

**IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
CRIMINAL SESSION CASE NO. 23 OF 2018**

**REPUBLIC
VERSUS**

1. MARCO MISHAMO @ NG'HONELA

2. NHANDI ANTONY

3. MABULA MILABA

JUDGMENT

14th & 30th March, 2022.

S.M. KULITA, J.

The accused persons Marco Mishamo @ Ng'onela @Marco Lukanhula @Ng'honela, Nhandi Antony @ Nhandi Mabula and Mabula Malaba @Mabula Milaba stand charged with the offence of Murder, contrary to sections 196 and 197 of the Penal Code Cap. 16 RE 2002. The accused persons pleaded not guilty to the charge.

It is alleged that, the accused persons on the 1st day of January, 2016 at Sanga 'K' Village, within Busega District in Simiyu Region, did murder one, Julius Mayombya.

In this case the prosecution was led by Daniel Masambu learned State Attorney, whereas Mr. Geoffrey Tuli Advocate, represented the accused persons.

In a bid to prove the case against the accused persons, the prosecution side summoned four witnesses to testify in court. They are Pondamali Sahani Songo, Sheila Manento, Makoye Julius Mayombya and D/Ssgt Sosthenes. They all testified as PW1, PW2, PW3 and PW4 respectively.

A summary of the evidence adduced herein is that, Pondamali Sahani Songo, 58 years, living at Sanga Village, in Busega District, a Christian, sworn and testified as PW1 that, on 1/1/2016 at 1900 hours he was with one Makoye Kanodi. They were traveling from Ngasamo to Butenge village. When they reached at Butenge centre, they met with Fitina Bugilima and Julius Mayombya who were taking alcohol at Kwandulu Bar.

After greetings, Julius Mayombya wanted them to go with him to his home for food. It was because he had slaughtered a goat for his guests. PW1 told the court that, they agreed and started the journey to his home. He went on stating that, they were three, Julius Mayombya, Makoye Kanodi and himself.

PW1 stated further that, just after 50 feet walk, they were invaded by 8 (eight) people with torches and ordered them to be under control ("chini ya ulinzi"). He told the court that, they disobeyed and started to

run, everyone taking a different direction. He added that, the invaders had pangas.

PW1 stated that, as the invaders were flushing torch lights, he managed to identify Nhandi Mabula (2nd accused). PW1 clarified that, he identified him by his clothes he had worn. He mentioned to have identified him through the green gum boots, white trouser and t-shirt with black and white strips.

He told the court that, he was only 12 paces from the scene of crime. He added further that the crime act took about 20 minutes. PW1 said that he witnessed the killing of Julius Mayombya through pangas.

He added that, he knows Nhandi Mabula as they were born and grew up in the same village. The witness stated to have not met with Nhandi Mabula on that day, except on 31/12/2015, one day before the incident. PW1 said that on that date the accused had worn the same T-shirt that he wore on the material date. PW1 successfully pointed to Nhandi Mabula at the Court. The witness insisted that the invaders' lights helped him to identify the clothes and gum boots that the said accused had worn.

Then the witness told the court that, he heard a voice telling others to fire a gun. He said that, he identified it being the voice of Marco Lukanula (1st accused). He went on saying that, Marco Lukanula grew up at Iwelimo Surburb in Sanga Village. He added that in order to identify the bandits he had to go 10 paces closer from the scene. He added that, that helped him to prove his identification that the voice was of Marco Lukanula.

He went on clarifying that, Marco wore a long coat, but did not cover his face. Again, the witness said that, with the help of a torch he actually identified the 1st accused, Marco. He said that he observed the accuseds for 20 minutes.

The witness stated that, Marco shifted from Sanga to Chato in 2013. He added that, he never seen Marco on a near time than 2014 when the said accused went to sell his farm.

The witness said that, as people gathered in response for the alarm, he got a chance to inform them what happened. He stated that, by that time he was with Makoye Kanodi and that the victim was in a bad condition, wounded on the neck and wrist. PW1 suggested no reason that caused the attack.

