

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

CRIMINAL SESSION NO. 46 OF 2020

THE REPUBLIC-----PROSECUTOR

VERSUS

DAUDI JACOB MATHIAS @ DAU-----1st ACCUSED

PASTORY MALABA MAIGE@ PASI -----2nd ACCUSED

ANTHONY ELIAS DOMINIC -----3rd ACCUSED

JUDGMENT

Date of Last Order: 27/10/2022

Date of Judgment: 21/11/2022

M. MNYUKWA, J.

On the fateful evening of 21st day of April, 2019, Philimon Eliakiara Kimaro (the deceased herein) met his demise at Machinjioni area within Nyamagana District in the City and Region of Mwanza. His death was caused by multiple cut wounds on the chest, neck and shoulder in accordance with the post-mortem examination report, Exhibit P2. As a result, Daudi Jacob Mathias @ Dau, Pastory Malaba Maige@ Pasi and

Anthony Elias Dominic were both accused and consequently, arrested and arraigned before this court facing charges of murder of the deceased contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E 2002 (Now 2022). The particulars of the charge revealed that the accused persons altogether on 21st day of April, 2019 at Machinjioni area within Nyamagana District in the City and Region of Mwanza did murder one Philimon Eliakiara Kimaro (herein referred to as the deceased). The accused persons denied the charge against them.

The incident started at Rose's grocery at Machinjioni, where it was alleged that the accused persons, the deceased and other customers were enjoying their evening at the premises. It was further alleged that, when they were drinking, the accused persons noticed the deceased had money to the sum of Tsh. 80,000/= and mobile phone in his pockets. The accused persons together with other 4 persons forcefully took the deceased out of the grocery to the Masai hut for snuff selling. The 1st accused person took out the knife he had hidden in his private parts and stabbed the deceased in his chest and neck who fell down while bleeding heavily. The 3rd accused person searched the deceased and took his belongings and left him to die while they vanished from the scene of the crime.



To prove this story for the accused persons to be convicted, the prosecution had a total of three witnesses namely, Inspector Valentine Sarakikya (PW1), Boniphace Mafuru (PW2) and F.1628 D/SGT Hija (PW3). The prosecution had 5 exhibits which are the, sketch map of the scene of the crime (Exhibit P1), the deceased's post-mortem report (Exhibit P2), and the three accused persons' caution statements (Exhibit P3, P4 and P5).

At the trial, the prosecution was represented by Ms. Sabina Choghogwe and Ms. Jainess Kihwelo, the learned State Attorneys. The three accused persons were respectively represented by Steven Kaijage, Machere Mkaruka and Constantine Ramadhani, learned counsels.

On the prosecution evidence, PW1 testified that he is a police officer currently working at Pamba Police station. He was previously stationed at Nyakato Police Station from 2017 to 2019 as an officer in charge of Criminal Investigation. On 21/4/2019 while on patrol, he received a call from Mntimba who was the chairman of Machinjioni Street. He was informed that there was a man suspected to be dead at Machinjioni Street. He informed the head of the Police Station of Nyakato (OCS) who ordered him to go to the scene of crime. As he reached there, he found the deceased laying down and looked lifelessly with wounds on his chest and



neck. People who were at the scene identified the deceased and also suspected the accused Daud, Anthony Mkumbo and the other known as White. PW1 took the deceased to Bugando Hospital for further action and continued with the investigation of the case and he wrote his statement.

When he was cross-examined, PW1 testified that, he got information from informers and intelligence information. That he did not further investigate the case as he was transferred. PW1 further testified that there was an electric bulb light at the scene of crime and that, he interviewed few people who had gathered at the scene of crime. He also testified that he did not witness the killing. He refuted the fact that the deceased fell onto the big stone. He also testified that he doesn't know if the accused were sent to the justice of peace. He further testified that he didn't get information that the 3rd accused person murdered the deceased person and he didn't know if the deceased was drunk.

