

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 103 OF 2021

THE REPUBLIC

Versus

MESANGA MWITA

JUDGMENT

14.07.2022 & 15.07.2022

Mtulya, J.:

The body of Joyce Julius (the deceased) was found at the meeting of shores of two waters bodies, namely: Lake Victoria and River Mara on 9th February 2019. The deceased was spotted, floating in low level waters of the shores facing downward, by Mr. Wambura Hegange, a Beach Management Unit (BMU) Leader of Mamu Mwalo of Kyasuka Hamlet within Kirumi Village in Butiama District, Mara Region.

In his usual visits and inspections in protecting and preserving the lake and river shores environments in morning hours of 9th February 2019, Mr. Hegange found the body of the deceased and informed Mr. Joshua Waryoba, Kyasuka Hamlet Chairman of Kirumi Village who also had summoned village leadership of Mr. Paschal

Damiano Mitagata, Kirumi Village Chairman. The two leaders at hamlet and village authorities, rushed at the scene of the body and found the deceased expired facing downward and his body was covered by black garments around the neck, chest and legs. Noting the death was unnatural and may be caused by murder, the leaders agreed to call the appropriate authority in criminal investigation, the police.

The investigation team of five (5) police officers, including G.7535 Cpl. Richard, arrived at the scene of the crime and removed the body from the low levels of the waters at the cited shores. The Criminal Investigation Department of the Police in Butiama District, after its preliminary investigations at the scene of the crime, called the village authorities to summon all villagers within Kirumi Village and neighboring villages surrounding Kirumi Village, namely: Nyakanga, Bukabwa and Muzami to identify the deceased. However, it was unfortunate that no single individual villager had identified the body hence the body was taken to Musoma Regional Referral Hospital (the hospital) for preservation and relatives searching.

The undisputed facts in the record show that the deceased was called Joyce Julius, an adult African female aged 31 years and resided at Kisesa area of Mwanza region duly identified by his brother Kurwa Julius in presence of police officer, G.7535 DC Richard

at the Mortuary of the hospital. The record shows further that the deceased had died from cerebral asphyxia caused by strangulations and multiple attacks on her head.

However, the mystery remained as who had killed the deceased by the strangulations and multiple attacks on the head. Following the mystery, the police initiated a thorough investigation on the matter by participating the son of Mr. Mesanga Mwita (the accused), Chacha Mesanga @ Kelvin and brother of the deceased Mr. Kurwa Julius. The detailed investigation of the matter pointed a finger at the accused hence the accused was arrested in night hours of 4th April 2019 at his home residence at Bukabwa Village in Butiama district and brought to this court to reply the charge of murder. During the interrogation and preliminary hearing, the accused denied participation or killing of the deceased.

According to the prosecution led by Ms. Monica Hokororo, learned State Attorney, the accused is pointed fingers because of two (2) reasons: first, there is an eye witness in the case who had seen what exactly transpired to the deceased from the accused; and second, all circumstances show that the accused had killed the deceased by strangulations and attacks on the deceased's head. The thinking of Ms. Hokororo was disputed by the accused and his learned defence counsel, Mr. Ostack Mligo, who contended that

there are several faults in the evidence of the eye witness which exonerate the accused from the alleged liability. In order to establish its allegations, the Republic had brought in this court a total of five (5) witnesses to prove its case against the accused, namely: Chacha Mesanga (PW5), Kurwa Julius (PW1), Joshua Waryoba (PW2), G.7535 Crpl. Richard (PW4) and Joshua Rian (PW3). Their evidences in brief display the following materials:

PW5 testifies that on 7th February 2019 they left Kisesa area of Mwanza region with his mother, the deceased, for Butiama in search of his father, the accused. According to PW1, they arrived at accused's residence on the next day, 8th February 2019, after a day sleep in one of the village leaders within Butiama jurisdiction. PW1 testified that they arrived at the accused's residential home on 8th February 2019, and found the accused, his wife (*Mama Mdogo*) and Mr. Kibago who welcomed them. However, upon greetings from the deceased to the accused, the accused remained mute without any replies and since then did not cooperate, including giving the visitors food or an area to rest their exhaustions. The evidence of PW5 shows further that the deceased and PW5 had used Kibago's utensils for cooking food and house for resting their fatigue. The distance from Kibago's house to the accused's house, according to the evidence of PW5, is about eight (8) meters.

