IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA DISTRICT REGISTRY)

AT KASULU

CRIMINAL SESSION CASE NO. 9 OF 2021

REPUBLIC

VERSUS

NDAISENGA VICENT

JUDGEMENT

6/9/2021 & 27/9/2021

L.M. MLACHA, J.

The accused NDAISENGA VICENT is charged of murder contrary to section 196 and 197 of the Penal Code, Cap 16, R.E. 2019. It was alleged that he murdered ABAS MANANGA on 2/4/2020 at Nyarugusu Village, Kasulu District, Kigoma Region. When the charges were read and explained to him in Kirundi language he pleaded not guilty. With the aid of the interpreter, Mr. Kasama Katigili, who interpreted Swahili to Kirundi and vice versa, the court could conduct the case.

The evidence adduced by the prosecution can be put as follows; The deceased, Abasi Mananga was a resident of Nyarugusu Village, Kasulu District. He and some other village mets had a second residence in the

farmlands in an area called Mpazi. Now while there in the evening of 2/4/2020, pealing maize with his children (PW2 Moses Jonas and PW3 Sakibu Japhet) the accused, NDAISENGA VICENT came with 2 children. Both PW2 and PW3 said that he needed food for his kids. He also needed a place to sleep. They knew him for he had a farm adjacent to their farm and was their regular visitor. They knew him very well. The deceased agreed. He prepared food and all had dinner together that evening. They then entered to sleep. PW2 said that sometimes later, during the night, he heard people beating the deceased. On looking, he saw that it was the accused who was beating him. He was beating him outside using a stick. There was a bright moonlight. He run out and hide himself at the beans. He was at a distance of about 5 and 6 meters from the accused. There was nothing in between to block him so he could see the accused beating the deceased using the stick. While there, he saw the accused taking the deceased inside the house. He then put it on fire. He left to Mr. Kachira. The accused asked him to tell Mr. Kachira that he had been killed by a bandit. But when he went there, he told Mr. Kachira that he had been killed by the accused. He also returned with people to the area on the other day. He told them that he had been killed by the accused.

PW2 stressed that the accused took sometime to beat the deceased using the stick. He could identify the stick (ID1) in court.

PW3 too run outside. He said that he saw the accused beating him on the head and ribs. He saw the beatings from the maize where he was hiding. He saw him taking the deceased inside the house. He saw him putting it on fire. PW3 did not move with PW2 to Mr. Kachira. He remained behind. He slept in the maize till the next day. He rose up early in the morning and went to see Mr. Bosko. He told him that his father had been killed by Ndaisenga, the accused. They moved to the scene. He met other people. He also told them that he had been killed by the accused. PW3 could identify the stick, ID1. Both PW2 and PW3 could identify the accused at the dock.

It was the evidence of PW1 Fadhili Fanuel that on 3/4/2020 during morning hours, while at home, he saw Kachira Kazehe and Issa coming to him. They asked him to accompany them to the house of a neighbor which was burning. They met someone on the way who adviced them to rush as the boy had a plan to run away. He told them that his name was Ndaisenga. They rushed. They met Mr. Ndaisenga on the way at the farm of Mr. Rupia. They put him under arrest and moved to the burning house. They saw a dead body inside the burnt hut. They identified him as Abasi Mananga. He was burnt but his head had blood. The beans outside the house had blood as well. A boy of the deceased who was there told them that it was the accused who killed him. They took him to the village office.

They reported the matter to the police. The police came, drew a sketch map and adviced them to take the dead body to a place which was accessible by road. They did so. They slept with it till the other day when the police came with a doctor for medical examination. He could identify the stick, ID1. PW4 Dr NEBO EDSON MWAMAKAMBA told the court that he examined the body of the deceased on 4/4/2020 and filed the Postmortem Examination Report, exhibit P1. He had the opinion that death was caused by brain damage caused by a blunt object and burning of the whole body. He said that the hands were burnt completely; the bones of the hands were burnt. The skull had signs of being broken. The front area of the head and the near side had fractures. The mouth was burnt completely leaving the teeth open. The male private parts were burnt completely leaving a small black thing.

