

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

CRIMINAL SESSION NO. 12 OF 2019

(Originating from PI No. 1/2018 in the District Court of Babati District at Babati)

REPUBLIC

VERSUS

PETRO FABIANO@ TARMO

1st & 7th December, 2022

JUDGMENT

MWASEBA, J.

The accused person, one Petro S/O Fabiano @ Tarmo stands charged with the offence of murder C/S 196 and 197 of Penal Code, Cap 16 R.E 2002 (Now R.E 2022). It was alleged by the prosecution side that on the 27th day of August, 2017 at Ufana village within Babati District in Manyara Region the accused person murdered one Sali Giragweni.

When the charge was read over to him, the accused person pleaded not guilty and the matter proceeded to full trial. To prove their case, the prosecution paraded a total of five witnesses and tendered one exhibit which is a post-mortem report (Exhibit P1). On defence side, a total



number of two witnesses testified and no exhibit was tendered on their side.

Throughout the trial, Mr Peter Utafu learned State Attorney appeared for the Republic while the accused person enjoyed the services of Mr Joseph Mniko, learned Counsel.

The first prosecution witness was Doctor Tiofil Muhale (PW1) who examined the body of the deceased on 30th August, 2017 at Dareda Hospital. Performing his duty at the mortuary in the presence of two police officers, mortuary officer, and deceased's relatives, he observed that the deceased's body had a cut wound at his neck suggesting a sharp object was used. The wound was from one side of a neck to another (left to right) whose length was about 8 Cm with a depth of about 5-6 Cm. There was no any other wound from the rest of the deceased's body. He clarified that the wound at the neck was a straight line which suggests that a sharp object was used. It was further his observation that the cause of the deceased's death was severe bleeding within short time (severe haemorrhage) and that the trachea was cut so there was no communication to the lungs and other parts of the body. He tendered in court the post-mortem report and was admitted as Exhibit P1.



On cross-examination he explained that the post-mortem report has numbers. At number 6 one has to fill the name of the deceased; while at number 9 a summary of the findings of the body has to be filled. He admitted that the name, Qadwe Qamara that appears at the summary is of the person who identified the body to him and not the deceased. The deceased was Sali Giragwen Qamara. So, he did not examine a wrong body but what transpires at the summary is a slip of the pen.

Luli Saktay (PW2) testified that on 30th August, 2017 he went to Dareda hospital to take the deceased's body. Before being allowed to pick the body from the mortuary, the body was examined in the presence of Amnaay Kaduwe, PW2 and others. He said the doctor examined the body of Sali Giragwen which had a cut wound at the throat. Thereafter, they took the body of the deceased to Ufana village for burial.

Further, it was the testimony of Lala Giragwen (PW3) that on 27th August, 2017 at 9 Pm while at his residence, a young man, namely Emanuel Bayo informed him that people were fighting somewhere so he urged him to assist them. So, they went together to the crime scene. On their way, they heard noises and shout as "hayoda! hayoda!" coming from the deceased's house. In their tribe the said kind of shout means there is a danger so people must run to the crime scene for possible

Hawula

rescue. Reaching at the crime scene, just after getting in the fence he saw Mandela Sali lying down and his head, nose and legs were bleeding,. He went ahead and saw Sali Giragwen lying down too and his neck was slaughtered to his death. He clarified that the deceased was slaughtered at his neck to the extent that just a small part of his neck remained. PW3 asked Mandela what had happened there. He replied, albeit with difficulties that five people had attacked them there and they absconded but he managed to identify two of them. He mentioned Petro Fabiano and John Askwari. After giving him such information, Mandela Sali lost his consciousness. Neighbours and other people showed up then Mandela was taken to hospital. He stated further that Petro Fabiano is well known to him as he is their neighbour and they had been visiting each other at their particular homes. Police officers were notified about the incident, so they went to the crime scene the same night and took away the deceased's body. More to that, after the incident, Petro Fabiano and John Askwari disappeared from the village up to January, 2018 when Petro Fabiano was seen cultivating a farm for which they had a dispute with the deceased. He reported at the village office, then after few days Petro Fabiano was arrested.

