

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MWANZA REGISTRY  
AT MWANZA**

**(ORIGINAL JURISDICTION)**

**CRIMINAL SESSION CASE NO. 107 OF 2020**

**THE REPUBLIC-----PROSECUTOR**

**VERSUS**

**JUMA MASANJA @ "J" -----1<sup>st</sup> ACCUSED**

**ADRIANO COSMASS-----2<sup>nd</sup> ACCUSED**

**JUDGMENT**

*Date of Last Order: 31.08.2022*

*Date of Judgment: 13.09.2022*

**M. MNYUKWA, J.**

The accused persons, stand charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The Accused Persons denied the charge hence the full trial which involved calling five (5) prosecution witnesses and two for the defence.

The prosecution alleged that on the 3<sup>rd</sup> day of September 2019 at Sokoni Machinjioni street, within Nyamagana District in Mwanza Region,



the accused persons JUMA MASANJA @ "J" and ADRIANO COSMASS did murder one HAMISA D/O MSAFIRI. During the trial, the prosecution side was represented by, Sabina Choghogwe, Jainess Kiwelo and Naila Chamba the learned State Attorneys while Mr. Godfrey Martin learned counsel appeared for the 1<sup>st</sup> accused person and Mr Machele Mkaruka appeared for the 2<sup>nd</sup> accused person.

The prosecution witnesses include INSPECTOR KATANI MAKIA (PW1), BEATRICE LUCAS (PW2), COSMAS MBURA(PW3), AHMAD NGIZILLI (4) and MAFWELE NINALO MIGO (PW5) and the defence case paraded two witnesses JUMA MASANJA @ "J" the 1<sup>st</sup> accused person as DW1 and ADRIANO COSMASS the 2<sup>nd</sup> accused person as DW2.

INSPECTOR KATANI MAKIA (PW1) testified that he is a police officer who is currently working at Nyakato Police Station, within Nyamagana District at Mwanza region in Criminal Investigation unit with 20 years of experience in criminal investigation. He testified that, on 3/9/2019 at night around 2:30 while on duty station at Nyakato Police Station, he received information that there was an incidence of armed robbery in the house of HAMISA MSAFIRI and he went to the scene of crime and he was shown the door of the victim, HAMISA MSAFIRI which was broken. He entered in the house and found the victim who is now a deceased bleeding on the



upper part of her face and she told him that her door was broken and when she put the light on, she saw two persons who invaded her who carried machete and iron bar. That, one of the assailants beat the victim with the iron bar on her face and later on, she heard the voice coming from outside that "J" hurry up so as to leave the place. PW1 took the victim to Nyakato Police Station to get PF3 and to report the incidence. PW1 also escorted the victim to Igoma Hospital by using police's motor vehicle.

PW1 further testified that, he received information that Adrian Cosmas and another person, were the one involved in that incidence and he managed to arrest the first accused on 03.09.2022 in his home and in the preliminary interrogation, he admitted to have committed the crime and named Adriano Cosmas who was living at Igoma and he also arrested him and sent them to Nyakato Police station. On 9/9/2019, he received information that the victim, HAMISA MSAFIRI was referred to Sekou Touré hospital where she later referred to Bugando hospital and passed away. PW1 managed to identify the accused persons by pointing out the finger to the accused persons on the dork.

When cross examined, he testified that, the victim told him that the accused is called "J" and after arresting him, he realized that J was Juma. He went on that, the accused person namely Adriano Cosmas admitted to



have committed the offence when he was interrogated. The defence counsel noted that there was contradiction between his testimony and his statement written to the police as he wrote that it was the first accused Juma Masanja@J who admitted the commission of the offence when interrogated.

PW1 was shown his statement by the defence counsel which he identified and tendered it in court and admitted as exhibit D1. In re-examination, PW1 avered that, it was the 1<sup>st</sup> accused person who admitted to have committed the offence as it appears in his statement and that he was mistakenly as human being to have said that it was Adriano Cosmas who admitted to have committed the offence.