PW5 G951 PC Godlove received the stick from PW6 E905 D/CPL Malaki at the exhibit room, Kasulu Police Station. He gave it number KAS/EXH/REG/73 of 2020. That was in respect of HER/IR.11/2020. He tendered it and it was received as exhibit P2.

It is PW6 who picked the stick at the scene of crime on 3/4/2020. He kept it at Police Heruushingo until the day when he brought it to PW5.

It was the evidence of PW6 that he arrived at the scene of crime on 3/4/2020. They saw a big stick which had blood. The deceased was inside

the burnt hut. The head had clot blood. He talked to PW1 and Kazira Kazehe who were there. They told him that PW2 and PW3 had witnessed the crime. He took their statements. They told him that he had been beaten by the accused using a stick and put to the hut which he set on fire. He inspected the scene and drew a sketch map. He tendered the sketch map (exhibit P3). He ordered the body to be shifted to a place where can be accessed easily by road. They did so. PW4 examined it at this point.

That marked the end of the prosecution case.

The accused was the only defence witness. He had no witness to call. He told the court that he is a Burundian. He entered Tanzania to do agricultural activities. He came to Tanzania with his wife and three children to get land for agricultural activities. They arrived at Mpazi area. They started to work for someone who also gave them food. He knew Mr. Kachira and Bizimana Ruboyi. He lived near them. He denied to know the boys (PW2 and PW3) whom he saw in court.

He went on to say that he slept with his two kids on 2/4/2020. He saw people coming to him early in the following morning who put him under arrest. They had torches. These are Kachira and Fadhili. They put him under arrest. They locked him up in a certain house. He was removed later and sent to Makere Police lock up. He stayed there for many days

before being sent to court. He denied the charges.

The assessors were taken through the above evidence and the applicable law. That done, they had the following to say; The first assessor believed prosecution witnesses and had the view that the Republic have proved their case beyond reasonable doubts. She believed the evidence that the children of the deceased knew the accused very well and witnessed what happened that night properly. She added that what was said by the kids was supported by the doctor who said that the deceased had been burnt. She found that the accused had bad intensions when he told the child that he should not tell Mr. Kachira that he was the one who murdered the deceased adding that, children usually speak the truth (for he told Kachira despite this warning). She believed the evidence that the accused beat the deceased with a blunt object on the head, pulled him to the hut and set it on fire. Based on this evidence, she formed the opinion that the accused intended to kill the deceased, he acted very barbaric (unyama). She found him guilty of murder.

The second assessor had the opinion that the prosecution failed to discharge its burden of proof. He pointed out six area of doubts; (i) He doubted the credibility of PW2 because of differences of names. Giving details, he said that, PW2 said that the deceased was his father but his name, Mosses Jonas did not reflect the name of the deceased, Abas

Mananga. He expected him to be called Mosses Abas. He had no doubt with PW3 because he said that the deceased was just an uncle. (ii) He doubted the evidence of PW2 and PW3 for failure to raise an alarm. He said that, PW2 (aged 10) and PW3 (aged 13) were old enough to raise an alarm but could not do so. He found them as being big enough to do so. (iii)He questioned the reason as to why the children of the accused (2) could not be brought as prosecution witnesses because they were present and witnessed what happened. (iv) He doubted the evidence of PW1 who said that the stick was found besides the body of the deceased which was burnt but it did not show any signs of being burnt, (v) He did not believe the words of PW2 that he moved with the accused that night to Mr. Kachira. He said that it could not be possible for the accused to kill the deceased and go to Mr. Kachira and (vi) He doubted the evidence of PW1 in respect of the sketch map. That PW1 said that the one who led PW6 to draw the map was Mzee Michael but PW6 said that he was led by PW1. He saw this as a contradiction moving to discredit PW1. In totality, he found the accused not guilty of murder.

