

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL SESSION CASE NO. 10 OF 2021

REPUBLIC

VERSUS

FRANCIS FANUEL KITILYA

JUDGMENT

21/6/2022 & 24/6/2022

SIMFUKWE, J

The accused, **FRANCIS FANUEL KITILYA**, has been arraigned on a charge of Murder, contrary to **section 196 and 197 of the Penal Code, Cap 16, R.E. 2019**. The prosecution, being represented in this case by Mr. Kassim Nassir assisted by Mr. Mabuba Malima, both learned State Attorney, set out to prove that on 15th day of September, 2019 at Kileo Village within Mwanga District in Kilimanjaro region, the accused murdered one **ISSA JUMA** (hereinafter "the deceased").

Six witnesses and one exhibit were marshalled to prove the prosecution case. The accused, who enjoyed the services of Ms. Rachel Mboya, learned advocate, had two witnesses (including himself).

The first prosecution witness to take the flow was **PW1 Hassan Hussein Balozi**. His testimony was that, on 14/9/2019 while heading home from the farm accompanied with his relative one Ramadhan on a motorcycle, they met Juma Issa (deceased) around 11;00 hrs accompanied with the

traditional doctor whom he later on identified to be the accused herein. He greeted them. Later on in the evening, they received information that the deceased whereabouts was unknown. That, the youth and family members gathered and went to find the deceased till 01:00 hrs unsuccessfully. However, on the next day that is on 15/9/2019 at about 08:00hrs he heard an alarm from the deceased's farm. Upon responding to the alarm, he found the people gathered at the well and witnessed the deceased being removed from that well. PW1 continued to testify that the deceased had two big wounds on his head and one wound on his nose which showed that they were inflicted by using a sharp object. That, the body of the deceased was examined by a doctor then it was taken for burial.

In cross examination, PW1 said that he did not know the name of that traditional doctor but he knew his face as he used to see him at the deceased's homestead. He admitted that he did not see the accused killing the deceased but the accused was the one who left with the deceased from his homestead.

Answering questions from the assessors, PW1 said that the wounds showed that they were caused by a sharp object. Also, he stated that the said Well was a dug well.

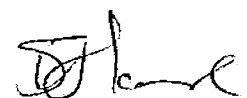
PW2 Ransul Juma Issa, told the Court that the deceased was his biological father. This witness said that on 14/9/2019 at 20:00hrs he received a call from his relative one Ibrahim Juma informing him that their father had not returned home since morning when he went to dig traditional medicine with a traditional doctor. Following such information, PW2 decided to go home as he was residing at Njiapanda which is not far



from his father's home. He arrived at home about 21:00hrs and gathered with other people and relatives then they went to find their father (deceased). Until 01:00hrs or 02:00hrs they had not yet found him and decided to return back home. In the morning on 15/9/2019 his uncle one Hussein Issa Chakuingwa left about 07:00hrs and went to the farm of the deceased. He informed them through the phone that he had seen one shoe of the deceased. They went there and found flies on the well. They called the police who arrived and ordered what was seen in the well to be taken out. They managed to take the body of the deceased out of the well. PW2 testified further that the body had two wounds on the head one of the wounds was on the top of the head which showed that it was caused by a sharp object. That, another wound was on the forehead which showed that it was caused by blunt object. After the doctor had examined the said body, they buried it on 16/9/2019.

Elaborating further on what happened, PW2 told the Court that they did not see the said traditional doctor throughout the tragedy. That, he disappeared since when he left with the deceased. Though he was informed through the phone by one relative one Ibrahim that their father was found dead in the well, and responded that he would attend the burial, still the accused did not attend and his phone was not reachable thereafter.

PW2 testified further that, he knew the accused even before as he used to come at their homestead periodically since 2009 and stayed there whenever he came. PW2 identified the said traditional doctor by pointing the accused in the dock.

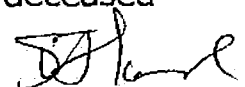


In cross examination PW2 elaborated that such traditional doctor came to their homestead to treat people though he stated that he never saw his traditional tools. Also, in cross examination, PW2 said that the well was about 8 metres but it was not being used and it was open.