BEATRICE LUCAS (PW2) who is now living at Igunga and before she used to live at Machinjioni as a tenant in the house of Bomba Yanga where she lived the next door to HAMISA MSAFIRI, the deceased. She testified that, on 3/9/2019 at night hours, around 2:00 hours while she was in her room with her one (1) year old child, she heard a voice of a person asking for help and tried to open the door but the door was locked from outside. She shouted for help and in a while her door was opened from outside and she found neighbours gathered to the house of the deceased who was injured on her upper face. she further testified that, police came and took the victim to the hospital.



In cross examination, she testified that she did not know who were the accused persons and she don't know the person who invaded and injured and cause the death of the deceased.

COSMAS MBURA(PW3), testified that, he is a medical doctor of Bugando referral Hospital. He further stated that, on 09.09.2019 he examined the body of the deceased which was in a mortuary. He was introduced the body of the deceased by Geniva, a police officer and on his examination, he observed that the cause of death was due to traumatic brain injury secondary to blunt force trauma. He also identified his report that was admitted in court as exhibit P1. When cross examined, he maintained that he did not know the accused persons and also he did not know who assaulted the deceased.

AHMAD NGIZILLI (PW4) testified that on 03.09.2019 at around 2.30 hrs at night while sleeping he heard a screaming sound from the neighbouring house and he got out and headed to the house of Bomba Yanga and the house was closed. Upon asking one Rashid Yasin why he was not getting out, he told him that the door was closed from the outside. He jumped the wall and opened the locked door and went to the house of HAMISA and found her wounded on her face. The deceased told him that, she was invaded but could not recognise the invaders only she could hear a person calling the invader from the outside. He went on that, at



the time he did not hear a *Bajaj* or motorcycle (*boda-boda*) sound at that particular time.

MAFWELE NINALO (PW5) a *boda-boda* driver, 39 years of age and a resident of Machinjioni testified that, on 03.09.2019 at around 3.00 hours at night, he was called by one of his passengers to take him at Kijereshi bus stand and it was near the house of Bomba Yanga where the deceased was living and he found four persons standing outside. As he draw near he was able to identify Adriano Cosmas, the second accused person and the first accused who was famous known as J in the distance of two steps, they both run away. He testified that, Adriano Cosmas wore a white t-shirt with a black jeans trouser and J wore a chocolate trouser and a red t-shirt and at the time they were carrying weapons and a handbag. He went on that, he recognised them by the aid of the light powered by Tanesco and he know both of them as they lived together in the streets and they both worked as slaughters at Machinjioni and J works with his brother called Rasto.

He testified further that, when he went on his place of work *kijiweni* he heard from his fellows that, the house of Bomba Yanga was invaded and a female tenant was robbed. That, he made a call and informed the police officer one Mr. Katani who came and PW5 told him that he saw four persons outside the house of Bomba Yanga and managed to identify the



two accused persons Adriano and J and he accompanied the police officers in searching the accused persons and they managed to arrest Adriano in his residence who also escorted them to the house of J, whom they also arrested. PW5 also identified the two accused person at the dork.

When cross examined, PW5 testified that, after reporting the matter and assisted the arrest of the accused persons, he also wrote a statement in police which the counsel for the 1<sup>st</sup> accused prayed it to be admitted as exhibit and it was tendered by PW5 and admitted as exhibit D2. The defence side prayed the statement of the witness wrote at police to be admitted as evidence as they observed the contradiction between PW5's testimony and his statement wrote at police in terms of the time he received a call from his passenger between 2.00 hours or 3.00 hours. Another contradiction is at what time, he saw the accused persons between the time he was going to pick his passenger or when he was on the way to drop her at Kirejeshi bus stand.

He went on testifying that, when he saw the accused person outside the house of Bomba Yanga at around 3.00 night, he did not know what had transpired and for the reason that they work at Machinjioni as slaughters he did not suspect anything. He maintained that he know the accused person for more than five years and he was able to easily identify





them. He also stated that his motorcycle a *SANLG* made had a normal sound and has a light.

