

IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
CRIMINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 59 OF 2019
REPUBLIC

- 1. FRANK ^{s/o} SIMBEYA**
- 2. JAMES ^{s/o} SIMZOSHA**
- 3. ROMWARD ^{s/o} KALUMBWE @ SINESHA**
- 4. SAMWEL ^{s/o} KALUMBWE**
- 5. ELIUD ^{s/o} GEREMANIKO @ SIMBEYA**

JUDGEMENT

05th – 18th May 2021

NDUNGURU, J

Accused persons, Frank Simbeya, James Simzosha, Romward Kalumbwe @ Sinesha, Samwel Kalumbwe and Eliud Geremaniko @ Simbeya (henceforth the accused persons) stand charged with the offence of murder contrary to **section 196 of the Penal Code, Cap 16 RE 2019**. It is alleged that on 24th day of July 2016 at Lwanji Hamlet, Kafukoka village – division of Kasanga within Kalambo District in Rukwa Region did murder one Emmanuel s/o Malisawa.

The accused persons were arrested and charged to this court. When the information of murder was read over and properly explained to the accused persons, all denied to have committed the offence, and

thus plea of not guilty was entered to each of the accused persons, hence this full trial.

During the trial of this case, Mr. Njoloyota Mwashubila, learned Senior State Attorney represented the Republic; whereas, the 1st, 2nd and 3rd accused persons were represented by Mr. James Lubus, learned advocate while 4th and 5th accused persons were represented by Ms. Tunu Mahundi, learned advocate. I also sat with three court assessors namely; Godfrey Mwiga, Patrick Wanyama and Imelda Kamsweke.

In their effort to prove the case against the accused persons, the prosecution called a total of four (4) witnesses namely; F. 9968 D/C Obert who testified as prosecution witness No. 1 (PW1), Dr.Arcado Erick Mwamba as PW2, Zawadi Ndaipi as PW3 and Dafrosa Maiko as PW4. The prosecution also tendered sketch map as exhibit P.1.

Upon the closure of prosecution case, defence case opened after it was found that the accused persons had a case to answer. In disproving the prosecution allegations levelled against them, Frank Simbeya testified as defence witness No. 1 (DW1), James Simzosha as DW2, Romward Kalumbwe @ Sinesha as DW3, Samwel Kalumbwe as DW4 and Eliud Geremaniko @ Simbeya as DW5. They neither called witness to testify on their favour nor tendered exhibit.

The evidence for the prosecution case is as follows; PW1 F. 9968 D/C Obert, is a police Officer working at investigation department at Matai Police Station within, Kalambo District, having five years' experience in investigation. He testified that on 24.07.2016 he was at Matai Police Station. He was then assigned by OC-CID to investigate murder crime happened at Kafukoka village. He was required to get prepared so as to go to the scene. He and his fellow policemen accompanied by Medical Officer went to the area of scene. He arrived at around 02.00 pm at the scene where he found the deceased body burning outside the house. He identified the body that was of a male person. He then called the relatives of the deceased who after having identified the body of the deceased, the Medical Officer conducted post-mortem examination on the deceased body. He then drew the sketch map which was produced and admitted in evidence as exhibit P.1, during preliminary hearing. He then interrogated some of the witnesses, including is the wife of the deceased, who named Frank Simbeya and James Simzosha as the persons involved in the killing of the deceased. He arrested the two in the course of interrogation, named the rest of the accuseds.

When cross examined by Mr. James Lubus defence counsel for the 1st, 2nd and 3rd accused persons, PW1 replied that he has five years experience in investigation and in 2016 he had only one year experience. He stated that he interrogated the accused and recorded their statements.

When cross examined by Ms. Tunu Mahundi, defence counsel for the 4th and 5th accused persons, PW1 stated that he visited the scene of crime on 24.07.2016. He found the deceased body burning. He removed the grasses which was burning over the body. He said the whole body was burnt while the head had already burst. The whole body was burnt, only the spinal and ribs remained. He further interrogated the people who were at the scene of crime. After Post Mortem Examination, Medical Officer said the cause of death was due to lack of oxygen (suffocation). At the scene of crime, he interrogated the Village Chairman, but he does not remember his name. He arrested 1st and 2nd accused persons at Matai football ground where they were watching football match on 31.07.2016 around 05.00 pm. He stated that the 1st and 2nd accused mentioned their fellow 3rd, 4th and 5th accused who were arrested on another date by at Ilambila village at 00.hrs at midnight.