PW2, Boniphace Mafuru testified that, he is a motorcycle driver with 15 years of experience living at Maswa Street. His duty station is at Machinjioni Sokoni. That on 21/4/2019 at night around 21:00 hrs while at his duty station, there was a murder of a male person who was stabbed with a knife by a person known as Daudi. That, the accused persons were six of them, to whom are Daud and Anthony and four other people whom



he didn't know. That, Daudi (the 1st accused person) was the one who stabbed the deceased while his fellow searched him and took the deceased's mobile phone and money which he didn't know how much. That, after the incidence, the 1st accused person threw the knife at Kishimba's compound and disappeared. PW2 testified that, identified the accused persons with the aid of electric light which was very bright and he was just 3 paces walking distance from the scene of crime and the incident took about 20 minutes. He further described that, he identified the 1st accused person as he has a scar near his eye. He further testified that Daudi and Anthony lived at the area which he works for gain at Machinjioni Street for almost 7 years. He testified that Anthony was working at Machinjioni but he didn't know where the 1st accused person work. He reported the matter to the OCS of Nyakato police station and told him he knew the culprit.

He further testified that, on 28/5/2019 at 13:00 hrs, he saw the 1st accused person at *banda la video* at Igoma as he was taking his customer to Igoma and he informed the OCS who sent PW3 to arrest the 1st accused person. That on 30/5/2019 while at Nyakato police station PW3 asked if he had seen the other accused and he said he haven't. However, as he was leaving, he saw the 3rd accused person and showed PW3 who



arrested him. PW2 was able to identify the 1st and 3rd accused persons at the dock.

In cross examination, PW2 insisted that he is a motorcycle driver and he saw the 1st accused person stabbing the deceased person and the culprit were 6 but he identified two of them as he knew them. He further narrated that the 3rd accused person was at the scene of crime around 21:00hrs and the incident ended at 21:20 hrs and that he was alone when the incident happened. He further narrated that, the 3rd accused person didn't kill the deceased person but he stole from him. PW2 also made it clear that he went to the police station to look for his brother who was arrested and charged with the offence of use of abusive language is when he saw the 3rd accused and notified PW3.

PW3 testified to the effect that, he was the investigation officer stationed at Nyakato police station. He was assigned the murder file and started investigation as he was already given the number of the secret informer who was PW2. He went to the scene of crime on 24/4/2019 and drew a sketch map of the scene of crime which was admitted during preliminary hearing as exhibit P1 during the preliminary hearing. PW3 further testified that, he was led by PW2 to where the accused allegedly threw the knife but they did not find it. On 28/5/2019 he was informed



that the 1st accused person was seen at Igoma. He went there with the direction of PW2 and arrested the 1st accused person at 13:30 hrs and sent him to the police station. PW3 took the 1st accused person's caution statement from 14:30hrs to 16:00hrs which was tendered and admitted as exhibit P3. PW3 narrated that, the accused person admitted to have killed the deceased person by stabbing him on the chest and neck.

PW3 F.1628 D/SGT Hija testified that, on 29/5/2019 around 23:41 hrs, the 1st accused person took him and his fellow police officers to Rodan Kakebe for arresting another culprit by the name Dizo, but they couldn't find him in his residence. The 1st accused person took them to another house located at Mandu Majengo Mapya famously known as Shigunga in which the 2nd accused person was found hiding under the bed and he was arrested around 2:00 hrs at night. That the 1st accused person showed them another house but they did not find another culprit. The 2nd accused person's caution statement was taken from 06:30 am to 08:00 am on 30/5/2019 and it was admitted as exhibit P4.

PW3 further narrated that, on 30/5/2019 he arrested the 3rd accused person around 15:30 hrs after he was informed by PW2 while he was in his office that, the 3rd accused was around Nyakato Police station. After his arrest, the 3rd accused person's caution statement was taken by



PW3 and it was admitted as exhibit P5. PW3 testified that, it took time to arrest the accused person as they tried to hide, he identified them at the dock as the one he arrested and took their caution statements.

