

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**ORIGINAL JURISDICTION**

**IN THE SUB-REGISTRY OF MWANZA**

**AT CHATO**

**CRIMINAL SESSIONS CASE NO. 54 OF 2020**

**THE REPUBLIC**

**VERSUS**

**STEPHANO S/O KASINDIKO ..... 1<sup>st</sup> ACCUSED**

**KHAMIS S/O SHIGULA ..... 2<sup>nd</sup> ACCUSED**

**JUDGMENT**

*1<sup>st</sup> - 5<sup>th</sup> & 8<sup>th</sup> December, 2022*

**ITEMBA, J.**

In the evening of 9<sup>th</sup> January 2015, the family of Kongwa Hoyelo was about to have dinner at their home in Nyamalulu, Geita. A girl named Linda Lukiko was serving food, only to see the 3 people invading them and putting them under arrest. The assailants were having a machete and a torch. Linda Lukiko and Angelina Kongwa Hoyelo panicked and ran to their neighbour. It is alleged that; the assailants attacked and killed the wife of Kongwa Hoyelo named Regina Kuzenza. Upon investigation, the two accused persons Stephano Kasindiko and Khamis Shiguna were arrested on various dates in their respective villages, in the Region of Geita and an Information of murder was laid on their doors.

The two accused persons were arraigned on an Information of murder contrary to section 196 and 197 of the Penal Code Cap 16 [R.E 2002]. The Information revealed that on the 9<sup>th</sup> day of January 2015, at Nyamalulu village within Geita District, the accused persons Stephano Kasindikio and Khamis Shiguna murdered Regina Kuzenza. They both entered a plea of not guilty. A full trial was conducted in efforts to prove these allegations.

When the trial was set for hearing, the republic was represented by Ms. Monica Matwe learned State Attorney. The 1<sup>st</sup> and 2<sup>nd</sup> accused were represented by learned advocates, Messrs. Constantine Ramadhani and Innocent Kaijage Dominick respectively. After closure of both prosecution and defence cases, both parties made their final submissions. I thank the counsels for their useful submissions which have been considered in this judgment.

The account of the prosecutions' case is based on 3 prosecution witnesses. **Linda Lukiko (PW1), William Cosmas Hoyelo (PW2)** and **Angelina Kongwa Hiyelo (PW3)**. Linda Lukiko (PW1), through the aid of an interpreter from Kisukuma to Kiswahili language, told the court that

she was the deceased's granddaughter. In 2015 she was living in the family of four people, Regina Kuzenza who is the deceased, Kongwa Hoyelo, the deceased's husband and Angelina Kongwa (PW3) the deceased daughter. She testified that, on 9<sup>th</sup> January 2015 at around 20:00hrs she was serving food, commonly known as 'ugali' ready for dinner. It was dark so she was using the torch which had a bright light. She saw 3 people coming up to a close distance of about 5 steps. She identified them as their neighbours, Defa Kasandiko and Masumbuko Kasandiko both wearing black coats and black trousers. She could not identify the 3<sup>rd</sup> person as he had covered his face with a black cloth. She explained that Defa Kasandiko is also known as Stephen Kasandiko, the 1<sup>st</sup> accused. That at the scene, the 1<sup>st</sup> accused was holding a machete and a torch and he pulled the deceased, Regina Kuzenza. PW1 testified further that she knew the 1<sup>st</sup> accused and Masumbuko Kasandika because they have been neighbors who lived about 200 meters apart, for a long time at Nyamalulu village and she knew their mother who is named Mwanamayombya. That her family and the accused did not have any grudges. PW1 explained that upon seeing the two assailants she was terrified, she ran with PW3 up to the neighboring house of **William Cosmas (PW2)**, who is also her uncle. They

left behind Konga Hoyela and the deceased at the scene. Upon reaching at PW3's house, they could not explain anything. Soon thereafter, she went back to their house and found Regina Kuzenza on the ground, her neck was slaughtered and she had already breathed her last. They raised an alarm 'mwano' and neighbors gathered at the scene. PW1 identified the 1<sup>st</sup> accused at the dock and explained further that he was arrested the following morning at 08:00hrs, at the scene by the people who responded to the 'mwano' but the second assailant Masumbuko Kasindika had run away. PW1 also mentioned that she has a brother named Kuzenza Kongwa who lives in Katoro and upon hearing the incidence he came at the scene. PW1 also testified that on the same day, prior to the incidence, the 1<sup>st</sup> accused and Masumbuko Kasindika visited their home and asked for a chicken.

