

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT RUANGWA
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 11 OF 2020
REPUBLIC
VERSUS

- 1. HAMISI HUSSEN NG'ITU**
- 2. SHAIBU S/O ATHUMANI @ NYALAWI @ MKAOABUN**
- 3. ZAMOYONI MIKIDADI @ MNALI @ DR. KIMA**

JUDGMENT

Hearing date on: 16/3/2021

Judgment date on: 29/4/2021

NGWEMBE, J:

The accused **Hamisi s/o Hussein Ng'itu, Shaibu s/o Athumani @ Nyalawi @ Mkaoabun** and **Zamoyoni Mikidadi @ Mnali @ Dr. Kima**, stand charged for murder contrary to section 196 and 197 of the Penal Code Cap 16 R.E 2002. According to the particulars of the charge, the deceased is Agness d/o Thomas Katopola who met her death on 22nd day of July, 2018 at Namapwiya Village within Nachingwea District in Lindi Region. The accused were alleged to set fire to the house of the deceased, which caused her death.

That on diverse dates and time the three accused persons were arrested. Particularly, the 1st accused person was arrested on the same date of incidence at night of 22nd day of July, 2018 when he was at Mnero Hospital nursing and taking care for an admitted patient called Omar, Hamis Kalipe. The 2nd accused person was arrested a month after the incidence; and the 3rd accused person was arrested at Milola Village within Lindi District on 18th September, 2018. Thereafter, they were arraigned in court and charged accordingly.

When the information was read over to the accused persons, they all pleaded not guilty, hence the prosecution lined up in court six (6) witnesses to establish and prove criminality against them. Those prosecution witnesses are:- Renard Damas Chitanda; Severina d/o Bakari Matekula; Hermani Vitus Ng'ombo; Daud Anselemu Mbinga; Constantino Ezekiel; and G 1808 D/C Rogato (PW – PW6 respectively). The prosecution also tendered one exhibit in court, that is a sketch map, admitted and marked as exhibit P1. Out of those witnesses and exhibit, the prosecution managed to establish and build the case of murder against all accused persons. Thus, the court ruled that the accused persons had a case to answer, hence invited them to adduce their defence case.

The genesis of the ordeal, began in the evening hours of 22nd day of July, 2018, when the accused persons and their young colleges, who are not yet arrested, were present at Namapwiya Village, within Nachingwea District in Lindi Region. A group of young men in the said evening, went up to their Ward Executive Officer (WEO) to make follow up on their fellow young man called Omari Hamisi @ Kalipe, who was arrested by the Ward

Militiamen, famous known as Police Jamii, for failure to pay TZS. 3,000/= as contribution for construction of Ward Health Centre.

When they arrived to the office of WEO, they found the said Omari Hamisi @ Kalipe, badly beaten and wounded by those Militiamen who arresting him. Thereafter, they obtained permission from WEO to look for Constantino Ezekiel, who was the leader of those Militiamen, but failed to find him. Hence they went up to his house (house of Constantino Ezekiel @ Njunjunda) but in vain.

That angry young boys decided to destroy some properties of Constantino Ezekiel including, doors and windows of his house. Also is alleged to set fire into his pig zoo (hut) which killed all three pigs in there, and set fire to the house of Constantino's mother (deceased) one Agness d/o Thomas Katopola. Alleged that when they went to the deceased house, they found the deceased at her house, seeing that angry group of young boys, the deceased decided to enter inside her house in order to hide. But one Issa Lisaputu, who is yet to be arrested, closed her door and set fire. The deceased being an old woman failed to survive, hence burnt to death.

Thereafter, the group went to the deceased neighbor one Vitus Herman Ng'ombo and throw stones and club to his house, destroying doors, windows and some iron sheet, later they ran away.

The information about the incidence reached the Village Chairman who reported the incidence to Nachingwea Police Station. Police arrived at the scene of crime on the same night and found the deceased already dead by

fire. Thus, they took the body of the deceased to Mnero Mission Hospital for medical examination, whereas, it was revealed that the cause of death of Agness Thomas was due to severely burnt wounds.

Having such brief background of the incidence, now I find it important to give brief summary of evidences adduced by both parties during trial.

The first prosecution witness was Renard Damas Chitanda (PW1), who testified as a Medical Doctor working at Mnero Hospital in Nachingwea District. That on 23/7/2018, while was at Mnero Hospital, Police from Nachingwea came to his office and together went to the mortuary to examine a dead body of Agness Thomas. The result of that examination was to the effect that, the deceased body was of a female person, which body was almost bunt down. He concluded that, the source of death was due to fire.

The second prosecution witness (PW2) was Severina d/o Bakari Matekula, testified that Agness Thomas (deceased) and Constantino Ezekiel, were her neighbours. On 22/7/2018 at around 6:00 pm was at her home place with her husband Herman Vitus. At around 7:00 pm she saw a group of young boys going to her house, when they arrived at her neighbour's house, (Constantino Ezekiel), she heard such group uttering "lianzishe", meaning let us begin. Then she saw them throwing stones and clubs to the house of Constantino. At that particular time, she was outside of her house, but at the rear side of the house, preparing dinner.

