

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MASASI

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 40 OF 2019

THE REPUBLIC

VERSUS

GERVAS GERVAS COSMAS @ CHAMBI.....1ST ACCUSED

OSCAR PETER MKUTWA @ JAJI.....2ND ACCUSED

SILAJI ISMAIL MBUYU.....3RD ACCUSED

MUSSA HASHIMU NANGUKA.....4TH ACCUSED

TAISI S/O HAMIDU TAISI.....5TH ACCUSED

CHARLES ABDELEHEMAN CHINYANG'ANYA.....6TH ACCUSED

JUDGMENT

10th & 23rd September, 2021

DYANSOBERA, J.:

The six accused persons namely, Gervas s/o Gervas Cosmas @ Chambi, Oscar s/o Peter Mkutwa @ Jaji, Silaji s/o Ismail Mbuyu, Mussa s/o

Hashimu Nanguka, Taisi s/o Hamidu Taisi and Charles s/o Abdelehman Chinyang'anya, hereinafter referred to as the 1st, 2nd, 3rd, 4th, 5th and 6th accused, in that order, are alleged to have murdered Halfan s/o Said Ulaya on 14th day of August, 2017 at Mtandi area within Masasi District in Mtwara Region; an offence which is in contravention of Section 196 of the Penal Code [Cap. 16 R.E.2019]. The accused persons pleaded *non culpabilis*.

Since the burden of proof lies on the prosecution to prove beyond reasonable doubt not only that the offence was committed but also to link the accused with the offence charged, the prosecution, in a bid to discharge this burden, tendered in court two documentary exhibits, namely, an identification parade register (exhibit P. 1) and a report on postmortem examination (exhibit P. 2). Besides, they called eight (8) witnesses, namely, Blandina Mrope (PW 1), Yusuph Chibwana Choyo (PW 2), F. 4398 D/Cpl Amandus (PW 3), E. 8317 Cpl Humphrey (PW 4), G. 603 D/Sgt Robert Kelvin Ngonyani (PW 5), Insp. Edwin John (PW 6), G. 1963 D/Cpl Hamdun (PW 7) and Dr. Paul Makoye Ng'walalu (PW 8).

The Republic was initially represented by Ms Caroline Matemu assisted by Mr. Meshack Lyabonga, both learned State Attorneys but later Mr. Wilbroad Ndunguru, learned Senior State Attorney assisted by Ms Rabia Ramadhan, learned State Attorney, took over. The accused persons,

throughout, enjoyed the legal services of Mr. Rainery Songea, learned Advocate.

The case for the prosecution established that PW 1 is a resident of Mtandi Ward in Masasi District. She was married to the deceased. She recalled that on 14.8.2017, at about 2000 hrs, she was at home while the deceased had escorted PW 2 who had visited him and they had little conversation before leaving. PW 1 who was inside the house heard scuffle outside. When she went outside to see what the matter was, she met the tenants and other two people who identified themselves as *askari*. The so called *askari* told her that they were in need of her husband and money. They took her inside the house and started searching the house. PW 1 and her fellows were placed under custody. With threats, PW 1 and her other fellows were asked to reveal where her (PW 1's) husband was. They also insisted to be given the money. Few minutes later, PW 1 heard a voice of her husband. The invaders then went outside hence paving her a way to escape and ask for assistance from her neighbours. As to how PW 1 managed to identify the invaders, she said that though the electricity was off, there was solar light emitting bright light. PW 1 was also emphatic that she stayed with them for a long time, they were conversing and were looking at each other and were very close. She said that she could recall

those two people and that they are in court. When invited to touch the two culprits she claimed to have seen and identified at the crime scene, PW 1 touched the 5th accused.

With regard to describing them, PW 1 told this court that one wore normal clothes, a pair of trousers and a jacket while the other wore security guard clothes. She asserted that the rooms were a bit large.

During cross-examination, Mr. Songea successfully asked the court to invoke the provisions of Section 164 (1) (c) of the Tanzania Evidence Act [Cap.6 R.E. 2019] and use PW 1's statement to cross examine her. In her response, PW 1 said that according to the statement the identification was made by *taa ya kuchaji ya umeme*. She stated that the source of light was not mobile. PW 1 admitted that at the time of the invasion, the power supply had been cut off and that the incident happened at 2000hrs. As to whether the torch light could illuminate other rooms, PW 1 responded in the negative. She admitted not to have stated in the statement that the invaders had their torch. She admitted that at home there was no solar. It was her further argument that in the rooms, the torch used was that of the two invaders. She was emphatic that the invaders were two and spent almost half an hour. She admitted to have not witnessed when the deceased was being assaulted.

