

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSION CASE NO. 38 OF 2020
REPUBLIC

VERSUS

1. RICHARD KALIPESA MATOFARI
2. KILIANI TITUS KALIPESA

R U L I N G

Dated: 15th & 16th November, 2022

KARAYEMAHA, J

On 25/06/2019 at about 21:00hours three culprits stormed into the residence of **Leonard Kasian Sichone** (deceased). They cut the deceased with a sharp object on his head mercilessly leaving him with multiple head wounds. The cuts left him with wounds on the head and caused severe bleeding that led to his death. During the assaulting time, the deceased yelled uttering words "*nakufa*". At that time Elizabeth Daudi (PW1) was at the toilet releasing herself. The yelling made PW1 to get out of the toilet and on seeing three people armed with pangas, she hid on the nearby tree. She managed to identify the accused persons and one Josephat who is not part to this case by help of moonlight and observed

them within half a minute. She also heard them saying "*amekufa*". Then the culprits took on their heels.

According to PW1, when she entered into the house, she found the deceased already dead. She then run to inform Gasper Kasian Sichone (PW2) the deceased's young brother. PW2 also rushed to the deceased's house and found him already dead and immediately reported the incident to the Village Executive Officer (VEO) who in turn reported to Kamsamba police station. Of the police officers who went to the scene of the crime was a police officer with force number E.2782 D/Sgt Roger (PW3) who drew the sketch map of the scene of crime (exhibit P1). PW1's statement led to the arrest of the accused persons on 06/07/2019. Consequently, they were charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2022). The indictment is that on 25/06/2019 at Masanyita Village within Momba District in Songwe Region, they jointly and together murdered Leonard Kasian Sichone. They have all along denied involvement in the murder incident, hence, this trial which has seen the prosecution marshal three witnesses.

Banking on the evidence of PW1 and PW2, death of the deceased is undisputed and considering the areas attacked, that is, head and neck,

force used which led to serious wounds, I hold that the assailants had malice aforethought. This being proved beyond reasonable doubt, the prosecution has a secondary duty to prove that it was the accused persons who assaulted the deceased.

The prosecution evidence can be conveniently divided into two parts. The first part is the scene that was created at the pombe club between the 1st accused person and the deceased and witnessed by PW1 and PW2 among other people who were there having drinks. The second part is the invasion and killing of the deceased at his residency.

Let me begin with the scene created at the pombe club the incident that occurred at about 20:00hours as per PW1 and evening according to PW2 of 25/06/2019. It was the prosecution case that the 1st accused met the deceased who was having drinks with PW1 and started accusing him of killing his child/grandchild. PW1 and PW2 both testified that the 1st accused was complaining that he bewitched his child and caused his death. As if that was not enough, the 1st accused attempted to beat the deceased. People's intervention rescued the deceased. It was the prosecution further evidence that the 1st accused threatened the deceased that he could not finish the year 2019 without dying. PW2 first advised the 1st accused to report that incident to the village leaders and later advised

the deceased to leave the pombe club and go home. It is evident that the deceased left with PW1. That is what happened at the pombe club.

The second incident happened at the deceased's residence. This incident took place at about 21:00hours on the same date. According to PW1's evidence, when the two got in their house they went in bed directly. Some moment later she had to go to the toilet. While there she heard the deceased yelling saying "*nakufa*". The yelling triggered her to get out of the toilet and observe what was going on. While in the hiding, she saw three people getting out of the house and asking whether the deceased had died. She was able, assisted by the moon light, to identify Richard (1st accused), Josephat and Kiliani (2nd accused). Confirming that he was dead, the assailants took on their heels.

On how the assailants dressed, PW1 testified that they were in long coats with caps which covered their heads up to the hair of the eyebrow. Half a minute was used by PW1 to observe the assailants and identify them. On cross-examination she said she used only one second. Another thing that made her to easily identify them was because they were living in the same village.

