIA

JUDGMENT

Date of Last Order: 12.03.2021

Date of Judgment: 18.03.2021

A.Z.MGEYEKWA, J

The Accused WANDALE S/O HINDIA stands charged with murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2002]. The Accused Person denied the charge and hence the full trial involving calling of four prosecution witnesses and one for the defense.

The prosecution had alleged that on the 26th November, 2012 one WANDELA S/O HINDIA murdered one JOHN S/O SABAGANGA at Gininiga Village within Busega District, Mwanza Region. The murder in question is

alleged to have been committed at the deceased's residential house at Gininiga Village within Busega District, Mwanza Region.

During the trial, Ms. Gisela Alex, learned State Attorney represented the Republic while Mr. Mshongi, defence counsel represented the accused. The trial was conducted with the aid of three assessors namely; Josephal Madili, Jamila Kitundu, and Catherine Katemi. After each of the case had been closed, the counsels for both parties made their final submissions. I thank the counsels for their informative submissions, and the same has been considered in this judgment. I extend my thanks to the ladies and gentleman assessors who sat with me and stated their opinion basing on the facts of the case. All assessors opined to find the accused guilty.

In building its case, the prosecution called four witnesses, namely; Naomi John, Esther Washa, Petro William, Julius Sabaganga, and F 7041 Mwaluko. The prosecution side also tendered two exhibits namely; Sketch Map (Exh.P1) and Post Mortem Report (Exh.P2). The prosecution witnesses testified as following:-

The first witness, Naomi John, testified that in 2012 she was 14 years old. She testified that on 26.11.2012 around 00:00 hours she was asleep and heard noises, people were outside the cattle shed and the dogs were

barking. His father waked up and went outside to find out what was going on. PW1 testified that she also waked up and saw four people who entered into the sitting room and they had torches and bush knife and started to cut her father and one approached PW1 at the room door and requested for money.

PW1 went on to testify that her father was a farmer and a businessman. He was selling cows and had a credit business. PW1 stated that the culprit also injured her with bush knife on her hand. PW1 testified that she was able to identify the culprits because they had a torch and they were talking. PW1 testified that the incident took place within 30 minutes.

It was PW1 further testimony that she knew the accused, he was their neighbour and he often obtained loan from her father's business. PW1 testified that the Police Officer interviewed her and she named the culprits; Wandela Hindia, Kulwa Kaswakila, Pascal Mabula, and Masaga Madoli. When PW1 was cross examined

During cross examination, PW1 testified that in their village there was no electricity but the solar was on. PW1 said that she identified the culprits by a torch lite and the solar helped her to see inside. PW1 admitted that in her statement she did not mention that there was solar light. PW1

claimed that she narrated the suspects' appearance but the Police Officer did not record it. PW1 testified that on the day when the incident occurred she was mentally unwell. PW1 testified that the incident occurred when the villagers were planting maize.

During re-examination, PW1 testified that the suspects were four of them and they had four torches. PW1 testified that she saw the accused because they were lighting each other.

PW2, Esther Washa, testified that she is residing in Gininiga Village, at Simiyu Region with her children and John Sabaganga was her husband. PW2 testified that on 26.11.2012 while asleep at 00:00 hours, they heard voices and went to the cow shed. PW2 went on to testify that four culprits chased them and managed to enter inside the house and started to cut her husband. PW2 named the culprits; Wandela Hindia, Kulwa Kaswalala, Pascal Mabula, and Majumba Masaga.

She testified that she was able to identify them because of torch light. PW2 testified that the sitting room was small approximately 2 meters x 3 meters. PW2 went on to testify that the incident took one hour. PW2 testified that he was able to identify them because of bright moonlight and they were standing approximately 2 paces from where she was

standing. PW2 testified that the culprits cut her twice on her head and forehead and they stole Tshs. 2,500,000/=.

