IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

ORIGINAL CRIMINAL JURISDICTION

CRIMINAL SESSION CASE NO. 5 OF 2019

THE REPUBLIC

VERSUS

1. RASHIDI AMIRI@CHILI

2. NURUDIN ABASI NAMPALA

JUDGMENT

3 & 20 May, 2021

DYANSOBERA, J.:

The accused persons, Rashid Amiri @ Chili (1st accused) and Nurudin Abasi Nampala (2nd accused) are charged with murder contrary to sections 196 and 197 of the Penal Code Cap [16 R.E. 2019]. It is alleged by the prosecution that the duo, on 13th day of December, 2015 at Mpeta Village within Masasi District in Mtwara Region, did murder one Yahaya s/o Lazima Binamu.

The accused pleaded not guilty and the prosecution, in proof of the charge, called a total of eleven witnesses. These were: Iddi Swedi Lazima (PW 1), Lazima Yahaya Lazima (PW 2), Jaffari Lazima Binamu (PW 3), Stella d/o George Kuonewa (PW 4), Mr. Saidick Ally Hassan (PW 5), Asumin d/o Halifa (PW 6), Nathanael Kyando, SP (PW 7), Insp. Iddi Omary (PW 8), F.8982 DC Paul (PW 9), G.1562 DC Hemed (PW 10) and H. 4088 DC

Zakayo (PW 11). Four exhibits were tendered in court that is a report on post mortem examination (exhibit P 1), sketch plan of the crime scene (exhibit P 2), three spent cartridges (Exhibit P 3) and a Ballistic Laboratory Report from Forensic Bureau (Exhibit P 4).

On their part, the accused persons, led by Mr. Robert Dadaya, learned Defence Counsel defended the case. The 2nd accused testified as DW 1 while the 1st accused testified as DW 2.

Briefly, the case for the prosecution is as follows: the deceased owned a shop at Mpeta and PW 1 and PW 2 were supervising sales in that shop. On 12.12.2015 at about 2300 hours, PW1 and PW 2 were in the shop packing water and putting shop goods inside as it was a closing hour. They then saw people coming to the shop. One had a gun and the other had two pangas. The one who was handling the gun was white, slender and tall while the other was black, a bit slander and tall. PW 1 and PW 2 managed to identify them through electricity lights through two bulbs which were outside. Inside the shop there were two bulbs as well. The invaders demanded money but PW 1 and PW 2 said that they had none; only their father, the deceased, had. The invaders forced these witnesses to take them to the deceased. PW 1 and PW 2 took the lead; their shirts tied together. At the deceased's house, the deceased was with PW 3, his brother, discussing on their business. The culprits ordered PW 1 and PW 2 to kneel down while the deceased and PW 3 were ordered to lie down. The invaders asked the deceased to produce the money but the latter said that the money was at the shop. They ordered PW 1, PW 2 and the deceased to go back to the shop. Meanwhile, the deceased's wife managed to slip away and PW 3 was ordered to remain behind. At the shop the deceased told them that the money was at his uncle but the invaders insisted the

deceased to produce the money. People around started throwing stones to the culprits, the 2nd accused shot in the air to scare them away. PW 1 and PW 2 started managing the one who had pangas. According to PW 1 and PW 2, the 2nd accused who had a gun shot the deceased and PW 1. They fell down. The 2nd accused and his fellow took to their heels. PW 3 rushed at home, collected the motor cycle and took the victims to the Police Station; secured PF 3's and then rushed them to Mkomaindo Hospital. After about 15 minutes, the Dr. told PW 3 that the deceased was already dead. PW 1 was then referred to Ndanda Hospital where he was admitted for four months and then referred to Muhimbili National Hospital for further treatment.

PW 4, the then Mpeta VEO who in that night was sleeping outside her house for fear of heat, heard gun shots and went to the crime scene where she saw a pool of blood and communicated with Afande Jefta of Chiungutwa Police Station. The police went to the crime scene, inspected it, collected spent cartridges and interviewed the witnesses. The following day, the deceased was handed over to them for interment.

PW 5, an Assistant Medical Officer at Mkomaindo Hospital medically examined the deceased on 13th December, 2015 and found him with a penetrating wound on iliac bone. He also found that there were characteristics that it was a bullet caused wound. According to his findings, the body had a lot of bleeding; there was visible bullet entry at upper medial part of iliac artery/vein area. He established that the cause of death was haemorrhagic shock. He filled in the PF 3 (Exhibit P. 1).

PW 6 recalled that in 2015 she was residing at Mbuyuni at her grandmother and was, by then, living with the 1st accused who was her love partner and had been living together for about two and half months.

The 2nd accused, a resident of Dar es Salaam, is her brother in law, he being the brother of the 1st accused, sharing the same mother. PW 6 informed the court that the 2ndaccused used to go to visiting the 1st accused who was living with his mother.

