

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT TARIME

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 33 OF 2020

THE REPUBLIC

VERSUS

NYAMHANGA S/O MTIBA NYAHUCHO..... 1st ACCUSED

STEVEN S/O MTIBA NYAHUCHO.....2nd ACCUSED

JUDGMENT

24th & 25th March, 2021

Kahyoza, J.

Marwa s/o Daudi died a violent death on the 15th day of October, 2013. The assailants inflicted a severe cut wound at the posterior part of the neck, 10 cm deep and 10 cm long. In deed the head was almost severed from the rest of the body. The police accused **Nyamhanga s/o Mtiba Nyahucho** and **Steven s/o Mtiba Nyahucho** of murdering **Marwa s/o Daudi**. **Nyamhanga s/o Mtiba Nyahucho** and **Steven s/o Mtiba Nyahucho** denied the accusation deposing that they nowhere near the scene of the crime.

The issue is whether **Nyamhanga s/o Mtiba Nyahucho** and **Steven s/o Mtiba Nyahucho**, (the accused persons) murdered **Marwa s/o Daudi** (the deceased persons).

The accused persons, **Nyamhanga s/o Mtiba Nyahucho** and **Steven s/o Mtiba Nyahucho** stand charged with information of

murder contrary to section **196 and 197** of the **Penal Code [Cap. 16 R. E. 2019]** (the Penal Code). It was alleged that on 15th day of October, 2013 at Nyakunguru village within Tarime District in Mara Region, the accused persons murdered one **Marwa s/o Daudi**. They pleaded not guilty to the information of murder.

The prosecution summoned three witnesses to prove the accused persons' guilt. It summoned **Samwel Isaya Obrero (PW1)**, the medical doctor who examined the deceased's body and prepared a post mortem report (Exh.P.1), **James Daudi Salima (PW2)**, the deceased person's younger brother, and **No E 9351 SGN Frank (PW3)**, the arresting police officer.

The prosecution evidence is that on the 15th October, 2013 at 06.00 pm **Pw2 James Daudi Salima** heard heated arguments from the deceased person's farm. He went to the scene where he saw the deceased sandwiched between Nyamhanga Mtiba and Steven Mtiba @ Sailo. Nyamuhanga stood behind while Steve stood in front of the deceased person, each holding a machete. He knew both Nyamhanga Mtiba and Steven Mtiba @ Sailo for a long time. He deposed that they grew up all together and they were village mates. He identified the accused persons in the court's dock.

Pw2 James Daudi Salima deposed that Steven who stood in front of the deceased, threatened to cut him with a machete. At the same time, Nyamhanga Mtiba who stood behind the deceased cut him with machete on the neck from behind. He witnessed all that while he was about 15 metres away from the scene of the crime. He stated that it was daytime. The sun had not yet set down. He shouted for help and people arrived at that place. The accused persons escaped. **Pw2**

James Daudi Salima identified Wambura Mkwabe, Mirango Mirengo and Mama Ghati at scene of the crime.

The deceased bled profoundly from the neck and blood was trickling from the nose. Shortly, thereafter the deceased passed away.

Pw2 James Daud Salima reported the incident to police station at Tarime that Nyamhanga Mtiba and Steven Mtiba @ Salilo killed Marwa Daudi. On the 16/10/2013 police went to the scene of the crime with a doctor, **Pw1 Samwel Isaya Obyero**.

Pw1 Samwel Isaya Obyero examined the deceased person's body at Nyakunguru Village. **Pw1 Samwel Isaya Obyero** deposed that Marwa Daudi's death was due to loss of blood as result of the cut wound. He testified that a sharp object was used to inflict the cut wound and that the wound was 10cm deep and 10 cm long. **Pw1 Samwel Isaya Obyero** tendered a post mortem examination report, as Exhibit. P.1

A number of years passed before the accused persons were arrested. **E. 9351 SSGT Frank (Pw3)** the arresting police officer deposed that he arrested the accused persons who were hiding in the farm on the 2/09/2017. He deposed that the accused persons escaped after they committed the offence on the 15/10/2013, resurfaced later before they were arrested on the 2/09/2017. **E. 9351 SSGT Frank (Pw3)** deposed that the OC CID instructed him to go to Nyakunguru Village and arrested the accused persons. He added that he OC CID got information from his informer.

