

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE No. 46 OF 2018**

**THE REPUBLIC**

Versus

- 1. KAMHANDA JOSEPH @ ABEL**
- 2. EMILIANI WILLIAM @ SANYU**
- 3. EDWIN SHUKURU @ KUMBUKA**
- 4. MAWAZO AUGUSTINO**
- 5. JACKSON THEONEST @ JACK**
- 6. AFIDHU YAHAYA**

**JUDGMENT**

28/04/2021 & 03/05/2021

**Mtulya, J.:**

Mr. Emmanuel Kashaija @ Sentasa (the deceased) was invaded, attacked and killed by a group of people at night hours in his home residence of Bugango Village in Missenyi District of Kagera Region on the 3<sup>rd</sup> day of October 2016. After investigations on the attack and killing of the deceased, six (6) persons were arrested and connected to the murder of the deceased contrary to section 196 of the **Penal Code** [Cap. 16 R. E. 2002] (the Code). The six persons are named: Kamhanda Joseph @ Abel, Emiliani William @ Sanyu, Edwin Shukuru @ Kumbuka,

Mawazo Augustino, Jackson Theonest @ Jack, and Afidhu Yahaya (the accused persons).

The Republic represented by learned State Attorney, Mr. Kahigi alleged that the offence was committed in night hours, but accused persons were correctly identified by wife of the deceased, Mrs. Asira Emmanuel (Asira) and son of the deceased Mr. Innocent Emmanuel (PW2) who were present at the scene of the crime and witnessed the attack and killing of the deceased, as there were: moon light (mbalamwezi); torch light; solar light; the accused persons were next to the witnesses; heard their voices; and knew them before the invasion and attack as they lived in the same village of Bugango.

According to the prosecution, the Republic complied with the law in the precedent of **Amos Mgaji @ Seje & Juma Mlemeta v. Republic**, Criminal Appeal No. 254 of 2006, where the Court of Appeal stated that where there is clear conditions of identification, such as favorable light, long duration for correct identification of the accused, and that a witness had known the accused persons before the attack, the court cannot doubt the identification.

In order to substantiate its allegations against the accused persons, the prosecution summoned in this court a total of five (5) witnesses and tendered three (3) exhibits. The son of the deceased was summoned

and marshalled as prosecution witness number one (PW1) and briefly testified that he had seen the accused persons attacking the deceased when he was at the back yard kitchen and the deceased was sitting in a stone adjacent to the house. PW1 testified that there were a total of five (5) persons who showed up at the scene of the crime, namely: the third and sixth accused persons, followed a bit later in a few minutes by the first and second accused persons and finally the fifth accused person joined them and all were asking why the deceased is protesting to leave the village of Bugango. PW1 testified further that the named accused persons started to attack the deceased with Panga on different parts of the deceased's body hence caused death of the deceased. Being worried as he may also be attacked by accused persons, PW1, decided to shift from the kitchen, where he was seeing the accused persons attacking the deceased, in favour of hiding in the nearby *omusheshe* tree which had several leaves.

According to PW1, he was hiding in a place without any obstruction to see the events at about ten (10) meters between himself and the attackers. With visibility of the scene of the crime and identification of attackers, PW1 stated that there was *mwanga wa mbalamwezi* (moon light) and torch lights which were switched on by the attackers during the attack and looting of deceased's properties. PW1 stated further that

all that time when the attack was under way, his mother was inside the house and finally the attackers looted house stuffs, including a bicycle, torched the house into fire and left the scene of the crime. Following the torching of the house into fire and looting of the materials, according to PW1, he decided to escape the scene of crime for Mr. Onyango's residence in search of safety. At Mr. Onyango's residence, PW1 mentioned names of all six (6) accused persons before Mr. Onyango and early in the morning, the dual went to Bugango Village Chairman and could not find him and decided to go to the scene of the crime where they found police officers. In this court, PW1 identified by face and names of five accused persons, and by face the third accused person.

