



IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

THE DISTRICT REGISTRY OF BUKOBA

AT KARAGWE

CRIMINAL SESSIONS CASE NO. 55 OF 2017

(ORIGINAL JURISDICTION)

THE REPUBLIC

VERSUS

1. REVELIAN CONSTANTINE

2. MUGISHA SILYVESTER

JUDGMENT

5/5/2021 & 12/5/2021

Kairo, J.

Originally in this case, there were three accused persons namely; - Revelian s/o Constantine, Endrew s/o Kawamala @ Tinkamanyile and Mugisha s/o Silyvester being the first, second and third accused respectively. All of them were being accused of killing Dominic s/o Gorodian with malice afore thought contrary to Section 196 of the Penal Code, cap 16 RE: 2019. It was alleged that on 7/10/2015 during night

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hours at Kagutu village within Karagwe District in Kagera Region, the trio did murder Dominic s/o Gorodian.

When the case was scheduled for hearing on 29/4/2021 the prosecution informed the court that the second accused that is Endrew Kawamala@Tinkamanyile has passed away on 5/6/2018 while in remand prison. They submitted a burial permit No. BD 0511834 to verify his death. The prosecution further prayed the court to mark the charge against the second accused to have been abated under Section 284A of the Criminal Procedure Act Cap. 20 RE: 2019, which prayer was accordingly granted. The case thus remained with two accused: Revelian Constantine and Mugisha Silyvester. The court further ordered that the two accused shall from that day onwards be referred to as the first and second accused respectively. Both accused were represented by Adv. Samwel Angelo and pleaded not guilty when the charge was read over to them.

The prosecution was conducted by Mr Adolph Maganda; Senior State Attorney.

It is not disputed that Dominic S/O Gorodian is no more and has died unnatural death. This is confirmed by the evidence of PW1 and PW2 when testifying in court and further confirmed by the report on the postmortem examination admitted as exhibit 'P1'. The said report states that his death was due to excessive bleeding due to fracture of the skull. Further the summary of the report states:

"the body was found lying flat spine position with multiple cut wounds on head, both lower limbs and posterior back. Also had facial

swelling. The patient died due to fracture of the skull excessive bleeding due to big cut wounds”

With that state of the body, there can be no doubt that the deceased met a violent death and whoever is responsible must have intended to kill him.

The only key question to be answered in this case is as to whether or not it was the two accused persons in the dock who caused the death of the late Dominic s/o Gorodian, and if yes, whether the killing was with malice aforethought.

The prosecution paraded three witnesses and tendered three exhibits to prove that it was the accused persons who murdered Dominic s/o Gorodian with malice aforethought. The said exhibits were the Postmortem Examination Report together with a sketch map of the place of incidence which were admitted collectively as exhibit 'P1', a statement of one Rose w/o Dominic who testified as PW1 was admitted as exhibit 'P2' and an Identification Parade Register which was admitted as exhibit 'P3'.

The first prosecution witness (PW1) was Rosemary Dominic who was the deceased wife. She told the court that on the night of 7/10/2015 around 2:00midnight she was asleep together with her deceased husband, their house girl and boy she named to be Justina and Mutalemwa respectively. That when asleep, the house door was hit by a big stone (Fatuma), forced it open and some bandits holding iron bars, pangas and axe then invaded their bedroom and demanded money. PW1 went on that when she told them she doesn't have the money, they hit her on the head with an iron



bar, the action which forced her to give them Tshs. 900,000/= she was given by her late husband to keep.

She went on that, the bandits then turned to his husband demanding to be given the money claiming that he had sold some coffee recently, but the deceased told them that he doesn't have as he had paid school fees. On hearing that the invaders hit the deceased with iron bars on the eyes, head and back. Noting that he was still adamant to give them the money, they cut him with a '*panga*' on the shoulder. The deceased then directed PW1 where the money was and found about Tshs. 800,000/= which again she gave the bandits. The bandits promised to kill him there. The witness further testified that, the bandits then tied her with a piece of cloth on her eyes and shifted her to another room adjacent to their bedroom and was ordered to lie down with her face down which she obeyed. PW1 told the court that she saw the invaders using the solar energy bulbs which was installed in their bedroom and another bulb was near the sitting room. She also testified that the distance between the deceased where he was being hit and herself was about one pace and the distance between the deceased and the invaders when hitting him was about three paces. That in the adjacent room where she was ordered to lie with her face down while her eyes were tied/covered by a cloth, she heard them cutting the deceased with pangas. PW1 went on that, then the bandits called her and ordered her to hold the deceased, she obeyed and the deceased leaned on her chest. The bandits left the house around 4:00am. The witness told the court that she identified some of the invaders who are also here in court. She correctly identified and mentioned Revelian Constantine to be among



them. Another invader whom she managed to identify at the scene but he wasn't in court according to PW1 was Endrew. Another one was Kamugisha Silyvester and correctly pointed at him in the dock.

