

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

AT ARUSHA

CRIMINAL SESSION NO. 52 OF 2020

(Originating from PI No. 22 of 2016 at Manyara Resident Magistrate's Court at Babati)

REPUBLIC

VS

- 1. PASCHAL HILKU KINYOOE**
- 2. CHARLES GIDAR @SHAURI GIDARJA**

JUDGMENT

1/12/2022 & 07/12/2022

MWASEBA, J.

The accused persons Paschal Hilku Kinyooe and Charles Gidar @ Shauri Gidarja stand charged with the offence of murder contrary to Section 196 of the Penal Code, Cap 16 R.E 2002 (Now R.E 2022). The prosecution alleged that on the 22nd day of November 2016, at Golimba Village, within Hanang District in Manyara Region the accused persons unlawfully killed two persons one Alute S/O Hango and Umbe Alute.



The accused persons pleaded not guilty to the charge of murder prompting the prosecution through the Learned State Attorneys Mr Mutalemwa Kishenyi and Peter Utafu to call six (6) witnesses, namely Kassim Dule Mweka (PW1), Anatory Clet (PW2), Pearson Boniface Mbijiri (PW3), Kajiunga Brassy (PW4), Ayubu Abdallah (PW5) and Shaban Hamis (PW6).

The prosecution also tendered a number of exhibits to wit: Post-mortem Report (P1), Sketch Map (where the deceased was murdered) – Exhibit (P2), Forensic DNA profiling test report (P3) and Written Statement of Giyaa Ginabe (P4).

On the other hand, the accused persons were the only two defence witnesses with no exhibits, who were represented by the learned advocates Mr Godlisten Ayo and Kuwengwa Ndonjekwa respectively.

Brief facts of the case are that, on 22/11/2016 at Gombani village information about a person who was murdered together with his son circulated. According to the evidence of PW1, he received the information about the murder from Mr Richard who went to buy maize in his house. Thereafter, he went to the crime scene where he found people and a deceased's body lying on the ground having three arrows pierced into his body. He furnished the information to PW6 (Village

Atanga

Chairman) who also informed the Village Executive Officer (VEO) and reported the matter to the police station. Then the police officers went to the crime scene together with PW5. At the crime scene PW5 saw the deceased's body lying on the grounds with one arrow pierced into his back and two arrows in his right thigh. He was informed by the people that the deceased's name was Alute S/O Hango and that his son is missing too.

Following the heard information, PW5 directed people to look for the deceased's child and they were able to find his apparels and a bone suspected to be of a child a hundred metres away from the deceased's body. Thereafter, the two arrows were removed from the deceased's body and the body was taken to the hospital where a Post mortem (P1) was conducted to establish the cause of death. On the other side, the apparels of the child and the bone were taken to the Chemist in Dar-es-Salaam and PW4 delivered the results that the examination failed to be conducted due to lack of samples from the bone.

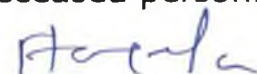
Afterward, some of the people were called in for investigation by the police officers and one of them was Giyaa Ginabe who was not available in this session for him to come and testify. However, the prosecution tendered his Written Statement to be admitted as exhibit via PW5 who



wrote the said statement. The said statement was admitted as Exhibit P4 and in the said statement Mr Ginaya said that he saw a group of people having commotion with the deceased and later on the 1st and 2nd accused persons shoot an arrow to the deceased who was running and then fell down. After that, they shoot his child too who was trying to escape.

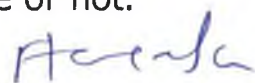
On 28/11/2016 PW3 received information from PW2 who is a witch doctor that there were two people who went to his house seeking for medicine after killing a man and his son who invaded their land. PW2 informed those people that the medicine would be available on the next day, and since PW3 had already prepared a trap, they were able to arrest the accused persons on 29/11/2016 on their way to the house of PW2.

The 1st and 2nd accused persons who stood as DW1 and DW2 respectively in their defence, both denied to have participated in the killing of the deceased Alute S/O Hango and his child as alleged by the prosecution. DW1 alleged that he was arrested by the police officers at the bus stand when he was coming back from Dongobesh on 29/11/2016 where he was since 19/11/2016. However, he admitted there were some conflicts between him and the deceased person. On his



side, DW2 also alleged that he was arrested by the police officers on 29/11/2016 at Magara Village, and he alleged to be aware of the death of Alute S/O Hango as he was present on the material day and even went to the scene to see what happened.