The prosecution case was marked closed and this Court ruled that the accused persons, JUMA MASANJA @ "J" (the 1<sup>st</sup> accused person) and ADRIANO COSMASS (the 2<sup>nd</sup> accused person) in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 R. E. 2019], has a case to answer and were addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA whereas the accused persons chose to defend on oath without calling witnesses and relied on their defence of alibi.

JUMA MASANJA (DW1) 30 years of age and a residence of Kishishi testified that, he is a slaughter of cow and goat and that on 03.09.2019 he was on his duty station from 1.00 hrs and left at around 6.00 hrs. DW1 went on that, he knows PW5 for more than 7 years as *polisi jamii* and they had earlier quarreled when they were watching football whereas he accidentally poured water to him and PW5 refused to pardon him and promised him that he would see what will happen to him.

He went further that, he was arrested on 07.09.2019 together with the 2<sup>nd</sup> accused and he was told that the offence was committed on 25.10.2019. He admitted to know the 2<sup>nd</sup> accused person as they lived together in one area.





When cross examined, he avered that from 1.00 to 6.00 am he was out of his home place and he lives in Kasota and not kabebe. He avered further that, from his home to Machinjioni is about 1 kilometer. He denied his name to be J and for the first time he was arrested for the offence of fighting with Gerald which is still pending before this court.

ADRIANO COSMAS (DW2) 32 years of age and a resident of Mhandu, testified that he is a businessman engaging in selling clothes at *Mlango Mmoja* and on 03.09.2019 he was in a police custody at Nyakato police station where he was arrested on 01.09.2019 at *Machinjioni Sokoni* in one of the grocery called *Kwamasori* alleged to engage in fighting. He denied to have committed the offence of murder as charged. He went on that, PW5 mentioned him because of grudges for he is a *police jamii* and they once fought as he restricted PW5 from collecting money from the gumbling business "karata" which he used to get money. He went on that he was arrested on 01.09.2019 and his name was registered at Nyakato police station register.

When cross examined, he testified that, he fought with Fantebes and was sent to Nyakato police station on 01.09.2019 and stayed in the lock up for 1 month and 3 weeks when he was sent to the court facing a charge of murder. He went further that, he has no proof that PW5 is a



*police jamii* and also he did not tender exhibit to show that he was arrested on 01.09.2019 and he did not ask about the quarrel during the testimony of PW5.

After both parties marked the end to their evidence before this court, both the prosecution side and the accused persons learned counsels filed their written final submissions. I extend my gratitude for their research well deserved, that had also assisted me in various legal juncture during the composition of this judgment.

In determining the case before me, as it stood, both the accused persons are before this court facing the charge of murder whereas the law is settled under Section 196 of the Penal Code, Cap. 16 [RE: 2019] which provides that:-

*"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".*

It is the prosecution, who are duty bound to prove the case against the accused persons that it was the accused persons who killed the deceased and at the time of committing the act of murder, they did so with a malice aforethought. The standard of proof that is required in this



kind of cases is beyond reasonable doubt as it was held in the case of **Said Hemed v Republic** [1987] TLR 117.

After the testimonies from both the prosecution and defence, PW4 evidence and exhibit P1 the post-mortem report proved that the death of the deceased HAMISA d/o MSAFIRI, which was not disputed by either party and her death was unnatural and the assailants did it with malice aforethought and there is no disagreement that the assailant contemplated and intended to kill. To that point, it is my findings that whoever inflicted the wound to the deceased, did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2002] now [RE: 2019].

As observed earlier on, the question now is whether, owing to the evidence on record, the prosecution managed to prove that it was the accused persons who killed the deceased person. As observed in the testimony of all witnesses in this trial, there is no doubt that no prosecution witness testified to have seen the accused person assaulting the deceased, therefore, made the evidence before this court being circumstantial evidence.