Among the many invaders, the ones she knew before the incident were Endrew and Revelian Constantine.

PW1 went on that on 3/12/2015 she was called at the Police station Kayanga for the purpose of identifying a person who was among the invaders. She told the court that there were 10 persons paraded and she identified one of the invaders who was the 7th amongst the paraded persons. She mentioned the person by the name of Kamugisha Silyvester.

When cross examined, PW1 conceded that she had given her statement at the Police and tendered it in court as exhibit 'P2'. The statement was read over to her by the defence counsel as she didn't know how to read and write. PW1 conceded that according to the statement, she didn't state that the distance between the deceased and the invaders when hitting him was three 3 paces. When further cross examined, the witness agreed that in the statement the amount of money she stated to have given the bandits was Tshs. 950,000/= but when testifying she stated to be Tshs.900,000/= but attributed the difference to the shock she was in. The witness also conceded that there is nowhere in the statement where it was stated that there were three bulbs in the sitting room, due to shock. She also stated that, to her the solar energy and electricity is one and the same thing as all illuminate light. On further cross examination, PW1 stated that she told the police (as per exhibit P1) that the bandits covered her with a blanked after



ordering her to lie with her face down and further told them that the blanket she was covered with had a space (mpenyo) which enabled her to peep through and see the bandits. She clarified that she was tactfully removing the blanket so as to peep at them while laying on the floor and cover herself again thus she managed to see the 1st accused whom she stated to have put on a black long coat which was beyond his knees.

When cross examined about Mugisha, PW1 stated that, he saw Mugisha when he invaded with others but she denied not to have described his body structure/body physique at the police and further forgot to tell the police his estimated age due to confusion. PW1 also told the court that she doesn't know how they got hold of Mugisha but she was told to go to identify him at the identification parade. She conceded not to have stated to the police about his height, body structure, skin color etc. but she still marked and identified him by his face adding that those who were at the identification parade had similar body structures. The witness denied that no one had shown Mugisha to her during the identification parade.

During re-examination PW1 stated that the bandits whom she saw invading their house were four mentioning them to be Revelian, Mugisha and Andrew Kawamala but she didn't see properly/identified the fourth person adding that other invaders were outside. She also stated that she didn't know the persons who were at the identification parade but when the police told her to search for invaders out of them, she identified Mugisha.

When the first Assessor sought for clarification, PW1 stated that the person to whom she handed over the money was Revelian Constantine. Clarifying



to the 2nd Assessor, PW1 stated that the room where she was shifted to after being stripped/tied her eyes with a piece of cloth was just adjacent to the one she was before shifted.

When the court sought for further clarification, the witness stated that, they were invaded around 2:00 midnight and they were tortured for about two hours while demanding money before she was shifted to another room. When clarification was further sought, PW1 stated that, she knew Revelian before the incident and were living in the same village. She also denied to have any misunderstanding between them.

The second prosecution witness (PW2) was Jasinta Jessy who was the house maid into the deceased's house. She told the court that she was asleep when she heard some people to have entered their house but didn't know how they entered. She went on that one of them had put on a black coat and had a torch stripped on his forehead. That they then switched off the torch and switched on the bulb lights. PW2 went on that the invaders threatened to kill her if she shouts and they later went to the room of PW1 and the deceased. That they started beating them demanding to be given some money. The invaders had iron bars, 'panga' and an axe. The witness went on that she was at her room when the invaders were beating the deceased and PW1 but she could hear as they beat them demanding for the money. PW2 further told the court that PW1 later gave in and handed them the money. She stated that one of the invaders was in court and pointed at Revelian (*she took some time searching for him in court*). The witness went on to tell the court that she can't remember others as many days has lapsed since the incidence occurred. The witness further testified



that it was the bulbs from the solar electricity which assisted her to identify Revelian. She told the court that the invaders entered their home around 2:00midnight and left around 4:00am, adding that by the time they left, the deceased was in bad condition due to beatings.

When cross examined, PW2 stated that she had stayed with the family for two months before the incidence occurred. She conceded that the late Dominic Gorodian had neighbors. However, none came to assist them but doesn't know why. When further cross examined, PW2 stated that Revelian was not their neighbor but she had seen him twice before the incidence, on the way. When asked as which bandit has stripped the torch on his forehead, PW2 answered it was another invader. When reminded that she told the judge (when testifying in chief) that it was the invader who had put on a black coat to be the one who had also stripped on the torch on his forehead, PW2 agreed that she did. When further asked whether in the circumstances whereby the torch is stripped on the forehead, she would be able to see him, PW2 stated that the invader switched off the torch and switched on the bulb light of solar electricity. She however added that the invader continued to remain with the said torch stripped on his forehead. The witness also conceded that due to that, she didn't see the whole face of the said invader.

In re-examination, PW2 stated that the three solar bulbs were installed at the PW1 and deceased's bed room, one at her room and the third bulb in the sitting room. She also insisted that she managed to identify only one invader out of those who invaded their home.



