

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT KAHAMA**

CRIMINAL SESSIONS CASE NO. 48 OF 2017

THE REPUBLIC

VERSUS

1. MARCO GAMAYA@MWANDU GAMAYA

2. JUMANNE MAGANGA @ MPIKACHAI

JUDGMENT

29th April&6th May,2021

MDEMU,J.:

The two accused persons are jointly and together charged with two counts of murder both contrary to the provisions of section 196 of the Penal Code, Cap.16. In the first count, they are charged to have murdered one Simon Kali. As to the second count, the two accused persons murdered one Ngolela Bushesha. According to the particulars of offence, the brutal murder of the two deceased persons was on the night of 7th day of September, 2016 at Kawe Village within Kahama District. Upon their arrest, the two accused persons denied involvement in the said murder. Who brutally terminated the life of the two deceased persons? Are the accused persons in the dock responsible?

To start with, on the 9th day of October, 2018, preliminary hearing was conducted in which, it was agreed that Simon Kali and Ngolela Bushesha died unnatural death as per the postmortem examination reports (P1 & P2). On these facts, the trial of the two accused persons was thus mounted to establish if the two accused persons are responsible with the murder of the two deceased persons. At the trial of the two accused persons, Ms. Salome Mbuguni, learned Senior State Attorney represented the Republic whereas Mr. Festo Lema and Mr. Mackanjero Ishengoma learned Advocates represented the 1st and 2nd Accused persons respectively.

To prove the charge of murder booked to the two accused persons, the prosecutions assembled the following witnesses: Lucas Makurumo, Mussa Kali, Jumanne Dalali, F.7252 D/Cpl. Hussein and Nashon Didas Nyakurungu PW1, PW2, PW3, PW4 and PW5 respectively. It was also tendered in evidence postmortem report of Simon Kali(P1), postmortem report of Ngolela Bushesha (P2), sketch map (P3) and the statement of Manogwe Simon(P4) tendered under the provisions of section 34B (1) and (2) (a) of the Evidence Act, Cap.6. The defence had two witnesses, the accused persons themselves who testified as DW1and DW2, for the 1st and 2nd accused persons respectively.

The prosecution opened their case by calling **Lucas Makurumo, PW1** who testified that, during the night of 7th of September, 2016 while at home, received a telephone call that at Kawe village, two people have been murdered. He then rushed to the crime scene where he found two dead bodies, one of a male Simon Kali lying outside and the other of a female Ngolelwa Bushesha who was inside. He thus informed the police who then took the deceased bodies. As to who participated in the brutal killings, PW1 denied to have knowledge.

The second witness was **Mussa Kali, PW2**. He testified that, in July 2016, while in town, was informed through telephone call that their house has been invaded. He went there only to find Kahabi Lushanga, his brother in law, being cut with "pangas". He then took him to hospital. Yet on 7th of September, 2016, while at home was informed of the murder of the two deceased persons. He called one Mapinduzi Maharage and both rushed to the *locus in quo* where they found his lovely brother being hacked with "pangas", so was to his mother.

He further testified that, at the scene of crime, there were five houses one occupied by the deceased's son Manogwe Simon who also died in 2017. Manogwe's house was between the two deceaseds' houses. He also testified to have found a piece of letter at the crime scene fixed behind

a bathe room having the following words “tulikosea mara ya kwanza, sasa tunarudi na tuliowaacha waliona.” He added that, those words reminded him the land dispute between Mwandu Gamaya and Simon Kali of which Mwandu sold a farm to Simon Kali in 2001 for 8 herds of cattle. He thus suspected the 1st accused who by then shifted his residence to Masumbwe.

It was the evidence of **PW3one Jumanne Dalali** on 6th of September, 2016 at 11:00 hours he met Michael Gamaya with his wife Shona Kachungwa at the centre at his sister's house. The next day on 7th of September, 2016, in the morning he took Michael Gamaya with his wife to Kahama town. After dropping them, he then heard a murder incident at Kawe. He however denied to know who did the murder.

Another witness was **PW4. F. 7252 D/Cpl. Hussein** who testified that, on 7th of September, 2016 on the instruction of his boss OC-CID joined a team of detectives to the *locus in quo* where he drew a sketch map which he tendered as exhibit P3. The last prosecution witness was **PW5one Nashon Didas Nyakurungu**, a retired policeman. Him being an investigator, he recorded the caution statement of the 2nd accused person which was however rejected in evidence for being recorded out of time because there is no record at all indicating who and when the accused was arrested.

