

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE DISTRICT REGISTRY OF BUKOBA
AT BIHARAMULO
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 80 OF 2017**

**THE REPUBLIC
VERSUS
1. BAHATI JOHN
2. MGAMBO SAANANE**

RULING

(IN TERMS OF SECTION 293 OF THE CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2019)

Date of Last Order: 16.06.2022

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A.E. Mwipopo, J.

Bahati John and Mgambo Saanane who are accused persons in this case are charged for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E. 2002. It was alleged that on the 22.12.2008 at Kikomakoma Village within Biharamulo District in Kagera Region jointly and together they did murder one Sebastian Kaboyoka. Both accused persons pleaded not guilty to the offence they were charged with and the Republic summoned 4 witnesses and produced 2 exhibits to prove its case against the

accused persons.

Briefly, the evidence adduced by prosecution witnesses is as follows;

Rodrick Sebastian - PW1 testified that he is one of the deceased sons. That on 22.12.2008 at night hours they were at the deceased house compound sitting around the fire (*kikome*) which was outside the house. The people who were present at "*kikome*" together with PW1 includes the deceased person and deceased children namely Felix Sebastian, Domician Sebastian and Abel Sebastian. The fire at "*kikome*" was very bright. While at "*kikome*", a person who is not known came and asked a way to the house of Mr. John who is deceased neighbour. The deceased did stand up and while he was showing the direction to the house of John, the unknown person kicked deceased legs and deceased fell on ground. Suddenly, accused persons emerged from banana farm which is close by holding bush knives (*panga*) and came to "*kikome*" where the deceased was. They were wearing black coats. The accused persons and that unknown person who kicked the deceased to the ground attacked the deceased by using bushknives in his neck and head. PW1 and his brothers run away while yelling for help. PW1's brother namely Charles Sebastian - PW2 and some neighbours came and PW1 and his brothers who run away returned to the area of incident. They found the deceased person is already dead and accused persons and the unknown person have already left. He said that the deceased was buried on

23.12.2008 and from that day he never saw both accused persons.

PW1 said that he was able to identify the accused persons as the fire light from "*kikome*" was very bright and illuminated the area and accused persons are well known to him. He said that first accused person is their neighbour whom his house is next to deceased house and the second deceased person is the friend of the first accused person who lives at Songambebe Village. Most of times the accused persons were seen together.

During cross examination, PW1 said that there were other people in the house during the incident, but they were a little bit far around 20 paces from "*kikome*". PW1, deceased and deceased children were sitting at "*kikome*" facing it. He said that they did run away when they saw accused persons holding bushknives. It was approximately one pace when he saw accused persons holding bushknives. He said that his brother Felix Sebastian is not known his whereabouts as he disappeared after the incident. PW1 said that he never recorded his statement or give story about the incident to the police officer or anybody and he did not go to police station.

In re - examination, PW1 said that he saw accused person attacking the deceased with bushknives. After the police came he recorded his statement.

Charles Sebastian - PW2 testified that he is the elder son of the deceased. That on 22.12.2008 around 20:30 he was at his house in Rusese Village when he

heard voices calling for help in the direction of the deceased house. He took a torch and went to the direction of the deceased house to see what was going on. While on the way he met with the first accused running from direction of deceased house holding a bushknife. PW2 was able to identify the first accused person as he directed the torch light which was bright to him and he know the first accused very well as the neighbour of the deceased. The distance between him and the first accused person when they met was approximately 10 metres. The first accused person insulted him and PW2 switched off the torch. First accused passed him and PW2 continue to go to the direction of deceased house.

PW2 said he arrived at the deceased house and found the deceased is already dead. The deceased body had several cut wounds in the neck and head. There were several people at the area and he asked what happened. Some women told him that the deceased was attacked by accused persons and another unknown person with bushknives. He said that he also know the second accused person as he is residing at Songambebe Village. The police were informed about the incident and they came to the scene of crime on 23.12.2008. After police has arrived the accused persons disappeared from the village.

