IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(In the District Registry of Kigoma)

AT KIGOMA

ORIGINAL JURISDICTION

CRIMINAL SESSION NO. 1 OF 2021

(Original PI case no. 33 of 2018 in the District Court of Kibondo at Kibondo)

THE REPUBLIC

VERSUS

ALFREDY S/O KWEZI @ ALFONCE..... ACCUSED

J U D G M E N T

8TH & 8TH April,2021

A. MATUMA, J.

The accused persons herein, ***ALFREDY S/O KWEZI @ ALFONCE***, stand charged of Murder contrary to sections 196 and 197 of the Penal Code (Cap.16 R.E. 2002). He is alleged to have murdered one **GODFREY *S/O NDAYATE*** on the 15th day of November, 2018 at **Mgwanda B** hamlet within Kakonko District in the Region of Kigoma. It was further alleged that he stabbed the herein above deceased with a panga on several parts of the

body and around the neck leading to severe bleeding and subsequently death secondary to severe hemorrhage due to multiple severe cut wounds. To substantiate the charges against the accused persons, the prosecution called and brought a total of six witnesses while the accused person had a total number of three witnesses including himself for his defense. The witnesses called by the prosecution were PW1 (Anatalia Thomasi); PW2 (Ntibagiligwa Godfrey); PW3 (Laurence Gasper); PW4 (Bigilimana Francis); PW5 (Inspector Kisu A. Mwapongo) and PW6 (G. 3226 D/C Cretus Ngonyani.

The summary facts of the case is as follows; the accused person and the deceased were related as the deceased was a husband of PW1 the biological aunt of the accused. The father of the accused Mr. Kwezi was a blood brother of PW1 Anatalia Thomas. PW2 the daughter of PW1 is thus the cousin to the accused. The accused is therefore alleged to have murdered the husband of his own biological aunt.

On the material date during night hours approximated to be 20:00 hrs, the deceased was at his home sitting outside of his house. His wife (PW1) was inside sleeping and his daughter (PW2) was outside the house in the kitchen cooking. Thereat, the deceased's family was attacked by a group of two people allegedly to have been identified as the accused in the instant

matter and one Linus Ngowe who was by then the hamlet chairman. The said Linus is nowhere to be seen as he escaped from the crime date to day. The attackers assaulted the deceased to death and the cause of death was established to be Severe hemorrhage due to multiple severe cut wounds. The body was further found to have sustained multiple cut wounds on different parts of the body which were deadly cuts involving bones and a complete separation of the neck from the trunk.

The accused person in his defense, tried to raise a defense of alibi and the grudges which existed between his family and that of the deceased.

During trial, I sat with the lady and gentle assessors; **M/S. Mwanvua Ramadhani** and **Mr. Said Mrisho** who opined as shall be reflected later herein below.

As a cardinal principle in criminal charges, it is the prosecution side which has the duty to prove the charges against an accused person beyond any reasonable doubts. It is not for the accused person to establish his innocence. This responsibility never shifts throughout. The prosecution therefore, had a duty to prove beyond reasonable doubt, the following elements for the offence: ***That death was caused to the deceased person; That the death was not natural; That the death was caused***

by an unlawful act or omission; That it is the accused person who did the unlawful act or omission and that the death was caused with malice afore-thought in the meaning that the accused intended to cause such death or grievous bodily harm.

According to the evidence on record, there is no dispute that the deceased **Godfrey s/o Ndayate** is actually dead and that he faced a violent death. PW1, PW2, PW3 PW4, PW5 and PW6 all testified to have observed the dead body of the deceased herein with multiple cut wounds and the neck to have been completely cut off from the trunk (body). The evidence of PW4, the Assistant Medical Doctor who examined the body of the deceased and his Post Mortem Examination Report exhibit P1 is very clear to that effect. My lay two assessors unanimously opined that the prosecution case has sufficiently proved the death in question and that the same was unnatural. I join hands with them and determine that the prosecution sufficiently proved the death in question and that the same was not natural.

Also, it is undisputed fact that whoever caused the death in question, caused it unlawfully and with malice aforethought as rightly observed by the lay two assessors. That is clearly established by the evidence of PW1 and PW2 who were together with the deceased at the time of the attack. They

saw the deceased stabbed with a panga to death and nobody has contradicted them on the manner the deceased met his death. It is further established that the number of blows and nature of the wounds sustained by the deceased leaves no any other conclusion than that the killing was intentional, brutal and well calculated.