He also tendered the statement of Manogwe Simon (exhibit. P4.) he recorded because the said witness is dead. In the statement PW5 read in court, the two accused persons were identified by the said Manogwe who peeped through a crack of the door and through the aid of a torch and later solar light, identified persons who murdered the deceased persons. According to the statement, the accused persons were known to him and also identified their voices.

With this testimonies, the prosecution case got closed. Parties left the matter to court to decide whether or not the two accused persons have a case to answer. In terms of the provisions of section 293(2) of the Criminal Procedure Act, Cap. 20, the two accused persons were found to have a case to answer. After being addressed in terms of the provisions of section 293(2) of the CPA, Cap. 20, the accused persons elected to testify themselves on oath as DW1 and DW2 respectively.

DW1 Marco Gamaya therefore testified to have been arrested on 9th of September, 2016 at his residence in Kabanga. He commenced his life there after selling his farm at Kawe village to Simon Kali for 28 cows. As he did not collect the remaining 20 cows in February 2002, the matter was thus referred to Makoye Madoke, a hamlet chairman as the deceased

paid only 8 cows out of 28. He however decided not to pursue the matter on advice from Ward authorities.

It was his further testimony that, on 4th of September, 2016 he was at Kawe for burial ceremony of his daughter then went to his daughter on 6th of September, 2016, then left to his father in-law Kachungwa Manoni where he stayed for two days. On 7th of September 2016 in the company of his wife Elizabeth were taken to Kahama by Jumanne Dalali. He denied to have participated in the murder and that he met Jumanne Maganga in prison.

Next in defence case was **DW2. Jumanne Maganga** who stated that, on 7th of September, 2016 when at home, three armed policemen arrested him. While holding a piece of paper, they told him to have murdered the deceased. He testified also to have been tortured thus decided to confess in the manner instructed. On 17th of September, 2016 at about 23:00 hours he was taken to Kahama police station where by on 18th of September, 2016 he was taken to a certain house for torture. It was on 22nd of September, 2016 when he was taken to court alone and later, Gamaya joined, a person whom he met in prison.

Following closure of both the prosecution and defence case, parties made their final submissions. Ms. Salome Mbuguni, Learned Senior State Attorney Submitted that, five (5) witnesses of the prosecution proved the case beyond reasonable doubt. To prove this, PW1 a leader of the area confirmed that on 7th of September, 2016, there was murder incident and that according to PW2 there was a dispute between the 1st Accused and one Simon Kali. As to PW3, her submission was that, the 1st accused was at the scene of crime and left the following morning after the incident.

As to PW4, her view was that, he prepared a sketch plan and tendered as exhibit P3. With respect to PW5, her submissions was that, he recorded the statement of Manogwe Simon (P4) which was tendered in evidence under section 34B (1)(2)(b) the Evidence Act, Cap. 6. It is in the said statement got where there is direct evidence and convinces this court to trust the said statement.

After that summary of evidence, the learned State Attorney submitted that, this case rests on direct evidence in exhibit P4 where the accused were identified by Manogwe Simon who peeped through the door being aided by torch light, though at that time, he was unable to have proper identification. In her view, the said Manogwe properly identified the accused persons when took cover(hidden somewhere) thus followed them

and they entered in the house of the 2nd accused. He identified them there though solar power light. He also observed the 2nd accused washing his legs. By then, the 1st accused was also in the house of the 2nd Accused.

Ms. Salome Mbuguni also submitted to be aware that, evidence of visual identification, especially at night, is the weakest kind of evidence. In this, he cited the case of Waziri **Aman v. Republic (1980) TLR, 250**. In this case cited, her other views were that according to sketch plan, the distance was not far and also the witness had time to observe them when he followed them from behind. She also thought, as the incident occurred in the village where houses are built by local materials, his evidence that he identified through an opening should be trusted. The two accused persons were also known the said Manogwe. She thought therefore under the premises, benchmarks in **Waziri Aman** (supra) has been met.