In cross examination, PW2 said that the distance from his house to deceased house is approximately 1.5 km and he met with first accused person around a forest with small trees. The torch light was intensity enough as he was

able to identify him from 10 metres. He recorded his statement - Exhibit D1 to the police officer on 23.12.2008. In the statement he said that first accused asked who is this when they met and he switched off the torch. After he arrived at deceased house, Cesilia who is one of the deceased wives told him what transpired. There at deceased house the fire at "kikome" was still very luminant and it provided light sufficient to see even at 10 metres. He said that two days after funeral Leopold Kifulede demanded to be paid his money Tshs. 350,000/= he loaned to Felix Sebastian who is PW2's young brother. This incident occurred two days after he recorded his statement. First accused was came to the scene on 23.12.2008 and PW2 did not do anything about it. When the police came to the scene of crime on 23.12.2008 the first accused person was present. PW2 did not inform the police that it was the first accused who was responsible for the deceased death when first accused person was present at the scene of crime.

The third prosecution witness namely Dr. Domitina Kabyemulo Prosper testified that she is working at Kikomakoma Dispensary as Clinical Officer. She said that on 23.12.2008 she examined the deceased body at Kikomakoma Village. After examining the deceased body she filled the report - Exhibit P1 which show that the cause of death is cut wounds which led to severe blood loss. The witness read the Exhibit P1 to the Court.

In cross examination, PW3 said that the head and neck of the deceased

was separated by sharp object and the head and neck were joined by a piece of skin only.

A/Inspector Junguli - PW4 was the fourth and last prosecution witness. He testified that he is police officer from investigation department at the Biharamulo District Police and he was one of the investigator of this case. He received information from OC CID Biharamulo that there is murder incident at Rusese Hamlet within Kikomakoma Village on 23.12.2008 and he visited the scene of crime together with other police officers and PW3. They found the deceased body lying on ground two metres from "*kikome*" at his house and the fire at the said "*kikome*" was still burning. PW3 examined deceased body and PW4 drafted sketch map of the scene of incident. Other police officers recorded statement of witnesses and they allowed deceased relatives to bury the deceased body.

Police proceeded with investigation by interviewing deceased relatives and village leaders where they got information that it was accused persons who killed the deceased. Police went to first accused house to arrest him but they were absent. On the next day they returned to the village and informed the villagers to inform the police if the accused persons will resurface. It was in 2015 when they got information about the accused persons and were able to arrest them. Mgambo Saanane was arrested on 23.09.2015 at his house and Bahati John was arrested on October, 2015 at Kikomakoma Village. The delay to arrested accused

persons was for the reason that accused relatives threatened villagers not to report their whereabouts to the police.

In cross examination, PW4 said that they arrived at the scene of crime on 23.12.2008 around 11:00 or 12:00 hours. He do not know that first accused was at the scene on 23.12.2008. He was not a part of the team who went to the house of first accused person to arrest him on 23.12.2008. The accused persons were arrested in 2015 and were charged for all offences they have committed including attacking Rajab Anthony in 2013 by using bushknives. He don't know if accused persons were arrested in 2013 for the offence of attempted murder and were out on bail. He said he dont know what happened in 2013 when accused persons reported to the police, what he know is that accused persons were arrested for this offence in 2015. Accused persons were not staying at once place as they were residing at different places in rotation. After the testimony of PW4 the prosecutions closed their case.

This evidence adduced by prosecutions' witnesses proves without doubt that the deceased namely Sebastian Kaboyoka is dead and his death is not natural. The evidence from PW3 and Report on Post Mortem Examination - Exhibit P1 shows that deceased is dead and the cause of his death is head and neck wounds causing severe hemorrhage. The same is corroborate with the evidence of PW1, PW2 and PW3 who said that the deceased body had several

cut wounds in the head and neck.

The next question is whether the accused persons are responsible for the deceased death. The prosecutions case rest on direct evidence of PW1 who is the eye witness and circumstantial evidence of the conduct of the accused persons to disappear from the village after the deceased was buried on 23.12.2008.