I had time to examine the evidence carefully. I have also considered the views of the assessors. The prosecution case is based on the evidence of two eye witnesses (PW2 and PW3), the stick which was used to beat the deceased (exhibit P2), the evidence of people who visited the scene of

crime on the next day and saw the body of the deceased in the burnt hut and who talked to PW2 and PW2 at the scene of crime, and the Report of Postmortem Examination, exhibit P1. The Postmortem Report which was admitted without objection and the evidence of PW4, the Doctor, show that the deceased had two fractures on the head, one on the front and the other on the near side. The whole body was burned. PW1 spoke of blood in the head supporting the evidence of PW4 that he was beaten by a heavy object on the head before he was finally subjected to the fire. PW4 said that the whole body and particularly the two hands were burnt seriously. One of the hands was burnt completely (with bones) while the other had its palm burnt completely. His male organs were burnt completely leaving a small black thing. The mouth was burnt completely leaving the teeth outside. The accused did not dispute that Abas Mananga is dead or the manner in which he was killed.

Looking at the evidence of the doctor and other people who saw the body of the deceased, I was left with no doubt that the one who inflicted the head injuries and burnt the deceased had intended to kill him. He had full malice and as pointed out by one of the assessors, those who killed him acted very barbaric. There was therefore good evidence to show that the deceased was murdered. The question is who did it? The prosecution has paraded six witnesses and tendered three exhibits to prove that the one

who did it is the accused and nobody else. The accused denied the charges and have brought evidence showing that he is not the one who did it.

There is evidence from PW2 and PW3 which show that the accused was seen beating the deceased with the stick. He beat him heavily. He beat him on the head and the ribs. He then pulled him to the hut which he set on fire. By the time all the children who were in the house had run outside the house. PW2 and PW3 who were present said that it was during the night but could see the accused through a bright moon light. The first question to be addressed now is whether PW2 and PW3 could identify the accused properly. There must be evidence showing that the accused was property identified.

The leading case in identification is the case of **Waziri Amani v. Republic** [1980] TLR 250. The court said thus;

> *"... the following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc.), whether the witness knew or has seen the accused before or not."*

In **Magara Shuka v. Republic**, CAT Criminal Appeal No. 37 of 2003, the Court of Appeal had this to say;

> "In our settled mind, we believe that it is not sufficient to make **bare assertions that there was light at the scene of crime**. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from wick light from wick lamp cannot be compared with light from pressure lamp or fluorescent tube. Hence **the overriding need to give in sufficient details the intensity of the light and the size of the area illuminated.**" (Emphasis added)

These decisions were followed by the Court of Appeal in **Frank Maganga v. The Republic,** Criminal Appeal No. 93 of 2018.

In **Magari Juma Dimbwe v. The Republic**, CAT Criminal Appeal No. 352 of 2014, the Court of Appeal had a chance to address moonlight as a source of light in identification cases. The court followed its decision in **Hashimu Hamisi Totoro Zungu Pablo & Two others v. The Republic**, CAT Criminal Appeal No. 170 of 2004 where it was held thus;

> "Admittedly, **moonlight is a weak source of light and is not a strong light** as sunshine or powerful electric light. However, **under certain**

> **circumstances, such as proximity and familiarity to the assailant, moonlight can enable the victim to sufficiently recognize his or her assailant."** (Emphasis added)

In **Julius Charles and 2 others v. The Republic**, CAT Criminal Appeal Np. 167 of 2017, the Court of Appeal addressed the ability to name the suspect at the earliest opportunity as a credit to the witness. The court followed its decision in **Marwa Wangiti Mwita and another v. Republic** [2002] TLR 39 where it was held thus;

> *"**The ability of witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability,** in the same way as delay or complete failure to do so should put a prudent court to inquiry." (Emphasis added)*

Coming to our case, there is evidence from PW2 and PW3 who said that they knew the accused prior to the date of crime. They said that he was their neigbour in the adjacent farm. He used to visit them regularly. He came in the evening and found them pealing maize. He presented his request for food and a place to sleep. It was allowed. Food (ugali) was prepared. They shared the meal together. They all said that they stayed with him that day for many hours. They ate the food together before they went to sleep. They woke up after hearing the beatings (and possible cries from the deceased). They run outside. They witnessed the beatings. They

witnessed the deceased being pulled to the house. They witnessed it being set on fire. They then saw the accused moving away. PW2 said he moved with him.

