

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL SESSION CASE NO. 54 OF 2019

REPUBLIC

VERSUS

PAUL LUCIAN KIMARA@ MAWESE

JUDGMENT

15/12/2021 & 22/12/2021

SIMFUKWE, J.

The accused person namely, Paul Lucian @ Mawese stand charged before this Court with the offence of Murder contrary to **section 196 of the Penal Code, Cap 16 R.E 2002** (now R.E 2019). The accused is alleged to have murdered one Weraikunda Jonathan @ Swai on 11/5/2017 at Kimashuku Mnadani village, within Moshi District in Kilimanjaro Region. The accused person pleaded not guilty to the charge.

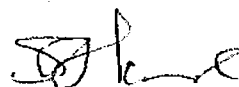
In proving the charge against the accused person, the prosecution marshalled a total of four witnesses, Dr. Patrick Amsi (**PW1**), Gabriel Prosper Njau (**PW2**), Benadetha Elizaudi Swai (**PW3**) and Bonaventura Joseph Mallya (**PW4**). The prosecution also had one exhibit which is a Post-Mortem Report filled with PW1 (**Exhibit P1**). The accused person defended himself, he did not call any witness.

Evidence tendered by the prosecution in support of the charge is to the effect that the death of the deceased Weraikunda Jonathan @ Swai was unnatural; and that the cause of death was blunt force trauma on the



head. Evidence of PW1 and Exhibit P1 are relevant. That on 10/5/2017 Gabriel Prosper Njau (PW2), the grandson of the deceased arrived home where he used to reside with his grandmother (the deceased) about 00:40hrs. The grandmother opened the door for him after he knocked. They both went to sleep but after a while after going to sleep, PW2 heard an alarm from his grandmother crying for help saying: **"Nisaidie nakufa"**. While heading to the room of his grandmother, PW2 met the accused herein, holding a bright torch which was directed to him. PW2 was ordered to go back to his room, PW2 obeyed the order. The accused took Tsh 8400/= out of the trouser of PW2 and demanded some more money or otherwise they would kill him. After PW2 told the accused that he had no money, the accused carnally knew him against the order of nature. Thereafter the accused took him to the sitting room where PW2 heard collision from the room of the deceased. Then, the accused ordered PW2 to take a big stone which was used to break into that house, from the sitting room. PW2 said that he managed to identify the accused person when the accused was demanding to be given more money and when PW2 he was taking that big stone outside the house where there was a moonlight. While being cross examined by the Defence counsel PW2 stated further that the accused was his friend as they used to work together in farms. Apart from that, PW2 alleged that they were invaded by more than two people, but he did not manage to identify the other bandits.

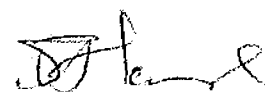
PW2 further testified that, inside the house, the accused asked him the whereabouts of his sister. PW2 told the accused that her sister was staying in another house nearby. The accused ordered PW2 to sleep on his stomach and left. After a while PW2 heard an alarm from their



neighbour one Benedict. He went outside while shouting and the people who had gathered at their neighbour moved to him. He told them that they were invaded by Mawese. The deceased was taken to hospital where she passed away 6 days after being invaded, while undergoing treatment at the ICU at KCMC Hospital. Next day, the grandfather of PW2 took him to the police where his statement was recorded.

The prosecution evidence *vide* PW3 further established that, PW3 was also invaded on that particular day but the bandits fled after she raised an alarm. PW3 decided to visit at his mother's homestead (deceased's homestead) which was not far from her homestead, accompanied by her neighbour. At the deceased's house, they found the door closed from outside and PW2 asked one, Emma to open the door. When Emma opened the door, PW3 went straight to the deceased room and found her lying upward. He tried to call her but she could not respond. Upon inquiry, PW2 told her that they were invaded by a person called Mawese. They took the deceased to the police station and their statements were recorded. They were issued with a PF3 and went to Mawenzi Hospital. The doctor conducted examination and referred Bibi Weraikunda (deceased) to KCMC, where she was treated without improvement. On 17/5/2017 Bibi Weraikunda passed away.

PW4 who is a militiaman, his evidence established that the accused was arrested. On arrest, the accused was found cultivating a farm. After being informed that he was wanted at the police station, the accused was escorted home where he changed his clothes and thereafter, he was taken to the police station.



lay down on his stomach. In the circumstances, I hesitate to believe that the accused person was properly identified by PW2. Moreover, apart from PW2, there was no other corroborating evidence in respect of identification of the accused person at the scene.

On the issue **Whether the circumstantial evidence in this case is capable of forming basis of conviction against the accused person;** as a matter of law in order to ground conviction on circumstantial evidence, the same must not be capable of more than one interpretation.

