

**IN THE HIGH COURT OF TANZANIA**

**AT MWANZA**

**ORIGINAL JURISDICTION**

**(MWANZA REGISTRY)**

**CRIMINAL SESSION CASE NO. 21 OF 2018**

**THE REPUBLIC**

**VERSUS**

**SHIDA MAHUGIJA**

**JUDGMENT**

*Date of Last Order: 15.03.2021*

*Date of Judgment Date: 19.03.2021*

**A.Z.MGEYEKWA, J**

The Accused SHIDA S/O MAHUGIJA 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 24<sup>th</sup> October, 2016 at Ng'haya Village area within Magu District in Mwanza Region did murder one MANUNGWA D/O LUCAS.

During the trial, Ms. Lilian Meli, learned State Attorney represented the Republic while Mr. Erick Katemi, defence counsel represented the accused. The trial was conducted with the aid of three assessors namely; Josephat Madali, Jamila Kutundu, and Catherina Katemi. The ladies and gentleman assessors who sat with me in the trial of this case were divided in their opinions. The two ladies' assessors thus entered a guilty verdict against the accused person. The gentleman assessor entered a not guilty verdict against the accused person.

In building its case, the prosecution called seven witnesses, namely; Mdo Malugu, Malugu Shindano, Dr. Omary Hoza, Mlima John, Dotto Suka Mbuki Sololo, and F 4152 D/C John. The prosecution side also tendered one exhibit namely; Post Mortem Report (Exh.P1). The prosecution witnesses testified as follows:-

Breaking the ice for the prosecution was Mdo Malugu, (PW1). Mdo Malugu testified that on 24.10.2016 at night hours she went to sleep in one room with her sister Manungwa Lucas and Rehema Kadoto and a young child. While asleep, at around 3.00 hrs, she heard a heavy rumble which worked her up, she went to the sitting room and saw the accused one Shida Mahugija who has been residing in their house for four months and he was married to Manungwa Lucas. She went on that, they were living in a grass house which was seven paces opposite her parents'

house which had a solar light that lightened their house. She testified that she recognize Shida Mahugija who was wearing a T-shirt and shorts and was holding a long bush knife sharpened on both sides like a knife. It was her further testimony that she saw Shida Mahugija running from the sitting room. PW1 tried to persuade him but he threatened them and fled. At a time her sister was stabbed in her neck and was crying in pain and PW1 called her parents and she told them what happened.

When cross-examined, PW1 testified that they did not have a solar in their house. She insisted that the solar in their fathers' house illuminated bright light.

Malugu Shindan testified as PW2, The deceased father testified that on 24.10 2016 while sleeping in his house he heard Mdo and Rehema raising an alarm. He testified that they were sleeping in a grass house that was 7 paces away from his house. PW2 testified that he was informed that her daughter was killed by her husband and when they tried to get out they realized that the door was locked. They broke the lock and when they approached the other house he saw her daughter snoozing, they took her out only to discover that she was stabbed on her neck and shortly she passed away. PW2 continued to testify that the accused is his son-in-law, he was grazing John Kaswisi cattle in a nearby village. He testified that after the incident, they raised an alarm and called the police.



During cross-examination, PW2 testified that the incident occurred at night at around 1:00 hrs to 3:00 hrs and there was no light in the room as it was dark 'PW2 testified that he was informed by PW1 and Rehema that it was accused who committed the murder but he did not witness the killing neither saw any weapon.

PW3, Omary Hoza testified that he is a medical doctor. He stated that on 24.10.2016 he went to a scene of a crime with a police officer and examined a female body who was stabbed on her neck. PW3 testified that the deceased's name was Munungwa D/O Lucas. He went on to testify that the cause of death was excessive bleeding. PW3 stated that after examining the body he prepared a Post Mortem Examination Report. The Post Mortem Examination Report was admitted as Exhibit P1.