On hearing this case, this court was assisted by three assessors, namely Farida Diagwa, Fatuma Juma and Aziza Idd. However, during the summing up one of the assessors fell sick and she was not able to attend the session which prompted the court to proceed with only two assessors. After summing up to the assessors, the court assessors were of the different views regarding the guiltiness of the accused persons. The first assessor was of the opinion that the accused persons are guilt of both two charges based on the evidence of PW2 (witch doctor) who alleged the accused person admitted to kill two persons and then PW6 who witnessed the incident and the act of the 1st accused person as a Village Chairman not to be aware of what happened in his village and not to be present on the incident day. The second assessor opined that there is a lot of doubts whether the accused persons were guilt of the offence charged, this is for the reason that the police officers arrested too many people but it was only the accused persons who remained. Thus, it was not clear if they committed the offence or not.



In determining this case, this court will be guided by the following issues:

1. Whether the accused persons were properly identified at the crime scene.
2. Whether the prosecution has proved the accused's guilty to the required standard.

Starting with the first issue, regarding the evidence of identification, I think it is pertinent to start by reiterating the principle enunciated in a number of decisions of this Court including the case of **Raymond Francis vs The Republic** [1994] TLR 100 and **Alfredy Kwezi @ Alfonce vs The Republic**, Criminal Appeal No. 216 of 2021 (Reported at Tanzlii) that before a court can find a conviction basing on visual identification, the evidence must be watertight to remove the possibility of honest mistaken identity. In the latter case the court held that:

"The court is required to consider, among others, the following matters; one, the time witness had the accused under the observation; two, the distance at which he observe him; three, the condition in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; four, whether the witness knew or had

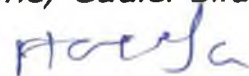
Alfonce

seen the accused before or not; and five, all factors on identification considered, it should also be plain that were any material impediment or discrepancies affecting the correct identification or the accused person by the witness."

In our case, it was only the evidence of Giyaa Ginabe which was tendered by PW5 and admitted as Exhibit P4 (written statement of Giyaa Ginabe) made at the police station after being nowhere to be found, where he stated that he saw the accused persons together with other people attacking the deceased person and his son with Arrows. Although Giyaa Ginabe alleged in his statement to have known the accused persons even before the incident, the question is whether the said evidence is admissible without being corroborated with other evidence?

Regarding the admissibility of the evidence admitted under **Section 34B of the Law of Evidence Act**, Cap 6 R.E 2022, the Court of Appeal in William **Onyango Nganyi @ Dadii & Five Other**, Criminal Appeal No. 9 of 2016, when resolving an appeal from this court at Moshi Registry regarding the conviction of the second appellant on armed robbery contrary to Section 287A of the Penal Code [Cap. 16 R.E. 2019], it observed that:

"...the second appellant, whose conviction was based on exhibits P.28 and P.29 which were statements of one, Gadiel Sifael which



*were tendered under the provisions of section 34B of the Tanzania Evidence Act [Cap 6 R.E. 2002], because he was not procured to appear and testify in court. In the said statements, it was indicated that the witness identified the second appellant... Starting with the second appellant, his conviction for the charged offence by the trial court was based on the evidence of visual identification which came from one Gadiel Sifael. **This witness never appeared in court to testify, instead, the statements which he had given at the Police Station were tendered as exhibit P.28 and P.29 by PW23 and PW24 in terms of section 34B of the TEA.** From what could be discerned from the record, we are fully in agreement with Mr. Komanya that **the statement of a person who never appeared in court to testify, so as to be cross-examined by the accused and his demeanour assessed by the trial court; could not without corroboration, ground conviction against him.** We are thus at one with Mr. Komanya that in this case there is no independent evidence to corroborate the said statement and hence, the second appellant's conviction was unsafe..." [Emphasis is mine]*

In our case, apart from the evidence which was admitted as exhibit P4 (written statement of Giyaa Ginabe) there is no other evidence which link the accused persons and the death of the deceased apart from the evidence of PW2 (witch doctor) who said the accused persons told him that they killed a man and his son in Lahuda Village but they never mentioned the name of the deceased.

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More to that, even the time taken by Giyaa Ginabe to report the matter to the Police Station creates doubts if he really saw the accused persons committing the murder. As it was held in the case of **Marwa Wangiti Mwita and Another vs The Republic**, Criminal Appeal No 6 of 1995 (Unreported) it was stated as follows:

"The ability of a witness to name a suspect's name at the earliest opportunity is an all important assurance of his reliability"

For those reasons, this court finds it unsafe to rely on such kind of evidence in proving that the accused persons were identified at the scene of crime.