When the 1st Assessor sought for clarification, the witness stated that she knew Revelian by face and name before the incidence and that she doesn't remember if the 2nd accused was at the incidence when they were invaded.

When the court sought for clarification, PW2 stated that she had met Revelian twice just as a passerby but she heard his name on the incident day as the bandits were calling each other. When asked if there was another name she heard she agreed stating that the other name she heard was Kamugisha.

The third (PW3) and last prosecution witness was one Nurdin Sadik Tunutu, the police officer who supervised the conduct of the identification parade. The witness told the court that on 3/12/2015 around 12:00 noon while at his duty station at Kayanga Police station, he supervised the identification parade concerning a murder incidence occurred at Kagutu, Ndama Ward Karagwe District.

He went on to tell the court that the one to be identified was Mugisha Sylvester who was in custody by then and the one to do the identification was a witness called Rose Dominic (PW1). PW3 went on that as a supervisor he informed Mugisha on the presence of the parade and that he was the one to be identified. Mugisha agreed. PW3 then mixed Mugisha with persons of like looking/ similar looks who some were from the remand and others from the streets (normal netizens). The similarities were in heights, body structure, skin color etc. He added that those who participated into the parade were ten (10) persons. PW3 went on that when the preparations were proceeding, Rose Dominic was hidden in a



room so as not to witness the preparation. The witness went on to tell the court that after finishing preparing the said parade, they requested PW1 to pass in front and back of the parade and she identified Mugisha who stood between the 6th and 8th persons that is he was the 7th person. The witness then identified Mugisha at the dock. PW3 further told the court that he later filled the identification parade Register which was admitted as exhibit "P3". The witness further told the court that according to exhibit 'P3' it was stated that the persons to be included in the parade were nine (9) but at the back of exhibit 'P3', it was indicated the persons to be ten (10). The witness explained the error to be an oversight or human error. He further stated that the document stated;

"I was identified by Rose Dominic" which PW3 stated to be incorrect and that it was supposed to read *"the accused was identified by Rose w/o Dominic"*.

When cross examined PW3 stated that nobody gave him the description like age, height, skin color, or body physique of the person to be identified. When asked further as to what then were they going to identify, PW3 answered that he had already seen the person to be identified and thus he searched for like looking persons to mix them with. He added that he supervised the identification parade as per relevant law and procedures. On further cross examination, PW3 stated that according to his understanding, the person to be identified must have similar features or resemblance with the ones to be included in the parade. When asked as to whether ages of the parade participants are also required to be similar, PW3 answered not to know. When further asked if age differences cannot



differentiate the likeness (muonekano), he answered NO. When further cross examined the witness stated that Mugisha was taken from the lock-up and sent to the identification parade. When asked for how long has Mugisha stayed into custody he answered not to know. The witness also stated that Rose w/o Dominic didn't tell him what made him to identify Mugisha.

When re-examined PW3 told the court that, in this case, he was only involved in supervising the identification parade denying not to know Rose w/o Dominic before the parade. He also testified that there was only one suspect on the parade and that he was brought to PW3 by Dtc. CPL. Mohamed who also participated in the parade conduct.

When sought for clarification by the 1st Assessor, PW3 stated that he doesn't know if the parade was requested by Rose Dominic or she was just invited to make the identification by the police. He further clarified that Mugisha was in remand but he doesn't know when and how was he apprehended and for how long was he in remand custody before the parade. He added that if Rose Dominic would have pointed out another person, he would have accordingly noted the pointed-out person.

When the court sought for clarification, PW3 conceded that the description of the person to be identified is to be given by the witness but mostly is given to the investigators who is not involved in the parade. He denied not to know if Revelian was already in remand custody when the parade was conducted adding that the one who knows is the investigator.



The defense side had two witnesses only who were the accused themselves. (DW1) was Revelian Constatine. He told the court that he was a painter at Kagutu Village where the incidence occurred. That on 7/10/2015 around 6:00am while asleep, his wife came from the farm and informed him that Dominic Gorodian was killed. On hearing that DW1 took his painting items to Hamidu Abdu where he had a painting task, informed them of the killing incidence and went to bereaved/mourning home, stayed for sometimes, then went back home after passing at a '*pombe*' club. DW1 told the court that while preparing to go again to the bereaved home, the VEO and police officer came and apprehended him. The witness was taken to police station where he was told that he is being suspected for killing Dominic Gorodian to which he denied. He further told the court that, what was testified by PW1 that she had seen him on the fateful night at their home is not true. He went on that even PW2 told lies to court as she failed to state /explain which shoes DW1 had worn on the night she alleged to have seen him. He added that if PW2 would have seen him, she would have stated what other outfit he had put on that is which shirt, trouser, his height, the skin color of his face etc. D1 denied to have ever met PW2 as she stated. He further told the court that according to PW2 he (DW1) had stripped a torch on his forehead which was switched on when he entered her room but, in that circumstances, the torch would have prevented her from identifying him. DW1 also stated that what 'P1' statement at the police was different from what she testified in court, but when asked to pin point the differences he didn't. The witness further told the court that PW1 wasn't in good condition to identify him as when testifying she told the

court that she was stripped with a piece of cloth in her eyes and covered with a blanket. Further that she was just peeping through the space (mpenyo) adding that the said testimony shows that she was lying when she stated to have seen and identified him. DW1 pleaded with the court to find him innocent and discharge him.