On 12.12.2015 at about 2000 hours PW 6 went to the video show and was back at 2200 hours but to find the 1st accused not yet back. She decided to go to the 1st accused's mother and remained there and at the time of sleep, she slept with her sister in law. By the time, both accused persons were absent and she did not know where they had gone. At 0200 hours, they were back and she and the 1st accused went back home. On 13.12.2015 at 1100 hours, PW 6 was informed by Bakari Chiunda that the police were looking for the items that had been stolen by the 1st accused and hidden at their home. In her testimony, PW 6 was emphatic that on 13.12.2015 the 1st accused who was a motor cyclist commonly known as *bodaboda* had left in the previous morning but went back home at 0200 hours.

PW 7, the OC-CID at Masasi Police Station testified that on 12.12.2015 at night two incidents occurred, one at Songambele where one person was invaded at his shop, robbery committed and a gun was involved. The other incident occurred at Mpeta where the deceased was killed and a gun was also used. He was informed that the culprits were three; one was riding a motor cycle while the other two were armed. The 2nd accused had been identified and named and when they went in search of him, he escaped. He was later arrested. According to the investigation, the 1st accused was cycling a motor cycle while the 2nd accused had a gun. The other suspect who is not in court was alleged to have died at the third incident committed at Morogoro. The motor cycle the 1st accused was

riding was retrieved and tendered in court in another case. The gun the 2nd accused possessed was not retrieved; however, the spent cartridges were retrieved at the scene of the crime. As to how the 1st accused was implicated, PW 7 insisted that he actively participated in facilitating the commission of the offence by driving the culprits to and from the scenes of the crimes at Songambele and Mpeta. He insisted that the 2nd accused had a gun.

On 13.12.2015 PW 8, an investigating officer, was assigned to visit and inspect the crime scene. PW 9 recorded the police statement of the 1st accused. The substance of these two witnesses will be discussed when evaluating the evidence.

PW 10 drew a sketch plan of the scene of the crime on 13.12.2015 (exhibit P 2). According to PW 10, the sketch plan meant the crime scene was visited and inspected.

PW 11 a ballistic expert did, on 19.1.2018, receive exhibits from WP 9601 DC Eshimendi for examination. They were three spent cartridges of 12 bore. He marked those exhibits Q 1, Q 2 and Q 3 and established that they were used in the gun of the same calibre. He prepared a ballistic report. PW 11 tendered in court the three spent cartridges and the report (Exhibits P 3 and P 4, respectively).

On 29.4.2021 the accused persons led by their defence counsel, Mr. Robert Dadaya, entered their defences. The 2nd accused who testified as DW 1 recalled that on 6th March, 2016 while in Dar es Salaam at Dovya Street, he, at 2300 hours, heard a knocking at a door to his room. He opened it and went outside and saw about six people who were in their civvies and introduced themselves to be police officers. They put him under restraint and told him that he was needed at the police station. He was

required to produce a weapon but said he knew nothing. He was tortured and beaten. Stella then told him that he was facing a murder case at Masasi-Mtwara and was to wait for a police escort. On 20th March, 2016 he was collected by police from Mtwara where he stayed for four days and on the fifth day, he was interviewed by PW 8 who asked him on what he knew about the incident at Mpeta. The 2nd accused replied that he knew nothing. He was tortured but insisted that he was living in Dar es Salaam and denied to have gone to Mbuyuni in 2015. He said that PW 8 wrote on a paper and required him to sign. He was later taken to a Primary Court Magistrate as a Justice of the Peace where he recorded his statement but denied to know anything. He was taken to the District Court and charged with murder. There, he found another accused person and they became two.

The 2nd accused denied to have committed the offence, claimed that the allegations against him are untrue and that he could not have committed the offence at Mpeta as alleged as he was in Dar es Salaam. He asserted that the gun he is said to have used was not produced in court. He said that PW 7 said that the informers described him as an albino but he was not an albino. Further, PW 7 failed to prove the source of the light which could have enabled him being identified in that night. The 2nd accused also challenged the allegations against him arguing even the motor cycle was not produced in court. He also told the court that it was not proved that the said blood was of a human being. The 2nd accused also challenged the testimonies of the witnesses on the documentation of the spent cartridges as well as their markings. He said that there were inconsistencies on the distance from the shop to the deceased's house and

what the invaders actually ordered the victims to do lie down or kneel down.

During the cross examination, the 2nd accused admitted to be the 1st accused's brother born of the same mother and that PW 6 was the wife of the 1st accused. As to why he did not cross examine her on her evidence that in December, he was at Mbuyuni with the 1st accused, the 2nd accused replied he did not recall what she was saying but that she was just saying so. He said that the 1st accused happened to be in bad terms with PW 6 and he happened to reconcile them and he thought that his advice displeased her.

The 2nd accused said that he heard of the incident of murder while at Dar es Salaam but came to know the deceased to be Yahaya Lazima while at Masasi. He admitted that he used to go to Masasi to greet his mother.