Ms. Salome Mbuguni also insisted on evidence of identification by recognition and cited the case of **Charles Nanati V. R, Criminal Appeal No. 286 of 2017** (unreported) specific at page 13 where identification on recognition was held to be more reliable to identification by strangers. She thus trusted the evidence in exhibit P4 as the said Manogwe mentioned names and also remembered faces of the two accused persons. In her opinion, this was the reason why the third person was not identified.

As to evidence of a single witness, the learned Senior State Attorney cited the case of **Hassan Juma Kameriyela and 3 Others v. R (1992) TLR 100** insisting that, the evidence of a single witness is reliable. The court therefore should trust that evidence and find the two accused persons guilty of murder.

On his part, Mr. Festo Lema, learned Advocate submitted that, all five prosecution witnesses arrived at the *locus in quo* after the incident. Therefore, the only evidence is in the statement (P4) tendered by PW5. He however cited the case of **Christian Kaare Rweikiza Bernad V. R (1992) TLR 302**, that it is the duty of the prosecution to prove their case beyond reasonable doubt and that, the accused should be convicted on the strength of the prosecution case. His view was therefore that, the prosecution has not proved if are the two accused persons who murdered the deceased because:

One, PW3 who stated to see the 1st accused on 6/9/2016 and that on 7/9/2016 he picked him to Kahama town has not stated if thereafter he was not at home. Two, sketch plan (P3) tendered by PW4 creates doubts. There is evidence that from where Simon Kale was, that is "A" to "D" where he resided is almost 28.19 meters. There is also evidence that the distance is about 50 paces. The learned counsel thus noted contradictions. To the

contrary, the eye witness talks of a long distance compared to PW4 who drew the sketch plan. He concluded that, as the wife of Manogwe was also present, she would have testified to corroborate what the deceased in exhibit P4 stated that he peeped through cracks of the door and identified the accused persons.

In addition to what Mr. Lema submitted, Mr. Ishengoma observed that, none of all the five witnesses witnessed the murder. The evidence in P4, have certain doubts and is contradictory in the former and additional statement dated 7th of September, 2016 and 19th July, 2017 respectively.

He submitted that, in the former statement the said Manogwe heard someone knocking and then peeped. However, in the additional statement, he said to have been awakened by cries for help from his father. According to the statement, the said Manogwe followed the 1st accused and through window, in the house of Juma Nyelu where there was light, he identified the 1st accused. However, in the additional statement, he said the source of light was solar. He however did not describe that component in the 1st statement.

Citing the case of **Waziri Aman** (supra), the learned counsel submitted that, evidence of visual identification is the weakest type and courts should warn itself that there is mistaken identity before convicting

on such evidence. There is also the issue of time, distance, circumstances/environment during commission of the offence and if the accused were known to the witness.

Mr. Ishengoma on this, thought in exhibit P4, there is no description on brightness of the light from torch and if at all the accused are the one who shorn torches to each other. He also commented that, the distance between the house of the witness and that of Simon Kali is not stated, which is also the case in exhibit P3 by PW4. Under the circumstance, Mr. Ishengoma was doubtful if in exhibit P4 the accused persons were identified. This thus ended final submissions from parties.

After summing up to honorable assessors, they unanimously found the two accused persons guilty of the murder of both deceased persons in the two counts on the basis of exhibit P4. I will comment on their positions later.

From the evidence on record, it is not disputed that Simon Kali and Ngolelwa Bushesha died unnatural deaths as per the postmortem reports exhibits P1 and P2 respectively. It equally on record that, Manogwe Simon, the only eye witness died before testifying thus, his statement was tendered in evidence by PW5 following compliance of the conditions

prescribed in the provisions of section **34B (1) & (2) (a)** of the **Evidence Act, Cap.6.**

Is in the said statement on visual identification contain proper description of the identity of the two Accused persons? For clarity, the said statement is reproduced as hereunder:

TANZANIA POLICE FORCE
CASE FILE NO. KAH/IR/4707/2016(C'1)
WRITE PARTICULARS IN BLOCK CAPITALS

Statement of MANOGWE SIMON Occupation MKULIMA
Race/Tribe/Nationality MSUKUMA Religion MPAGANI Age 21 YRS
Address business (in full)
Address home (in full) KITONGOJI CHA MASEKE- KAWWE IYENZE
Telephone No. House Office/Work
Mobile 0683-663400 Others

DECLARATION UNDER SECTION 34B(2)(C) OF THE EVIDENCE ACT, 1967

This statement (consisting of.....pages each signed by me) is true to the best of my knowledge and belief and I make it knowingly that if is tendered in evidence, I shall be liable to prosecution for perjury if I have willfully stated in it anything which I know to be false or do not believe to be true.