Testified further that, thereafter such group went to the pig zoo (hut) and to the house of Agness Thomas (deceased), where they found her seated

at outer door. Seeing that group, the deceased went inside her house. Then she saw Issa Lichaputu, locking the door of the deceased house outside. Then, other boys called Shaibu Athuman and Hamis Hussein Ng'itu used Match box to set fire in a dry grass to the house of Agness Thomas and in the pig zoo.

It was her further testimony that, while the two huts were burning, all group of boys went to her house, they met her outside in the rear side of her house. In total the group comprised 15 young boys, but she managed to identify only 5 of them namely; Issa Lichapuka (not in court); Shaibu Athuman; Hamis Ng'itu; Simageni Mkunyila (Not in court); and Akeke (Not in court). However, Hamis Ng'itu and Shaibu Athuman went to her place and asked her as to where about her husband, she replied that her husband was not at home. Then, Shaibu Athuman destroyed her solar bulb, which was lighting, continued to throw stones and clubs to her doors, windows and utensils. On the same night, she went to the Village Chairman to report the incidence.

She proceeded to testify that, the distance from her house to the deceased was just close, likewise the house of Constantino. She easily identified Shaibu Athuman; Hamis Ng'itu; Issa Lichaputu; Simagen; and Akeke because they were from the same Village. Testified that the event took about 20 minutes.

Within the same night, while she was at home, police went to the scene of crime. She participated to show police on the scene of crime. Also testified that she helped police to fetch water, and extinguish fire in the house of

the deceased Agness Thomas. Also she took some clothes, hoe and a bag which used by police to put the dead body to Mnero Hospital. Again police turned to the scene of crime on 23/7/2018 for further investigation.

On cross examination, PW2 responded that in the scene of crime there were 15 young boys.

Herman Vitus Ng'ombo was the third Prosecution witness (PW3) who testified that, he was a neighbor of Agness Thomas (deceased) and Constantino Ezekiel. Agness Thomas was his grandmother, while Constantino was his uncle. On 22/7/2018 he was at his house with his wife. At around 7:00 pm he saw a group of young boys more than 15, invading the house of Constantino Ezekiel. At that time, he was at the front door of his house. He heard that group uttering "Lianzishé" meaning let us begin. Immediately thereafter they started throwing stones and clubs to the house of Constantino Ezekiel.

Further, testified that, they went to the house of Agness Thomas (deceased) who by then was seated outside her house. Seeing that group of persons, immediately, she entered inside her house, while the door was still open. Upon arrival to her house, one Issa Lichapuka locked the door of her house outside. The deceased house was roofed with dry grass.

Testified further that, he saw one person firing the house of Agness Thomas and did the same in the pig zoo. The one who fired those two houses was Shaibu Athuman. Seeing the two houses burning, the said

group invaded his house, but himself ran away with one child to hide in unknown place till in the following morning.

Among the persons in that group, he identified four (4) of them, namely; Issa Lichaput; Hamis Ng'itu; Shaibu Athumani; and Zamoyoni Mikidadi. He identified them through flame of fire in the burning house of Agness and Solar bulb in his house. More so, Issa Lichaputu was living in the same Village, but different hamlet. Hamis Hussein Ng'itu was his village mate together with Shaibu Athuman and Zamoyoni Mikidadi. While was hiding, the group went to his house, throwing stones and clubs. He continued to hide until the following morning.

It was his further testimony that, when he came to his house on that morning, he witnessed, doors and windows were destroyed. That, the house of Agness was burnt down. Thus, she died by fire and three pigs were burnt to death. On 25/7/2018 he was summoned to Nachingwea police station for interrogation.

Following his testimonies, the fourth Prosecution witness was Daudi Anselemu Mbinga (PW4), a village chairman. That on 22/7/2018 he was in the area known as Kijiweni in the evening hours, where youth meet and exchange ideas. One Severine Bakari went where he was, she informed him on the burning of the house of Agness Thomas. Immediately he called the councilor and together went to the scene of crime. Also they informed police from Nachingwea.

Further testified that, he witnessed fire in the house of Agness Thomas, pig zoo and destruction in the house of Severine. Then he left the scene of crime to his office to wait for arrival of police from Nachingwea.

However, upon his arrival at the scene of crime, he did not see any one save Severine. While he was at the scene of crime, some neighbours came to the scene of crime. Police also arrived to his office and together went to the scene of crime. Police witnessed fire and, in that house, they found a body of Agness Thomas. Police and PW4 took the deceased body to Mnero Hospital.

Testified further that, on 23/7/2018 he was in his office, later police from Nachingwea, arrived and he led them to the scene of crime for sketch map drawing. Then police interrogated few witnesses and left to Nachingwea, while leaving him at his office.

Moreover, testified that, the source of event was Constantino Ezekiel, a militiaman who went to arrest Omari Hamisi @ Kalipe. In the process of arresting him, they did beat and injure him badly, until he was admitted at Mnero Hospital for medication. That being the case, friends of Omari Hamisi @ Kalipe, went to the Ward Executive Officer, demanded permit to arrest Constantino Ezekiel, the permission was granted and they went to the scene of crime looking for Constantino Ezekiel, but failed to find him. Thus, such group of young boys, decided to revenge by destroying his properties and burnt his mother's house and pig zoo.

Constantino Ezekiel (PW5) testified briefly that he was born and grew up at Nachingwea District in Namapwiya Village. He is a land tiller and is voluntarily working as Militiaman, famous known as "Polisi Jamii". That he built his house near to his mother's house (Agness Thomas) the deceased and Herman Vitus his uncle.