During cross examination DW1 stated that he doesn't remember the people he found when he went to the bereaved home as there were many people. He neither could remember the people he found at the '*pombe*' club. DW1 insisted that PW1 didn't identify him as he wasn't there at the scene of incidence. However, the witness conceded to know PW1 before the incident date as they were living in the same village.

During re-examination, DW1 stated that PW1's testimony was contradictory thus raises doubts as she told the court that the person who entered their room when invaded were three but, in her statement, she stated to be four.

When sought for clarification from the 1st Assessor, DW1 told the court that the distance from his home to the deceased's home was a walking distance of about 1/2 an hour.

DW2 and the last defence witness was Mugisha Silyvester. He told the court that he was residing at Rwamishenye before apprehended. He went on that on 7/10/2015 he was at his home Rwamishenye continuing with his *bodaboda* activities. That the accusation that he had killed Dominic Gorodian wasn't true. DW2 went on that on 24/11/2015 he was apprehended suspected to have stolen a sewing machine and taken to



Bukoba Central Police where he stayed for 4 days, before transferred to Kayunga Police Station on 31/11/2015. That he gave his statement concerning the sewing machine theft on 5/12/2015 and was later taken to court to answer the theft charges. He was then taken back to Kayunga Police Station where the OC-CID of Kayunga ordered that a murder charge should be opened against him as well, which was done. Later in May, 2016, the theft charge was dismissed for lack of evidence.

DW2 conceded that the identification parade was conducted as testified by PW3 but the same was conducted against the procedures. When asked to state the flouted procedures, DW2 told the court that he wasn't informed the intention of the identification parade, persons paraded had different ages and clarified that he was 40 years old by then but two participants he mentioned by the names of Imani Julius and Paschal Patric were 28 years and 21 years respectively according to their explanations. He went on that all other participants were netizens from the streets (uraiani) while on his side he had already spent 10 days at the police lock-up thus dirty looking and on top of that, after the parade, he wasn't asked to comment so that the comments could have also be included into the identification Register. DW2 also testified that none of the prosecution witnesses had stated how does he look like so that the police could search for. He added that he was surprised as to what criteria PW3 took into account to involve him into the parade.

When asked with regards to PW2 testimony that she heard the name of Kamugisha being mentioned at the scene of incidence, DW2 first clarified



that his name is Mugisha and not Kamugisha. Further that even if his name would have been Kamugisha, there are a lot of persons with that name.

He concluded that he had nothing to comment as to whether PW2 heard the name being mentioned or not. He also denied to know Revelian before this case nor Endrew Kawamala. He told the court that he was taken to court to answer murder charges on 10/12/2015 then taken to remand prison where he met Revelian and Kawamala as the paper he was given concerning the case had their names as well. DW2 prayed the court to note the unjust done to him and order for his discharge.

When cross examined, DW2 stated that in his view, PW3 was obliged to inform him the purpose of the identification parade and further that after finishing, he was supposed to be given a chance to give his comments regarding the conduct of the parade.

DW2 also stated that PW1 alleged to have identified him at the parade when she gave her additional statement, but the said statement had no date nor time, as such it could have been written on any date. He added that he saw PW1 for the first time at the identification parade and denied to know the deceased.

During re-examination, DW2 clarified that PW1's testimony that she identified him at the place of incidence wasn't true clarifying that he had featured only in the additional statement of PW1, otherwise he wasn't mentioned in any how in the first statement adding that he suspects to have been added and implicated with the murder through the additional statement after he was apprehended.



When sought for clarification by the 1st Assessor, DW2 stated that he was at Rwamishenye Bukoba on the incident date and he had never visited Kagutu village. Clarifying to the second Assessors, the witness stated that he did not have any information concerning the death of the deceased while at the police.

That made the end of defense case. Both of the counsels didn't wish to make the final submissions, and thus a summing up of the evidence was made by the court to the Lady and Gentleman assessors, before invited to give their opinions. All of the assessors after the summing up had a common opinion that all of the accused persons are not guilty as charged and thus should be acquitted. I will be referring to the Hon. Assessors opinions in the course of writing this judgment.

The cannon principle in criminal cases is to the effect that, the prosecution has to prove its case and the standard is beyond reasonable doubt. The position has been stated in many cases among them being **Said Hemed vrs R(1987) TLR 117 & Mohamed Said Matula vrs R (1995 TLR3]**

In the case of Mohamed said Matula, the Court of Appeal held as follows: -

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death, but also the link between the said death and the accused, the onus never shifts away from the prosecution".