PW3: ASP Asia Matauka, OCCID at Mwanga Police Station (as she then was); her evidence was that she received information that there was a person who was found died at Kileo area at Mnoa. She called Cpl Emmanuel and other police officers together with a doctor and headed to the scene of crime. Upon arrival, they found many civilians gathered crying and raising alarms. They talked to the relatives who told them that there was a body in the well which they suspected to be their father (deceased) who had disappeared a day before. That they suspected so because they found one panga and one yeboyebo shoe at the top of the well and their father had left worn such shoes and carrying one panga.

PW3 went on to state that, they took the body out of well and found that the same had wounds on the head which showed that were caused by sharp object. The relatives identified such body to be their father. PW3 filled the form and required the doctor to examine the cause of death whom after examination told her that the deceased was cut by a sharp object and that he was also hit with heavy object on his head.

PW3 explained the situation regarding the investigation, that they interrogated different people including relatives of the deceased who told them that at their homestead, they were staying with a traditional doctor who came to treat the deceased and that they stayed with him for a long time to the extent that the deceased allowed him to treat other people. PW3 also testified that she was told that on 14/9/2019 the deceased



together with the said traditional doctor left home. That, after a while the traditional doctor returned alone full of worry and fear. He took his bag and coat and left. They waited until 19:00 hrs and the deceased did not return home which was not normal. That, they asked the said traditional doctor who responded that he did not know the whereabouts of the deceased and cut the phone and thereafter he was not reachable. Basing on those explanations from the relatives of the deceased, PW3 required to be given the phone number of the said traditional doctor. She called but it was not reachable. Upon cyber track, the phone in which the first line was used was tracked and succeeded to arrest the accused. Upon inquiry, the accused admitted that he knew the deceased as he used to stay at his homestead. About his death, he said he knew nothing. Also, he was interrogated on whether he went with the deceased to the farm but he had no straight answer. PW3 identified the accused in the dock.

When cross examined, PW3 said that they found a panga around the well which was under a police custody. She also stated that she was told that the accused came back home worried. That, the accused introduced himself as a traditional doctor.

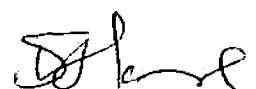
Answering questions of assessors, PW3 said that the panga had no blood stains and that the well was not built by bricks or stones, it was just dug.

PW4 Ms. Bitizari Jumaa, told the court that she was the granddaughter of the deceased and on the fateful date she was at home (deceased's homestead) when the deceased told him that he was going to the farm and directed him that once Babu Mganga came, he should tell him to follow him at the farm. She said further that one Babu Hussein came and asked the whereabouts of his grandfather. She told him that he went to

the farm. The said Babu Hussein communicated to him and the deceased came back. The two had conversation which PW4 told the court that she did not hear the same. PW4 also told the court that Babu Mganga came and joined their conversation. Also, one Babu Omary Makono also joined them and they became four and continued talking. That, babu Omary started to leave followed by Babu Juma and Babu Mganga followed to the direction where the deceased had gone.

PW4 stated further that around 14:00 hrs Babu Mganga came back from the same direction while in a hurry, sweating and told her to give him his coat. PW4 gave him a coat. He told PW4 that he was going to Tanga and asked her if she could go with him. PW4 said that the said Babu Mganga was talking while worried. That, apart from that coat he also took his bags. PW4 said that they had known the said Babu Mganga for about three months, that he used to tell fortunes and he was using herbs (*mitishamba*) to treat people. That, Babu Mganga used to say bye whenever he left but, on that day, he did not say bye. Also, he used to leave by a motorcycle but on that date, he left on foot. That, when he was talking to PW4 he seemed to be worried.

PW4 also testified that on that date, the deceased did not come back home. She decided to call Babu Mganga who replied that he was not with the deceased and thereafter cut off a call and was not reachable. That, people went to find the deceased unsuccessfully. However, on 15/9/2019 they discovered that their grandfather Juma Issa was died. PW4 told the court that previously she never had misunderstanding with the said Babu Mganga. PW4 identified the said Babu Mganga to be the accused in the dock. When cross examined, PW4 stated that on that date she was alone

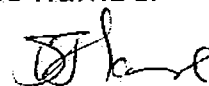


since her mother was at her business and her grandmother also was not at home.

Also, when cross examined, PW4 said that the deceased left while carrying a panga. She did not know the name of the said babu Mganga but she had his phone number as they were staying together at the deceased homestead.