The witness stated to have told the people gathered thereat that, he identified Nhandi Mabula and Marco as the invaders. And that, it was at 22:00 hours. He said that he repeated narrating the same story in the morning when the police officers from Nyashimo arrived.

While cross examined by Tuli Advocate he stated that, when they were put under control by the bandits/invaders, he took the southern direction while the victim took the eastern one. He added that the invaders were 5 paces away from them when they tried to put them under control. PW1 said that he guessed that the invaders were 8 (eight) in number. PW1 stated that, the torches were of high intensity and were flushed towards themselves sometimes. He said further that, he does not know if Nhandi Mabula has other clothes or not. He agreed again that, even other people can have the same clothes he saw with the 2nd accused, Nhandi.

On the other hand, PW1 agreed that he was also apprehended and left free on the second date. He again said that he knows the voice of Marco Lukanila but not all voices in the village. He explained further that, he always remembers the voice of everyone he talks with.

The witness stated that, his testimony that he went nearby and identified Marco wearing long coat, were also stated in his police

statement. When he was referred to it, PW1 said, those words lack there in. PW1 stated that, the victim ran away for 10 paces when they were put under control. When he was required to state on the distance as between him (PW1) and the victim after they ran away, he said that there were no 20 paces away between them but 12, he said.

When re-examined PW1 said that in the first place the light was flushed towards them all but after they spread away the light was directed to the victim. The witness stated that, he went closer and saw Marco Lukanila as well as he heard his voice.

Sheila Manento, 35 years, living in Mwanza, a Resident Magistrate at Nyamagana District Court, Christian sworn and testified as PW2 stated that, in 2016 she was a Magistrate at Nyashimo Primary Court in Busega District. Among the duties she was doing is to record extra judicial statements as a Justice of Peace. She went on stating that, on 13/4/2016 while she was at Nyashimo Primary Court a Police Officer sent therein the accused person called Marco Mishamo (1st Accused).

PW2 stated further that, she introduced herself first and asked the accused if he has been induced in anyhow to confess before her. On that she stated that, the accused denied. She thus recorded his statements. Concerning the accused confession PW2 stated that, his

confession was that, he was paid for and actually killed one Julius by using panga. PW2 stated that, the accused gave the reason for killing being the victim's adulterous behaviour. The witness identified the Extra Judicial statement she had noted down and prayed to tender it to court. The same was admitted as exhibit P2.

When cross examined PW2 stated that, she recorded the statement on 13/4/2016 but the statement shows that she signed it on 13/4/2017. She said that it was a slip of the pen but it was on the same date, 13/4/2016.

While re-examined she stated that, difference in dates on the statement was just a human error.

Makoye Julius Mayombya, 30 years, living at Sanga village in Busega, a Pagani, affirmed and testified as PW3. He stated that, he is the second born in their family. On 1/1/2016 at 20:00 hours he was at Sanga Village walking to their home at Butenge village.

He told the court that, he was told that his father had been invaded and cut by pangas. PW3 said that, when he saw his father dead, he fainted. He added that, he got well on its following day. He further informed the court that at 07:00 he went at the incident place

and met with many villagers together with those who were with his father during the incident. He mentioned them to be Makoye Kanoti and Pondamali Sahani.

He said that Makoye Kanoti and Pondamali Sahani narrated what happened. He said, the narration was that, while walking they were put under control by invaders. The PW3 said that, Pondamali and Makoye narrated that, they identified the invaders at the time of the incident. To be certain PW3 stated that, Marco Mishamo, Nhandi Mabula and Mabula Milaba were mentioned to be among the invaders.

While cross examined the witness admitted that, his evidence is a hearsay one. PW3 went on admitting that the statement he had made at the Police Station does not show where the witness stated that Mabula Milaba was mentioned at the crowd that he too committed the crime.

When re-examined, the witness changed and stated that, at the crowd only two people were mentioned that is, Marco and Nhandi.

D/Ssgt Sosthenes, a police officer living at Bariadi, Christian, testified as PW4 that, among his duties he uses to conduct is to record witnesses' statements and to testify in court. He disclosed that he has

10 years' experience in performing those duties. He told the court that, he ever worked at Busega.

