

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MBEYA)**  
**AT MBOZI**  
**CRIMINAL SESSIONS CASE NO. 33 OF 2018**  
**THE REPUBLIC**  
**VERSUS**  
**KILIAN MARTIN KIVUTWE**  
**JUDGEMENT**

Date of Hearing : 23/04/2021  
Date of Judgment: 12/05/2021

**MONGELLA, J.**

**Kilian Martine Kivutwe** has been arraigned in this Court for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2002. He is alleged to have murdered one **Rachael d/o Samwel**, a girl aged 2 years. The murder incident occurred on 24<sup>th</sup> May 2017 at Chang'ombe village within the district of Songwe in Songwe region.

The Republic was represented by Mr. Ofmedi Mtenga, learned senior state attorney while on the other hand the accused enjoyed the legal representation of Ms. Nyansige Kajanja, learned advocate.



During the hearing of the case, it was alleged by the prosecution witnesses that on the date of the incident at around 20hours Kilian arrived at the deceased's home and found **PW1**, one **Musa Samwel William** (the deceased's brother), and the deceased playing outside. He asked PW1 if his father and mother were at home. PW1 replied to him that they were not at home. Kilian then told PW1 to take a hat that he was holding. PW1 refused to take the hat. Kilian however, threw the hat at him covering his face, took the deceased and ran away with her. PW1, who was 8 years by then, started crying. His sister named **Edina (PW2)** came outside and found him crying. When she asked him as to what had happened and as to where the deceased was, PW1 replied to her that Kilian has taken the child (the deceased). He also showed Edina the direction to which Kilian headed. Edina called their aunt named Subilaga, who was cooking in the kitchen and told her what had happened. Thus the three of them went searching for Kilian and the deceased.

On the way they met **PW3**, one **Therezia Mpakasi** and asked her if she had seen a person carrying a child. Therezia told them that she saw a young man in red trousers and black shirt with white dots passing carrying a child whom she recognised to be Rachael, the deceased. She told them that he headed to the direction heading to Catalogue bar. The four of them thus went to that direction searching for Kilian and the deceased. They reached Catalogue bar and searched in vain. Later they decided to go back home.



At home they met their father (PW4), one **Samwel William Adam** and reported to him what had happened. PW4 also engaged in searching for the deceased, but did not succeed. He thus decided to notify the village authority. The village chairman made an announcement requiring all local pubs near PW4's house to be closed and for people to gather. In a short while the villagers gathered at PW4's house and were notified of the incident. While arranging to search for the deceased, Kilian arrived at PW4's house and asked them if they were searching for a child. He then told the villagers to follow him to where the child is. He took them to the crime scene where the child was found dead. Following this incident Kilian was arrested and taken to the village office. When the police arrived, he was taken to Galula police post and later shifted to Mkwajuni police station. Kilian denied to have been involved in the murder incident.

The unnatural death of the deceased is in fact not in dispute. The witnesses from both sides testified as to the mysterious death of the deceased whereby she was found dead in a maize farm and appeared to have been strangled to death. Therefore, the only issue that stands for the prosecution to prove is whether Kilian, the accused herein murdered the deceased. However, before I endeavour to deliberate on this issue, I wish to first present the opinion of the wise assessors.

The opinion of all three assessors was to the effect that the accused is guilty of the offence. The 1<sup>st</sup> assessor, Ms. Christina Kibona was of the opinion that the accused is involved in the murder. She found the accused did not tell the truth especially where he claimed that he does not know how to read and write. She added that the prosecution

witnesses have given evidence regarding the clothes he wore on the date of the incident, which were red trousers and black T-shirt.

The 2<sup>nd</sup> assessor, Mr. Sunday Seme joined hands with the first assessor. He said that PW1 testified to have seen the accused carrying the child and the child was not seen until when she was found dead. He as well referred to the testimony of PW3 who said that she saw a person she did not know carrying a child and recognised the child to be Rachael. PW3 also described the clothes worn by the accused to be red trousers and black T-shirt. He also considered the testimony that Kilian was mentioned to have shown the place where the child was found dead. He concluded that the prosecution witnesses' testimonies showed that Kilian had a motive to do the act as he had grudges with PW4 who did not pay him part of the proceeds in the paddy farming business and that the deceased was his child.

