

**IN THE HIGH COURT OF TANZANIA**  
**(MWANZA REGISTRY)**

**AT GEITA**

**CRIMINAL SESSION NO.220 OF 2015**

**THE REPUBLIC**

**VERSUS**

**WILSON S/O SIMON**

**JUDGMENT**

*Last Order 11.05.2021*

*Judgment date: 11.05.2021*

**A.Z.MGEYEKWA, J**

MILEMBE D/O LUSESA and LETICIA D/O MWENDAMKONO were brutally killed on 16<sup>th</sup> January, 2012 at Nyamirambano Village in Geita District at Geita Region. The accused WILSON S/O SIMON is arraigned in court for the charge of murder of the above-mentioned deceased, contrary to section 196 of the Penal Code, Cap.16 [R.E 2002]. Now, [R.E 2019] which to date he stands trial.

The accused, Wilson S/ Simon, is charged with two counts; on the first count, it is alleged by the prosecution that on 16<sup>th</sup> January, 2012 at 21:30 hours at Lukaya village within Geita District in Geita Region did murder one Milembe D/O Lusesa. On the second count; it is alleged by the prosecution that on 16<sup>th</sup> January, 2012 at 21:33 hours at Lukaya village within Geita District in Geita Region did murder one Milembe D/O Lusesa.

Briefly, the background of this case as per the fact of the case which was presented during the preliminary hearing is that on 16<sup>th</sup> January, 2012 at night hours the accused person at Lukaya area, Nzera village within the District and Region of Geita. The accused person invaded the house where Milembe Lusesa and Leticia Mwendamkoko were living while armed with a bush knife. It is alleged that the accused started to cut their bodies with the bush knife. The victims cried for help at the time of the attack then the accused run away. It was further alleged that the accused person met Godfrey while on the way, the accused person was holding a bush knife with blood and disappeared into the bush. Then Good Samaritans came to the scene of the crime and reported the incident to the police station.

The prosecution continued to allege that the deceased bodies were examined and the Doctor revealed that the death of the deceased was caused by a sharp object and the cause of death was excessive bleeding.



On 11/02/2014 the accused was arrested and sent to Geita Police Station where he denied the charges. On 25/3/2014 the accused person was arraigned before the District Court of Geita and he pleaded not guilty before this court.

At the closure of the prosecution case, the court found that the accused had a case to answer and was called upon to defend which he duly complied by giving evidence himself and under oath.

During the hearing of this case, the Republic prosecution was dully represented by Ms. Janeth Kisibo, learned State Attorney while the accused was under the services of Mr. Beatus, learned counsel. I wish at this point to express my profound appreciation to the learned State Attorney and learned counsel for their commitment and strenuous efforts during the conduct of this case. I extend my thanks to the three assessors who sat with me and stated their opinion basing on the facts of the case. All assessors opined to find the accused is not guilty because they found that the prosecution has not proved the case beyond reasonable doubt.

The prosecution case consists of FOUR (4) witnesses and ONE for the defence. The witnesses were D7761 D/C Joel (**PW1**), Dr. Christopher Johana Matola (**PW2**), Geoffrey S/O Juma (**PW3**), and Nhungu Lunyilija (**PW4**). In the course of the trial, the court admitted a Sketch Map (Exh.

P1) and Post Mortem Examination Report (Exh.P2). For ease of reference, the said evidence is summarized below:-

D7761 D/C Joel who testified as PW1. He testified to the effect that on 16/01/2012 at night hours he received a phone call from the Executive Chairman, one James Ndaswa of Lukaya village informing him that a murder occurred in their village. PW1 testified that they headed to the scene of the crime and were informed that two women were murdered at the house of Nyilembe Musesa. He said that he saw the bodies of Milembe D/O Lusesa and Leticia D/O Mwendamkono with injuries on their neck, head, and hands. PW1 further testified that on the following day they headed to the scene of the crime and he recorded the witnesses' statements and draw a sketch map. PW1 tendered the Sketch map the same was admitted as exhibit P1.

