

**IN THE HIGH COURT OF TANZANIA**

**AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**CRIMINAL SESSIONS CASE NO. 38 OF 2018**

**REPUBLIC**

**ZINGULA <sup>S</sup>/o KUBA @ LUNYENG'OMBE**

**JUDGEMENT**

**17<sup>th</sup> April - 18<sup>th</sup> May 2021**

**NDUNGURU, J**

The accused person one Zingula <sup>S</sup>/o Kuba @ Lunyeng'ombe stand charged of the offence of Murder contrary to section 196 of the Penal Code (Cap 16. R.E 2019).

It is alleged by the prosecution that on 22<sup>nd</sup> day of April 2016 2016 at Isangwa Village within Sumbawanga district Rukwa Region the accused person murdered one MILLU <sup>D</sup>/o GODADI.

The facts as presented by the prosecution which gave rise to this trial are that: on 22.04.2016 at about 1.00 hours over midnight Godadi s/o Kulwa and Yusuf s/o Kulwa were slept at their home at Isangwa village they were awakened by explosion of gun. That having heard the gun explosion suddenly two persons (bandits) entered the room and

kept them under restraint. As tried to defend himself Yusuph Kulwa was hit by stone on his mouth by the accused person one Zingula s/o Kuba who he identified that Yusuph s/o Kulwa identified only the accused.

That the other bandit whom he failed to identify went to the house of MILLU d/o GODADI broke into and cut the said Milu d/o Godadi. That Yusuph Kulwa escaped through the back door to call the neighbours. That Yusuph Kulwa reported the matter to one Robert s/o Nkana who was a village chairman. That when the people gathered at the scene Millu Godadi has already died. The body had huge cut wounds on different parts of the body. The matter was reported to the Police Station and the accused person one Zingula s/o Kuba Lunyeng'ombe was arrested.

That following his arrest the accused person is now arraigned for murdering Millu d/o Goodadi

When the charge of murder was read to the accused person during plea taking and preliminary hearing, the accused person pleaded "not" guilty to the charge. On 26.02.2020 when the case came for trial the charge was reminded to the accused who pleaded not guilty thereto.

The Republic enjoyed the service of Ms. Marietha Maguta, learned State Attorney while Mr. Samwel Kipasha learned advocate appeared as the defence counsel.

In discharging its duty of proving the guilty of the accused person, the prosecution paraded six (6) witnesses and tendered two documentary exhibits sketch map (Exh.P1 and Post mortem Examination Report Exh. P2)

These are, PW1, **Yusufu Kulwa Godadi**, peasant, resident of Muze village, within Sumbawanga District. His testimony was that on 22/04/2016 at about 01:00 hrs. in the night he was at his home Isangwa village and was awakened by gun blast, two bandits invaded their home and kept him under arrest. He said to have identified one person namely Zingula by using a light of a torch with two batteries. He informed the court that he knows the accused person as they lived in some village and the accused person is well known to him before that event. He further told the court that Zingula took a stone and hit him at his mouth. In the house he said they were two persons himself and the son of his sister one Godadi Kulwa. He further told the court that one person who was with Zingula got out of their house heading to his mother's home while Zingula remained there and he then heard the door of the house where his mother was sleeping broken and heard his mother shouting asking for help. It is his testimony that his mother at that time had slept with her granddaughter one Khadija Shaban. He further told the court that the accused person one Zingula also left at his home and went to the house of his mother and then he saw the accused

person cutting his mother with a machete. He further informed the court that there was a gleam of moon and there were no clouds at the sky and the whole transaction took place within 15 minutes. He told the court that the two bandits left. He reported the incident to the sungusungu leader one Mwanamila and he went back to the scene of crime where found his mother dead. The body had cuts wound at various parts of her body and he reported the matter to the village chairman one Robert.

When cross examined by defence counsel Mr. Kampakasa PW1 told the court that on 22/04/2016 he was at home at about 01:00hrs on the night as he was sleeping together with a son of his sister called Godadi Kulwa each at his own bed. He clarified that when two persons pounded upon them the house had no doors and was therefore open. He stated that the two persons were having torches and were all shining their torches on them and it was impossible to identify them. He then said when he took his torch and shone it to them, he was able to identify Nzingula who were living together in the village from 2007 up to 2016 and when he was hit with a stone at his mouth he fell down.

When re-examined by state attorney Marietha Maguta PW1 told the court that the house they were sleeping was still on the building process as it had no doors and he identified the accused person by his

physical appearance as he put a trouser of grey color with a jacket which was black in color.