PW 1 was clear and specific that she did identify only those two who were inside. At the identification parade she said that she identified Peter and Gervas (2nd and 1st accused). She admitted to have not seen them prior to the incident.

When re-examined by Ms Caroline Matemú, PW 1 pressed that the torch she was using was chargeable by either electricity or solar powers and clarified that the torch was on the lounge but that its light illuminated on the sitting room, dining room and in the kitchen.

The statement PW 1 recorded before the police was, through the Defence Counsel, admitted in court as exhibit D 1.

With regard to the discrepancies in exhibit D 1 pointed out by Mr. Songea, PW 1 explained that when her statement was being recorded, she was not mentally ok as it was just after the incident. She clarified that the person who wore a jacket had a container (*mfuko*) which had a machete and insisted that inside the house, those two were searching and assaulting her. PW 1 asserted that the invaders made away with them Tshs. 200,000/=. She said that there is no change of light whether the charging is by solar or electricity.

After the occurrence of the incident on that day, PW 1 came to learn that the deceased had taken refuge to a neighbouring house. PW 2 heard

that the deceased had been wounded. The deceased was rushed to Mkomaindo Hospital where it was found that he was severely injured. He was taken to St Benedict Hospital at Ndanda and later referred to Muhimbili National Hospital at Muhimbili Orthopaedic Institute (MOI) but on 8th day of September, 2017, the deceased succumbed to death. On the same date, that is 8.9.2017, Awadhi Chiko, the Acting OC-CID at Dar es Salaam Central Police Station, assigned G.603 D/Sgt Robert Kelving Ngonyani (PW 5) to go to Muhimbili National Hospital to supervise the conduct of post mortem examination in respect of the body of Halfan Said Ulaya, the deceased. He filled in PF 99 and, in company of Mohamed Said Ulaya and Akidi Mwapwa, the relatives of the deceased, they went to the Hospital where PW 5 registered the Form and was given PM No. 0729 of 2017. At about 1130 hrs, Dr. Paul Makoye Ng'walau (PW 8), a pathologist and lecturer, called them in the special room. The deceased's relatives identified the deceased and after PW 5 narrated to what they were up, PW 8 started the medical examination on the body of the deceased. He first inspected the outer part of the body and found that it had healed wounds on both forearms and the wounds were caused by a sharp object. The deceased seemed to have profusely bled from the nose. He then autopsied the body. He found a fractured rib on the left and explained that the

fracture of the rib might have been caused by suspension of the body in manoeuvring to assist the deceased.. PW 8 also discovered bleeding in the abdominal cavity about 700 ml. He established that the cause of death was haemorrhagic shock due to severe bleeding. He tendered the report on Post Mortem Examination (exhibit P 2). He explained that he discovered that the blood pressure became low due to internal haemorrhage. He dismissed the suggestion that the internal haemorrhage could have been caused by the external injuries. He stated that the deceased had to undergo surgery but no surgery was conducted. With regard to nose bleeding, PW 8 elaborated that when there is pressing, the blood in the body cavity can come upwards probably through the nose. He also clarified that if the rib had caused bleeding, the affected area would not have been the abdominal cavity, rather, it would have been the chest.

Back to PW 1. On 11th day of September, 2017, she was called at Masasi Police Station and required to identify the culprits at the identification parade conducted by PW 6. According to PW 1 and PW 6, at the parade there were twelve men and the parade was conducted between 1100hrs and about 1200hrs noon. At the parade, twelve men including the 1st and 2nd accused persons were lined up and PW 1 managed to identify the two both in front and from behind and that this was done twice. PW 1

told this court that at the identification parade she identified Peter and Gervas (2nd and 1st accused). She admitted not to have seen them prior to the incident.

Supporting PW 1's identification evidence at the parade, PW 6 recalled that on 11th day of September, 2017 at 1100 hrs he was assigned to supervise the conduct of identification parade whereby the identifying witness was PW 1 and the suspects to be identified were the 1st and 2nd accused persons who were in a police lock up. PW 6 argued that the identifying witness had told them their physiques. He took the two accused persons that is Cosmas Gervas Chambi and Oscar@ Jaji and had their clothes changed so that they looked smart and remained in the reception room. PW 1 looked for others who were at the police station and then collected the two accused and joined them with those ten people. PW 6 asserted that he made sure that the identifying witness did not come in contact with the accused and those others. He gave them their rights to have their relative or friend present during the identification but opted their absence. PW 1 identified the two accused in court. PW 6 told this court that the accused persons chose their positions to stand between those other ten people. He then ordered Det. Constable Mwambe to call PW 1. She was asked to identify the suspects she saw and identified at the crime

scene during the incident. She at first identified Oscar (2nd accused) and then Gervas (1st accused) by touching them. She did so both in front and from behind them. After the first stage was completed, the accused's positions as well as their clothes were changed. PW 1 identified the 2nd and 1st accused in front and from behind. The statements of the participants who were close to the accused were written and the statement of the identifying witness was also recorded. In court, PW 6 produced the identification parade register (exhibit P 1). Clarifying on the purpose of identification parade, PW 6 stated that the identification parade is used to render assurance to the investigation that the identifying witness actually identified the suspects at the crime scene. PW 6 could not recall if photographs were taken.

