

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 29 OF 2021

REPUBLIC

VERSUS

- 1. ALEX ^{S/o} LUCIAN @ KIPONDA**
- 2. KOMBE ^{S/o} MATONANGE @ TINDE**
- 3. ZENGO ^{S/o} NKUBA @ MADUSHI**
- 4. NHINGO ^{S/o} ISEME @ MELEMETA S/O NG'WANDU**

JUDGEMENT

Mwenempazi, J.

The accused persons herein are charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002. It is alleged that on the 1st day of May 2019 at Mpete village within Sumbawanga District in Rukwa Region, the accused persons did intentionally murder one person known as **BENEDICTO CHAPEWA**.

It is alleged that; the accused persons were already at Mpete Village two days prior the date of the incident. They had already arranged the murdering processes and the means to be used in the completion of the offence. Whereas the deceased was a Ward Executive Officer of Mwadui and he owned a bar and a guest house at Mpete Village, and on that fateful date, at around 21:45 hours, he was spending his precious last time on Earth with his friends.



At the that material time, the accused persons invaded the place while armed with a gun and machetes where the deceased was sitting with two other persons at his bar. The accused persons shot the deceased and cut him with the machetes on various parts of his body until he breathed his last breath. The assailants started off on their heels after they had made sure that the deceased is breathing no more.

The incident was reported to the Police Post at Muze Ward, and thereafter a team of police investigators in company of a medical doctor arrived at the scene of crime. As witnesses were interrogated at the scene, some witnesses claimed that the 1st, 2nd and 4th accused persons were recognized at the crime scene and that led to the apprehension of the accused persons from different places at different times.

During the hearing of this matter in hand, the Republic was represented by Mr. Simon Peres learned Senior State Attorney being assisted by Mr. John Kabengula alo learned State Attorney, while the 1st, 2nd and 3rd accused persons were represented by Father Charles Kasuku learned Advocate and the 4th accused person was represented by Mr. Innocent Mwipopo learned Advocate.

In proving their case against the accused persons, the prosecution side paraded five (5) witnesses and tendered two (2) documents which are: -

- i. Post-mortem examination report-exhibit P₁
- ii. 3rd accused person's cautioned statement-exhibit P₂

After I have thoroughly gone through the prosecution and defence cases, I realised that the main issue before this court to be determined,

is ***whether the accused persons did cause the death of the late Benedicto Chapewa***, and, if the answer is in the affirmative, ***whether they did so with malice aforethought***.

In this case at hand, it has been alleged that the deceased was attacked and killed by villains equipped with weapons which were a gun and machetes (no witness specified the number of the machetes). It is the prosecution's case that PW2 and PW5 are the only eyewitnesses to this ill will offence. Both witnesses were present during the attack as they were summoned by the deceased to accompany him in killing off the night by sipping up some alcohol.

In their testimonies of both PW2 and PW5, each had recognised some of the assailants at the event, whereas PW2 identified two assailants, one by his facial appearance and the other by his famous name known as Madushi. PW5 recognised only the 2nd accused person as he used to eat at her restaurant for three days and she was the one serving him.

PW2 testified that it was around 20:45 hours, he was with the deceased and PW5 drinking alcohol sitting under a tree near the deceased's guest house which was some six paces from where they were. Then, four men attacked them and suddenly they started to hack the deceased using machetes, he ran and fell into a trench, stood up and ran again, and he then a loud bang as a gunshot.

He clarified that the area had two bulbs drawing energy from solar, and that, there was enough light, and he was able to identify two among the four men, he recognised one villain by his facial appearance and the other one by his famous name of Madushi, and both of them were black

in colour, and that the event was sudden, and it may have taken almost five minutes.

PW5 testified that it was around 20:30 hours as she was called by the deceased to join him in drinking alcohol as the night passes. She said they sat under a tree that was some twenty (20) paces from the deceased's guest house and that they were three in number, herself, the deceased and PW2. She added that, the place depended on the solar energy light which was emanating from the deceased's guest house.

She added that, suddenly, five or six people invaded the area they were sitting and started to threaten them while banging the machetes to the tree. She and PW2 ran but the deceased could not as he was drunk. She added that, she was not far from the scene as she hid behind a bush, and she saw the villains hacking the deceased with the machetes on his neck and that she was able to identify the 2nd accused person through the aid of the solar energy light and that some ten minutes ago the 2nd accused person was at her restaurant eating and he has eaten three times before the fateful day.

Considering the testimonies of the two witnesses, I hesitate to underline that the suspects were vividly recognised by the witnesses. I will elaborate on this more. All three were using alcohol, the extent of alcohol was undetermined for the two witnesses to be of sound mind to able to clearly identify the suspects in the dark been lit by a light bulb of solar energy which is at not less than 10 paces.

In proving that the two witnesses were not of sound mind, PW2 said the villains were 4 but PW5 said the villains were 5 to 6. This inconsistency verifies there was insufficient light at the area of the scene, and that is

why PW2 said the suspects he identified they were black in colour, of which every person in the dark would appear to be black in colour.