The fourth witness was Mlima John Kaswiswi. PW4 testified that he employed the accused in 2012 and the accused continued to work for him until 2015. PW4 testified that on 23.10.2016 the accused told him that he was going to Nghaya village. On 24.10.2016 at around 4.00hrs, he heard an alarm from Nghaya and was told by the Executive Officer that they were searching for the accused who stabbed her wife. He went on to testify that on 29.10.2016 at 20.000 hrs the accused arrived at his place asking PW4 for money. PW4 went on to testify that, he knew that the accused wanted to flee, thus he took him to his house and informed the

village Executive officer who informed the Police Officer, and the accused was arrested.

Dotto Suka was PW5. She testified that on 28.10.2016 he saw the accused who was tired and searching for a job. PW5 testified that the accused person told her that he is from Magu District. PW5 said that she took the accused to his home and they called his relative who promised to go and pick the accused. PW5 went on to testify that she offered him a place to sleep and around 4.00 hrs the accused opened the door and claimed to go to the toilet and fled. She testified that later the accused was arrested

During cross examination, PW5 admitted that he did not report to the chairman or leadership that she had a guest, and also she did not report the theft incident to the police station.

Mbuki Sololo testified that on 24.10.2016 around 3:00 hrs he was informed that Manungwa Lucas was stabbed and the responsible person for the murder of Manungwa Lucas was Shida Mahugija. PW6 testified that on 28.10.2016 he received information that the accused person was at PW5's house. On the next day, PW6 arrived at PW5's house and was informed that the accused fled and stole a trouser and a bedsheet and he told PW5 that the accused person is alleged to have murdered his wife.



The prosecution paraded F4152D/C John (PW7). His testimony was to the effect that he was an investigator of the case. He testified that on 24.10.2016 he was informed that there was a murder incidence at Ng'haya village. He testified that he was informed that the one who commits the murder was Shida Mahugija. PW7 testified further that on 29.10.2016 he was informed that the accused was in the PW4's house, they went to PW4's house and managed to arrest the accused person who was unwell. PW7 further testified that on 31.10.2016 he recorded the accused statement. PW7 prayed to tender the caution statement as an exhibit. This prayer was opposed by the defence counsels. On account of the prosecution's failure to fulfil the conditions set under section 50 (1) of the Criminal Procedure Code Cap.20 [R.E 2019]. Consequently, this court ruled out that the statement was not admissible for being recorded out of prescribed four hours, the accused was arrested on 29.10.2016 and the PW7 recorded the same on 31.10.2016.

On his side, DW1 Shida Mahuguja, 19 years old stated that he was born in Mwabulegha village at Magu District. He went on testifying that, he was grazing Mlima's cattle from 2011 to 2016 when he was arrested by a Police Officer. He went on to testify that, Manungwa D/O Lucas was his wife, and they were married in 2014. He denied the allegations that he murdered his wife. DW1 claimed that his father in law wanted him to pay

dowry but he asked him to allow him to pay the said dowry in the next year. He denied that he wanted to flee to Tabora. He insisted that he loved his wife and prays this court to find that the evidence against him is untrue and set him free.

When cross examined, the accused person testified that he does not know when he was exactly born. He testified that on 25.10.2016 he was at PW4 place and did not go out and was not at the scene of the crime. He testified that he once lived with his wife in his in-laws' house for three months in the in-law opposite house and they had small solar and a torch and did not know if they bought a big solar. He stated that he had no any dispute with his father in law.

After having heard the prosecution and defence witnesses in this case, there is no doubt that Manungwa D/O Lucas is dead and her death was unnatural. The issue for determination is who caused the deceased's death. I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in this judgment. These cover aspects of criminal law as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence. The prosecution is placed with a heavy burden than that of the accused.