In the case at hand, the prosecution has hinged its case on the identification of the deceased's assailants who invaded the house of the

late Dominic Gorodian and his family, attacked him using iron bars, pangas on various parts of his body and eventually killed him. The said identification was twofold; first through visual which was done by PW1 and PW2. The second was through Identification Parade that was conducted and supervised by Afande Nurdin Tunutu (PW3) through which PW1 identified the 2nd accused (Mugisha Silyvester).

Admittedly, visual identification is regarded as the weakest kind of evidence and courts have been warned not to act on such evidence unless all possibilities of mistaken identity have been eliminated and the court is fully satisfied that the evidence before it is absolutely water tight. [Refer the case of **Mwalimu Ally and another vrs R; criminal appeal No. 39 of 1991 CAT DSM** (unreported)].

In ensuring that, there was no mistaken identity, the court listed guiding factors to be taken into account by the court so as to determine whether or not the evidence was water tight. These factors include the amount of time the witness had the accused under observation, the distance which he observed the accused, the condition in which the observation occurred, for instance whether it was day or night time and the kind and intensity of light at the scene, the distance between the two (accused and witness) during the commission of the offence, whether the witness knew the accused before the incidence and whether there was any impediment between the two that could affect the correct identification [Refer the case of **Waziri Amani vrs R (1980) TLR 250**]. The wanting question therefore is whether the court can safely conclude that the conditions were favorable to enable PW1 identify both of the accused and further PW2



identify the 1st accused to have been among the bandits invaded their house and attacked the deceased thereby causing his death on the fateful night.

Both PW1 and PW2 have testified that they were invaded at 2:00midnight and the bandits left at 4:00 am, which means the incidence took about 2 hours. Further, they both stated that there were about 3 (three) solar bulbs in the house; one in the sitting room, another one in the PW2's bed room and the last one in the bedroom of PW1 and her deceased husband. The said solar bulbs were switched on by the bandits when invaded the house (PW1&PW2). I wish to state that I have no reservation with the intensity light of the solar energy bulbs.

In this judgment, I will analyze the identification of the two accused separately for the reason to be noted later in my judgment, starting with the 2nd accused.

The only prosecution witness who testified to have seen the 2nd accused to be among the invaders was PW1. However, she conceded that she didn't knew him before the incidence but she marked his face and could remember it. Given the lengthy of time spent in the house while demanding for some money and the intensity of the solar energy lights in the house, I am convinced that the conditions were favorable for PW1 to mark and remember the face of the 2nd accused. I will revert to this point of favorable conditions when discussing the identification of the 1st accused by PW1.



As earlier stated, PW1 haven't seen the 2nd the accused before the incidence nor did she knew his name. This necessitated the conduct of identification parade so that PW1 could identify the assailant she saw on the fateful date. The parade was prepared and supervised by PW3 and it was through this parade that PW1 identified the 2nd accused who was in police custody.

When giving his oral testimony, PW3 told the court that the identification parade was legally conducted and he followed proper procedure stipulated in police Government Order (PGO) No. 232.

After finishing the conduct of the parade, PW3 filled the Identification Parade Register (exhibit P3). The 2nd accused did not dispute that the identification parade when fending himself but criticized it arguing that it was conducted against the procedure. The interlocutory question therefore is whether or not the parade was conducted in accordance with the stipulated procedure.

It is true that the conduct of identification parade is governed by the police General Orders (PGO) Order 232 as rightly stated by PW3 which orders were well articulated in the case of **R vrs Mwango Manana (1993) 3 EACA 29** and approved in the case of **Andrea Augustino @ Msigara & Jesse Kajuna@Mwemeso vrs R; Criminal Appeal No. 365 of 2016 CAT TAG**. (unreported) wherein the court observed as follows: -

"The person to be identified must be informed that he has a right to a lawyer or friend to be present when the parade takes place, the suspect should be placed amongst at least eight (8) persons as far as



possible of similar age, height, general appearance and a class of life as himself".

When giving evidence, PW3 amplified on how he conducted the parade. That he gave information on the presence of the identification parade to the 2nd accused and told him that he was the one to be identified to which the 2nd accused agreed to. He then found nine (9) other persons from the remand and netizens from the street with similar looks to participate into the parade together with the 2nd accused. He explained the similarities were in height, body structure and skin color. Going through PW3 testimony, nowhere has he indicated that the 2nd accused was informed of the right to have his friend, relative or an advocate present during the parade. It is not enough in my view to inform him that there would be such a parade and he would be involved being a suspect.

