IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

CRIMINAL SESSION CASE NO. 56 OF 2020

THE REPUBLIC

VERSUS

MUNGEI SIMION

JUDGMENT

27th and 30th April, 2021

BANZI, J.:

The accused person, Mungei Simion stands charged with the offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16 R.E. 2002] ("the Penal Code"). It is alleged in the Information that, on 8th September, 2017, at Luanda Village, within Rorya District in Mara Region, the accused murdered one Thomas Dalmas Rumba (the deceased).

The accused person denied any involvement in the murder of the deceased; therefore, a plea of not guilty was accordingly entered in record. At the Preliminary Hearing, the following were agreed as undisputed facts: the name and address of the accused person. Besides, the Prosecution side offered to tender a post-mortem examination report of the body of the

deceased, which was admitted in evidence without objection from the defence as Exhibit P1.

In a bid to prove the case against the accused person, the Prosecution side under the representation of Mr. Anesius Kainunura, learned Senior State Attorney lined up a total of three (3) witnesses, namely, Matiko Mwita, PW1; Tina Thomas Dalmas, PW2 and G.3978 D/C Mohamed, PW3. Besides, as just indicated above, they tendered one exhibit, the post-mortem examination report, which was admitted without objection at the preliminary hearing as Exhibit P1. On the other hand, the accused person enjoyed the services of Ms. Rebecca Magige, learned Advocate, who relied on the sworn testimony of just one witness, the accused person himself (DW1), with no exhibit.

In the main, the body of evidence by the Prosecution presents a case that, PW2 was living with her husband, the deceased, in Luanda village since 1995 following their marriage. On the fateful day, 8th September, 2017 around morning hours, the deceased went to their farm to cut trees while PW2 went for grazing. At about 8:00 am, PW1 who was also in his farm which is almost 80 to 100 metres away from the deceased's farm, he heard an alarm and ran towards it. On arrival at the deceased's farm, he found three persons, namely, Mungei Simion, (the accused person), Kyeyo Simion

and Membe Kyeyo assaulting the deceased, Thomas Dalmas. The accused person and Membe Kyeyo each had bush knives, while Kyeyo Simion had a spear. PW1 witnessed Membe Kyeyo cutting the deceased on the fore head; the accused person cutting the deceased on the left leg, whilst Kyeyo Simion stabbing the deceased by spear on the back left side. He knew and recognised them, as he lives with them in the same village and he was standing at a distance of five to six paces away. He knew the accused person and Membe Kyeyo since their childhood. He went on to testify that Membe Kyeyo was wearing a white shirt, Mungei Simion was on black sleeveless T-shirt and Kyeyo Simion on a shirt with dots.

While witnessing the assault, he raised alarm, which was positively responded by the deceased's wife, Tina Thomas Dalmas. According to her testimony, she also claimed to witness the accused person with his two colleagues assaulting her husband. She also recognised the accused person with his colleagues because she knew them very well since 1995. After the assault, the accused person with his colleagues ran away. Immediately thereafter, the Village Chairman, Karan Mumanyi and some other villagers arrived at the crime scene following continued alarm raised by PW1 and PW2. The Chairman called the police who arrived at the crime scene.

Upon their arrival, the police officers including PW3, saw the deceased person's body laying down with injuries on the head, chest and ankle. They took the body to the mortuary of KMT hospital, at Shirati. On the same date around 1700 hours, an autopsy was conducted on the deceased person's body in the presence of PW1 and PW2, whereby, the report reveals that, the death of the deceased person was caused by severe bleeding secondary to multiple injuries. PW3 carried out the investigation of the case, including looking for the whereabouts of the persons who were named to have committed the alleged offence. On 28th August, 2019, he received information from police in Mwanza about the arrest of the accused person. Arrangements were made, on 31st August, 2019, the accused person was transferred from Mwanza to Shirati police Station. He was interviewed and denied to commit the alleged offence. On 9th September, 2019, he was arraigned before the Tarime District Court for committal proceedings. At the hearing, in this Court, PW1, PW2 and PW3 identified the accused person at the dock.

The accused person, in his defence, categorically denied to have committed the alleged offence. His testimony is to the extent that, he lives with his grandmother at Luanda village. On 8th September, 2017, he woke