PW2 went on to testify that they raised an alarm people arrived and they were brought to Mkula Hospital and around 12:00 hours they were discharged. PW2 said that she knew one Wandela because they were residing in the same village. PW2 testified that she did not name the culprits to her fellow villagers because she was afraid. She added that the distance from their house to Wandela is approximately 3 minutes walking distance.

When PW2 was cross examined testified that at the time when they were invaded she was not in a normal condition. PW2 testified that the accused was wearing normal dresses. PW2 testified that they do not have any solar at their house. PW2 testified that lite of torch enabled her to identify the accused. PW2 testified that from their house to the cattle shed is a bit far. PW2 testified that there was no window in the sitting room. The moonlight lighted at the open door so the light was enough.

The third witness, Petro William testified that he is in 2012 he was a Street Chairman. PW3 said he knows Wandela as a residence of Gininiga village, before he was residing in another Ward. PW3 testified that on 26.11.2012, John Sabaganga was invaded and cut by a bush knife. PW3

testified that the deceased family raised an alarm and villagers gathered at the scene of the crime and they had a meeting and started to search for villagers. PW3 testified that they went to Wandela's house he was not present but his wife told them that his husband went to the place where the alarm was raised.

PW3 testified that he saw Wandela at the scene of the crime and they asked him of his whereabouts he said that he thought the alarm was raised at Madukani area like 10 minutes' walk from his place. PW3 testified that Wandela was arrested on the third week.

When PW4 was cross examined he testified that Wandela had a troll. PW1 testified that Wandela was present at the scene of the crime though he appeared at the funeral late and he participated to fetch water.

PW4, Julius Sabaganga, testified that the deceased was his young brother. PW5 testified that on 26.11.2012, he was at his house around 00:00 hours he was informed by Leah that they were invaded. PW4 testified that he saw John lying down and he had an injury on his head he was still alive but shortly they were informed that John passed away. PW4 testified that he took the PW1 and PW2 to the hospital. PW3 said that he know Wandela, they were residing in the same village.

When he was cross examined, PW4 testified that PW1 and PW2 did not tell him who killed the deceased. PW4 said that the wheelbarrow was used to fetch water at the funeral but he did not know if the wheelbarrow belonged to Wandela. PW4 said that the murder occurred on 26.11.2012 at 00:00 hours and Wandela was arrested on 17.12.2012.

It was F.1041 D/C Mwaluko (PW5), testimony that on 26.11.2012, he was informed that a murder occurred at Gininga village, one John Sabaganga was murdered. PW5 testified that the deceased body had several wounds. PW5 testified that the Doctor examined the body and prepared a Post mortem Report. PW5 prayed to tender the report because the Doctor already passed away. The Post Mortem Examination Report was admitted and marked as Exh. P1.

PW5 further testified that PW1 and PW2 told him that they were able to identify the suspects; Wandela Hindia, Luhanga (deceased) Kulwa Kaswalala, and others, they were residing at Gininga Village. PW5 testified that he left the scene of the crime but his secret informers were instructed to investigate the matter. PW5 stated that the accused was arrested on 17.12.2012 at his home. PW5 testified that they tried more than three times to arrest the accused but it was not easy to arrest them because they were hiding. He said that on the third attempt they managed to arrest Wandela Hindia at his house around 05:00 hours.

On the defense case; Wandela (DW1) who pleaded not guilty to the offence narrated that he resides in Gininiga village at Busega District, Simiyu Region. DW1 testified that he was arrested on 17.12.2012. DW2 went on to testify that he was facing the charges for murder of John Sebaganga. DW testified that on 26.11.2012 while asleep at his house he heard an alarm, later he waked up and headed to Gininiga center, then he was told that the alarm was coming from the other direction. DW1 did not end there, he testified that he delayed to arrive at the scene of crime. DW1 stated that he offered his wheelbarrow which was used to fetch water and collect wood at the funeral. DW1 testified that the Police Officer arrived at the scene of crime and all people were around including him and after the funeral they continued with their daily activities. DW1 denied to have murdered the deceased.