According to PW5, it is in this house of Kibago where the attacks on head and killing had occurred and the body was transported from the house to elsewhere by use of bicycle. In explaining how the attacks occurred, PW5 stated that the accused had approached the house of Kibago at night hours when PW5 and deceased were asleep and pulled the deceased from a bed and did cut her on head by use of sharp object called *Sime* and finally strangled her. After completion of the attacks and strangulations, PW5 testified that, the accused took the body of the deceased by use of bicycle and left the scene of the crime and returned back home after a long time.

On how he managed to see all the incidents and identification of the accused at night hours, PW5 testified that he was identified his father on arrived at his resident on 8th February 2019 noon hours and the residential compound had two (2) houses separated by four (4) meters, and that both houses had solar energy with a high intensity lights and the accused had used a hand sized torch during the commission of the offence and took time in the killing of the deceased. Finally, PW5 testified that he was moved from the accused's home residence to accused's mother for a while before his return and witnessing his father being arrested by the police officers in the presence of and his uncle, Kurwa Julius (PW1).

The testimony of PW5 was corroborated by PW1, PW2, PW3 and PW4. The evidence registered by PW1 shows that the deceased had left their home residence at Kisesa area in Mwanza Region on 7th of February 2019 with PW5 in favour of Butiama District of Mara region in search of her former husband, the accused, to request for monies in raising their three (3) blessed children, namely: Ghati, Winfrida and Kelvin @ Chacha Mesanga (PW5). According to PW1, the deceased had approached him for bus fares and accused's sister for direction towards the accused's home residence in Butiama District.

PW1 testified further that he was in touch with the deceased through cell-phone communications from the start of her journal through a certain Executive Officer to the accused's home residence where the deceased had found the accused, but reported to PW1 that they had no any conversations (*hawakuongelehana*) despite greetings registered by the deceased to the accused. To the evidence of PW1, from that day, at evening hours of 8th February 2019, he had never heard from the deceased. Following the silence, according to PW1, it triggered a search by asking the accused, accused's sister and several other authorities. It is the search and asking of the authorities which prompted the police to take PW1 to the hospital for identification of the deceased, in a company of the

police officer, G.7535 Cpl. Richard (PW4). At the hospital, PW1 correctly identified the body of the deceased and found her with two wounds on head. Following the circumstances of her death and communications between PW1 and the deceased, the police associated the death of the deceased with the accused hence they went and arrested the accused at his home residence at Bukabwa Village within Butiama District in Mara Region on the night hours of 4th April 2019.

According to PW1, the accused was arrested in the presence of his wife, Mr. Kibago, police officers and Village Executive Office. PW1 testified further that when PW5 saw him, he rapidly rushed to him and disclosed what transpired on the night hours of 8th February 2019 when the accused was killing the deceased. The story of PW5 during the arrest of the accused interested the prosecution machinery hence marshalled PW5 in this court for details of the incidents.

The testimony of PW1 was corroborated with evidence of PW3 and PW4 which, in brief, shows that: on the 9th February 2019, PW3 had received cell-phone call from Ward Executive Officer on the spot of a dead body of unknown woman at Kirumi lake shores and assigned the case to PW4 for investigation on the matter who found out that the death was caused by the accused as from the statement

of PW5. PW4 on the other hand testified that on the 9th February 2019, he was ordered by PW3 to investigate the death of the deceased at Kirumi area where Mara River and Lake Victoria shores meet. According to PW4, the investigation team was lead to the scene of the body by Kirumi Ward Executive Officer and found the body of the deceased in a low laying waters of shores of Mara River and Lake Victoria. PW4 testified further that after initial investigation of the team on the incident, they allowed villagers to identify the body unsuccessfully hence they ferried the body to the hospital.

Following the circumstances of the case, injuries on the head of the deceased, and signs of strangulations to the deceased, the investigation team interpreted the incident as murder and immediately started a thorough investigation which, according to PW4, revealed that the accused is associated with the killing from the statements of PW1 and PW5. PW4 testified further that they arrested the accused at his home residence at Bukabwa on the night hours of 4th April 2019 in the presence of PW5 who had clues on what exactly transpired to the deceased.