PW4 stated that on 31/3/2016 at about 0900 hours, he together with other police officers, were ordered to go to Chato in Geita, for searching and arresting of accused persons who murdered Julius Mayombya by using pangas on the 1/1/2016. He said that they were given the names of the persons to be arrested, they were Marco Mishamo and Nhandi Mabula. He added that, it was on 1730 hours when they arrived in Chato, particularly Buseresere Police Station.

PW4 stated that at Buseresere Police Station they were given two Police Officers to accompany them. He informed the court that, they decided to arrest the accused at night. He said that it was on 2300 when they started carrying on the mission. PW4 said that they also informed the village chairman who responded to have known Marco Mishamo. He added that, the chairman escorted them and that he is the one who knocked the accused person's door calling him out of his house.

PW4 stated that through that way, they managed to arrest Marco Mishamo and took him to Buseresere Police Post. He added that, the preliminary interrogation of the accused person took place at 0200 hours. PW4 stated that, during that interrogation, the accused admitted

to have killed the victim assisted with Kula Mtobelo, Bugohe, Mabula Milaba and Bufiti. PW4 stated further that Marco Mishamo told them that, it was Kulwa kisinza, Manyama, Baraka and Shija who followed and asked them to kill the victim for his adulterous behaviour.

He went further stating that, the killers were paid 750,000/= and carried out successfully the killing act. PW4 stated that, it is Marco Mishamo who directed them where they could find the other accused persons, that is Runzewe.

PW4 added that, at Runzewe they failed to get any, despite struggling for 2 days. While on their way back, they got an information that, those other bandits might be at Geita town. On 2/4/2016 they went to Geita together with the first accused. Also, they failed to get one, PW4 stated. He added that, following another information they got, they then went to Misungwi. Likewise, they failed to get one. PW4 stated that, they thus decided to go back to Busega where they arrived at 06:00 hrs.

PW4 added that it was 0800 hours when he was ordered to record the first accused person's statements. He said that was on 5/4/2016 at 0830 he started to record the statements. He said that before being recorded, the accused was given his rights. He added that, the accused

admitted the offence and thumb printed the statement. PW4 successfully identified the statement and prayed to tender the same. The statement was admitted in court and marked as an exhibit P3.

When cross examined, he stated that, he took the accused to the Justice of Peace on 13/4/2016. PW4 added that, the accused was in custody for all 8 days after his confession till when he was sent to the Justice of Peace. He again told the Court that, the 1st accused was needed to be recorded his statement in four hours' time after being taken to the Nyashimo Police Station, Busega.

In the re-examination the witness stated that, as they were hunting other accused persons, then they failed to meet the 4 hours' time to record the 1st accused person's statements after his arrest. When he was asked again, PW4 stated that, when he was recording the statement of the accused, they were only two in the investigation room, he and the accused.

On these four witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act (CPA), the accused persons were found to have a case to answer in Murder as charged. After being addressed in terms of section

293(3) of the CPA the accused persons opted to testify alone on oath as DW1, DW2 and DW3.

DW1 one MARCO MISHAMO NG'HONELA, a resident of Chato, 40 years old, Christian; testified that, he lives at Mikoto Chato for 10 years now. Before that he was living at Sanga in Busega District, Simiyu. He said that he lives with his family. He went on stating that, on the night of 31/1/2016 he was at his home, Mikoto in Chato District, Geita Region. He added that, it was a day that his son namely Revocatus got died. He went on testifying that, they buried him on 1/1/2016 at 1400hrs.

He testified further that; he was caught on 31/3/2016 at Mikoto Chato. He was then taken to Katoro police station. He said that, on 1/4/2016 he was taken to Nyashimo, Busega police station. DW1 stated that, then he was put under custody and was tortured for the allegations that he committed murder of Julius Mayombya.

He went on testifying that, the caution statement was actually taken on 5/4/2016. He said that, he denied to have committed the offence. On 15/4/2016 he was taken to Bariadi District Court. Upon this offence, the witness stated that he should be set free as he did not commit it. He added that, he does not even know the victim.