The 3<sup>rd</sup> assessor, Ms. Lucia Lyesya in her opinion considered first the testimony of PW1. She was convinced by the testimony of PW1 to the effect that the accused went to their home, talked to PW1 and left with the child. She said that PW1, who is a child of 12 years, testified without fear or contradiction. She added that the accused gave defence testimony that he saw people carrying the child and told people that they should follow him to where the child was. However, the prosecution witnesses testified that he took them to where the child was. She was thus of the view that all this shows he knew where the child was. She also did not find the accused's testimony credible as the accused did not bring any witnesses to back up his testimony in this court.



After summarizing the testimony of the wise assessors I now proceed to deliberate on the main issue in this case. I first of all agree with Mr. Mtenga that the prosecution evidence in this matter is entirely circumstantial. For circumstantial evidence to be relied upon certain conditions must be met. These were set by the court of appeal in the case of **Ndalahwa Shilanda and Buswelu Busaru v. Republic**, Criminal Appeal No. 247 of 2008 (unreported) to be:

- i. *"The circumstance from which an inference of guilty is sought to be drawn must be cogently and firmly established;*
- ii. *Those circumstance must be a definite tendency unerringly pointing towards the guilt of the accused;*
- iii. *The circumstances taken cumulatively, should form a chain so, complete that there is no escape from conclusion that within all human...the crime was committed by the accused and not one else."*

In the matter at hand, the prosecution presented three major pieces of evidence suggesting that the accused committed the offence. First, the accused was seen by PW1 taking the deceased. Second, that when the villagers were gathered at PW4's house, the accused arrived and asked them if they were looking for the child and told him to follow him whereby he took them to the place where the deceased was found dead. The third piece of evidence is the clothes which PW1 described to have seen the accused wearing when he took the deceased. These were a pair of red trousers and a black T-shirt with white dotted stripes and prints on both sides and a two colour hat.



As testified by PW1 the accused went to PW4's house and found PW1 and the deceased playing outside the house. He asked PW1 if his father and mother were around. When told that they were not around, he told him to take a hat he was holding on his hand. When PW1 refused the accused threw the hat at him, carried the deceased and ran away with her. PW1 described the accused's clothes to be a pair of red trousers and a black shirt with white dots. **PW6**, one **Hamisi Atanas** who is the village executive officer (VEO) of Mwagala village also testified to have met the accused, in the afternoon of the date of event, wearing a pair of red trousers commonly known as "modal" and a black T-shirt with white dots and prints and a purple hat. PW3 also testified to have seen a man carrying a child wearing a pair of red trousers and black T-shirt with white dots and prints. She said that she recognised the child as being the deceased.

PW1, PW2, and PW4 testified that while the villagers were gathered at PW4's house preparing to go search for the child, the accused arrived and asked if they were looking for the deceased. When they told him that they were looking for the deceased, he told them to follow him and led him to the place where they found the deceased dead.

In his defence, the accused, though agreeing to have worn a pair of red trousers and black T-shirt with white dots and prints, denied being at PW4's house, taking and running away with the deceased. He testified that on the date of the incident, he went to the market in the morning with his sister and wife to sell maize. After the sale of maize whereby he got T.shs. 24,000/-, he used T.shs. 10,000/- to buy a pair of red trousers. After trying



them at his friend's house he decided to put them on and was in those clothes during the whole day.

He said that he spent the whole day with his friend named George until evening hours whereby he went back home and stayed there until when he was woken up by his mother at around 20:30hours who told him that whistles have been blown in the village and they should go out to see what was happening. He followed the direction where the sound of the whistles came from which led him to PW4's house. On the way however, he met two people named Adidas Laiton Simwita and Joseph Alphonse Simfukwe. Adidas was carrying a baby on his back. The accused asked them as to where they were heading while whistles were being blown. They replied to him that they were coming from a local pub and were heading home to sleep. He said that he believed the child was Adidas' as he knew Adidas had a small child.