In cross-examination, PW3 testified that, he didn't know the accused persons before the incident. He denied to know if the 2nd accused was arrested for rape accusation. He admitted that, he took the accused persons to the justice of peace but he was told that the accused failed to express themselves before the justice of peace. He also testified to have drawn the sketch map on 24/4/2019 while the incident happened on 21/4/2019. He further testified that, inspector Sarakikya was the one who informed the OCS. He testified that, PW2 told him he saw the 3rd accused person grabbing the phone which he didn't know its description and he also took the money. That he tried to trace the phone but failed. That, the other culprit to whom were not found are Mau, Dizo, Opara and White

In re-examination, PW3 further testified that PW2 told him he identified the accused persons by their skin tone and he knew them by their names and 1st accused person had a scar near the head.

The prosecution case was marked closed and the accused persons were required to enter their defence in accordance with section 293(2) of the Criminal Procedure Code Cap 20 R.E 2019[Now 2022]. The defence



case was opened, the accused persons testified. Daud Jacob Mathias testified as (DW1), Pastory Malaba Maige testified as (DW2) and Anthony Elias Dominic testified as (DW3).

In his defence, DW1 testified that he was a resident of Mahango, and he was arrested on 28/5/2019 in the afternoon hours while at Igoma where he went to buy a mobile phone cover. That, he was arrested around 9:00 hrs to 10:00 hrs and they took him to Mwatex police station where he handed over his belongings and he was sent to the lockup around noon. That on 29/5/2019 he was taken to the interrogation room by PW3. He was ordered to sit and sign a statement. As he asked why he was signing a document while he haven't given his statement, PW3 and his fellow two policemen beat him by a club and belt under his footprint, waist and buttocks. They threatened to kill him if he could not sign. That PW3 used a certain knife from a shotgun to stab him on the leg and on the right hand near the knee. DW1 showed an old scar from the leg. He testified that, he asked to be taken to the hospital but they refused. He then signed as he was ordered and he was taken to the lock-up until on 30/5/2019 when he asked PW3 to take him to justice of peace.

DW1 further testified that, he was taken to Justice of Peace at Urban Primary Court where he stated that he knew nothing about the incident.



DW1 testified further that, he was sent before Hon Sumari where murder charges were read over to him while connected with other two people he never knew until 19/6/2019 when they took him to court. DW1 prayed to be set free as he did not involve in the offence of killing.

In cross-examination, DW1 testified that, PW3 threatened him by a club, shotgun and belt. He further testified that he gave information about his personal particulars after he was beaten. He denied to give information of participating in the incident of murder. He also testified that he had the scar and injuries when he was first sent to court on 19/6/2019.

DW2 testified to be a resident of Mandu and a businessman. He was arrested on 29/5/2019 and he was taken to the police station and after he had handed his belongings he was taken to the lockup. That the following day he was taken to a room where he was beaten and pointed a gun threatened to be killed by police officers. He was asked his personal particulars and forced to sign a paper. That on 31/5/2019 he was taken to Mwanza Urban Primary Court before a Magistrate who asked him to state about the incident. He told her he knows nothing about the murder charges. He was taken back to the lockup. He further prayed to be set free as neither PW2 identify him nor did he mention him in the court that he was involved in the offence charged.



In cross-examination, DW2 stated that he met his fellow accused on 19/6/2021 when they were at the dock. That he only gave his particulars to PW3. That he doesn't know why the 1st accused mentioned him on his statement. He also testified that PW3 beat him on his back but he has no exhibit to prove the same.

DW3 on his testimony testified that, he is a small businessman selling kitchen utensils in the street. He was arrested on 30/5/2019 by an unknown person when he wanted to cross the road. He was taken to Nyakato police station and PW3 asked for his personal particulars. He was taken to the lockup and later on PW3 came to take his personal particulars. He was later on taken to another room by PW3 and there were another two persons carrying shotguns and there was another shotgun on the table. That he was forced to sign a paper he didn't know after he was pointed a gun. He asked to be taken to the justice of peace after he was advised by his fellow in the lock up. He was taken to justice of peace the following day on 31/5/2019 in the morning hours at Mwanza Urban Primary Court. He denied the murder accusation before a justice of peace. He was taken back to Nyakato police station until on 19/6/2019 when he was taken to the court and murder charge read over to him.