On his part, PW2, a medical doctor at Kalambo District Hospital by then, testified that on 24.07.2016 he was informed by the Police Officer on the murder incident occurred at Kafukoka village. He accompanied Police Officers to the scene of crime. At the scene he found the human body burning. He then conducted post mortem examination on the deceased body of a male person aged to be 48's years. He filled in a Post Mortem Report which was produced and admitted in evidence as exhibit P.2. PW2 opined that the cause of death was due to severe bleeding due to the cut wound and severe pain due to the burn wounds of the whole body.

When cross examined by Mr. James Lubus, defence counsel for the 1st, 2nd and 3rd accused, PW2 stated that the deceased was called Emmanuel Malisawa. He conducted post-mortem examination in 2016. He said the deceased had a fracture on head which made part of the brain to get out, he said the body was totally burnt to 100%.

When cross examined by Ms. Tunu Mahundi, defence counsel for the 4th and 5th accused, PW2, replied that the cause of death was due to severe bleeding as a result of cut wound and severe pain due to the burn wounds of the whole body.

In her testimony, PW3, Zawadi, said she currently live at Safu, but in 2016 she was living with her parents at Iwanji Cell – Kafukoka village. Her father was called Emmanuel Malisawa(deceased) and her mother is Dafrosa Maiko. She testified that on 23.07.2016 one pregnant woman died at the village. She was known as mama Dani and on 24.07.2016 her father also died. She further testified that on that date 24.07.2016 she was with her mother and father at home. At about 10.00 am while they were at home five young men took her father to the home of the mother who died. When she asked them why were taking her father, they said he was the one who had bewitched Mama Dani. They then locked her father in the house and killed him and having killed him they burned the body. She went on asserting that she knows the people who came to take her father at home. One is called baba Nesha, Mchule, Eliud, Taakola and she said the other one was a young man who was new face to her. She identified the 2nd, 3rd, 4th and 5th accused in the dock by their names; while touching the 1st accused as a youngman she had mentioned. PW3 further asserted that she knows them because she used to see them at Kafukoka village where she was living. She added that the accused were also living at Kafukoka village.

When cross examined by Mr. James Lubus, defence counsel for the 1st, 2nd and 3rd accused, PW3 replied that she is currently living at Safu village, but in the year 2016 she was living at Kafukoka village. She stated that the people who took her father had weapons that is pangas, axe and clubs. She further stated that she did not witness when her father was killed. She could not know all the people. She was with her mother outside the house where her father was killed. She asserted that her father was killed inside the house, and she saw the body when was taken outside by the accused for burning. She stated that the names mentioned are the ones used at the village by the accused, however she does not know their official baptised names.

When cross examined by Ms. Tunu Mahundi, defence counsel for the 4th and 5th accused, PW3 replied that her father was a peasant and he died when she was 22 years old in 2016 and currently, she is 27 years old. She further stated that when her father was taken at home she was there at home and she followed her father where he was taken by the accused. She heard the accused telling the deceased that today you are also dying. She made her statement at the police. She said the accused persons are from Simzosha family/clan and Simbeya clan. She knows Sinesha, but does not know Samwel and gilbert. She identified

the 2nd accused and 3rd accused in the dock and said those are the ones she named at the police. She further said all whom she saw and named, came to take her father at home. She knows the accused also through their children name.

On her part, PW4, Dafrosa, testified that in the year 2016 she was living at Kafukoka village – Iwanga cell along with her husband one Emmanuel Malisawa and her children. She testified that on 23.07.2016 at Kafukoka village one pregnant woman (Mama Dani) died. She further testified that the next day on 24.07.2016 in the morning while were at home there came young men telling her husband that he is the one who had killed mama Dani by bewitching her. They took her husband to the house of mama Dani to the funeral, ordering him he is the one to carry the dead body. They restrained the deceased inside the said house and locked the door. They killed the deceased inside the house. Later on they took the body outside and burned. She said they young men who came to collect her husband were five in number. She identified them all by mentioning their names except the 1st accused was a youngman and she did not know his name. she said she managed to identify the accused persons because they lived together in the same village.