PW1 testified further that after discovering that the deceased had died, she ran as quickly as her legs could enable her to report the incidence to PW2. On reporting the incident, she also mentioned the accused persons and Joseph as murderers of the deceased to PW2. Conversely, PW2 informed the court that PW1 mentioned the accused persons when she was being interrogated by the police officer not to him. According to her, the accused persons were arrested on 06/07/2019 but the 1st accused attended the deceased's burial which in view of PW1, PW2 and PW3 evidence took place on 26/06/2019.

Having received the prosecution's evidence, I have to decide in the light of the available evidence, whether this court can enter a finding of not guilty or that the accused persons committed the offence of murder for which they must enter a defence in terms of section 293 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA).

Having subjected the prosecution evidence on thorough examination, I hold the view that it hinges on two factual issues. **First**, on visual identification and **secondly**, on threats by the 1st accused that the deceased would die in the year 2019.

I propose to begin with the issue of identification. As the alleged incident occurred during night time, it is crucial to determine if the accused persons were properly identified at the scene of crime. Before that, I wish to restate the principles guiding visual identification which have been emphasized in various decisions of this Court and the Court of Appeal.

The law on the evidence of visual identification is well settled as the court is warned not to act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water tight. In that regard, the trial court must consider the following guidelines: **One**, the time the witness had the accused under observation; **two**, the distance at which he observed him; **three**, the conditions in which the observation occurred, for instance whether it was day time or night time; **four**, whether there was good or poor lighting and **five**, Whether the witness knew or had seen the accused before or not. See: **Waziri Amani vs. Republic** [1980] T.L R 250, **Raymond Francis vs. Republic** [1994] T.L.R 100 and **Chokera Mwita vs. Republic**, Criminal Appeal No. 17 of 2010 (unreported). Similarly, the Court of Appeal drew an inspiration from the case of **Waziri Amani** (supra) in the case of **Said Chally Scania vs. Republic**, Criminal Appeal No. 69 of 2005 (unreported) having underscored the following:

"We think that where a witness is testifying about another 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 aids to unmistakable 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."

In **Issa s/o Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court was confronted with a situation whereby witnesses claimed to have identified the appellant as he was not a stranger. Having relied on the case of **Said Chally Scania** (supra) the Court said:

*"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence **on sources of light and its intensity** is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."* [Emphasis supplied].

It is also a general rule that, evidence on visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. See - **Hassan Kanenyera and Others vs. Republic** [1992] T.L.R 100 and **Shamir John vs. Republic**, Criminal Appeal No. 166 of 2004 (unreported).

With the above considerations in mind, I am increasingly of the view that the evidence on record does not justify the conclusion that the accused persons were positively identified at the scene of crime considering that, it is not sufficient to make bare assertions that there was enough moon light at the scene of the crime because the intensity of the light must be clearly stated. I am fortified in that account because PW1 fell short of stating the intensity of the moonlight and failed to state whether there were clouds or not. In this regard, the assertion that the moonlight was bright enough to enable her to see the accused persons was not sufficient. I am also doubting because she did not state in her evidence if the distance of 20 meters had impediments or not in between that could interrupt her ability to clearly observe the culprits.

Moreover, since it is evident that PW1 saw the assailants coming out of the deceased's house asking themselves whether the deceased was dead and were running, holding pangas. I seriously doubt because

identification was made fleetingly and in stressful and shocking circumstances. Therefore, she was not in a position of making unmistakable identification of the accused persons. On this I draw an inspiration on the warning given by the Court of Appeal of Kenya in the case of **Wamalwa and Another vs. Republic** [1999] 2 EA 358 where it stated that:

"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances."