The deceased wife was summoned to appear to testify as prosecution witness number five (PW5) on what she witnessed on night hours of the fateful day, but could not be found as per evidence recorded by Bugango Village Chairman Mr. Cyprian Joel Tindikahwa. Therefore, the prosecution prayed her cautioned statement recorded immediately after the events on 3<sup>rd</sup> October 2016 and additional statement recorded on 17<sup>th</sup> February 2018 be admitted in this case under the authority of section 34B of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act) and were collectively admitted as exhibited P.3. The initial statement in PW3 recorded immediately after the event

shows that on 3<sup>rd</sup> October 2016 at 20:00hrs, the deceased and Asira were outside their house and saw a group of people arriving in their residence. In her statement she was recorded stating that: *niliwaona watu wengi, kundi kubwa la watu walifika nyumbani*. According to P.3, Asira was able to identify all the accused persons from voice conversations, face and that they all live in Bugango village. P.3 also depicts that the deceased was attacked in different parts of his body by use of *mapanga, shoka, marungu* and *mikuki*.

However, Asira was not recorded on: the source of light; intensity of light; duration of stay of the attackers in her residence and distance between Asira and the attackers. All these were replied in the additional statement in P.3 recorded one year and four months after the events of attacks to the deceased. The statement shows that: *nilikaa nao kwa muda mrefu kama dakika kumi na tano...niliwaona kutokana na mwanga wa mbalamwezi*. Despite this statement, the intensity of light and distances between Asira and the attackers were not recorded.

Paulo Nyanda @ Onyango (PW2) was summoned to testify on what he was informed by PW1 on the night hours after the attacks on the deceased and events of the following day. According to PW2, on the 3<sup>rd</sup> October 2016 at around 21:00 hours, PW1 showed up at his residence in a state of pressure and fear and had informed him of the attacks

against his parents, the deceased and Asira. PW2 testified that PW1 informed him that he was able to identify two accused persons, the third and sixth. As it was night of darkness and state of fear emanated from the attackers, PW1 and PW2 could not risk their lives to go to the village Chairman to report the incidence at night hours. According to PW2, they went to the Village Chairman in the morning and found him in his residence and advised the dual to go the scene of the crime. At the scene of the crime, the dual found the body of the deceased, police officers, the first, second, third and fourth accused persons. However, PW2 stated that he was not at the scene of the crime when the event of attack occurred; he went with PW1 at the village chairman's residence and found him; he stated that PW1 had told him of the two people who were attacking the accused; and in his Cautioned Statement mentioned one accused person only, third accused person.

An investigation officer from the police department, numbered E.7984 D/Cpl. Brighton (PW4) and Medical Doctor Geoffrey Hochi (PW3) went to the scene of the crime in morning hours of 4<sup>th</sup> October 2016. PW3 testified that he went at the scene of the crime and examined the deceased body and recorded a Postmortem Examination Report, which was admitted as exhibit P.1. The report in P.1 shows that the deceased

died from excessive loss of blood emanated from deep cut wounds in skull bone, left shoulder and right hand.

On the other hand PW4 testified that he has fifteen (15) years investigation experience and went to the scene of the crime to investigate the events leading to attacks which caused demise of the deceased. According to PW4, he consulted several individuals including wife of the accused, Asira, accused's relatives and village leaders and decided to record cautioned statements of several other individuals, including the Asira, PW1 and PW2.

PW4 testified further that PW1 and Asira mentioned all accused persons in her statements recorded in two different occasions, *viz*: 4<sup>th</sup> October 2016 and 17<sup>th</sup> February 2018 and stated how she was able to identify the accused persons as there were: moonlight; solar light; she was outside washing her legs; and she had long conversations with the accused persons. Finally, PW4 prayed to tender Sketch Map of the Scene of the Crime which was admitted and numbered exhibit P.2. However, PW4 stated that he had not sketched the kitchen of the deceased's house, *omusheshe* tree and solar energy. With reasons of leaving them out of the map, PW4 stated that the sketch is aimed at important things of the killing events and in any case, there was neither *omusheshe* tree nor kitchen.

PW4 also stated that the deceased body was found in front of the house with wounds in different parts of the body. With reasons of recording two cautioned statements in P.3 in different dates with interval of one year and four (4) months, PW1 stated that the initial statement was recorded when Asira was at Bugango Hospital in bad health conditions and could not register all facts of what transpired.