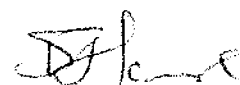
As it was correctly pointed out by the accused person, PW2 the only prosecution witness who alleged to have identified the accused person at the scene, stated that he was sodomised by the accused person while other assailants were assaulting his grandmother in her room. The names of the said assailants were not mentioned and he never saw them. It is obvious that the said assailants who were not seen by PW2 possibly are the one who are responsible for the murder of the deceased Bibi Weraikunda. In other words, the deceased might have been killed by the accused person or the other assailants who were not identified by PW2 Gabriel Njau. To support my findings, I subscribe to the Court of Appeal decision in the case of **HASSAN FADHILI V. REPUBLIC [1994] TLR 89**, where it was found that circumstances relied upon to convict the appellant were capable of more than one interpretation. Thus, the appeal was allowed on that basis. It is therefore a considered opinion of this Court that circumstantial evidence in this case is not safe to ground a conviction against the accused person due to the fact that, the same is capable of more than one interpretation as already noted herein.



In his defence, the accused had this to say; That he was followed by a militiaman at the farm who informed him that he was wanted at the police station. He asked him what was wrong but the militiaman told him that he would know ahead. He asked for permission to go home so that he could take a bath and change clothes. At home he bathed and changed clothes. He reported to the ten-cell leader, then he was taken to the police. The accused alleged that if he had done something wrong, he could have escaped in the process. At the police the accused was informed that he was suspected to have committed unnatural offence of one Gabriel Prosper Njau. He was arraigned, charged and acquitted with said offence.

It was alleged further by the accused that, the said unnatural offence was alleged to have been committed on the same date, time and place where the offence of murder was committed. In that respect, he claimed that he is innocent. He testified further that on 6/6/2017 he was informed that he was charged with the offence of Murder. The accused person tendered a copy of judgment of **Criminal Case No. 132/2017** of Hai District Court as exhibit (Exhibit D1), to prove that he was acquitted from the charges of unnatural offence.

The accused testified further that PW2 Gabriel Prosper Njau did not mention those who attacked his grandmother but he said that he was sodomised by the accused while other people were assaulting his grandmother in her room. The names of those people were not mentioned and he never saw them. He also disputed to have worked with Gabriel Njau and insisted that he had no relationship with Gabriel. Further to that the accused testified that he knew nothing about the



death of the deceased and never knew her and that he had no bad name in that village.

The fact that Bibi Weraikunda Jonathan is dead and that her death was unnatural was not disputed during the trial of this matter. The issues are:

1. **Whether the accused was properly identified by his voice and his physical appearance through the moonlight.**
2. **Whether the circumstantial evidence in this case is capable of forming basis of conviction against the accused person.**
3. **Whether it is the accused person who killed the deceased Weraikunda Jonathan Swai.**
4. **Whether the prosecution has proved the charge of murder beyond reasonable doubts.**

Starting with the first issue ***whether the accused was properly identified by his voice and his physical appearance through the moonlight;*** it is trite law that where conditions of identification are unsatisfactory, evidence must be watertight. In the case of **MOHAMED BAKARI & 7 OTHERS V. R [1989] TLR 134** it was held that:

"Where the conditions for identification are unfavourable, corroboration is necessary."

In this case PW2 alleged that he managed to identify the accused person properly through a moonlight. PW2 also alleged that he knew the accused even before the incidence, the fact which was disputed by the accused person in his defence. The Court of Appeal of Tanzania has emphasized in a number of decisions that the intensity (brightness of

 5


the light) must be explained, for the identification to be considered unmistaken. In the case of **PONTIAN JOSEPH Vs. THE REPUBLIC, CRIMINAL APPEAL NO. 200 OF 2015**, (Unreported) the Court of Appeal of Tanzania held that:

"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was "enough moonlight." It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained." Emphasis supplied

In another case of **ISSA MGARA @ SHUKA V. R, CRIMINAL APPEAL NO. 37 OF 2005** (Unreported), the Court of Appeal stated that:

"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of light and its intensity is of paramount importance. This is because as occasionally held, even when the witness is purporting to recognize someone whom he knows.... Mistakes in recognition of close relatives and friends are often made." Emphasis added

In the instant matter, PW2 did not describe the brightness of the moonlight which was necessary for the purpose of determining whether or not identification could be made without any possibility of mistaken identity. PW2 also alleged that his assailant was commanding him not to look at him, and that while the accused was leaving, he ordered PW2 to



The Ladies Assessors who set with me during the trial, unanimously were of considered opinions that basing on circumstantial evidence of PW2, the prosecution managed to prove the offence of Murder against the accused person, beyond reasonable doubts. They said that, the accused was properly identified as there was a moonlight and that PW2 had known the accused for one year. With respect, on the basis of the above reasoning and pursuant to **section 298 (2) of the CPA**, I dissent from the opinions of the Ladies Assessors.

It goes without saying that, since the 1st and 2nd issues have been answered negatively, there is no doubt that the prosecution has failed to establish that it is the accused person herein who killed the deceased Bibi Weraikunda. Also, the prosecution has failed to prove the offence of Murder against the accused person beyond reasonable doubts as required by the law.

It is on the basis of the above findings that I find the accused person Paul Lucian Kimara not guilty of the offence charged of **Murder** contrary to **section 196 of the Penal Code, Cap 16 R.E 2019**. I therefore acquit the accused person forthwith under **section 235 of the Criminal Procedure Act, Cap 20 R.E 2019**; and order his immediate release from custody, unless held lawfully for other reasons.

It is so ordered.

Dated and delivered at Moshi, this 22nd day of December, 2021


S. H. SIMFUKWE

JUDGE

22/12/2021