On the evidence of visual identification, the law is settled that the evidence of visual identification is the weakest kind, and thus before it is taken as a basis of conviction, it must be watertight. This was stated by the Court of Appeal in the case of **Waziri Amani v. Republic [1980] TLR 250**. The Court of Appeal stated further that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight.

In the case of **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza, (unreported), the Court of Appeal while discussing the possibility of mistaken identity in visual identification provided some guidelines for eliminating possibility of mistaken identity. The Court held that:

"The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source

and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."

In this case, PW1 said in his testimony that the incident took place during night hours and he was able to identify the accused persons as there was sufficient light from "kikome" and he recognise accused persons since he know them very well. He said that first accused is their neighbour and the second accused person is friend of first accused person who resides at Songambebe Village. PW1 said that accused persons came close to him by one pace and he watched the first accused person in the eyes before the accused persons attacked the deceased was just two metres from where PW1 was standing.

However, in cross examination PW1 said that when he saw accused persons are coming to "kikome" armed with bushknives he run away together with his brothers as they were not armed. This contradict his testimony in examination in chief that he saw accused persons attacking the deceased. PW1 did not explain the intensity of the fire light from "kikome" apart from saying it

was bright light. He said that the light did not reach people who were 20 paces away, but also he did not say the light was luminant enough to allow identification of a person at what distance, is it two or three or ten metres? The witness did not say if he named the accused persons as responsible for deceased death to the first person who came to the scene or to the police after they visited the scene of crime on 23.12.2008. It was PW2 who came to the scene of incident after the deceased was attacked who testified that he was told by Cesilia who is one of the deceased wives that it was the accused persons who killed the deceased. The said Cesilia was not summoned to testify as prosecution witness and the evidence available shows that she was not at "*kikome*" where the incident occurred during the incident. If she was at all around, then she was far than where the intensity of fire light from "*kikome*" was reaching.

Further, the evidence from PW1 and PW2 shows that the first accused person attended burial of the deceased in the evening of 23.12.2008. These witnesses testified that they did not tell the police that the person responsible for deceased death is the accused persons and the first accused was there at the scene. This means PW1 and PW2 were not certain that the accused persons are responsible for the deceased death.

PW4 who is investigator testified that they arrived at the scene of crime around 11:00 hours and 12:00 hours and they recorded witness statement, draw

sketch map of the area and examination of deceased body was conducted before they allowed the deceased body to be buried in the evening. Those witnesses did not tell PW4 or the police that it was the accused persons who were responsible for the incident. It was after interviewing deceased relatives that they got information that it was accused persons who are responsible for deceased death. PW4 did not say whom among the deceased relatives told the police that it was the accused persons who killed the deceased.

The law is settled that naming the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness. Likewise, failure to mention the suspect at the earliest possible opportunity may put the credibility of the witness in question. This position was stated by the Court of Appeal in **Marwa Wangiti Mwita & Another vs. Republic [2002] TLR 39** and in **Nebson Tete vs. Republic**, Criminal Appeal No. 419 of 2013, Court of Appeal of Tanzania at Mbeya, (unreported). The delay in naming the accused persons as the suspects responsible for deceased death put the credibility of PW1 in question.

I'm aware that every witness is entitled to credence and to have his/her evidence believed by the court. This position was settled in the case of **Goodluck Kyando v. The Republic [2006] TLR 363** it was held that:

"...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. ”

As the trial court, I got chance to see PW1 when he was testifying. In cross examination he denied to record his statement to any police officer and to anybody about the incident leading to deceased death. He also said that he did not go to any police station. But, in re examination he said that he recorded his statement to the police officer on 23.12.2008. Further, the witness said in cross examination that he run away soon after he saw accused persons armed with bushknives which contradict his testimony in examination in chief that he saw accused persons attacking the deceased by using bushknives were they cut him on head and neck. Also, PW1 did not say the time he took to observe the accused persons during the incident. With such numbers of shortfalls, I hesitate to say that PW1's evidence on the visual identification was watertight and the possibilities of mistaken identity has been eliminated.