When cross examined DW1 stated that, he was born at Sanga and that he lived there for a long time. He added that, he does not know all villagers of Sanga, but he knew Pondamali Sahani and the victim before. He said that, he had no knowledge that Julius Mayombya met unnatural death. He did not know the date the victim got died. When was further cross examined DW1 stated that, preliminary hearing took place at Maswa. DW1 stated that in the preliminary hearing, he agreed that the victim got died on 1/1/2016. DW1 told the court that, as he stays in custody and his residence is far, then he failed to bring any one to witness where he was on 1/1/2016. When re-examined, DW1 stated that, at the police station is where he came to know the date the victim got died.

When asked by assessors, DW1 said that, during committal he mentioned Leo Lazaro, a village chairman as his witness but as time went by, he lost interest of calling him. He again stated that, he does not have any problem with his fellow villagers and Police Officers but he wonders to be given such a case.

NHANDI ANTONY, 44 years old who resides at Isadukilo, Ngasamo in Busega, Christian, sworn and testified as DW2 stated that, he is living at Isadukilo village with his mother and children for 30 years now. He

testified further that, on 1/1/2016 he was at home. He added that, on 2/1/2016 he received a phone call and was informed by his relative that, Julius Mayombya got unnatural death at Butenge. He said that, he is a relative of the victim that is why he was given that information. He added that, burial took place on 2/1/2016 and he attended the same. He went on stating that, he remained at the funeral premise for two days later, before he went back home.

DW2 went on testifying that, on 23/3/2016 is a date when he was arrested. He added that, on that day he took maize to Dutwa Auction (mnadani) to sell so as to get money for buying clothes for school children. He said that it is when he was going back home, when he was arrested. He told the court further that, he was taken to Ngasamo Police Post then to Nyashimo Police Station where he stayed for four days up to 26/3/2016. He said that he was taken to court on 29/3/2016. Concerning the offence he is charged with, DW2 said that he should be left free as he did not murder his relative.

When cross examined, he stated that he does not know Pondamali Sahani. He added that, Makoye Julius, is his uncle's son. DW2 admitted that, Villagers of Sanga and Ngasamo are neighbours. Again, DW2 told the court that, from Ngasamo he is the only one caught in this offence.

He said that he had no grudges with his fellow villagers, Police Officers nor Marco Mishamo.

DW3 one MABULA MILABA, 56 years old, lives at Kisesa, Ngasamo in Busega, Pagani, affirmed and stated that, he lives with his family. On 1/1/2016 he was at his home. He said that, he heard alarm voice calling for help. He said he went thereto. He said that, at the alarm point he met with many people including Pondamali Sahani. He added that, Pondamali started narrating to them about the incident. He added that, the victim is his in-law (shemeji) as he has married the victim's sister. Again, he said that, he attended the burial on 2/1/2016 and after 3 days he went back home. He added that, he was caught on 12/5/2016 at his home Kisesa. He said that, he was taken to Nyashimo police station and that, his statements were recorded on 16/5/2016. He stated further that, this court should do justice by letting him free as he did not commit murder.

When cross examined, he said that, he wonders why Marco Mishamo has mentioned him to have committed murder.

That marked the end of both parties' evidence. Counsels for both parties got an opportunity of making final submissions which will be

referred in the course of determining the issues I am prepared to raise them shortly.

In view of the above evidence, the following issues call for determination: -

1. Whether the victim was met with unnatural death (if yes)
2. Whether the accused persons are responsible for that death of the victim (if yes)
3. Whether the accused persons with intention/malice aforethought killed the victim.

Concerning the first issue; from both sides' testimonies, it is not in dispute that Julius Mayombya is dead. According to the post mortem report, the cause of the death of the victim, Julius Mayombya is severe bleeding that was caused by multiple cut wounds on his body including neck and parts of head by a sharp object(s). This verifies that, the victim was met with unnatural death. As there is no evidence disapproving this fact, then I see no need of dwelling much on this issue.