He further denied being involved in the killing and that the prosecution did not prove the charge as they did not give a description of the mobile phone he is allegedly to take. He was not properly identified as no description of him was given. He testified that PW2 is a liar, and requested his extra-judicial statement to be brought to show if he confessed. He prayed to be set free.

In cross-examination, DW3 testified to have seen PW2 first in court. That he gave his personal particulars to PW3. That he signed a caution statement at gunpoint. He denied to be beaten by PW3. That he knew his fellow accused person when arraigned in court as they lived in separate lock up. And that marks the end of both side's evidence.

Now in determining the fate of the three accused persons before this court, the prosecution must prove beyond reasonable doubt that, indeed, the accused persons, with malice aforethought killed the deceased person contrary to sections 196 and 197 of the Penal Code Cap 16 RE 2019 (Now 2022).

We have seen from the evidence adduced, the prosecution relies on PW2's testimony who claims to be an eyewitness who has identified the accused persons during the commission of the crime. Apart from PW2's evidence, the prosecution also relies on the accused persons' caution



statement, in which the accused persons admitted to have killed the deceased person. In analysing these two key aspects in our scenario, I will also consider the evidence of both parties adduced before the court. Before I determine the fate of the case, I thank both counsels for their final submissions.

In the first aspect of identification, PW2 who is the only eye witness, testified to have witnessed the accused persons killing the deceased person. He testified that the incident took place at 21:00 hrs as he was 3 paces away from the crime scene. That there was light from an electric bulb illuminated in the scene of crime and the incident took 20 minutes. He also pointed out that he identified the 1st accused person that he has a scar near his eye. He further added that he knew the 1st and 3rd accused for almost 7 years as they work at his working station at Machinjioni. PW2 also clarified that out of the six people whom murdered the deceased he only knew the 1st and 3rd accused persons.

In order for this court to rule out if the identification by PW2 was watertight, the evidence adduced by PW2 must be subjected to a test to make sure that there was a positive identification for this court to be able to rely on the evidence of identification. In this regard, the principle of



identification was enunciated in the landmark case of **Waziri Amani vs Republic** [1980] TLR 250 in which the Court of Appeal held that;

"The evidence of visual identification is of the weakest and most unreliable. It follows, therefore, that no courts 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 watertight"

The Court of Appeal went further to elaborate on how the possibility of mistaken identity could be eliminated as it stated that, the court would be expected to determine the following questions; the time the witness had the accused under observation, the distance he observed him, the condition the observation occurred, whether it was day light or at night, whether there was poor or good lighting, whether the witness knew the accused or had seen the accused before or not. (See also **Aus Mzee Hassan vs Republic**, Criminal Appeal No. 17 of 2020, **Yohana Kulwa @ Mwigulu & 3 Others vs Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 396 of 2017, **Alfred Kwezi @ Alphonse vs Republic**, Criminal Appeal No. 216 of 2021). The Court of Appeal insisted that, when the court is satisfied that there was no mistake of identity then the court can convict the accused relying on the identification of the accused person.



From the prosecution testimony, PW2 alleged to have identified the accused persons as I said earlier, PW2 testimony must be subjected to the scale in weighing whether his testimony is watertight to rule out all possible mistaken identity. In our case at hand, there was no dispute that, the killing incident happened around 21:00 hrs which is night hours. PW2 in his evidence testified that, he was able to identify the accused persons through electricity light generated from the bulb that was around Masai hut. He also testified that, he was just three paces from where the incident took place and the incident took 20 minutes in which it was enough time to observe the accused persons. Further to that, he testified to have known the 1st and 3rd accused persons for almost seven years and he pointed out that the 1st accused had a scar near his eye.

The testimony of PW2 suggested that, he was able to state the kind of light that he used to identify the accused. As he stated that, the light was generated by the electric bulb, the intensity of the light was explained. PW2 also was able to state the proximity from where he was to the scene of a crime as to be three paces

Further PW2 was able to state that the incident took place for about 20 minutes which in my firm view it was enough time to recognize a person who is just three paces away. Apart from that, PW2 identified the 1st and



3rd accused persons as the one whom he witnessed killing the deceased person when he was at the dock and he went further to identify the scar on 1st accused face.