Made at (place) KISEKE KAWWE on the 07 day of 9/2016
Time 05:00 HRS (Signed) SGD: MANOGWE SIMON

MAELEZO KAMILI

Mimi ni mzaliwa wa hapahapa kijijini Kawe. Nimezaliwa na Mzazi wangu aitwaye SIMON S/O KALI, Msukuma , miaka 58, mpagani ila kwa hivi sasa ni marehemu. Mama yangu anaitwa Cecilia d/o Luhanga ambaye kwa hivi sasa yuko Isaka anamuuguza dada yake ambaye alijeruhiwa hapahapa nyumbani tarehe 24/7/2016 saa 20:00 hrs. Mimi naishi hapohapo nyumbani pamoja na mke wangu aitwaye MAGRETH D/O DEUS. Nakumbuka kuwa mnamo tarehe 7/9/2016 muda wasaa 01:00 nikiwa nimelala chumbani kwangu na mke wangu mara **ghafla nilisikia kishindo hapo nyumbani na baada ya kusikia kishindo niliamka na kuanza kuchungulia mlangoni kwa kupitia nyufa za mlango** na hapo niliona watu Zaidi ya wawili wakiwa karibu na mlango wa nyumba ya Baba wakiwa wanavunja mlango. **Watu hao niliwaona kwa sababu ya mwanga wa tochi waliokuwa wanamulika lakini sikutambua mtu yoyote kwa wakati huo.** Walifanikiwa kuvunja mlango huo lakini nilimuona baba anatoka nje na kuanza kukimbia. **Watu hao walimfukuza na kwa bahati mbaya alianguka na hapo ndipo watu hao walianza kuwakata mapanga hadi baba yangu alipokufa na ndipo walipomuacha na kwenda kwenye nyumba ya bibi yangu aitwaye NGOLELWA BUSHESHA** ila pale kijijini wanamwita MARIAM D/O BUSHESHA. Walipofungua huo mlango niliona watu wawili wameingia ndani na baada ya muda nilimsikia bibi analia na baada ya muda niliwaona hao watu wanatoka mle ndani. **Mimi kwa wakati huo nilikuwa nawachungulia kwa makini sana ila sikuwa** na silaha yoyote ambayo ingelinisaidia kupambana nao. Baada ya kumaliza kutenda tukio hilo, niliwaona watu watatu wanaongozana kutoka eneo la tukio ambapo mimi niliwafuatia hadi nyumbani kwa JUMANNE S/O MAGANGA @MPIKACHAI na walipofika pale nikiwa nawafuatia kwa kunyemelea, nilimwona JUMA S/O MAGANGA @MPIKACHAI akitoa beseni ndani ya nyumba yake akipeleka bafuni akiwa na maji yake na kuanza kuoga. **Hapo ndipo nilipomtambua huyo JUMANNE S/O MAGANGA na wale watu wengine wawili nilipokaribia walipo niliwasikia sauti zao ambapo nilizitambua kuwa ni sauti ya JUMA S/O NYERI na wote**

wakaingia hapo na kila mmoja alikwenda kuingia katika nyumba yake na kulala. Mimi sijakomea hapo, nilifuatilia MARCO S/O GAMAYA katika nyumba alimolala na humo ndani kulikuwa na mwanga wa kutosha ambapo mimi nilichungulia ndani kwa kupitia nyufa za dirishani na kumwona MARCO S/O GAMAYA kwa vizuri kabisa na kumtambua. Baada ya kumtambua kuwa ni yeye ndipo nikajua kuwa kilichomuua Baba ni mzozo wa eneo kati yake na MARCO S/O GAMAYA amabaye alikuwa anaishi katika maeneo ya Mkweni –Masumbwe –GEITA . Na leo baada ya kuwaeleza askari walipo hao wauaji, tumekwenda wote katika miji yao lakini hatukuwakuta . Haya ndiyo maelezo yangu nimeyasoma na yako sahihi.