However, evidences registered by the prosecution side, were protested by the defence. The versions from the defence were as follows: Mr. Kamhanda Joseph @ Abel (DW1) testified that he was arrested by the police following mention of his name from a list which was prepared and read by Bugango Village Chairman on the 4<sup>th</sup> October 2016 when the villagers gathered at the scene of the crime. According to DW1 the list also included the second accused, third accused, John Bosco, Anthony Kaswa and Kalory Protas. DW1 testified that after the arrested, all suspects were arraigned before Bugango and Kyaka Police stations for interrogations and cautioned statements recording. With where he was on the night hours of 3<sup>rd</sup> October 2016, DW1 testified that he was at his residence asleep with his wife. However, DW1 admitted the deceased was alleged to be a witch in Bugango Village and was killing women and children. DW1 testified further that he hated the



deceased and at one instance, he was involved in cutting down deceased's banana trees because of hate and fear against him.

On his part Mr. Emilian William @ Sanyu (DW2) testified that on 3<sup>rd</sup> October 2021, it was a rainy day and did not move out of his residence and slept early hours of 19:00hours in his house with his family including wife and children. According to DW2, on 4<sup>th</sup> October 2016, he went to his farmland for cultivation and was called by Ward Executive Officer and informed him of the death of the deceased and directed him to go to the scene of the crime. When they arrived at the scene of the crime, according to DW2, they found the body of the deceased who was a village mate and was alleged to be a witch.

DW3 further testified that it is from the allegations of witchcraft which moved the villagers to invade his farmland and did cut down banana trees in inserting pressure for the deceased to leave their village. DW2 testified that he did not participate in the cutting down the banana trees. Finally, DW2 testified that he was arrested morning hours of 4<sup>th</sup> October 2021 following mention of his name as a neighbor to the deceased. To DW2, the order was pronounced by PW4 and was asked to assist police in Kyaka Police Station in investigation process on the attack and demise of the deceased. However, after recording of the statement, DW2 was connected to the attacks landed to the deceased.

The third accused person, Mr. Edwin Shukuru@ Kumbuka (DW3) testified that he received cell-phone call from Afande Mohamed, OCS Bugango Village Police Station and was informed of the death of the deceased. According to DW3, he received the cell-phone call when moving from Kashojua Hospital to his residence in Bugango Village in morning hours of 4<sup>th</sup> October 2016 and Afande Mohamed directed him to go to the scene of the crime. At the scene of the crime, DW3 found many people including Hamlet Chairman, Village Chairman, Village Executive Officer and Ward Executive Officer. DW3 testified further that in the course of conversations, Village Chairman, Mr. Cyprian Joel Tindikawa asked him as to where he was on 3<sup>rd</sup> October 2016 and replied that he was at Hospital with his wife attending their sick children until morning hours of 4<sup>th</sup> October 2016. With his wife showing up in this court to corroborate his evidence, DW3 stated that the wife disappeared to her homeland Kigoma and cannot be found.

DW3 testified further that the police officers from Kyaka Police Station arrived at the scene of the crime on the 4<sup>th</sup> October 2016 and interrogated village leaders and himself as a ten cells leader. After interrogation, according to DW3, the police officers conducted a separate interrogation and DW3 was interrogated by Afande Msekwa and suspected him of hiding some facts of the attacks against the

deceased. At the end of the interrogation, DW3 was arrested and connected to the attack and killing of the deceased.

With witchcraft allegation, DW3 stated that there were wide spread beliefs in the village that the deceased was a witch and had killed and swallowed daughter of Anthony Kaswa, Wife of John Bosco Joseph and son of Theophil @ Boss. The waves of allegations against the deceased on witchcraft were escalated by the deceased's wife utterances when she was quoted during *kupandwa mizimu* stating that she had killed and swallowed the three dead persons. According to DW3, it is from anger emanated from utterances of the deceased's wife which caused banana trees cutting, killing and torching of the deceased's house. To DW3, he had reported the threats to the appropriate authorities including village leaders and police station and did not participate in the banana trees cutting. Finally, DW3 testified that he stated all these facts before the police and were recorded in cautioned statement.

Mr. Mawazo Augustino (DW4) on his part testified that his arrest and connection to the death of the deceased emanated from list of names which were read by Bugango Hamlet Chairman, Mr. Cleophas on 4<sup>th</sup> October 2016 at the scene of crime where he went for burials issues. According to DW4, there were seven people mentioned from the list, viz: himself, first, second, third accuse persons, Anthony Kaswa, John

Bosco and Kalory Protasi. On his absence from the scene of the crime on 3<sup>rd</sup> October 2016, DW4 stated that he was at his residence with his family and knew the deceased as a good villager, but at one point villagers were pointing finger at him alleging that he was witch. With the death of the deceased, DW4 stated that he did not participate in the killing and was informed of the attack by Mr. Lucas in the morning hours of 4<sup>th</sup> October 2016 when he was cultivating maize in his farmland.