Before I rule out that the accused was positively identified, I proceed to weigh the credibility of the PW2 who was the eye witness. In the cause, eye witness 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. In **Jaribu Abdalah v Republic** [2003] TLR 271, CAT, quoted with authority the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs Republic**, Criminal Appeal No. 184 of 2018 where it held that: -

"In 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"

Going to the evidence of PW2, he was able to name the culprit the earliest time possible. In the case of **Kadumu Gurube vs Republic**, Criminal Appeal No. 183 of 2015, while quoting with authority the case of **Marwa Wangiti Mwita vs Republic**, Criminal Appeal 6 of 1995, it was stated that, naming of the suspect at the earliest time possible add value



to the credibility of the witness. PW2 testified to have informed the OCS of the incident of killing soon after it happened. In fine, I proceed to find that PW2 was a credible witness and his testimony can be relied upon.

Regarding the 2nd accused person, no witness had testified to have identified him. PW2 only testified to have identified the 1st and 3rd accused persons as he knew them earlier before the incident took place. PW2 testified not to know the other four people who were alleged to be with the 1st and 3rd accused persons. Therefore the 2nd accused person was not identified on the night of the killing as far as the evidence of PW2 who is the eye witness is concerned.

It is my finding that, the 1st and 3rd accused persons were properly identified by PW2 as his testimony covered all circumstances surrounding the positive identification and removed all possibility of mistaken identity of the 1st and 3rd accused person.

Moving on with the second aspect of the accused persons' caution statements, PW3 testified that, he arrested the accused persons at different time. As the 1st accused person was arrested at Igoma, the 2nd accused person was arrested at Shigunga and the 3rd accused person was arrested at Nyakato police station. PW3 further testified that, the 1st accused person confessed to the killing of the deceased person when his statement was



taken. Nonetheless, the other two accused persons also admitted to have been involved in the killing of the deceased person. All accused persons' caution statements were admitted as exhibits P3, P4 and P5 respectively. In their caution statements, all the accused persons admitted that the deceased was stabbed by the 1st accused person on the chest and neck.

It is a trite law that, the best evidence in a criminal case is one in which the accused person confesses his guilt. This is the settled position of law as it was stated in a number of Court of Appeal decisions including the case of **Jacob Asegelile Kakune vs Republic**, Criminal Appeal No. 178 of 2017, in which the Court of Appeal cited the case of **Mohamed Haruna Mtupeni vs Republic**, Criminal Appeal No. 259 of 2007, whereby the Court stated;

"The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt."

Furthermore, in the case of **Bahati Makeja vs Republic**, Criminal Appeal No. 118 of 2006, the Court of Appeal while quoting the case of **Rhino Migere vs R**, Criminal Appeal No. 122 of 2002, stated that;

"....for a statement to qualify for a confession, it must contain the admission of all the ingredient of the offence charged as provided for under section 3(c) of the Evidence Act, 1967...."



In our case at hand, the caution statements exhibit P3, P4 and P5, the accused persons admitted to have involved in the murder of the deceased person. In Exhibit P3, the 1st accused admitted to have stabbed the deceased with a knife that he had hidden in his private parts. The accused stabbed the deceased the chest and neck. This statement was corroborated by the post mortem report exhibit P2 and the testimony of PW2 who is the eye witness who also testified that the 1st accused person stabbed the deceased twice, at the neck and chest. Again, exhibit P3 was also corroborated by the caution statement of 2nd and 3rd accused persons who also mentioned in their testimony that, the 1st accused person stabbed the deceased. Looking to the 1st 2nd and 3rd accused persons' caution statements, the accused persons admitted to participate in the murder incidence. Therefore, it is my findings that, the caution statements are worth to be relied upon as they both gave a detailed account of what happened in the scene of crime and the cause of the deceased's death.