**Angelina Kongwa Hoyelo** testified as **PW3**. She told the court that the deceased was her mother. She basically corroborated the evidence by PW1 that she was at the scene and saw three people including the 1<sup>st</sup> accused. She stated that prior to the incidence, the 1<sup>st</sup> accused and one Masumbuko Kasindika visited their home and asked for a chicken to take it to the traditional healer named Puya, but they did not give them any

chicken. She did not know the reason for a demand for chicken. As regards to what happened at the scene, she stated that she could identify the 1<sup>st</sup> accused and Masumbuko Kasindika among the 3 assailants by the aid of a torch light held by PW1 and pointed to the assailants. She stated that the assailants were very close, about few steps to her and they were both wearing black jackets and black trousers and the 3<sup>rd</sup> person covered his face. She stated that the 1<sup>st</sup> accused is the one who was carrying the machete and that the assailants put them under arrest. PW3 states that when they ran and reached the house of PW2, she was in agony and she could not utter any word. That, PW2 went to their home and soon thereafter, he came back with news that her mother Regina Kuzenza is dead. PW2 went at the scene and she could see her mother's body, behind their house. While very emotional, PW2 explained that the deceased's neck was slaughtered and her head was injured. She later mentioned to the neighbors that the assailants were the 1<sup>st</sup> accused and Masumbuko Kasindika and that the 1<sup>st</sup> accused was arrested at the scene.

PW2 added that apart from being neighbours to the 1<sup>st</sup> accused and Masumbuko Kasandika, her brother named Kuzenza has married one Tatu who is a sister of the 1<sup>st</sup> accused.

Upon cross examination of both the PW1 and PW3, the defence suggested that both PW1 and PW3 told the police that they identified the accused by the aid of a lamp but both PW1 and PW3 maintained that it was a torch light and that at their home they did not have a lamp.

**William Cosmas Hoyelo** testified as **PW2** and told the court that he is a clan member and a neighbor with PW1 and PW3, That, on the fateful day, at 20:00 hours, they were at home about to have dinner. Suddenly, PW3 came running while carrying a child on her back. She fell down, she could not talk and she was just making signs indicating that they should keep quiet. Shortly thereafter, PW1 came running, the only thing she could say was 'mapanga' meaning machetes. PW2 informed another neighbour named Charles Mwenhelwa and they went to the scene. That, they could not raise any alarm because by then, they were not sure of what was happening. Upon reaching the scene, they saw the food, 'ugali' which was outside the house. They knocked the door, Kongwa Hoyelo was inside but the door was locked from outside. PW2 told the court that Kongwa Hoyelo mentioned that the assailants beat him but he could not identify them. Kongwa Hoyelo asked for the whereabouts of his family members. As the deceased was missing, they all started a search

using a torch. That, behind the house they saw the wounded body of the deceased, lying lifeless. The body had wounds on the neck and head. They raised an alarm 'mwano' and PW2 went back home and informed PW1 and PW3 of the tragedy that had just happened. PW2 also took Kongwa Hoyela to the hospital.

PW2 stated that on the following day, that is 10/1/2015 he went back to the scene and found the 1<sup>st</sup> accused already arrested. PW2 knows the 1<sup>st</sup> accused in another name as Defa and that the 1<sup>st</sup> accused is his in law because PW2's son was married to the sister of the 1<sup>st</sup> accused named Tatu Masindiko but they later separated. PW2 finalised his testimony by stating that there are just two houses between the house of PW2 and that of the 1<sup>st</sup> accused.

At the end of prosecution case both accused persons defended themselves under oath. The 1<sup>st</sup> accused stated that he is the resident of Mwekezi, he lived there with his wife and 3 children. He explained that on the fateful day he was at Nyamalulu at his mother's place. He had gone there to help his mother Martha Madirisha Ndubaga to cultivate rice. At around 20:00 hrs, he heard an alarm 'mwano' raised. He responded by

running towards the 'mwano' which was at the house of Kongwa Hoyela. He found Kongwa's wife was murdered and she knew her by the name of Mwana Kuzenza. There were many people and he joined them shouting and raising an alarm. The 1<sup>st</sup> accused stated that he was in a shock but remained calm at the scene. His brother-in-law named Kuzenza Kongwa arrived from Katoro. That the 1<sup>st</sup> accused had married the sister of Kuzenza Kongwa named Tatu. The 1<sup>st</sup> accused also stated that before the arrival of Kuzenza Kongwa both PW1 and PW3 were asked if they know who were the assailants and they replied that they did not know. He also stated that his arrest was after his brother in law Kuzenza Kongwa mentioning that he was suspecting him. That, his brother-in-law, was complained of the 1<sup>st</sup> accused breaking his marriage. The accused stated that he was taken to Katoro police station and was charged with murder which he did not commit. He insisted that he was at the 'mwano' all the time with other people including the PW1, PW2 and PW3. He also did not know the 2<sup>nd</sup> accused at all, as he met him at the police station.