That on 22/7/2018, he was assigned by WEO to arrest one Omar Hamisi @ Kalipe for his failure to pay contribution for construction of Health Centre. He participated together with two others to arrest Omar Hamisi @ Kalipe, who was at the traditional dance (unyago), a distance equal to one kilometer from the WEO's Office. They brought him to the WEO's office, they left him in the hands of WEO and themselves went to their respective homes. At around 7:00 pm, suddenly, a group of young persons from WEO's office went to his house. Seeing that, he left home and went to hide to unknown places.

Testified further that the reasons for those people going to his house, was related to a person he arrested and took him to WEO's office. Upon arrival to his house, he saw his mother seated near the door. While he was hiding, he saw fire to his mother's house and pig zoo. So, he continued hiding until next morning, when police arrived to the scene of crime. What he saw in that morning was a burnt house of his mother and pig zoo.

Also testified that the distance from his house to the house of Herman is about 10 steps.

The last prosecution witness was E 1808 D/C. Rogato (PW6), who testified that on 22/7/2018 at around 7:30 pm, he was called by OC CID and ordered him to go to Namakwiya Village. Himself and others went to Namakwiya, upon arrival, they found one house burnt down and one person called Agness Thomas was burnt to death. They extinguished that fire and managed to find the body and took her to Mnero Hospital.

He added that on 23/7/2018, they went to Mnero Hospital, where the deceased body was preserved. Dr. Chitanda examined the deceased body and thereafter handed over the body to the relatives for burial ceremony. Thereafter, they went back to the scene of crime for investigation and he drew sketch map of the scene of crime. He identified the drawn sketch map, same was tendered and admitted in court as exhibit P1.

That on his investigation, he observed that, the house of Agness Thomas together with pig house were totally burnt down. Also found stones and clubs in the house of Constantino and Herman. He interrogated some witnesses including Severine Bakari and Herman. The information gathered was that the accused persons, Hamis Hussein Ng'itu; Shaibu Athuman; Zamoyoni Mikidadi; and Issa Lichaputu (who is yet to be arrested) were responsible.

He investigated on where about of those culprits, he realized that they ran away from the village after the incidence. Hamisi Hussein Ng'itu was arrested on 22/7/2018 at Mnero Hospital when he was taking care of Omari Hamisi Kalipe, who was injured by militiamen and was admitted in that hospital.

On 15/8/2018 he was informed that other culprits have returned to the village, thus, on 17/8/2018, he went to the village and arrested Shaibu Athuman; Ally Chinemba; and Juma Seif. Again, he was informed on 17/9/2018 that Zamoyoni Mikidadi; and Ramadhani Omari; were at the village of Milola in Lindi rural area. Thus, used police at Milola to arrest them. On 18/9/2018 were brought to Lindi police and on 20/9/2018 were taken to Nachingwea police Station.

He concluded his testimonies by insisting that the accused persons were responsible for murder of Agness Thomas. On cross examination, PW6 testified that the event occurred at 7:00 pm. When the event occur at night, sometimes they conduct identification parade with a view to properly identify the culprits, but in this case, they did not conduct identification parade, he concluded.

Upon review of the prosecution evidences, this court found all three accused persons to have a case to answer; hence the court explained to the accused, all their rights as provided for under section 293 of CPA. In turn the defense case was blessed by three witnesses, (accused persons) who testified under oath and affirmation.

Briefly the defence case commenced by Hamisi Hussein Ng'itu (DW1), that he lives at Likongowele in Namakwiya Ward within Nachingwea District. That on 22/7/2018 he was at home doing family activities. He heard that Omari Hamisi Kalipe was arrested by Militiaman called Constantino Ezekiel @ Njunjunda. Omar Hamisi @ Kalipe was his brother in law, whom he

married his sister. He went to WEO's office where he found Omari Hamis @ Kalipe badly beaten and injured. He took motor cycle to carry him to Mnero Hospital for treatment. Omari Hamisi Kalipe was admitted at Hospital and remained with him at that night.

While he was at the Hospital with a patient, at about 11:00 pm, police went to Mnero Hospital to the admitted patient and arrested him without any explanation. They took him to police station at Nachingwea leaving the patient alone in hospital, subsequently they punished him thoroughly.

Added that, after being beaten, he was ordered to record confession on what happened at Namakwiya village. Then was put in police lockup until 29/7/2018 when he was arraigned in court charged for murder. He denied to participate in killing the deceased (Agness Thomasi). Moreover, he denied to know the deceased.

In cross examination, DW1 responded that he was born and grew at Likongowele Village in Namakwiya Ward. On the eventful date he was at Likongowele.

Shaibu Athuman @ Nyalawi (DW2) testified that on 22/7/2018 he was at his farm in Miluwi village in Liwale District. He went to his farm around 8:00 am and he arrived around 12:30 noon. On that day, he went to prepare sesame for sale. That he remained in his farm for three days, then he returned to his village. On 24/7/2018 he went back to his village with sesame in his bicycle. When he was on the way home, he met people

drinking local brew at Mbute village, who told him on presence of police in his village due to the incidence of murder.