The distance between the witnesses and the accused was not long. PW2 defined it as being 5 to 6 meters. They all said that there was nothing in between to block them. They could see what was going on clearly through the bright moonlight.

We are told that moonlight is a weak source of light. It cannot be compared with sunlight or electric light. But we are also told that under certain circumstances, such as *proximity and familiarity*, moonlight can enable the victim to sufficiently recognize the assailant.

In this case there were both proximity and familiarity. The boys were close to the accused and were very familiar to him. He used to visit them regularly. And he was present that day with them for many hours. They were also not very far from the place where the crime was committed. The distance was short, 5 to 6 meters. And the fact that the house was set on fire soon thereafter, must have added a second source of light (the light from the burning house) to them making it easier to identify him. The circumstances therefore, enabled a good identification of the accused.

One of the assessors could not doubt the evidence. She had the views that the accused was properly identified committing the crime and thus guilty of murder. The other expressed serious doubts to some areas of the prosecution case as shown above. Based on those doubts, he found the accused not guilty.

I had time to give a thought to the areas of doubts pointed out by the honourable assessor. I will address them one by one. On the difference of names, I could not get difficult on my side because the issue was not whether he was his child or not. The issue was whether he saw the accused committing the crime or not. Whether he was his child or not did not matter, but what he saw and said. Further, most people have more than one name. I think this was an area for clarification during "questions for clarifications from assessors" rather than an area of doubt. It is also likely that the deceased was called Jonas as well or the boy was born from another brother of the deceased. Things could be different if PW2 had been asked and denied the name of the deceased for what was at issue was the name of the deceased and not his. On the question as to why there was no alarms, I could not get difficult on my side to know why PW2 and PW3 could not raise the alarm. I think the reason was that, the boys were worried too much. Waking up from the sleep and seeing your father being beaten heavily and burnt may cause a lot of confusions even to

adult people. Further, the area being a farmland with houses/huts scattered far away did not favour anybody to call for help by way of alarms for it could be useless. It was a moment to run and hide rather than a moment to raise alams.

On the children of the accused, I could not get difficult in knowing why the prosecution could not call them as their witnesses. Much as we are not told of their age to know if they were capable of giving evidence, but I think it has never been a practice to call them as prosecution witnesses for obvious reasons; they may act in defence of the accused and damage the prosecution case. As the prosecution is not bound to call each and everybody as a witness, I see nothing wrong with what had happened. Further, I think that it was a question of choice and if the prosecution have opted for PW2 and PW3, the court has no room for interference. But the accused had an equal chance to call them as his witnesses. The fact that he could not call them shows that they were not material witnesses in his defence.

The other areas of doubts did not touch the children. I will leave them for discussion later. Meanwhile, let me move to examine weight of evidence of a *child of tender age* and the weight of *unsworn evidence*. Section 127 (1), (2), (3) and (4) of the Evidence Act is relevant. It provides as under;

*"1. **Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by** reason of **tender age, extreme old age, disease** (whether of body mind) or **any other similar cause.***

*2. **A child of tender age may give evidence without taking an oath or making an affirmation** but shall, before giving evidence, **promise to tell me truth to the court and not to tell any lies.***

*3. Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (6), **the evidence of a child of tender age received under subsection (2) may be acted upon by the court as material evidence** corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated.*

*4. For the purposes of subsections (2) and (3), the expression **"child of tender age" means a child whose apparent age is not more that fourteen years."*** (Emphasis added)

It is clear from the above provisions that, all persons (adults and children inclusive) are competent witnesses unless the court exclude them by

reason of tender *age, extreme old age, disease (of body or mind) or other similar cause.* A child of tender age (under 14 years) may give evidence with or without an oath or affirmation. He may give evidence without oath or affirmation, but shall, before giving the evidence, *promise to tell the* court *the truth and not to tell any lies.*

Children like adults, are competent witness. They can take oath if they know the meaning of an oath and give a sworn testimony. They can give an unsworn testimony, if they don't know the meaning of an oath. But in both situations, their evidence is good and may be acted upon by the court. Corroboration is not necessary to support unsworn evidence of a child of tender age provided that there is full compliance to section 127 (2) of the Evidence Act (See **Hassan Kamunyu v. The Republic**, CAT Criminal Appeal No. 227 of 2016 page 22).