The 2<sup>nd</sup> accused person **Khamis Shiguna (DW2)**, for obvious reasons, had nothing much to state. He told the court that he was the resident of Bulega village in Bukombe District. He was a farmer also



dealing with mining activities. On 18/1/2015 he was arrested by police officers while at her home in Bulega village. At the police, he was put in the lock up and he was asked why he is dealing with stealing and he replied that he has never stolen anything, he was later taken to court and joined with the 1<sup>st</sup> accused in the offence of murder. He stated that he had never met the 1<sup>st</sup> accused or the alleged Masumbuko Kasindiko who is still at large, neither did he knew the family of Kongwa Hoyele. He asked the court to set him free.

From the totality of the evidence, the question to be addressed is whether the prosecution has proved its case beyond reasonable doubts.

The accused were charged under section 196 of the Penal Code, Cap-16 RE 2002 which establishes the offence of murder. The section 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 therefore relevant for the elements of the offence of murder to be proved before a conviction can be entered against the accused persons. As per the provisions above, there are four elements requiring proof in the

offence of murder. **One**, that the deceased actually died, **Two**, the death must be a result of an unlawful act or by an unlawful omission, **Three**, the prosecution's evidence must satisfy, beyond reasonable doubt, that the accused persons are the one who killed the deceased and **Four**; the killing must be preceded an intention to kill (*malice aforethought*).

In this case, there is no doubt that the deceased lost her life after being brutally slaughtered her neck and sustaining head injuries. This is according to the testimony of PW1, PW2, PW3 who saw the deceased's body right after the assault. Further, the 1<sup>st</sup> accused does not dispute the deceased's death, as he even gathered at the deceased's house following the raised alarm and he noticed that the one who died was Regina Kuzenza. The accused stated he knew the deceased as Mwana Kuzenza. It is without doubt that the deceased's death was unnatural. In their final submissions, the prosecution had cited the decision case of **Casto Nyelenga and another v R** Criminal Appeal no. 27 of 2019 CAT (Mbeya), pointing out that death need not be proved by medical evidence alone. I agree with the prosecutions on this. See also **Mathias Bundala v R** Criminal Appeal no. 62 of 2004. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> issues are answered in affirmative.

As to who killed the deceased, as pointed out by the learned state attorney, the prosecution case is based on circumstantial evidence. There is evidence from PW1 and PW3 that they saw the 1<sup>st</sup> accused person, Masumbuko Kasindika and other unknown person at the scene which was their home. They explained that the assailant put them under arrest and that the 1<sup>st</sup> accused was holding a machete. Out of fear they ran to their neighbor and relative, PW2 and soon thereafter, they found their mother already dead at the back of their house.

Because the incidence is said to have happened at night, the issue is whether the 1<sup>st</sup> accused was properly identified by PW1 and PW3. It has been established by the renowned case of **Waziri Amani V.R.** (1980) TLR 250; that:

*"... evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight".*

Furthermore, in the following case of **Scapu John and another v. Republic**, Criminal Appeal No. 197 of 2008 (Unreported) the Court in

agreement with the decision in **Waziri Amani**, expounded the conditions for ensuring there is no mistake of identity and had this to say:-

*"Water tight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity. The court should, inter alia, consider the following;*

*How long the witness had the accused under observation*

*What was the estimated distance between the two,*

*If the offence took place at night which kind of light did exist and what was its intensity,*