up in the morning and started to dig a pit hole. He kept on digging until 0900 hours when he heard an alarm and decided to run towards it. On arrival, he saw a lot of people while his neighbour Thomas (the deceased) was lying down. He saw the deceased from far and heard people saying that, he is severely injured. Thereafter, the government leaders arrived including the Village Chairman and they were told to disperse. He then went back home to his grandmother, but at around 1500 hours, he was arrested by a police officer named Mohamed (PW3) and taken to Shirati Police Station where he found two other persons, Matiko Mwita (PW1) who is a relative of the deceased and Kelvin Kyeyo who had already been arrested over the incident. He was joined with them. They stayed in police custody at Shirati Police Station for about a week, and thereafter they were released on condition that, in case of need they would be recalled. He went home to his grandmother and continued with his routine farming until 28/8/2019 when he was arrested at his grandmother's house at Luanda Village by PW3 with his colleague whom he did not remember. After the arrest, they took him to Shirati Police Station, where he was interviewed. During the interview, he denied to have been involved on the incident. He stayed in custody for almost 14 days until 9th September, 2019, when he was arraigned before the Tarime District Court on a Charge of murder of Thomas Dalmas Rumba. He

denied to assault the deceased in a company of Membe Kyeyo and Kyeyo Simion. He also denied to escape after the incident claiming that, he was in Luanda Village throughout that time, as he testified. Apart from that, he denied to have been in Mwanza between 2017 and 2019. Finally, he prayed to be acquitted because he did not commit the offence.

In a nutshell, that was the evidence of the Prosecution and defence sides. The counsel for both parties exercised their respective rights of addressing the Court on their final submissions.

In her final submission, the defence counsel, after summarising the evidence on record, she was of the view that the Prosecution side has not proved the case beyond reasonable. According to her, the Prosecution's case depends on the contradictory evidence of PW1 who claimed to have witnessed the accused person assaulting the deceased on his left leg while, PW2 and PW3 said it was the right leg. She cited the case of **Mohamed Said Matula v. Republic** [1995] TLR 3 which emphasises on the duty of court to resolve contradictions. In that regard, she prayed for the accused person to be acquitted.

The Prosecution side, on the other hand, was affirmative that a case against the accused was sufficiently proved and that makes him guilty as

charged. Mr. Kainunura reached at this firm conclusion after analysing the evidence on record. According to him, the accused person was positively recognised by PW1 and PW2 as among the attackers of the deceased. Also, looking at weapons used, parts of body on which the blows were inflicted, and the fact that the accused person escaped soon after the incident, all together established malice aforethought. To him, the defence evidence is an afterthought especially the issue of being arrested, released and re-arrested after two years, because questions concerning the same were not asked during cross-examination of PW1 and PW3. Finally, he invited this Court to convict and sentence him accordingly. The following case laws were cited to support his submission: **Christian Mbunda v. Republic** [1983] TLR 340, **Waziri Amani v. Republic** [1980] TLR 250, **Enock Kipela v. Republic** Criminal Appeal No. 150 of 1994 CAT (unreported) and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 CAT (unreported).

In summing up to the Ladies and Gentleman Assessors, each one was of the opinion that the accused person was positively recognised by PW1 and PW2. All three ended up with an opinion of a verdict of guilty against the accused person to the offence charged.

Having considered the evidence on record and the submissions by the counsel, there is no dispute that deceased is dead and his death was unnatural. Therefore, the main issues before the Court for determination are: **one**, *whether the accused person killed the deceased* and **two**, *if the first issue is answered in the affirmative whether he acted with malice aforethought*.

It is vital to underscore that, the offence of murder according to section 196 of the Penal Code gives rise to four crucial ingredients of which the prosecution must necessarily prove beyond reasonable doubt in order to discharge its burden. These are: one, *the fact of the death of the deceased*; two, *the cause of such death*; three, *proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person* and four, *proof that the said unlawful act or omission was committed with malice aforethought*. Section 200 of the Penal Code expound on what amount to malice aforethought.

In discharging the aforesaid burden, the prosecution brought three (3) witnesses but the key witness was PW1, who was the first person to arrive at the scene of crime and eye witnessed the incident. As I have pointed herein above, at this stage, only two issues that calls for determination by

this Court. Admittedly, as rightly submitted by counsel, the vital issue in this case revolves around the identification/recognition of the accused person. That being the situation, this case depends on main class of evidence, *i.e.* the evidence of visual identification. One might pose a question, was visual identification evidence of PW1 and PW2, cogent enough to sustain the prosecution case?

It is now settled law that, in a case entirely depending on the evidence of identification, evidence on conditions favouring the correct identification is of the utmost importance and such evidence must be absolutely watertight with no possibility of mistaken identity or fabrication to justify conviction. The same principle applies even in cases of recognition evidence. Therefore, courts must, as a rule of practice, exercise caution in relying on such evidence, otherwise, it may result in substantial miscarriage of justice. It is similarly true that, in matters of identification, it is not enough merely to look at factors favouring identification, equally important is the credibility of the witness. As even recognising witnesses often make mistakes or deliberately lie. The conditions might appear ideal but that is no guarantee against untruthful evidence. See the case of **Abas Matatala v. Republic**, Criminal Appeal No. 331 of 2008 CAT (unreported), **Issa Ngwali v. The Republic**,

Criminal Appeal No. 215 of 2005 CAT (Unreported), **Waziri Amani v. Republic** (*supra*) and **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015 CAT (unreported).