Among the concerns of the 2nd accused with regards to the identification parade conducted is age differences as he stated that he was 40 years by then, but there were participants whom he named them and were actually among the participants as per Exhibit P3 whose ages were 21 and 28 years. It is imperative to note that the names of the participants had not stated the ages of each one of them. When asked by the defence counsel as to whether age differences can differentiate the likeness of the persons, PW3 boldly answered NO. Honestly, I don't subscribe to his answer since it is a fact that age variance can differentiate the likeness of people. Just by looking into one's face, you can tell or rather estimate his/her age. That is why age similarities has been put as one of the factors. PW3 denial shows that age similarities were not taken into account in the said identification



parade which again is a flout/ shortcoming as per the cited case of **Mwango Manana (supra)**.

When defending himself the 2nd accused lamented that he had already spent ten (10) days in remand custody when taken to the parade and thus was dirty and miserably looking compared to other parade participants, suggesting that it was possible to single him out due to his state. When asked as to when and how or what led to the apprehension of the 2nd accused, PW3 stated not to know as he only supervised the identification parade and that the answers to those questions can be given by the investigator of the case. However, the investigator was not called by the prosecution to come to testify and no reason was advanced for the said omission. The law stipulates that failure by the prosecution to summon a witness within reach without apparent reason attracts the court to draw adverse inference to the prosecution [Refer the case of **Lubeleje Marine and Another vrs R; Criminal Appeal No. 2 of 2002 CAT DOM**] (unreported). In the same vein this court hereby draws adverse inference against the prosecution as the said omission raises doubts as to why didn't the prosecution summon the investigator as rightly opined by the 1st assessor.

PW3 also conceded the importance of the identifying witness to give physical descriptions of the person he saw at the scene of crime before the parade. Strangely in the case at hand the same weren't given to the police prior to identification (PW1 and PW3).



PW3 however insisted that the descriptions were supposed to be given to the investigator. Besides PW3 conceded that PW1 didn't tell him what made her identify the 2nd accused.

In my candid conviction, the absence of the descriptions of the invader seen by PW1 at the scene of crime, absence of information as to what led to the apprehension of the 2nd accused or what connected him with the murder, how, when and where was he apprehended, the questions which according to PW3 were to be answered by the investigator whom was not called to clarify and answer those questions, have left a lot to be desired and raise doubts as rightly opined by the 1st Assessor which doubts are to be resolved in favor of the 2nd accused.

Leaving aside the above stated omission, PW3 told the court to have filled the identification parade Register (exhibit P3) after its completion. I had the advantage of going through it and noted that the comments of the suspect are not contained in the register as the procedure requires. Besides, the witness (PW1) has categorically told to go and identify the suspect (PW3) to which in my view amounts to influence her in the sense that she was assured that the suspect was in the parade which is contrary to Identification Parade Procedure. The case of **R vrs Mwango Manana (supra)** had this to say regarding the stated issues and wish to quote;

"at the termination of the parade or during the parade, the suspect must be asked if he is satisfied with the manner the parade is being conducted, the reply must be recorded. In introducing the witness, he must be told that he will see a group of people who may or may



not contain the suspected person, the witness should not be influenced in any way".

In his defence, the 2nd accused has also raised a defence of alibi stating that he was at his home at Rwamishenye Bukoba when the incidence occurred.

As a matter of law, an accused person is not required to prove his alibi once puts forward. It is sufficient if such alibi introduces reasonable doubt in the prosecution case [Refer the case of **Alli Msetu vrs R (1980) TLR 1& Rashid Ally vrs R (1987) TLR 97 (HC)**].

His evidence was not controverted by the prosecution. The legal stance concerning the witness's evidence is to the effect that, every witness is entitled to be believed unless there are good and cogent reason to the contrary [Refer the case of **Goodluck Kyando vrs R (2006) TLR 363**]. I wish to put it clear that, in the absence of any evidence by the prosecution to the contrary, I have no reason not to believe his testimony which has casted doubts to the prosecution case.

All in all, the whole process with regards to the identification of the 2nd accused by PW1 leaves a lot to be desired: the flouted procedures of the Identification Parade conducted, the unexplainable omission to call the investigator who would have clarified the issues raised, the uncontroverted testimony of the 2nd accused, has made this court to resolve that the identification of the 2nd accused by PW1 was not water tight.



I am alive that PW2 has told the court that she heard the name of Kamugisha being mentioned at the scene of crime, but as rightly stated by the 2nd accused, his name is *Mugisha* and not *Kamugisha*. But further to that even if he would have been Kamugisha, again there are a lot of persons with similar names. As such the evidence doesn't implicate the 2nd accused in any way.

For the aforesaid reasons, I join hands with all of the Assessors findings that the 2nd accused was not properly identified at the scene, as such when applying the factors as per the cited case to the facts at hand, not guilty of murder as charged. I thus order the acquittal of the 2nd accused forthwith unless otherwise lawfully apprehended for other reasons.

I now revert to analyze the visual identification of the 1st accused by PW1 and PW2.