During cross examination, DW1 testified that he knew the deceased and his children and that they were in a good relationship. DW1 testified that on the day when the incident occurred he was asleep at his house with my wife and children, suddenly he heard an alarm. DW1 testified that he intended to call his wife as a witness but she left him. DW1 denied to have killed the deceased. DW1 claimed that he heard an alarm coming from the center. DW1 insisted that he was present at the scene of the crime with other people.

Upon a charge of murder being preferred against an accused person, the onus is always on the prosecution to prove not only the death of the deceased but also the link between the said death and the accused person. The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his innocence. See the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported). The standard of proof is one beyond reasonable doubt. By that, it means the proof of the charge against an accused person must not leave a shadow of any reasonable doubt that the person charged did indeed kill the deceased in the manner stated in the information.

In case the evidence leaves the court with any reasonable doubt as to the accused person's guilt, the court must acquit the accused person even though it believes him to be guilty. In the premises, the acquittal of an accused person does not always mean the accused person is innocent; it simply means that a case against him has not been proved to the required standard; that is, beyond reasonable doubt.

In a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person with malice aforethought. Section 196 of the Penal Code, Cap. 16 [R.E 2019] under which the accused person in the present case was charged provides as follows:-

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

Therefore it was the duty of the prosecution to prove the case against the accused person at two stages; first that it is the accused person Wandela Hindia who killed the deceased John S/O Sabaganga and secondly, that he did commit the killings with malice aforethought. Section 200 of the Penal Code, speaks of malice aforethought.

After having heard and scrutinized the witnesses' testimonies, in this case, the submissions made by both learned counsels, I have no doubt that John Sabaganga is dead and he died of unnatural death. Therefore murder is proved since it is established that John Sabaganga was killed with malice aforethought. In this case, the deceased died because of severe bleeding from cut wounds. Accordingly to the evidence the wounds were inflicted by another person by using a sharp object. Therefore *actus reus* is proved. The assailant contemplated and intended to kill.

The issue for determination who caused the deceased's death. I need to address my mind to the above mentioned predominant legal principles which are of relevance to this case and will guide me in this judgment. The prosecution on their party submitted that they have proved their case beyond reasonable doubt and they believed the evidence of this case is

based on visual identification. From a total of four (4) witnesses, the prosecution led evidence to the effect that on the 26th November, 2012 at 00:00: hrs four people forcibly gained ingress into the deceased's premises situated at Gininiga village within the District of Busega in Mwanza Region. PW2, Esther Washa the "deceased wife" evidence, will lead this court to ascertain whether her evidence was watertight.

In the examination in chief PW2 testified that on the 28th day of May, 2015 while asleep with her husband and children they heard the door was knocked three times, and suddenly, two people entered the house one of them was uncovered. Accordingly, to PW2 the murder incident took place in the presence of the deceased's wife Felister Misango and her children.

PW2 advanced a claim of having impeccably identified the accused one Wandela S/O Hindia as a person who forcibly entered into her bedroom. Testifying on how she identified the accused, PW2 asserted that the sitting room was sufficiently illuminated by a lit of torch, she saw the suspects entering the room while holding a bush knife and a torch and that she was able to identify all of them including the accused because they reside in the same Village and used to obtain loan from the deceased. PW2 said that the incident took approximately an hour, then the invaders left the deceased's premises but they were still outside and there was

bright moonlight outside thus she identified them. Then the suspects went back in and continued to cut the deceased. PW2 in her statement at the Police Station named five suspects including Wandela Hindia. However, when the incident occurred an alarm was raised and the leader and neighbours immediately went to PW2's house but PW2 did not name the suspects.

PW1, testimony is almost similar to PW2's evidence. PW1 testified that she saw the accused holding a bush knife and a torch and that she was able to identify the accused because the accused illuminated the torch on her face and they reside in the same Village. PW1 testified that she was able to identify the suspects because there was also bright moonlight outside. However, PW2 did not mention the name of the accused at the Police Station.