The salient factors to be followed by courts were stated with sufficient precision by the Court of Appeal of Tanzania in the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported). These include, How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

I am aware that, these guidelines were not meant to be exhaustive. This Court is under obligation to consider the circumstances of each case and make its own determination as justice of the case demands as it was observed in the case of **Anyelwisye Mwakapake and Another v. Republic**, Criminal Appeal No. 227 of 2011 CAT (unreported).

In the case of **Philimon Jumanne Agala**, (supra) the Court of Appeal observed that:

> *"We have already sufficiently demonstrated that visual identification and/or recognition evidence should be cautiously acted upon as it is prone to fabrication or being based on honest mistakes. It has been repeatedly held that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying."*

The same observation was made in the case of **Shamir John v. Republic** (supra) where the Court held that:-

> *"... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

Reverting to the first issue whether the accused killed the deceased, the only incriminating evidence is that of PW1 and PW2. According to the testimony of PW1, he was able to identity and recognize the accused person around 0800 hours at a distance of five to six paces between where he stood and the crime scene. He saw the accused person cutting the deceased on the left leg with a bush knife while, his colleagues Membe Kyeyo who had

bush knife cut the deceased on the fore head and Kyeyo Simion stabbed him on the backside towards the chest. It is true as testified by PW1 that he knew the accused person and his colleagues very well as they were living in the same village. When responding to a question from the Court, PW1 insisted that, he knew the accused person since his childhood. The evidence of PW1 is supported by the evidence of PW2 who also testified that she saw the accused person with his colleagues at the crime scene. Both PW1 and PW2 recognised them very well to the extent of describing type of clothes worn by the assailants on the fateful day. According to them, the accused person was wearing a sleeveless black T-shirt. PW2 described it as vest.

From their evidence, I find no ill motive on the side of the identifying/recognising witnesses as there is no evidence pointing out that there was misunderstanding between the prosecution witnesses and the accused person. For that reason, I find it safe to hold that the accused person was properly identified/recognised by PW1 and PW2 on the incident date as among the assailants who actually cut the deceased to death.

As I have stated herein above, the defence counsel attacked the evidence of Prosecution side claiming that there is contradiction in respect of part of body upon which the blow by the accused person was inflicted.

Admittedly, PW1 stated that, the accused person cut the deceased on his left leg while PW2 said it was right leg and PW3 saw injury on the right leg. Nonetheless, it is a settled principle that not every discrepancy or contradiction in the prosecution's evidence will cause their case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. This was stated in the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 CAT (unreported).

In another case of **Marmo Slaa @ Hofu and Three Others v. Republic**, Criminal Appeal No. 246 of 2011 (unreported) it was stated that;

> *"...in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such errors in memory due to lapse of time...* ***Minor contradictions, inconsistencies, embellishments, or improvements, on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected."*** (Emphasis is mine).

What I gather from the extract above is that, it is expected to find people who have eye witnessed the occurrence of one incident, giving contradicting accounts of its occurrence. Depending on circumstances of each case, the gap of contradiction may be widen having regard to the lapse

of time. The gist of evidence of PW1 was about how he witnessed the accused person and his colleagues assaulting the deceased. It is undisputed that the accused person cut the deceased on the leg specifically on the ankle. Exhibit P1 also shows that, the deceased had injury on the ankle. The issue whether it was right leg or left in the considered view of this Court is based on details. Thus, the contradiction is minor and normal and did not go to the root of the matter considering the fact that, PW1 was testifying after expiry of almost three years from the day he witnessed the incident. It can be recalled that, human recollection is not immaculate since a witness is not expected to be right in minute details when retelling his story. See the case of **Marceline Koivogui v. Republic** Criminal Appeal No. 469 of 2017 [2020] TZCA 252 at www.tanzlii.org. It was also held in the case of **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1991 (unreported) that;

> *"Due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies."*

I am aware that a person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt. See the

case of **John Makolobela, Kulwa Makolobela and Eric Juma alias Tanganyika v. Republic** [2002] TLR 296.

In this case it is the accused person's defence that on the fateful date around 0900 hours, while he was digging a pit hole, he heard the alarm and went to scene where he found a lot of people there with the deceased laying down. After the government leaders arrived, they were told to disperse. He went back home, but at around 1500 hours, he was arrested by PW3 in connection of the alleged offence. He was then taken to Shirati Police Station where they arrived at 1700 hours and he found PW1 with Kelvin Kyeyo in custody and he was joined with them. The trio stayed in custody for one week and after being released, he went back to the village and continued with his farming until 28th August, 2019 when he was re-arrested by PW3.