**PW2, ROBERT S/O NKANA**, resident of Muze Village, Isangwa sub village, a peasant within Sumbawanga District, in 2016 was acting village chairman also the chairman of ulinzi na usalama of the village. He testified that on 22/04/2016 during the night he was awakened by neighbors and was informed of the killing of a person in the village by the leader of sungusungu. He informed the court that the killing occurred at the house of Millu d/o Godadi. He then went to the scene of crime and found the deceased body with a cut wound at her head and shoulders and the body was lying down at the door of her house. He then reported the matter to the police station by phone. He told the court that the deceased was living with her family members including Yusufu Kulwa and Kulwa Godadi. He told the court that he does not know the accused as he has never seen him before in the village.

When cross examined by defence counsel Mr. Kampakasa, PW2 told the court that he was informed of the killing of Millu Godadi by the kamanda of sungusungu, however he was not told the name of any suspect who killed the deceased. He said the deceased was living with her family members including Yusufu Kulwa Godadi and Kulwa Godadi.

He also told the court that he did not interrogate any person and he does not know the accused person.

When re-examined by Ms. Marietha Maguta PW2 told the court that he was acting village chairman and he did not interrogate Yusufu Kulwa as he reported the matter to the police.

**PW3, E. 7490 D/C SALEHE,** a Police Officer working with investigation department at Sumbawanga police station. His duties include interlia investigation of crimes and taking police case file to the office of DPP and with experience in the police force for seven years now. He testified that on 23/04/2016 was assigned a file by OC – CID concerning the killing of a person at Muze at Uzia village. The person who was killed was one Millu Godadi. He said on 27/04/2016 the accused person Nzingula Lunyengómbe was arrested at Uzia village. He told the court that the accused person was mentioned by Juma Godadi who on the material day was at the scene of crime. He further informed the court that through his investigation was satisfied that the accused is the one who killed the deceased. He however named Yusufu Godadi as the one who pointed the accused as the killer of the deceased and not Juma Godadi as earlier on said.

When cross examined by defence counsel Mr. Kampakasa PW3 told the court that the accused person was arrested on 27/04/2016 by a police man working at Muze police station.

When re-examined by Ms. Marietha Maguta PW3 said he was the sole investigator of the case as the killing took place on 22/04/2016.

**PW4, G. 2662 D/C GILBERT**, a Police Officer – CID department stationed at Laela Police station and in 2016 his station of work was at Muze Police station Sumbawanga District. inter alia his duties are investigation, arrest, interrogation and charge the suspects before the court of law and that on 22/04/2016 at around 00:00 hrs. Was informed through a phone by sub village chairman at Isangwa that there was a killing at that area and he then informed the OCS of Muze Police Station. The following day in the morning together with his fellow and a doctor, went to the scene of crime. It was his further testimony that on 27/04/2016 he got information that the accused person was at Muze bus stand preparing to escape. He managed to arrest the accused person and took him to Muze Police station. He further stated that at the scene of crime he found two houses. One was occupied by the deceased Millu Godadi and the other was occupied by Yusufu Godadi and were almost ten meters apart. Also, at the scene of crime he found the body of the deceased at the door of her house with a cut on the head and



shoulders. He then drew a sketch map of the area of scene which was admitted as exhibit during preliminary hearing.

When cross examined by defence counsel Mr. Kampakasa PW4 said to have seven years of experience since he was assigned the task of investigation and in 2016, he was at Muze police station where he stayed there for six years. He told the court that he interrogated the village chairman one Robert Nkana who informed him of the incident. He said the killing of the deceased happened inside the house at night.

When re-examined by State Attorney Ms. Marietha Maguta PW4 told the court that he knows the deceased had slept with her daughter Khadija who was also present at the scene of crime and he found blood on the deceased bed as the incident appear to have happened inside the house.

Further to that, **PW5, Dr. MARY KAVWANGA**, Medical Officer working at Mpui health centre, resident of Mpui Village, Sumbawanga District. She told the court that she is a clinical officer and in a year 2016 she was working at Mtowisa health centre treating people as well doing administrative duties. She testified that on 22/04/2016 she was at her duty station at Mtowisa she received a call from police officer one Gilbert who informed her that there is a murder event at Uzia village Isangwa area. She was requested to go and conduct post mortem examination.



She prepared herself and then went to the scene being accompanied by police officers one of them being Gilbert. While being at scene she met crowd of people and the relatives of the deceased who sent them to the place the dead body was. She told the court that the dead body was at the veranda near the outer door of the deceased house. As she arrived at the scene around 01.00 pm she found the body was full of blood and the body had a bid injury on the head and on the fore head. After her investigation she revealed that the cause of death was due to severe bleeding caused by cut wounds on the head. It was her testimony that the deceased was a female around 60-70 years. After her examination she filled the investigation form which was tendered earlier on as exhibit P2.