F. 4398 Cpl Amandus (PW 3) testified that on 15.8.2017 at 0730hrs upon reporting on duty, was assigned vide Masasi IR 1837 of 2017 to investigate an offence on causing grievous harm in respect of a magistrate. He interrogated the witnesses and arrested the 1st accused at Nangoo area. The latter was wounded and on 8th September, 2017 at 2300 hrs PW 3 took him to Masasi Police Station. He was interviewed on a caution and mentioned his other five fellows.

During the investigation it was revealed that the accused person participated in killing the accused. He discovered the source of the killing was that one of them (6th accused), had his relatives charged with armed robbery in the District Court in Criminal Case No. 94 of 2015 whereby the accused in that case were convicted and sentenced to thirty years prison. He pointed out that there were two groups, the other case which involved the 6th accused was before Mwetindwa, RM. In that case, the 6th accused was acquitted.

In response as to when the 1st accused was wounded, PW 3 stated that the wounding occurred on 14.8.2017 and the wound was caused by a machete cut. PW 3 informed the court that the victim of the assault died. He also admitted that he had information on a report with regard to samples of blood, hair and saliva sent to the Government Chemist for scientific analysis. The report was negative. PW 3 was also quick to point out that the report on the scientific analysis had no connection with the offence. PW 3 further stated that the other evidence implicating the accused persons is their own statements. He, however, admitted that the evidence incriminating the accused persons is circumstantial. PW 3 insisted that the 1st accused, in confessing to have committed the crime, mentioned

the 6th accused to have to have sent them to kill the deceased and that there was an agreement for payment but the amount was not specified.

The fourth prosecution witness was E.8317 Cpl Humphrey. His testimony was that on 9.9.2017 at 0900 hrs he was assigned by then OC-CID Afande Kyando to interview Gervas Gervas Cosmas @ Chambi , the 1st accused who was in a police lock up on murder allegations. After detailing to him his basic rights, he cautioned him and after he volunteered, PW 4 started interviewing the 1st accused. According to PW 4, the 1st accused told him that on 13.08.2017 he met the 6th accused who told him that he had a job to perform in Masasi which was to kill the Resident Magistrate Halfani Ulaya. The 6th accused told the 1st accused that his fellows to the mission were the 2nd, 3rd, 4th and 5th accused persons. It was agreed that each would be paid Tshs 100,000/= . On 14.8.2017 during the night time, they left Nangoo, taking three motorcycles and went to Hon. Ulaya at Nanjuga Street. They did not find him there. When the deceased was back, the 1st accused and his fellows started cutting him with machetes. While the 2nd accused was in the process of cutting the deceased, he missed the target and cut him (1st accused). PW 4 saw the scar the 1st accused had mentioned. On inquiry on why the 6th accused had instructed them to kill the deceased, the 1st accused told him that the deceased had convicted the

relatives of the 6th accused on the offence of armed robbery and had sentenced them to thirty (30) years term of imprisonment and the 6th accused who was displeased at his relatives being imprisoned decided to retaliate by killing the magistrate.

PW 4 denied to have been present during the incident and the apprehension of the 1st accused and asserted that he received the information which he believed to be true. He insisted that he interviewed the 1st accused on 9th day of September, 2017 after the latter was apprehended on 8th September, 2017. He admitted that an interview of a suspect has to be conducted within four hours after the arrest and that from 8th to 9th more than twelve hours had passed. He admitted that the statement he recorded was not procedural but what he was telling the court was the truth. He admitted to have been wrong when pointed to the 2nd accused to have been the one he had interviewed. PW 4 denied to have asked the 1st accused if he had received the payment for the work they had contracted for with the 6th accused. He asserted that each accused had a machete though during the apprehension they had no machetes as the incident had occurred on 14th day of August, 2017 and the apprehension made on 8th day of September, 2017.