Jackson Theonest @ Jack (DW5) on his part testified that he was arrested by the police officers on 9<sup>th</sup> October 2016 at his home residence of Bunazi Village in Missenyi District and linked with the death of the deceased occurred on 3<sup>rd</sup> October 2016. In his testimony, DW5 stated that he may be connected to the death because he divorced his nine (9) years stay wife, daughter of the deceased and married another woman in Bunazi Village. According to DW5, he heard the news on expiry of the deceased on 6<sup>th</sup> October 2016 from Nazir, but was unable to attend the funeral as he was very far and had no money in support of his journey.

With the attacks and torching of the deceased's house on 3<sup>rd</sup> October 2016, DW5 stated that he was at his residence in Bunazi Village with his new wife who is currently cannot be found as she left their residence. DW5 testified further that he was also affected by the events

as he lost his father in law, his family house as it was also set into fire and family disintegration emanated from the attacks and torching of the houses. On witchcraft allegations, DW5 stated that he is not aware of the allegations of witchcraft against the deceased.

The sixth defence witness (DW6), Mr. Afidhu Yahaya testified that he was arrested on 26<sup>th</sup> October 2016 and connected to the attack and death of the deceased occurred on 3<sup>rd</sup> October 2016. However, according to his testimony on the night leading to the event he slept at his residence at Bugango centre following busy schedule of assisting his pregnant wife at *Mkunga wa Jadi* (traditional healer). According to DW6, in October 2021, his wife was in final stages of delivery, but faced with difficulties hence ferried her to the traditional healer for assistance.

DW6 stated that on 4<sup>th</sup> October 2016, when he was returning from the traditional healer, himself and his wife were in a bicycle and along the way they met peoples militia (*Mgambo*) Mr. Jamal and police officer Mr. Ahmed in a motorbike, and asked of their trip in the bicycle and received a reply. To DW6, he was in financial difficulties and went to several people in search of assistance, after consultation and permission from Mr. Ahmed and Village Chairman to leave the scene of the crime.

According to DW6, his trip in search of money to assist his pregnant wife took him to neighboring village of Bwangoma and ended

in neighboring country of Uganda at Chazanga Masaka on 19<sup>th</sup> October 2016. DW6 returned Bugango Village on 24<sup>th</sup> October 2016 and was arrested in the next day, 25<sup>th</sup> October 2016 and brought to Kyaka Police Station for statement recording and charged for the murder of the deceased. DW6's stated that all that he testified is reflected in his statement recorded at Kyaka Police Station.

According to the defence, under legal representation of Mr. Mujaki the prosecution case is faulted at different levels. To his opinion, the attacks and killing occurred at night hours and therefore identification of accused persons is paramount important as per requirement of the law in the precedent of **Raymond Francis v. Republic** [1994] TLR 100. According to Mr. Mujaki in the present case, PW1 who is the key witness, said the event occurred at night hours and happened when he was in the kitchen and later shifted to the nearby *omusheshe* tree with a lot of leaves hence had difficulty in seeing the events. Mr. Mujaki stated further that PW4 testified that the sketch map of the scene of the crime does not display the kitchen or *omusheshe* tree which are very vital in the present case. With voices of the attackers, Mr. Mujaki submitted that identification by voice is not reliable as per decision in **Nuhu Selemani v. Republic** [1984] TLR 93 and that there were no descriptions of the attackers.

Mr. Mujaki also contested the variations in evidences of two eye witnesses on the same event. To Mr. Mujaki, PW1 testified that the attackers came in three groups of two, two and one making up a total of five (5) persons whereas PW5 testified that they came in a large group and was able to identify the six accused persons. With aid of light at the scene of the crime, PW1 and statement in P.3 show that there were moonlight whereas PW4 testified that there were moonlight and solar powered light. According to Mr. Mujaki this is not watertight evidence and contradicts the directives in the precedent of **Rashid Ally v. Republic** [1987] TLR 97.