When cross examined by defence counsel Mr. Samwel Kipesha PW5 said in a year 2016 she had three years' experience of working and concerned the incident she recorded her statement to the police. On the very date she went to the scene of crime at Isangwa in Uzia village where she found the dead body at the outer door. She told the court that the cause of death being the loss of blood due to severe bleeding caused by sharp cut wounds. She said the body was still fresh and bloody as the death appeared to have happened few hours before.

**PW6, KHADIJA SHABAN KONDO**, Adult (18 years), secondary school student, Moslem currently living at Dar es salaam with her brother at Kitunda ward Ilala municipal. She told the court that she is a secondary school student studying at Kitunda Secondary School form IV student. She testified that in a year 2016 she was living at Uzia Isangwa village, Rukwa region. There she was living with her grandmother one Millu Godadi also with her uncle Yusufu and her brother Godadi Kulwa. She informed the court that her grandmother is now dead. It was her testimony that on 22/04/ 2016 at night while sleeping in the house of her grandmother around 02-03 hrs her grandmother awakened her after having a shout noise coming from the house which her brother and uncle lived. It was her further testimony that at that compound there were three houses, one was occupied by her uncle and brother, the second was used by her grandmother and her and lastly was used as a store for crops and kitchen. She stated that the house used by her grandmother had two rooms, grass roofed and the door was made of "matete" and were almost ten metres from each other.

It was witness's story that her grandmother having awakened her did sit on the bed and wore shoes. She said her grandmother took a stick and went straight to the door while she stood behind her grandmother. She said over suddenly the door was broken down and there entered a person who was short, who wanted to go direct to the

room they used for sleeping, but her grandmother hit the person with her stick at the forehead who started bleeding and the person got one step behind as her grandmother wanted to escape, she was cut with a panga on the head which the man had on his hand. The attack happened at the door when her grandmother tried to escape outside and before she got out came another man who was tall and had a torch and panga on his right hand, he also cut her grandmother on the neck and shoulders who had fallen down. While that incident happened, she had stood at the door heading outside, almost three meters from where the grandmother was cut. She stated that if she sees those two persons was able to identify the tall one who came second pointing the finger to the accused on the dock. She stated that at that house, there was solar light but it was not intense because the sun was not strong on that date, but the accused had a torch and there was moonlight. She was told by a short man to go to sleep. PW6 said to know the accused person as she used to see him at the street when she was 13 years old while studying at Uzia Primary School. The witness told the court that the event took almost 15 minutes

When cross examined by defence counsel Mr. Samwel Kipsha PW6 told the court that after the incident she recorded her statement at the police that "*huyo aliyeingia ni mweusi, mnene wa wastani*", but it is the accused person here present at the court. She said when her

grandmother was cut with panga she had stood at the door of the room. PW6 informed the court that the event happened around 01 – 02 hours as the murderers worn jeans trousers and black coats one of them had boots. She said to have offered her statement at the police in the morning after the incident which happened at night and the neighbours were somehow far from their home.

When re-examined by State Attorney Ms. Marietha Maguta PW6 told the court that the person she named in her statement is the accused on the dock. She said it is now five years since the event happened. She told the court that she did not know the accused by name but when he was talking to her when meeting him.

**DW1. ZINGULA NKUBA**, resident of Majimoto Village, within Katavi region, a peasant and pagan. He testified that in 2016 he was living at Majimoto village where he has been there since 2013. He told the court that he does not remember anything to have happened at Majimoto. He informed the court that he it his first time to see PW5 (Khadija) as he remembered that he went to his parent at Uzia before he was arrested. It was his testimony that he does not know Kulwa Godadi, Millu Godadi and Yusufu Kulwa. He stated that what he remembered he was arrested and sent to Muze police station and upon asked what is wrong he was told to know later. He said to have arrested

on 26/06/2016 and sent to Muze police station. On 27/06/2016 was brought to Sumbawanga where he recorded his statement. On 09/07/2016 he was charged with the offence of murder. He told the court that he had good relation with his neighbors.

When cross examined by Ms. Marietha Maguta DW1 told the court that before 2013 he was living at Uzia.

When re-examined by defence counsel Mr. Samwel Kipesha he said to have left Uzia village to Majimoto in 2013 and he said he has never seen Khadija before as he saw her for the first time in the court.

Both Learned Counsels Ms. Marietha Maguta for the Republic and Mr. Samwel Kipesha for the defence opted to make final oral submission before this court as follows;

The defence through learned advocate Samwel Kipesha submitted that it is the duty of the prosecution to prove the case beyond reasonable doubt and not otherwise.

The defence counsel argued that the burden does not shift at any time to the accused or defence side. It is their submission that the prosecution had completely failed to discharge such a duty against the accused present for the following reasons.

The defence counsel contended that of all the prosecution witnesses, no prosecution witness has testified in court on how he/she knows the accused person apart from hear assertions.