He said when he arrived at home, he went to the market, where he heard that Agness Thomas died due to fire. On 17/8/2018 at about 3: 00 am police came to his house and arrested him. They went together to the house of Juma Seif and arrested him, arrested Zamoyoni Mikidadi, Akeke and Ally Juma Chinemba, then went to Nachingwea police and all were locked in until when were taken to court on accusation of murdering Agness Thomas.

The last defence witness was Zamoyoni Mikidadi @ Mnali @ Dr. Kima (DW3) who testified that on 22/7/2018 in the morning, he was at his home, building toilet of his house. At around 7:10 in the evening, he went to the market to purchase some food. While was on the way to the market, he heard people saying there was fire in one house. Also, he heard pronouncement from mosque that the burnt house had a person inside. The one who died was Constantino Ezekiel's mother called Agness Thomas.

In the night he heard another announcement that the deceased will be buried on 23/7/2018 in the afternoon. On 23/7/2018 when he was at the market place, he heard people saying the source of death of Agness was Constantino Ezekiel who injured Omari Hamis Kalipe. On 3/8/2018 he went to Milola to build house of his Grand Mother. However, on 18/9/2018 at about 5:00 pm while at Milola building the said house, three police men from Milola arrested him and took him to Milola police. Then he was taken to Lindi police station and later to Nachingwea police station.

Consequently, on 25/9/2018 was arraigned in court at Nachingwea District Court. However, he denied to participate in killing the deceased Agness Thomas.

Upon closure of evidences by both parties, this court allowed the learned counsels to present their final arguments, whereby the learned State Attorney strongly argued with useful precedents convincing this court to find the accused liable for murder of Agness Thomas.

Argued quite strongly that on 22/7/2018, at Namapwiya village in Nachingwea District, all accused persons murdered Agness Thomas contrary to section 196 and 197 of the Penal Code. Six Prosecution witnesses and the sketch map of the scene of crime proved the offence of murder to the standard required, against the accused persons.

Argued rightly that in criminal cases, the prosecution has a statutory duty to prove the case beyond reasonable doubt. He referred this court to the case of **John Namahanga Vs. R, [1980] T.L.R** and in the case of **Mohamed Matula Vs. R, [1995] T.L.R** where the court insisted on such duty of the prosecution.

Further argued that, in order for murder to exist, there must be a death of a human being; such death must be unnatural; the killing must be done with malice aforethought; and the accused must be proved that they participated in that murder. Upon proving those elements, murder will likewise be proved. In respect to this trial, the learned State Attorney, argued that, all those elements were proved by six prosecution witnesses and an exhibit tendered in court.

The fact that Agness Thomas was killed by fire was proved by PW1, and that PW2, proved to see the deceased while alive and entered in her house and also saw the accused closing her door outside, while the deceased was inside her house. That the source of death of the deceased was fire which burnt her body. To support his assertion, he referred this court to the case of **Edga Kayumba Vs. DPP, Criminal Appeal No.498 of 2017 (CAT – Mbeya) page 12**. Added that, death of Agness Thomas was unnatural, it was caused by fire set by the accused persons.

Went further to argue on the intention of the accused persons to set fire to the house of the deceased was to kill her. Referred this court to the cases of **Enock Kipela Vs. R, Criminal Appeal No.150 of 1994, and Zayumba Vs. R, Criminal Appeal No.227 of 1993**.

That the evidences of PW2 and PW3, at the eventful date, they were at home when they saw a group of young persons' arriving to the house of PW5 and altered "lianzishe" which followed with destruction by throwing stone and clubs to that house. He repeated what was testified by PW2 and PW3. At the end he submitted that the accused had malice aforethought, which is proved by the use of fire to destroy the deceased house, while they knew she was inside. Thus, proved intention to kill.

Submitting on common intention, he referred section 23 of the Penal Code, which defined common intention, such definition suited the circumstances and actions of the accused persons to have common intention to commit an unlawful purpose to the deceased.

On proper identification of the accused person, he argued that the house of PW2 had a Solar light and later the flame of fire from the deceased house and the Pig Zoo helped to identify the accused persons. Moreover, at certain time, PW2 discussed with the accused persons on where about of her husband. Above all, PW2 and PW3 are residing in the same village with some of the accused persons, thus knew each other. Therefore, the issue of identification of the accused persons were properly done.

The State Attorney rightly submitted on the source of light as fundamental to prove proper identification. He cited the case of **Abdallah Waziri Vs. R, Criminal Appeal No.116 of 2004 at page 10**. Where the court discussed on the source of light, which was a Matchbox that was enough to identify the accused. In respect to this case, the source of light was solar bulb and flame of fire in the deceased house.

He referred also to **Criminal Appeal No.273 of 2017 Godfrey Gabinus and 2 others Vs. R. (CAT Mtwara) and Waziri Aman Vs, R [1980] T.L.R 250** where the court discussed in details on virtual identification that must be watertight, time used to observe, distance, source of light, and whether they knew each other prior. The testimonies of PW2 and PW3 indicated that the incidence took about 20 minutes. Therefore, their evidences were watertight against the accused persons, he added.