When cross examined by Mr. James Lubus, defence counsel for the 1st, 2nd and 3rd accused, PW4 replied that she is currently living at Kasitu village. She stated that the killing of the deceased took place on 24.07.2016 at Kafukoka village – Iwanje Hamlet. She asserted at the funeral; the people dispersed because the accused persons were very furious. The neighbours escaped. That Mama Dani died on 23.07.2016. She was with Zawadi, while following the accused from behind. Other people escaped as they were threatened to be killed. She was peeping far from an angle of the house as she was afraid of being killed. She was confused and could not remember to whose family house she did hide looking at the accused carrying the deceased. She saw the deceased being taken out having been beaten. It is the accused who locked the door. She saw the deceased when taken outside the house. She saw the accused killing the deceased. She just followed them to see what was going to happen. When the accused persons were arrested, she was at Kasitu village. The names she had mentioned are the ones used by the accused at the village. Among the accused, she did not know the name of the 1st accused. She replied that the 1st accused was very young he was living at Ilambila village and he used to visit his mother. Though, she did not know his name but the 1st accused was present at the scene. The deceased was killed inside the house, the

body was taken outside the house before it was burnt. She added that when the crime took place, she was with her daughter hidden at the angle.

When cross examined by Ms. Tunu Mahundi, defence counsel for the 4th and 5th accused, PW4 replied that she has seven children. However, when the accused persons came to pick the deceased, they were only three at home i.e., herself, her daughter and the deceased. It was about 10.00 am. Other children were at the village on their walk. While taking her husband all five accused persons were talking. She just saw the accused at home taking her husband. She does not know if they had seen each other for sometimes. She made her statement at the police station. On the day of incident, she was confused and until today she is still not well. At the police, she might have stated other words. From her house to the house of mama Dani where the killing took place there are almost four to five houses in between, and a person could easily see the house of mama Dani from her home. She reported the incident to village chairman and to the police and was the one who named the accused persons at the police station. That she has lived with accused persons at Kafukoka village for almost 10 years. That no identification parade was conducted at the Police Station.

All the accused persons testified under oath. Their respective testimonies are as hereunder;

DW1 Frank, a peasant, resident of Ilambila village, testified that on 30.07.2016 he was at Matai. He was arrested by Police Officers who were armed. He was taken to the Police Station without knowing the reasons for his arrest. He stayed at Police station for two days. Then, he was informed the reasons for the arrest during interrogation. He went on asserting that at the Police Station he was beaten by Police compelling him to admit to have killed. He was beaten on the buttocks and the back. He was forced to sign the statement which he didn't offer. He is illiterate, does not know how to write and read. That from the Police Station he was taken to the justice of peace to record confession statement. He denied to have been involved in the killing. He prayed the court to set him free as he did not commit the offence charged.

When cross examined by Mr. Mwashubila, counsel for the republic DW1 replied that he was arrested at Matai while watching football Match. He does not know the Policemen who arrested him. At the play ground there were many people watching match. He said police may arrest any person suspecting to have committed offence. He said it is

not true that he was among the guys who took the deceased as alleged by the prosecution (PW3 and PW4).

When re-examined by Mr. James Lubus, defence counsel for the 1st, 2nd and 3rd accused DW1 stated that the police can arrest any person even if he is not criminal. He denied to have been named by PW3 and PW4.

DW2, James testified that he resides at Ilambila since he was born. He testified that on 30.07.2016 he went to play football at Matai. While there he was arrested by the Policemen. He was sent to the Police Station where he stayed there for three days. On the 3rd day he was sent to the interrogation room. At the Police Station, he was informed to have committed murdered the deceased and denied. Before interrogation, he was not informed anything. During interrogation he was clamped his hands and legs. He was beaten by wire but he never admitted to have committed the offence. He denied notwithstanding the beatings. He was not taken to the justice of peace. He prayed the court to consider and let him free because he has stayed in remand prison for a long time without any fault.