The accused persons defended themselves on oath. They did not call any witness. Their defence was to the extent that they were nowhere near the crime scene. They technically raised the defence of

alibi. **Nyamhanga s/o Mtiba Nyahucho (Dw1)** deposed that at 06:00 pm on the 15/10/2013 he was still grazing his herds of cattle. He returned home his herds of cattle on that day at 07:00pm and went to sleep. He refuted the evidence that he killed Marwa Daud and the evidence that he fought with Marwa. He testified that he did not know the deceased person. He admitted that he was arrested on the 2/9/2017 suspected of being found in unlawful possession of stolen cow.

Steven s/o Mtiba Nyahucho (Dw2) like **Nyamhanga s/o Mtiba Nyahucho (Dw1)**, his elder brother, gave evidence on oath that on the on the 15/10/2013 at 06:00 pm was at his business place. He deposed that he was a barber, conducting that business at Kyamakorele village. He deposed that he used to take one hour from his village to his business place on foot. On the day, the prosecution alleged he killed the Marwa Daud, he left his business place at 09:00 pm and arrived home at 10:00pm.

He deposed further that on the 2/9/2017 four militiamen arrested him at his home place together with the first accused. The police suspected them to possess stolen goods. They suspected them to possess one head of cattle. He testified that the police charged them with the offence of being found in possession of goods suspected to have been stolen and the offence of murder on the same day before the District Court.

In trials like this, the prosecution has to prove beyond reasonable doubt all the elements of the offence of murder, which are; **one**, that the person alleged to have been killed is in fact dead; **two**, that the alleged death was unnatural one; **three**, that the accused before the court is the one who killed the deceased; and **four**, that the killing was

done with the intention of either causing death or causing serious bodily injury. That is the killing was done with malice aforethought.

In this case, as submitted by the defence advocate, there is no dispute that Marwa Daud is dead and that he died on the on the 15th day of October, 2013. It is also not contested that Marwa Daud died an unnatural death. He died from severe loss of blood caused by a cut wound inflicted on his neck. Besides not being contentious, **Samwel Isaya Obrero (PW1)**, the medical doctor who examined the deceased's body and prepared a post mortem report (Exh.P.1) and **James Daud Salima (PW2)**, the deceased person's younger brother proved these facts beyond all reasonable doubt. Thus, acting under this evidence I find it proved beyond all reasonable that Marwa Daud is dead and that his death was not a natural one.

As in most murder cases, the most contentious issue is whether the two accused persons are the ones who killed the deceased. The prosecution's case hinges on the evidence of **James Daudi Salima (PW2)**, the eye witness. The prosecuting Attorney named him a star witness. The accused persons' defence was that they were not at the scene of the crime on the time the offence was committed.

First, it has been undisputably established that the deceased, the accused persons, and **James Daudi Salima (PW2)** are all residents of Nyakunguru village. Second, it is not contested that the offence was committed at 06.00 pm. The only dispute is whether it was dark or daytime. The defence did not give any evidence whether it was dark on the fateful day at 06:00pm or not. It is in the defence's final submission that it was dark. The prosecution testified via **James Daudi Salima (PW2)** that the offence was committed at 06:00pm, during the daytime

as the sun had not set down. The prosecution's evidence was not contradicted. I find it proved that the offence was committed during the daylight.

Three, the prosecution's eye witness also deposed that he knew the accused persons very well. Despite the accused persons being his village mates, **James Daudi Salima (PW2)** stated that they grew up all together. I trusted **James Daudi Salima (PW2)**'s evidence.

It is important to determine if **James Daud Salima (PW2)** saw and clearly recognized the accused persons at the scene of the crime. **Steven s/o Mtiba Nyahucho (Dw2)** deposed that he was not at the scene of the crime on the material time as he was grazing his herds of cattle and that he returned them home at 07:00 pm and went on bed. **Nyamhanga s/o Mtiba Nyahucho (Dw1)** like the first accused person stated that on the material day and time he was at Nyamakolele village running his business of a barber shop. He left his business premises at 09:00 and arrived to his home village at around 10:00pm.

Given the above contradictory versions, it is upon this court to find which part of the story is more reliable than the other. That is which witness is more credible than the other, of course bearing in mind that the accused persons have no duty to establish their innocence.