Arguing on *alibi*, as per the 2nd accused person, the learned State Attorney was right to point out prerequisites before an accused may rely on defence of *alibi*. *Alibi* is governed by section 194 (4) (5) of Criminal Procedure Act. Defence of *alibi* must be accompanied with notice, which is lacking in this case. Rested by arguing that the evidence adduced by prosecution, proved

the offence of murder against all accused persons beyond reasonable doubt. Thus, all accused persons, be found guilty and accordingly be sentenced as per the case of **Twaha Lunyungu Vs. R. [2000] TLR 277.**

In reply, the learned defence counsel Mr. Issa Chiputula argued vehemently, that the prosecution failed to prove the case to the standard required by law. That the prosecution failed to prove all elements of murder. Thus, referred to section 3 (2) (a) of Evidence Act which provide statutory duty to the prosecution to prove the case beyond reasonable doubt. Rightly argued that, always the accused is not convicted due to weak defence case, but on strong prosecution evidence. He referred this court to the case of **John Makorobera & 2 others Vs. R. [2002] TLR 296.**

Agreed on the occurrence of the incidence at night and the evidence available is virtual identification. Cited the case of **Waziri Aman Vs. R, (Supra)**, where the Court of Appeal held that virtual identification is the weakest and unreliable identification. Same position was repeated in the case of **Kamuri Machimba Vs. R, Criminal Appeal No.325 of 2013 page 6**, where the court provided several basic elements to rely upon on proper virtual identification. Added that in respect to this case, PW2 and PW3 both testified that the event occurred at night, and the source of light was a solar bulb, but none of them explained the intensity of that light. Solar bulb differs on their intensity of light. Also, none of them disclosed as to the place where that bulb was placed? If PW2's evidence should be considered and is true that she was cooking food at the rear door of the house, it means the bulb was at the rear side of her house, how could she see what was happening to another house? Also, the distance from the source of light to where the accused were, none of the prosecution

witnesses disclosed it. Referred this court to the case of **Magwisha Mzee Vs. R**, at page 9 the court held, mere assertion that there was light is not enough, it must be clearly stated. The question of what light or source of light used to identify the accused firing the deceased house remain unanswered, he added.

Arguing on the distance from where the witness was and the accused, and time spent to observe the event, he referred this court to the case of **Mohamed Musa Katuli V. R, Criminal Appeal No.65 of 2016 at page 7**, where the court held, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, must explain satisfactorily on the dressing, distance and time spent to recognize him.

The third element on proper identification is description of the witness to a second person he will meet with and to police. PW2 said he went to PW4 to explain on the event. It means PW2 first met with PW4, however she did not disclose who were involved in that killing, instead she said there was a group of young persons who invaded the deceased house. It means PW2 did not know the accused, otherwise she could have disclosed their names. This is also a fact testified by PW4, that the first person to inform him was PW2, but did not disclose the culprits. PW2 disclosed to police on another date when was interrogated. Failure to name the accused persons at the earliest opportunity is fatal as stated in the case of **Marwa Wangiti Mwita & Another Vs. R, Criminal Appeal No.6 of 1995 (unreported)**.

Arguing on delayed to arrest the accused persons, while were within the village, raised reasonable doubt, he added. This was considered in the

case of **R, Vs. Isaya Mokoli & Another, Criminal Session Case No.112 and 136 of 2016; Jaribu Abdallah Vs. R, [2003] TLR 271**. Submitted that PW2 and PW3 were not credible in respect to identification of the accused.

On *alibi*, he submitted that section 194 (6) of CPA is clear that notice should be issued prior to relying on *alibi*. However, that was a failure of an advocate which should not turn against the accused persons.

Finally submitted quite rightly that murder is the most serious offence when proved to the standard required has only one punishment, that is, death by hanging. Therefore, its proof must leave no doubt, such proof is lacking on this case, he added. Referred to the case of **DPP Vs. Elias Mkoba and another [1990] T.L.R 115**, where the court held that when there are doubts on the prosecution evidences, the accused should benefit from that doubt. Since the prosecution's case has many doubts, same should benefit the accused persons, he rested.

Upon final submissions by the learned counsels, this court, prepared a summing up note to the Hon. Assessors to air their opinions ahead of judgement as required by section 298 of CPA. Despite the fact that their opinions do not bind the presiding judge, but that is the law, unless changed otherwise, must be complied with. Thus, when were invited to air their opinions, unanimously found the accused persons responsible for death of Agness Thomas Katopola. Their conclusion was arrived based on the reason that, though the accused did not intend to kill the deceased, rather intended to revenge against the acts of Constantino Ezekiel, yet at the end they killed the deceased. That they were properly identified by

PW2 and PW3, and that the accused persons were present on the eventful date so they participated.

Having painfully, summarized the evidences adduced in court by both parties and the final arguments advanced by the learned counsels, I find important to point out relevant elements constituting the charge of murder. Section 196 of the Penal Code, clearly define murder to be *"Any person who with malice aforethought causes the death of another person by unlawful act or omission is guilty of murder"*.

In order for the offence of murder to stand, malice aforethought must be established. Section 200 of the Penal Code, clearly provide circumstances upon which malice aforethought may be derived including but not limited to; an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not; knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous harm is caused or not, by a wish that it may not be caused; an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years; an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

Therefore, the crux of this case is to evaluate the available evidences with a view to underscore as to whether the prosecution successfully, established and proved the offence of murder against the accused persons

beyond reasonable doubt. It is a cardinal rule of criminal justice, that the accused persons shall not be convicted on the basis of their weaknesses of the defence, rather the conviction shall be based on the strength of the prosecution case. The only advantage on the weakness of the defense case is to enhance the prosecution case. According to the case of **Nzogya Ramadhani Vs. R, Criminal Appeal No. 29 of 2017**, the Court of Appeal considered the purpose of evaluating evidences adduced in court is to calculate the quality, importance, amount or value of the evidence adduced in court before arrival to the conclusion.