The testimony of Dr. Christopher Johana Matola (PW2) was to the effect that on 17/01/2012 he examined two female bodies; an old lady and one young lady; Milembe and Leticia respectively. PW3 testified that the deceased bodies had injuries and were inflicted by a sharp object on the head and neck. PW3 testified that the cause of death was severe bleeding. PW3 tendered the Post Mortem Examination Report the same was admitted as exhibit P2. PW2 testified to the effect that the murder occurred on 16/01/2012 and he recorded the Post Mortem Examination



Reports on 17/01/2012 but the Post Mortem Examination Report is dated 16/01/2012.

During cross-examination, PW2 testified that the PMER's were filled in correctly but the dates are not correct. PW2 testified that after examining the bodies it was revealed that the injuries were inflicted by more than one person by using a sharp object such as a knife or hoe.

Geoffrey S/O Juma was the third witness to testify for the prosecution. He testified that he was residing at Nyambowe village. PW3 testified that on 16/01/2012 night hours while at his house he heard an alarm. PW3 testified that when crossing the road, he saw the accused person, who was wearing a black jacket and white trouser holding a bush knife. He said that he wanted to cut him on his head but he ran away. PW3 testified to the effect that he recognized the accused person. PW3 testified that he knew him before because he was they were residing in one Village. PW3 said that he had no any relation with the accused. PW3 testified that he identified him because of torchlight and bright moonlight.

PW3 further said that he met the accused person on the way heading to the scene of the crime. PW3 testified that on his arrival at the scene of the crime he saw his mother; Leticia Mwendamkola and his grandmother; Milembe Lusesa who were assaulted by bush knives on their head and neck. PW3 testified that he informed the tencell leader that he meet the

accused and he suspected him because he was holding a bush knife. PW3 was able to identify the accused person in court.

During cross-examination, PW3 testified that the deceaseds were murdered at Kihimbo Street. He stated that in his statement he said that the incident occurred at Lukaya Street and the distance from where he was residing to the scene of the crime is 200 km. PW3 testified that he was coming from Nyambogwe and other villagers were coming from the same direction but he was only one who saw the accused person.

PW3 continued to testify that on the material date he did not report the matter but on the following day he told his uncle one Nkungu Lunilija (PW2). PW3 testified that the bodies were not taken anywhere. PW3 denied that the bodies were taken to the hospital. PW3 testified the murder occurred on 12/02/2012 and Wilson was arrested after 2 years.

During Reexamination, PW3 s that the murder occurred on 12/02/2012 and that he told Nkungu Yunyilija that he saw the accused persons on the following day.

The last witness was Nhungu Lunyilija, PW4 testified that he was residing in Lukaya village. PW4 testified that on 16/01/2012 while at his house around 21:00 hours he heard an alarm coming from Letecia Mwendamkono's house. PW4 testified that Letecia and Milembe were



assaulted by a bush knife on their heads, shoulder, neck and hands. PW4 testified that Geoffrey, his nephew (PW 3) told him that he saw the accused person wearing a black coat and black trouser.

When PW4 was cross-examined, he testified that on 16/01/2012 he was present at the scene of the crime. PW4 testified that in previous days on 12/01/2012, 14/01/2012 the accused person was not seen at the village. He said that the accused person was not around for sometimes. PW4 testified that PW3 told him that Wilson was wearing a black jacket and black trouser. PW4 testified that PW3 told him that the accused person was coming from allay street and PW3 told him that he did not witness Wilson assaulting the deceased. PW4 testified that PW3 told him the same night that he saw the accused person holding a bush knife, not on the following day. He added that if one says that he was informed on the following day, he is a liar.

