

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT GEITA

ORIGINAL JURISDICTION

(MWANZA REGISTRY)

CRIMINAL SESSIONS CASE NO. 130 OF 2022

THE REPUBLIC

VERSUS

DAMIAN ANDREA @ KANKONO

JUDGMENT

*09<sup>th</sup>-14<sup>th</sup> & 17<sup>th</sup> June 2022*

**ITEMBA, J.**

On 2<sup>nd</sup> July 2013, at midnight hours, in Lyobahika village within Bukombe District, a gunshot claimed the life of **Samwel Songoma**. It was later released that the bandits have invaded the deceased house, stole an unknown amount of money. In the course of investigation **Damian Andrea @ Kankono** the accused herein, was arrested and charged with the offence of murder.

The accused was arraigned before this court on an Information of murder contrary to section 196 and 197 of the Penal Code Cap 16 [R.E 2019].



The particulars of the offence pronounce that on the 2<sup>nd</sup> day of July 2013, at Lyobahika village within Geita district and region, the accused murdered Samwel Songoma.

In efforts to prove the alleged offence, the prosecution brought eight witnesses and ten exhibits whereas the defence paraded the accused as the only witness and he did not produce any exhibit. The Prosecution Exhibits are as follows: A firearm, a riffle, make AK 47 or SMG with serial number 3n9524 (**Exhibit P1**), 72 Bullets (**Exhibit P2**) 3 magazines (**Exhibit P3**), an envelope with three standard cartridges (**Exhibit P4**), an envelope with one spent cartridge (exhibit P5), Certificate of Seizure (**Exhibit P6**), Ballistic Expert examination report (**Exhibit P7**), sketch map of the crime scene (**Exhibit P8**), Post Mortem Report (**Exhibit P9**), A letter from OC CID Bukombe to the Resident Magistrate in Charge Bukombe District Court (**Exhibit 10(a)**) and a letter from OC-CID Bukombe to RCO Geita (**Exhibit 10 (b)**).

During trial the prosecution was represented by Ms. Janeth Kisibo learned state attorney while the accused person had the services of Ms. Penina Mashimba, learned counsel.



A tale as to what transpired at the scene is told by the deceased wife, **Helena Hemiliana**, who testified as **PW4**. She narrates that she lived in Lyobahika village with her husband, the deceased, who was dealing with mining business. On the fateful night, she was asleep with her husband, and at midnight, the bandits stormed in, requesting for money. The deceased gave the bandits an unknown amount of money but they kept on insisting for more. The bandits moved outside, broke the window and shot the deceased who was standing close to the wall. The deceased fell down and the bandits entered the room and started searching. Since they could not find anything else, they flew away.

PW4 testified further that at the scene, she could identify one person by face because she used to see him around. He was a mason and he had no wrist. His nickname was Kankono and he comes from Ibamba village. She could identify this person by the aid of the solar light which was inside the bedroom. PW4 pointed at the accused at the dock that he is the one she identified at the scene.

According to PW1, it appears that, when the deceased house was invaded, in the same night, there was a police patrol and investigation

going on in respect of an armed robbery case at the nearby village of Nampangwe. The said investigation was done by a team of the following officers **F. 1568 D/SGT Eric (PW1), John Malulu**, who was the then OC-CID-Bukombe, **Maro Kinyunko, Sergeant Josephat and A/insp Juston**. In the midst of such investigation the team received information about the deceased house being attacked by armed bandits. They went at the scene and found the deceased body wounded with a bullet. The OC CID assigned duties to the team, PW1 seized and labelled one spent bullet cartridge which was admitted as Exhibit P 5. **A/Insp Godson (PW3)** drew a sketch map which was admitted as Exhibit P8. The deceased's body was later examined by **Dr. Joshua Mazingo (PW7)**, he tendered a post mortem examination report (Exhibit P9) which revealed that the deceased's body was injured by a sharp object at the right wrist, thigh and abdomen and that a cause of death was reported to be excessive bleeding.