The accused denied to have led the villagers to the place where the deceased was found dead. He said that when he arrived at PW4's house he asked one named Raphael Blazio as to what had happened. Raphael informed him that PW4's child was stolen. He told the people gathered that he met two people carrying a child and took them to where he met those people. When they reached at the place, they found three different footprints. One was of shoes commonly known as "chachacha" the other was of shoes commonly known as "kobasi" and the other was of slippers. They thus decided to follow footprints of "chachacha" which led them to Adidas' house. There Adidas' wife opened the door and told them that Adidas left home around 20hours. There they split into two

groups whereby one group went to search for Adidas and the other group in which he was included went back to where they found the three different footprints. On reaching there they heard noises coming from the direction of the school farm. They headed there and found some villagers gathered and there was a small child lying dead. He stayed there until around 21 hours and headed back home to sleep. At 22 hours the police and some militiamen went to his house to arrest him in connection with the murder. At first they told him that he was alleged to have love affairs with PW4's wife.

He said that he went back home to sleep as it was very cold out there and he was feeling pain on the injuries on his right hand. Explaining about the injuries, he said that he sustained the injuries on a fight with a militiaman at the village office whereby he hit a window glass and got cut. He was taken to Ifisi hospital whereby he was stitched with 12 stitches. He said that the date the murder incident occurred was the third day from the date he was stitched. Referring to his condition he also said that it was not possible for him to carry the deceased as he was not fit to do that given the injuries on his hand and he had bandage on.

With regard to clothes the accused tendered a pair of red trousers "modal" and a black T-shirt with white dots and white prints on both sides. These were collectively admitted as "exhibit D2." He challenged the clothes tendered by the prosecution as "exhibit P4" saying that they were not his clothes and the pair of trousers was not "modal" as claimed by the prosecution witnesses. He said that his clothes were never seized by the police as his wife took them to him in prison and he has been wearing



them all the time. He was of the view that the clothes tendered in court by the prosecution were brought in court by the police who knows where they got them. He also denied to have owned any purple hat before.

Considering the evidence from both sides, I ask myself a question as to which side between the prosecution and the defence is telling the truth regarding the murder incident in this case. The evidence adduced by PW1, PW2, PW3 and PW4, I can say, is basically under the doctrine of "the last seen person." Expounding on this doctrine, the Court of Appeal, in the case of **Emmanuel Kondrad Yosipati v. The Republic**, Criminal Appeal No. 296 of 2017, while quoting in approval its previous decision in the case of **Mathayo Mwalimu and Another v. The Republic**, Criminal Appeal No. 147 of 2008 stated:

*"In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of Hamisi Mnino, like the court below, we too are satisfied that they are the ones who killed him."*

To this juncture I have to evaluate as to whether PW1 correctly identified the accused at the crime scene, that is, at their home where the deceased was taken. PW1 and PW4 testified that the accused was familiar to PW1 as he once lived with them at their home. They said that the accused lived with them for more than two years, which is a long time. As testified by PW4, the accused went to PW4, who is a pastor, to receive spiritual healing as he was suffering from demonic attacks. After

being healed he continued to live with them until when he was expelled by PW4 for having love affairs with a church member not his wife.

Therefore, the identification of the accused by PW1 is that of recognition as the two knew each other well. This kind of identification is regarded as stronger and proper than that of unknown person. See: **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (CAT at Mbeya, unreported) and **Jackson Kihili Ruhanda and Another v. Republic**, Criminal Appeal No. 139 of 2007 (CAT, unreported). However, the court still has to be certain with the credibility of the identifying witness even where the witness appears to be familiar with the accused. The credibility can be ascertained if the witness(es) mentioned the accused at the earliest possible opportunity and whether there are no contradictions in the witnesses' testimonies.

