

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA  
AT MUSOMA**

**CRIMINAL SESSIONS CASE NO. 14 OF 2022**

**REPUBLIC**

**VERSUS**

**MWIBURI s/o MURIRO @ HAMIS s/o MICHAEL @ MNG'URURI...1<sup>ST</sup> ACCUSED**  
**KINYERERO s/o MUNG'URURI @ MICHAEL.....2<sup>ND</sup> ACCUSED**  
**SHIWA s/o NG'ONG'O @ NYAKIBAYA.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

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

**M. L. KOMBA, J.:**

Mwiburi s/o Muriro @ Hamis Michael @ Mng'ururi, Kinyerero s/o Mung'ururi @ Michael and Shiwa s/o Ng'ong'o @ Nyakibaya hereinafter referred as accused persons are facing a charge of murder contrary to Sections 196 and 197 of the Penal Code Cap.16 [R.E 2019]. In brief, they were stated to have murdered Amos s/o Joseph @Amose Joseph @Magesa on 10 day of July, 2020 at Bisarye Village, Butiama District within Mara Region.

All accused persons pleaded not guilty when information read and explained to them, compelling the prosecution to summon four (4) witnesses to discharge the burden of proof beyond reasonable doubt. In the course of the trial, the court admitted two documentary exhibits to wit; Statement of Amos Joseph Magesa (Exh.P1) and Post Mortem Examination Report

(Exh.P2). Accused were represented by Mr. Daud Mahemba, learned counsel while the prosecution was conducted by Mr. Yesse Temba, learned State Attorney assisted Mr. Nico Malekela and Ms. Evangelina Ephraim both learned State Attorneys.

The case for the prosecution is set out in detail by the four witnesses summoned by the state. The summary of the evidence as captured by the witnesses is set out hereinunder as follows: -

**WP 11592 PC Sofia (PW1)**, testified that she is a police officer, on particular date that is 10/07/2020 she was attending clients at RCO where around 23.00 hrs she attended Amos Joseph whom arrived there by motorcycle. By physical appearance he was seriously injured and the body had blood. Due to that condition, she informed the court that she interrogates him while on the motorcycle supported by a driver and one relative at the back.

It was the testimony of PW1 that while Amos is at Bisarye village at his home the door was knocked and heard a familiar voice of Mwiburi (DW1) and decided to open the door, suddenly he was attacked and hit by heavy object in head by Mwiburi and then was strangled and stabbed in the stomach by sharp object by Kinyerero. At the second time he was stabbed at the

shoulder. He said he saw three people the other one was Shiwa. Statement of Amos was admitted as Exhib P1 which was recorded on 10/07/2020. When read out in court it revealed that Amos who is now a deceased, was complaining to one of assailant that "*Kinyerere ni kweli unaniua?*" to mean is it really that Kinyerero you are killing me?. Then he felt down as he was short of energy.

During cross examination PW1 informed the court that she did not record the number of the motorcycle which was used by the victim to arrive at the police station, she did not interrogate persons who they escorted victim to the police station nether took their phone numbers. It was her testimony that when victim told her he was hit by heavy object he did not enquire what a thing was that. She further informed the court that victim used a torch when he opened the door but she did not inquire about the strength of the light from the torch nor she did not enquire about electricity.

The second witness was Emmanuel Joseph (PW2) a resident of Bweri area in Musoma Urban, informed the court that Amos Joseph was his brother and that on 11/07/2020 he went to Musoma Government Hospital to see him undergoing medical treatment. He testified that he found Amos in critical condition and he was informed by Amos that he was attacked by Mwiburi,

Kinyerero Michael and Shiwa Ng'ong'o, he knew them because Kinyerero was one who strangled him and tore his shirts and others two he knows them by their voice.

PW2 further testified that it is accused persons who took the victim to the Butiama hospital and later to Musoma Referral Hospital. He did not saw wounds when Amos was admitted and confirmed that deceased and accused are blood related relatives.

George Richard Mabigi was the third witness (PW3), he testified that on 11/07/2020 he went hospital to see Amos Joseph Magesa who was sick, while at hospital Amos informed him that he was attacked by three people who are Kinyerero Magesa, Shiwa Ng'ong'o and Mwiburi Magesa on 10/07/2020 while he was at Bisarye village and the victim Amos is now a deceased.

PW3 confirmed to visit the house where the victim was after being informed by 1<sup>st</sup> accused father, Mzee Mng'ururi Magesa of the occurrence of the incident. When he reached at the homestead he found the victim was already taken to the hospital and that Mzee Mng'ururi told him that the victim was assisted by accused who sent him to hospital. It was his testimony that 1<sup>st</sup>

and 3<sup>rd</sup> accused persons were arrested while at hospital in his presence while the 2<sup>nd</sup> accused was arrested while at the Bisarye village.