The only dispute therefore is on who killed the deceased as such. To the prosecution, it was the accused person in the assistance of his fellow who is still at large who brutally murdered the deceased while to the defense, the accused person is not in any way responsible for the death of the deceased person.

As I have earlier on said, it is the prosecution side which retained the duty to prove the accused person's guilty. All the accused had to do is just to raise reasonable doubts to the prosecution case.

Out of the six witnesses for the prosecution only PW1 and PW2 testified to have witnessed the accused committing the offence. The accused is further incriminated by circumstantial evidence of PW3, PW5 and PW6 as shall soon be demonstrated. My lay two assessors M/S Mwanvua Ramadhani and Mr. Said Mrisho opined that the accused person was properly identified by PW1 and PW2 hence guilty of the offence.

Starting with the evidence of PW1 and PW2, they testified that on the material date they were at home and suddenly invaded by people whom they identified to be the accused in the dock and one Linus their hamlet chairman who is at large. That they started to run to neighbours while raising alarms for help. PW1 took almost four to five minutes witnessing the accused cutting her husband by pangas (bush knives) just five paces from where she stood when the assault took place inside the house and PW2 was only three paces away from the accused persons when assaulting the deceased in the first instance outside the house and spent almost ten minutes observing the movements of the attackers and subsequently the attack itself.

Both PW1 and PW2 identified the accused person as their blood relative a nephew to PW1 and a cousin to PW2 since he is the son of the brother of PW1. The two witnesses also named another suspect Linus Ngowe who was their hamlet chairman who is at large since the crime date to day. The two witnesses averred to have identified the attackers the accused inclusive by their naked eyes under the aid of the solar light and the moon light. On the intensity of the light PW1 repeatedly stated that it was so bright *'Ulikuwa ni mwanga mkubwa sana'.* She insisted on her identification in her own Swahili

words; ***'Niliwaona kabisa kabisa Linus Ngowe na Alfredy Kwezi, Mungu ashuke'. 'Alikuwa ni shangazi yangu zamani, ameua mume wangu, jamani!!'***

On her party PW2 on the intensity of the light, she stated that the Solar was bright enough to the extent that she could see at a distance of 12 to 15 meters or paces away.

The witnesses also described the dressings of the attackers at the crime scene that Alfredy the accused person had dressed black clothes (trouser and shirt) while Linus Ngowe had a black trouser and white shirt.

These witnesses PW1 and PW2 stood firm that the conditions for their identification of the accused were very favourable as the accused was familiar to them, the attack was made in their presence just three to five paces respectively.

With this evidence of PW1 and PW2 if believed, it suffices to find the accused person guilty of the offence even without any corroborative evidence as the law is very clear that to prove a certain fact, no particular number of witnesses is required, what is important is the witness's credibility.

See section 143 of the Evidence Act, Cap. 6 R.E 2019 and the case of ***Yohanis Msigwa V. R.*** *[1990] TLR 148 at page 150*

Also, it has been decided in a number of cases that Favourable circumstances for unmistaken identity and the Fact that the accused is not a stranger to the identifying witness, it is sufficient to convict. *See* ***Eva Salingo MT.6222421 PTE. Peter Magoti and MT.62218 Paschal Mgawe V. Republic*** *(1995) TLR.220.*

In the instant case as I have said earlier my assessors unanimously opined that the conditions at the crime scene and the fact that the accused was not stranger to PW1 and PW2 favourable for correct identification of the accused.

I find the same. The evidence of PW1 and PW2 is a direct oral evidence and thus admissible under section 62 (1) (a) of the Evidence Act, supra which provides that; Oral evidence must in all cases be direct and if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. In this case the fact is a stabbing of the deceased to death, and the two witnesses PW1 and PW2 testified that they saw the accused person in a company of one Linus stabbing the deceased as such.

There was both the moon light and Solar light, the accused was not stranger to the them, proximity between the witnesses and the accused at the time of the attack was just paces below 5. The fact that there was Solar light and moon light was corroborated by PW5 Inspector Kisu who visited the crime scene on the same night and even DW3 who stated to have identified one Kasindi as there was moon light. Even the accused himself stated during his defence that when they were going to the crime scene in response to the alarm, they met several people from whom he identified Kasindi because he was making noisy *"wako wapi kina Alfredy Kwezi"*, and also identified Badiliko Nziguye and Hatari Jeremiah **by voice and face.** (*Kwa sauti na sura*). In the circumstances on the crime date not only the prosecution witnesses could identify one another but also the defence witnesses.

