

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL SESSIONS CASE NO. 51 OF 2020

THE REPUBLIC

VERSUS

SAIDOTH YUSTINIAN

JUDGMENT

24th and 30th November, 2022

BANZI, J.:

The accused person, Saidoth Yustinian stands charged with the offence of murder contrary to sections 196 of the Penal Code [Cap. 16 R.E. 2002] ("the Penal Code"). It is alleged in the Information that, on 28th April, 2019, during night hours at Kihwela Village, within Muleba District in Kagera Region, the accused person murdered one Respikius Yustinian (the deceased). The accused person who is the young brother of the deceased denied any involvement in the alleged murder; therefore, a plea of not guilty was accordingly entered in record.

In a bid to prove the case against the accused person, the Prosecution side under the representation of Mr. Omary Kibwana, learned Senior State

Attorney and Ms. Evarista Kimaro, learned State Attorney lined up a total of four (4) witnesses, namely, Michael Onesphory Mauki, PW1; Justa Respicius, PW2; Alistidia Respicius, PW3 and E.5219 D/SGT Ally, PW4. Besides, they tendered two exhibits; the post-mortem examination report, Exhibit P1 and sketch map of the scene of crime, Exhibit P2. On the other hand, the accused person enjoyed the services of Mr. Frank Karoli John, learned Advocate, who relied on the sworn testimony of two witnesses, the accused person himself (DW1) and his wife Gudula Saidoth (DW2), with no exhibit. During the preliminary hearing, the accused person issued a notice under section 194 of the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA") that, he intends to rely on the defence of *alibi*.

In the main, the body of evidence by the Prosecution presents a case that, the deceased and his wife, PW3 were married for fifteen years and in 2015, they parted ways. The deceased continued to live with his children including PW2. On the fateful day, 28th April, 2019 around 8:00 pm when they were about to have dinner, they heard someone from outside calling "*mwatan!*" "*mwatan!*" meaning neighbour. According to PW2, she recognised that voice as of his uncle, accused person. After hearing that, the deceased stood up and headed to the door. PW2 asked him "*unaenda kumfungulia*

nani?" and her father replied "*ngoja nifungue nimuone*". Immediately after opening, the deceased was stabbed on the left side of the chest. After that, the one who stabbed him began to push the door in order to get in and at the same time, the deceased pushed back trying to close it. After seeing that, PW2 with her siblings joined their father and managed to close the door. It was at that juncture when PW2 claimed to identify the accused person by using light from kerosine lamp commonly known as "*Kibatari*". After closing, the deceased fell down and died right away. PW2 and her siblings raised alarm which was responded by her uncle Teobald Kassim and Eradius Fulbelt. On arrival, they asked PW2 if their father is dead and the latter replied yes. Then they went to inform village chairman.

Thereafter, their neighbour one Sixbert Raphael came and after being told about the death of the deceased, he assisted them to raise alarm which was positively responded by villagers. Around 1:00 am, their other uncle Chrizostom Christopher came and asked them if they recognised the killer and it was at that juncture when PW2 named the accused person. According to PW2, the said uncle told them not to mention the accused person especially to the police because if they do so, they will be taken to jail. On 29th April, 2019, the police including PW4 together with a doctor, PW1 went

to the crime scene where PW1 examined the deceased's body whereby, post-mortem report (Exhibit P1) reveals that, the death was due to internal bleeding caused by left chest injury. The police conducted interview but nobody mentioned the killer. PW4 drew sketch map of the scene of crime (Exhibit P2). In the course of investigation, they were informed by their informer that, it was the accused person who perpetrated the alleged offence and on 4th May, 2019, he was arrested while he was at the deceased's house. According to PW2 and PW3, the accused person and the deceased had land dispute which is the source of the incident in question.

The accused person, in his defence, categorically denied to have committed the alleged offence. As stated above, he has raised the defence of alibi claiming that, on the material date and time, he was at his house with his wife and children. His wife testified as DW2 to support his assertion. Basically, the evidence for the defence reveals that, on the fateful day between 7:00 pm and 10:30 pm, the accused person was at home resting. Around 10:30 pm while he was listening to radio Karagwe Sunday story session, he heard some people calling "*baba mdogo, baba mdogo*". He recognised the voice as of deceased's children whereby, he opened the door and found them crying. Upon being asked, they informed him that, their

father has been killed. Upon hearing that, the accused person and DW2 went to the crime scene with those children and on arrival, they found several people among them being clan members including the deceased's mother, father, sister and brother. He asked them who killed the deceased and he was told that, the killer was not recognised.