He further argued that PW1 testified that he knows the accused but did not say/report as earliest as possible on how he knew the accused. He said it is trite law that the witness must give description of the accused and how he/she identified him to the immediate person he met or the police. He referred the case of Director of Public Prosecution V. Mohamed Said & Another Crim. Appeal No. 432 of 2018.

He submitted that in the cited and supplied case at Pg 12 last paragraph the court stated the said position above.

Defence further submitted that PW6 in his statement at the Police Station did not give description of peculiar features to police who went at the scene; PW6 said the murderer was a black relatively average fatness who entered the house. Further that he said it is the very person who was greeting her when met on the way. Further argued that such kind of people are many thus it is not necessarily be the accused. PW6 also in court gave another version of description, he added the said person to be tall.

Mr. Kipsha argued that when PW6's statement was recorded at the Police said only one murderer entered the house. But when testified



said there entered two murderers. He said there now two versions of evidence. He was of the view that when there are two versions of evidence one must a lie, thus the witnesses is not worth to be trusted to be credible at all.

He argued that the position was held in the case of **Nkanga Daud Nkanga V. R**, Crim. Appeal No. 316 of 2013 CAT (Unreported) At Pg 7 last paragraph the court observed that;

“In our firm view the fact that the witness had two versions shows that he was not telling the truth”.

Defence counsel prayed the court to adopt the same wisdom of the supreme court of the land. He is of so opinion because the statement issued at the police was used to contradict as per section 164 of the Evidence Act. She admitted that she never stated at the police that the 2<sup>nd</sup> murderer entered the house and committed the offence. That the change of physical appearance of the accused is a mere bear assertion which is should not be trusted by the court.

Mr. Kipesha submitted that as a reasonable person may ask the question at what time the accused could be at a better position to describe the accused and how the offence was committed. Is it immediately after the commission of offence or five years after the occurrence of the crime/event?



Defence counsel argued that PW1 never explained how he knew the accused. Thus, his statement is a bare assertion. He submitted his explanation was an afterthought, thus it be disregarded. He of the view that the court is not required acting on visual identification unless all possibilities of mistaken identities are eliminated as he referred the case of **Suma Marwa & 2 Others V. R**, Criminal Appeal No. 91 of 2006 CAT (Unreported).

Defence counsel argued that on how the identification was not water tight, he submitted that PW6's statement offered at the police did not give a water tight identity. He submitted that the description does not eliminate possibilities of mistaken identity. There is doubt as who was referred. He said according to the case of **DPP V. Mohamed Said & Another** (supra) it was a proper moment for the witness to give description of the culprit. Thus, he of the view that the evidence tendered in court is the afterthought.

As regard PW1, Mr. Kipsha submitted that is evidence also was not watertight because; he had two versions on what happened on the fateful date. In his statement he said "*nilimfhamu kwa sura aliyeenda kuvunja nyumba ya mama yangu*", he never referred any other person to have got at his mother's house break it. But when testified in court, said he saw the accused cutting the deceased. He never stated it at the

earliest opportunity possible. He was of the view that was an afterthought after couching. He referred the case of **Nkanga daudi Nkanga's Case** (Supra).

As far as source of light, defence counsel submitted that there is nowhere where PW1 said at their house the source of light is solar. Thus, the evidence of PW6 that their source of light is solar is a bare assertion.

As regard the torch light which witnesses said were used by the murderers. He argued that torch light is not enough to identify the culprit, particularly when the witness claims to have been illuminated by the said torch. In all the possibilities of mistaken identity and if the witnesses knew the accused-identification parade was not done. PW1 who just said he know the accused, PW6 who testified if she sees the culprit could identify, he is of the view that such kind of virtual identification was not watertight as it is weakest of character which raises doubts as to where the accused was properly identified. It is his humble prayer that such identification be disregarded as it does not justify the conclusion that it is the accused and not anybody else who committed the crime.

They prayed for the court to see that all evidence tendered by the prosecution did not prove the case against the accused beyond

reasonable doubt. Thus, dismiss the charge and acquit the accused person.

On the other side, the prosecution through learned state attorney Ms. Marietha Maguta submitted that it is the role of the prosecution to prove the charge beyond reasonable doubt as held in the case of

**Goodluck Kyando V. R (2006) TLR 369.**

The prosecution side contended that they have proved the charge beyond reasonable doubt on the following reasons.

First, identification of the accused at the scene. Ms Marietha submitted that the PW6 in evidence explained the way she identified the accused not only at the scene but even before the event of Uzia and that she used to meet her on the way and the accused used to greet her. She argued that the said witness said they were invaded by two one entered the room the other remained at the door. That the one who entered cut the deceased with panga and the other who was at the door also cut the deceased with panga having fallen at the door and PW6 was at a distance of 3 paces (metre) the witness said he identified the accused by face not the name. When the witness saw the accused lady cried in court that it is the accused who cut the deceased with pangas at the door.