On being cross examined by Mr. Mwashubila, counsel for the Republic DW2 said he was arrested at Matai where he went to play

football. Having sent to the police station, he realised that those who arrested him were policemen. At the play ground there were many people. He does not know PW3 and PW4. He saw them for the first time here in court. He has no grudges with them. He has been at Ilambila for the rest of his time. The witnesses have not named him though they pointed (touched) him.

In re-examination, DW2 stated that he has witnessed several times police arresting people. His name is James Simzosha, an official name which identifies a person. He does not have a nickname.

On his part DW3, Romward, a peasant, resident of Ilambila testified that on 27.12.2016 he was at home village at Ilambila. At about 01.00 hours while asleep the door was knocked. When he asked who was knocking, he was commanded to open the door. Before he woke up, the door was forced open. There, entered policemen with two guns. He was then arrested and taken to the Police Station without disclosing the reasons. The police went direct to another house where another person was arrested. After arrest, he was sent to Matai Police where he stayed for 2 days. The other day he was taken to the interrogation room. It was on that day he was informed that he was suspected to have committed murder crime. He denied the allegations and did not

offer any statement be it cautioned or confessional. He has come to know Frank and James in the prison. He prayed for the court considers him innocent because he has never committed the alleged charged offence.

When cross examined, DW3 said that he was arrested at Ilambila village by police officers who were accompanied by village chairman. He stated that he never knew the police who arrested him before. He was arrested at home. At home village there are many houses. It is their police duty to arrest. He neither know PW3 and PW4 nor does not have grudges with them. The witnesses never mentioned his name as they pointed when testifying.

When re-examined, DW3 said he has seen police arresting person without any reason. He has heard "kesi za kubambikiziwa". PW3 and PW4 said they are living at Kafukoka but he is living at Ilambila village.

In his testimony, DW4 Samwel, said he resides at Ilambila. That on 27.12. 2016 at night hours while asleep at his home village he was arrested by Police Officers, who broke the door and entered therein. That on being arrested he was taken to Matai Police Station where he stayed for two days. On 29. 12. 2016 he was formally interrogated and told the reasons behind his arrest. In the interrogation room, he was

beaten and told to have murdered the deceased at Kafukoka. He denied the allegation. He asserted that he has never gone to Kafukoka. He was formally charged with murder of the deceased in this case.

When cross examined, DW4 replied that he was arrested at night at his Ilambila home. He was arrested by Police Officers who accompanied the village chairman. He further replied that at the village there are so many houses, but he does not know why the Police arrested him. He did not know the witnesses before; he came to know them here in court. He has no grudges with the prosecution witnesses. Though the witnesses pointed him, but it is not true because the witnesses are prepared by the prosecutor on how and what to testify.

On his part, DW5 Eliud, a peasant resident of Ilambila village testified that on 27.12.2016 he was at his home at Ilambila village. At night while asleep the Police came and to arrested him. At home he slept with his wife and children. The policemen were four in number, they were accompanied by village chairman. While knocking at the door, the chairman introduced himself. On being arrested, he was chained and taken to Matai Police Station. He was not informed why he was arrested. At the Police Station he was interrogated on the third day. He was informed to have killed Emmanuel Malisawa. He denied. He does not

know where Emmanuel Malisawa lived. The fare from Ilambila to Matai is Tshs.3,000/=. He does not know Kafukoka village. He said, there are many people with the name Eliud. He prayed the court to release him because he did not commit the alleged offence.

When cross examined, DW5 replied that he was arrested at his home at Ilambila village. That at Ilambila village there are many houses. The police accompanied the village chairman. He does not know police who arrested to him before. He does not know why the police came to arrest him. He never knew PW3 and PW4 before. It was his first time to see them. He had no quarrel with PW3 and PW4.

When re-examined by Ms. Tunu Mahundi, counsel for the 4th and 5th accused, DW5 said PW4 when interrogated by Police saidshe was not at a good mental state, as she was confused.