Although Yusuph Chibwana Choyo (PW 2) and G. 1963 D/Cpl Hamdun (PW 7) testified in court, their evidence was insignificant and not material to the determination of this case because, while PW 2, though asserted to have been at the crime scene, he was clear in his evidence that he did not identify any suspect as during the incident he was slapped on his face by a person who came from his (PW 2's) rear causing him to run away. PW 7 said that he went to the crime scene and drew a sketch plan. His efforts to have the sketch plan admitted in evidence were unsuccessful after the Defence Counsel successfully objected its admission.

The accused persons' defences constituted general denial of involvement regarding the commission of alleged crime. According to them, the 1st to 5th accused persons are residents of Nangoo while the 6th accused resides in Dar es Salaam though at Nangoo he has a house and cashewnut farm and relatives as well.

The 1st accused testified that he was residing in Mozambique and then came back to Nangoo where his occupation is peasantry dealing with green vegetables (mbogamboga). He was apprehended at Nangoo on 8.9.2017 at 2000 hours and ordered to embark on a police van which was stationary on the tarmac road. He was ordered to sit down and told that he

had committed an event (nimefanya tukio). He argued that by that time he had not yet been told what offence he had committed. He was then asked if he had committed an offence at Masasi but he denied. He was assaulted and taken to Masasi Police Station where he was locked up but then taken to the torturing room. According to him, he was beaten using knives, wires and the clubs and was thereby injured on the forearm, legs and on the buttocks being forced to admit to have committed the offence.

It was his further testimony that they were taken to the Justice of the Peace and then on 12.9.2017 an identification parade was conducted. He argued that his face was swollen, the shirt was smeared with blood and he had a limp. On the way he met some citizens including the deceased's wife. At the parade the participants were smart. The 1st accused admitted that the identification was done twice and there was a change of positions. He asserted that they were photographed. On 13th day of September, 2017 they were taken to Mkomaindo Hospital where samples of blood, saliva and hair were taken from them to the Government Chemist for scientific analysis. The end results were not revealed to them. The 1st accused denied to have known the deceased. He denied to have gone to his house and to have assaulted him on 14.8.2017 arguing that by the time, he was at home at Nangoo. The 1st accused also denied to have known the 2nd and

6th accused persons though he argued that 2nd accused was a resident of Nangoo. He admitted to be acquainted to the 3rd, 4th and 5th accused persons. He also admitted that his statement inculpated his fellow accused persons. He admitted to have been present at the identification parade and to have been identified but denied to have known PW 1. He termed the evidence of PW 1 and PW 4 as false. As to why they were mentioning him, he argued that it was because he was the first suspect to be apprehended. He argued further that although PW 1 identified him at the parade, the same witness failed to recognise him in court.

As to why PW 1 managed to identify him at the parade, the 1st accused asserted that she was being shown that, *'yule mwenye madamu damu'*. Admitting that when PW 6 was testifying that the identification parade was conducted on 11.9.2017, he and his advocate were in court, He, however, argued that he did not hear PW 6 saying that the parade was conducted on 11.9.2017.

The 1st accused maintained that on 8.9.2027 when he was apprehended he was in good condition but the police officers and not the 2nd accused injured him.

The defence of Oscar Peter Mkutwa @ Jaji (2nd accused) also a resident of Nangoo was to the following effect. On 9th day of September,

2017 he was apprehended while at home, slapped and ordered to embark in the motor vehicle and asked to lie face downwards. He was later taken to Masasi Police Station where he was alleged to have cut Halfani Ulaya and to have killed him. He was tortured by being assaulted on the eyes, back, legs and buttocks using wires and clubs but denied involvement. The 2nd accused mentioned Afande Lukindo to be the person who was assaulting him. Before the Justice of the Peace, the 2nd accused denied to have been present at the crime scene and to have participated in assaulting the deceased. The 2nd accused asserted that when being taken to the identification parade, a woman who was the identifying witness was seated at a tree and observing him when passing. He argued that at the parade, the participants were smart and of different size while he, the 2nd accused, was dirty, had his trousers torn and was not walking properly. The 2nd accused supported the testimony by the prosecution witnesses that the identification was conducted twice and positioning was changed.

Admitting to have been identified by PW 1, the 2nd accused argued that it was because he was dirty and PW 1 was being directed. As was the 1st accused, the 2nd accused denied to have been at the crime scene and to have been identified by PW 1, hence her failure to identify them in court. He said that on 14.8.2017 he was at Nangoo. As to whether or not he

knew the 1st accused, the 2nd accused argued that he does see him selling green vegetables. He said that his parents are two different tribes; while her mother is Makua his father is Fipa from Sumbawanga. He told this court that though the police said that he was mentioned by his fellow, they did not tell him who mentioned him but has come to realise that it is the 1st accused. With regard to failure by some prosecution witnesses to identify him, the 2nd accused admitted that he is growing, has beards and has changed. He emphasised that PW 1 failed to identify him in court.