Based on the accused's descriptions by PW4, in the following day, a team of investigators launched a search of the accused. They found a village executive officer who confirmed that there is a person of such descriptions however, his ten-cell leader is in a better position to know him. The said ten cell leader was summoned and he explained that he knows



the person and he has just passed across him building a house somewhere. PW1 testified that around noon, they traced and arrested the accused while building a house at his home. The accused was orally interrogated by PW1 and PW5 and he confessed to have killed the deceased and added that he own a firearm, a riffle, named A.K 47 also known as 'SMG'. Following that confession, the team realized that they are dealing with a serious crime, therefore, Inspector Maro had to call the OCD- Bukombe, SP Msabila Bundala to join the team. The accused led PW1, PW5, OCD Msabila Bundala, the Village Executive Officer, the relevant ten cell leader and other police officers to a place where he had hidden the said riffle. That; it was behind the accused's house where there was a tree planted on the potato farm. He had buried the riffle under the said tree. PW1 explained that it was the police officers who unearthed the said riffle because it was a dangerous weapon and there was a risk of eruption. He stated that the riffle was packed in a white bag commonly known as 'sandarusi' and inside the bag there was a piece of cloth 'kitenge' which was used to wrap the firearm three (3) magazines and seventy-eight (78) bullets. He described that the firearm had a serial number 3n9524, it had butt cut and that '1960' means it was made in the year 1960. PW1





added that, outside the hole there was a bicycle which according to ASP Maro Philipo (PW5), it was identified to have been stolen in the said armed robbery case in Nampangwe village. There was also a machete around its specific location was not said. Upon seizing the said items, a certificate of seizure was filled (Exhibit P6). PW1 was instructed to store the said firearm, the bullets, magazines and a cartridge where he handled the same to E. 5914 CPL Adrian who was the custodian of the armory. On 13.9.2019 CPL Adrian handed over the duty of custodianship of the armory to **F.3032 Sgt Michael (PW8)** who handled the same to PW1 to bring the exhibits before this court.

PW1 told the court that the accused person was also charged with another case of unlawful possession of firearm and armed robbery whereas the same riffle produced in this court was involved. PW1 also testified that during investigation they requested the original certificate of seizure from Bukombe District Court and they informed that the said CC No.228/2014 is still at appeal stage before the High Court (Mwanza). PW1 explained that he gave the said feedback to the RCO Geita. He later tendered the letters from OC CID Bukombe to the Resident Magistrate in Charge Bukombe and



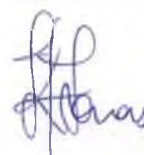
the letter from OC CID Bukombe to RCO Geita to support his testimony. The said letters were admitted as Exhibits P10(a) and P10(b) respectively.

On 9<sup>th</sup> February 2014, **E.3977 D/CPL Aristide (PW6)** took the said exhibits to be examined by the ballistic expert **SP John Mayunga Sangija (PW2)** that is to examine the relation between the seized cartridge and the seized firearm. PW2 testified before the court and issued a detailed scientific report (exhibit P7) to the effect that the 'spent cartridge of SMG/SAR caliber 7.62mm' which was seized from the crime scene was fired from SMG with serial number 3n9524 caliber 7.62mm' the firearm which was seized at the accused house (Exhibit P1). PW2 stated that out of 78 bullets which he was handled, 3 bullets were used in examination of the present case and 3 bullets were used in examination of the armed robbery and unlawful possession of firearm case which was Criminal case no.228 of 2014 in the district court of Bukombe. Therefore, after examination, he handled PW6 A firearm, 3 magazines, 72 bullets and three standard cartridges which were used for examination and one cartridge which was seized at the scene and seven cartridges in respect of the other case, which makes a total of 11 cartridges issued to PW6. He added that the said three cartridges were produced as exhibit in that other



case mentioned. PW2 explained that some of the bullets were fired during examination and they had turned into cartridges that is why there were less bullets and more cartridges. PW2 explained further that the said firearm is named assault rifle, and its ownership is restricted to security forces as opposed individuals. PW2 identified the said firearm, 72 bullets, spent cartridges and standard cartridges. That marked the end of prosecution case.