Starting with the evidence of PW5, he testified before this court that, on the fateful day at around 3.00 night, he saw the accused persons with



other two persons carrying machete, an iron bar and a handbag outside the house of Bomba Yanga where the deceased was residing as a tenant. He also stated that when they saw him, they all run away and he knew the two accused persons and it was ease to recognise them. PW5 testified to stand two steps near them and by the aid of the electric light powered by TANESCO from the neighbouring house he was able to recognise them.

With the above evidence on visual identification, I have no doubt that this is good case to apply the principles of recognition which is more reliable than identification to strangers. In the case of **Charles Nanati vs. Republic**, Criminal Appeal No.286 of 2017, the Court of Appeal at page 13 of the judgment quoted the decision in **Kenga Chea Thoya vs. Republic**, Criminal Appeal No. 375 of 2006 (unreported) that:

*On our own re-evaluation of evidence, we find this to be a straight forward case in which the Appellant was recognized by witness PW1 who knew him. this was clearly a case of recognition rather than identification and it has been observed severally by this Court, recognition is more satisfactory, more assuring and more reliable than that identification of a stranger.*

As severally held, the identifying witness is required to disclose such surrounding factors as the the type of light used and its intensity, proximity, familiarity to the assailant in terms of appearance, living in the



same locality, being a family member, in names, work. (See **Waziri Amani vs Republic** [1980] TLR 250).

Subjecting the evidence of PW5 to test whether the required standard was fulfilled, it is quite obvious that, the accused persons were well known to PW5 who testified that, they both lived together in one area and meet in the streets. The evidence was not disputed by the accused persons. PW5 testified that both the accused persons worked as slaughters at *machinjoni* and the second accused person who was also named J, works with his brother called Rasto. DW1 did not deny the fact that he works as a slaughter as testified by PW5 and DW1 also added that on the fateful day he attended his work and both DW1 and DW2 were well known to PW5 before the incidence. PW5 testified that, he was able to recognise the accused by the aid of the electric light from the neighbouring house which illuminated the area where the accused were standing and he was two paces from the accused persons. From the evidence of PW5, I find that based on the circumstances, PW5 stood a chance to identify and recognise the accused person.

Before I rule out that this court can rely on the evidence of PW5 in determining the fate of the accused persons before this court, I am cautious guided by the Court of Appeal in the case of **Elipafula**



**Timotheo Vs The Republic** Criminal Appeal No. 350 of 2014, stated that: -

*"Whenever reliance is placed on evidence of visual identification or evidence of recognition, this Court has invariably insisted that courts should only act on such evidence after eliminating all the possibilities of mistaken identity and the potential of miscarriage of justice."*

I am content that the law is trite that, when dealing with the evidence of eye witness, the credibility of the witness is of the uttermost importance. For eye witness testimony can be a very powerful tool in determining a person's guilt or innocence, but it can also be overwhelming when false witness identification is made due to honest confusion or outright lying. This was insisted by the court of appeal in **Mawazo Mohamed Nyoni @Pengo & 2 Others vs Republic**, Criminal Appeal No. 184 of 2018 held that: -

*"a matter of identification is not enough merely to look at factor favouring accurate identification equally important is the credibility of the witness, the ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor"*

An inevitable question of law for determination is whether PW5 is a credible witness whose testimony can be relied upon. First, PW5 who testified to be a *bodaboda* driver was in his daily activity and when he saw



the accused was not subjected to tension. Second, PW5 was later told that the house of Bomba Yanga was robbed, he was able to connect the incidence that he saw the accused who caried weapons outside of the house and immediately informed the police PW1 who with the aid of PW5, the accused were arrested. In the case of **Kadumu Gurube vs The Republic**, Criminal Appeal No. 183 of 2015 as referred to the case of **Marwa Wangiti Mwita vs. The Republic**, Criminal Appeal No. 6 of 1995 the Court made the following observation: -

*"The ability of witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry. "*

Going to the accused persons defence, I did not find if their defence could lower the credibility of PW5 for the reasons that while PW5 testified to be familiar with both accused, non of them disputed, and while denied to involve in the crime, it is not shown that PW5 has grudges with the accused persons. Based on the test subjected to the evidence of PW5, I find that, PW5 is a credible witness and his evidence can be relied upon by this court.