The accused Wilson S/O Simon did not call any witness but choose to testify himself as the only Defence witness (DW1). He testified under oath. His line of defence was that he did not commit the offence which he is charged with. DW1 testified that he is involved in the timber business also doing farming activities. DW1 raised a defence of Alibi that on 16/01/2014 he was not at the village, he left to nurse his sick mother who was residing in Bukoba Region.

DW1 testified further that he was arrested on 11/02/2014 and after his arrest, he informed the Police Officer that on the material date he was not around he was in Bukoba attending his sick mother. He stated that even PW4 confirmed that he was not around because he has not seen him for a week. He valiantly claimed that PW3 testimony was untrue because he testified that he identified him and he was wearing a black coat and white trouser while PW4 testified that he was wearing a black coat and black trouser.

DW1 went on to testify that PW3 told PW4 that he meet the accused person along the road while PW4 testified to the effect that PW3 told him that he meet the accused at alleys streets. He claimed that there was no any eye witness who witnessed the commission of the crime. He said that he has forgiven all who framed the case against him. DW1 urged this court to set him free.

When DW1 was cross-examined, he stated that he made a statement at the Police station. DW1 testified that the evidence against him is framed and he does not know why they framed such a case. He insisted that there were no any other people who were present at the funeral who appeared in court to testify.

Having heard the witnesses' testimonies, in this case. I have no doubt that Milembe Lusesa and Leticia Mwanamkono are dead. PW2 testified to



effect that the cause of death was massive bleeding from multiple cuts in her different parts of their bodies. There is no dispute that the deceased; Milembe D/O Lusesa and Leticia D/O Mwendamkono passed away and their deaths were unnatural. Therefore *actus reus* is proved.

Next for determination is the issue; *who caused the deceased's death*. I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in this judgment. These cover aspects of criminal law, as well as the law of evidence.

The prosecution is placed with a heavy burden than that of the accused. The first long-established principle in criminal justice is that of *onus of proof in criminal cases*, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under sections 110 and 112 of the Evidence Act, Cap.6 [R.E 2019].

Applying the above provision of law, it implies that the prosecution evidence must be so convincing that no reasonable person would ever question the accused's guilt. The same was held in the cases **Anatory Mutafungwa v Republic**, Criminal Appeal No. 267 of 2010, Court of Appeal of Tanzania and **Festo Komba v Republic**, Criminal Appeal No.77 of 2015, Court of Appeal of Tanzania (both unreported).

Additionally, in a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person with malice aforethought. Section 196 of the Penal Code, Cap. 16 [R.E 2019] under which the accused person in the present case was charged provides as follows:-

*“Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder”.*

Therefore it is the duty of the prosecution to prove the case against the accused person at two stages; first that it is the accused person Wilson S/O Simon who killed the deceased and secondly, that he did commit the killings with malice aforethought as stipulated under section 200 of the Penal Code, Cap.16 [R.E 2019]. In determining this case, I will determine the issue *whether Wilson S/O Simon is the one who murdered Milemba D/O Lusesa and Leticia D/O Mwanamkono?*

It is from the court record that the accused denied having murdered the deceased and there is no any eyewitness who testified to have seen the murderer. The prosecution accusation is based on PW3 evidence as a sole witness who alleged that he meet the accused on the material date.

Having gone through the prosecution testimonies, I find that the prosecution case was marred with discrepancies. It is settled that if a witness state inconsistency statements on oath, his credibility is



completely destroyed and the Court of Appeal of Tanzania in its numerals decisions has stated that where there are contradictions in evidence the court is duty-bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major. Minor discrepancies and contradictions do not jeopardize the credibility of witnesses but major discrepancies and contradictions do jeopardize the credibility of witnesses considerably. This was held by the Court of Appeal of Tanzania in the case of **Dickson Elia Nshamba Shapwata & Another v Republic**, Criminal Appeal No. 92 of 2007 (unreported) and **Sahoba Benjuda v Republic**, Criminal Appeal No.96 of 1989, it was held that:-