Accordingly, the evidences on record, is certain that the deceased Agness Thomas Katopola died unnatural death. That she was killed by fire on that fateful night; Also, it is undisputed that a group of young persons' accounting up to 15 or more, after being aggrieved with the conduct of Constantino Ezekiel @ Njunjunda, decided to revenge. The group obtained permit from WEO to go and either arrest or call Njunjunda for the act he did to Kalipe. When they missed him, such group decided to revenge and the killing occurred during night. The question for determination in this trial is, who set fire to the deceased house? Second, whether the accused persons were properly identified by the witnesses testified in court, while were in a group of angry young boys?

To answer these questions, this court asked a common question as to why the prosecution has uncompromised duty to prove criminal cases beyond reasonable doubt. Proof on murder cases usually is more demanding than may be on other criminal offences. Such requirement is traced back to 19th century, in England, when **Lord Benjamin Franklin** said *"It is better one*

hundred guilty persons should escape than that one innocent person should suffer". That theory was immediately supported by a Jewish legal theorist called **Maimonides** who expounded the theory by saying *"It is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death"*. On 20th century the theory was modified to require the prosecution to prove criminality *"beyond reasonable doubt"*.

In year 1947, just two years after the World War II, **Lord Denning** endeavored to give breath to that theory by providing the most lucid definition of the phrase *'beyond reasonable doubt'* in the case of **Miller Vs. Minister of Pensions**, (1947) 2 All ER 372, when he said: -

"... and for that purpose, the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed"

The Law of Evidence in our jurisdiction adopted the same line of theory governing proof of Criminal cases in section 3 (2) (a) of Evidence Act as quoted hereunder:-

(a) "in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

Using this section of law, Justice Msoffe J.A in the case of **Nathaniel Alphonse Mapunda and Benjamini Alphonse Mapunda Vs. R [2006] T.L.R. 395** strongly pronounced that:-

"As is well known, in a criminal trial the burden of proof always lies on the prosecution. And the proof has to be beyond reasonable doubt. There must be credible evidence linking the appellants with the offence committed"

In similar vein, in the case of **Jonas Nkinze Vs. R, [1992] T.L.R 213**, held:-

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"

I fully subscribe to the requirement of proving criminal cases beyond reasonable doubts, especially on murder cases, its proof should always leave no reasonable possibility. As such the court must satisfy beyond reasonable possibilities that the prosecution proved the case and the whole evidences adduced in court, directly linked the accused with the alleged murder. There are two dangers apparent on being obsessed with demanding proof of the offence beyond slightest possibility of doubt. The first danger is to make the law fail to protect innocent citizens against hard core criminals and deflect the course of justice. If the evidence is strong enough against an accused person as to leave only a remote possibility in his favour, such remote possibility may be dismissed and the accused should be convicted for the offence he committed.

The second danger is to convict an innocent person to undergo capital punishment. Thus, agreeable with the referred legal theorists that better one hundred or a thousand guilty persons to escape conviction than to convict to a capital offence one innocent person.

Irrespective of what is said, the question remains, whether the prosecution dutifully performed their duty to prove the case against the three accused persons beyond reasonable doubts. Beginning with the first accused person, undoubtedly, was arrested by police when he was at Mnero Hospital nursing the injured Omar Hamisi Kalipe. The accused in his defence came with explanation that when he arrived to the office of WEO he found his brother in law badly injured, he took him in a motorcycle to Mnero Hospital, where he was admitted for treatment. Such explanation is not counted by any witness from the prosecution. There is no explanation from prosecution side on the truth that Omari Hamisi Kalipe that he was admitted on that fateful night? If true who took him to Mnero hospital from WEO's Office? Who caused injuries to Omar Hamisi Kalipe? These questions remained unanswered, thus the only explanation in this court is of DW1.

The court expected to get answers from WEO who was not called by the prosecution to adduce evidence on it. I find WEO was a material witness in this case for two reasons; first the whole fracas commenced in his office, by sending the militiamen to arrest Omar Hamisi Kalipe. When Kalipe was brought in his office, while badly injured by that militiamen, what did he do? Who injured Omari Hamisi Kalipe? As a leader, how could he permit

angry young boys to go and arrest his militiaman Constantino Ezekiel?
PW4 testified in this court quite clearly that:-

"Source of event was police Jamii (Constantino Ezekiel) who arrested Kalipe for failure to pay contribution of TZS 3,000/= to build Health Centre in the cause, they did beat Kalipe and injured him badly. His friends went to WEO demanding permission to arrest Constantino Ezekiel, when they failed to find Constantino Ezekiel that group decided to revenge by destroying his properties...."

In any event, WEO was a material witness, and failure to call him raise doubt as per Justice Sisya in the case of **Hemed Saidi Vs. Mohamed Mbilu [1984] TLR 113** construed in his language as saying: -

"where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."