I need necessary precautions before making my findings that the accused was correctly identified. Thus, I need to analyse the evidence of the prosecution and arrive at the correct conclusion. In doing so I will determine the issue *whether the identification of the accused left no doubt or whether there was no mistake of identity.*

This court needs to satisfy the standard guidelines on identification as enunciated in a celebrated case of **Waziri Amani v R** (1980) TLR 250.

PW1 and PW2 the only eyewitness, when examined by the prosecution stated that they identified the accused by using torch lit, the source of light was torch lite and bright moonlight. They said that the light was sufficiently illuminating the sitting room. When PW1 was cross examined she added that inside the sitting room there was solar light which was on all night. PW1 and PW2 did not explain the brightness of moonlight at 00:00 hours. If the moonlight was bright enough I expected PW2 and her husband could have seen what was happening at the cattle shed. But they were not able to identify the suspects.

Similarly, in the case of **Ally Mohamed Mkupa v R**, Criminal Appeal No.2 of 2008 (unreported), the Court of Appeal of Tanzania held that:-

"...where one claims to have identified a person at night there must be evidence not only that there was light, but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect."

It is now well settled that witness relying on source of light as an aid to visual identification such witness must describe the source and intensity. The court has repeatedly in its various decision in this respect emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the accused at the scene of the crime. As it was held in the case of **Richard Mawoko and**

another v R Criminal Appeal No. 318 of 2010 Mwanza and in the case of **Gwisu Nkonoli and 3 others v R** Criminal Appeal No. 359 of 2014 Dodoma (both unreported).

PW1 is recorded telling the trial court that the torch which was held by the accused person helped in improving the brightness and visibility of the accused person. PW1 also testified that the torch was flashed against her by the accused person. It is worth noting that it is easier for the one flushing the torch to identify the person against whom the torch is flushed. This incontrovertible view is given credence by the Court of Appeal of Tanzania magnificent reasoning in the case of **Michael Godwin & Another v Republic**, Criminal Appeal No. 66 of 2002 (unreported), the Court of Appeal of Tanzania held that:-

"It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly. In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out."
[Emphasis added].

The position in **Michael Godwin** (supra) was underscored in the subsequent decision in **Bariki Kinyaiya, Jacob Hubert & Elioani Kinyaiya v. Republic**, Criminal Appeal No. 220 of 2007 (unreported), wherein it was held as that:-

"Ordinary human experience is that a person uses a torch, otherwise known as flashlight in American English to enable them to see an object or a person in front of the user but without the user being clearly seen by the person shone at because of the blinding effect of such light on that other person. It may be possible, however, for a person in front of the user of the torch who is not directly shone at to see and identify the person using the torch if the light from the torch is reflected by a shiny wall or object. Otherwise, usually, it is not easy to identify reliably the user of the torch who directs the light from the torch to objects in front of or around them. In the case under discussion there was no evidence that the light from the torches was reflected by the walls or the room or by shiny objects in the room." [Emphasis supplied].

Applying the above authorities, in my view that the evidence of PW1 that she was able to identify the accused person who lightened the torch is doubtful and therefore, this evidence is unacceptable.

Additionally, the prosecution witnesses; PW1 and PW2 were not sure which source of light was illuminating the scene of the crime. During cross examination PW2 testified that they have no solar while PW1 testified that there was solar light which was illuminating the sitting room. I am not sure who is telling the truth between PW1 and PW2. On the whole, PW1 proved that a torch lite was not bright enough, the solar light improved the brightness and visibility of the accused persons.