SGD:MANOGWE S/O SIMON

R/O D.5581 D/SGT NASHON

UTHIBITISHO

Mimi D.5581 D/Sgt. Nashoni nathibisha kuwa nimeandika maelezo ya MANOGWE S/O SIMON kwa usahihi na kwa uaminifu.

R/O D.5581 D/SGT NASHON (emphasis supplied)

After almost nine months, PW5 on 19th of July 2017, recorded additional statement of the said Manogwe, this time very detailed as hereunder:

NYONGEZA YA MAELEZO YA MANOGWE SIMON

Nakumbuka kuwa mnamo tarehe 07.9.2016 muda wa saa 01:00 nikiwa nimelala mara nikasikia kelele za kuomba msaada zilizokuwa zinapigwa kutoka nyumba aliyokuwa analala baba na aliyekua anapiga kelele hizo ni baba yangu mzazi aitwaye SIMON S/O KALI. Mimi pamoja na familia yangu tunaishi hapohapo nyumbani kwa baba yangu. Mimi niliposikia kelele hizo nilijaribu kufungua mlango ili niende nikatoe msaada na kabla ya kufungua huo mlango nikaona mwanga, mkubwa wa tochi hapo uani nikajua hao ni majambazi. Mimi nikarudi ndani na kuanza kuchungulia

kwenye nyufa za mlango ambapo niliona mtu anafungua mlango ambaye nilidhania ni baba yangu, kweli alikuwa ni baba yangu ambapo alifungua mlango na kutoka na kuanza kukimbia kama hatua hamsini hivi(50) hivi alianguka chini karibu na nyumba ya Bibi aitwaye NGOLELWA D/O BUSHESHE na hapo ndipo walipoanza kumkatakata na mapanga na **baadaye niliwaona wanakuja kwenye nyumba yangu na hapo mimi na mke wangu tulitoka nje na kupitia dirishani na kukimbilia vichakani.** Mimi nilirudi polepole kwa kunyatia ambapo niliona hao watu ambao idadi yao ilikuwa kama watu watatu wakitoka nje ya nyumba ya bibi na kuanza kuondoka. Umbali uliokuwepo kati ya nyumba yangu na nyumba ya baba ni kama hatua thelathini hivi pamoja na kuwaona hao watu majambazi sikuweza kuwatambua. Wakati hao majambazi wanatoka pale nyumbani baada ya kutekeleza mauaji mimi niliwafuatilia **nikiwa kama umbali wa mita mia hamsini hivi ambapo niliwaona hao majambazi wnaingia nyumbani kwa JUMANNE MAGANGA @MPIKACHAI na Jumanne Maganga aliingia ndani na kuchukua beseni na kwenda kuoga bafuni.** Watu hao waliingia wote na walipomaliza kuoga JUMANNE MAGANGA alirudi ndani na wale wengine waliondoka na kwenda kwa JUMA NYERU. JUMANNE MAGANGA nilimwona na nilimtambua kwa sauti kwani ni jirani yangu na sauti yake huwa naifahamu kwa muda mrefu na pale nyumbani kwa JUMANNE MAGANGA mwanaume ni yeye tu. Vilevile umbo lake la mwili na urefu ninafahamu hata kama kuna giza. Kikwazo kilichokuwepo wakati nawafuatilia niliogopa kupiga kelele kwa sababu wangelisikia kelele wangenifuatilia au wangelinikimbiza na kunukatakata mapanga. Wale watu wawili waliokwenda kwa JUMA NYERU **nilipowafuatilia niliona wanaingia kwenye nyumba ya vijana wa Mzee Nyeru(JUMA NYERU) na hapo nikajua ni mzee JUMA NYERU** nilipochungulia ndani ya nyumba walimoingia hao watu, niliona hao watu wawili kwani palikuwa na mwanga wataa za solar ambapo nilimtambua **MARCO GAMAYA vizuri kwa sababu yeye huwa haishi hapo kijijini kwa muda mrefu lakini siku hiyo kabla ya tukio nilimwona humo kijijini akiwa anatembea na**