The prosecution counsel said in the case of **Augustino Kaganya v. R (1994) TLR 16**. The trial court is the best place to determine the credibility of the witness.

She further submitted that at all the time PW6 was testifying she was sadly crying as it is something hard to witness such kind of death thus she could have not lied. PW6 went further testifying that there was Solar but due to the weak sun the light was weak, but she through torch of the accused and moonlight assisted her to identify the accused also she knew her before.

Ms Marietha further argued that the identification conditions were elaborated in the famous case of **Waziri Aman v. R (1960) T.L.R 250 Pg 256**. Where it was held that the conditions are:

1. Time witness has under accused observation.
2. Distance
3. Day condition day or night
4. Light used to assist the witness to identified

She was of the strong view that the PW6 said she knew the accused before, she was assisted by torch and moonlight, she observed the accused at 3 metres distance and the event took 15 minutes. She was of the view that all those conditions were favourable. She further submitted there are no two versions of evidence. The witnesses'

statement was by way of interview questions. Here the witness just added the fact that the culprit was tall, and her evidence was on oath/affirmation thus there are not two versions.

Prosecution counsel argued that the court should pay regard to the sworn evidence not otherwise. She referred the case of **Waziri Abdallah Rajab V. R.** Criminal Appeal No. 116/2014 CAT Tanga (Unreported) at page 9 the court dismissed on the statement issued at police and the sworn evidence. The witness made more clarification to the person she saw killing the deceased. If the culprit was known before identification is wastage of time.

She referred the case of **Charles Nahati V. R.**, Criminal Appeal No. 256 of 2017 CAT (Unreported) at Pg 13 last Para. Talks of the recognition and identification. Identification parade is not necessary when the culprit is recognized.

She submitted that in the case at hand PW6 knew the accused before she was not stranger.

Prosecution counsel argued that PW6's identification is corroborated by the evidence of PW1 who said he identified Zingula and the other by face. That it is the person whom he knew as they lived in the same village Uzia. Whom he identified the accused and that saw him cutting his mother with a panga at the door.

Ms Marietha submitted that PW5 was the medical officer who said where the dead body was, likewise PW1 and PW6 who said the dead body was found hanging at the local lock (wood) of the door, the witness also testified on the cause of the death which multiple cut which cause excessive bleeding, PW1 and PW6 and the accused had pangas.

She was of the view that they have discharged their case to the standard required. This being the trial court has observed the demeanour of the witnesses.

With such evidence tendered they argued that they have discharged the duty of proving the case beyond reasonable doubt.

With that submission they prayed that the accused be found guilty of the offence charged.

At this point there are four issues to be determined by this court. The issues are: -

- i. Whether the person one Millu Godadi alleged to have died is actually dead, if yes
- ii. Whether the death of the said Millu d/o Godadi was of unnatural cause, if affirmative,
- iii. Whether it was the accused person one Zingula s/o Kuba @ Lunyeng'ombe, who is responsible for the death of Millu d/o

Godadi who is subject of this trail; if the answer is in affirmative.

iv. Whether his action was actuated with malice aforethought.

To start with the first issue as to whether one Millu d/o Godadi alleged to have died is actually dead. The evidence of PW1, PW3, PW4 and PW5 and PW6 is to the effect that the said Millu d/o Godadi is actually dead. PW1 being the son of the deceased told the court that on the fateful date (22.04.2016) at over midnight hours they were invaded by two bandits (murdered). That being invaded, they kept him under restraint and one of the murderer headed to the house of the deceased. The culprit broke the door and attacked the deceased with a panga he had PW1 told the court he heard a shout for help. That when he escaped to the neighbours for assistance when coming back found the deceased dead and the body had cut wounds at various parts of the body.

PW2 was a village chairman who rushed to the scene. His evidence was that having been informed of the incidence he went to the scene and found the deceased body with cut wounds on the head and shoulders. He is the one who reported the matter to the Police Station. PW3 is the investigator of the case. He told the court that he is the one who investigated on the killing of Millu d/o Godadi. PW4 is



the Police Office, worked at Muze Police Station. His evidence is to the effect that he was informed of the killing of Millu d/o Godadi on 22.04.2016 at about 00.00 hours. That the following date PW4 being accompanied with Medical Officer (PW5) visited the scene. At the scene they found the body with cut wounds on the head and shoulders. PW5 conducted Post Mortem Examination. That the report on Post Mortem Examination revealed that the cause of death was due to severe bleeding due to the multiple cut wounds. She tendered Post Mortem Examination Report as exhibit (Exh. "P2").