Siraji Ismail Mbuyu, the 3rd accused also gave his sworn testimony. Led by Mr. Songea, he said that he resides at Nangoo Ujamaa Village, is a peasant cultivating mixed crops. He told this court that he was arrested on 9th September, 2017 and was thrown in the motor vehicle which was at the tarmac road. He with his fellows were taken to Masasi Police Station. He argued that he was severely tortured. On 12.9.2017 they were taken to the Primay Court Magistrate and had their statements recorded. He also supported the fact that some samples were taken from them and an identification parade conducted. He admitted that he was mentioned by the 1st accused whom he knows as they live in the same Nangoo village. It was his evidence that the charge contained about ten people but others were released at the police station. He also knows other accused persons but

argued that the 1st accused does not stay long in the village as he frequents to Mozambique. He denied to have participated in the commission of the crime. He insisted that the identification parade was conducted on 12.9.2017. He clarified that he was beaten on 9.9.2017 the day he was apprehended.

In his defence, the 4th accused Mussa Hashim Nanguka informed the court that he has been at Nangoo for thirty five years. He said that he was arrested on 9.9.2017 though at the time of arrest he was not told why. He also stated that he was tortured leading to his toe nail to come off. As to what then transpired, the 4th accused reiterated almost what his fellow accused had said. He admitted that all the accused persons are his village mate though he does not know them in deep.

Taisi Hamidu Tais was the 5th accused. He said that in the night of 9.9.2017, his door was broken, he was placed under custody, handcuffed and taken to Masasi Police Station. He was then tortured. On 12.9.2017 they were taken to the Primary Court Magistrate where they had their statements recorded. He denied to have participated in the commission of the offence charged. He admitted to know the 2nd, 3rd, 4th and 5th accused persons but denied to know the 1st accused and to have seen him in the village.

Charles Abdelehman Chinyang'anya is the 6th accused person. His testimony was to the following effect. He was apprehended on 7th day of July, 2019 while in Dar es Salaam. He resides at Temeke Kilakala and sells fruits at Stereo Market. At Nangoo he has a family, house and a farm. He is married and has four children. He was apprehended by police officers from Temeke Chang'ombe who told him that there was the death of a Magistrate known as Ulaya and that he had sent people to kill him. He was also told that his relatives had been imprisoned for thirty years by the deceased and had sent *vijana* who were his relatives to kill him. The 6th accused denied to have any relative who had been imprisoned by the deceased. He denied to have hired the youths to kill the deceased. He denied to know the 1st accused. He said that the 2nd, 3rd, 4th and 5th accused persons were known to him after they met at the prison.

He informed this court that in October, 2017 he was at Nangoo to see his cashew nut farm and harvest the crops. He said that on 14.8.2017 when the incident happened, he was in Dar es Salaam. He denied to participate any how to kill the magistrate as there is no relative of his who was imprisoned. He denied to have either known or seen the deceased. He said that the allegations against him are false.

On cross-examination, the 6th accused said that he resides in Dar es Salaam but come to Nangoo during the harvest season. He asserted that some residents of Nangoo know him but the 1st accused admitted that he did not know him.

The 6th accused clarified that at Nangoo he has a family and a cashew nut farm. He said that he does not know who mentioned him.

After I had summed up to the lady assessors, all of them returned a unanimous verdict of not guilty.

In the instant case, there is no dispute that the person by the name of Halfan Said Ulaya is dead and his death was unnatural. All the prosecution witnesses, particularly PW 1, the deceased's wife and PW 8, the pathologist who conducted the Post Mortem Examination, have proved this fact. According to the report which was admitted in evidence as exhibit P 2, the cause of death was **haemorrhagic shock due to severe bleeding**. PW 8 had observed in exhibit P. 2 that apart from the healed scars on both forearms, there was bleeding from the nose as well as in the abdominal cavity and there was also a fractured one rib on the left.

The main issues calling for determination in the present case are firstly, who killed the deceased and secondly, whether in killing the deceased, the perpetrator was actuated by malice.

The prosecution, on one hand, wants the court to believe that it is these six accused persons who killed the deceased and that in killing him they were actuated by malice aforethought. The defence, on the other hand, rebuffs liability.

Having dispassionately considered the totality of the evidence unfurled before me, it is apparent that the case rests on three facets. Firstly, is the oral confession made by the 1st accused before PW 3 and PW 4. Secondly, is the visual identification by PW 1 at the scene of the crime and thirdly, is the identification made by PW 1 during the identification parade conducted by PW 6.