PW4 was Doctor whose testimony was to the effect that the body of Amos Joseph, African male was given to him by Police officer number F. 6875 DC Nelson and found it to be blooded the whole of it and had three wounds on the left shoulder, left side of the stomach and at the back of the head (kisogoni). Upon operation he found broad vein was ruptured and there was internal bleeding. He records his findings in Exb P2.

He testified further during cross examination that the way he saw wounds and information from those who surrendered him for examination suggests that deceased was attacked while asleep because he was not defending himself. his determination was based on the facts that the deceased had no wounds on hands and the way sharp object was inflicted in the stomach and the position of the wound in the head.

Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, leading by advocate, Mr. Daud Mahemba, the defence side entered their defence. Each of the accused give testimony under oath.

DW1 testified to the effect that on 10/07/2020 around 23.45 hrs his father. Michael Mages knocked his home and informed him that Amos was attacked and when he went to the scene, he found Amos Joseph laying on the floor in the pool of blood. He decided to go for a motorcycle to 3<sup>rd</sup> accused so that they can rescue the deceased. They passed to Butiama Police station for them to be given PF3 and proceeded to Butiama District Hospital. After the first aid they were referred to Musoma Referral Hospital where he was admitted and was given treatment. It was his testimony that he was with the victim all the time until he died on 12/07/2020 and that he was arrested while at mortuary waiting for the body for burial processes.

It was his testimony during cross examination that when victim was attacked, he was at his home. He was the one who raised yowe at night and some people came. He said the victim was serious and he was not able to talk and confirmed he did not cross examine PW2 on the status of the victim when he visited him at the hospital.

Kinyerero Mng'ururi Michael (DW2) informed the court that he was arrested by police officer on 13/07/2020 while he was at home and sent to Butiama Central Police where he was joined with other accused. Police officers were forced him to mention culprits while he was denying to be involved in the



incident. It was his testimony that he responded to yowe at night and went to Michael Magesa where yowe was coming.

During cross examination he informed the court that Michael Magesa informed him during yowe that his brother was attacked. Michael Magesa went to hospital while he remained at home. It was his testimony that he went hospital on 11/07/2020 and he denied to have a torn shirt.

The last defence witness was Shiwa Ng'ong'o Nyakibaya (DW3) who was arrested on 12/07/2020 while at hospital for him being associated with the death of Amos. He informed the court that he was asked by Machael Magesa (the father of the victim) to accompany 1<sup>st</sup> accused to the hospital by using his motorcycle. They first went to Butiama District hospital and then to Musoma referral Hospital. It was his testimony that when he arrived at the scene, he found people who responded to yowe. It was his submission that the accusation against him was because he assisted 1<sup>st</sup> accused to rescue his brother.

During cross examination he informed the court that Kinyerero (2<sup>nd</sup> accused) was not at home when the yowe was raised, he went to hospital on another day. He said he did not want to disturb Michael Magesa to be his witness as he asked him to accompany 1<sup>st</sup> accused because Mr Magesa is an old man.

That marked the end of defence case.

Having heard the witnesses in this case, I do not doubt that Amos Joseph Magesa is dead, and it was an unnatural death. The issue for determination is who caused the deceased's death. I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in this judgment. These cover aspects of criminal law, as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence.

It is the trite law that the prosecution is placed with a heavy burden than that of the accused. The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022] (The evidence Act) and cemented in the case of **Joseph John Makune vs. Republic** [1986] TLR 44 at page 49, where the Court of Appeal held that;

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ... "*



The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case **of Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that;

*"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

That means the evidence must be so convincing that no reasonable person would ever question the accused's guilt. See cases **of Mohamed Said Matula vs. Republic** [1995] TLR 3, **Anatory Mutafulungwa vs. Republic**, Criminal Appeal No. 267 of 2010 (unreported) and **Festo Komba vs. Republic**, Criminal Appeal No. 77 of 2015, the Court of Appeal of Tanzania (both unreported).

Evidence by the prosecution suggested that the case against accused persons are entirely base on dying declaration. Additionally, from the evidence, it is clear that there was no eye witness to the murder of the

deceased. The evidence implicating accused persons are alleged dying declaration. The issues which I am going to address in this judgement are:-

- 1. Whether the deceased made a dying declaration and identified the accused as the person who had assaulted him,*
- 2. Whether the dying declaration was corroborated and*
- 3. Whether the dying declaration is legally accepted.*

In determining the 1st issue on *whether the deceased made a dying declaration and identified the accused as the person who had assaulted him.*

I have perused the evidence on record and found that several witnesses testified that the deceased made a dying declaration and named the accused as the persons who had assaulted him. Under section 34B of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence. The admissibility of statements under section 34B (2) of the Evidence Act, was discussed at length in the case of **Elias Melani Kivunyo vs. Republic**, Criminal Appeal No. 40 of 2014 (unreported).