In order to show that the body of the deceased was found at the meeting of shores of Mara River and Lake Victoria, the Republic had marshalled Mr. Joshua Waryoba (PW2), a Kyasuka Hamlet Chairman within Kirumi Village in Butiama District of Mara Region, to

the last time in 2018 and was informed of her expiry by the police officers during his arrest on 4th April 2019 and had no any clue on the source of the deceased's death, or knowing a person called Mr. Kibago or having any cell-phone communications with PW1.

Regarding the evidence of PW5, DW1 stated that he had not seen PW1 or the deceased in his home resident in February 2019 and had not transferred PW5 from his home residence to her mother in February 2019 as his mother had already expired in 1998. Finally, DW1 stated that the case was fabricated against him as even PW1 and PW5 were not present during his arrest at his home residence at Bukabwa area on 4th April 2019, but police officers, his wife Neema Wambura and Village Chairman Mr. Mwita Marwa were present and witnessed his arrest and finally DW1 testified that the location where the body of the deceased was found at shores of the cited lake and river is far away from Bukabwa area in Butiama.

After registration of all relevant materials, learned minds in Mr. Mligo and Ms. Hokororo were invited to assist this court in interpreting the case in assisting this court to arrive at justice of the parties. According to Mr. Mligo, the accused cannot be blamed for the death of the deceased as the allegations leveled against him were not proved as per law in section 3 (2) (a) & 110 of the **Evidence Act** [Cap. 6 R.E. 2010] (the Evidence Act). In order to

bolster his argument, Mr. Mligo registered a total of two (s) reasons, which in brief show that:

First, the prosecution witnesses PW2, PW3 and PW4 brought in this court hearsay evidences which do not show the accused had killed the deceased; second, PW1 and PW5 brought little evidence trying to connect the accused and the death of the deceased. However, their evidences had several faults hence left a lot of questions to this court. In substantiating his claims, Mr. Mligo stated that:

First, PW1 was narrating stories of cell-phone communications and contacts with the accused, but no exhibits were brought to court to justify the communications; second, PW1 mentioned several persons during the search of the deceased and various communications without any proof; third, PW5 was aged four (4) years when the incident occurred in 2019; fourth, PW5 knew his father for the first time in 2019 when introduced by his mother; fifth, PW1 stated that the accused is black and short while the accused is tall and fairly white; sixth, the event of attack according to PW5 occurred at nigh hours and the identification was not proper in terms of extent of lights in watts for the torch and solar as per precedent in **Waziri Amani v. Republic** [1988] TLR 280; seventh, PW5 failed to describe the attacker's attire during the attack as per precedent in

Samwel Nyamhanga v. Republic, Criminal Appeal No. 70 of 2017; and finally, the weapon *Sime* and items of solar and torch mentioned by PW5 were not brought to court to justify evidence of PW5.

In his opinion, Mr. Mligo, submitted that the evidence of DW1 are credible and reliable as he has displayed in this court materials which show that the deceased and PW5 had left his home residence for Kisesa Mwanza since 2016 and during the separation he had been supporting them in various matters and in any case the facts of the present case show that there was no previous quarrels between the accused and deceased to cause the alleged attacks.

This thinking was protested by Ms. Monica who contended that the Republic had brought in this court a total of five (5) witnesses and each had specific role to display in this court. According to Ms. Monica, PW2, PW3 and PW4 were brought to testify on the death of the deceased at the shores of Mara River and Lake Victoria and PW4 added value in the evidence of PW1 and PW5 as he was present during the arrest of the accused and saw PW1 and PW5 during the arrest of incident. Additionally, PW4 testified that they arrested the accused in presence of the Village Chairman, Mwita Marwa, the facts which are corroborated by PW5 and the accused himself. According to Ms. Hokororo, it does not make sense to find PW5 at the accused's home residence in 2019, during the period where the

deceased disappeared, whereas the accused testified that he had never saw PW5 since 2016, when he left him with the deceased for Kisesa area of Mwanza region.

Ms. Hokororo contended further that accused in his defence mentioned Village Chairman, Peter Marwa and his wife Neema Wambura, but declined to call them to substantiate his allegations. Finally, Ms. Hokororo submitted that there is reliable and credible evidence of eye witness in the present case, named PW5. This witness, according to Ms. Hokororo, narrated the whole story from the 8th February 2019, when they arrived at the accused's home residence, killing of the deceased, his transfer to the accused's mother and return to the accused home residence in Bukabwa, and finally on the next day 9th February 2019, the body of the deceased, who lived in Kisesa Mwanza, was found in the next village of Kirumi bordering River Mara and Lake Victoria in Mara Region.