All these indicates clear favourable circumstances for correct identification by PW1 and PW2 against the accused and or any other who committed the offence.

In the case of ***Anuary Nangu and Kawawa Athumani versus The Republic.*** *Criminal Appeal no. 109 of 2006*, there were similar facts to the

case at hand. The Court of appeal discussed the circumstances under which **Anuary Nangu** and **Kawawa Athumani** were identified. It stated;

> *"The testimony of the complainant PW1 on the identifying circumstances was the time taken to commit the offence, which was long, there was moonlight, the appellants lived in the same village and he had seen the appellants several times before. He was able to describe the types of clothes which each of the appellants wore when the incident took place."*

The court of appeal then concluded that such identifying circumstances were favourable for correct identification;

> *"The conditions for identification in this case, as gathered from the evidence were favourabble. The complainant knew the appellants before, they were staying in the same village and there was moonlight. He was also able to identify the types of clothes the appellants wore.... It took sometime before the offence was committed as the attack was proceeded by a conversation"*

In the instant case as I have already stated, the facts are identical to that of **Anuary Nangu's** case supra and therefore I have no reason to doubt the circumstances upon which the accused was identified as being very favourable for correct identification.

The only issue is therefore, whether PW1 and PW2 were witnesses of truth or not. This cannot be ignored as it happens sometime in life one to lie against another and yet seem to be impressive. This was once observed in the case ***Festo Mawata Vs Republic*** *Criminal Appeal No. 299 of 2007* (Unreported) in which the Court stated that:

> *"A witness might appear to be perfectly honest but mistaken at the same time.* ***On the other hand it is a fact of life again that even lying witnesses are often impressive and or convincing witnesses"***

I have thus to use the available principle for crediting or discrediting a witness to avoid the possibility of the accused to be victimized by the lying but impressive witness. Principally, every witness is entitled to credence and have his evidence accepted unless there is good and cogent reasons for not believing him or her. See ***Goodluck Kyando v. The Republic*** *[2006] TLR 363.*

The accused invited me and my two gentle assessors not to believe PW1 and PW2 stating that at the alleged crime he was at the homestead of DW2 Francisco Gombo thus raising a defence of alibi and that he might have been fabricated due to the existed grudges between the deceased's family

and his own family whereas PW1 who is his aunt conflicted her own brother the father of the accused for farm inheritance to the extent that they sued each other and his farther rose a winner. But after the death of his father he observed that the deceased's family (PW1 and PW2) inclusive so to speak, started to distant themselves. They avoided even normal greetings;

'*Nilishangaa wanajikata hata kusalimiana hakuna'.* He stressed that all these created hatred of the deceased's family to his family and therefore PW1 and PW2 should not be believed. My two lady and gentle assessors unanimously rejected this line of defence. They opined that PW1 and PW2 gave a credible evidence against the accused and it was trustworthy.

I would join hands with my two lay assessors in their determination of the credibility of PW1 and PW2. I find nothing material in the defense evidence to contradict the evidence of PW1 and PW2 lowering their credibility and reliability. This is because the two witnesses did not identify only the accused but also one Linus Ngowe the then hamlet chairman of the locality containing the locus in quo. The said Linus despite the fact that he also accompanied other people including the Village Chairman PW3 and the Village Executive Officer, he soon escaped from the crime scene and from the village as a whole to date he is nowhere to be found. Mr. Said Mrisho a

lay assessor found this as a corroborative fact that the said Linus was honestly named by the witnesses so does the accused and that is why he has escaped to date. Although this is not his case but that implies what was stated by PW1 and PW2 in relation to identification is reliable as the absolute truth.

Not only that but also the earlier naming of the suspect by the prosecution witnesses has always been regarded as an assurance of their reliability as it was held in the case of ***Marwa Wangiti Mwita and Another v. Republic*** *[2002] TLR 39.* It was stated at page 43 of that case that:-

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

I have tried to think in vain, what was so special as between PW1, PW2 and the accused so that PW1 and PW2 could keep him in their mind for future incrimination. How could the two witnesses witness the brutal death of their husband and father respectively, run to different directions to the neighboring houses then immediately and simultaneously name the accused person and his companion as perpetrators to the crime. Did they have time

to cool and agree to fabricate the two in the crime? Why then! Why didn't they fabricate any other family member of the accused's family? Why didn't they incriminate him to some other crimes and await the instant crime as if they knew it was going to happen and they will survive! I find no suggestive reasons.