Similar position was repeated in the case of **Lazaro Kalonga Vs. R, Criminal Appeal No. 348 of 2008 CAT, (Iringa)** (unreported) the court held:-

"The general and well-known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"

The same position was repeated in the case of **Faraji Augustine Chambo Vs. Republic, Criminal Appeal No. 346 of 2015 CAT, DSM** (unreported) where the court held:-

"A court may be invited to draw a permissible adverse inference against the prosecution case where a crucial or material witness who is within reach and who could have testified against a critical or decisive aspect of its case is withheld without sufficient reasons".

In respect to this case, there is no explanation as to why WEO was not called in court, while in any event was a material witness in this case. Moreover, WEO would help the court to identify properly and name those young boys and friends of Kalipe, who sought permission to go and arrest that militiaman called Njunjunda or Constantino Ezekiel. Either by design or by default, in any way, WEO was a material witness I would safely conclude that the absence of WEO weakened the prosecution case.

The question of who set fire in the deceased house cannot be properly answered without discussing the issue of proper identification. According to PW2, PW3, PW4, PW5 and PW6 all meet in one point that the event occurred at around 7 o'clock in the evening of 22 July, 2018 at the Village of Namapwiya in Nachingwea District. PW2 testified that it was already dark, thus she did put on solar light when was cooking dinner at the rear door of her house. The question is how intensity of that light to enlighten four houses, that is, her house, house of Costantino Ezekiel, Pig zoo and house of Agness Thomas, is not explained.

The evidence of PW3, likewise, is to the effect that, he was at the front door of his house, also disclosed that there was a solar light. The question is similar, how intensity was that light to cover four neighboring houses? Moreover, the identification of the accused was visual as opposed to recognition.

I think in our jurisdiction, the issue of proper identification is settled, since there are numerous precedents to that effect, including, but not limited to the case of **Dadu Sumano @ Kilagela Vs. R, Criminal Appeal No. 222 of 2013**, where the Court discussed extensor on the criteria for identification. The court went further to provide other preconditions for proper identification; **first** how long did the witness have the accused under observation? **Second**, at what distance? **Third** what was the source of light and intensity of light? **Four** was the observation impeded in any way? **Five** had the witness ever seen the accused before? **Six** how often? (the list is not yet exhaustive). Likewise, in the case of **Waziri Amani Vs. R, (1980) T.L.R 250**; and the Court of Appeal for East Africa had similar principles in the case of **R Vs. Eria Sebwato (1960) EA 179**; and **Mugo Vs. R. (1966) EA 124**. Therefore, proper identification is extremely important in cases of this nature. The expected action to be taken by the investigator was to conduct identification parade as required by the law in similar circumstances. However, in this case identification parade was not done.

The evidence of PW2 and part of PW3 answered some questions, like the time spent in observing the accused persons is said about 20 minutes, and the distance from the scene of crime to where PW2 & PW3 were standing

was not certain, while PW3 said the distance was about ten (10) steps, PW2 said *"from the house of Agness to my house was about 20 steps"* At the same time PW5 testified that the *"distance from the deceased house to PW2 was about 6 meters and all houses were built having the same direction"*. Based on these three different answers, it is obvious the distance was not properly disclosed. Even common sense without having measurements, four houses or take it three houses cannot occupy a distance of 20, or 10 steps or 6 meters. There must be more than that.

However, Exhibit P1 Sketch map, clarified the distance from the deceased house to PW2's house was 46 ft. while from the deceased house to PW5 was 38 ft. and from the deceased house to the pig zoo was 37 ft. Looking inquisitively on exhibit P1, obvious the said four houses were not built looking in one direction, rather the deceased house was at the middle, while PW2's house was at the right hand side and PW5 was at the left hand side of the deceased house and the pig zoo was a bit far from PW2's house. The distance of 46 ft. is equal to approximately 12 meters. The court does not intend to enter into mathematical calculations, rather is intended to find ability of human eyes during night hours to identify an event happening at a distance of 12 meters. Also, is intended to satisfy itself on the intensity of light required to correctly identify the event happening 12 meters away.

Notably, PW2 testified that the accused were known to her so it was ease to identify them. However, such evidence is impeded with the fact that she failed to name them when she met with the first person who was PW4 Daud Anselemu Mbinga, when was at the area known as Kijiweni with

young boys, PW2 met him and explained on what happened to the house of Agness Thomas and the neighbouring houses. However, she did not name the culprits who were known to her. In the case of **Marwa Wangiti Boniface Matiku Mgendi Vs R**, Criminal Appeal NO.6 of 1995 (unreported), the Court insisted on ability of the witness to name the culprits to the first persons he/she meet. The Court used the following wording:-

"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 is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor"

In the case of **Magwisha Mzee Vs. R. Criminal Appeal No. 465 of 2007** (unreported) the Court of Appeal discussed at length on proper identification of the accused at the scene of crime and concluded that:-

"This court has consistently held that when it comes to issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witness was reasonably bright to enable the identifying witness to see and positively identify the accused person.....bare assertion that there was light, would not suffice"

The same reasoning was repeated in the case of **Thomas Mlambivu Vs R, Criminal Appeal No. 134 of 2009**, (unreported). The question is whether this court should rely on the visual identification made by PW2 and partly by PW3 to arrive safely to the conclusion that the accused were properly

identified in the scene of crime? To answer this question, I find important to be guided by the decision of the Court of Appeal in the case of **Omari Iddi Mbezi and 3 Others Vs. R, Criminal Appeal No. 227 of 2009** (unreported) the Court gave few precautionary measures which courts may follow to avoid mistaken identities:-