On his part, the 1st accused testified that on 27th December, 2015 he was at home at Mbuyuni where he quarrelled with his wife, PW 6; the reason of the misunderstanding being that she refused to cook for him and after he inquired into the reason, she started using abusive language. The 1st accused then went outside but PW 6 got hold of his shirt and he held her blouse and it was torn. He then went to buy some bites but when back he found the fire extinguished and some clothes and utensils amess. He then took his properties to his mother but PW 6 went to sue him. On 20th December, 2015 the 1st accused was put under arrest by the police on the ground that he had assaulted his wife. The 1st accused was taken to Chiungutwa Police Outpost where he admitted to have beaten PW 6 and torn her clothes. He was later taken to Masasi Police Station and on the following morning he was asked to state on what had happened at Mpeta. The 1st accused said he knew nothing. He was, however, handcuffed and

tortured forced to undress and assaulted by being hit with a club on the mouth causing his teeth to come off (kukatika). A woman police was brought and he was forced to make love with her and they started playing with his testicles. A pen was then inserted into the opening of his penis. Likewise, a soda bottle was inserted into his anus forcing him to admit.

As to the tracing the 2nd accused, the 1st accused informed the court that on 6th January, 2016 he accompanied the police to Dar es Salaam, led them to Mbagala then to Kiburugwa but to be told that he had already moved away. They failed to trace the 2nd accused and on 7th January, 2016 they took back the 1st accused to Masasi Police Station where he was interviewed but denied. At the Justice of the Peace, the 1st accused admitted to have assaulted PW 6 but denied the murder allegations.

The 1st accused admitted to have been interviewed on both the assaulting his wife and the murder allegations. He denied to be responsible for the death of the deceased and denied that the information he gave to the police assisted in arresting the 2nd accused. He denied to have been present at the crime scene as a motor cyclist and maintained that he was apprehended on assault allegations. He asserted that he called the 2nd accused to settle the dispute between the 1st accused and PW 6. It was the 1st accused's evidence on cross examination that she fought PW 6 on 27thDecember, 2015 after he asked her where she had slept. He further testified that the 2nd accused went to Masasi in 2014 to buy a motor cycle.

After the closure of the defence case, the learned Senior State Attorney for the Republic and the Defence Counsel were accorded with opportunity to give the final submissions which were aired orally.

I undertake to consider them when analysing and evaluating the evidence.

In the instant case, the accused persons are alleged to have murdered Yahaya s/o Lazima Binamu. The offence of murder is defined under section 196 of the Penal Code, [Cap. 16 R.E. 2002] to be as follows:-

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

This being a criminal case, the prosecution, in order to sustain a conviction, was duty bound to lead evidence to prove not only the elements of the offence of murder but also to link the death of the deceased to the accused persons.As correctly submitted by Mr. Robert Dadaya, learned Defence Counsel,

In the present case, there is no dispute and the evidence is clear that the person known by Yahaya s/o Lazima Binamu is no more. He died on 13th day of December, 2015 and that his death was both unnatural and violent. According to PW 1, PW 2, PW 3 and PW 8 the deceased was shot with a gun. In his sworn evidence, PW 5 was clear that the deceased was found with a penetrating wound on the iliac bone. PW 5 found that there were characteristics of a bullet caused wound in that the body had a lot of bleeding and there was visible bullet entry at upper medial part of iliac artery/vein area. PW 5 established the cause of death to be haemorrhagic shock. He was supported in this by the PF 3 (exhibit P.1). In their oral submission, both the learned Senior State Attorney and learned Defence Counsel seem to agree that the deceased is not only dead but also that his death was not natural and was violent. The evidence and circumstances of the case leave no doubt that whoever did the act was actuated by malice aforethought as defined under section 200 of the Penal Code [Cap. 16 R.

E. 2002 now R. E. 2019]. In such circumstances, I am inclined to hold that prosecution proved beyond reasonable doubt that the deceased Yahaya s/o Lazima Binamu is dead, the death was unlawfully caused and the perpetrator was actuated by malice aforethought.

Having so found, the remaining pertinent issue for consideration and determination in this case is as to who was responsible for the death. The prosecution, on one hand, alleges that it is the 1st and 2nd accuseds that were responsible for murdering the deceased. To prove this, they ushered in eleven witnesses and produced in evidence four exhibits. The accused persons, on the other hand deny complicity. I have attempted to dilate, in summary, the substance of the evidence.

Mr. Wilbroad Ndunguru, learned Senior State Attorney sought to persuade the court that the prosecution had proved the case against the accused persons beyond reasonable doubt. Relying on the case of **Jonas Nkize v. R** [1992] TLR 213 he submitted through the prosecution witnesses and exhibits, the Republic has proved that the deceased died unnatural death which, as evidenced by Exhibit P 3 and P 4, was caused by bullets. According to him, malice aforethought was established in that the weapon used was a gun. In support of this argument, learned Senior State Attorney cited Section 200 of the Penal Code [Cap. 16 R.E.2019] and the case of **Saidi Ally Matola@ Chumila v. R**, Criminal Appeal No. 129 of 2005 (unreported).