The evidence of PW6 was to the effect that, she was sleeping with the deceased. That on the fateful date she witnessed with her necked eyes the killing of the deceased who was cut with panga on the head, neck and shoulders. There is no any other piece of evidence which is at variance with the above proposition.

The above being the evidence on record, there is no dispute that the deceased one Millu d/o Godadi who is alleged to have died is actually dead. That she died on 22.04.2016. Further, the above evidence shows that the cause of death was due to severe bleeding from the cut wounds. This proves that the deceased death was unnatural. That the deceased met or encountered a violent death.

The most vital issue of determination and contentious for that matter is whether or not it is the accused person who killed the deceased.

The evidence on record reveals that the offence was committed at 01.00 hours (over midnight) at night time. My careful scrutiny of evidence have led me to the conclusion that there is only one strand of evidence tendered by the prosecution to prove the accused's guilty; the visual identification by PW1 and PW6. The same has been the subject of deliberations in the final submission of the counsel. It is not surprising that the issue of identification is fundamental in determining the guilty of the accused person. I now propose to carefully consider the evidence of identification.

In dealing with the evidence on identification I am mindful of the principles enunciated in un broken chain of decisions of the Court of Appeal emphasizing that before a court can found a conviction basing on visual identification evidence such evidence must be water tight so as to remove the possibility of mistaken identity. See **Said Chally Scania V. Republic**, Criminal appeal No. 69 of 2005 (CAT) Unreported and **Raymond Francis V. Republic** [1994] TLR 100. In essence the two cases restated the principles laid down in the often cited case of **Waziri Amani V. Republic** [1980] TLR 250. In that

case the Court of Appeal laid down the following factors which must be established in determining that the identification is water tight.

1. The time the witness had the accused under observation.
2. That distance at which he observed him
3. The condition in which such observation occurred, for instance, whether it was day or night time. Whether there was good or poor lighting at the scene.
4. Whether the witness knew or had seen the accused before or not.

The only identifying witnesses in the present case are PW1 and PW6. In their evidence they claimed to have known the appellant before the event date. Thus their evidence is that of "*recognition*". This kind of identification is taken to be more reliable than that of other identification. But I am warned, it should not be taken wholesale, believed and acted upon to convict the accused person without considering the circumstance of the case. In **Shami John v. Republic** Criminal Appeal No. 166 of 2004 the Court of Appeal observed.

*"..... 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”.*

I now proceed to consider the evidence in the present case in the backdrop of the above laid down principles.

According to PW1, one of the identifying witnesses, on 22.04.2016 at about 01.00 hours were pounced (invaded) by two bandits. PW1 said by then he was inside the house sleeping. The house had neither outer door nor room door. The deceased was sleeping in another house at about 6 (six) to seven(7) paces from PW1's house. That while asleep he had gun blast. That he woke up and found himself being shone with torches by the bandits who kept them under arrest (chini ya ulinzi). PW1 told the court, he woke up and took a torch and a spear he had at the bed. That he shone to the culprits and by the light of the torch he managed to identify one who is called Nzingula. PW1 said he lived in one village with him. That he knew him before he event. PW1 told the court that the accused took a stone and hit him on the mouth, he fell down. That he woke up and was ordered to surrender himself as he refused the bandits asked to the person purported to be out to give them gun. Having heard that PW1 surrendered. The episode took almost 5 (five) minutes.

It was a further testimony of PW1 that one of the bandits went to the home of the deceased broke the door of the deceased house. PW1 said he heard the deceased crying for help. That the accused also went to the house of the deceased. PW1 said he woke up and while at the door he saw the accused (Nzingula) cutting the deceased with a panga, while the deceased was at the door of her house. He (PW1) said there was a gleam of moonlight the sky had no clouds. He said the whole transaction look about 15 minutes.

PW1 told the court escaped and went to the neighbours seeking for help. PW1 said he reported the matter sungusungu leader naming the accused to have been identified. PW1 said he reported the matter to the village chairman one Robert naming the accused one Nzingula to have been identified. PW1 went further saying, when ran away he was followed by Khadija who was sleeping with the deceased. When went back at the scene found the deceased dead. The deceased had cut wounds on various parts of the body. When cross examined PW1 told the court that the house he slept had no doors. The house was open. Further the culprits (both) switched on their torches to PW1 thus it was impossible for him to identify them till when he picked his torch and light it on to them. That he was awoke by gun blast. That he identified the accused person by his physical appearance. As a family they had no

quarrel with the accused person. Even when re-examined PW1 insisted saying he identified the accused person by his physical appearance.

In view of the above set of facts PW1 is to purporting tell the court that he had enough time had the accused under observation, as he said the event at his house took five (5) minutes and the whole crime transaction took about 15 minutes.

Further that he observed the accused while under arrest at the distance of three paces and at the distance of 6-7 paces when cutting the deceased. Further, he used torch as the source of light to identify the accused. Again he knew the accused person before the event date.