PW5, Fatuma Mohamed Mbaga, told the court that on 14/9/2019 around 12:00hrs she saw the deceased accompanied with the traditional doctor passing at her homestead. After a while that is about 14:00hrs, the said Babu Mganga came back alone. Next day she heard that the deceased was missing and later he was found in the well died. PW5 also pointed at the accused herein to be the said Babu Mganga she was referring. In cross examination, she said that she did not know his name. However, she elaborated that the said Babu Mganga was a traditional doctor who used to treat people at Mzee Juma's (deceased) homestead.

The last witness was **PW6 G.1865 D/CPL Emmanuel**, who was the investigator who accompanied PW3 to the scene of crime. His evidence was not far from the evidence of PW3. Serve that PW6, had additional evidence. That he witnessed the doctor while conducting post mortem examination and recorded the statement of the said doctor who issued to him a Post Mortem Examination report. PW6 identified the Report on Post Mortem Examination and tendered the same as Exhibit which was admitted without objection and marked as **Exhibit P1**. PW6 also testified that he was the one who arrested the accused after getting information that he was the last person to be seen with deceased. That, through investigation and cyber track, they were informed that the phone number



of the accused was reachable on 14/9/2019 at about 21:00hrs at Kileo village. That, through the assistance of cyber crime department while accompanied with the deceased relatives who knew the accused, he managed to arrest the accused at Gonja at the homestead of his second wife. After searching the house, they found traditional medicine. He said further that the accused was a traditional doctor who was telling fortunes as he introduced himself so.

PW6 testified further that he was the one who recorded the cautioned statement of the accused who denied to be a traditional doctor also denied the fact that he was the last person to be seen with the deceased. On interrogation, PW6 told the court that the accused failed to explain why he left the deceased's homestead without notice. Also, PW6 said that the accused told him that he knew that Juma Issa was dead at the police station while the relatives of the deceased alleged that they had informed the accused about the death of Mzee Juma.

On cross examination, PW6 said that he saw a panga and yebo yebo shoe at the scene. Also, when cross examined by Ms Mboya, PW6 said that the accused failed to prove that on the available information he was not the last person to be seen with the deceased. He also said that the suspect did not cooperate with the family of the deceased when the deceased was missing.

On re-examination, PW6 elaborated that the farm belonged to the deceased thus he knew the location of the said Well, that it was impossible for a person to take off the yeboyebo and leave a panga before falling in the well. That the water in the said Well was shallow thus even if a person would fall in it, he could not be harmed.



Upon being called upon to defend himself, the accused gave his sworn evidence as DW1. Led by Ms. Mboya the learned Defence counsel, the accused stated among other things that on the fateful date he was at his homestead at Gonja where he attended the funeral of Mzee Omary and they spent three nights at the funeral. He also testified how he was arrested by police Officers on 8/11/2020.

He said that in the investigation room he was forced to sign a statement without reading the same. That when he refused, they tortured him and due to that torture, he admitted and signed in order to save himself. At the end of his evidence, DW1 told the court that he did not know the deceased Juma Issa.

Answering questions in cross-examination by Mr. Kassim, DW1 denied to be with the deceased and he denied his cautioned statement and also denied to be a traditional doctor.

DW2 Yusuf Subaya Athuman, his evidence was to support the fact that on the fateful date that is on 14/9/2019 he was at the funeral at their sub village with DW1 where they stayed for three days. Though, he named the deceased of the alleged funeral to be Mussa Kabosi.

In cross examination DW1 said that he did not know the issue of Francis going to Mwanga on 13/9/2019.

After receipt of evidence from witnesses of both sides, the Court allowed counsels of both parties to submit their final submission *viva voce*.

Ms Rachel Mboya, learned counsel for the accused, began her submission. by condemning the prosecution for calling only the relatives of the deceased without calling other independent witnesses. She was of the



view that such evidence raises doubts as it was easy for those relatives to conspire and testify against the accused. It was her expectation that some other witnesses should have been independent villagers who were present at the scene.

Also, she incriminated the prosecution evidence particularly the evidence of PW1 and PW5 on the reason that no one witnessed the accused killing the deceased.

The learned Defence counsel also argued that, the principle of last person to be seen by the deceased cannot be applied in this case. She referred the court to the cases of **Lucas Venance @Gwandu and Godfrey Barnabas vs Republic, Criminal Appeal No. 392 of 2018, Mohamed Said Matula vs Republic [1995] TLR 3.**

She also argued that even if the accused knew the deceased but still in the line of the case of **Nathaniel Alfonse Mapunda and Benjamin Alfonse Mapunda vs Republic, [2006] TLR 395,** the same cannot be ground of conviction since suspicion in criminal cases does not ground conviction especially for the offence of murder.