With respect to identification, it was submitted on part of the Republic that there was direct identification of the accused at the crime of the scene by PW 1, PW 2 and PW 3 who not only said that they saw and identified the accused but also detailed their mission, that is the money

and the bandits forced the witnesses to take them from the shop to the deceased's house and then back to the shop. It was Mr. Ndunguru's further submission that the identifying witnesses had ample time to observe the bandits by electricity lights at the shop and at the house of the deceased and that the light was sufficiently bright to enable the witnesses identify the bandits. Reference was made to the case of **Rajab Halifa Katumbo v. R** [1994] TLR 129. The court was informed that PW 1 and PW 3 were bold enough to confront the bandits who were armed. According to the learned Senior State Attorney, the conditions on visual identification set out in the case of **Waziri Amani v. R** [1980] TLR 250 were met. It was also submitted for the Republic that the 1st accused assisted the investigation and apprehension of the 2nd accused as testified by PW 8 and PW 9 and that the interview conducted by PW 9 complied with Sections 3 (a), (b) and (c) of the Evidence Act. He explained that the statement recorded during the interview was corroborative of the identification evidence of PW 1, PW 2 and PW 3, the fact which was not controverted in the cross examination. This court was referred to the cases of **Ally Mpangala v. R**, Criminal Appeal No. 213 of 2016. The Court in that case cited the case of **Mohamed Hamis v. R**, Criminal Appeal No. 114 of 2013 (unreported) in which it was observed that:

> *"It is settled law that failure to cross examine a witness on a particular point/issue leaves his evidence to stand unchallenged".*

On the existence of any discrepancies, learned Senior State Attorney invited the court to find them as minor not going to the root of the case.

As for the defence, Mr. Robert Dadaya, the learned defence Counsel canvassed four areas namely, insufficiency of identification, credibility of witnesses, chain of custody and standard of proof.

Relying on the case of **John Nyamhanga Misare v. R.** [1980] TLR 6, he submitted, and rightly so, that the prosecution carried the burden of proving beyond reasonable doubt the case against the accused and that the said burden does no shift. He was of the view that the prosecution failed to discharge their burden and asserted that the case hinged on mere suspicion and grudges.

Clarifying on the issue of identification where PW 1, PW 2 and PW 3 are said to have seen and identified the accused at the crime scene, learned Counsel buys into that these three witnesses did not identify the accused. He reasoned that they had not seen them prior to the incident; the factors in the cases of **Waziri Amani** (supra) and **Raymond Francis v. R** [1994] TLR 202 were not met. He explained that the evidence of PW 7 was hearsay because the people who claimed to have identified the accused at Songambele were not called in Court and that PW 7 had poor vision.

With respect to the people who clarified on the particulars of the 2nd accused, Counsel for the accused contended that they were neither mentioned nor called in court and the court had no duty to trace them. Since PW 1 and PW 2 admitted to have not known the accused prior to the incident, it was obligatory on part of the prosecution to conduct an identification parade, Mr. Dadaya argued. Reliance was placed on the case of Joel Watson @ Ras cited in the case of **Rajab Juma Ramadhan v. R**, Criminal Appeal No. 33 of 2020 (unreported) on the authority that if the suspects are not known to the witnesses prior to commission of the

offence, an identification parade is necessary. Mr. Dadaya also made reference to Section 166 of the Evidence Act and was of the view that the absence of an identification parade rendered the identification by the prosecution witnesses improper.

Mr. Dadaya also complained that there was failure on part of the identifying witnesses to mention the culprits at an earliest opportunity. He placed reliance on the case of **Marwa Wangiti Mwita and Others v. R.** [2002] TLR 39 in which it was stated that ability of a witness to mention the suspect at an earliest possible time renders assurance to the reliability of the witness. Mr. Dadaya also referred this court to the case of **Mohamed Athui v. Rex** (1942) 9 EACA 72 cited with approval in the case of **Joseph Shaghembe v. R** [1982] TLR 142. It was his contention that there is no witness who, after the incident, described the accused to either the relatives or police.

With respect to credibility of witnesses, an attack was made on the evidence of PW 6 who had asserted that she had seen the accused with blood-soaked clothes. Mr. Dadaya argued that PW 6 did not reveal this fact to anybody but remained silent until after she had gone to the police station at Chiungutwa where she had gone to report that the 1st accused had assaulted her that is when she stated that the 1st accused was involved in a murder case at Mpeta. Since the report was made after an elapse of about two weeks and the court has not been told the whereabouts of those clothes and no explanation on blood stains whose proof could be by DNA test, then doubts were created. The court was urged to presume that PW 6 was actuated by grudges as she already was in bad terms with the 1st accused and for that reason; she had every reason to lie. Counsel for the accused was of the view that the 1st accused

was linked to this case on love conflict between him and PW 6 and there is mere suspicion which, according to the case of **Aidan Mwalulenga v. R.**, Criminal Appeal No. 2017of 2006, cannot sustain conviction.

