

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 02 OF 2022

REPUBLIC

VERSUS

ATHUMANI IDI NIHUKA 1ST ACCUSED
BAKARI MTIMKA 2ND ACCUSED
TATU MAMBO KATONA 3RD ACCUSED
ALLY MOHAMED NANGOPA 4TH ACCUSED

JUDGEMENT

Date of Last Order: 22/08/2022
Date of Judgement: 29/09/2022

MLYAMBINA, J.

On 26th July, 2018, at Mfuate hamlet, Likuyu Sekamaganga Village, Namtumbo District in Ruvuma Region, Mussa Burhani Nihuka was found lying dead alongside his house. It was suspected that the deceased was a drunkard person and he was beaten by the people alongside the road.

The accused persons, namely Athumani Idi Nihuka, the first accused person; Bakari Mtimka, the second accused person; Tatu Mambo Katona, the third accused person and Ally Mohamed @ Nangopa the forth accused person; were arraigned before this Court for the offence of murder contrary to *sections 196 and 197 of the Penal Code*

[Cap 16 Revised Edition 2019], the murder which was alleged to be committed on 25th July, 2018. The accused persons denied to commit the atrocity.

At the hearing, the Court was assisted by Ladies Assessors, namely Ms. Odila Mapunda and Ms. Elizabeth Ngonyani, together with a Gentleman Assessor one Mr. Manfred Hyera. The Republic was initially represented by Mr. Shabani Mwegole, learned Senior State Attorney assisted by Mr. Frank Chonja, State Attorney. Later it was represented by Ms. Tumaini Ngiruka, learned Senior State Attorney assisted by Mr. Lugano Mwasubira and Tumpare Lawrence State Attorneys. The first and second Accused were represented by Vincent Kassale assisted by Lazaro Simba, learned Advocates while the third and fourth Accused were represented by Mr. Melkioni Mpangala, learned Advocate. The prosecution paraded six (6) witnesses and two (2) documentary evidence to prove the charge laid against the accused persons.

PW6, Amri Abeid Nihuka testified before this Court that; on 25th July, 2018 he was with his uncle known as Amiri Kihimbi guarding the harvested maize at their farm at Mfuate Hamlet, Likuyu Sekamaganga Village, Namtumbo District. While there, they heard a voice saying "if they want to kill me let them do." They decided to follow alarm

direction. They discovered that the voice was coming from the house of Tatu Mambo. He recognised the voice of his uncle known as Mussa. He went closer to and he looked inside of the fence and saw the 1st, 2nd, 3rd and 4th accused persons assaulting the deceased by using a piece of pestle, wood and two pieces of bamboo tree.

Furthermore, PW6 told this Court that; he managed to identify the Accused persons by the assistance of the light from a bulb placed at the door of Binti Mataka's House. He knows the accused persons for more than five years. He witnessed the event for 40 minutes. His uncle Amiri was standing under the mango tree which was few paces from Binti Mataka's house. While witnessing the event, another person joined them. He was Joseph (PW4). He asked the names of the assaulters. PW6 mentioned their names to him. After a while, Joseph left. PW6 and his uncle returned 30 paces back and waited. Thereafter, it was silent and after five minutes they saw the accused persons carrying the deceased and went around the house. He managed to identify the colour of Bin Mataka's clothes only to be a mixture of colour. Due to their movements, he was not able to recognise the colour of other Accused persons' clothes. PW6 insisted that he was the only one who went closer to the scene of crime. Joseph was 10 paces far from him.

He refused go to the scene. He testified further that; the house of Bin Mataka was surrounded by a fence made of glasses.

PW6 evidence was supported by the evidence of PW4. The latter added that; he was 25 paces from the crime scene. He managed to identify the accused by their appearance assisted by the light which was coming from a solar bulb placed at the door of the house of Bin Mataka. Also, he identified the person who was assaulted. He observed the event for ten minutes. PW4 testified further that; he was the one who mentioned the names of the Accused persons. He was afraid to go near the scene. He explained further that; the house of the third accused was roofed by glasses and it was surrounded by mud soil fence.

PW1, a Police Officer acting as OCCID of Namtumbo District received an information from a person who claimed to be a Villager from Mfuate Village that there was a male body lying alongside his house allegedly killed. They went to the crime scene accompanied by PC Juma, PC Gerald, Dr. Mushi and Other Policemen. At the scene of crime, he saw the body of the deceased person having injuries on his stomach and legs. PW6 admitted to witness the event and narrated what transpired that night (21:30 hours). He mentioned to them the persons who assaulted the deceased. PW6 directed them where the whereabouts of

the Accused. They managed to arrest two of them. The remaining were arrested on the following day.