The accused defended himself under oath and he was the only witness. He totally denied to have killed the deceased. He testified that before arrest he lived in Runzewe, Ibamba village within Geita. He was a businessman selling second hand clothes. That on 2<sup>nd</sup> of July 2013 in the afternoon, he was arrested while preparing himself to go to the market for his business. Among the arresting officers, he identified one Eric (PW1) because he was his customer. He was taken to the Runzewe police station without being told the offence he is facing; he was shown a person whom he stated he doesn't know and when he said that, he was terribly beaten. A firearm was brought to him and he was asked to admit that he used it in crime commission and he was forced to sign some paper which he did not know it's contents. He stated that his house is at the 'centre' that is close





to the market where it is busy and there is no way he can grow potatoes. The accused also denied to have anything to do with the firearm and he challenged the prosecution for failure to bring evidence of his finger prints on the seized firearm. He also questioned as to why did the village chair and ten cell leaders who are alleged to have witness the search were not called as witnesses. He explained further that his then chairperson was named Maganga Masele and not Deus Juma who appears on the certificate of seizure. He challenged his identification by PW4 the deceased's wife because he was not working as a mason and that in his village, there are several people with disability and who have no wrist including one Abel who also carries bricks like him.

Having heard both parties the issue is whether the prosecution has discharged its duty of proving beyond reasonable doubts that it was the accused person who unlawfully killed the deceased.

Referring to the Post mortem report (**Exhibit P9**), and testimony from an eye witness (PW4), the deceased was gunshot and he died due to excessive bleeding. Thus, there is no dispute that the deceased death was unnatural. PW4 had explained in her testimony that she was at the scene

and witnessed her husband, the deceased being killed by bandits. She visually identified and recognized the accused as one of the bandits, One of the bandits, a mason who lives in Ibamba and goes by nickname of Kankono. It has been established by the celebrated case of **Waziri Amani V.R.** (1980) TLR 250; that:

*'evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight.'*

In the subsequent case of **Scapu John and another vs. Republic**, Criminal Appeal No. 197 of 2008 (Unreported) the court in approval of **Waziri Amani** expounded the conditions for ensuring there is no mistake of identity and had this to say:

*'Water tight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity. The court should, inter alia, consider the following;*

*How long the witness had the accused under observation*

*What was the estimated distance between the two,*

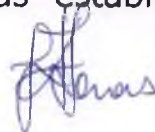
*If the offence took place at night which kind of light did exist and what was its intensity,*

*Whether the accused was known to the witness before the incident,*

*Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration."*

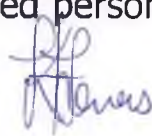
PW4 was very categorical that among several bandits, she only identified the accused person. She explained that the bandits entered the house and start searching and they made a mess in the bedroom. She was in the same room, terrified, but noticing what was happening. She stated that the accused whom she identified was just one step next to her, and there was a solar light which could enable them see around at night. PW4 added that she knew the accused before as he was a mason and he had no wrist. She didn't know the accused's official name but she knew he was nicknamed Kankono. Before the court, by observation, indeed, the accused had a disability in that his left wrist is missing and according to PW1 the accused was arrested while building a house.

It is also in evidence that after arrest, the accused person led a team of investigators to where he had hidden his firearm. The police officers seized a firearm, 78 bullets and 3 magazines among others and that after a scientific examination done by PW2, it was established that a bullet



cartridge which was seized at the scene was fired by the firearm seized at the accused's house.

I have gone through the defence raised by the accused person, first he has denied to have been found with the firearm and secondly, that he was forced to sign the seizure certificate. PW1 has testified how the accused, after arrest confessed to have been killed the deceased and how he led them to a place where he had buried the said firearm, the place where under normal circumstances, no one would have easily guessed. All these other witnesses who have signed the seizure certificate could not have conspired just to frame him in a murder case. If the accused thought he had another person who was either his village chairman or his ten-cell leader, he had an opportunity to mention them during committal proceedings, preliminary hearing and during trial but he never bothered to call them. This shows that there is less or no weight in those statements. As regards absence of the fingerprint evidence, it was not necessary to bring fingerprint evidence. I believe that the direct evidence from the witnesses who seized the firearm from the accused, was sufficient to prove that the firearm was found in possession of the accused person with or without the fingerprint evidence.