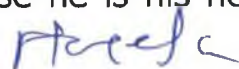


PW3 clarified that the offence was committed at night but at the crime scene there was solar light enough to see even a coin. That there was moonlight but solar light outshone moonlight. PW3 said the solar bulb was under the roof at the door of the deceased's house and thus could light the whole ground. The distance from the solar bulb to the fence was about 7 to 10 meters. So, the light was full to the fence/gate.

He concluded by stating that he did not witness Petro Fabiano and John Askwari cutting the deceased, but he was informed by Mandela, the deceased's son about people who were involved in attacking them and he saw a machete at the crime scene which was used to cut Mandela.

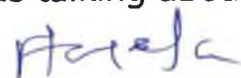
On cross-examination he stated that he suspected the accused person because PW3 was informed about who invaded the victim and the act of disappearing at the village proved that the accused person was involved in commission of the offence.

PW4, Mandela Sali Giragweni, the deceased's son, testified that on 27th August, 2017 at around 20:30 hours he returned to his father's house from Kijiweni where he was watching Television and taking tea. Before reaching the gate of his father's house, he saw two people standing at the gate. He identified them as Petro Fabian and John Askwari. PW4 clarified that he managed to identify Petro because he is his neighbour



so they knew each other. Petro caught PW4's hand and there was enough moonlight so he clearly identified him. Further to that Petro Fabian and John Askwari asked PW4 to show them his father. At the same time, they started cutting him with a machete at different parts of his body. In court, PW4 showed the scars at his legs, shoulders, head and nose. He stated further that the two invaders pulled him in the fence where there was moonlight and bright solar light. Then they pulled him close to the house. By that time other three invaders joined them. Petro Fabian and John Askwari entered in the house after pushing the door with their feet. Thereafter, they pulled his father up to the door close to the solar light and slaughtered him. PW4 was in pain but was watching. He clarified that among the five invaders, it is Petro Fabian and John Askwari who slaughtered his father at his neck while the deceased's father and children were shouting.

After an alarm, PW3 showed up. When he was asked what was wrong, he informed him that Petro Fabian and John Askwari did cut him and slaughtered his father. Thereafter, he lost his conscious and found himself at Hydom Hospital receiving treatment. He finally pointed out the accused on dock to be Petro Fabian he was talking about.



When he was cross-examined by Mr Mniko learned counsel, he stated that in 2017 they were using solar energy at their village. He said in examination in chief he did not state the appearance of the invaders and that he did not state the duration he spent with invaders from outside the gate to the house compound. More to that he admitted that he had not stated the distance from the place the invaders pushed him down to a place the incident occurred. He further averred that a machete has one holder, and for it to be used effectively two people can not hold it together. However, when he was asked as to who specifically among the invaders slaughtered the deceased, he said both of them, Petro Fabiano and John Askwari.

PW5, E 40001 D/Sgt Ramadhani, the investigator of this case testified that he started his investigation by interrogating PW4 at hospital and was told that the deceased were invaded by five people and two of them (Petro Fabiano and John Askwari) were identified at the crime scene by PW4 . After getting those details he went to Ufana village to look for the invaders and assigned village leaders to notify him in case they saw the accused persons. On 28/01/2018 he was notified by the Ufana village leaders that the four suspects were arrested including Petro Fabiano. He went to arrest them and later he interrogated the

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accused herein who denied to have committed the offence. He prepared the file to the AG chamber. He declared that he never went to the deceased's home. On cross-examination, he said that they did not conduct identification parade in this case.

After the prosecution closing their case, the ball turned to defence side. DW1, Petro Fabiano @Tarmo raised a defence of *alibi* that since 20/07/2017 he left Ufana village to Tangasiro village in Kondoa to conduct sugarcane selling business.. Thereat, he found his host one Moses Samwel. He purchased sugarcane from Sauna area and started selling them at Tangosi. Then, on 28/10/2017 he went back home to Ufana and proceeded with preparation of his farm. On 28/1/2018 he was arrested by militiamen while farming and he was not informed about his offence but rather came to know it at the police station. When he was interrogated, he denied committing the alleged offence.

He further stated that he lost his bus tickets to prove that he travelled to Tangosi area. And he said that he is suspected to commit this offence due to land dispute located at Datari between the deceased and the accused person which started in 2011 up to 2017.