Another disturbing feature which renders the alleged visual identification questionable is the unexplained delay in mentioning and arresting the accused persons after the commission of the offence because PW1 was categorical that the 1st accused was present during the burial ceremonies and so he was not at large. She also informed the court that she could not mark all the people who attended the burial ceremony. This means that even if the 2nd accused was present or not, she could not know. In the same vein, her evidence is silent if the 2nd accused was not in the village vicinity. If she identified them at the scene of crime, I am behooved to find and hold that they could be arrested on the spot not on 06/07/2019 which is almost 11 days. Worsening further is PW1's evidence that she mentioned the accused person to PW2 simultaneously with the

reporting of the murder incident. Conversely, PW2 testified that PW1 never mentioned any suspect to him on that night. So, she mentioned them when her statement was being recorded by the police officer. Again, it is not clear as to when she made her statement because if she mentioned them on 26/6/2019 in the morning before the deceased was buried, I am firm that they would be arrested at that time. Nevertheless, she failed to mention them on that day because she was weak. Relying on the available evidence, PW1 mentioned them after 11 days which in law lowers her reliability. I am fortified in that account in the light the holding in the case of **Wangiti Marwa Mwita and others vs. Republic** [2002] T.L.R 39 where we stated:

"The ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry."

See also the unreported case of **Baya s/o Lusana vs. Republic**, Criminal Appeal No. 593 of 2017.

Another equally disturbing feature is how PW1 could identify persons who dressed coats with caps covering their heads up to the hair of the eyebrow and running from the house within half a minute or one second.

Even if both PW1 and the assailants were village mates, I am pretty sure that she could not identify them under those circumstances. I am mindful that PW1 and the accused persons were familiar to each other due to the fact that they resided in the same village. In that case it was enough for her to tell the court that she recognized them, the evidence which would be more reliable. Nevertheless, strengthened by the case of **Said Chally Scania** (supra) PW1's evidence was to be clear on sources of light and its intensity and the ability which are of paramount importance. This is because, it is underscored further, even when the witness is purporting to recognize someone whom he/she knows, as was the case here, mistakes in recognition of close relatives and friends are often made.

I think these few doubts I have raised are enough to indicate that identification of the people who murdered the deceased was not watertight. It is therefore not safe to base conviction on it bearing in mind that PW1's evidence on identification lacked corroboration as per the principle articulated in the case of **Hassan Kanenyera and Others** (supra) and **Shamir John** (supra).

The second possibility connecting the accused persons with the murder of the deceased are the threats the 1st accused exerted on the deceased. As already hinted above, it is the evidence of PW1 and PW2 that

some hours before the deceased's murder, the 1st accused had threatened the him that he could not finish the year 2019 without dying because he killed his child through witchcraft. PW2 was emphatic that it was the accused persons who murdered the deceased for revenge. These, in my considered opinion, are suspicions. It is a settled law that suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt. See **Republic vs. Kerstin Cameron** [2003] TLR 86. This being a murder case, the burden is on the prosecution to prove beyond reasonable doubt that the accused persons murdered the deceased not anybody else. It seems to me that the principle should be that more weight ought to be given or attached to the evidence given of people's acts than their alleged words which are easily mistaken or misinterpreted. It is no wonder that anybody else can take advantage of the threats and commit murder. In the result many people will be behind bars because of the suspicion emanating from the words uttered in heat of passion and actual murders would be walking freely in the streets. Therefore, thorough investigation is needed in such circumstances.

In view of the foregoing, in order to call upon the accused persons to stand in the witness box and defend themselves in terms of section 293

(1) and (2) of the CPA, I must be satisfied that the accused persons were identified at the scene of crime something which in view of the discussion above was not water tight.

Since the visual identification evidence is not water tight and this court cannot rely on suspicion, and no any other evidence implicating the accused persons, I find them not guilty of the offence of murder. The case against them has not been proved to warrant inviting them to present their evidence in defence. In simple terms they have no case to answer. Consequently, I proceed to acquit them of the charge of murder contrary to section 196 and 197 of the Pena Code.



It is so ordered.

A handwritten signature in black ink, appearing to read "J. M. Karayemaha".

J. M. Karayemaha
JUDGE
16/11/2022