The accused also mentioned about Abeli who also had similar disability like his. Mentioning Abel does not necessarily raise doubts as to whether he was the one at the scene because the said Abel, PW4 was very specific that the accused's name was Kankono and not Abel.

Regarding the evidence against the accused, section 3 (1)(a) of the Evidence Act defines confession and I quote:

*'3. -(1) In this Act, unless context otherwise requires - "confession" means-*

*(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence;'*

In addition, Section 31 of the Evidence Act provides the following:

*'When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.'*





Further there is a litany of court of appeal authorities which gives the stance that confession leading to discovery is reliable evidence against the accused. In **Mathias Bundala v R** Criminal Appeal No. 62 OF 2004, CAT, Mwanza, the accused has led the witnesses to a saw pit where he has hidden the deceased body and in **Chamuriho Kirenge @ Chamuriho Julius v R** Criminal Appeal No. 597 Of 2017, CAT, Mwanza, the accused person led the investigator and village executive officer to where he had hidden the axe which he used to kill the deceased. In both cases the court of appeal found that the accused confession leading to discovery was sufficient evidence to convict the accused persons therein, with the offence of murder.

In **John Peter Shayo and 2 others vs Republic** (1998) TLR 198 quoted in **Tumaini Daudi Ikeru vs Republic**, Criminal Appeal No. 158 of 2009 (unreported) the Court observed as follows:

*'(i) Confessions that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967 if, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that **such discovery supplies a guarantee of the truth of that portion on the confession which led to it**'*



It is my firm view that the accused's admission to the commission of the offence to PW1 and PW5 was for all purposes, a valid confession in terms of section 31 of the Evidence Act, Cap 6 R.E.2019. Further to that the accused was properly identified at the crime scene by PW4. I find this evidence sufficient by itself to ground conviction.

The identification of the accused at the scene was proper and it is well corroborated by the confession of the accused which led to discovery of a firearm.

There is an unbroken chain of events from the moment when the firearm was seized to when it was produced before the court, which incriminates the accused.

In respect of the malice aforethought, the fact that the accused person and others who are still at large, went to the scene of crime with a firearm which was an assault rifle and shot the deceased's abdomen, they surely had a common intention of committing armed robbery and murder.

Consequently, I am satisfied that the prosecution has proved its case to the required standard, that is beyond reasonable doubt, against the accused person. I therefore, find the accused Damian Andrea @ Kankono



guilty of unlawfull killing Samuel Songoma and consequently, I hereby convict him for the offence of Murder contrary to section 196 and 197 of the Penal Code Cap. 16 [R.E 2019], as charged.

**Dated** at **GEITA** this 17<sup>th</sup> day of June 2022.



**L. J ITEMBA**

**JUDGE**

**SENTENCE**

Having heard submissions by both parties, there is only one sentence for the offence of murder, that is, **death by hanging** and my hands are tied to the same. Consequently, in compliance with section 197 of the Penal Code, the convict, **Damian Andrea @ Kankono** is sentenced to suffer death by hanging.

It is so ordered.

Right of appeal explained.



**L. J ITEMBA**  
**JUDGE**

## ORDER

1. In respect of disposing the exhibits, in terms of section 353 (1) and (5) of the Criminal Procedure Act, the firearm Exhibit P1, the 72 bullets (Exhibit P2), 3 magazines (Exhibit P3) and cartridges (exhibits P4 and P5), be forfeited to the Government.
2. The forfeiture order not to be carried out until the period allowed for lodging an appeal has elapsed or, when an appeal is lodged, until the appeal has been disposed of.
3. In the present time pending disposal, the exhibits mentioned in paragraph 1 above should be stored at the police armory, Geita

**Court:** Judgement delivered at Geita this 17<sup>th</sup> day of June 2022, in the presence of the accused person, Mr. James Pallangyo State Attorney, Ms. Penina Mashimba advocate for the accused and Mr Pascal Alphonse, RMA.