Although we say that, the accused persons caution statement are worth of believe, still, the caution statements pointed the 1st accused person who stabbed the deceased. Now comes the question what about the 2nd and the 3rd accused person, who did not personally stab the deceased as the 1st accused person did.



The law is settled under section 23 of the Penal Code Cap. 16 RE 2002 (now RE: 2022) which reads: -

23. *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".*

Much guidance on this may be obtained from the decision of the Eastern Africa Court of Appeal in the case of **Wanjiro Wamiero & Others V. R.** (1955) 22 EACA at page 523 where the Court, in relation to section 21 of the Kenya Penal Code which was identical with our section 23 of the Penal Code cited above held that: -

"... in order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of the crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged ..."



In this particular case, for the doctrine to be invoked, there must be two or more people who have shared common intention to pursue an unlawful act and in the execution of the pre-planned plan the offence was committed by both or some of them. The doctrine was well elaborated in the case of **Diamon S/O Malekela@ Maunganya vs R**, Criminal Appeal No. 205 of 2005, the Court of Appeal held that,

"Much has been said and written on "common intention" as a basis of criminal liability. Suffice it to say here that the doctrine of common intention, as distinguished from similar intention, can only be successfully invoked where two or more persons form a common intention to prosecute an unlawful purpose and they commit an offence and are eventually jointly charged and tried together"

See the case of **Issa Mustapha Gora & Another vs R**, Criminal Appeal No. 330 of 2019.

In our case at hand, PW2 testified to have seen the 1st and 3rd accused person together with the other 4 culprits who abducted the deceased, stabbed him and took his belonging which was money and the mobile phone. This testimony was corroborated by Exhibit P3, P4 and P5 which showed that, the accused person together with other 3 people took the deceased out of the grocery, where the 1st accused person stabbed him while the 3rd accused person searched the deceased and took his



money and mobile phone in which they divided the money among themselves. The story has been repeatedly told in all three accused persons' caution statements which confess the way the accused persons took the deceased out, after they had seen that he had money and the 1st accused stabbed him while the 3rd accused searched him. In terms of section 23 of the Penal code Cap. 16 RE: 2019 now RE: 2022, both the accused persons had a common intention to prosecute an unlawful purpose that resulted in the commission of the offence of murder.

Reverting to the accused person's defence, they both denied the charged offence against them. In their defence, the accused persons denied to have involved in the offence they are charged with. Further, the accused persons denied to know each other. The 1st accused testified to have been arrested while at Igoma where he went to buy his phone cover. The 2nd accused also testified to have been arrested at his residence while the 3rd accused person alleged to be arrested when crossing the road as he was selling kitchen utensils. All the accused persons claimed to have been taken at the justice of peace in which they denied the charge. It is a trite law that, the accused only needs to cast a shadow on the prosecution evidence and their duty is on the balance of probabilities. Now weighing the evidence from the prosecution side with the defence side, I



am of the view that, the prosecution has successfully proved the case beyond a reasonable doubt.

First, the prosecution has managed to prove the identification of the 1st and 3rd accused persons which was watertight. Second, the caution statements were able to prove that, the accused persons with common intention did kill the deceased person. The accused persons only deny the charge, without establishing evidence to cast a shadow as to their identity at that night as well as to successfully contest the caution statement which the prosecution successfully relied on.

All that being said, the prosecution has managed to prove the case beyond a reasonable doubt. Therefore, the accused persons Daudi Jacob Mathias @ Dau, Pastory Malaba Maige@ Pasi and Anthony Elias Dominic are hereby convicted for the offence of murder contrary to sections 196 and 197 of the Penal Code Cap 16 R.E 2022.

DATED at Mwanza this 21st day of November, 2022.



M. Mnyukwa.

Judge

21/11/2022

SENTENCE

Since, DAUDI JACOB MATHIAS @ DAU, PASTORY MALABA MAIGE@ PASI AND ANTHONY ELIAS DOMINIC, the accused persons have been convicted of murder, I hereby sentence them to death by hanging.




M. Mnyukwa.

Judge

21/11/2022

Right to appeal fully explained.


M. Mnyukwa.

Judge

21/11/2022