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

Equally, the Court of Appeal in **Mohamed Said Matula v Republic** (1995) TLR 3 held that:-

*" Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has 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 only minor, or whether they go to the root of the matter."*

Based on the above legal authorities, it is my considered view that in the present case; apart from minor contradiction there were major contradictions which affected the case at hand the said contradictions are as follows:-

First of all, I am confused whether PW2 examined the deceased bodies. I am saying so because PW2 himself was not sure about the dates when he examined the deceased bodies. PW2 testimony was contrary to the content of the Post Mortem Examination Reports of the deceased. In his testimony, he stated that he examined the deceased bodies on 17<sup>th</sup> January, 2014 while in the Post Mortem Examination Reports. PW2 examined the bodies on 16<sup>th</sup> January, 2014 the day when the deceased was murdered. Although PW2 rectified the mistake, it is hard to believe him because PW3 denied that the bodies were moved from the deceased's house. He insisted that the bodies were not brought to the hospital instead the bodies were placed in the coffins and on the following day they proceeded with burial services.

This piece of evidence of PW2 and PW3 contradicts each other and leaves this court with the question whether the dead bodies were examined by PW2 in his station of duty or whether at all the deceased's bodies were moved to the hospital or not. The contradiction goes to the



root of the case, the court is left with unresolved questions as to who between PW2 and PW3 is telling the truth.

Second contradiction is when PW3 testified to the effect that he identified the accused with the aid of torch light and bright moonlight. PW3 described the appearance of the accused that he was wearing a black coat and white trouser. While PW4 testified to the effect that PW3 told him that the accused was wearing black coat and black trouser. Their statements are contradictory the same creates doubt whether the light was bright enough for correct identification.

Since PW3 was not sure whether the accused was wearing a black coat and black trouser means there was a possibility of a mistake in identifying the accused, taking into account that the incident occurred at night. In the case of **Riziki Method Myumbo v R 2007**, the court held that:-

*" Visual identification is a **class of evidence that is vulnerable to mistake, particularly in the conditions of darkness**. Courts must, as a rule of prudence, exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice." [Emphasis added].*

Based on the above authority, it is possible to confuse a person whom you know with other people especially where PW3 and PW4 evidence was contradictory. PW3 could have gone further to described the body

appearance of the accused was he tall, short, thin, or black which was not done.

The third contradiction, PW3 testified to the effect that on the following day he told his uncle that on his way to where the alarm was raised, he met the assailant who he suspected to be one Wilson S/O Simon holding a bush knife and he threatened him. The story was different from PW4 who testified that on the same day while at the scene of the crime that night, his nephew one Godfrey (PW3) told him that he saw the accused person coming from the direction where the murder occurred holding a bush knife and threatened him. Indeed these are two versions of testimonies by the prosecution which raised doubts as to the involvement of the accused.

In the fourth contradiction, PW1 testified that he saw the accused person at the road heading where the alarm was raised while PW4 testified to the effect that PW3 told him that he meets the accused who was coming from alleys ways. Indeed these are two versions of testimonies by the prosecution whom should this court believe?

Moreover, there is variance of date when the murder occurred. The charge sheet state that the murder occurred on the 16<sup>th</sup> day of January 2012 at about 21.30 hours at Lukaya Village within Geita District in the Geita Region. While PW3 during cross-examined had a different version,



he testified to the effect that the murder occurred on 12.02.2012, and during re-examination by the prosecution, PW3 insisted the murder occurred 12.02.2012. I am asking myself if the charge sheet is defective or PW3 evidence was untrue? If the charge sheet is defective, the Court of Appeal of Tanzania in its numerous decisions held that an accused person cannot be convicted based on a defective charge sheet. Therefore, in my respectful opinion, this is a major contradiction which goes to the root of the case.