Submitting on exhibit P 3, Mr. Dadaya pointed out that the chronological documentation of that exhibit was not established. He informed the court that chronological documentation from the time it was collected at Mpeta village by PW 7, its custody at Masasi Police Station, its conveyance to Dar es Salaam up to the time of its production in court by PW 11 was lacking. It was his further argument that there was no proof of marking of the exhibit by other witnesses before being handled by PW 11. Learned Counsel was of the view that the evidence that exhibit P 3 tendered in court is the same as the one retrieved at the crime scene at Mpeta is lacking. Dilating on this aspect, Mr. Dadaya cited a litany of cases on chain of custody. These cases were the following: **Mohamed Seif v. R** [2006] TLR 427, **Kashindye Bundala and Another v. R**, Criminal Appeals Nos. 349" B" and 352" B", **Maduka Ng'abi and Another v. R**, Criminal Appeal No. 556 of 2016, **Paul Maduka and 4 Others v. R**, Criminal Appeal No. 110 of 2007, **Makoye Samwel @ Kashindye and 4 Others v. R**, Criminal Appeal No. 32 of 2014.

On the question of proof beyond reasonable doubt, learned defence Counsel pointed out that there were inconsistent statements by PW 1, PW 2 and PW 3 on the distance in respect of walking and time from the shop to the deceased's home. The other discrepancy pointed out by Mr. Dadaya was on the source of light the identifying witnesses are alleged to have used to identify the accused persons. He said that while PW 1 told this court that there were four bulbs; two inside and two outside, PW 10 said that there was only one bulb at the shop.

In his concluding remarks, Counsel for the accused reminded the court some pertinent issues which he enumerated.

On a careful examination and evaluation of the evidence, I find as established that the accused persons were not caught at the scene of the crime. The prosecution, however, wants the court to believe that there was positive and direct identification of the accused at the crime scene. The defence denied complicity. On this, the defence relied on the insufficiency of identification as well as grudges with respect to the 1st accused and alibi with regard to the 2nd accused.

According to the evidence, the only eye witnesses to the invasion at the shop and the deceased's home and the killing of the deceased was PW 1, PW 2 and PW 3. It not disputed that the incident occurred at night that is between 2300 hours and 2400 hours. In such circumstances, the issue of identification comes in. It is axiomatic that identification evidence, resembles confession at the same time in that both are extremely compelling and potentially unreliable. Why?

Eyewitness testimony plays an important role in establishing the identity of the perpetrator of the crime. That notwithstanding, an eye witness has his failures. For instance, he can be mistaken though honest or he can deliberately misrepresent the truth. I am not oblivious of the fact that crimes are secret. People, conscious of their criminal purpose, and while executing criminal acts, endeavour to hide their guilty in secrecy and darkness. In such circumstances, the aim of the court's trial is twofold: to make sure that the truth is pursued and justice is served. In this case, since the incident occurred at night, the court has to ascertain if the identification was correct and unmistaken. That is why the Court of Appeal extensively deliberated on the issue of visual identification in the case of

Waziri Amani v. R, [1980] TLR 250 as cited by both the learned Senior State Attorney and learned Defence Counsel.In that case, the Court observed:

> *"... Evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore that 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."*

Besides, the Court of Appeal, in the same case, laid down five conditions which may seemingly assist in determining whether a particular accused may have been properly identified. It is imperative to quote that part *in extenso* as follows:

> *"Now, the extent to which the possibility of the danger of an affront to justice occurring in this type of case depends entirely on the manner and care with which the trial Judge approaches his task of analysis and examination of evidence. If the judge does his job properly and before accepting any evidence of identification, he goes through a process of examining closely the circumstances in which the identification of each witness came to be made, the dangers of convicting on such evidence are greatly lessened. 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 the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.*

We would, for example, expect to find on record questions such 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 out 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. If at the end of his examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could, in those circumstances, safely convict on the evidence of identification. On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as a visual identification made in a poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit."

Having evaluated the evidence on part of the prosecution, I am satisfied that the identification by PW 1, PW 3 and PW 3 was correct, watertight and unmistaken. These witnesses identified the 2nd accused and his fellow who were armed. They described their physiques, the clothes in which they were clad and the arms they were carrying. They described the

source and intensity of light which enabled them to sufficiently see and identify their invaders. They stated that they managed to identify the invaders by the electricity light. With that compelling evidence, I find no good cause to discredit the evidence of PW 1, PW2 and PW 3. In the first place these witnesses were testifying on what they had actually observed and conceived what was taking place at that material time. I have no reason to doubt that they were truthful as there was no suggestion leave alone indication that they had any interest to serve other than vindicating the law. The inconsistency pointed out in the evidence of PW1, PW2 and PW3 on the distance from the shop to the deceased's house due to the fact that these witnesses were not experts and were testifying on their knowledge according to their perceptions. As rightly pointed out by Mr. Ndunguru, theirs was but estimations.