*Whether the accused was known to the witness before the incident,*

*Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration."*

I have considered the doubts raised by the defence counsel when challenging the visual identification and recognition by PW1 and PW2. Starting with the light intensity, both PW1 and PW3 explains that the scene was dark, but they also explain that PW1 had a torch which had a bright light and she pointed it to the assailants an act which enabled them to

identify the 1<sup>st</sup> accused. I'd say, the type of torch is immaterial, so long as the light coming from it is bright enough to enable identification. One can have a big fancy torch which produce weak light yet another can have a small ordinary torch but with bright light. As to the contradiction on whether the light was from the torch or lamp. As said above, both PW1 and PW3 maintained that the light was from torch and that they did not even have a lamp at home. Further, the witnesses statement recorded before the police did not form part of prosecution or defence case, therefore, I am not prepared to rely on it. Even if the two witnesses ran from the scene, they had already recognized the 1<sup>st</sup> accused. The defence attorney had complained that if PW1 and PW3 described the 1<sup>st</sup> accused to the villagers then at least one of the villagers should have come to testify. In my opinion, as PW1 and PW3 mentioned the 1<sup>st</sup> accused by his name and not just by description there was no need to bring those other villagers. Besides, according to section 143 of the Evidence Act, there is no specific number of witnesses required to prove case, what is important is the credibility of a witness and weight of evidence. See also the case of **Simba s/o Mswaki vs. Republic**, Criminal Appeal no. 401 of 2021, CAT at Dar es salaam, (unreported).

The case of **Casto Nyelenga and another v R** (supra) it was held that:

*"... evidence of identification by recognition may be more reliable than visual identification of a stranger even though it is also thru that such evidence is not entirely fool-proof particularly where the credibility of witnesses is in issue"*

The evidence herein reveals that 1<sup>st</sup> accused was very close to the assailants about 5 steps. Both PW1 and PW3 knew the 1<sup>st</sup> accused before as he is a neighbor close by and actually, earlier that day he had gone at their house to ask for a chicken which he can take to the traditional healer. If that is not enough the 1<sup>st</sup> accused's sister is married to the family of Kongwa Hoyela. Therefore, these two families knew each other's well. It means the evidence of PW1 and PW3 was identification by recognition which is more reliable than that of visual identification. I find that the conditions at the scene were favorable for both PW1 and PW2 to identify the 1<sup>st</sup> accused.

**I** have noted the contradictions raised by defence on what happened at the scene; that PW1 stated that the 1<sup>st</sup> accused pulled the deceased to the back of the house but PW3 did not mentioned to have seen such move.

In my view, when there is invasion of people armed with a machete and every one in under panic, it is not easy to account of slight details of the exact moves which transpired at the scene. Thus, whether the 1<sup>st</sup> accused pulled the deceased to the back of the house or not, I find this a minor contradiction, as both PW1 and PW3 maintains that the 1<sup>st</sup> accused was seen at the scene holding a machete and the deceased was found dead soon thereafter.

I have also pondered on the complaint by defence that both PW1 and PW3 did not mention the 1<sup>st</sup> accused as the assailant at the first earliest opportunity, which might affect their credibility. The prosecution has countered that stating that PW1 and PW3 could not have mentioned as to who is the assailant because no one has asked them, and cited the case of **Fredy Mathia Marwa v R** Criminal Appeal no. 136/2020 CAT (Musoma) which allows the witness to give reason for the delay of mentioning the assailant. The way I see it, the evidence show that the incidence happened at night, the mentioning was done in the morning and the arrest was done in the morning as well at around 08:00hrs. I find that duration between around 20:00 hrs and the following morning before 08:00hrs was not a serious delay. Furthermore, PW3 told the court how the two ladies

were shocked and shaken by the incidence, I believe it would have taken them time for both PW1 and PW3 to regain their composure, process the whole situation, mourn for the sudden loss of the deceased and to be able to talk of what happened. And; under normal circumstances, once the dust has settled, PW1 and PW3 could possibly immediately tell Kongwa Hoyelo who was their head of family or PW2 who were their relative, but Kongwa Hoyelo was taken to the hospital by PW2. Therefore, it was logical for PW1 and PW3 to mention the names of the assailants to the neighbours in the following morning.

When PW1 and PW3 ran away, it was only Kongwa Hoyela and his wife Regina Kuzenza who were left at the scene with the assailants. It was also evidence from PW2 that when he reached the scene, he found Kongwa Hoyela locked inside the house and he was unwell they had to take him to the hospital that night. They did not find the assailants but upon search, they found the deceased's body at the back of her house. As argued by the learned state attorney, it is trite law that the last person to be seen with the deceased will be considered to be responsible with the death if there is no plausible explanation of the cause of death. In



**Mathayo Mwalimu and another v R** criminal appeal no. 147 of 2008

the Court held that:

*"..... If an accused person is alleged to have been the last person to be seen with the deceased, in the absence of plausible explanation to explain the circumstances leading to the death, he or she will be presumed to be the killer"*

See also the cases of **Mashaka Juma Tatula v R** Criminal Appeal no. 140 of 2022. See also **Mark s/o Kasimiri V. R.**, Criminal Appeal No. 39 Of 2017 (Tanzlii). As the 1<sup>st</sup> accused is among the people who were last seen with the deceased at the scene, holding a panga and threatening PW1 and PW3, and shortly thereafter, in the same night the deceased was found dead and the assailants have all disappeared, this is strong circumstantial evidence to establish that the 1<sup>st</sup> accused is the one who killed the deceased.