DW1 stayed there until 29th April, 2019 around 2:00 pm when the police came. The deceased's body was examined and he saw injury on the left side of the chest. After examination, they were given the body for burial. After burial, he stayed there until 4th May, 2019 when he was arrested. After the arrest, they took him to his house where they conducted search but nothing was found. Thereafter, he was taken to Nshamba police station together with his relative Chrizostom Christopher. After thirty minutes, he was taken Muleba police station leaving behind his relative Chrizostom Christopher at Nshamba police station but after three day, he was also brought to Muleba police station. DW1 stayed in lock up until 13th May, 2019 when he was taken out for interview whereby, his statement was recorded against his will. Thereafter, he was arraigned to court and charged with the offence of murder. He insisted that, the case was concocted by PW3 who did not like their family from the beginning. According to him, he had no

grudges with the deceased or his family as they were living without any problem. Finally, he prayed to be acquitted.

In a nutshell, that was the evidence of the Prosecution and defence sides. Learned counsel for both parties did not wish to make their final submissions. Having considered the evidence on record, there is no dispute that deceased is dead and his death was unnatural. Therefore, the main issues before the Court for determination are: **one**, *whether the accused person killed the deceased* and **two**, *if the first issue is answered in the affirmative whether he acted with malice aforethought*.

It is worthwhile noting here that, the offence of murder according to section 196 of the Penal Code gives rise to four crucial ingredients of which the prosecution must necessarily prove beyond reasonable doubt in order to discharge its burden. These are: one, *the fact of the death of the deceased*; two, *the cause of such death*; three, *proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person* and four, *proof that the said unlawful act or omission was committed with malice aforethought*. Section 200 of the Penal Code expound on what amount to malice aforethought.

In discharging the aforesaid burden, the prosecution brought four (4) witnesses but the key witness was PW2, who was at the scene of crime and claimed to identify/recognise the accused person by voice and visually. That being the situation, one might pose a question, was identification/recognition evidence of PW2, cogent enough to sustain the prosecution case?

It is now settled law that, in a case entirely depending on the evidence of identification, evidence on conditions favouring the correct identification is of the utmost importance and such evidence must be absolutely watertight with no possibility of mistaken identity or fabrication to justify conviction. The same principle applies even in cases of recognition evidence. Therefore, courts must, as a rule of practice, exercise caution in relying on such evidence, otherwise, it may result in substantial miscarriage of justice. It is similarly true that, in matters of identification, it is not enough merely to look at factors favouring identification, equally important is the credibility of the witness. As even recognising witnesses often make mistakes or deliberately lie. See the case of **Abas Matatala v. Republic**, Criminal Appeal No. 331 of 2008 CAT (unreported), **Issa Ngwali v. The Republic**, Criminal Appeal No. 215 of 2005 CAT (Unreported) and **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015 CAT (unreported).

The salient factors to be followed by courts were stated with sufficient precision by the Court of Appeal of Tanzania in the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported). These include, how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

I am aware that, these guidelines were not meant to be exhaustive. This Court is under obligation to consider the circumstances of each case and make its own determination as justice of the case demands as it was observed in the case of **Anyelwisye Mwakapake and Another v. Republic**, Criminal Appeal No. 227 of 2011 CAT (unreported).

In the case of **Philimon Jumanne Agala**, (supra) the Court of Appeal observed that:

"... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

In another case of **Said Chaly Scania v. Republic**, Criminal Appeal No. 69 of 2005 (unreported), the Court of Appeal of Tanzania stated that:

*"We think that **where a witness is testifying about identifying another person in unfavourable circumstances like during the night**, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to mistaken identification like proximity to the person being identified\ **the source of light, its intensity**, the length of time the person being identified was within view and also whether the person is familiar or a stranger."* (Emphasis is added).

Moreover, when it comes to the voice identification, it is settled law that voice identification by itself is not very reliable. See the case of **Nuhu Selemani v. Republic** [1984] TLR 93. In another case of **Kenedy Ivan v. Republic**, Criminal Appeal No. 128 of 2007 CAT (unreported) it was held that:

"Voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it. This is so because there is always a possibility of a person imitating another person's voice. For voice identification to be relied upon it must be shown that the witness is familiar with the voice as being the same voice of a person of the crime scene."

Reverting to the first issue whether the accused killed the deceased, as state above, the offence was committed at night and the only identifying witness is PW2. According to her testimony, she was able to identity and recognise the accused person visually and by voice around 8:00 pm by using kerosine lamp which was illuminating the sitting room. It was also her testimony that, when she heard a person from outside calling "*mwatani, mwatani*", she recognised the voice as that of his uncle, the accused person who she knew well. She went on and testified that, after his father welcomed him, the accused said "*asante nilikuwa nakuhitaji*". But she further testified that, before her father opened the door, she asked her "*unaenda kumfungulia nani?*" and her father replied "*ngoja nifungue nimuone.*" One may wonder, if PW2 recognised the voice of the accused person, how comes she asked her father to whom does he go to open the door. If she really recognised the voice as that of the accused person, it is very unbecoming to

ask something else questioning his identity. This in itself is a clear indication that, PW2 was not certain about who was calling from outside.