Ms. Gisela, learned counsel in her submission insisted that the witnesses recognized the accused person thus there was no need of description. In my view, recognition does not automatically amount to correct identification and is not always reliable. In the case of **Issa Mgara v R** Criminal Appeal No.37 of 2005 (unreported), it was held that:-

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

In the case of **Anthony Kigodi v Republic** Criminal Appeal No. 94 of 2005 (unreported), the Court held that:

*"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in **Abdala bin Wendo and Another v Rex** (1953) EACA 116 and followed by this Court in the celebrated case of **Waziri Amani v Republic** [1980] T.L.R. 250 regarding evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no Court should act on such **evidence unless all the possibilities of mistaken identity are eliminated** and that the Court is satisfied that the evidence before it is absolutely watertight..."*
[Emphasize added].

It is trite law that description is important in the identification of suspects as it was held in the case of **Raymond Francis v. R** [1994] T.L.R 100. Even with if the lit is bright enough but without a description of the accused appearance one can say there was no mistaken of identity as it was held in the case of **Karim Ramadhani & 2 Others v R**, Criminal Appeal No. 113 of 2009 Arusha (Unreported) it was held that:-

*"...What is on record is general statement that the witnesses identified the appellants **with the assistance of seventeen tube lights**. Under such circumstances, **without the description of the appellants either of their outlook or attire, the seventeen tube lights notwithstanding, one***

cannot with certainty say that there was no mistaken in the identification of the appellants". [Emphasis added].

In the instant case, there was no any description of the accused person. Saying that PW1 and PW2 identified the accused because they reside in the same Village was not enough, if one can mistakenly recognize his own relatives the same means a villager is more easily to mistakenly recognized him, as it was held in the case of **Issa Mgara v R** (supra) therefore apart from recognition, the description was highly important. Taking to account that the evidence of visual identification is easily susceptible to error as was observed in the case of **Waziri Amani** (supra).

I have taken into account all the elements of identification, the distance, and the time of observation. I have to say that with the source of the light ' torch lite' and the unexplained moonlight the quality of identification evidence is poor since even it was a longer observation it was made difficult conditions such as visual identification made in poorly lightened a room which had no any light depending on the suspects' torches. In the case of **Aburaham Daniel v R**, Criminal Appeal No.6 of 2007 the Court of Appeal of Tanzania held that:-

"...where the quality of identification evidence is longer observation made in difficulty conditions such as visual identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation it was made difficulty conditions such as visual identification made in poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit."

Applying the above principle to the instant case, I can certainly say that the conditions of identification pertaining at the material time were not conducive for positive identification. The distance of seven paces at which PW1 claimed they were able to identify the accused was not so close to rule the possibility of mistaken identity. The intensity of the moonlight was not explained, saying it was bright is not enough how bright? like electricity light? or sunlight? In the circumstances of this case, extra care should be taken, I have doubt if the identification, in this case, was accurate to ground conviction on the accused person.

Another area for determination is voice identification, I am asking myself can a criminal suspect be identified by voice easily? Accordingly to PW1 evidence, there was no much exchange of words, only the words '*naomba held*' seems to have been uttered, were insufficient to enable PW1 to make a clear identification based on voice? What is the standard

for voice evidence? The court has to warn itself on the reliability of voice evidence in criminal cases. In the case of **Mohamed Musero v R** (1993) TLR 290 the Court of Appeal of Tanzania held that:-

"With regard to the voice, this was also most unreliable in the circumstances of this case. There was no much exchange of words in this confused atmosphere, only one 'tulia' seems to have been uttered and possibly another one word 'lete pesa' when the bandits were demanding money."

Applying the above authority, the voice evidence was unreliable. Moreover, there was no any voice identification test made by the prosecution the same was not sufficiently proved. If PW1 was so sure that it was Wandela I expected her to mention him as early as possible. But that was not the case, PW1 did not mention Wandela at the time when she was recording her statement. Until on 12th March, 2021 when PW1 testified before this court, she mentioned the accused as a responsible person for the murder of her father. Therefore, I restrain myself to link the accused with the said voice identification, the same cannot favour accurate identification. For the reasons stated above, I find that PW1 was not a credible witness. Her evidence is doubtful thus this court cannot rely upon it.