PW2 was clear in her testimony that she managed to identify the 1st accused, on the fateful date. Further that she had seen/met him twice on the way. Sincerely I failed to comprehend what was so special with the 1st accused that made PW2 remember him considering that she met him on the way just as a normal passerby. The same sentiments were echoed by the 1st Assessor when giving his opinion. Worse, PW2 didn't tell the court what made her remember the 1st accused with whom they met on the way as a passerby.

It should also be noted that though the whole incident took two hours but analyzing PW2 testimony, the bandits didn't spend all of the two hours into her bedroom. After all, their interest seems to be on the money which



under normal circumstances wouldn't be in the hands of a house girl. PW2 also told the court that the bandits threatened to kill him or do anything bad to her if she would shout which means she was terrified, and in the circumstance, there was great possibility that her vision and consequently her identification was blurred/distorted. No wonder when was told by the court to identify the said Revelian if she was in court, she took some times searching for him.

PW2 further did not state the distance between the 1st accused and herself when observing him. Further to that, when testifying in chief, PW2 told the court that Revelian had stripped a torch on his forehead but when cross examined, she changed and stated that the one who stripped the torch on his forehead was another invader. In my view, this is an inconsistency that goes to the root of identification. Besides in the stated situation, PW2 could not have properly identified the 1st accused as part of his face was covered, and PW2 conceded to this fact during cross examination

PW2 has also stated to know Revelian by face and name when asked by the 1st Assessor. However, when sought for clarification by the court if she knew Revelian before, PW2 clarified that, she met him twice as a passerby but he knew his name on the invasion day when she heard other bandits calling him. The above testimony as well shows inconsistency in her testimony. The stance of the law is to the effect that contradiction or inconsistency are bound to happen in the testimonies due to passage of time since the occurrence of the incidence [Refer the case of **Ntagalinda@Koro vrs R; Criminal Appeal No. 231 of 2015** (unreported) CAT BK.



As to what the court is required to do in such circumstances, the case of **Mohamedi said Matula (supra)** serves as a guidance in this aspect wherein it was observed;

"Where the testimonies by witnesses contain inconsistencies, the court had a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter"

The two above stated contradictions, concerns identification itself which is the root of the matter.

In giving their opinions, both Assessors explained their doubts on the identification of the 1st accused by the PW2 which doubts are legally to be resolved in favor of the 1st accused. In the foregoing therefore, I am convinced that all of the possibilities of mistaken identity weren't eliminated and I am thus with firm view that the 1st accused was not properly identified by PW2 as correctly opined by both assessors.

The remaining issue to be determined is whether PW1 has properly identified the 1st accused at the scene of crime.

As earlier indicated, the evidence of visual identification is of the weakest kind. When testifying, the prosecution witnesses told the court that when entered, the bandits switched off the solar energy bulbs which were three in the house (PW1 and PW2), thereafter they switched off their torches



they had (PW2). In the circumstances I have no doubt that the intensity of light was enough for proper identification.

The incidence proceeded for two hours (PW1 & PW2). I am alive that in between, PW1 was stripped with a piece of cloth, shifted to another room, forced to lie with her face down and covered with a blanket which the Hon. assessors opined to be an impediment to correct identification. However, I am of different views. According to the evidence adduced, the bandits demanded money after invading the house. PW1 and his late husband didn't give them the money right away, but after sometimes following the tortures. They started with PW1 who after being adamant to give them the money, they attacked her with an iron bar on her head. She later gave-in and took the money and give it to the bandits. They then turned to the deceased who at first refused. He later gave-in as well and instructed his wife (PW1) to where the has hidden and gave the same to the bandits. According to PW1, she handed the money specifically to Revelian. Exhibit 'P2' also explain that PW1 went with the bandits to the store outside the house in search of some more money thinking that some might have been hidden there. When all the above incidents were happening, PW1 was yet to be stripped/covered with a piece of cloth in her eyes nor shifted to another room nor where she was covered by a blanket.

Though it wasn't stated how much time was spent for the above explained fracas, but by all standards in my view, the time taken to conduct all those events was enough for PW1 to properly identify the 1st accused whom she knew before the incidence (PW1& DW1) and in fact she also saw him in the evening preceding the incident. (PW1, & Exhibit P2). Above all, the 1st



accused was the person to whom PW1 handed over the money twice. Definitely they were facing each other when giving him the money and the distance between them was short, despite her testimony that the distance between herself and invaders when attacking her deceased husband was just three (3) paces. Further to that PW1 had seen Revelian in the afternoon and the incidence occurred in the night (Exhibit P2), which means there was no much changes in his appearance in terms of body structure. With that analysis therefore, PW1 had already identified him by the time she was stripped with a piece of cloth into his eyes and shifted to another room. That's why I beg to differ with the opinions of both Hon. Assessor in this aspect with due respect. I would have shared their opinion if PW1 was stripped/coved with a piece of cloth immediately after the invaders entered.