Concerning the second issue as to whether the accused persons are responsible for the killing of the victim, the prosecution side relies on the identification as testified by an eye witness PW1. Also it relies on the

confession of 1st accused as recorded and testified by PW2 and PW4 and the principle that the accused persons were mentioned at the earliest possible time, as testified by PW1 and PW3. Assessors who set with me opined on this too. Two of them opined that all accused persons are not guilty while the last one opined that only the 1st and 2nd accused persons are guilty. I too, in determining this issue, I will deal with those evidences one after the other as I hereunder do.

Concerning the issue of identification, PW1 testified that, he together with the victim and Makoye Kanodi were invaded by 8 people who told them to be under control (chini ya ulinzi). PW1 told the court that, they disobeyed that order and spread running, everyone taking his direction. He went on stating that, the invaders took the direction taken by the victim. They caught him and started cutting him. On his part, he said, he returned to the scene about 12 paces away and started to observe. While admitting that he had no source of light, he contended that, with the help of the torch light of the invaders, he managed to identify the accused persons. He added that, he identified Nhandi Mabula through the clothes and the gum boots he had worn, as well he contended to have identified Marco Mishamo through the voice he had made while ordering a gun to be fired. In convincing that he actually

identified the accused persons, he said that; firstly, the invaders light was of high intensity; secondly, he observed the crime for 20 minutes; and thirdly, is that he actually knows Nhandi Mabula and Marco Mishamo as he has been living with them in the same village for quite a long time.

The main question is, with that testimony of PW1 can we say with certainty that the 1st and 2nd accused persons were properly identified at the scene of crime? In a good number of cases, it was held to the effect that, even when one testifies to have known the invaders before, be it his relatives or friends, mistaken identity can always be made. This is so when the conditions are not favorable. See, **Issa Mgara @ Shuka v. Republic, Criminal Appeal No. 37 of 2005 Court of Appeal, Mwanza** where it was held that; -

"This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made"

With the presence of the above holding, this court has an obligation to ascertain as to whether the testimony of PW1 shows that

there were favorable conditions that takes away all the possibilities of mistaken identity.

Deeping down to the testimony of PW1, he told the court that he identified the accused persons through their own torches. Here it should be known that, the invaders carried torches for their own goal of pointing to the one they needed to kill. No one will think that, the invaders carried torches for the purpose of pointing to (flashing) his fellow invaders. However, I agree that sometimes in the cause of running and cutting the hands can be unstable and so the torch point onto the victim. On these circumstances the light may be pointed to a fellow invader. But when this happens, it will take a very short time.

To the testimony of PW1, we are not told for how long the invaders light fell on their fellow invaders to enable PW1 observe and identify the accused persons without mistakes. The 20 minutes that PW1 testified, was the time he used to observe the whole act of murdering the victim. Thus, the 20 minutes were not the duration the invaders pointed light on their fellow invader, unless there was special circumstance and PW1 would have testified so. Had PW1 testified on the duration the light fell on the accused persons, the court would have

been in a better position to determine whether he properly identified the accused persons.

However, PW1 also testified that he recognized the 2nd accused person through the clothes and gum boots he had worn. In the cross examination PW1 also agreed that, those clothes and gum boots are produced in large quantity that even other people have them. If so it is, I find it hard to say with certainty that, those particular clothes and gum boots were the ones possessed and worn by the 2nd accused. Thus, it follows therefore that, PW1 may have mistakenly identified the 2nd accused person.

PW1 also testified that, he identified the 1st accused person through his voice when he said "fire a gun". Unfortunately, PW1 did not tell the court as to the number of repetitions the accused did in saying those words. It is impossible for PW1 to identify the 1st accused through his voice for the following reasons; first, as the words were said only once, and secondly, as PW1 told us that 1st accused shifted from Sanga Village to Chato, away from him for about three years. As voice identification is inherently unreliable, I am of the settled mind that PW1 did not properly identify the 1st accused person. See, **Juma Malaya v. Republic, Criminal Appeal No. 159 of 2008, CAT at Dodoma.**

Again, PW1 told the court that, after being invaded they all ran away spreading, each one taking his direction. That was terror that everyone had by that time. I find it not convincing that PW1 decided to return back and stayed within 12 paces' range observing the killing act for the said 20 minutes period of time. It is quite doubtful.