From his evidence, the accused person claimed that he was arrested on the date of incident at 1500 hours whereby upon arriving at the station around 1700 hours, he found PW1 already in custody. But questions pertaining to his arrest on the date of incident together with PW1 were not asked on cross examination to either PW1 or PW3. Besides, the evidence by the Prosecution side shows that, around 1700 hours when the accused person claimed to have found PW1 in Shirati Police Station, PW3 was with

PW1 at KMT hospital witnessing an autopsy of deceased body. Likewise, both PW1 and PW3 were not cross examined on this aspect. This connotes that, the defence was comfortable with the contents of testimony of PW1 and PW3 in those aspects. It is a settled principle that, failure to cross-examine a witness on a relevant matter ordinarily means acceptance of veracity of the testimony. This was stated in the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 CAT (unreported). In another case of **Cyprian A. Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 CAT (unreported) it was held that;

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

See also the unreported decisions of the Court of Appeal of Tanzania in the cases of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, **Niyonzima Augustine v. Republic**, Criminal Appeal No. 483 of 2015 and **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007.

Taking all this into account, it is in my view that the evidence by the defence was an afterthought. It is also my considered finding that the

defence by the accused person does not raise any reasonable doubt on the Prosecution's case. Thus, I give it no weight and accordingly reject.

Therefore, on the basis of the foregoing observation, it is my firm view that, the Prosecution side has discharged its obligation to prove the case beyond any reasonable doubt that it was the accused, Mungei Simion, who killed the deceased, Thomas Dalmas @ Rumba. Thus, the first issue is affirmatively answered.

The only remaining issue is whether the accused person killed the deceased with malice aforethought. Section 200 of the Penal Code illustrate on what amount to malice aforethought. The same provides as hereunder;

> *"Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances–*
>
> *(a)* ***an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or*

grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) 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." (Emphasis supplied).

See also the cases of **Florence Mwarabu v. Republic**, Criminal Appeal No. 129 of 2003, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Mohamed Said Matula v. Republic** [1995] TLR 3.

Apart from that, the Court of Appeal of Tanzania in the case of **Enock Kipela v. Republic**, (supra) it was held that;

"....usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) ***the type and size of the weapon,*** *if any used in the attack, (2) the amount of force applied in the assault, (3)* ***the part or parts of the body the blow were directed at or inflicted on,*** *(4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this*

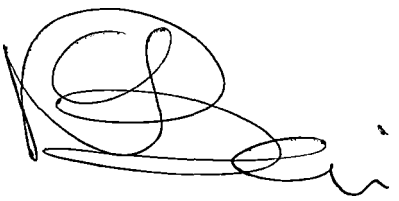
purpose, (5) the kind of injuries inflicted, (6) the attackers utterances, if any, made before, during or after the killing, and (7) ***the conduct of the attacker before and after the killing.*** *"*(Emphasis is mine).

See also the cases of; **Moses Michael @ Tall v. Republic**, [1994] TLR 195 and **Elias Paul v. Republic**, Criminal Appeal No. 7 of 2004, CAT (unreported).

The evidence on record shows that, the deceased died due to "*severe bleeding secondary to multiple injuries*". He had cut wound on the head, and injury on the ankle joint and right shoulder. This is clearly proved by Exhibit P1. There is evidence on record that, the accused person cut the deceased on the ankle by using bush knife. Bush knife is a kind of weapon that if used will cause grievous harm to the assaulted person. Besides, soon after the incident, the accused person escaped. All these are clear proof of malice aforethought on the part of the accused person. Thus, it can safely be concluded that, the accused person killed the deceased with malice aforethought.

For the reasons thereof, I join hands with Ladies and Gentleman Assessors that, the prosecution has proved the case beyond reasonable doubt against the accused person. I therefore, find the accused person

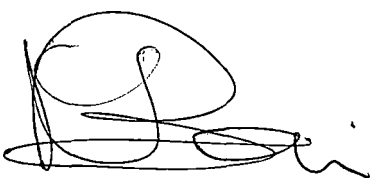
Mungei Simion guilty as charged and I hereby convict him with the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002].



I. K. BANZI
JUDGE
30/04/2021

SENTENCE

Section 197 of the Penal Code [Cap. 16 R. E. 2002] is very clear that, the offence of murder has only one punishment. My hands are tied. Thus, I hereby sentence the accused person, Mungei Simion to suffer death by hanging.



I. K. BANZI
JUDGE
30/04/2021

Right of appeal under section 323 of the Criminal Procedure Act [Cap. 20 R. E. 2019] is fully explained.

I. K. BANZI
JUDGE
30/04/2021

The Ladies and Gentleman Assessors are thanked and discharged.

THE HIGH COURT OF TANZANIA
MUSOMA

I. K. BANZI
JUDGE
30/04/2021