The Republic on the other hand thinks that PW1 and statement in P.3 show exactly what transpired on the night hours of 3<sup>rd</sup> October 2016. According to Mr. Kahigi, the accused persons were correctly identified by PW1 and Asira by use of moonlight as per requirement of the law in the precedent of **Amos Mgaji @ Seje & Juma Mlemeta v. Republic**, Criminal Appeal No. 254 of 2006 where the Court of Appeal stated that where there is clear conditions of identification, such as favorable light, long duration for correct identification, and the witness had known the accused persons before, the court cannot doubt the identification.

On contradictions, credibility and reliability of witnesses, Mr. Mujaki submitted that there are a lot of contradictions which show that the evidences of all witnesses were fabricated to indicate the accused persons and therefore the witnesses cannot be trusted. To justify his statement, Mr. Mujaki submitted that the contradictions can be seen in the following evidences:

- (i) PW1 stated he saw the accused coming in different groups of two, two and one person making them five (5) persons at intervals whereas statement in P.3 shows that Asira saw a group of people coming and attacked the deceased and was able to identify six (6) attackers in the group;
- (ii) PW1 stated when the attackers were coming, Asira was inside the house whereas P.3 shows that she was outside;
- (iii) PW1 testified to have hidden in kitchen and *omsheshe* tree whereas PW4 testified that there was no such *omsheshe* tree or kitchen at the scene of the crime;
- (iv) PW3 stated the identification was possible by use of moonlight and solar energy light whereas eye witnesses PW1 and Asira stated it was moonlight only; and



- (v) PW3 sketched and testified that the body of the deceased was found in front of the house whereas PW1 testified that the deceased's body was at the backyard;

According to Mr. Mujaki all these contradictions are serious and go to the root of the case as it was well explained in different precedents, such as in **Mohamedi Said v. Republic** [1995] TLR 3; **Mohamedi Bakari v. Republic** [1989] TLR 134; **Rashid Ally v. Republic** [1987] TLR 97; and **Wilfred Lukago v. Republic** [1994] TLR 189.

On other hand, Mr. Kahigi thinks that the Republic has marshalled credible and reliable witnesses, especially PW1, who may not be faulted unless there are good reasons to disbelieve him as per requirement of the law in the precedent of **Goodluck Kyando v. Republic** [2006] TLR 363. To his opinion, Mr. Kahigi, thinks that discrepancies and contradictions mentioned by Mr. Mujaki are minor and do not go to the root of the matter as per decision in **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 and in any case contradictions cannot be avoided as it was stated in the case of **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015. To Mr. Kahigi's views, the major issues are whether PW1 and Asira were at the scene of the crime or whether the attack against the deceased occurred.

On mentioning the accused persons at the earliest possible time, Mr. Kahigi submitted that the cautioned statements of PW1 and Asira show that the accused persons were mentioned at the earliest possible time as PW1 mentioned them on the same day before PW2 and on the next day before the police officers and Asira mentioned them on the next day just after the attack. To opinion of Mr. Kahigi, precedents in this court and Court of Appeal give high consideration in mentioning accused persons immediately after the attack and killing as it was stated in the case of **Marwa Wangiti Mwita v. Republic** [2002] TLR 39. However, Mr. Mujaki thinks that the mentioning of the accused persons had a lot of contradictions, discrepancies and faults which show that the case was fabricated against the accused persons, and therefore this court cannot enter conviction based on such contradictory evidences.

Finally, Mr. Kahigi blamed the defence on raising the issue of *alibi* at the stage of hearing without abiding by the laws on notice of *alibi* in **Criminal Procedure Act** [Cap. 20 R. E. 2019] and precedent in **Tongeni Naata v. Republic** [1991] TLR 54 in calling witnesses who were together with the accused persons to substantiate their testimonies. In reply of this argument, Mr. Mujaki submitted that the accused persons mentioned several persons in their cautioned statements recorded by the police at the earliest opportunity, including village leaders, peoples'

militia and police officers, but all those mentioned were not summoned by the prosecution to dispute the testimonies of the accused persons hence adverse inference may be drawn against the Republic.