I am aware that PW1 and her deceased husband survived a murder attempt just five days prior to the instant crime in which the accused was alleged to have been among the companion to several others but that is not the case before me. And even if I would have to consider it, the same would only be corroborative evidence against the accused that he had intended to kill PW1 and her husband but on his unsuccessful he rearranged and finally succeeded to murder PW1' husband on 15/11/2018 just few days after the first attempt. This is because PW1 could not only wait crimes to befallen her to incriminate the accused. That means in the absence of crimes committed against her, the accused is not fabricated. It does not click a reasonable mind that a person intending to fabricate another would wait to be victimized in a crime as if he or she is aware of the nature of the crime and its degree. And if she or he will survive the crime.

It is undisputed fact that the deceased died brutally in the presence of PW1 and PW2, the two witnesses were shocked and run away. Under this worry situation, it is unexpected that an eye witness to such a brutal killing could quickly memorize his or her historical enemies, quickly make a decision as who among them should be fixed and immediately name him to the people who responded to the crime. I had time to observe their demeanor, they were responding to the questions at the examination in chief and during cross examination in a manner that persuaded not only me but also the two lay gentle assessors that they were speaking nothing but only the truth. I therefore rule out that PW1 and PW2 were witnesses of truth, credible and reliable. I have no any good reason and or even cogent one for not believing these witnesses. I find them to have properly identified the accused person Alfredy Kwezi @ Alfonce in companion of another stabbing the deceased person to death.

That being said, I find that the evidence of PW1 and that of PW2 could even stand independent of the other evidence on record, and either of it could sustain conviction of the appellant even if it would have been the only evidence on record provided that I would have warned myself of the danger to rely on the evidence of a single witness as it was held in the case of

Ahmad Omari v. The Republic, *Criminal appeal no. 154 of 2005* which quoted with approval the decision in the case of ***Anil Phukan v State of Assam*** *1993 AIR 1462* which held as follows:

> *"A conviction can be based on the testimony of* ***a single - eye witness*** *and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone".*

Even though and as rightly observed by the assessors, the evidence of PW1 and PW2 got corroborated by that of PW3, PW5 and PW6.

The three witnesses supra arrived at the crime scene in the same night, they authenticated the availability of Solar light and the moon light as well, so does DW3 the accused's own witness. The identifying two witnesses named the accused to them, instantly to have been among the assailants.

The accused disappeared from the village and that is why he was not seen soon after the crime despite of being traced by the village authority as testified by the Village Chairman PW3. The averment of the accused that he was in the village throughout is not true. This is because he himself admitted that he was indeed traced by the local authority and the police from the first day of the crime. If he was really in the village and did not commit the

offence, on the knowledge that he was accused and traced one would expect him to have surrendered himself. Even though he was not arrested in the village but in the different District at Kibondo as rightly observed by M/S Mwamvua Ramadhani lay assesor.

I have carefully gone through the defense evidence and dully considered it. I however disbelieve it just like my two assessors. I find the defense evidence of the accused to have been a fabricated story. This is because the accused has contradicted so much with his own witnesses in trying to establish the alibi. While the accused testified that he was at the homestead of DW2 and that when he got there found DW2 with some others namely; Ntezimana Balaya, Sikiliza Francisco and Keka or Alfred Chupa, his witness DW2 testified that it was the accused who joined him first and all others came later. On the other side, DW3 contradicted both the accused and DW2 when he stated that it was him the first to join DW2 then came the accused and then others, the last in the order of attendance being Ntezimana while DW2 testified that the last to join them was Keka Chupa.

Not only that but also the three defence witnesses contradicted on who did they met at the road on their way to the crime scene. While the accused stated in his evidence that they first met a group of people including Badiliko

Nziguye Banyikwa and Hatari Jeremiah who told them; '*Yaani mmejileta, ndugu wa marehemu wanawatafuta kwamba nyinyi ndiyo mliotenda tukio hususani wewe Alfredy Kwezi'* and that they ignored the warning and continued their way to the crime scene and then they met Kasindi holding a panga, his two witnesses denied completely to have met such people nor to have met anyone warning them as such. They insisted that they only met Kasindi the deceased's son who started to assault them with a panga.