nguo zake alizokuwa amevaa kabla wakati namwona ni zilezile alizokuwa amevaa wakati namwona humo ndani shati likuwa ni rangi nyeusi na vilevile suluali ilikuwa ni rangi hiyohiyo. Yule wa tatu nilimwona umbile lake la urefu ambalo ni tofauti kidogo na umbile la JUMA NYERU kwani JUMA NYERU ni mrefu zaidi ya futi saba na huyo niliyemwona urefu wake analinganalingana na MARCO GAMAYA. **Baada ya kuwa nimekamilisha zoezi hilo la ufuatiliaji nilirudi kwenye tukio ambapo viongozi wa kijiji walikuwa wamefika na kuanza kuniuliza kama najua lolote kuhusu tukio hilo. Vile mimi nilishindwa kuwaeleza kwa sababu waliniuliza mbele la kundi la watu.**Lakini wakati narudi kwenye tukio JUMA NYERU nilimkuta hapo nyumbani. Baadaye askari polisi walifika kama saa 9:00 hivi na waliponiuliza ndipo nilipowaeleza kuhusu ufuatiliaji wangu na ndipo tulipoanza ufuatiliaji na polisi. Tulifanikiwa kumkamata JUMANNE MAGANGA na tulipokwenda kwa JUMA NYERU tulimkuta mtoto wake mkubwa aitwaye MAKOYE JUMA ambaye ndiye anakaa katika nyumba ile niliyowaona wale watu wanaingia siku ile ya tukio ambapo tuliambiwa kuwa wameondoka na MARCO GAMAYA@MWANDU GAMAYA na sehemu aliyokwenda hakunielewa. Askari hao baada ya kuwakosa hao watu walimkamata JUMA NYERU na kuondoka naye. **Mimi kwa vile nilikuwa najua kijiji amnachoishi MARCO GAMAYA, niliwapeleka askari na tulipofika hatukumkuta** ila askari walifanya upelelezi wao na kubaini kwa tangia atoke kijijini kwetu kutenda kosa hajarudi pale kijijini/nyumbani kwake ila (anaishi) amejificha kwa hawala yake kijiji cha NKWENI. Askari walifanikiwa kumkamata na tulikuja naye hadi kituoni. Hawa watuhumiwa wote waliokamatwa mimi ninawafahamu kabla ya tukio. Haya ndiyo maelezo yangu nimesoma maelezo yangu yako sahihi.

SGD:MANOGWE

UTHIBITISHO

Mimi D.5581 D/Sgt. Nashoni nathibisha kuwa nimeandika maelezo ya MANOGWE S/O SIMON kwa usahihi na kwa uaminifu.

From the statements, both the former and the additional one, in the first place, I hesitate to call the additional statement recorded after almost nine (9) months an additional one in real terms. In fact, it was another statement because instead of adding additional information as it was expected of it, it did create new set of facts. I will deliberate on this later.

In law, as the said Manogwe Simon was the only eye witness whose oral evidence therefore is direct in terms of section **62(1) (a)** of the **Evidence Act, Cap.6**, and as there is evidence that the said witness is dead, a statement made by that witness may be used in evidence subject to the provisions of section **34B** of **Cap. 6** as hereunder:

34B (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written statement may only be admissible under this section—

(a) where its maker is not called as a witness, **if he is dead** or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;*

(f) *if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.*

(3) N/A

(4) *So much of any statement as is admitted in evidence by virtue of this section shall, unless the court directs otherwise, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.*

Is there any description in the statement of Manogwe as quoted above regarding aiders of identification and the identity of the two accused persons? In this, I will be comparing the contents of both the former and additional statements. As to aiders of identification, **one**, in the statement, exhibit P4, the said Manogwe stated that the murders had a torch. He did

not describe the intensity of that torch light the reason why he concluded to have not identified them. In the additional statement, he said “niliona mwanga mkubwa wa tochi” and yet he concluded that, he did not identify them. This therefore concludes that, through the said torch light while in his premises, the said Manogwe(P4) never identified the Accused persons.

It appears the identity of the Accused, according to P4, came when the said Manogwe pursued the assailants from behind after they had completed their mission. In this, **two**, he did not identify them till when they entered in the house of the 2nd Accused. To the conclusion of his statement, he never mentioned any aiders towards identification. In the additional statement, it is stated in exhibit P4 that, there was solar light inside the house of the 2nd Accused person. It is even not known how did this witness managed to observe all the three assailants each retiring to his house for sleeping.