The law and practice of this court in cases like the present one has been that the burden of proof is always on the prosecution to prove its charge beyond any reasonable doubt as it was stated in the precedents in **Mohamed Saidi Matula v. Republic** [1995] TLR 3 and **Said Ahmed v. Republic** [1987] TLR 117. In cases like the present one, the prosecution is also required to establish nexus between the attacks leading death of the deceased and participation of the accused persons as it was held in the precedent in **Mohamed Saidi Matula v. Republic** [1995] TLR 3.

The law in section 62 (1) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act) requires oral evidences to 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 the present case, evidence in PW1 and statements of Asira show that the dual were at the scene of the crime and stated to have seen the accused person killing the deceased.

However, there is important *proviso* from the practice of this court and our superior court that: *it is trite law that before basing a conviction solely on evidence of visual identification, such evidence must remove*

*all possibilities of mistaken identity and the court must be fully satisfied that the evidence is watertight* (**R. v Eria Sebwato** [1960] E.A. 174; **Waziri Amani v. Republic** [1980] TLR 250; and **Shiku Salehe v. Republic** [1987] TLR 193). It is from this *proviso* that the Court of Appeal in 1970 handed down the precedent in **Waziri Amani v Republic** (supra) stating, at page 251-252 that:

*...evidence of visual identification, as Courts of in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore that 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.*

The issue therefore before this court is whether the evidences registered by the prosecution in the present case are absolutely watertight. Before, I employed judicial determination of the case, I invited three (3) Hon. Assessors, who sat with me in this case. The idea was to get lay persons' interpretations of the issue. All of them concurred that the prosecution did not prove its case beyond reasonable doubt.

Although they arrived at the same conclusion, but each had its own route. The first Hon. Assessor was of the view that the investigation team did not complete its task and left some of the issues untouched, such as the status of *omsheshe* tree and kitchen. The second Hon. Assessor thinks that the evidences of PW1 and Asira differed sharply, who are the key witnesses and were at the scene of the crime whereas the third Hon. Assessor thinks that the mentioning of three (3) persons before PW2 by PW1 immediately after the event, and later recorded six (6) persons is unfortunate.

In law, the criteria was well set in the decision of **Waziri Amani v Republic** (supra) followed by many other precedents of this court and Court of Appeal, including **Amos Mgaji @ Seje & Juma Mlemeta v. Republic** (supra), and recently in **Annuary Nangu Kawawa Athumani v. Republic**, Criminal Appeal No. 102 of 2016. Reading all these precedents, the tests which are put for consideration in resolving the issue whether the evidences registered by the prosecution in the present case are absolutely watertight to convict the accused persons of the offence of murder, are: clear conditions of identification, such as favorable light, long duration for correct identification of the accused, and that a witness had known the accused persons before the attack.

In the present case, the evidences registered show that the attack occurred at night hours of 3<sup>rd</sup> October 2016. However, eye witnesses who were at the scene of the crime and investigation officer who visited the scene of the crime, sharply differed in very key issues, such as the source of light. PW1 mentioned moonlight (*Mbalamwezi*) and accused persons' torch lights used in the attack and looting of the properties in the deceased's house. PW3 identified moonlight (*Mbalamwezi*) and solar powered light whereas the statement of Asira shows that the source of light was moonlight and it was recorded in the additional statement after one year and four months after the events of attacks to the deceased.

The Key witness PW1 and statements in P.3 shows that witness PW1, PW2 and Asira lived in the same village with deceased and the accused persons and that the witnesses knew the accused persons and had long duration of stay with the accused persons as they had conversations. However, record shows that PW1 stated to have identified two persons only from a group which came in different people at certain interval. Again, PW1 failed to name the third accused person during the proceedings in this court who he admittedly to be his neighbour. As long as the accused persons were recorded in statements after a list of names delivered by the Hamlet Chairman, and details of

identification were not stated in the initial statement in P.3, and noting of discrepancies of the eye witnesses on the arrivals of the accused persons, it will be unsafe to convict the accused persons for the offence of murder.

As this case was solely based on identification of the accused persons, I will not be detained to determine whether the discrepancies are minor or major. In any case, PW1 stated that he was hiding in the kitchen and later in *omsheshe* tree, which cannot be substantiated by evidence, taking consideration that the investigator has fifteen (15) years investigation experience and PW1 mentioned to him where he was hiding.