Furthermore, while the accused did not state that the village chairman PW3 was among the people they met on the road, DW2 maintained that he was, and in fact was among the people who were chased by Kasindi. PW3 was in the witness dock, did not talk of meeting the accused and his witnesses and was never cross examined on that fact. In fact, he testified to the contrary that they traced the accused that night in vain. I don't think that this important fact escaped the mind of the accused to have notified his advocate that he was together with the village chairman near the crime scene but they (including the chairman) were chased by the deceased's son. All these contradictions damage the defence case as I find its evidence fabricated to evade the hand of justice because it is not possible for the three

witnesses to have been together and yet contradicts on those important aspects.

In the case of ***Sijali Juma Kocho V Republic*** *(1994) TLR 206,* the Court of Appeal of Tanzania observed that the appellant was under no legal obligation to prove the alibi but in the fact of the allegations made against him one would reasonably expect him to call the person he claims he was with at the time of the event. In this case the accused raised some issues on how he was responding to the alarm, how the deceased's son attacked them and how they got some assistance from the Village Executive Officer (VEO) who wrote them a letter to hospital.

In view of the herein reflections, one would expect the accused to call the VEO to corroborate his story and or cross examine PW3 who stated in evidence that he was together with VEO tracing the accused in vain. I join my gentle assessor Mr. Said Mrisho that the accused could have not been at any time with VEO, as the said VEO was among the people who were tracing the accused to be arrested for the offence but the accused was nowhere to be seen.

What is my legal stance on grudges? I had time in various cases to scrutinize the weight of established grudges in criminal cases where there is positive and strong evidence against the accused person. One of those cases is that of ***Majaliwa Ihemo v. The Republic,*** *Criminal Appeal no.2 of 2020* (HC) at Kigoma in which I observed;

> *'While proof of the existing grudges might be a good reason for discrediting a witness's testimony, it is equally true that proof of the existing grudges might be inferred as a corroborative evidence to the commission of the offence by the appellant/accused.... where there is evidence sufficiently to establish that the offence was in fact committed particularly a serious offence with some serious injuries to the victim and more so when there is corroborative evidence like in the instant case,* ***the existing grudges might justifiably be taken as corroborative evidence against the appellant as they tend to establish the motive behind the crime'.***

I hold the same view in the instant case and in my humble decision, I stand firm that; in the circumstances of the Oral direct and credible evidence of PW1and PW2 even if grudges as so alleged would have been sufficiently established, the conviction of the accused of the charged offence would be inevitable.

I therefore concur with my two lay assessors that the prosecution case has been proved beyond reasonable doubts against the accused person. I accordingly find him (Alfredy Kwezi @ Alfonce) guilty of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E. 2002 as he stood charged and convict him accordingly of that offence.

A. MATUMA,

JUDGE

08/04/2021

SENTENCE:

Upon conviction, the prosecution has called this court to enter a sentence in accordance to the law i.e section 197 of the Penal Code, Cap. 16 R.E 2002. On his party Mr. Joseph Mathias learned advocate for the convict prayed for mercy and forgiveness the convict is the first offender, has a family which depends on him and that despite this being not a Religious Court, the Holy Books stress for forgiveness.

Having heard the aggravated and mitigating factors, it is my finding that; since we have only one sentence against the person convicted of murder, under section 197 of the Penal Code Cap. 16 R.E. 2002, my hands

are tied. I have no option rather than pronouncing the prescribed sentence. I therefore sentence the convict Alfredy S/O Kwezi @ Alfonce to suffer a sentence of death under section 197 of the Penal Code Supra. I also in accordance to section 322 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019, direct that he shall suffer death by hanging. I further under the provisions of section 323 of the CPA supra inform the convict and his advocate that they still have a chance and right to appeal to the Court of Appeal of Tanzania against the conviction and sentence subject to the requirements of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and the Court of Appeal Rules, 2009 as amended. It is so ordered.

Sgd: A. MATUMA,

JUDGE

08/04/2021

Court: Judgment delivered on this 08th day of April, 2021 in the presence of Raymond Kimbe and Benedict Kivuma learned State Attorneys for the Republic and in the presence of the Accused in person and his Advocate Mr. Joseph Mathias.

Sgd: A. MATUMA,

JUDGE

08/04/2021