The evidence by identification by PW 1, PW 2 and PW 3 that they identified the culprits at the crime scene was not their bare assertions but were assertions accompanied by a detailed description of the culprits.

It is true as argued by Mr. Dadaya that the 2nd accused and his fellow were strangers to these identifying witnesses. According to him, an identification parade had to be conducted. With respect, there was no such necessity. Normally identification parades belong to the stage of investigation. There is no provision in the CPA which obliges the investigating officer to hold, or confers a right upon the accused to claim the test identification parade. They do not constitute substantive evidence. That aside, dangers of identification parades cannot be overlooked. It has been suggested that police tend to encourage the witness to identify the person the police already suspect of committing the crime, when a trial is based primarily on eye witness identification, the investigators should be

very careful not to confirm the witness identification. It is better to avoid tainting the identification process with suggestive procedures. The prosecution's failure to conduct the identification parade cannot, in this case, be taken to have amounted to their failure in their duty of investigation.

In his defence, the 2nd accused denied to have been present at the crime scene. Indeed, vigorously contended that he did not commit the crime and maintained that he was in Dar es Salaam. As said before, the accused persons were not arrested at the scene of the crime. There is no dispute that the 2nd accused's apprehension was made in Dar es Salaam. He, in other words, raised an issue of alibi. Unfortunately, learned defence Counsel did not say much on this during his final submission. However, the law is clear that an accused person who raises a defence of alibi bears no burden whatsoever to prove it; it suffices if the defence raises reasonable doubt in the prosecution case.

Section 194 (4), (5), and (6) of the Criminal Procedure Act [Cap.20 R.E. 2002] which relates to the defence of alibi provides as follows:

> *"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*
>
> *(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.*
>
> *(6) If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."*

It is, therefore, the law that notice of intention to raise it must be given. This is normally done at the earliest possible opportunity by an accused before the hearing starts.

This, I think, enables the prosecution to investigate the alibi and prepare to undermine or disprove it. But in all circumstances where the accused may be required to say something in answer to the case against him, what he is required to do is to raise some reasonable doubt on the prosecution case. There is no burden for him to prove it.

The defence of alibi is that the accused was elsewhere at the time the offence is alleged to have been committed. If this is true, it being impossible that the accused should be in two places at the same time, it is a fact inconsistent with that sought to be proved and excludes its possibility.

Thus, in this conflict of evidence, whatever tends to support the one, tends in the same to rebut and overthrow the other; it is for the court to decide where the truth lies.

In the instant case, although the 2nd accused raised that defence by stating that he was in Dar es Salaam when the offence was being committed and his brother, the 1st accused, sought to support it, it is clear that the defence was not promptly and properly raised. It is true according to the legal position elucidated by the Court of Appeal in the case of **Mwita s/o Mhele and Another v. R**, Criminal Appeal No. 65 of 2002 (Mwanza Registry) (unreported), that this court is enjoined to take into consideration. The Court in that base observed:

> *"In case of defence of alibi which is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under sub-*

section (6) of section 194 of the Criminal Procedure Act. First, that the trial court is not authorised by the subsection to treat the defence of alibi like it was never made. Second, that the trial court has to take cognisance of the defence and third, it may exercise its discretion to accord no weight to the defence."

The issue is whether or not I should accord weight to this defence. I think the answer is in the negative. This is partly because, as I have demonstrated above, there was cogent prosecution evidence that the accused was not only present at the crime scene but also committed the offence charged, and the accused having failed to offer satisfactory explanation and partly because, the defence failed to raise reasonable doubt in the prosecution case. The reasons for this are not far-fetched. First, it was clearly proved by PW 6, the 2nd accused's sister in law that on 12.12.2015 the 2nd accused was in Mbuyuni and he with his brother, the 1st accused were absent from home from the morning to 0200 hours, the following day.

Second, PW 1, PW 2 and PW 3 affirmatively testified that they identified him at the scene of the crime and was armed with a gun and he is the one who shot and killed the deceased.

Third, the evidence of PW 8 and PW 9 was corroborative of what PW 1, PW 2 and PW 3 had told this court on the presence of the 2nd accused at the crime scene and how he participated in the commission of the crime. He was amply identified by these identifying witnesses. With those reasons, I accord no weight to the accused's defence of alibi. I find the prosecution having led sufficient evidence to implicate 2nd accused in the commission of the offence.