The defence counsel also faulted the prosecution evidence particularly the evidence of PW3 and PW6 for being contradictory. That, PW3 denied to have been involved in investigation while PW6 stated that he worked together with PW3.

Concerning a panga which was alleged to have been found at the scene, PW3 said it would have been brought in court by PW6 as exhibit but PW6 did not produce it on the reason that the said panga was already touched by many people. Also, she challenged PW6's tendering of exhibit P1 as he



was not the one who prepared it hence curtailed the defence's right to examine the same.

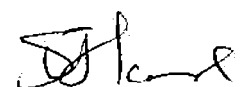
To substantiate the point of discrepancy, she referred the court to the case of **Jeremiah Shemweta vs Republic, [1985] TLR 228**; in which it was held that:

"The discrepancies in the various accounts of the story by the prosecution witnesses give rise to some reasonable doubts about the guilt of the appellant."

Ms. Mboya also raised another weakness on the prosecution side in respect of PW3 and PW6's evidence which was to the effect that the deceased could have fallen down in the said Well and sustained injury considering that the said Well was approximately 8 metres. She stated further that evidence coupled with doubts and contradictory information in respect of the panga and allegation that the deceased would fall accidentally in the said Well, raises great doubts in respect of conviction of the accused person. She cemented her argument by citing the case of **Abdallah Jeje Mchina vs Republic, Criminal Appeal No. 195 of 2007**; in which it was held that:

"In law where there is two possible views on the evidence, one pointing to the guilty of the accused person and the other to his innocence, a court must adopt the one favourable to the accused person."

Also, the learned Defence Counsel condemned the prosecution side for failure to prove that the accused was a traditional doctor even to bring traditional medicine which according to her would have connected the accused with the offence charged.



Furthermore, the defence counsel also faulted PW6 for failure to tender certificate of seizure contrary to **section 38 (1) (b) and (2) of Criminal Procedure Act, Cap 20 R.E 2019.**

Ms. Mboya also criticised the prosecution evidence in respect of the issue of identification, where PW2 and other witnesses failed to mention the name of accused though PW2 stated to have stayed with him for 3 months. She cited the case of **Yasin Maulid Kipanta and Others vs Republic [1987] TLR 183** in which it was held that:

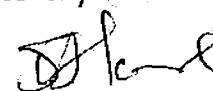
"Where evidence against the accused person is solely that of identification, such evidence must be absolutely watertight to justify conviction."

Ms Mboya emphasized that the prosecution case failed to prove the case beyond reasonable doubts.

The learned Counsel concluded by expressing her view that the accused is not guilty, and the Court should acquit him.

In his reply submissions, the learned State Attorney Kassim Nassir maintained that they proved the case beyond reasonable doubts through their six witnesses and basing on the principle that the accused was the last person to be seen by the deceased while alive. He referred to the case of **Sikujua Idd vs Republic, Criminal Appeal No. 484 of 2019** at page 12 last paragraph; where it was held that:

"As suggested in Mark s/o Kasimil v. Republic, Criminal Appeal No. 39 of 2017 (Tanzlii) an accused person before convicting on circumstantial evidence must be the last person to be seen with the deceased; and in the absence of the plausible explanation to explain



the circumstances leading to the death, he will be presumed to be the killer."

Mr. Kassim said that in this case the accused was the last person to be seen with the deceased while alive. That the same was proved through the evidence of PW1, PW4 and PW5. He faulted the accused for failure to cross examine the fact that he was the last person to be seen with the deceased and never stated how he parted with the deceased which he had the onus to prove how he parted with the deceased. Referring to the case of **Sikujua Idd** (supra), the learned counsel was of the view that this court can safely hold that the accused was the last person to be seen with the deceased and presume that he is the killer of the deceased. That, in cases of this nature, the onus of proof shifts to the accused who must state how he parted with the deceased.

Also Mr. Kassim contended that evidence that the accused was a killer was supported by other evidence. He referred to the case of **Kitigwa vs Republic [1994] TLR 65** and the case of **DPP vs ASP Abdallah Zombe and 8 Others, Criminal Appeal No.358 of 2015** at page 51, 17th and 18th lines (unreported). The Court insisted that:

"This doctrine needs corroboration and the fact is corroborative evidence may be circumstantial and may well come from the words and conducts of the accused person."