Three, in both, the said Manogwe when peeped at his door through cracks, he did not manage to identify the assailants. In the 2nd move through window cracks, he peeped and managed to identify them. Much as this is only in the additional statement, yet there is no description of the width of the crack and the intensity of the light inside the house of the 2nd Accused that aided him to see through.

Four, in P4, in the former statement, it is not stated how the said Manogwe got out of his house when following the assailants from behind. In the additional statement, the said Manogwe stated to have escaped through the window when the assailants retreated back to his house. **Five**, in the additional statement, it appears Manogwe was not sure as to aiders of identification by his version “umbo lake la mwili na ni mrefu na ninamfahamu hata kama kuna giza” This therefore contradicts his versions regarding torch and solar lights.

Six, in the additional statement, there are descriptions regarding height, color, stature, clothes, distance, light in the house of the 2nd accused, source of light; facts which are devoid in the former statement. This is the reason I said earlier that there was a new statement recorded instead of naming it an addition statement. In fact, an additional statement as quoted above is bigger than the original statement.

Seven, the said Manogwe did not name those assailants to anybody waiting for the police. I do not see any justification for so doing because reasons that “Mimi nilishindwa kuwaeleza kwa sababu waliniuliza kwenye kundi la watu” is not sounding at all. He said to have left each of them retiring for sleep in their respective residences. What were the fears or worries for? Actually, this witness also stated to have not raised an alarm

because he was worrying. Again, this may not be a justification because, as the bandits had disappeared, then there was no any fear to raise an alarm. It takes that, the said Manogwe was not sure as to whom he identified. In this, it was stated in **Marwa Wangiti Mwita and Another vs. R [2002] TLR 39** that:

“The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so, should put a prudent court to enquiry”

As warned in **Waziri Amani v. R [1980] TLR 250** regarding visual identification that: -

“Evidence of visual identification is of the 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 satisfied that the evidence is absolutely watertight”

For the variance between the former and additional statement regarding description of the two accused persons, it is my considered view that, the possibility of mistaken identity has not been eliminated in the

statement of Manogwe bearing in mind that, the said witness, due to his death may not be available for cross examination. Of course, going in the two statements, as enumerated in the seven points above, in it there is inconsistencies and contradictions of Manogwe regarding identity of the accused. My duty in this contradictions and inconsistencies got stated in the case of **Mohamed Said Matula v Republic(1995) TLR 3**that:

“Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter.”

I think, there is contradictions regarding the source of light in the two statements, the former is on torch whereas the additional is on solar light; there is also the question of the Witness escaping through the window in the additional statements while in the former, it is silent. The issue of distance stated in the additional statement is not corroborated by PW4 who prepared a sketch map (P3). Descriptions regarding height, color, stature, clothes, described in the additional statement are devoid in the former statement. As the case rests purely on evidence of visual identification, the

above contradictions and inconsistencies have gone to the root of the matter. In that therefore the prosecution has not proved their case beyond reasonable doubt.

I should add one this from the exhibit P4 particularly on the credence attached to that exhibit. Whether in the original or additional statement, there are unanswered questions which goes to the credence of exhibit P4. One would ask, how did Manogwe managed to identify the two accused chasing Simon Kali from his house to the house of Ngolelwa Bushesha through peeping through the crack of the door?; How did he managed to follow the two accused from the bush to the house of the 2nd accused? Is the bush near to the said house? Why was he not ready to reveal the persons he identified to the village leaders? How courageous was he pursuing murderers alone bearing in mind that he was not armed? What prevented him from raising an alarm? These unanswered questions led me to believe that in exhibit P4 there is nothing like evidence of visual identification.

The three honorable assessors unanimously opined that the two accused persons maliciously terminated the life of the two deceased persons. However, in terms of the provisions of section 298(2) of the Criminal Procedure, Cap.20, I am not bound by their opinion. As stated

above, there is nothing in exhibit P4 such that the two Accused persons were properly identified to have murdered the two deceased persons. This, as said, is the only evidence relied by the prosecutions.

Under the premises, I find the two accused persons not guilty of the offence of murder as they stand jointly and together charged and they are accordingly acquitted. I hereby order their release from custody, unless, for lawful causes, they are held thereat. It is so ordered.


Gerson J. Mdemu
JUDGE
6/5/2021

DATED at KAHAMA this 6th day of May, 2021




Gerson J. Mdemu
JUDGE
6/5/2021