- (1) "If the witness is relying on some light as an aid of visual identification, he must describe the source and intensity of that light;*
- (2) The witness should explain how close he was to the culprit (s) and the time spent on the encounter;*
- (3) The witness should describe the culprit or culprits in terms of body built, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence;*
- (4) Ideally, upon receiving the description of the suspect (s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again"*

In my inquisitive review to the evidences of all prosecution witnesses including PW2 and PW3 as eye witnesses, failed to fulfil all those legal requirements. Above all PW6 as police investigator, in cross examination, admitted that police identification parade was not conducted to allow PW2 and PW3 to identify the culprits. The purpose of conducting identification parade is not only intended to properly identify the accused, but more so, is to ensure that the memory of the alleged eye witness properly identified the accused at the scene of crime.

In respect to this case, PW2 and PW3 testified that the culprits were 15 of them and all were young men. The question is whether that good number of angry young boys, could easily be identified during dark night?

Another important issue is on defence of *alibi* raised by the 2nd accused. It is a legal requirement that defence on *alibi* is governed section 194 (4) (5) (6) of CPA. The accused who intended to rely on *alibi* was under statutory duty to issue notice to that effect. The effect of failure to issue notice is to accord no weight to his defence as rightly provided for under subsection (6) of section 194. Accordingly, I give no weight to it. However, such conclusion does not mean he is guilty to the charge of murder. Rather, even without his defence or even if the defence case is so weak, yet the accused cannot be convicted simply because of weak defence case. Conviction always is based on strong prosecution case against the accused person. This position was pronounced long time ago, by Chief Justice Georges in the case of ***Fanuel s/o Kiula v. R. (1967) HCD at 369*** held:-

"It is not necessary to accept the evidence of the accused in order to find him not guilty. All that an accused need to do is to raise a reasonable doubt as to his guilt".

When I am about to arrive to the destination, I find equally important to note the considered opinion of Hon. Assessors who unanimously opined that all accused persons are guilty to the offence of murder as charged. However, I depart from their opinion based on the above reasons. I find a lot of wisdom to the legislature in section 298 (1) of CPA, as quoted hereunder:-

"The judge shall then give judgement, but, in doing so, shall not be bound to conform to the opinion of the assess

Much as I appreciate to the opinion of wise assessors' opinion, yet the prosecution and investigators failed to perform their noble duties to the standard required by law. There are lot of doubts on this case which the prosecution failed to clear them. That said, doubts always benefits the accused persons.

Having so said and for the reasons so stated, I find **Hamisi s/o Hussein Ng'itu; Shaibu s/o Athuman @ Nyalawi @ Mkaoabun; and Zamoyoni Mikidadi @ Mnali @ Dr. Kima** are not guilty of the offence of murder. Subsequently they are hereby acquitted and should be released from custody forthwith unless lawfully held.

It is so ordered.

DATED at LINDI this 29th day of April, 2021



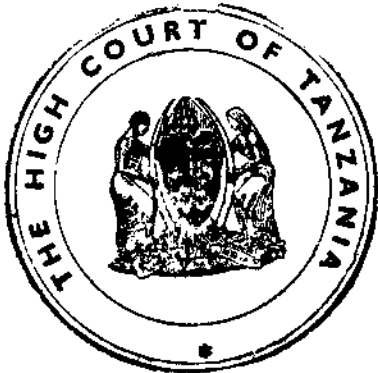
P.J. NGWEMBE

JUDGE

29/4/2021

Judgement Delivered at Ruangwa on this 29th day of April, 2021 in the presence of Yahya Gumbo State Attorney for the Republic and in the presence of Stephen Lekey for Issa Chiputula Advocate for the accused persons.

Right to appeal to the Court of Appeal explained.



A handwritten signature in black ink, appearing to be "P.J. Ngwembe", written over a horizontal line.

P.J. NGWEMBE

JUDGE

29/4/2021

ASSESSORS

1. SEIPH JUMA NGWEMA;
2. HALIMA SIMON MNUNDUMA; AND
3. HAWA ALLY MPINGA.

Date: 29/4/2021

Coram: Hon. P.J. Ngwembe, J.

For the Republic: Yahya Gumbo, State Attorney

For Accused: Stephen Lekey, For Issa Chiputula Advocate

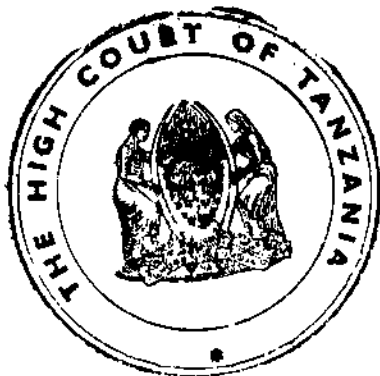
Accused persons: Present

B/C: Nanyanga, SRMA

Assessors:

1. Halima Simon Mnunduma
2. Hawa Ally Mpinga

Order: Judgement delivered today on 29/4/2021.



A handwritten signature in black ink, appearing to be "P.J. Ngwembe", written over a horizontal line.

P.J. Ngwembe

Judge

29/4/2021