In the case of **Bakari Abdallah Masudi v. Republic**, Criminal Appeal no. 126 of 2017 (unreported) the Court held that "...the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his credibility." In the case of **Jaribu Abdallah v. Republic** [2003] TLR 271, the Court also held:

*"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 conditions 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."*



PW1 testified that he mentioned to PW2 that it was Kilian who took the deceased. PW2 also testified to that effect. However, in my considered opinion I do not find this testimony being true on the following reasons:

First, when PW1 and PW2 met PW3 and went together searching for the accused and the deceased, both PW1 and PW2 never mentioned to PW3 that it was Kilian who took the deceased. It is doubtful that the three of them searched for the accused for a while without PW1 and PW2 mentioning his name to PW3. PW2 and PW4 testified that PW2 was the first to tell PW4, their father, when he returned home that it was Kilian who took the deceased. Thereafter, PW4 met PW3 and they again went to search for the accused and the deceased. However, all this while PW4 never mentioned to PW3 that he was told by PW2 that it was the accused who took the deceased.

PW4 further said that after the search in vain, he went and pleaded with PW1 for him to explain in detail as to who took the deceased. PW1 mentioned that it was Kilian. However, when PW4 called the village leaders he never mentioned to them that it was Kilian who took the deceased. Even when Kilian arrived at PW4's house PW4 never told the village leaders or any person gathered there that it was Kilian who took the deceased. I find this act of omission to mention the accused so doubtful.

PW4 explained in court that he never mentioned Kilian to the village leaders or to the villagers gathered at his house even when Kilian arrived and took them to the crime scene, because he had no worries as he saw that the deceased was taken by someone he knew and he only



concentrated in finding his child. I honestly find this explanation not convincing at all.

This is because it should be remembered that the accused had quarrels with PW4 to the extent of being chased from PW4's home and ostracized from the church congregation which PW4 led. This fact shows that PW4 already considered the accused as being morally corrupt. Under the circumstances, it does not make any sense for him to have no worries with such a person taking his 2 years old daughter at night to an unknown place.

Second, PW4 was very well familiar to the accused and his family after living with him and healing him spiritually. Thus before or after the search in vain with the help of PW3 he should have gone straight to the accused's house to look for him if at all PW1 and PW2 had mentioned the accused to him. The act of calling the village leaders and wait for them to make an announcement gathering other villagers and directing them to engage in the search of the deceased without even mentioning to them the suspect, proves that he had no idea of who had exactly taken the child.

Still on the principle of mentioning the suspect at the earliest possible opportunity, I wish to consider another factor which regards the contradictions between PW1 and PW4 on the conversation PW1 claims to have had with the accused. PW1 testified in court that when the accused went to take the deceased, he first asked him if his father and mother were at home and he replied that they were not at home. On the other hand, PW4 testified that PW1 told him that someone came and told PW1



that he was sent by one named Daniel to take the child. He said that PW1 was first afraid to mention the accused's name to him as the accused had threatened him not to mention his name. PW1 however, never testified to that effect.

Where there are contradictions in the witnesses' testimonies, the court has an obligation of determining whether such contradictions are material or not. See: **Mohamed Said Matula v. Republic (1995) TLR no. 3**. Like I pointed out earlier, the contradictions are in connection with the identification of the accused by PW1, particularly on the ability to mention him at the earliest possible opportunity. It should be recalled that PW1 and PW2 testified in court that PW1 mentioned immediately to PW2 that it was Kilian who took the deceased. I therefore wonder that if PW1 had already mentioned the accused to PW2, how then he would be afraid of mentioning him to PW4. If he was really threatened by the accused not to mention his name, he would not have mentioned him to PW2 as he claims. I thus find the contradictions between PW1 and PW4 being material and going to the root of the case as far as the credibility of these witnesses is concerned.

PW3 testified that she saw that night a man in red trousers and black T-shirt with white dots and prints carrying a child on his neck. She said that she managed to recognise the child as being the deceased, but did not recognise the person carrying the child. Considering the description explained by PW3 on how the child was carried, I get the impression that the child was looking towards the front facing PW3 when being carried. The child was thus facing the direction the said man was heading. In my

considered opinion, if PW3 could see the child to the extent of recognizing that it was the deceased, then definitely she could as well see the person who carried the child. It is only that the said person was someone she did not know.

To this point, I wish also to consider the testimony of PW3 and that of the accused as to their relationship. Both PW3 and the accused testified that they are close relatives, cousins for that matter. These two grew up together and thus know each other very well. Considering this relationship, it is my settled view that if indeed the accused was the one carrying the child, then PW3 would have easily recognised him.