He submitted that they had circumstantial evidence to corroborate the principle, which is the conduct of the accused after the death of the deceased as stated by PW4. That, the accused was in a hurry and worry and that he was speaking words which PW4 could not understand. That, he collected his belongings and left without notice. Also, after being

phoned and asked the whereabouts of the deceased he replied that he did not know and thereafter the phone was not reachable to date, which was also stated by PW3 and PW6 and later the accused changed his phone number.

Mr. Kassim also pointed another circumstantial evidence that the accused denied the fact that he knew the deceased.

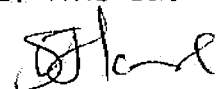
The prosecution counsel also denied the fact that the deceased could have been fallen in the said Well and sustained injury, he stated that as per the report on the post mortem examination, the deceased had a cut wound on the head which caused severe bleeding. Also, he said that it was difficult to fall in such well since the deceased knew it as it was in his farm. Also, the deceased could have fallen with the shoes and panga.

Concerning the defence allegation that the prosecution did not prove if the accused was a traditional doctor, Mr. Kassim argued to the contrary. He said that they had a duty to prove that the accused was the last person to be seen by the deceased and not that he was a traditional doctor.

The State Attorney also questioned the defence of alibi to the effect that it did not state sufficient particulars and thus defective. He said that even if it is assumed that such defence is true still on the fateful date the accused could have been committed the offence and go to the alleged funeral since Mwanga and Same are near.

Hence, in totality, it was the learned State Attorney's prayer that the Court finds the accused guilty of murder as charged.

The above constitutes the case on part of the prosecution and the defence. The two gentlemen assessors and one lady assessor who sat



with me in this case have expressed their undivided views to the effect that the prosecution case has failed to prove their case beyond reasonable doubts.

I now turn the question as to what is my opinion? My opinions will squarely scrutinize the following issues as summarized to the assessors during summing up:

- 1. Whether the principle of the last person to be seen by the deceased while alive suffices to convict the accused person in this case.*
- 2. Whether on the available evidence on record, it is the accused who killed the deceased Juma Issa.*
- 3. Whether the prosecution has proved the charge of murder against the accused person beyond reasonable doubts.*

Before dwelling in these issues, it is better to state that, it is undisputed fact that the deceased Issa Juma died unnatural death. What is in dispute is who killed him.

It is an established principle that in criminal cases, the prosecution has the duty to prove the offence charged beyond reasonable doubts. The prosecution is supposed to establish through evidence the elements of murder which are; death, the involvement of the accused as the person who caused the death and malice aforethought (evil intention) of the accused person. The accused has no duty of proving his innocence. His duty is to show doubts in the prosecution case

The prosecution evidence is based on two fonts, first on the principle of last person to be seen by the deceased and second, circumstantial evidence. These two fonts fall within the ambit of the raised issues.

Under the 1st issue of the principle of last person to be seen by the deceased alive (last person's rule). There are number of decisions to that effect. Among them has been referred by Mr. Kassim for the prosecution and defence counsel.

For the Last person's rule to apply, the prosecution must establish that it is the accused who was lastly seen with the deceased person and the circumstances should convince the reasonable person that the accused is the assailant. Once the principle of the last person to be seen with the deceased is established, an adverse inference can be drawn against the accused if he fails to explain the circumstances in which he parted the company of the deceased. In the case of **Gody Katende @ Godfrey Katende vs Republic, Criminal Appeal No 399 of 2018** the Court of Appeal had this to say in respect of the last person principle. That:

"In this regard, if an accused is alleged to have been the last person to be seen with the deceased, in the absence of plausible reasons to explain away the circumstances leading to the death, he or she will be presumed to be the assailant. Thus, the circumstances must be such as to produce moral certainty and precision, to the exclusion of every reasonable doubt..."

In the present case, there were three witnesses who proved that the accused herein was the last person to be seen with the deceased while alive. These are PW1 who met the accused and the deceased at the farm of Nuru. PW4 the deceased's granddaughter whose evidence was to the effect that the deceased and the accused left home together and PW5 who testified that the two passed at her homestead. This evidence proves

without doubt that it is the accused who was lastly seen by the deceased whereas he was later on discovered to be died in the well.