When defence case was closed, both state attorney and the learned advocates for the republic and the accused persons respectively were given audience to address the court on final submissions. They all opted not to file. They left the matter to the court. After thoroughly going through prosecution and defence case I summed up to court assessors who thereafter gave their respective opinions.

The issues to be resolved before this court are as follows; first, whether or not the accused persons did cause the death of Emmanuel Malisawa; if the first issue is answered in the affirmative, the second issue to be resolved is whether they did so with malice aforethought. Along with answering the above two pertinent issues, three important legal issues need to be considered and determined in the present case, which are; burden and standard of proof in criminal cases, visual identification/recognition and the doctrine of the last person to be with the accused person.

In criminal litigations, the prosecution is duty bound to prove any case beyond reasonable doubt, as it was held in the case of **John s/o Makolobela, Kulwa s/o Makolobela and Eric s/o Juma @ Tanganyika versus Republic [2002] TLR 296**, by the Court of Appeal that: -

“ii) a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt”

In murder cases akin to this one, to find the accused person guilty the available evidence must prove not only the death but the link

between the said death and the accused; the onus never shift away from the prosecution and no duty is cast on the accused person to establish his innocence. The duty of the accused is only to cast a reasonable doubt.

First, is the issue of identification which I find to be crucial in this case. It is a trite law that identification of accused person is necessary where the offence is committed at night or day time. The law requires that identification evidence must be watertight to ground conviction; an identifying witness must give a detailed explanation as to how he identified the accused person. In the case of **Republic versus Elia Sebwato [1960] E.A**, the Court held that,

“Identification evidence must be watertight to sustain conviction and exclude possibilities of mistaken identity”

The Court of Appeal of Tanzania in the case of **Waziri Amani versus Republic [1980] TLR 250** provided guidelines with sufficient lucidity on the evidence of visual identification. The Court provided the following guidelines on visual identification at pg. 151 and 152 as follows;

"Evidence of visual identification is of weakest kind and most unreliable. No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

The Court of Appeal in this landmark case added at page 252 that;

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on record a careful and considered analysis of all circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and

further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity”

The same principles above apply even to cases of recognition evidence as in this case where the identifying witnesses claimed to have recognised the accused at the scene of crime.

In the instant case, as stated elsewhere the offence was committed at day time. The prosecution, as per information, alleges that the accused persons did murder Emmanuel Malisawa. Therefore, the prosecution has to prove the offence of murder against any or all accused persons. Proof will depend on how they have led their witnesses to prove beyond reasonable doubt that no one else but any or all accused persons murdered the deceased.

I have to state at the very outset that this case falls squarely on the issue of identification by recognition. As regard recognition the Court of Appeal in the case of **Shamir John versus Republic, Criminal Appeal No. 166 of 2004**, stated that;

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

My duty now is to determine whether the accused(s) is /are the one who invaded the house of the deceased and took him to where the brutal killing of him happened. The PW3 and PW4 claimed in their testimony to have properly recognised all the five accused persons being the bandits who invaded the house of the deceased on the material date of 24/ 07/ 2016 at around 10:00 am and took him to the place where they executed the killing and burning of the deceased. Was the evidence of PW3 and PW4 absolutely watertight? The evidence of the prosecution witnesses (PW3 and PW4) connotes that they connect the accused persons with the offence they stood charged for the following reasons, which I think to my view, cannot be ignored;

Firstly; the prosecution witnesses PW3 and PW4 testified that the incident which resulted to the death of the deceased took place around 10:00 am. At this time around, and in a normal circumstance there is favourable conditions in which an identifying witness is able to make a

good observation of the event as there is a clear visibility. PW3 and PW4 while testifying said while being there at home together with the deceased, there came the accused persons five in number who took the deceased outside and then they sent the deceased to the house of mama Dani. That fact, resolves the issue of distance upon which the identifying witness PW3 and PW4 observed the accused persons when they came at their home. Under such circumstances, it cannot be denied that the accused persons came close to the identifying witnesses PW3 and PW4 when they came at their home. Therefore, PW3 and PW4 recognised the accused persons instantly.