I understand Mr. Kahigi cited the decision in **Goodluck Kyando v. Republic** [2006] TLR 363 on credibility and reliability of witness stating that a witness who testifies consistencies statements and his demeanor is inviting may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him. That is correct statement and it has been repeated in the Court of Appeal (see: **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018).

However, it is a settled law that a witness must show that he *had the opportunity to see what he claimed to have seen* (see: **Johana's**

**Msigwa v. Republic** (1990) TLR 148). In the present case, without doubt, there are major inconsistencies in statements of the witnesses which completely destroyed their credibility and reliability (see: **Kibwana Salehe v. Republic** (1968) HCD 391; and **Surdeyi v Republic (1971)** HCD 316). In **Sahoba Benjuda v. Republic**, Criminal Appeal No. 96 of 1989, stated that:

*Contradiction in the evidence of a witness effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.*

That is why the Court of Appeal in the precedent of **Jaribu Abdallah v. Republic**, Criminal Appeal No. 220 of 1994, has attempted to combine the two tests for purposes of appreciating the principle in identification of accused persons and credibility of witnesses in the following text:

*In matters of identification, **it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witness.***



*The condition for identification might appear ideal but that no guarantee against untruthful evidence.*

(Emphasis supplied)

There is a claim registered by Mr. Kahigi that the witnesses PW1 and Asira mentioned the accused persons the earliest possible and they pointed a finger to the accused persons as per precedent in **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. I understand that position of the law and was cemented ten years later in the precedent of **Onesmo Kashonele & Others v. Republic**, Criminal Appeal No. 225 of 2012. However, when there is a more than one year delay, plausible explanation must be registered in this court. Even the claim by PW1 that he mentioned the accused persons before PW2 immediately after the attacks and killing is doubted.

In the present case, there is tough suspicion leading to arrest and prosecution of the accused persons. However, strong suspicion alone is not enough to land conviction to accused persons and it cannot take the place of proof (see: **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002, **B. Mapunda v. Republic**, Criminal Appeal No. 2 of 1989 and **Benedict Ajetu v. Republic**(1983)TLR 190).

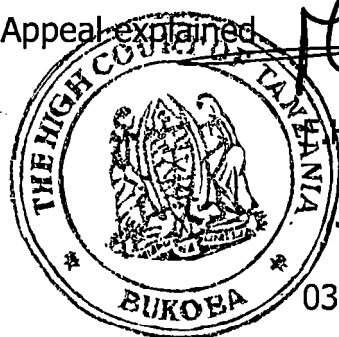
Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death of the deceased but also the

link between the said death and participation of the accused persons. The onus never shifts away from the prosecution and no duty is cast on the accused persons to establish their innocence (see: **Mohamed Said Matula v. Republic** [1995] TLR 3). The prosecution must produce evidence to substantiate its case beyond any reasonable doubt (see: **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v. Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).

Having said so and reasons adduced in this judgment, I have formed an opinion that the accused persons have raised doubts in the present case and the prosecution has failed to establish its case beyond reasonable doubt and therefore it is unsafe to land conviction against the accused persons on the registered evidence in this case. I therefore find the accused persons not guilty of the offence of murder as charged and I hereby order the accused persons be released from prison custody forthwith, unless further held for other lawful cause.

Ordered accordingly.

Right of Appeal explained



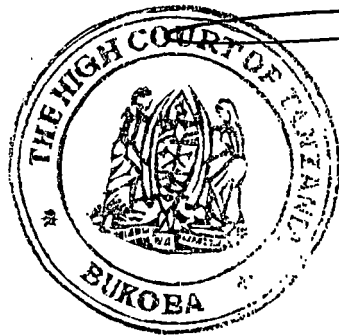
H. Mtulya

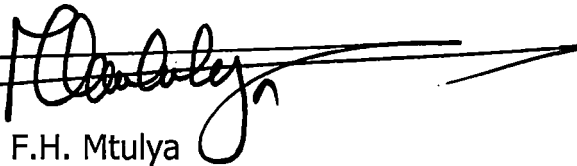
Judge

03.05.2021

This Judgment was delivered under the seal of this court in open court in the presence of learned State Attorney, Mr. Emmanuel Kahigi for the Republic, Mr. Dastan Mujaki for the Defence, and in the presence of the accused persons.

Honorable assessors thanked and accordingly discharged.



  
F.H. Mtulya

**Judge**

03.05.2021