As far as the oral confession by the 1st accused to PW 3 and PW 4 is concerned, it was PW 3's testimony that on 15.8.2017 he was assigned vide Masasi IR 1837 of 2017 to investigate an offence on causing grievous harm in respect of a magistrate. He interrogated the witnesses and arrested the 1st accused at Nangoo area. The latter was wounded and on 8th September, 2017 at 2300 hrs PW 3 took him to Masasi Police Station. He was interviewed on a caution and mentioned his other five fellows.

During the investigation it was revealed that the accused person participated in killing the accused. He discovered the source of the killing was that one of them (6th accused), had his relatives convicted of armed

robbery in the District Court in Criminal Case No. 94 of 2015. As to when the 1st accused was wounded, PW 3 stated that the wounding occurred on 14.8.2017 and the wound was caused by a machete cut. PW 3 informed the court that the victim of the assault died. PW 3 further stated that the other evidence implicating the accused persons is their own statements. He, however, admitted that the evidence incriminating the accused persons is circumstantial. PW 3 insisted that the 1st accused, in confessing to have committed the crime, mentioned the 6th accused to have sent them to kill the deceased and that there was an agreement for payment but the amount was not specified.

On his part, E.8317 Cpl Humphrey stated that on 9.9.2017 at 0900 hrs he was assigned by then OC- CID Afande Kyando to interview Gervas Gervas Cosmas @ Chambi , the 1st accused who was in a police lock up on murder allegations. After detailing to him his basic rights, he cautioned him and after he volunteered, PW 4 started interviewing the 1st accused. According to PW 4, the 1st accused told him that on 13.8.2017 he met the 6th accused who told him that he had a job to perform in Masasi which was to kill the Resident Magistrate Halfani Ulaya. PW 4 further testified that 6th accused had told the 1st accused that his fellows to the mission were the 2nd, 3rd, 4th and 5th accused persons. It was agreed that each would be

paid Tshs 100,000/=. On 14.8.2017 during the night time, the first five accused persons left Nangoo, taking three motorcycles and went to Hon. Ulaya at Nanjuga Street but who, by the time, was absent. When he was back, the 1st accused and his fellows started cutting him with machetes. While the 2nd accused was in the process of cutting the deceased, he missed the target and cut him (1st accused). PW 4 saw the scar the 1st accused had mentioned. On inquiry on why the 6th accused had instructed them to kill the deceased, the 1st accused told him that the deceased had convicted the relatives of the 6th accused on the offence of armed robbery and had sentenced them to thirty (30) years term of imprisonment and the 6th accused who was displeased at his relatives being imprisoned decided to retaliate by having the magistrate killed.

PW 4 asserted that he received the information which he believed to be true. He insisted that he interviewed the 1st accused on 9th day of September, 2017 after the latter was apprehended on 8th September, 2017. He admitted that an interview of a suspect has to be conducted within four hours after the arrest and that from 8th to 9th more than twelve hours had passed. He admitted that the statement he recorded was not procedural but what he was telling the court was the truth. He admitted to have been wrong when pointed to the 2nd accused to have been the one

he had interviewed. PW 4 denied to have asked the 1st accused if he had received the payment for the work they had contract for with the 6th accused. He asserted that each accused had a machete though during the apprehension they had no machetes as the incident had occurred on 14th day of August, 2017 and the apprehension made on 8th day of September, 2017.

The defence of the accused persons was a flat denial. The first five accused persons claimed that they were tortured.

Although torture was raised to negate the voluntariness of the confession by the 1st accused, the evidence does not suggest that the 1st accused was tortured by P W 3 or PW 4. The torture, if any, had no bearing on what the 1st accused confessed to PW 3 and PW 4. I find that the oral confession by the 1st accused before PW 3 and PW 4 was free and voluntary and deserved the highest credit. I am supported in this by what was stated in the case of **Warrickshall** 1 Leach cc in Wigmore J.M 1940: A treatise on the Anglo- American Evidence in Trials on Common Law, 3rd Ed. p. 238 at p. 246 it was stated that:

'A free and voluntary confession deserves the highest credit in evidence on the ground that it is presumed to come from the

strongest sense of guilt and therefore admitted to prove the commission of the crime by the person confessing;.

Likewise, Sarkar on Evidence 1981, 13th Ed. p.248 comments that:

'A voluntary confession of guilt proceeds only from penitence and remorse or a desire to make reparations for the crime and it usually comes from a person who commits a crime in a fit of passion'

Even if, for the sake of argument, the oral confession of the 1st accused was induced, the confession is, nevertheless admissible as the circumstances show that it was a confession of truth. This position was echoed in the case of **R. v. Mgomboi Rwanyigeta** [1973] III LRT 90.