He went to the crime scene which was a house of the third Accused and the said house was roofed by corrugated iron sheets and it was within the glass fence with height about one and half meter. Apart from the Accused, there were Other people living near the crime scene. This evidence was supported by PW3, a Police Officer at Namtumbo. He was among the team which went at the crime scene. He was the one who drew a sketch map of the scene of crime. He has confirmed to see a deceased body having injuries at his legs and stomach. He saw a bulb at the door of the house of the third Accused but they did not enquire as to the size of the solar power. Also, PW5 conceded to see the deceased body. PW5 was the one who collected the logs, sticks and pestles (exhibits) believed to be used to assault the deceased person.

Aloyce Luka Mushi (PW2), is a Clinical Officer who examined the deceased body. He told this Court that while examining the deceased, he saw injury at the left side of his chest, laceration on his legs and clotted blood on his ear and nose. He went further and conducted surgery on his stomach but there was no sign showing the cause of his death. He operated his head and discovered the presence of clotted

blood (hematoma) and the skull had fracture at the middle which was caused by been hit by a blunt object. After examination, he handled the deceased body to his relative for burial. PW2 confirmed that the deceased died due to the head injury.

On defence side, the Accused persons testified as DW1, DW2, DW3 and DW4 respectively. They testified themselves without any additional witnesses or documentary evidence. They all in different occasion denied to have assaulted the deceased in one way or another. DW1 testified that; he is living at Likuyu Sekamaganga. He knows Mussa Nihuka and Samli Abeid. The latter is his young brother's son. He had a farm at Mfuate. He also knows Tatu Mambo as her house is near the road to the farms. He went there off season only. He was informed about the deceased death on 26th July, 2018 and participated at the burial ceremony. He denied to have any relationship with Tatu Mambo. She is a peasant, selling rice cake "vitumbua" and not alcohol.

DW2, is a resident of Mfuate hamlet at Likuyu Sekemanganga Village. He testified that; the third and fourth accused are his neighbour at Mfuate. The deceased Mussa Nihuka was his neighbour too and he is dead. He denied to be involved in assaulting the deceased. He got information of the deceased death on 26th July, 2018 and he participated

on the burial ceremony. There are other people living at Mfuate. He knows Tatu Mambo as his neighbour. Athumani is his neighbour at Likuyu. At the fateful day, he was at Likuyu to roof his house.

DW3 averred that, she was living with her husband. She was selling vegetables and rice cake at Mfuate hamlet. On 25th July, 2018 she was at her home sleeping. She denied to be involved into killing of the deceased and the latter been assaulted at her house. She denied to sell alcohol or drink it. She contested to have her house being roofed with corrugated iron sheet, surrounded by a fence made of glasses and having a solar electricity. Instead, they use local electricity bulb known as "Videnja". There are many people at their hamlet. She denied to have bought piece of cloth known as "Kitenge" from Joseph.

Furthermore, DW4 testified that, it is ten years now since he started to live at Mfuate Village. He is a peasant. Mussa Nihuka was his cousin and they were neighbours. He denied to assault the deceased.

After carefully consideration of the evidence of both sides, this Court is of the findings that; there is no dispute that Mussa Burhani Nihuka died unnatural death. PW3, a Medical Doctor who examined the deceased body proved so and he was supported by all witnesses who saw the body of the deceased. The issues to be determined in this case

are; whether the accused persons are the ones who assaulted the deceased (Mussa Burhani Nihuka) to death. If the answer is in affirmative, whether they murdered him with malice aforethought.

The prosecution believes that the Accused persons herein are the ones who assaulted the deceased to death. It is a cardinal law that in criminal cases, the prosecution is duty bound to prove their case beyond reasonable doubt. As per *section 3 (2) (a) of the Evidence Act [Cap 6 RE 2022]* the burden does not shift to the Accused. Also, see the case of **Hamisi Mbwana Suya v. The Republic** [2017] TLR 160, the case of **Godfrey Paulo, Frank Warioba, Nelson Mbwile v. Republic** [2018] TLR 486, where the Court has this to say:

The burden of proof is always on prosecution side to prove their case beyond reasonable doubt. This means that the prosecution is duty bound to lead strong evidence as to leave no doubt to criminal liability of the accused person.

To prove their case, the prosecution evidence relied on the visual identification evidence of the two witnesses who are Joseph Mgaya (PW4) and Samli Abeid Nihuka (PW6) who claimed to witness the accused persons assaulting the deceased.

The law relating to the virtual identification is well settled in our jurisdiction. The guide lines were analysed in the case of **Waziri Amani**

v. Republic [1980] TLR 250. Where the Court had this to say:

...no Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolute watertight.