I have also considered the 1<sup>st</sup> accused defence that he had grudges with the family of the deceased. That the 1<sup>st</sup> accused's sister named Tatu was married to Kuzenza Kongwa a family member in the deceased's family and they later separated and that their family was blaming the 1<sup>st</sup> accused

for such separation. However, PW2 who is the father to the said Kuzenza Kongwa testified before the court and the 1<sup>st</sup> accused did not cross examine him on the grudges which they had so that the court can assess the credibility of both parties on that aspect. Be it as it may, this is a doubt which does not go to the root of prosecutions' case because the said conflict does not negate the fact that the 1<sup>st</sup> accused was seen at the scene of crime shortly before the deceased died. Therefore, the 3<sup>rd</sup> issue also answered in affirmative.

Having established that it was the 1<sup>st</sup> accused who killed the deceased, the last issue on whether he killed with *malice aforethought*. PW1, PW2 and PW3 demonstration of the deceased's body is that her neck was slaughtered. There would not be any other reason which will cause someone to slaughter another without intending of killing her. The neck is a delicate part and that is no wonder the deceased is reported to have died on the spot. Without doubt, the 1<sup>st</sup> accused intended to kill the deceased and he knew that his acts will cause death to the deceased. The last issue is also answered positively.

Before I conclude, there is a question of the second accused **Khamis Shigula**. The possible assumption of him being a co accused was that maybe the 1<sup>st</sup> accused was intending to point a finger to the 2<sup>nd</sup> accused but up to the close of defence case that was not the situation, whatsoever. There are no better words to say, but why was the 2<sup>nd</sup> accused before the court in the first place? It is noted with serious concern that the 2<sup>nd</sup> accused Khamis Shigula was arrested on 18/1/2015, in few weeks it will be 8 solid years since his arrest. Yet, there is no single evidence which even suggest that he was involved or he had knowledge with the offence or the people involved therein. It was the duty of prosecution to make quick decisions and let him walk out of the remand custody instead of waiting for the court to do that. The investigators might be the one with the duty to arrest the suspects and the judiciary will try their cases but, in between it is the prosecution who process the evidence. And; in the cause of processing this case, the charge against the 2<sup>nd</sup> accused which attracts a capital punishment, should have been dropped 8 years ago.

As there is no evidence against the 2<sup>nd</sup> accused person, I find that **Khamis Shigula** is not guilty of the charged offence of murder, contrary

to **section 196** of the Penal Code R: E 2019. Accordingly, I acquit him and set him free unless he is held on other lawful charges.

In respect of the 1<sup>st</sup> accused, as all issues have been answered in affirmative, I am satisfied that the prosecution has proved its case to the required standard, that is beyond reasonable doubt, against the 1<sup>st</sup> accused person. I therefore, find the 1<sup>st</sup> accused **Stephano Kasindika** guilty of unlawful killing **Regina Kuzenza** and consequently, I hereby convict him for the offence of Murder contrary to section 196 and 197 of the Penal Code Cap. 16 [R.E 2019], as charged.

**Dated** this 8<sup>th</sup> day of December 2022.

A handwritten signature in blue ink, appearing to read 'L. J. Itemba', is placed above the judge's name.

**L. J ITEMBA  
JUDGE**

### **SENTENCE**

Having heard submissions by both parties, there is only one sentence for the offence of murder and that is, **death by hanging** and my hands are tied to the same. Consequently, in compliance with section 197 of the

Penal Code, the convict, **Stephano Kasindika** is sentenced to suffer death by hanging.

It is so ordered.

Right of appeal explained.



**Court:** Judgement delivered this 8<sup>th</sup> day of December 2022, in the presence of both accused persons, Ms. Monica Matwe State Attorney, for the Republic, Ms. Mgeni Mdee, advocate, holding brief for Messrs. Constantine Ramadhani and Innocent Kaijage advocates for the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively and Ms. Evodia Kakwezi, RMA.

A handwritten signature in blue ink, appearing to read 'L. J. Itemba', enclosed within a rectangular box.

**L. J ITEMBA  
JUDGE**