Secondly; PW3 and PW4 testified that they are familiar with the accused persons as they were living in the same village of Kafukoka. In her every testimony, PW3 asserted that she knows the accused who came to their home on that material date and who took the deceased to the house of mama Dani where he was assaulted resulted to his death. PW3 mentioned those people who came to their home in their nick names and through their children names as used by the accused in the village. She baba neshia, nachule, eliud and taakola. With due respect, PW3 pointed baba neshia as 3rd accused person, nachule as 4th accused person, eliud as 5th accused person and taakola as 2nd accused

person and pointed the 1st accused while saying he was young by then, she could not capture his name.

As well, PW4 in her testimony mentioned baba nesha, namchule, taakola, Eliud and the young man whom she could not capture his name as the one who came to their home and took the deceased to the house of mama Dani and eventually killed him before they burnt his body outside the house. PW4 as well, pointed baba nesha as the 3rd accused person in the dock, pointed namchule as 4th accused person in the dock, taakola as the 2nd accused person in the dock and Eliud as the 5th accused person in the dock. She pointed the 1st accused person as one who was very young by then could not capture his name.

In the light of the above testimony of PW3 and PW4 as regard the names of the accused, it appears and without colour of doubt that the identifying witnesses (PW3 and PW4) knew or had seen the accused persons before the incident on the material date. They all testified that the names mentioned by them are the one used by the accused in the village. I find that where an identifying witness is able to name the accused by his nick name or through his children name during examination in chief, he is said to be a credible witness and can be relied by this court. As in the case of **Mussa Mustapha Kusa & Others**

versus Republic, Criminal Appeal No. 51 of 2010, unreported, the Court held that;

“Where a witness mentions the name of the offender at an earliest opportunity it is an assurance that the identification made by the witness is not a mistaken one”

Thirdly, to show that they identified the assailant properly, PW3 and PW4 in their testimony, made it clear that they named the accused persons before the police during recording of their statements. PW3 testified that she recorded her statement at the police where she named the accused as the one killed the deceased. As well, PW4 testified to have named the accused persons when she was recording her statement to the police. The testimonies of PW3 and PW4 as regard the naming of the accused is corroborated by the evidence of PW1, F. 9968 D/C Obert who in his testimony said in the course of interrogating, the wife of the deceased PW4 named the persons involved in the killing of the deceased. He stated that PW4 named Frank Simbeya and James Simzosha who were immediately arrested on 31.07.2016. PW1 informed the court that his fellow policemen also did interrogation of the witnesses and as well they recorded their statements.

As discussed hereinabove, it is my finding that the evidence on identification do meet the test set in **Waziri Amani's** case to warrant conviction. The detailed explanation by prosecution witness PW3 and PW4 and the favourable circumstance surrounding the killing of the deceased one can say had eliminated all possibilities of mistaken identity. In that regard, I have no doubt whatsoever the accused persons were properly identified at the scene of crime.

As hinted hereinabove, the general rule in criminal prosecution is that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution. See **Jonas Nkize versus Republic [1992] TLR 213**.

Now, applying the doctrine of the last person to have been seen with the deceased, I find the allegation against the accused merit of proof. The law is very clear as regard the applicability of the doctrine as stated in the case **MathayoMwalimu and Another versus Republic, Criminal Appeal No. 147 of 2018**, the Court stated that;

"In our considered opinion, if an accused 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.....”**

See also, the Court decision in the case of **Makungire Mtani versus Republic [1983] TLR 1983, Richard Mtangule and Another versus Republic [1992] TLR 5.**

In this case, the accused persons were the last persons to be seen with the deceased alive. I said so because, the testimonies of PW3 and PW4 in this case was that the accused persons who were five in number came to the house of the deceased on the material day of 24/07/ 2016 at around 10:00 am and they then took the deceased to the house of Mama Dani. In their further testimonies, PW3 and PW4 informed the court that when the deceased was taken to the house of mama Dani, they were following from behind to see what was going to happen. It is their evidence that, the accused locked the deceased in the house of mama dani, thereafter the body of the deceased was taken out of the house by the accused who then burnt the body. After that killing of the deceased the accused persons disappeared from Kafukoka village until they were arrested at Matai and at Ilambila village. That piece of evidence suggests that PW3 and PW4 witnessed the moment the accused took the deceased from his home until when he was locked

inside the house. They also witnessed the accused when taking the deceased outside the house of mama Dani and when they burnt the body on such material date.