According to Ms. Hokororo, PW5 correctly identified the accused during the killing and in this court. During the killing, Ms. Hokororo argued, that PW5 saw the accused during evening hours, during entering in the house and killing of the deceased in intensive light of torch and solar and finally witnessed the body of the deceased being transported by the accused using a bicycle. On court identification, Ms. Hokororo argued that PW5 was given opportunity

in this court to identify the accused and correctly identified him in the dock without any hesitations.

In bolstering her argument, Ms. Hokororo contended that the materials presented in the instant case shows that the prosecution has proved its case beyond reasonable doubt and abided by the law in the precedent of **Waziri Amani v. Republic** (supra) and PW5 mentioned the accused in the earliest opportunity available as per precedent in **Elisha Edward v. Republic**, Criminal Appeal No. 333 of 2018. Finally, Ms. Hokororo stated that in the present case, apart from having an eye witness PW5, all circumstances irresistibly point a finger to the accused as per precedent in **Mohamed Mustafa @ Rajabu & Two Others v. Republic**, Criminal Appeal No. 25 of 2017.

I have had an opportunity to peruse the present case and materials registered by both parties. I will start with the final submission of the learned State Attorney Ms. Hokororo on circumstantial evidence. The law regulating circumstantial evidence is to the effect that the evidence must irresistibly lead to the conclusion that it is the accused and no one else who committed the crime. The principle was set in the case of **Simon Musoke v. R** [1958] EA TLR 89 and was celebrated in many cases of the Court of Appeal (see: **Hassan Fadhili v. Republic** [1994] TLR 89; **Shabani**

Abdallah v. Republic, Criminal Appeal No. 127 of 2003 and **Waziri Amani v. Republic** (supra).

In the present case, there are string of circumstantial evidence linking the accused with the commission of the offence. The facts in the present case show that PW5 and his mother had left Kisesa area of Mwanza region in search of the accused in Butiama area of Mara Region in order to ask the support of the accused to his three (3) children, namely: Ghati, Winfrida and PW5. PW1 testified how the journey started and ended and final communications with the deceased at the residence of the accused. Trips in search of the accused and involvement of legal machinery is well explained by PW1, PW2, PW3 and PW4. The location where the body was found, the residence where PW5 was found and his story on the murder creates a nexus of events and the murder of the deceased. It is unexplainable for PW5 to be found at accused's home residence in absence of the deceased, who had left Kisesa together, without any plausible explanation from the accused.

I am aware that the defence registered materials to show that the accused saw PW5 for the last time in 2016 when he departed with his mother for Kisesa area and saw the deceased for the last time sometimes in 2018 at Kisesa when he went to persuade her for return at Bukabwa area in Butiama District. However, the accused

declined to call his wife Neema Wambura and Village Chairman Mr. Mwita Marwa to show that PW5 and PW1 were not present at his home residence in Bukabwa village during the arrest on 4th April 2019. This is very important to shake the prosecution evidence of PW5 that he is a child and was not found at the accused's home residence at Bukabwa Village. Again, there are no other materials on record on how PW5 had travelled all the way from Kisesa in Mwanza to Bukabwa area of Butiama in Mara Region. It is unfortunate that the defence evidence carried further the prosecution evidence by mentioning Mr. Mwita Marwa during the arrest of the accused. Under normal circumstances, you would expect either Mr. Mwita Marwa or Neema Wambura to open up the facts of what exactly transpired during the arrest of the accused and presence or absence of PW1, PW4 and PW5 at accused's home residence. In absence of Neema Wambura or Mwita Marwa, this court draws an adverse inference to the defence case (see: **Aziz Abdallah v. Republic** [1990] TLR 71).

In the present case, however, there is eye witness PW5 who witnessed the events from opening of the door, attacks on heard, strangulations and transportation of the deceased's body. However, the defence had registered the so called doubts on visual identification of the accused during night hours. The law regulating

visual identification require the evidence to be watertight so as to remove any possibility of mistaken identity (see: **Waziri Amani v. Republic** (supra); **Said Chally Scania v. Republic**, Criminal Appeal No. 37 of 2005; and **Raymond Francis v. Republic** [1994] TLR 100).