The accused persons' defence implies that they could not have committed the offence because at that time they were away in different places from the scene of the crime. Thus, they raised the defence of *alibi*. The law regarding the defence of *alibi* is well settled. **First**, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage,

the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6)).

Second, the accused person is required to call evidence to prove the defence of *alibi*. See the case of **Sijali Juma Kocho V. R** [1994] TLR 2016. Though, even if, he does not adduced any evidence in support of the *alibi* the court has to consider the defence. **Third**, It is enough for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. Thus, 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. This position of the law was pronounced in the case of **Jumanne Juma Bosco & Mohammed Jumanne v.R**, Criminal Appeal No. 206/2012 CAT (Unreported) and **DPP v. Chibago Mazengo & Another**; Criminal Appeal No. 109 of 2019 (CAT Unreported).

Fourth, if the accused raises such a defence belatedly it casts doubts on its authenticity. In **Kibale v. U** (1969) Vol. 1 E.A 148, the erstwhile the East African Court held **that a genuine *alibi* is expected to be revealed to the police investigating the case or to the prosecution during trial. When it so given, the prosecution has an opportunity to investigate its genuineness. The defence of *alibi* given for the first time during the defence, there is a likelihood that it is an afterthought.** In **Masoud Amina v. R** [1989] TLR 25 the Court denied the accused's defence of *alibi* on

account that the accused did not issue a notice and that he did not call the witness who was with him.

In the instant case, the accused persons did not give notice that they will rely on the defence of *alibi*. They raised the defence belatedly during their defence. I accord the accused persons' defence no weight; firstly on the ground that it was raised after the prosecution had closed its case, thus an afterthought; secondly if one considers the prosecution's recognition evidence of **James Daudi Salima (PW2)** there was no chance of mistaken identity. **James Daudi Salima (PW2)** knew the accused persons before, the offence was committed during the daytime and he witnessed the incident about 15 paces away from the crime scene.

In addition to the above, to prove that **James Daudi Salima (PW2)** identified properly the accused person, he prescribed the role each accused person played. He stated that **Steven s/o Mtiba Nyahucho (Dw2)** who stood in front of the deceased and threatened to cut him with a machete. At that time, **Nyamhanga s/o Mtiba Nyahucho (Dw1)**, who was standing behind the deceased cut him. It is on the record that **James Daud Salima (PW2)** reported to police shortly after Marwa Daudi met his demise, mentioning the accused persons as the killers. The police arrived at the crime scene the following day with the doctor.

It is trite law 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 an unexplained delay or complete failure to do so should put a prudent court to inquiry. See the case of **Marwa Wangiri Mwita and Another V. R**, [2002] TLR 40. **James Daudi Salima (PW2)**

immediately reported the incident mentioning the accused person. The defence deposed and submitted that **James Daudi Salima (PW2)** reported the incident after 4 years. I was unable to buy that submission or find truth in the accused persons' defence, as **James Daudi Salima (PW2)** deposed that he saw the accused persons committing the offence, shouted for help and the accused persons escaped. I find truth in the **James Daudi Salima (PW2)**'s version. The suspects who escaped arrest at the scene of crime would not have stayed at their home waiting for the arresting officers.

I find **James Daudi Salima (PW2)** a credible witness and his recognition evidence watertight, thus, not shaken by the accused persons' defence of *alibi* even if, it were to be given weight. Like the Ladies and Gentleman assessors, I give the accused persons' defence of *alibi* no weight. It is valueless. They were therefore, present at the scene of the crime and **James Daudi Salima (PW2)** recognized them as persons who killed the deceased.

The last issue is whether the accused persons killed the deceased with malice aforethought. Malice aforethought may be proved directly and indirectly by establishing one of the elements stated under section 200 of the Penal Code or it could be inferred from the circumstances surrounding the killing as decided by the Court of Appeal in **Enock Kipera vs. Republic Cr. Appeal 150/1994**. was 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. (emphases supplied)

It is evident that Marwa Daudi died a violent death as a result of loss of blood due to a severe cut wound inflicted at the posterior part of the neck. **Pw1 Samwel Isaya Obyero** deposed that the wound was 10 cm deep and 10 cm long. The head was almost severed from the rest of the body. That evidence proves; **one**, that the weapon used was sharp and potentially dangerous, **two**, that massive force was applied; and **three**, the blow targeted a neck which is a dangerous and sensitive part of the human body. Once all the above proved facts are considered either in isolation or collectively, a conclusion that the person who wounded the deceased intended to cause death or grievous harm is an inescapable. Thus, I find that the prosecution proved that the accused persons who killed the deceased had malice aforethought.