I am doubtful whether PW3 was a credible and reliable witness to establish the case of murder against the accused person. The Court of Appeal of Tanzania in the case of **Ali Abdallah Rajabu v Saada Abdallah Rajabu & Others** (1994) TLR 132 CAT it was held, *inter alia*

*“ That where the decision of a case is wholly based on the credibility of the witness, then it is the trial court which is better placed to assess their credibility...”*

Based on the above authority, and with regard to the discrepancy in the testimonies of PW2, PW3, and PW4, it is clear that the evidence of PW3 has no weight, untrue the same is hereby disregarded and expunged from the court record.

In murder cases, evidence should be cogent and compelling as to convince a jury, judge, or the court that upon no rational hypothesis other

than murder can the facts be accounted for. The prosecution witnesses testified to the effect that they were suspecting the accused person. I am asking myself whether the evidence of the prosecution witnesses is enough to render this court to find that the accused is guilty. Reading the prosecution evidence it is clear that the evidence on record is based on hearsay evidence and suspicion.

PW4 evidence was purely hearsay evidence. Section 62 of Evidence Act, Cap.6 [R.E 2019] provides that oral evidence must in all cases be direct. Whatever that is not direct is hearsay and therefore the same is not admissible since direct evidence is the best evidence. In the case of **Vumi Liapenda Mushi v Republic**, Criminal Appeal No. 327 of 2016 delivered on 12<sup>th</sup> October, 2018. The Court of Appeal of Tanzania held that:-

*“ It is evident from the record that PW1, PW2, PW4, and PW5 did not witness the incident. **Their evidence was indeed hearsay. Hearsay evidence is of no evidential value. The same be discredited.** [Emphasis added].*

Applying the above provision of law and the authority, it is clear that pw4 evidence is indirect evidence the same is required to be supported by other evidence.



Likewise, PW3 evidence was purely based on suspicion. In the case of **John Mgindi v Republic** (1992) TLR 377 [downloaded on 29<sup>th</sup> June 2020 at [www.tanzlii.org](http://www.tanzlii.org)] the Court of Appeal of Tanzania held that:-

*“...while we agree that the **grave suspicion that the appellant was the culprit or a party to the crime was not altogether unfounded, we consider that the evidence as a whole left as a vestige of doubt as to his complicity.**” [Emphasis added].*

Guided by the above authorities, I am satisfied to state that, there is nothing on record from the prosecution side that has established a case sufficiently enough to require this court to ground conviction upon the accused person.

The accused person raised a defence of Alibi to prove that he was not at the scene of the crime. The law clearly stated that in order for a defence of *alibi* to stand the same needs to be corroborated. The accused had no any witness who was brought in court to testify. In the case **Kubezya John v Republic**, Criminal Appeal No. 488 of 2015, the Court of Appeal of Tanzania decided that the defence of alibi must be proved. I find that the accused person's defence of alibi is nothing else but an afterthought as it was stated in the case of **Nyerere Nyegue v Republic**, Criminal Appeal No. 67 of 2010, the Court of Appeal of Tanzania in Arusha (unreported).

Therefore, I reject the defence of *alibi* because the accused person failed to call witnesses to support his claims.

In the upshot, I have found that with the aforesaid critical deficiencies in the prosecution case; I am joining hands the assessors' opinions who found the accused person not guilty of murder. I have gone through the testimonies of the prosecution witnesses, their testimonies are tainted with contradictions, and it is not safe for the court to rely upon their testimonies. Therefore, I am left with no scintilla of evidence to support the conviction of the accused person for the murder of Milembe D/O Lusesa and Leticia D/O Mwendamkono.

In the light of the shortfalls which I have endeavored to illustrate above, the offence of murder has not been established. The doubts which have been expressed have to benefit the accused person. Therefore, the accused person, WILSON SIMON is hereby acquitted. I order the accused person to be released from the prison unless he is otherwise lawfully held.

Xlt  
A.Z MGEYEKWA  
**JUDGE**

11.05.2021

Right to appeal fully explained.