The most quoted statement from the precedent of **Waziri Amani v. Republic** (supra) is to the effect that in doubts regarding identification of accused persons, the factors to be considered are: first, the time the witness had in observing the attacker; second, the distance between the attacker and the witness; third, intensity of light at the scene of the crime and whether the witness knew or had seen the accused before or not.

The materials registered in the present case shows that PW5 had known his father in evening hours of 8th day of February 2019 by identification from his mother at the accused's home residence; during night he observed him through intense light of solar energy and torch; he saw him in a small room sized about two (2) X five (5) meters; and had ample time to witness the attacks and strangulations.

I am aware in the present case, the defence had raised doubts in some of the facts and complained on discrepancies with regard to the light of the torch and solar, exhibits in cell-phone numbers, torch, solar, and weapon *Sime*. However, that will not detain this

court. The law in the precedent of **Mohamed Said Matula v. Republic** [1995] TLR 3 shows that minor inconsistencies do not go to the root of the case. In any case, the thread of evidence in the present case is stronger than minor questions asked by the defence.

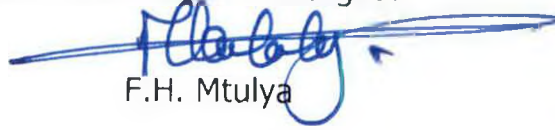
I also quietly aware that Mr. Mligo complained on witness Kibago and people who were in contact with PW1 during the search of the deceased. However, the law in Evidence Act does not compel the Republic to summon each and every person involved in the transaction or specific number of witnesses (see: section 143 of the **Evidence Act** [Cap. 6 R.E. 2019](the Evidence Act). Similarly, in the law of evidence, it is not the age of witness, but whether the witness can testify before the court and tell the truth of the matter (see: section 127 (1) & (2) of the Evidence Act and precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148). What is important is the weight of materials the evidences tendered in court to substantiate the prosecution's case. In the present case, PW5 is a child, but delivered a reliable and credible evidence to convict the accused (see: **Goodluck Kyando v. Republic** [2006] TLR 333 and **Saada Abdallah Rajabu & Another v. Republic** [1994] TLR 132).

Before I pen down, the present case had no exhibits in sketch map of the scene of the crime and post-mortem report of the

deceased tendered during preliminary hearing or during trial. According to Mr. Mligo, the defence did not protest the death of the deceased hence it is not necessary to be part of the record. However, he contended that absence of the same waters down the prosecution case. On her part, Ms. Hokororo, submitted that the practice of the Court of Appeal shows that the cause of death can be proved by other factors or materials registered by witness and cited the authority in **Herman Faida v. Republic**, Criminal Appeal No. 479 of 2019. I have read the judgment in **Herman Faida v. Republic** (supra) and **Ghati Mwita v. Republic**, Criminal Appeal No. 240 of 2011, and think that when there are precedents of the Court of Appeal, this court should not be detained on the proof of death and cause of death. In any case, much as I think, there are sufficient pointers on the evidence to establish that in the present case, the deceased, is indeed dead and her death was unnatural.

I have therefore considered the evidence of the parties registered in the present case, and I am convinced that the prosecution has established its case beyond reasonable doubt that it was the accused, Mesanga Mwita, who murdered the deceased Joyce Julius on night hours of 8th February 2019 at Bukabwa area within Butiama District in Mara Region. I am therefore moved to

convict the accused, Mesanga Mwita, for the offence of murder contrary to section 196 of Code as charged.



F.H. Mtulya

Judge

15.07.2022

MITIGATION

Mligo: My Lord, on my side I let it to this court. I have nothing to add.

F. H. Mtulya

Judge

15.07.2022

Accused person: My Lord, I consulted my learned counsel, and decided to let it all to this court.

F. H. Mtulya

Judge

15.07.2022

SENTENCE

From the premises of the conviction entered, I sentence the accused person, Mesanga Mwita, to death under section 197 of the Code, which shall be suffered by hanging.

Right of appeal explained.



F.H. Mtulya

Judge

15.07.2022



This Judgment was delivered in open court under the seal of this court in the presence of the learned State Attorney, Ms. Agma Agrey Haule and in the presence of the accused person, Mesanga Mwita and defence counsel Mr. Ostack Mligo.



F.H. Mtulya

Judge

15.07.2022