When he was cross-examined, he told the court that, he knows Sali Giragweni as his neighbour and that Mandela and DW1 know each other since 2015.

DW2, Moses Samwel Lorry who resides at Tangosiro Kitongoji in Kondo, gave his evidence supporting the accused person (DW1) that on 20/7/2017 the accused person went to Tangosiro Kitongoji for conducting sugarcane business. They conducted the said business up to 27/10/2017 then the following day the accused person left the place to Ufana. During all that time in Tangosiro DW2 says the accused never left DW2's home at any point up to 28/10/2017. When he called the accused in February, 2018, the accused's wife picked up the phone and notified him that the accused is charged with murder case which was committed in September, 2017. So, he said he had come to assist the court that when the offence of murder was committed the accused person was with him at Tangosiro Kitongoji in Kondo.

On cross-examination by Utafu Learned State Attorney he said Petro Fabiano is his paternal uncle and that he lived at his home for about three months. He pointed out the accused person in dock to be the said Petro Fabiano.



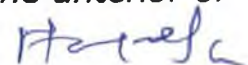
Having heard the evidence from both sides, to determine this matter I will focus on Section 196 of Penal Code which underlines the ingredients to be proved by the prosecution for a conviction of the offence of murder to stand. Regarding the case at hand the prosecution has to prove:

1. Whether Sali Giragwen died
2. Whether the death was with malice aforethought
3. Whether the accused person in court is responsible for the said death.

To prove the death of Sali Giragwen the prosecution, among other things, called a doctor who examined the deceased's body to testify. He tendered a post-mortem report which was admitted in court as Exhibit P1 to prove that he examined the deceased and found that the cause of death was severe haemorrhage. However, the defence counsel challenged the content of the post-mortem report regarding the name of the deceased being filled at the report summary which reads as hereunder:

"Qadwe S/o Qamara died on 27.08.2017 at 22 hrs.

My observation revealed that the death was caused by severe haemorrhage due to a cut wound on the anterior of



the neck. The trachea and both carotid arteries & veins were cut. The head was not separated. There are no other injuries to the body.” (Emphases added).

Going through the report it goes without saying that the name that is indicated to be examined is not the deceased's name. The doctor shows that he examined the body of Qadwe S/o Qamara. At the same time, at item 6 of the report where the name of the deceased is to be filled, he wrote a proper name of Sali Giragwen Qamara. This brings confusion to the court. It should be noted that the purpose of conducting post-mortem examination and subsequent issuance of its report is to establish the cause of death of the deceased. See the case of **Kavula S/o William and Another vs Republic**, Criminal Appeal No. 119/2020 (Reported at Tanzlii). Being guided by the above decision, I find that the purpose of the post-mortem report has not met the legal requirement and thus cannot be considered.

I have decided to venture in case laws as to the proof of death. In the case of **BOMBO TOMOLA vs Republic** (1980) TLR 254, the Court of Appeal held, among others that the proof of death in homicidal cases is through medical evidence and or circumstantial evidence. So long as medical evidence is not of help in the case at hand, I will consider the remaining evidence in record. PW2, PW3, PW4 and PW5 testified in

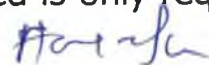
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court about the death of the late Sali Giragwen whom it was alleged that he was slaughtered. Throughout the proceedings, the defence side did not dispute the death of the deceased but only challenged the content of the post-mortem report. Thus, I am confident to hold that the deceased is dead.

Coming to the point as to whether the death was with malice aforethought, it was the evidence of PW4 that the invaders came at home at around 9 pm and attacked by cutting him with a machete. Then he saw them going in the deceased's house and pulled out the deceased and thereafter they slaughtered him. His evidence was supported with the evidence of PW3 who went to the crime scene immediately after the incident and found the body lying there with a cut wound at the neck. PW2 and PW5 also witnessed the body being examined by the Doctor and proved that the deceased was slaughtered at the neck. It goes without saying that regarding the nature of the death, the attackers had malice aforethought when they were committing this offence.

The last point to be determined is whether the accused person in court is responsible for the said death.