The 2nd Assessor was doubtful as to how the invaders who weren't living in that house knew where the sockets were to switch on the lights. Suffice to state that the invaders entered with their torches switched on (PW2) which in my view assisted them to locate the sockets.

My conclusion regarding identification of the 2st accused by PW1 is more intensified by the fact that PW1 mentioned him at the police as a culprit at the very earliest opportunity which is an assurance of her reliability when she went to give her statement (exhibit P2). I am fortified in this stance by the case of **Marwa Wangati and Another vrs R [2002] TLR 43** wherein the court observed as follows- "*the ability of a witness to name a suspect at the earlier opportunity is an important assurance of his reliability...*".



Even when assessing her demeanor, I am with candid view that PW1 was honest, truthful and didn't shake when testifying.

In his defense, the 1st accused stated to be at his home sleeping and informed of the killing by his wife around 6:00am, in a way he was raising an alibi defense. Though, the 1st accused didn't give notice as required under Section 194 of the CPA but the court is required to address it all the same (Refere **Marwa Wangati**) (Supra).

Having in mind that the bandits left around 4:00am (PW1 and PW2) and the distance between the deceased and the 1st accused houses was a walking distance of ½ on hour (DW1), it is possible for him to commit the offence and go back to his home. As such his alibi defense has not casted any doubt to prosecution case.

The 1st accused also stated that there were contradictions on what PW1 stated at the police and in court. When asked to pin point them, he failed. However, the court has noted the inconsistency in her statement and oral testimony on the amount of money she gave the bandits whereby she states to be Tshs. 950,000 and 900,000/= respectively. However, the inconsistency is minor and thus doesn't go to the root of the matter. Besides PW1 attributed the discrepancy to a state of shock she was in which reason I agree with.

In the foregoing therefore, it is the finding of this court that the conditions were favorable for PW1 to identify the 1st accused at the scene and the court is satisfied that all possibilities of mistaken identity have been eliminated.



Having found that the 1st accused was among those who caused the death of the late Dominic Gorodian, the court has to go further to determine whether the killing was with malice aforethought.

The case law has stipulated/listed factors that would assist to infer malice on the accused person, as normally the attacker would not declare his intention. The case of **Enock Kipela vrs R; Criminal appeal No. 150 of 1994** (unreported) has listed the said guiding factors as follows: -

- (1) The type and size of 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 or inflicted,
- (4) The number of blows one inflicted,
- (5) Kind of injuries inflicted,
- (6) The attacker's utterance if any before, during or after attack,
- (7) Conduct of the attacker before or after the killing.

In the case at hand, the attackers used pangas, axe and iron bar. (PW1, PW2). The Postmortem Report shows that the body had multiple cut wounds in different parts of the body including the head, the back part of the body which are dangerous parts of the body. The fact that the skull was fractured shows the excessive force used by the bandits and the multiple at wounds shows the number of blows inflicted on the deceased. (Exhibit P1).

During the attacks the invaders stated categorically that they will finish him there (kill) (PW1) which shows their intention to kill him.



In the circumstance therefore this court has made a finding that the prosecution has proved beyond reasonable doubt that it was the 1st accused Revelian s/o Constatine who together with others not in court who have killed the late Dominic Gorodian with malice aforethought. The court therefore enters conviction for the offence of murder as charged.

It is so ordered.




L.G. Kairo,
Judge

12/5/2021.

S/A: Hon. Judge, according to Section 322 of (1) & (2) of the CPA Cap. 20 RE: 2019, together with Section 197 of Cap. 16 RE: 2019, both state that upon conviction of murder charge, the only sentence is for the conviction to suffer death by hanging, that is all.

Advocate Dickson: Hon. Judge, since the punishment for murder charge has been categorically stated, I have nothing to say.

1st Accused person: Hon. Judge, I don't know anything concerning this case.

SENTENCE

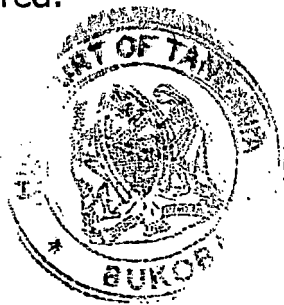
In our country the only punishment for murder offence is death sentence. That is what the law says. I am aware that the capital offence is a subject of criticism by many people including lawyers, human rights activist groups, religious leaders etc, needless to comment more. Even myself I am also of

the opinion that it is high time now we change and replace it with an alternative punishment to the people who commit the murder offence which attract a death sentence.

However as far as this case is concerned now, my hands are tied by my oath of office to uphold the Constitution and to respect the laws of the country.

From the premises of the conviction entered, I sentence the accused; Revelian s/o Constantine to death which shall be suffered by hanging.

It is so ordered.



L.G. Kairo,
Judge

12/5/2021.

Court: A lady and gentleman assessors are thanked and discharged.



L.G. Kairo,
Judge

12/5/2021.

AT KARAGWE.

12/5/2021