Apart from that, as stated above in the case of **Said Chaly Scania**, the need to mention source of light and its intensity is of utmost importance when it comes to identification in unfavourable circumstances like during the night. In the matter at hand, PW2 claimed to identify/recognise the accused person by the aid of light from kerosine lamp. However, throughout her testimony, she did not describe the intensity of the said light which enabled her to identify the assailant. Since the incident was occurred at night, and PW2 failed to describe the intensity of light, it cannot be said with certainty that there was enough light that would have enabled her to see and properly identify/recognise the person who stabbed her father. In the case of **Charles Boniface Miyeye and Another v. Republic** (Criminal Appeal No. 426 & 427 of 2015) [2019] TZCA 360, it was held that:

"As already demonstrated above, the offence was committed at night time and the only identifying witness in this case was PW1 who explained that at the time of the incident there was a kerosene lamp which was illuminating the room that enabled her to see and identify the appellants. She, however, as was rightly argued by the

learned State Attorney, failed to describe its intensity. The incident having happened at night, we cannot be certain that there was enough light that would have enabled her see and properly identify the bandits who stormed into her room."

Furthermore, during cross-examination, PW2 admitted that, when the deceased went to open the door, he did not open it widely and he was stabbed in the course of peeping out. Equally, she further admitted that, if someone opens that door, he impedes the one who is behind him. One may wonder how PW2 managed to see the accused person while she was impeded by the deceased who did not open the door wide? This unanswered question, leaves a lot to be desired on recognition/identification of the accused person.

Besides that, there is another controversy that creates doubt on the evidence of PW2. If she really recognised the accused person as the one who killed her father, why she did not name him to his uncle Teobald Kassim and Eradius Fulbelt or their neighbour Sixbelt Raphael who were the first responder to the alarm raised by them? The evidence reveals that, the incident occurred around 8:00 pm but PW2 failed to name the accused person until 1:00 am when she named him to her other uncle Chrizostom

Christopher who according to her, prevented them to mention the accused person even to the police because by doing so, they could be taken to jail. According to PW3, the said Chrizostom prevented her children to name the accused person because his safety would be at risk in case, he is known to be the killer. It is very unfortunate that, the said Chrizostom was not called to testify so that he could have explained his worries for not trusting security organ like police who are responsible in handling the safety of the accused person. In the case of **Venance Nuba and Another v. Republic**, Criminal Appeal No. 425 of 2013 CAT (unreported) it was held that:

"... this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."

In the absence of the testimony of the said Chrizostom Christopher, the evidence of PW2 remains doubtful so far as her explanation on delay to name the accused person is concerned. It can be recalled that, the accused person relied on the defence of *alibi* and he called his wife who supported his assertion. According to the testimony of DW1 and DW2, on the material date and time, the accused person was at his house with his family. It is the

position of the law that the accused did not have to prove his *alibi* to be true. He only needed to raise the slightest doubt on the prosecution case that he was not at the scene of crime. See the case of **Abas Matatala v. Republic** (supra).

In criminal trial, the burden of proof always lies on the prosecution and the proof has to be beyond reasonable doubt. See the case of **Nathaniel Alphonse Mapunda & Benjamini Alphonse Mapunda v. Republic** [2006] TLR 395 and **Mohamed Said Matula v. Republic** [1995] TLR 3. Taking together the testimony of PW2, it is my sincere observation that, her evidence did not measure up to the requisite standard in relation reliability so far as identification/recognition of the accused person is concerned. Since there is no evidence to corroborate her testimony, I find it unsafe to rely on her evidence alone to convict the accused person with this capital offence of murder. It is the view of this court that, evidence of identification/recognition at the crime scene was not watertight to eliminate the possibility of mistaken identity.

From the foregoing reasons, it is the finding of this Court that, the prosecution has failed to discharge its burden under the law in proving beyond reasonable doubt that it was the accused who killed the deceased.

That being the case, the first issue whether the accused person killed the deceased is negatively answered and thus, the remaining issue whether he did so with malice aforethought dies automatically. Thus, I find the accused not guilty and consequently, he is accordingly acquitted on the charged offence of murder and is hereby set free.

It is so ordered



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I. K. BANZI
JUDGE
30/11/2022

Delivered in open court in the presence of Mr. Audax Vedasto, Judge's Law assistant, Ms. Evarista Kimaro, learned State Attorney, Mr. Frank Karoli John, learned Advocate and the accused person. Right of appeal duly explained.



A handwritten signature in blue ink, consisting of a large, stylized 'B' followed by a series of loops and a horizontal line at the end.

I. K. BANZI
JUDGE
30/11/2022