With regard to the 1st accused, apart from denying being present at the crime scene, he sought to convince the court that he was only implicated after PW 6 had reported to Chiungutwa Police Outpost that he had assaulted her and lied that he had gone to Mpeta and committed the offence. It was his argument that PW 6 had grudges and Mr. Dadaya invited the court to buy this argument by urging the court to presume that PW 6 was actuated by grudges as she already was in bad blood with the 1st accused who was his love partner and had assaulted her.

I think the 1st accused's defence has missed the point, the evidence which materially implicates the 1st accused is neither of that of PW 6 nor of PW 1, PW 2 rather, it is the evidence of PW 8 and PW 9. PW 8 investigated the case and PW 9 recorded the 1st accused's police statement. These two witnesses were clear in their testimonies as hereunder:

On 13.12.2015 PW 8, an investigating officer, was assigned to visit and inspect the crime scene. He and his fellow police officers went at Mpeta and saw a pool of blood outside the shop signifying that someone had been injured. An inquiry was conducted to ascertain whether the culprits were known and identified at the crime scene and on the circumstances of the commission of the offence. After gathering information, it was established particularly from PW 2 that the culprits were the 1st and 2nd accused who had gone to the shop, found PW 1 and PW 2 and demanded them to produce the money. They then forced PW 1 and PW 2 to take them to the deceased and later back to the shop where the shooting of PW 1 and the deceased by the 2nd accused took place. At Mbuyuni, the 2nd accused was not apprehended as he escaped upon seeing the police van. On 22.3.2016 the 2nd accused was taken to the police station after he had been apprehended in Dar es Salaam. PW 8 interviewed

the 2nd accused who detailed to him how he and the 1st accused were involved in the commission of the offences at Songambele and Mpeta. According to PW 8, the 2nd accused told him that on 12. 12. 2015 he left home with the 1st accused on the motor cycle and went to Masasi for a mission and arrived at a Rest Camp area, Masasi urban where they met their fellows Selemani and Chidoba. At 1900 hours, Selemani and Chidoba left the area to Songambele. By the time, the 2nd accused was leading, riding the motor cycle as the 1st accused did not know the area. They invaded the shop, shot in the air and managed to steal Tshs. 170,000/=. The 1st accused drove back from Masasi to Chiungutwa and then to Mpeta where in the deceased's shop found PW 1 and PW 2 and demanded them to produce the money. They then asked the witnesses to take them to the deceased. The 2nd accused had a shotgun while the other had pangas. At the shop, PW 1, PW 2 and the deceased got hold of the suspect who had the pangas. The 2nd accused asked them to release his fellow but they refused. The 2nd accused shot and injured the deceased and PW 1. The 2nd accused said that they had left the 1st accused on the road with the motor cycle and after the shooting, the 2nd accused and his fellow went back to the 1st accused and rode away.

On 27.12.2015 the 1st accused was arrested by the police officers at Chiungutwa Police Out post and taken to the Masasi Police Station on having assaulted his wife. The 1st accused detailed how he facilitated the commission of the offence. There were three gun shots made at the crime scene. Two spent cartridges were retrieved on that very day that is on 13.12.2015 while the other was collected later. An identification parade was done but PW 8 was not involved in its supervision and was not therefore sure if the identification parade was actually conducted. He

argued that an identification parade was additional evidence to the already available identification evidence.

PW 9 on 27.12.2015 was given the 1st accused who had been taken to Chiungutwa Police Outpost on a dispute between him and his wife. The latter had said that the 1st accused was involved in a homicide incident at Mpeta. PW 9 interrogated the 1st accused who admitted to have a hand in the murder of the deceased and mentioned his fellows to be the 2nd accused and Selemani Chilokota. The 1st accused detailed how he carried them on the motor cycle. According to PW 9; at the centre was the 2nd accused who carried a gun while behind was Selemani Chilokota. It was in the PW 9's further testimony that the 1st accused said that it is his fellows who went to do the killing and he was left on the road with the motor cycle. The 1st accused then heard gun shots and realised that they were of the gun the 2nd accused was carrying. Then, after the incident, the two returned back soaked with blood. The 2nd accused then ran to Dar es Salaam. The 1st accused led them to Dar es Salaam but at the house the land lord told them that the 2nd accused had moved from there that night. On 20.3.201 the 2nd accused was arrested in 'Dar es Salaam. PW 9 received witnesses' statements, a sketch map and three spent cartridges and the Doctor's report. He handed over the spent cartridges in writing to DC Eshimendi and then received back the report.

The evidence of these two witnesses implicated the 1st accused in the offence of murder and there was no sufficient explanation from him to explain it away. Mr. Dadaya vehemently submitted that PW 6 had an interest to serve and was not, therefore, credible. I on my part, apart from finding that her evidence did not materially implicate the 1st accused, I find PW 6 was truthful and credible. Her testimony that on 13th December,

2015 the 1st and 2nd accused persons went back home at 0200 hours was not contradicted. Indeed, the accused persons did not explain where they had gone and this supports the evidence of PW 1, PW 2, PW 3, PW 8 and PW 9 that they were at Mpeta.