The dying declaration in this case is both **oral** and **written** whereas three witnesses; WP 11592 PC Sofia (PW1), Emmanuel Joseph, (PW2) and George Richard Mabigi, (PW3), all testified in court that they spoke to the deceased before he died, inquiring who had assaulted him, and the deceased told PW1, that it was Mwiburi s/o Muriro Michael @ Mung'ururi and Kinyerero s/o Mung'ururi @ Michael and the deceased responded to PW2 and PW3 that it

was Mwiburi s/o Muriro Michael @ Mng'ururi and Kinyerero s/o Mng'ururi @ Michael and Shiwa s/o Ng'ong'o. PW2 and PW3 maintained that it was all accused who assaulted the deceased while PW1 maintained that it was Mwiburi and Kinyerero who assaulted the deceased though he was invaded by three people.

In the case at hand, PW3 testified that he knew accused persons and the deceased alleged to have identified his two assailants; first and second accused and it was alleged that deceased uttered the following words "*kweli Kinyerero unaniua*". Therefore, according to PW1 and PW3 testimony it is clear that the deceased mentioned three accused to be his assailants. In accordance to prosecution evidence the deceased made a dying declaration and therefore the first issue is answered in affirmative.

Now I analyse and determine the second issue *on whether the dying declaration was corroborated*. It is trite law that dying declaration needs to be corroborated by other evidence before it can be accepted and relied upon. It is on record that the victim declared who they attacked him while at police Station. PW1 is the one who recorded the victim statement and informed the court that victim mentioned his assailants to be accused persons. PW2 and PW3 evidence was hearsay, they testified what was heard from the victim

that accused persons are the one who attacked him. It was evidenced by PW4 that victim was attacked while he was asleep. The evidence of PW2 and PW3 are different from that of PW4. In order for the court to rely on this, evidence there must be collaborated with other evidence as it was observed in the case of **Crosperry Ntagalinda @ Koro vs Republic**, Criminal Appeal No. 312 of 2015 (unreported), **Republic V. Ally** (1971 HCD No. 306 and **Republic vs. Joseph Ngaikwamo** [1977] LRT No. 6. Therefore, this court cannot rely upon PW2 and PW3 evidence without being corroborated by other evidences.

Again, according to PW1, the victims informed her that he hears the familiar voice and he used flash light when he went to open the door when assailants attacked him, the incident occurred at night, identification of accused at night must be properly made.

On this, it is part of our jurisprudence that in order to base a conviction on evidence of identification, such evidence must be watertight. (See **Republic V. Eria Senwato** [1960] EA 1974. Subsequently, it was held in the most celebrated case of **Waziri Amani V. Republic** [1980] TLR 250 that, such evidence should only be acted upon after all the possibilities of any mistaken identity have been eliminated and the court is satisfied in full that the evidence before it is unquestionable.

The **case of Waziri Amani** (supra) gave the following guidelines which must be considered and determined by the trial court; The amount of time the identifying witness had the accused under observation, The distance at which he observed him, **The conditions in which the observation was made, for instance if it was day or night time and whether there was sufficient or poor lightning**, Whether the identifying witness knew or had seen the accused before.

Notably, in the instant case, the incident which involved the deceased occurred during the nocturnal hours. According to PW1, it was dark and he had to take a flashlight with a view to illuminating the door before he was attacked. PW1 did not inquire about the strength of the light from the torch. On the basis of the uncertainty of the intensity of the light on a fateful night, the deceased might have been laboring under a mistaken identity. The court has been warned about the risk of relying on visual identification. See **Waziri Amani vs Republic** (supra).

As it will be recalled however, from record, the two accused were not strangers to deceased as they are blood related. To that end, deceased claimed to recognize the voice of 1<sup>st</sup> accused. With regard to such evidence of recognition, courts were guided in the cases of **Shamir s/o John vs. The Republic**, Criminal Appeal No. 166 of 2004 and **Frank Joseph**

**Sengerema vs. The Republic**, Criminal Appeal No. 378 of 2015 both of which are unreported, that: -

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

Recognition of 1<sup>st</sup> accused by the deceased through the voice is not reliable because voices are not unique to specific person. Identification of assailants failed to pass test as stipulated above specifically on the light used.

Based on the above observation, I consider the circumstance under which the dying declaration was made is tainted with suspicion. In the case of **Romanus Kabogo vs. Republic**, Criminal Appeal No.62 of 1998 and **Hemsi Nzuunda and two Others vs. Republic**, Criminal Appeal No.34 of 1995 the Court of Appeal of Tanzania held that: -

*'As a general rule, a court can act upon a dying declaration if it is satisfied that the declaration was made if the circumstances in which it was made give assurance to its accuracy and if is in fact true.'*

Guided by the above authority, I hold that in the instant case the evidence of dying declaration was not reliable for main reason, that it lacked corroboration. And therefore, the second issue is answered in adverse.