Since the accused is the one who is alleged with the deceased, he ought to explain the circumstances in which he parted the company of the deceased. The accused herein did not explain the circumstances as he had denied to have known the deceased. In the case of **Said Hemed v. Republic, [1987] TLR 117**; the Court of Appeal held among other things that:

"In criminal cases the standard of proof is beyond reasonable doubts. Where the onus shifts to the accused it is on balance of probabilities."

Therefore, in this case the accused person had the onus to prove on balance of probabilities that he knew the deceased but he was not his assailant.

It is not sufficient to convict the accused on the point that he was the last person to be seen with the deceased until the circumstances as presented in evidence point finger to the accused that he is the assailant. In other words, the last person principle must be corroborated with other circumstantial evidence. I am of considered view that, if the principle is left without corroborative evidence, people would have escaped from walking with their fellows on the reason that if one would be found died, then the other would be held criminally liable.

In this case the prosecution side elaborated the circumstances which incriminate the accused person. That, about 14:00 hrs the accused returned alone while worried and in a hurry. He even told PW4 the words which she did not understand. That, he left the deceased's homestead

without notice and that he did not cooperate with the family of the deceased when the deceased was missing, even during the funeral despite the fact that they had informed him.

This circumstance has convinced me to concluded that the accused is responsible with the death of Issa Juma. These circumstances if considered in its totality form a chain of events which have no other conclusion than concluding that the accused is guilt.

I have concluded as above, having in mind that I was dealing with the serious charge of murder. Thus, I warned myself with the principle that circumstantial evidence must be taken with care so as to avoid the danger of allowing suspicion to take place of legal proof. The Court of Appeal in the case of **Mohamed Seleman vs Republic, Criminal Appeal No 105 of 2012** (Unreported) quoted with approval the Indian case of **Balwinder Singh vs State of Punjab, 1996 AIR 607** which stated that:

"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof..."

Moreover, in the circumstances of this case, the conduct of the accused as explained above would lead to conclusion that he was guilty. It is trite law that in an appropriate case, the conduct of the accused person after the event may lead to an inference of guilt. In this case the accused returned at the homestead of the deceased worried and in a hurry where he took his belongings and left. His reason for doing so, given the

circumstances, are unknown as the accused decided to deny even simple truth that he knew the deceased. Having established as such I find myself to have established the second issue (*whether on the available evidence on record, it is the accused who killed the deceased*) in the affirmative.

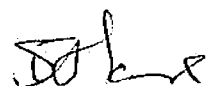
The defence counsel tried to raise doubts in respect of the circumstantial evidence. This argument will answer the third issue on whether the prosecution has proved the case beyond reasonable doubt. The first defence query was that the prosecution called only the relatives of the deceased as witnesses and thus it was easy for them to conspire. With due respect to Ms. Mboya, relatives are competent witness if their credibility and reliability is not questionable. See the case of **Sabas Kuziriwa vs Republic, Criminal Appeal No.40 of 2019**, at page 19 where the Court of Appeal had this to say in respect of the evidence of family members:

*"...there is no law which require that evidence of family members should be corroborated. What is of importance is the **competence, credibility and reliability** of the witnesses..." Emphasis added*

Also, in the case of **Aziz Abdallah vs Republic, [1991] TLR 71** it was stated that:

"...the general and well-known rule is that the prosecutor is under the prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts..."

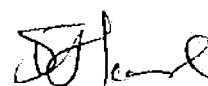
In the instant matter, I fully subscribe to the above cases and conclude that calling the relatives as witnesses in this case is not fatal.



The defence side also pointed out another doubt which is in respect of contradictory evidence. That PW6 told the court that he was with PW3 in the investigation while PW3 denied such fact. Without further ado, this discrepancy is not material discrepancy since the same does not touch the root of the murder case having in mind the fact that PW3 was the OCCID of Mwanga District by then. Thus, she was a supervisor of PW6 which impliedly made her to participate in the investigation of this case.

The defence also condemned the prosecution for failure to bring the said panga which was alleged to have been used to cut the deceased. With due respect to Ms. Mboya, I passed through the records, there is no where the witness has specified that the said panga which was around the Well to have been used to cut the deceased. The available evidence is that the deceased had a cut wound as per Exhibit P1. Also, the same applies to the allegations that the deceased could have been fallen in the said Well and sustained injury or could have been washing his body. As per the evidence on records, the said Well was not constructed it was a dug well and as per Exhibit P1 which was post mortem examination report, the accused had a cut wound cut to the skull.