I now turn to the issues of credibility, chain of custody and burden of proof raised by learned Defence Counsel, Mr. Robert Dadaya.

As far as the question of credibility of prosecution witnesses is concerned, I find that the witnesses were credible and their evidence was reliable, for they were telling the truth as they believed it to be. Their testimonies were not only plausible but were also in harmony with the preponderance of probabilities which a practical and informed person would readily recognise as reasonable in the circumstances pertaining in this particular case. I am fortified in this by the observations of the Court of Appeal of Tanzania in the case of **Geoffrey Laurent @ Mbombo v. R**, Criminal Appeal No.385 of 2013 that:

> *"The third principle is that, on whether or not any particular evidence is reliable depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness' testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances pertaining in a particular case."*

With regard to the establishment of the proper chain of continuity, otherwise known as chain of custody. There are two principal methods of

proving the real evidence. One is by establishing that the evidence is readily identifiable and two, by establishing a chain of custody.

Chain of custody refers to the process of maintaining and documenting the handling of evidence to ensure that the evidence was legitimately gathered and protected. In most cases, the purpose is to establish the *corpus delicti* (body of the crime) so as to ensure the integrity and evidentiary value of the seized property.

In determining whether an adequate chain of custody has been proved, the court must consider the nature of the article in issue, the circumstances of its preservation and custody and the likelihood of other tempering with it.

To be noted is that real evidence is admissible so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material respect. Physical evidence that is readily identifiable by a witness need not be supported by chain of custody proof. In other words, if an object is readily identifiable, there is often no need to establish a chain of custody.

In this case I am satisfied that the exhibit in question needed no establishment of chain of custody in that the spent cartridges were easily identifiable and could not easily change hands. It was sufficiently proved that Exhibit P 3 was exactly what it purported to be. There was no evidence that it was tempered with by any other person.

What is proof beyond reasonable doubt mean? Proof beyond reasonable doubt was defined by the Court of Appeal in the case of **Magendo Paul and Another v. Republic** [1993] TLR 220 thus:

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

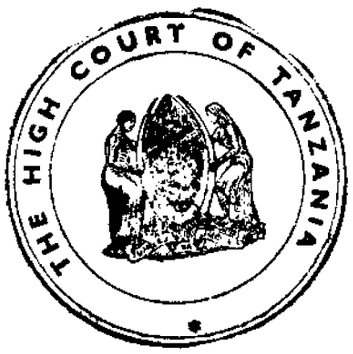
After carefully examining and evaluating the evidence in this case, I am satisfied that the evidence against the 1st and 2nd accused persons was so strong and the accused persons failed to raise any reasonable doubt in the prosecution on preponderance of probabilities.

During the trial in this case, I was assisted by three lady assessors, namely Scholastica Cholla, Mary Lungu and Fatuma Hamis. After summing up to them, they gave a unanimous verdict that the case against the accused persons was proved beyond reasonable doubt.

I agree.

Before I conclude my judgment, I have to observe that it is possible that I may not have considered other case laws and factors which either the prosecution or defence might have thought relevant but I must admit that every case is unique and must be considered and decided on its own merits.

We, thus, find the 1st and 2nd accused person guilty of murder and convict them under sections 196 and 197 of the Penal Code [Cap.16 R.E.2019].



W.P. Dyansobera

JUDGE

20.5.2021

SENTENCE

In the United Republic of Tanzania, the offence of murder under section 196 of the Penal Code, Cap 16 Revised Edition of 2019, upon conviction, attracts only one sentence which is death by hanging.

By virtue of section 197 of the Penal Code I hereby sentence the accused persons to death; and in terms of section 26(1) of the Penal Code and Section 322(2) of the Criminal Procedure Act, Cap 20 Revised Edition of 2019, I hereby direct that the accused persons shall suffer death by hanging.

It is so ordered.

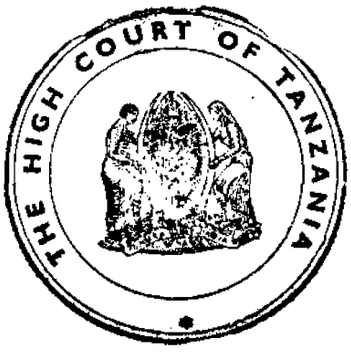
W.P. Dyansobera

JUDGE

20/05/2021

Judgement delivered this 20th day of May, 2021 in the presence of Mr Wilbroad Ndunguru, learned senior State Attorney for the Republic and Ms Lightness Kikao holding brief for Mr Robert Dadaya learned counsel for the accused person. Also in the presence of both the 1st and 2nd accused persons.

Rights of Appeal explained.



W.P. Dyansobera

JUDGE

20/05/2021

Court: The lady assessors are thanked and discharged.

W.P. Dyansobera

JUDGE

20/05/2021