Indeed, a confession is a statement, oral or written which admits all essential ingredients of the offence. In criminal cases, a confession made by the accused voluntarily is evidence against him.

Let me observe, at this juncture, that what a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him.

With the foregoing, I am satisfied that the 1st accused orally and voluntarily confessed before PW 3 and PW 4. I am also satisfied that the confession implicated the 2nd, 3rd, 4th, 5th and 6th accused persons in the commission of the offence charged.

On the aspect of the visual identification by PW 1 at the crime scene, the evidence is clear that the incident occurred at 2000hrs. It was dark as the power supply had gone off. It is trite that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do this, he must mention all aids to unmistakable identification, like the source of light, its intensity. **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005.

In the case under consideration, PW 1 was clear that although it was night, at 2000 hrs, she managed to identify the 1st and 2nd accused by means of the torch lights. According to her, there were two torches, one which was at the lounge and whose light illuminated on the sitting room, dining room and in the kitchen, and the other torch the accused possessed which they were using in searching the house. When she was cross examined by Mr. Songea, PW 1 maintained that in the rooms the torch used was theirs and she insisted that the invaders who entered were two.

With regard to the length of time the accused persons were observed by PW 1 and the distance the witness was from the accused, PW 1 was clear that she stayed with them for a long time, they were conversing, were looking at each other and were very close as well. She said that she

could recall those two people and that they are in court. It is true that when she was invited to make an in court identification, she touched the 5th accused. This court has to consider whether or not her inconsistency affected the truthfulness and accuracy of her testimony and to what extent.

In my view, whether and to what extent the inconsistency affects the truthfulness and accuracy of the witness' testimony depends on some factors such as time lapse, credibility of the particular witness and infallibility of human recollection.

With regard to time lapse, it is truism that with every day that passes the memory becomes fainter and the imagination becomes more active. Besides, identification in a court room, months or years after an encounter, is much less reliable and probative than one in the immediate aftermath of a crime. I am fortified in this by what the Court of Appeal in the case of **Kiroiyan Ole Suyan v. R**, Criminal Appeal No. 114 of 1994 (unreported) in its judgment dated 17.02.2002, unequivocally stated that

'when a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies'.

This case was quoted with approval in the case of **Mathias Bundala v. R.**, Criminal Appeal No. 2 of 2004. This is what happened in respect of PW 1. This was, in my view, a minor discrepancy on which allowance has to be given.

On the credibility of PW 1, some factors determining credibility of a witnesses include their personal knowledge, their presence at the scene of the crime, their paying attention to what takes place and their telling the truth. In the instant case, it was not disputed that PW 1 present when the assault of the deceased was taking place. Her narrative shows that she paid attention to what was happening and there is nothing showing that she was not telling the truth. PW 1 was an adult. According to her she was 39 years old at the time she was testifying.

Where the determination of the issues depends on the credibility of the witnesses, the court has to believe it unless the contrary is shown. On this aspect, I better borrow the wisdom of the Court of Appeal in the case of **Mathias Bundala v. R.**, Criminal Appeal No. 62 of 2004 where at p. 12, the Court observed:-

In our considered judgment if a witness is not an infant and has normal mental capacity as were PW.1 Massawe, PW.2 Amani, PW.3 Ngasa and PW.5 Lazaro, the primary measure of his / her credibility

is whether his or her testimony is probable or improbable when judged by the common experience of mankind. The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed some motive on his or her part to misrepresent the facts has been established, his or her bias or prejudice has been demonstrated and he or she has given fundamentally contradictory or improbable evidence or has been irreconcilably contradicted by another witness or witnesses.

Besides, the same Court in the case of **Goodluck Kyando v. R.**, Criminal Appeal No. 118 of 2003 stated:

"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".

In the instant case, PW 1 was not an infant and there was no suggestion that she had an abnormal mental capacity. I find nothing to disbelieve in what she stated.

On the question of infallibility of human recollection, this court, in the case of **Evarist Kachembeh and others v. R.** [1978] LRT No. 70 held:

"Human recollection is not infallible. A witness is not expected to be right in every minute details when telling his story".

This position was affirmed by the Court of Appeal in the case of **Issa Hussein Uki v. R.**, Criminal Appeal No. 129 of 2017 (unreported).