With the above discussion, I am of the firm views that, PW1 did not properly identify the 1st and 2nd accused persons.

With respect to the principle of mentioning the accused persons at the earliest time, PW3, the son of the victim testified to that effect. He is said to have mentioned earlier the 1st and the 2nd accused persons. PW3 testified to the effect that, PW1 narrated to them on the second day how the incident occurred and who actually he identified as the killers. But when PW3 was asked in the examination in chief and cross examination, he told the court that, PW1 had told them that he identified all the three accused persons herein. But when he was re-examined PW3 changed and stated that, only the 1st and 2nd accused persons were identified and mentioned by PW1.

Remembering the number of the accused persons identified at the crime scene is a very crucial issue that cannot be forgotten easily by the son of the victim. This inconsistency by PW3 himself, cannot be ignored

as it goes to the root of the case, it raises doubts and it lowers greatly his credibility. The inconsistent raises doubts; firstly, as to whether PW1 actually identified the accused persons, and secondly, whether PW1 actually mentioned the accused persons before the audience gathered thereat, as he identified them at the scene of crime.

I say so because, during the final submissions counsel for the accused persons raised a doubt that, had PW1 mentioned the accused person in the earliest time it would not have taken months to arrest them. This fact was not cleared by the prosecution, neither in their evidence nor in their final submission. The doubt holds water, as we are not told anywhere that the accused persons ran away after the commission of the offence. More so, according to the testimonies of the 2nd and 3rd accused persons that they attended the burial of the victim, it is a surprise and doubtful whether the 1st and 2nd accused persons were mentioned earlier, as the first accused person was arrested on 31/3/2016 according to the testimony of PW4, for the crime committed on 1/1/2016. If at all the accused persons were identified and mentioned at the earliest possible time, they would not even last for a single hour relaxing freely in their streets without being arrested. This fact casts much doubt on the prosecution case.

Now on the confessions, PW2 and PW4 testified that the 1st accused made before them. That is the only evidence the prosecution has remained with. Shall this court solely rely on it to convict on the Accuseds without corroboration? To those confessions, the first accused person denied to have made them and that he was tortured to accept and sign the statements.

I am aware with the position of the law that, it is dangerous to convict while relying solely on the retracted/repudiated confession without corroboration. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, Court of Appeal, Mbeya.**

"With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant."

However, I am also alive with the position of the law that, a court may convict on retracted/repudiated confession even without corroboration. See, **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

*"The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material particular, but that the court might do so **if it is fully satisfied that in some circumstances of the case that the confession must be true.** See also **Hemed Abdallah v. Republic (1995) TLR 172**" (Emphasis supplied)*

With the above reasoning, it follows therefore that, to act on the retracted/repudiated confession of the accused persons in P2 and P3, this court must be fully satisfied, while basing on some circumstances of the case that, those confessions must be true.

The question is, are there some circumstances in this case that make this court fully satisfied that the confessions are nothing but the truth? Here I must admit that, in this case, there are no circumstances to convince this court that the confessions are true.

More so, the failure to arrest the accused persons at the earliest possible time while there is no evidence that the accused persons had

ran away after the crime act, and the presence of grudges between the victim and the third accused person that the victim was caught in adulterous situation with his wife, casts much doubt on the prosecution case that this case is a result of a fabrication work.

On that account, I am of the settled mind that, as opined by the two assessors that, this issue is answered in the negative that, all the accused persons herein, are not the ones responsible for the murder of the victim, Julius Mayombya. I thus proceed to find them not guilty of Murder, hence acquitted. They should be released forthwith, unless held for any other lawful course.



A handwritten signature in blue ink, consisting of stylized initials "SK" followed by a flourish.

S.M. KULITA
JUDGE
30/3/2022