The accused did not deny wearing a pair of red trousers and a black T-shirt with white dots and prints. However, as I stated earlier, he also presented a set of similar clothes in court (exhibit D2) saying that those were the ones he wore on that day and not the ones presented by the prosecution. Mr. Mtenga in his final submission urged the court not to consider exhibit D2 as there were contradictions between DW1 and DW2 as to how the clothes reached the accused in custody at the police station. While DW1 said that he sent his wife to get the clothes for him at home on 26<sup>th</sup> April 2017, DW2 said that it was the militiamen who arrested the accused that went for the clothes on 25<sup>th</sup> April 2017. I in fact agree with Mr. Mtenga that these are material contradictions.

However, though I agree with Mr. Mtenga on the material contradictions between DW1 and DW2 on how the clothes reached the accused, I cannot ignore the possibility of similar clothes being owned by other

people out there. A close look of the sets of clothes presented by the prosecution and defence sides, shows that the two sets of clothes resemble by more than 97%. If there could be two sets of similar clothes brought to court then it is possible that there could be more similar sets of clothes out there including the one worn by the real culprit of the murder incident.

The clothes presented by the prosecution were only identified in court by PW6 as the one the accused had put on that afternoon and PW7 as the clothes they seized at the accused person's house. I however, find the identification by PW6 of no weight as it was not done at the crime scene. I think the better witness to have identified the clothes was PW1, but unfortunately he did not. It is also so doubtful that the police officers searched the accused person's house in his absence as he was kept in custody at the police station. The seizure certificate was signed by the accused person's wife who was not brought to court to testify on the correctness of the matter including her own signature. On the other hand, DW2, the accused's mother, who was also present at the search, testified that nothing was found in the house. Under the circumstances, benefit of doubt is hereby accorded to the accused person.

PW6, who is the village chairman, tried to present evidence of bad character by testifying that the accused had that habit of stealing small children and that he once stole a small boy who managed to escape. When questioned as to the actions taken by the village authority against the accused on that behaviour, he had nothing to present. He only said that he was told that by some people in the village. I find this piece of

evidence unworthy of any consideration because it is purely hearsay thus inadmissible under the law.

Lastly, I wish to consider the accused's state of health. As much as I discard exhibit D1, which is just a hospital identity card thus proving nothing on the treatment the accused person underwent, I find his claim that he was not physically fit undisputed. The accused testified that he got injured on his right hand whereby he got stitched with twelve stitches and the date of the murder incident was the third day he came from Ifisi hospital. He said that on the day of the incident he still had bandages on his hand supported by a rope through his shoulders. This testimony was in fact corroborated by prosecution witnesses being PW4 and PW5, a police officer who arrested him.

Considering the fact that the accused had a fresh wound on his right hand which had to be covered by a bandage, I expected PW1 who claimed to have seen him taking the deceased, and PW6 who claimed to have met him that afternoon and spent quite some time with him, to have described the state he was in regarding his injured hand. PW1 did not explain how the accused managed to carry the child with his injured hand.

In my considered view therefore, I am convinced that the accused person is just a victim of circumstances. His act of stating that he met two men carrying a small child that night; and that of wearing a pair of red trousers and black T-shirt with white dots and prints on that fateful date led to the calamity befalling him. I am convinced that the real culprit is on the loose out there.



In consideration of my observation as presented hereinabove, it is my finding that the prosecution has failed to prove its case beyond reasonable doubt. Under the circumstances, I find the accused person **KILIAN MARTIN KIVUTWE, NOT GUILTY** of the offence of murder he stands charged with under section 196 and 197 of the Penal Code, Cap 16, R. E. 2002 and consequently **acquit** him from the same charge.

Dated at Mbeya on this 12<sup>th</sup> day of May 2021.

  
**L. M. MONGELLA**  
**JUDGE**

**Court:** Judgement delivered at Mbozi in open court on this 12<sup>th</sup> day of May 2021 in the presence of the accused person, Ms. Nyansige Kajanja, learned advocate for the accused person and Mr. Innocent Njau, learned State Attorney for the Republic.

  
**L. M. MONGELLA**  
**JUDGE**