It is my strong view that, the events resulted to the death of the deceased took place within a short period of time under observation of witness PW3 and PW4. The fact that the accused persons were the one who took the deceased alive before he met his untimely death and the fact that, they were positively recognised by PW3 and PW4 who this court find them to be reliable and credible witnesses, it can be said without doubt that they were the persons last seen with the deceased before his death. It was PW4 testimony that from where the accused took the deceased at his home to where they locked the deceased inside the house of mama Dani one passes almost four houses between. This available evidence by PW3 and PW4 as to the circumstances resulted to the death of the deceased draw an inference as to the guiltiness of the accused persons in the commission of offence and such circumstances has eliminated all possibilities of someone else to kill the deceased apart from the accused persons. The general guidance with regard to evidence against accused persons is found in the decision **of Magendo**

Paul and Another versus Republic [1993] TLR 220 where the Court of Appeal at 223 held that;

"If the evidence is so strong against an accused person as to leave only remote possibility in his favour which can be easily be dismissed, the case is proved beyond reasonable doubt"

However, in their defence case all the defence witnesses, DW1, DW2, DW3, DW4 and DW5 denied to have been involved in the commission of the offence charged with. They neither said to know PW3 nor PW4. They all denied to have been in Kafukoka village. The defence evidence failed to cast reasonable doubt to the prosecution case. However, an accused person cannot be convicted basing on weakness of his defence. His conviction should always be emanated on the strength of evidence adduced by credible and reliable witnesses of the prosecution. Having found that PW3 and PW4 and other prosecution witnesses are reliable and credible witnesses, I find that the prosecution has successfully proved this case to the standard required.

The remaining necessary issue to be considered by this court is whether the accused killed the deceased with malice aforethought within the meaning of **section 200 of the PenalCode, Cap 16 RE 2019**.

Under **section 200** Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- a. An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not.*
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. An intent by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit an offence.*

It is cardinal principle of law in murder cases, that conviction cannot stand unless the prosecution has successfully established both the overt act (actus reus) and malice aforethought (mens rea).

In the case of **Moses Michael Tall versus Republic [1994] TLR 195**, Court has discussed situation which may constitute malice aforethought. In this case it was stated that;

(i)Malice aforethought may be inferred from the amount of force which an offender employs in inflicting fatal injury;

From the exhibit P.2, which is post mortem report which was produced and admitted the body of the deceased was found with a big cut wound on front head with a fractured skull bones and the whole body was burnt to 100 % degree.

The conclusion I get from foregoing cuts on the head and the burning of the deceased body, great force was used by the accused in assaulting the deceased resulted to his fatal injury.

From the facts and the evidence of the prosecution which clearly point the accused persons as the persons who killed the deceased, I am of the strong opinion that the element of malice aforethought, *mens rea* has been established to the satisfaction of this court.

Finally, I shake hands with my esteemed gentleman assessor Geoffrey Mwigwa who entered a verdict of guilty and depart from my esteemed gentleman assessor Patrick Wanyama and lady assessor Grace Ndolezi who entered a verdict of not guilty and proceeded to find that the offence of murder against all five accused persons has sufficiently been proved according to the requirement of the law. Therefore, I find

all the accused persons guilty of the offence of murder contrary to **section 196 of the Penal Code**, and I hereby convict them forthwith.



D. B. Ndunguru
D. B. NDUNGURU

JUDGE

18.05.2021

SENTENCE

There is only one punishment for the offence of Murder once it is proved. My hands are tied by the law and I have to pronounce the sentence. I sentence you Frank Simbeya, James Simzosha, Romward Kalumbwe @ Sinesha, Samwel Kalumbwe and Eliud Geremaniko @ Simbeya to suffer death as provided under section 197 of the Penal Code Cap 16.

I further direct that you all shall suffer death by hanging as provided by Section 26(1) of the Penal Code Cap 16 R.E 2019.

It is so ordered.



D. B. Ndunguru
D.B. NDUNGURU

JUDGE

18.05.2021

Right of Appeal explained.