The Court went further providing the elements to be considered when dealing with the case which relies solely on virtual identification. Thus:

Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questioned of disputed identity; it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surroundings of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: *the time the witness had the accused under observation; the distance at which he observed him; the condition in which such*

observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matter to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity. [Emphasis added]

Being guided by the principle laid above and after scrutinizing the evidence adduced by the prosecution witnesses, this Court is of the findings that the one who witnessed the event was only PW6. The latter told this Court that; he was the only one who went closer to the scene of the crime when Joseph (PW4) was ten metres away from him and Amiri remained at the Mango tree which was 12 meters away from where the deceased was assaulted (as per sketch map which was admitted as Exhibit P2). These facts are inconsistency with facts analysed in the sketch map of the scene of crime. Sketch map of the scene of crime shows that PW6 was with his uncle Amiri witnessing the event at the same point contrary to what he testified before this Court.

Furthermore, PW6 adduced further that; he managed to identify the Accused persons with the support of a light coming from the bulb at the door of the third Accused person's house. The same light helped him to identify the colour of the third Accused clothes but he did not identify the colour of the clothes of the remaining Accused persons. Bearing in mind that the event took place at about 2130 hours, the prosecution did not explain the brightness of the light. In the case of **Kasim Said and Two Others v. The Republic**, Criminal Appeal No. 208 of 2013, the Court of Appeal of Tanzania while sitting at Arusha (unreported), held that:

When it comes to the issues of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witness was reasonably bright to enable the identifying witness to see and passively identify the accused person. Bare assertion that "there was light" would not suffice.

From the record, PW6 averred that there was a light coming from the solar bulb placed at the door of the third accused person's house. The same was repeated by PW3 who insisted that they did not inquire

on the capacity of the solar. It is upon the prosecution side to establish clearly that the light relied on by identifying witness was reasonable bright to enable the witness to see and positively identify the accused persons.

Also, the prosecution did not mention at what distance the Accused persons were standing. Even in the sketch map there is no approximation of the distance between the witness and the Accused persons.

As for the time which the witness had the accused under observation, PW6 told this Court that; he observed the event for 40 minutes. If true that the Accused and the witness conceded to know each other for more than five years and there was enough light, there are no explanation as to why PW6 failed to analyse the colour of the clothes of the remaining Accused persons who were together with the third accused.

Apart from the factors analysed in the case of **Waziri Amani** (*supra*), I would like to consider the circumstance of the case as a whole. While PW6 claimed to see the accused persons assaulting the deceased, the Accused persons denied to participate in one way or another in the commission of the atrocity. So, it is crucial to examine the

credibility/truthfulness of the evidence of the identifying witness who is PW6, as it was stated in the case of **Jaribu Abdalah v. The Republic** [2003] TLR 271 in which the Court of Appeal has this to say:

... in matter of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witness. The condition for identification might appear ideal but that is no guarantee against untruthful evidence.

PW6 told this Court that; he was with his uncle Amiri Kihimbi but the prosecution did not bring the said Kihimbi to testify. Also, PW6 narrated that; the Accused were the only persons who lived at the area. But the sketch map of the crime scene shows that there is a school. The School institution cannot be built at the place where there is low population. That means, there are more people who are living at that area. There are no good reasons stated as to why PW6 did not make an alarm so that his uncle Mussa could have been rescued. This leaves much to be desired. There is something not been disclosed clearly by PW6.

The prosecution managed to prove that Mussa Burhani Nihuka was murdered as per evidence of PW1, PW2, PW3, PW4, PW5 and PW6. It

was supported by Exhibit P1. The question as to who murdered the deceased remain unsettled. The virtual evidence adduced by PW6 (the eye witness) is so weak and unreliable, it creates many doubts whether the Accused herein are the ones who assaulted the deceased to death. Therefore, this Court cannot use unreliable evidence to convict the Accused persons. The evidence of PW6 do not hold water. As the law requires that where there is doubt the Court has to resolve in favour of the Accused.

For the above reasons, the prosecution failed to prove their case beyond reasonable doubt as required by the law. Therefore, I agree with the Assessors Mr. Manfred Hyera, Ms. Odila Mapunda and Ms. Elizabeth Ngonyani who assisted the Court in the trial of this case that the first accused person Athumani Iddy Nihuka; the second accused person, Bakari Mtimka; the third accused person, Tatu Mambo Katona and the fourth Accused, Ally Mohamed @ Nangopa are not guilty of the offence of murder laid against them contrary to the provision of *section 196 of the Penal Code [Cap 16 RE 2022]*.

In the circumstances, the Accused persons are here by acquitted. They have to be released from the custody unless otherwise they are being held for other cases. Order accordingly.



Y. J. MLYAMBINA

JUDGE

29/09/2022

Judgement pronounced and dated 29th day of September, 2022 in the presence of State Attorney Hellen Chuma for the Republic, the Accused Person and his Counsel Vincent Kassale. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

29/09/2022