Coming to the second issues of whether the prosecution has proved the accused's guilty to the required standard. Here, the court will look on whether or not the accused persons killed the deceased persons and if it was with malice aforethought.

It is an undisputed fact that the late Alute Hango died an unnatural death. The multiple wounds were inflicted on his back and his right thigh by an arrow. It is my firm view that the injuries were so serious with a high probability that they would have caused death. The key question here is whether it was the accused persons who killed the deceased.

Hango

In order to prove that it was the accused persons who killed the deceased, the prosecution depends only on the evidence of PW2 (a witch doctor) who alleged that he was informed by the accused persons that they killed a man and his son so they needed some medicine to escape the trouble and Exhibit P4 (written statement of Giyaa Ginabe) who stated to have seen the accused persons attacking the deceased and his son. And lastly, the circumstantial evidence of PW6 that there was a long-time conflict between the 1st accused person and the deceased Alute Hango over a piece of land.

Starting with Exhibit P4 (written statement of Giyaa Ginabe) it has already been decided herein above that the said evidence is unsafe to be relied upon as it lacks corroboration, See the case of **William Onyango Nganyi @ Dadii & Five Other** (supra). Thus, this court will remain with the evidence of PW2 alone who did not witness the incident and alleged that he was informed regarding the said death by the accused persons themselves and later on he informed PW3 who arrested the accused persons on their way to the house of the PW2. The trap that was set was prematurely frustrated as they arrested the accused persons before reaching to PW2's house. This court asks itself whether the evidence of the prosecution witness (PW2) is enough to determine

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that the accused persons are guilty. In the case of **Vumi Liapenda Mushi vs Republic**, Criminal Appeal No. 327 of 2016 delivered on 12th day of October, 2018, the Court of Appeal of Tanzania held that:

*"It is evident from the record that PW1, PW2, PW4, and PW5 did not witness the incident. **Their evidence was indeed hearsay. Hearsay evidence is of no evidential value. The same be discredited.**" [Emphasis is mine].*

Guided by the said authority, since the evidence of PW2 was just a pure hearsay, it was supposed to be collaborated with other evidence to link the accused persons with the said deaths. And since that was not the case, then the evidence of PW2 is of no value and not worth to be relied upon.

Thus, based on the reasons adduced herein, this court is of the firm view that the prosecution side failed to discharge its duties of proving their case beyond a reasonable doubt. As it was held in the case of **Magendo Paul & Another vs Republic** (1993) TLR 219 the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."

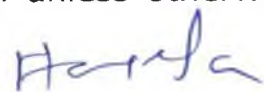


See also the case of **Nehemia Rwechungura vs the Republic**, Criminal Appeal No. 71 Of 2020 (Reported at Tanzlii) and **Vumi Liapenda Mushi vs Republic**, Criminal Appeal No. 327 of 2016 delivered on 12th October, 2018 (CAT- unreported).

For the reasons stated herein, I do not hesitate to concur with the 2nd assessor' opinions that the accused persons are not guilty of the murder. Having revisited the testimonies of the prosecution witnesses, their testimonies are tainted with hearsay evidence apart from the written statement of Giyaa Ginabe, (Exhibit P4) which was unsafe to rely on for the reasons already adduced hereinabove.

Consequently, I am left with no credible evidence to support the conviction of the accused persons for the murder of Alute S/O Hango and Umbe S/O Alute for the reasons clarified hereinabove. It is well demonstrated that the offence of the murder has not been proved to the required standard. The doubts explained herein have to benefit the accused persons.

Therefore, the accused persons, Paschal Hilku Ginyooe and Charles Gidarja are hereby found not guilty and therefore acquitted. The accused persons to be released from the prison unless otherwise they are lawfully held.



Ordered accordingly.

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



N.R. MWASEBA

JUDGE

07/12/2022

Judgment delivered on 7/11/2022 in the presence of Mr Utafu Learned State Attorney for the Republic and Mr Godlisen Ayo and Mr Kuwengwa Ndonjekwa Learned Counsels for 1st and 2nd accused persons respectively.



N.R. MWASEBA

JUDGE

07/12/2022

Right of Appeal is fully explained



N.R. MWASEBA

JUDGE

07/12/2022