The next question is do we have from prosecutions evidence any other independent evidence to prove that the accused persons are responsible for deceased death? Looking at the testimony of PW2, he said that he met with the first accused person carrying a bushknife at night in the bushes coming from the direction of deceased house after he heard a call for help. He used a torch light

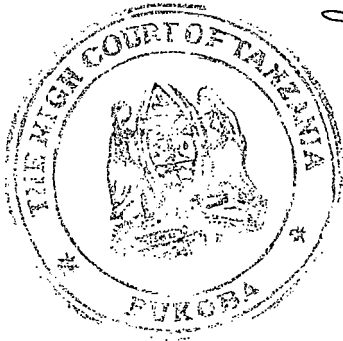
to identify him and first accused was ten metres away. This evidence does not prove at all that first accused person is the one who killed the deceased. There might be several explanations for the first accused to be in bushes on that day. Further, PW2 did not say if the torch had new batteries to have luminant light sufficient for a person who is 10 metres away to be identified. The remaining evidence of PW2 is hearsay from what he heard from women including what he heard from his stepmother namely Cesilia. The Court could not rely on such hearsay evidence bearing in mind that the said Cesilia was not called by prosecution to testify. Also, this witness said he recorded his statement to the police on 23/12/2008 but his statement which was tendered and admitted as exhibit D1 shows that he was talking in the statement about the incident which occurred 2 days later. This means the statement was not recorded on 23/12/2008 as he alleged but may be it was recorded on or after 25/12/2008. This makes the credibility of the witness to be in question.

The last piece of evidence available in this case is the conduct of accused persons to disappear after the burial of the deceased on 23.12.2008. This is found in the testimony of PW1, PW2 and PW4. Very unfortunately, PW1 and PW2 did not inform the police immediately after they have arrived at the scene of crime that it was the accused persons who are responsible for deceased death. PW1 and PW2 said in their testimony that when the police arrived first

accused person was present and he attended burial of the deceased. PW4 testified that after interviewing deceased relatives they got information that accused persons are responsible for deceased death. Police went to the house of first accused person but he was absent. PW4 said in cross examination he was not the one who went to first accused house on 23.12.2008 thus what he was saying was a hearsay evidence. There is no evidence that police went to look for first accused person in any other day apart from going back to the village and asked the villagers to give them information about accused persons whereabouts. There is no evidence whatsoever that PW4 or any other police officer went to Songambebe Village to arrest or look for the second accused person. Even PW1 and PW2 said nothing if the second accused person disappeared from Songambebe Village where he was residing. The evidence by PW4 shows that first accused was arrested on October, 2015 and second accused was arrested on September, 2015 in their houses. This is seven years from the date of incident and it raises doubts on the delay to arrest them.

With such kind of evidence available in this case it is obvious that there is so much doubt in prosecutions' case and the evidence is not sufficient to warrant both accused persons to defend themselves. The evidence available does not prove that it was accused persons who have committed the offence of murder or any other offence of which, under the provisions of sections 300 to

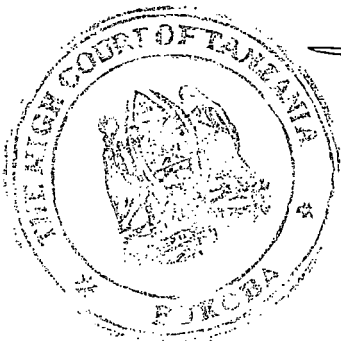
309 of the Criminal Procedure Act, Cap. 20, R.E. 2002, they are liable to be convicted. Thus, I record a finding of not guilty against both accused persons namely Bahati John and Mgambo Saanane. They are acquitted in this case for want of sufficient evidence. It is so ordered accordingly.



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A.E. Mwipopo
Judge
16/06/2022

The ruling was delivered in open Court this 16th June, 2022, in the presence of 1st accused person, 2nd accused person, the defence counsel namely Ms. Esther Centomi and Ms. Veronica Mushi, State Attorney appearing for the Republic.



A handwritten signature in black ink, appearing to read "A.E. Mwipopo", written over a horizontal line.

A.E. Mwipopo
Judge
16/06/2022