In determining the 3<sup>rd</sup> issue on *whether the dying declaration is legally accepted*, I will direct my mind in the legislation that introduced it. The law regulates the manner in which a witness who cannot be found, his recorded statement can be admitted in evidence and acted upon by the trial court subject to certain conditions. This is prescribed under section 34 B (1) and (2) (e) of the Evidence Act which stipulates as follows: -

*"34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*

*(2) A written or electronic statement may only be admissible under this section-*

*(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*

*(b) If the statement is, or purports to be, signed by the person who made it; (c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence,*

*he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;*

*(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and*

*(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence." [Emphasis supplied]*

The Court has on several occasions emphasized on the mandatory requirement of the law that, for a statement to be admitted in lieu of oral direct evidence, the conditions stipulated under the cited provision must cumulatively be complied with. (See: **Willy Jengela vs. Republic** Criminal Appeal No. 17 of 2015, **Mhina Hamis vs. Republic**, Criminal Appeal No. 85 of 2005 19, **Fredy Stephano vs Republic**, Criminal Appeal No. 65 of 2007 and **Adinardi Iddy Salimu and Another vs. Republic**, Criminal Appeal No. 298 of 2018 (all unreported)).

In the light of the stated position of the law, prior to tendering of the dying declaration during trial at this court, notice was supposed to be served to

accused so as to enable them to exercise their statutory right to object to its being tendered in the evidence against them. This was not done.

In view of the said circumstances, accused persons cannot be convicted on the basis of the evidence (dying declaration) they were not made aware of. Listing of the dying declaration as an exhibit during committal proceedings is not suffice as notice envisaged under section 34 B (2) (e) of the Evidence Act and that the accused persons were aware of the statement. I am fortified in that account because what is listed as an exhibit in committal proceedings is not a substitute of notice envisaged under section 34 B (2) (e) of the Evidence Act which categorically requires prior notice to be given to the other party so as to enable them to exercise the right to oppose the statement to be relied upon by the prosecution. See **Adinardi Iddy Salimu and Another vs. Republic** (supra).

In addition, the omission to comply with the mandatory statutory requirement cannot be remedied by the failure by the accused persons to object the same because this court is incumbent to ensure that the law is complied with before acting on the dying declaration. In the premises, since the dying declaration of the deceased was improperly/ illegally tendered and admitted, I accordingly discount it. - See - **Twaha s/o Ali and 5 Others**

**vs. Republic**, Criminal Appeal No. 78 of 2004. This marks the 3<sup>rd</sup> issue to be founded in contrary.

Now, having expunged the dying declaration, the remaining evidence is the hearsay evidence of PW2 and PW3 which takes me to determine their admissibility, which without further ado, are not admissible because the best oral evidence must come from the person who saw. See section 62 (1) of the Evidence Act.

I have considered these glaring shortcomings, taking into account that this is a murder case and how slight doubt raises the trial court to direct itself in deciding in favour of the accused since the accused ought to be convicted on the strength of the prosecution case as it was held in the case of **Aidan Mwalulenga vs. Republic**, Criminal Appeal No. 207 of 2006 CAT Dodoma.

In conclusion, I hold without demur that the evidence in this case, did not pass the test. The evidence did not exclude every possibility that the death of the deceased could have been caused by somebody else. In human eyes, yes the deceased died an unnatural death, legally it cannot be said it is the accused persons who murdered the deceased. Prosecution has failed to prove the case to the required standard and therefore I have no choice but to find the accused persons not guilty. Therefore, the accused persons, Mwiburi s/o

Muriro @ Hamis s/o Michael @ Mng'ururi, Kinyerero s/o Mng'ururi @ Michael and Shiwa s/o Ng'ong'o @ Nyakibaya are discharged from the offence of murder c/s 196 and 197 of the Penal Code Cap.16 [R. E 2019] and thus they are acquitted. I order accused persons, Mwiburi s/o Muriro @ Hamis s/o Michael @ Mung'ururi, Kinyerero s/o Mung'ururi @ Michael and Shiwa s/o Ng'ong'o @ Nyakibaya, immediately be released from the prison remand custody unless they are otherwise lawful held.

Dated at **MUSOMA** this 8<sup>th</sup> Day of December, 2022.



  
**M. L. KOMBA**

**Judge**

**8<sup>th</sup> December, 2022**

Right of appeal explained.

  
**M. L. KOMBA**

**Judge**

**8<sup>th</sup> December, 2022**