It follows that, the evidence of PW2 and PW3 which was given without oath is good evidence and a conviction can be based on it even without corroboration.

But the evidence of PW2 and PW3 was not without corroboration. I will give a few examples. The two children said that the deceased was beaten on the head, pulled into the house and burnt. This is exactly what was seen by PW1, PW4 and PW6 when they visited the scene of crime. PW1 and PW6 found him in the burnt hut. His whole body was burnt. His head

had blood indicating that it had been beaten by a blunt object. PW4 saw the burnt body. He said that the skull was fractured indicating that it had been beaten by a blunt object. This was also corroborated by the stick which had blood. The evidence of the children was also corroborated by PW1 and PW6 who said that they named the accused as the culprit early that morning. Early naming of the suspect gives credit to the witness as said above.

I will now return to the remaining areas of doubts. I start with the stick. The honorable assessor expressed doubts saying that PW6 said it was found inside the house but it did not show any signs of being burnt. I have revisited the relevant part of the record and saw the following;

> *"We got the body of the person who was dead. It was inside a "Kibande" (hut). Beside the body was blood. There was a big stick which had blood. The hut appeared to have been burnt."*

PW6 did not say that the stick was inside. He said that there was a big stick which had blood. It was actually outside at the place where he was beaten and I think that is the reason why it was found with blood. PW2 and PW3 were very clear that he was beaten outside using a stick and pulled to the hut where he was burnt. They did not say that the stick was also taken inside. With respect to the views of the honourable assessor, I could not see doubt in this area on my side.

The other area of doubt was that it could not be possible for the accused to kill and go to Kachira. The assessor had the view that the accused could go to some other place not to Mr. Kachira. The accused himself said that he was at home. I was asking myself which was the safe place for a person who had killed someone to go. Going home or to a friend. I think going to a friend was safer! People who have committed capital offences get confused soon or later. They can go anywhere. Some of them remain standing with the deceased, not knowing where to go or what to do. But even when we take that it was wrong so to say, I don't think that in whatever situation, that aspect could discredit the evidence of PW2 who appeared very credible.

Lastly, who led PW6 to draw the sketch map? PW6 is recorded saying "I drew the sketch map in the company of Fadhili Fanuel". Mr. Fadhili (PW1) is recorded saying "They drew the sketch map and required us to come". I could not see a place written Mzee Michael in the record. But in whatever situations, I find the defect as minor. It has no effect of discrediting the evidence of PW6 who appeared credible and reliable.

That said, all things measured carefully, I have the view that there is good evidence showing that the accused beat Mr. Abasa Mananga on the head with the stick and pulled him to the house which he set on fire. He was burnt and killed. I dismiss the defence of the accused that he is not the

one who killed him as baseless. I dismiss his defence that he does not know PW2 and PW3 whom he had seen in court. The circumstances show that the deceased was his neighbor and both PW2 and PW3 knew him very well. The evidence show that he killed him with full malice. I find that the prosecution has proved the case beyond reasonable doubts.

I find you the said NDAISENGA VICENT guilty of Murder contrary 196 and 197 of the Penal Code, Cap 16 R.E. 2019 as charged and convict you accordingly.

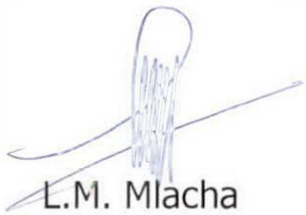
L.M. Mlacha

JUDGE

27/9/2021

SENTENCE

There is only one sentence for Murder which is death by hanging. Personally, I could prefer another sentence but my hands are tied. I sentence you the said NDAISENGA VICENT to death by hanging.



L.M. Mlacha

JUDGE

27/9/2021

Court: Judgment read in open court in the presence of the accused, Mrs. Happiness Mayunga and Miss Antia Julius State Attorneys for the Republic and Mr. Eliutha Kivyiro, Advocate for accused respectively.

Right of appeal Explained.

L.M. Mlacha

JUDGE

27/9/2021