According to PW1 he was able to identify the accused with the aid of batteries torch. The witness did not disclosed the intensity of the light emitted from the said torch. I am aware that the Court of Appeal has time and again emphasized that it is not sufficient for the evidence to allude that there were merely light at the scene of crime with which a witness was aided to identify the accused in **Kulwa s/o Makwajape & Two others V. R**, Criminal Appeal No. 35 of 2005 CAT Unreported it was held.

*"..... the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellant was identified".*

And in **Issa s/o Mgara @ Shuka V. R**, Criminal Appeal No. 37 of 2005 (unreported (CAT) the said:

*".... Even in recognition case where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount intensity".*

From the testimony of PW1 there is no iota of evidence to show the intensity of the light emitted by the torch or the extent of its intensity. Far from that when PW1 was cross examined, told the court that the culprits had enlightened their two torches to him that made it impossible for him to identify them till when he used his torch and shone to them.

The evidence in record is that PW1 named the accused person when reporting the incident to Sungusung leader at that very night as well as to the village chairman one Robert Nkana and other villagers who responded the call. I am aware that naming the suspect at the earliest possible opportunity is an important assurance of his reliability. See **Marwa Wangiti Mwita & Another V. Republic** [2002] TLR 40. See also **Ibrahim Songoro V. Republic** Criminal Appeal No. 298 of 1993 CAT (Unreported) unfortunately the said Sungusungu leader one Mwanamila was not summoned to testify.



Not only that the said village chairman (Robert Nkana) testified as PW2. In his testimony PW2, told the court that he was awakened by the neighbours who informed him on the murder tragedy occurred at the house of the deceased one Millu d/o Godadi. He said at the scene he found the dead body with cut wounds on the head and shoulder. He then reported the matter to the Police. When cross examined PW2 said it was Sungusungu Commander who informed him. It is obvious that it was not PW1 who informed him. Again PW2 told the court that, he was not told the name of any person who was suspected to have killed the deceased. He also said, he did not interrogate any of family members of the deceased. He did not know the accused person. He had not seen him in the village. He is a stranger. When re examined, PW2 insisted that he did not interrogate Yusuph Kulwa (PW1).

The above evidence is corroborated by the evidence of PW3 one E. 7490 D/C Salehe, who told the court that on 23.04.2016 when OC-CID assigned him the case file on the murder of Millu d/o Godadi, the police file had no name of the suspect. This means that the suspect was not yet known.

Further to that the evidence of PW4 one G. 2662 D/C Gilbert, is to the effect that he is the Police investigation department stationed at Muze Police Station by then. That he got information on the crime at a

very fateful night from the village chairman. In his evidence PW4 is silent on whether the chairman mentioned the accused person to have been identified at the scene. The same was emerged during cross examination where PW4 said I quote.

*"..... Yes I interrogated the village chairman. He said he had got the killing information at between 00.00hours and 01.00 hours on the night. He later told me on the person who was concerned with the killing. He mentioned his name to be Nzingula. He said the cause of suspecting him was that, one day in the morning before the incident, Nzingula was seen at the scene of crime by the deceased's daughter Khadija Shabani ".*

Further to that it is the evidence of DW1 that in 2016 he was living at Majimoto village, that he has been there from 2013. That he did not know Yusuph Kulwa, Millu Godadi and Khadija Shabani. That it was his first time to see Khadija Shabani in court".

The above scrutiny of the evidence have led me to the conclusion that PW1 never named the accused person to the Sungusungu leader nor to the village chairman.

Further it is the evidence of PW1 that he knew the accused as they lived together in the same village. But PW2 who was the village

chairman told the court that he had never seen the accused in the village. That the accused was a stranger. But again a mere fact that PW1 lived in the same village with the accused is not enough to have identified him.

PW1 has not told the court special features of the accused which eased him to identify the accused at that night. I am of that view because the mistakes are possible even in recognition of someone whom is known; be it a close relative or friend See. **Shamir John V. R (Supra). In Mengi Paul Samwel Luhana 4 Another V. R**, Criminal Appeal No. 222 of 2006 CAT (Unreported) the court had this to say:

*".....eye witness testimony can be devastating when false identification is made due to honest confusion or outright lying".*

The evidence of PW1 in the record is trying to show that all factors favourable for identification as outline in the case of **Waziri Aman (Supra)** were met. But as already hinted above such evidence should not be taken wholesale, believed and acted on to convict the accused person without considering other circumstances of the case. In this case while PW1 claims to have identified and seen the accused present at the scene and cutting the deceased with a panga, on the other hand, the accused (DW1) denied committing the offence. It is the word of one

against the other. The credibility of PW1 is therefore crucial in determining his truthfulness. This position was also elucidated in the case of **Jaribu Abdallah V. R**, Criminal Appeal No. 220 of 1994 (CAT) unreported. In this case the court of Appeal stated:

*"..... in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witness. The condition for identification might appear ideal but that is no guarantee against untruthful evidence".*

As stated hereinabove PW1 told the court to have named the accused at the earliest opportunity to the Sungusungu leader who did not appear to testify. He further said to have named the accused person to the village chairman one Robert Nkana (PW2). But the said witness denied to have been told who committed the said offence nor told the Police (PW3) who was suspected to have committed the murder of the deceased. Likewise PW3 told the court when assigned the file for investigation it has no name of the suspect. This implies that the suspect was not known and claim of PW1 that he named the accused was a lie thus his evidence is not credible at all. Having so said I am inclined to and indeed told that the identification of PW1 is full of doubt. Further the identification done by PW1 is not absolutely watertight but full of

doubts. This can also be detected from the final submission of the learned State Attorney. In her final submission the learned State Attorney (Ms. Marietha Maguta) did not dwell much on the evidence of PW1 as far as the identification of the accused is related.

Further to that when PW1 was cross examined on how he identified the accused. PW1 told the court that he identified the accused by his physical appearance. The same was his stand when re-examined. That he identified the accused person by his appearance. PW1 never went a step further telling which physical appearance of the accused made him identify the person to be the accused and not somebody else. But again if PW1 knew the accused why physical appearance assisted him while he knew him thorough before. This again raises doubt as to the correctness of the identification by PW1. I am inclined to hold that PW1 came to know the accused name in the court.

Taking into board the coherence of the testimony of PW1, having considered his testimony in relation to other witnesses and having taken into consideration all circumstances of the case such as reasonability of the testimony, consistency with other evidence including that of the accused and his interest in the trial, I have no hesitation to hold that PW1 is not a truthful witness. See also **Rashid Shabani V. Republic**, Criminal Appeal No. 310 of 2015 CAT (Unreported).

PW6 was another identifying witness. According to PW6, on the event night she had slept with the deceased in the house. That at about 02-03 hours they were awoken by the noise of shout which was coming from the house of PW1 his uncle which was in the same compound. PW6 told the court that having got up the deceased took her walking stick and went straight to the door. She said suddenly the door was broken and the person who was short entered the house as he wanted to go direct to the room he was hit by the stick, On the forehead. That the bandit got a step back but as the deceased tried to escape she was cut with a panga on the head. PW6 told the court the attack happened at the door as deceased wanted to escape. That before the deceased managed to get out there came another bandit who had a torch and a panga he cut the deceased on the neck and shoulders.

PW1 told the court that when the incident happened she stood behind the deceased almost three meters away. The witness told the court that the house had solar light but the light was not intensive due to the fact that sun was not strong on that date to charge the solar, but she managed to identify the accused due to the torch light which the accused had and the moonlight as the moon was shining. Further that the PW6 knew the accused as she used to see him when coming from school and also used to see him at street.

From the above piece of evidence of PW6, the question is whether PW6 properly identified the accused. First and foremost, PW6 stood almost three paces behind the deceased, thus the deceased obscured her to have a clear look as to what was happened in front of her. But again, the fact that it is a torch light which she purports to have aided her to identify the accused, the witness has not explained the intensity of the said torch light. See the case **Issa s/o Mgara @ Shuka and Kulawa s/o Mwakanjape** (supra). Further to that if said torch was in the hands of the accused, it means it was pointed to the deceased and PW1. In such circumstance it was easy for the accused to see the deceased and PW1 and not the contrary. Further PW6 said to have aided by the moonlight, the witness was silent as to the intensity of the moon.

PW6 purported to know the accused as she used to see him when coming from school and in the street (mitaani). The witness did not tell the court on the special feature/description which made her to identify the accused at that night to be the one she used to meet him when coming from school. The assertion that she knew accused is a fact which need to be proved by evidence.



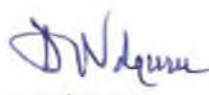
The witness's assertion on time that the event took almost 15 minutes is an estimation. The witness did not tell the court how she reached into that finding of time.

Being mindful of the principles on the identification evidence. I hold that evidence on identification before me is not absolute water tight, because it has not removed or eliminated all the possibilities of mistaken identify of the accused person.

I therefore hold that I am at variance with the unanimous opinion of hon. assessors who opined that the case against the accused is proved, and the accused is guilty of the offence charged. I hold that the prosecution has failed to prove that it is the accused person one Nzingula s/o Kuba Lunyeng'ombe and not somebody else is responsible for the death of one Millu d/o Godadi.

In the upshot, I hereby acquit the accused from the offence of murder which he stands charged.



  
**D.B. NDUNGURU**  
**JUDGE**  
**28/04/2021**