It is on record that during the cross-examination **James Daud Salima (PW2)** the deceased and the accused persons had quarrels over the boundaries. He added that on fateful day they quarreled over the boundary. It is an established principle that "*where there is evidence of a fight, the appellant should be found guilty on a lesser offence of manslaughter*". See the case of **Sospeter Karoli v Republic**, Criminal Appeal No. 122 of 2007 (unreported).

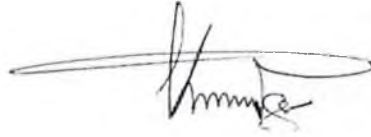
The question is whether there was a fight or quarrels over the boundary, which amounted to a fight referred in the case of **Sospeter Karoli v Republic** (supra). The term fighting is *taking part in a violent struggle involving the exchange of physical blows or the use of weapons.*" **James Daudi Salima (PW2)** deposed that he found the deceased sandwiched by the accused persons. The first accused person stood behind while the second accused person stood in front of the deceased each holding a machete. He did not witness *exchange of physical blows or the use of weapons*. The accused persons refuted the evidence that there heated arguments. They deposed that they did not know the deceased person. It is my considered view that even if there were heated arguments, such arguments do not amount to a fight, unless there was actual confrontations.

The ladies and gentleman assessors were divided on the issue whether there was a fight which negates malice aforethought in this case. The third assessor opined that there was fighting and opined further that, for that reason, the accused persons be found guilty of the lesser offence of manslaughter. The first and second assessors opined that there was no fighting. They opined that the accused persons were guilty of murder. I join hands with the two assessors that there was no evidence of a fight or actual confrontation. Neither the prosecution's evidence nor the accused persons' evidence established that there was a fight or actual confrontation. As pointed above the evidence established heated arguments which is not a fight.

In the upshot, I concur with the two assessors and I find **Nyamhanga s/o Mtiba Nyahucho** and **Steven s/o Mtiba**

Nyahucho guilty and convict them of the offence of murder u/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2002, now Cap. 16 R.E. 2019].

It is ordered accordingly.



J. R. Kahyoza

JUDGE

25/3/2021

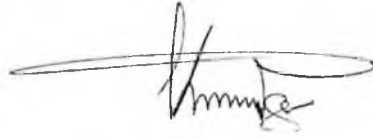
SENTENCE

Section 197 of the Penal Code provides a sentence of a person convicted of the offence of murder, as death by hanging. However, section 26(2) of the same Penal Code states that-

"The sentence of death shall not be pronounced on or recorded against any person, who at the time of commission of the offence was under eight years of age, but in lieu of the sentence of death, the court shall sentence the person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under condition as the Minister..."

Given the fact that the 1st accused person committed the offence when he was 18 years, I sentence him to be hanged to death under section 197 of the Penal Code read together with section 322 of the Criminal Procedure Act [Cap 20 RE2019].

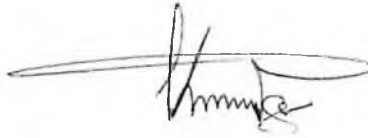
The second accused person, who committed the offence when he was 15 years, is to be detained in prison during the President's pleasure under section 197 read together with 26 of the Penal Code.



J. R. Kahyoza, J

25/3/2021

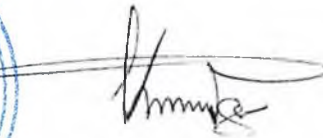
Court: Right to appeal by lodging a notice of appeal within 30 days from today explained.



J. R. Kahyoza, J

25/3/2021

Court: Judgement and sentence delivered in the presence of the accused persons, Mr. Temba, the State Attorney for Republic and Mr. Obwana Advocate and Mr. Kigombe Advocate for the first and second accused persons respectively. B/C Ms. Catherine Present.



J. R. Kahyoza, J

25/3/2021