Also, Ms. Mboya in her final submission had tried to question exhibit P1 that the same was tendered by PW6 who had not prepared the same hence they were curtailed right to cross examine the same. With due respect, this is an afterthought since on 8/6/2022 when the prosecution prayed to tender the Post mortem through an Investigator the defence side had no objection. Thus, they waived their right to cross examine. Thus, claiming that they were not given the right to cross examine the same at this stage is an afterthought. **Section 240 (3) of the CPA** provides that:



*"(3) When a report referred to in this section is received in evidence the court may, if it thinks fit, and shall **if so requested by the accused or his advocate**, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."* (Emphasis added)

In this case the accused person nor his advocate apart from not objecting PW6 to tender the Report on Post Mortem examination, they did not request that the person who made the said document be summoned for cross examination. Otherwise, according to the above quoted provision of the CPA, a medical document may be tendered in court by any witness. The same was also held by the Court of Appeal in the case of **Juma Masudi @ Defao v. Republic, Criminal Appeal No. 52 of 2007** at page 6, that:

*"The above quoted sub-section does not spell out expressly or impliedly as to who is to produce such document in court. But when you read this subsection in conjunction with sub-section (3), you will realise, as we do, **that any witness, not necessarily the medical officer who attended the victim in the prosecution case, is permitted to tender the document.**"* Emphasis mine

Thus, the defence side if not satisfied should have prayed that the doctor who prepared exhibit P1 be called for cross examination as prescribed by the law.

Ms. Mboya also criticised the prosecution evidence in respect of the issue of identification that the witnesses failed to mention the name of the

accused. In respect of this concern, the prosecution witnesses throughout their evidence referred the accused as Babu Mganga. However, they managed to identify the said Babu Mganga to be the accused herein. It seemed to me that it was the famous name which was used since he was said to be a traditional doctor. This was established by all prosecution witnesses that the accused was a traditional doctor. Though he denied to be a traditional doctor. Since witnesses stated under oath that he was a traditional doctor, then there was no reason whatever which was established by the accused for not believing their evidence. In the case of **Juma Masudi @ Defao** (supra) the name of the accused person was not mentioned by prosecution witnesses. However, since the accused person was found to have been identified well, his conviction was confirmed by the High Court and the Court of Appeal. This position was also stated in the case of **Goodluck Kyando vs R [2006] TLR 363**

In respect of the defence of alibi, Mr. Kassim questioned the same for contravening the law since the notice is defective, which I concur. The filed notice of alibi did not furnish sufficient particulars for the prosecution to rebut or otherwise. Even if the same was not defective, still the defence was wanting since DW1 and DW2 contradicted themselves in respect of the name of the deceased whom they claimed to attend his burial. DW1 said he was called Mussa Kabosi while DW2 said he was Omary Kagosi. DW2 who claimed a neighbour of the accused person did not know the names of the wife of the accused nor his children. Not knowing the name of the wife of a neighbour is possible but not names of all the children of your neighbour alleged to be your close friend.

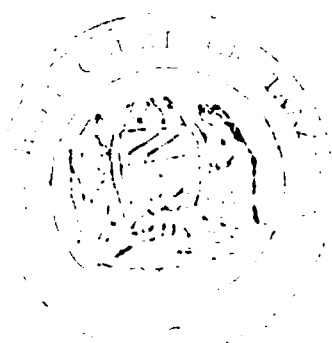
Basing on those circumstances I have explained, I am convinced that the accused's defence is not cogent enough to cause any dent on the

prosecution case. I am aware that the weakness of the accused's case cannot be the basis of a criminal conviction. However, in this case, apart from weaknesses in the defence of the accused person, the prosecution has proved the case against the accused beyond reasonable doubt.

I am also aware with the fact that the three assessors who sat with me in this trial have presented a common verdict of not guilty in favour of the accused. I believe that I have sufficiently demonstrated herein above, in this judgment, my reasons for dissenting from their wise opinions.

Therefore, the only conclusion from my analysis of the evidence and the applicable law is that the prosecution has succeeded in proving the charge of Murder against the accused. Consequently, I find the accused FRANCIS FANUEL KITILYA guilty of Murder as charged, contrary to **section 196 and 197 of the Penal Code, Cap 16 R E 2019**. I convict him accordingly.

Dated and delivered at Moshi this 24th day of June, 2019.




S. H. SIMFUKWE

JUDGE

24/6/2022