Moreover, PW2 said the event was sudden, it took about five minutes, in that scary situation and in an area with insufficient light and in an intoxication state, I am convinced that PW2 was in incapable state of recognising any of the suspect. He himself told the court that after they were invaded, he ran off and fell on a trench, he then stood up and ran even further.

In addition to that, PW5 said the event took about thirty minutes, and that after being invaded she ran and hide herself in a bush, but she insisted it was not far. However, she too was of unsound mind as she was drinking alcohol, and she ran even further from the source of the light, no wonder she could not be precise on the number of the villains as to whether they were five or six. Again, I am not convinced that PW5 had sufficient time to recognise the 2nd accused person as she claims.

In several cases, before and after **WAZIRI AMANI [1980] TLR 250**, other factors have been added to the list as necessitated by the peculiarities of each set of circumstances. Thus, in **JARIBU ABDALLAH v R. Criminal Appeal No. 220 of 1994** (unreported) it was held:

".... In matters of identification, it is not enough merely to look at factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

And that,



"Eyewitness testimony can be a very powerful tool in determining a person's guilt or innocence. But it can also be devastating when false witness identification is made due to honest confusion or outright lying"


Nevertheless, courts have insisted that such witnesses ought to give a detailed description of suspects to persons to whom they first report as it was held in the case of **R v Mohamed Bin Alhui (1942) 9. EACA 72** and that:

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

(see **MARWA WENGAJI MWITA AND ANOTHER v R Criminal Appeal No. 6 of 1955** (unreported)).

In the case at hand, PW2 testified that as he ran even further, he received a phone call from a new number asking him if he is alright and that it is safe for him to go back at the scene of the crime, and he did go back. He testified that he had recognised two of the assailants but, he did not say anywhere that he named them to anyone that night at the scene. Similarly, PW5 testified that she identified the 2nd accused person, but as she ran and asked for help at the village market, she too did not mention the person she identified at the crime scene.

Both witnesses were not capable to name the culprits at the earliest opportunity because, either they could not identify the culprits properly due to the quickness of the event itself or because of insufficient light at



the crime scene. And therefore, I join hands with the counsels for the Defence as they cited the case of **Waziri Amani Vs R** (supra) which is a landmark case as far as identification is concerned. Whereas the Court of Appeal while deciding on the question of identification said:

"The first point we wish to make is an elementary one and this is that evidence of identification, as Courts in East Africa and England have warned in a number of cases, is of weakest kind and most unreliable. It follows therefore, that 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 absolutely watertight."

Nevertheless, the prosecution side also tendered the 3rd accused person's cautioned statement in the attempts of proving the charges against the accused persons. As rightly submitted by Father Kasuku learned Advocate for the accused persons, that there are doubts whether **Section 52 and 53 of Criminal Procedure Act Cap 20 [RE 2022]** were complied.

In this, the 3rd accused person is illiterate, it was proved by PW3 who took his statement. However, in his caution statement DW3 told the court that he had gone to the police station to see his father who was in custody, and he was then arrested. On the other side, PW3 told the court that he read DW3 his rights before writing his statement. Among his rights were that DW3 had the right to call his relative, lawyer or friend during the process, to a prudent person's thinking, it was easy for DW3 to require his father's presence during being taken his caution statement. If at all

his rights were read to him, then DW3 has been deprived of his right to have his relative present during the taking of his statement, which means it has been taken contrary to law as cited above and deserves to be expunged.

However, during his testimony, DW3 did tell the court that he is illiterate and that the statement brought in court it was not the statement he made at the police station. This means DW3 repudiated and retracted the cautioned statement tendered in court as evidence by the prosecution side.

In **Richard Lutengo Vs Republic CAT Criminal Appeal No. 29 of 1996** (Mbeya) (Unreported) the Court quoted with approval the case of **Tuwamoi Vs R.** [1967] E.A.84 at page 91. Whereas the case of **Tuwamoi** is one of the classic cases on repudiated or retracted confessions or both that;

"The trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. It is however dangerous to act on uncorroborated retracted or repudiated confession."

As I warn myself in convicting the accused person basing on this caution statement, still there was no cogent evidence that would corroborate the statement itself to convince me that the accused persons did murder the deceased.



It is the principle that, the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. There are plethora of authorities emphasizing on this principle. See **Hamis Mkumbo vs. Republic, Criminal Appeal No. 124 of 2007, Rashidi Abdallah Mtungwa vs. Republic, CAT Criminal Appeal No. 91 of 2011**, (both unreported) just to mention a few.

In similar vein, I accord little weight to the testimony made by PW3 and PW4. That being the case, as I earlier hinted, I hold that Exhibits P2 required corroboration before being acted upon, and it was made contrary to Section 52 and 53 of the CPA. That leads me into holding that the prosecution has not managed to prove its case beyond reasonable doubt against any of the accused persons.

And therefore, I hereby acquit all four accused persons of the offence of murder under **Section 312 (3)** of the **CPA**. I proceed to order immediate release of accused persons from custody unless they are held therein for other lawful cause.

It is so ordered.



T. M. MWENEMPAZI

JUDGE

26/10/2022