In the present case, the inconsistency exhibited by PW 1 did not affect the substantive content of her testimony, particularly where it is clear that both the commission of the crime and out of court identification occurred in 2017 and the in-court identification was made on 28th day of June, 2021, after a lapse of almost five years.

Then there the identification of PW 1 at the identification parade. PW 1 and PW 6 were clear in their evidence that during the conduct of the identification parade, PW 1 identified the 1st and 2nd accused persons. The identification was done twice and the identifying witness managed to identify them both in front and from behind. These two witnesses were supported in this by the identification parade register (exhibit P 1). It was amply demonstrated by PW 1 that during the incident she did not see and identify any culprits other than the 1st and 2nd accused persons. This explains why she failed to identify the 3rd, 4th, 5th and 6th accused persons.

In such circumstances,

As a way of repeating, during in- court identification, PW 1 touched the 5th accused. For the reasons stated above and since a mistaken identification does not necessarily prove that the accused is innocent or that the witness untrustworthy in other respects, particularly, when the above factors are considered, I am satisfied and hereby find that the 1st

and 2nd accused persons were adequately identified to have been present at the scene of the crime and to have assaulted the deceased.

Since the oral statement by the 1st accused implicated the 2nd, 3rd, 4th, 5th and 6th accused in the same way as he stated, I find that these 2nd, 3rd, 4th, 5th and 6th accused persons were also *participes criminis* under section 22 of the Penal Code [Cap. 16. R.E. 2019].

It is true that the 6th accused managed to raise a defence of alibi in terms of Section 194 (4) of the Criminal Procedure Act which provides that:

“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.”

He said that he was in Dar es Salaam at the time the offence was being committed.

Alibi is a defence where an accused person alleges that the time when the offence was committed he was elsewhere. 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 case under consideration, the 6th accused is not implicated because he was at the crime scene when the offence was being committed and perpetrated in the commission of the offence but he is implicated because he hired his fellow accused persons to kill the deceased. This is borne out by the evidence on record. He is, in law, a principal offender and under section 22 of the Evidence Act, and for that reason, liable.

Were they actuated by malice aforethought? This I will tell. The first five accused persons cut the deceased with machetes. According to exhibit P 2 which is a report on Post Mortem Examination, the cause of death was haemorrhagic shock due to severe bleeding. There was bleeding from the nose and in the abdominal cavity about 700 ml. It seems, the deceased did not die on the spot. This aspect was not controverted.

But what is malice aforethought? According to section 200 of the Penal Code, malice aforethought shall be deemed to be established by evidence proving either any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference

whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d).....(not relevant)'

It was established by the prosecution that after the first accused five accused persons assaulted the deceased with machetes, the latter was rushed to Mkomaindo Hospital but it was discovered that he was severely wounded. He was then taken to St. Benedict Hospital at Ndanda but to be referred to Muhimbili National Hospital where he passed away.

In view of the above, it can be safely held that the accused's killing was pre-meditated. It was, therefore, murder.

In the instant case I am satisfied that the 1st, 2nd, 3rd, 4th and 5th accused persons, with malice aforethought, killed the deceased.

With regard to the 6th accused, the evidence implicating him is that he hired the first five accused persons who assaulted the deceased leading his death which evidence I entirely believe. He is also a principal offender by virtue of section 22 (1) (b) and (d) of the Penal Code [Cap. 16 R.E.2019]. It is provided as hereunder:-

22.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.'

In the case on hand, although the 6th accused was not a person who actually assaulted the deceased to death, it was amply proved that he did

an act for the purpose of enabling his fellows to commit the offence and also procured them by hiring them to kill the deceased.

The Lady Assessors, were, in their opinion, unanimous that the accused persons are not guilty.

However, for the reasons I have adumbrated above, my finding is different. I am enjoined in this in terms of section 298 (1) and (2) of the Criminal Procedure Act [Cap.20 R.E.2019].which provides as hereunder:

298.

(1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion.

(2) The judge shall then give judgment, but, in doing so, shall not be bound to conform to the opinions of the assessors.

It is my finding that it is the six accused persons who killed the deceased.

I, therefore, find all the six accused persons guilty as charged and, accordingly, convict them under Sections 196 and 197 of the Penal Code [Cap. 16 R.E.2019].


W.P. Dyansobera

Judge

23.9.2021



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 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 2019], I hereby direct that the accused shall suffer death by hanging.

It so ordered.




W.P. Dyansobera

Judge

23.9.2021

This judgment is delivered under my hand and the seal of this Court on this 23rd day of September, 2021 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the Republic and in the presence of the accused persons are who is also represented by Mr. Rainery Songea, learned Advocate.

Rights of appeal explained.




W.P. Dyansobera

Judge