The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with, is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act, Cap.6 [R.E 2002], and cemented in the case of **Joseph John Makune v R** [1986] TLR 44 at page 49, where the Court of Appeal held that:

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities....."*

The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that:-

*"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*



In determination as to whether the identification was proper to warrant the conviction of the accused, I have to carefully test the evidence on record and the principles guiding identification. In doing so I will determine the issue *whether the identification of the accused left no doubt or whether was no mistake of identity.*

First, from the evidence on record, it is with no doubt that there is no eye witness during the commission of the offense. It is from this perspective that this court is obliged to analyze the evidence on the record as to whether the identification was proper. As stated in **Philip Rukaiza v R** in Criminal Appeal No. 215 of 1994 at Mwanza (unreported), the Court of Appeal of Tanzania held that:-

*"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."*

Admittedly, the evidence going to incriminate the accused is recognition evidence, PW1 was quite emphatic that the accused was her brother in law who she knew him very well. This made the identification

easy. As eloquent as this testimony sounds, the law on visual identification is quite astute in our legal system. It is to the effect conviction of an accused person can be grounded on visual if such evidence is watertight and leaves no possibility of errors. This requirement has been emphasized in a plethora of other decisions of the Court of Appeal of Tanzania, in the celebrated case of **Waziri Amani v. R. [1980] TLR 250**, the Court of Appeal of Tanzania held that:

*"(i) Evidence of visual identification is of the weakest kind and most unreliable;*

*(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

To ensure that the evidence is watertight, several principle guidelines have to be taken into consideration by the court, including, among others, if the incident took place at night, the evidence must clearly state if there was a light, then:- First, the source, type, and intensity of the light, and second, the size of the area illuminated.

Starting with the first aspect, the source, type, and intensity of the light. The source of light at the scene of the crime casts doubts. PW1 testified to have identified the accused person by the aid of the solar light from the house of his father which is 7 steps away. The same evidence by PW1



described that the incident took place inside the house, with no explanation as to the penetration of the solar lights from the house located 7 paces far from the house where she was staying, and as to the intensity of the light affording the PW1 proper identification which also went far as to the identification of the weapon which accused hold a bush knife which was sharpened on two-sides.

Apart from the above, the evidence over the source and extent or intensity of light in the room casts doubts. While PW1 testified that she was able to identify the accused while standing in the sitting room with the aid of the solar light lightning from outside and outside there was moonlight. PW1 testified that in the grass house where the incident took place there was no light and the room was dark but the accused was holding a torch which lightened the sitting room. PW1 claims that the solar light lightened their house. In my view, I think there was a need to describe the intensity of the light illuminated the sitting room which was seven paces away from where the solar was placed which would have enabled PW1 to correctly recognize the accused.

Additionally, PW1 in her statement at the Police Station did not describe the intensity of light. PW1 also did not state that she identified the accused while inside the room. Instead, she stated that she identified the accused person when he was running with the aid of solar light and moonlight.

However, PW1 did not describe the intensity of moonlight and solar light. Therefore based on the above analysis, I have to conclude that PW1 evidence creates doubt on whether she made the correct identity of the accused person. This takes into consideration the fact that, for all the positive attributes that it has, this kind of testimony is prone to serious dangers that are bred by its unreliability. Owing to this serious undoing, courts have been warned against relying on the testimony unless all possibilities of mistaken identity are eliminated. This position was accentuated in the case of **Galous Faustine v. R**, Criminal Appeal No. 2 of 2009 (unreported), the Court of Appeal of Tanzania had the following observations:-

***"The law on visual identification, be it of a stranger or of a known person (i.e. recognition) is now well settled. It is trite law that such evidence is of the weakest type and Courts should not act on it unless all possibilities of mistaken identity are eliminated. furthermore, the Courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification and is accordingly watertight."** [Emphasis added].*

Equally, in the case of **Joseph Michael and Another v R** Criminal Appeal No. 213 & 215 of 2014 (unreported) it was stated that,

*"We wish to stress that even in recognition cases, clear evidence on the source of light and its intensity is of paramount importance. **As***



*occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

*[Emphasis added].*

The warning shot sounded in numerous decisions of our courts is in sync with the astute reasoning postulated by Elizabeth F. Loftus, a distinguished author of the **Eyewitness Testimony 19** (1979). She guided as follows:

*"The reason as to why this kind of evidence has to be given great caution when the court intends to rely on, is that the basic foundation for eyewitness is a person's memory. And we often do not see things accurately in the first place, but even if we take in a reasonably accurate picture of some experience, does not necessarily stay perfectly intact in memory, sometimes the memory traces can actually undergo distortion with the passage of time, proper motivation interfering facts. The memory traces seem sometimes to change or become transformed. These distortions can cause a human being to have memories of things that never happened. In **State of Utah v. Deon Lomax Clopten**, 223 P 3d 1103 (2009) 2009 UT 84:*

*"The vagaries of eyewitness identification are well known; the annals of criminal law are rife within instances of mistaken identification.*

*Decades of studies have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of the crime where certain factors are present. **The most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate identification may be just as convincing to a jury as an accurate one.** As one leading researcher said: "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says: That's the one!"*

In this case, conditions in which the identification was allegedly done were far less than conducive for proper and unmistakable identification. They fell short of the required standard, circumstances of the case would not enable PW1 to make a correct identification. The fact that PW1 had to rely on the combined impact of the light from the torch is a testimony that the room was poorly lit and that the source of solar light, whose intensity is not sure was bright, would not meet the required threshold of intensity that would pass the test.

Another area for discussion is circumstantial evidence. The issue for determination is whether the circumstantial evidence in this instant case can ground conviction upon the accused person? For the prosecution to sustain a conviction on circumstantial evidence, the chain of events must be consistent and unbroken, this was held in the case of **Emmanuel Kondrad Yosipati v Republic**, Criminal Appeal No. 296 of 2017,



delivered [21<sup>st</sup> February, 2019 TANZLII]. The Court of Appeal of Kenya in the case of **Sawe v Republic** [2003] KLR had this to say:-

*"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden that never shifts to the party accused."*

In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of the events must be such as to rule out a reasonable likelihood of the innocence of the accused. Therefore, this court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof.

In the instant case, PW4 testified that on 26.10.2016 the accused person told him that he is going to Ng'haya village. However, in his statement, PW4 did not say that the accused told him that he is going to

Ng'haya village. I am doubtful if it is true that the accused person told PW4 that he was going to Ng'haya village because PW4 in his statement he did not say those words. Those are strong words that justifies that he was at Ng'haya what if the accused did not go to Ng'haya village? the same will change the whole story.

PW4 testified that wanayowe arrived at his house on 29.10.2016. PW6 testified that he instructed wanayowe to go to PW4's to look for the accused person. However, in his statement, PW6 did not mention that he instructed wanayowe to go to PW4's house and the prosecution did not summon any witness from wanayowe to testify in court to prove that they arrived at PW4's house. Therefore PW4's evidence was not corroborated.

Moreover, PW5 did not inform the Ward Executive that she had a guest and she did not report the theft incident to the Police. PW5 in her statement stated that she communicated with DW1's uncle (PW6) who informed her that the accused person fled from Nkunguru village at Magu where he has killed her wife while the prosecution alleged that the murder occurred at Ng'haya village, not Nkunguru village. This piece of evidence creates doubt whether PW5 was informed about the murder of Manungwa Lucas or someone else since the murder of Manungwa Lucas (the deceased) did not occur in Nkunguru village. Even in his testimony she



only mentioned that the accused relative informed her that the accused has killed his wife without mentioning where the killing occurred.

Based on the above analyses, it is clear that the chains of circumstantial evidence linking the accused persons to the death of Manungwa Lucas is broken therefore it cannot lead this court to conclude that the accused person was responsible for the death of his wife.

This is a murder case however slightly the doubt raised the trial court has to direct itself in deciding in favour of the accused, the accused ought to be convicted on the strength of the prosecution case as it was held in the 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. Therefore, I proceed to acquit the accused person, SHIDA MAHUGIJA. I order the accused to be released from the prison unless he is otherwise lawfully held.



  
A.Z.MGEYEKWA

**JUDGE**

19.03.2021

Right to appeal fully explained.