With regards to circumstantial evidence, the evidence of PW1 and PW4 was to the effect that, they were able to speak to the deceased





shortly after she was assaulted and though she could not identify the assailants, she heard one of the assailant calling J from outside. It happens that PW5 testified that the first accused person Juma s/o Masanja was also known as "J" and it was the same person who was seen outside the house of Bomba Yanga at around 2.00 hrs at night with weapons.

In **Sadiki Ally Mkindi vs. The D. P. P**, Criminal Appeal No. 207 of 2009, the Court of Appeal, set out the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68 that among of the rules includes: -

*"That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt."*

The Court of Appeal severally restated that in a criminal case based purely on circumstantial evidence, that evidence must irresistibly point to the accused's guilt and exclude any other person (See the case of **Sikujua Idd Vs The Republic** Criminal Appeal No. 484 of 2019, also **Shaban Mpunzu @ Elisha Mpunzu V. R**, Criminal Appeal No. 12 of 2002 (unreported)).



Reverting to the case at hand, the evidence of PW5 corroborates with the evidence of PW1 and PW4 that while PW5 was able to recognise the accused persons outside the house of Bomba Yanga and the same house was the scene of crime, where PW1 and PW4 interrogated the deceased who at the time was injured on her face, she told them that she heard from outside a person calling that "J maliza ishakuwa noma", and it happens that a person recognised by PW5 was also called J and was seen carrying a weapon. In their defence, both the accused persons denied to have committed the offence and filed the defence of alibi.

DW1 testified that he was at his place of work from 1.00 hrs to 6.00 hrs and did not involve in the commission of the offence. As it appears on record, DW1 filed a notice of alibi which he claims as it reads that "that on the 3<sup>rd</sup> September 2019 in the mid night when the complained act of homicide took place, the accused person was sleeping at his home in Igoma-Kisota". DW1 gave two version of his defence that, his notice indicates that he was at his home sleeping while when testifying at the trial, he testified that he attended his daily work routine and from 1.00 hrs to 6.00 hrs, he was at *Machinjoni* and when he was cross examined he stated that he was out of his home but he didn't state as where he was.



As to the DW2, he denied to have involved in the murder of the deceased and he also managed to file a notice of alibi where the notice reads, "that on the 3<sup>rd</sup> September 2019 when the complained act of homicide took place, the accused person was in the police lockup at Nyakato police station." On his oral testimony he testified that he was arrested on 01.09.2019 and on the fateful night he was in a police custody. In this regard, DW2 evidence denied to be present on the crime scene or be arrested on 03.09.2019 as stated by PW1 and PW5, but when the evidence on his arrest was given by PW1 and PW5 that he was arrested on 03.09.2019 he did not cross examine on that effect. It is a trite position of law that failure to cross examine on a vital point, ordinary implies the existence of the truth of the witness evidence and may alarm to the contrary is taken as an afterthought. (See the case of **Martin Misawa v Republic**, Criminal Appeal No 128 of 2016, CAT at Mbeya).

Furthermore, both DW1 and DW2 evidence of Alibi contradicts their oral testimonies. In **Ali Salehe Msutu v. Republic** [1980] TLR 1, it was stated that: -

*"As a matter of law an accused person is not required to prove his alibi and that it is sufficient for him if the alibi raises a reasonable doubt."*



Neither DW1 nor DW2 did furnish their defence of alibi to the standard required and therefore their defence of alibi fails as I accord no weight on it.

In our present case, the defence counsel tried to contradict the testimony of PW1 and PW5 against their written statements wrote at the police. My task at this juncture is to determine whether or not the complained contradictions existed and if yes, if they went to the root of the matter. The defence counsel contended that, PW1 contradicts in his testimony and his statement as to who admitted the commission of the offence. While he testified that it was Adriano Cosmas, in his statement he stated that it was Juma Masanja @ J.