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*"...in matters of identification, it is not enough merely look at factors favouring accurate identification. **Equally important is the credibility of witnesses.** The conditions for identification might appear ideal but that is no guarantee against untruthful evidence". [Emphasis added].*

It is settled law now that naming the accused at the earliest stage is crucial, the accused could have been arrested on the same day by the Police Officers and the villagers. In such evidence, the court must be fully aware of the possibility of committing miscarriage of justice in the circumstance. The Court of Appeal of Tanzania insisted in naming the suspect immediately after the commission of the crime. In the case of **Marwa Wangiti Mwita and Another v Republic**, Criminal Appeal No. 6 of 1995 (unreported) the Court of Appeal of Tanzania held that: -

"The ability of a witness to name a suspect's name at the earliest opportunity is an all important assurance of his reliability".

Guided by the above holding PW2 was in the position to name the suspect contrary to that the same diminishes the credibility of the witness to identify the suspect immediately after the commission of the crime. The conditions for identification might appear ideal but that is no guarantee against untruthful evidence. I am satisfied that the mandatory

requirement of naming the accused immediately after the crime to favour accurate identification was not adhered to in the instant case.

Another area on the credibility of a witness is the **unexplained delay** by the prosecution in arresting the accused person. The accused has stated that on 20th March, 2012 when the murder occurred, he appeared at the scene of the crime on the same night. His evidence was corroborated by PW3, the Street Chairman. But, the efforts taken by the investigating officer (PW5) was poor. PW5 was informed on the same day that the accused was among the suspects.

No attempts were made to trace the accused on the same day, while there was adequate time. PW5 interviewed PW2 at the scene of the crime at 12:00 hrs that means PW5 had plenty of time to start his investigation on the same day. I believe his duty on that particular day was not only to record witnesses' statements and drawing sketch map but also to investigate the case and arrest the suspects immediately after the commission of the crime. Even in his statement, PW5 did not state anything relating to arrest this means that it was not among his priority exercise. In my view, the unexplained delay by the prosecution in arresting the accused person raises doubts on the credibility of PW5. In

the case of **Maswed Seleman v R**, Criminal Appeal No. 189 of 2007 (unreported) the Court of Appeal held that:-

*" In this case, the delay in arresting the appellant casts doubts on the credibility of PW1 and PW2 evidence. **To us it is obvious this aspect of unexplained delay in arresting the appellant was not addressed by both courts below. In our opinion, had it been brought to the attention of the learned appellate Judge, she would have arrived at a different conclusion.**" [Emphasis added].*

In the instant case, the issue of unexplained delay in arresting the accused was weakened by the investigation side.

This is a murder case how slightly doubt raises the trial court has to direct itself in deciding in favour of the accused, the prosecution was required to prove the case beyond reasonable doubt, the accused ought to be convicted on the strength of the prosecution case as it was held in case of **Christian S/O Kaale and Rwakiza S/O Bernard v R** [1992] TLR 302. In the case of **Aidan Mwalulenga v R** Criminal Appeal No. 207 of 2006 a suspicion cannot sustain a conviction. It entitles an accused person to an acquittal on the benefit of doubt.

For the reasons stated above, I differ with the assessors' opinion that the accused is guilty since the evidence alleged to implicate the accused

person is entirely of identification and recognition as I have pointed earlier the same was not watertight to justify a conviction. See the case of **Mwalim Ally and Another v R**, Criminal Appeal No. 39 of 1991. It is common ground that the offence of murder under which the accused stood charged is a serious offence carrying the capital sentence of death by hanging. In that regard, for one to be held culpable, the prosecution has to establish the offence beyond a reasonable doubt. In the light of the shortfalls which I have endeavored to illustrate above, the offence of murder has not been established. The doubts which have been expressed have to benefit the accused. Therefore, the accused is acquitted. I order the accused to be released from the prison unless he is otherwise lawful held.


A.Z.MGEYEKWA
JUDGE
18.03.2021

Right to appeal fully explained.

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