It is a settled law that the prosecution is under the duty to prove its case beyond a reasonable doubt, and the accused is only required in his



defence to raise reasonable doubt on the prosecution's case. **Section 3 of the Evidence Act** place such noble duty to the prosecution to prove the criminality of the accused beyond a reasonable doubt. This principle was well enunciated by the Court of Appeal in the case of **Mohamed Matula vs Republic** [1995] T.L.R 3, that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

In the case at hand, the evidence implicating the accused person to the charged offence is on visual identification. The offence was committed at night and the only eye witness who saw the killing is PW4, Mandela Sali. In his evidence he said at the scene of crime there was enough solar light the fact which was supported by PW3 that the light at the crime scene was enough even to see a coin.

The law is quite clear on how courts can take deliberate measures of caution when evaluating evidence of visual identification especially if identification is done at night, when circumstances do not readily lend themselves to easy identification. In the case of **Omari Iddi Mbezi and Three Others vs R**, Criminal Appeal No. 227 of 2009 (unreported) the

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Court gave a few precautionary measures which courts may, depending on specific facts of the case, follow to avoid mistaken identities:

- i.) If the witness is relying on some light as an aid of visual identification, he must describe the source and intensity of that light.*
- ii.) The witness should explain how close he was to the culprit (s) and the time spent on the encounter.*
- iii.) The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.*
- iv.) Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again.*

It has also been developed that in matters of identification, favourable conditions alone are not enough. The credibility of witnesses is also important (See **JARIBU ABDALLAH vs Republic**, Criminal Appeal No. 220 of 1994 (unreported)).

Being guided by the above decisions, PW4 who is the eyewitness told the court that at the crime scene he identified two persons to have

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committed the offence among five who invaded his father. He clearly said at the crime scene there was enough solar light and that he knew the attackers as they are living in the same village. However, during cross-examination, he admitted that he had not explained the appearance of the invaders and there was no explanation which made him to clearly state that those were Petro Fabian and John Askwari. He further admitted that he did not state the duration he spent with the invaders from outside the fence up to the time the deceased was pulled out and slaughtered. More to that, he had not stated the distance from a place he was pulled down to a place the incident occurred. PW4 failed to clarify as to who among the so-called identified attackers exactly slaughtered the deceased. He insisted that both of them did hold a machete and slaughtered the deceased. At the same time, he said for a machete to work effectively like how it did to the deceased, only one person must be holding it. Our witness is not clear on what he saw at the crime scene.

On defense, the accused person denied having engaged in commission of the offence and relied on a defense of *alibi*. On 13th September, 2019 during plea taking, the accused person gave a notice of *alibi* to the prosecution. And during defence hearing he brought a witness (DW2) to prove that he was not at the crime scene on the material date, but he

was at Tangosiro village in Kondoa for almost three months. Regardless that the prosecution had a prior notice of such defence, there is no witness who came to testify that the accused was present prior to the commission of the offence. Their prosecution evidence is on the fact that the accused person absconded after committing an offence. They agree that the accused was not present. However, it is not clear since when he left Ufana village. It should be noted that the accused person has no legal duty to prove his defence of *alibi*. This is a duty of the prosecution. However, the accused person is expected to establish facts that he was at Tangosiro village by bringing tickets or witnesses who to support him. This was well stated by the Court of Appeal in the case of **Sijali Juma Kocho v Republic**, [1994] T.L.R. 206, the Court had his to say:

"Admittedly, he was under no legal obligation to prove the alibi, but in the face of the allegations made against him, one would reasonably expect him to call the said uncle to bear him out. "

As pointed out earlier, the accused person brought his witness, DW2 to establish his circumstances of his defense of *alibi*. He said he was not at Ufana village since 20/07/2017 up to 27/10/2017. The prosecution has no proof that the accused person was present in the village just before commission of the offence. The prosecution witnesses say the accused

person absconded after commission of the offence. Thus, through this evidence, I find that the prosecution has failed to prove their case to the required standard.

Given the situation above, I am compelled to hold that the case has not been proved beyond a reasonable doubt. Thus, the accused person is found not guilty, and he is acquitted forthwith.

Ordered accordingly.

DATED at ARUSHA this 7th day of December, 2022.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE

07/12/2022