Admittedly, there is difference between PW1 testimony and his statement as to who admitted the commission of the offence. However, when he was re-examined PW1 stated that it was human error as he mistakenly said that it was Adriano Cosmas who committed the offence instead of Juma Masanja. For that clarification, I am satisfied that, this is minor contradiction which does not go to the root of the matter taking into consideration that in re-examination PW1 insisted that it was Juma Masanja@J who admitted the commission of the offence as he correctly wrote in his statement.



Another contradiction which was pointed out, is whether PW5 saw the accused persons when he was going to pick up the passenger or when he was going at Kijereshi bus stand to drop her and the time he received a call from the passenger as to whether it was at 2.00 hours or at 3.00 hours. With respect, I wish to point out that whether PW5 saw the accused persons when he was going to pick up the passenger or when he was going to Kijereshi bus stand to drop her, that does not impeach his evidence that he saw them near the scene. Besides, his contradiction at what time he met the accused persons between 2.00 hours or 3.00 hours also does not deny the fact that he received a call at night to pick the passenger and that he responded to the call and went near Bomba Yanga's house and saw the accused persons at that night. I therefore find this contradiction to be minor which does not go to the root of the matter.

In the case of **Charles Nanati** (supra), the Court of Appeal quoted with approval the case of **Dickson Elias Nsamba Shapatwa and Another v Republic**, Criminal Appeal No 92 of 2007 where it was held that:

*"In evaluating discrepancies, contradictions and or omission, it is undesirable for the court to pick out sentence and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistency and*



*contradictions are only minor or whether they go to the root of the matter."*

The Court went further quoting from the book of Sarkar in the Law of Evidence, 16<sup>th</sup> Edition, 2007 where it is stated at page 48 as follows:

*"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."*

Thus, it is my considered view that the purported contradictions in the evidence of PW1 and PW5 are minor, did not go to the root of the matter and did not impeach the credibility of the evidence tendered by the above witnesses and did not cause injustice to the accused persons. Consequently, I disregard it.

From the totality of the evidence adduced above, the chain of circumstances in the prosecution evidence suffice to prove that it was the accused who committed the offence.





The Court of Appeal in **Saidi Bakari V. R.**, Criminal Appeal No. 422 of 2013 (unreported), give its remarks in regards to circumstantial evidence that: -

*"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centred on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances.*

Cautioned by the above cited case, and this being the case of murder it is my findings that the chain of events implicates both the accused persons to the murder of the deceased.

In the strength of what have been discussed above, I have reached the following conclusions. The law is settled that, the accused person ought to be only convicted on the strength of the prosecution, I am satisfied that the prosecution's evidence is credible and reliable. I do not think that, the positive evidence of PW1, PW4 and PW5 is shakeable. In the event, I find that JUMA MASANJA @ "J" (the 1<sup>st</sup> accused person) and ADRIANO COSMASS (the 2<sup>nd</sup> accused person) are guilty as charged. I, therefore, convict JUMA MASANJA and ADRIANO COSMASS for murder contrary to section 196 of the Penal Code Cap. 16 [RE: 2019]





**DATED at MWANZA** this 13<sup>th</sup> September, 2022



  
M.MNYUKWA

**JUDGE**

13.09.2022

**SENTENCE**

Since JUMA MASANJA @ "J" (the 1<sup>st</sup> accused person) and ADRIANO COSMASS (the 2<sup>nd</sup> accused person), have been convicted of murder, I hereby sentence JUMA MASANJA and ADRIANO COSMASS to death by hanging in terms of section 197 of the Penal Code, Cap 16 R.E 2002 now R.E 2019.

  
M.MNYUKWA

**JUDGE**

13/09/2022

**Court:** The right to appeal against this Judgement is fully explained and guaranteed.

  
M.MNYUKWA

**JUDGE**

13/09/2021