

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN SUB-REGISTRY OF MWANZA)**

**AT GEITA**

**CRIMINAL SESSION CASE NO. 33 OF 2020**

**THE REPUBLIC**

**Versus**

- 1. JOSEPH S/O MASOLWA**
- 2. MARCO S/O MIHAYO**
- 3. BANGILI GANYAMAWA**

**JUDGMENT**

*Date of Last Order: 29/11/2022*  
*Date of Judgment: 15/12/2022*

**KAMANA, J:**

Joseph Masolwa, Marco Mihayo and Bangili Ganyamawa were indicted for charges of murder contrary to sections 196 and 197 of the Penal Code, Cap.16 [RE.2002]. It was the Prosecution's case that on 19<sup>th</sup> August, 2017 at 2000hrs at Nyashimba Village, Mbogwe District within Geita Region, the trio murdered one woman in the name of Mbula Ngweso by inflicting blows of machete on her head and other parts of her body.

When the case was called on for trial, the 3<sup>rd</sup> accused Bangili Ganyamawa was devoid of life and hence the case against him abated in terms of section 284A of the Criminal Procedure Act, Cap. 20 [RE.2019].



Marco Mihayo, the 2<sup>nd</sup> accused was discharged under section 91(1) of the same Act as the Republic entered *nolle prosequi*.

When the information was read to the remained accused Joseph Masolwa, he pleaded not guilty. In view of that, the trial was held. During the trial, the Republic was represented by Ms. Gisela Alex, learned Senior State Attorney. The accused was advocated by Mr. Erick Lutehanga, learned Counsel.

In a bid to prove its case, Prosecution marshalled seven witnesses and Exhibits which were a machete (Exh.PE1), certificate of seizure (Exh.PE2), Post Mortem (Exh.PE3), cautioned statement (Exh.PE4) and sketchy map (Exh.PE5). On the other hand, the accused was the only witness for Defence with one Exhibit which was the statement of PW4 Mchunguzi Mujuni Silas who recorded extra-judicial statement of the accused.

For the purpose of comprehending the whole episode that led to this case, I think it is pertinent to start with the evidence of **Kashindye Joseph** (PW3), the only eye witness who testified. It was her testimony that on the fateful night, she was with her family members including the late Mbula Ngweso outside their house whereby some of them were getting their evening meal.



PW3 testified that while they were at that place, three persons, walking in single file approached to where they sat and stopped near them. The one who was leading the trio approached her grandmother (Mbula Ngweso) and inflicted blows of machete on her head and shoulders. It was the evidence of this witness that she managed to recognize the assailant as Joseph Masolwa, the accused, since there was a bright solar light. She averred that Joseph Masolwa was known to her as he was her village mate.

Kashindye Joseph continued to tell this Court that the whole incident lasted within three minutes. She stated that upon seeing the attack, she ran to the bushes before finding her way to her father's house one Joseph Misalaba. Thereat, she found her mother and narrated to her what happened to her grandmother and mentioned Joseph Masolwa as an assailant. Having related the unpleasant incident, she and her mother went to the deceased's place where they found a gathering of *wananzengo*. She testified to have told *wananzengo* who were there that Joseph Masolwa was a perpetrator of the murderous act.

In cross examination, she insisted that she saw Joseph Masolwa cutting her grandmother with a machete as there was a bright solar light from the bulb that was on the door of their house and that the



assailants did not carry torches. She stated at the scene of crime there were five houses and she was distant from where the deceased sat. PW3 described that Joseph Masolwa had dreadlocks all over her head and there was only one person in their village who had dreadlocks who was him. It was her testimony that on that night which was during dark season Joseph Masolwa wore a hooded jacket which hid his face.

The witness told this Court that police officers are the ones who told them that Joseph Masolwa is responsible for killing their grandmother when they went to the scene of crime with the accused Joseph Masolwa. Kashindye Joseph further testified that she mentioned Joseph Masolwa as a perpetrator for the first time to the police when she was making her statement. She went on to testify that *wananzengo* did not go to the accused's place. She told this court that she was of the belief that police officers are the ones who helped them to know who killed their grandmother.

In re-examination, Kashindye Joseph testified that she identified Joseph Masolwa as a culprit due to the bright solar light and a light from the torch held by his young brother. She told this Court that she mentioned Joseph Masolwa as the assailant to her fathers and police officers. She continued to state that she was close to where Mbula Ngweso sat before her being killed.



Having summarized the evidence of PW3, another witness was **F.1251 S/Sgt. Majani Saasita** (PW1). In examination in chief, the witness testified that on 21<sup>st</sup> August, 2017 he was assigned by OC-CID for Mbogwe District ASP Mazura to investigate the murder of Mbula Ngweso. On 22<sup>nd</sup> August, 2017 he was ordered by ASP Mazura to prepare police officers for the purpose of arresting two persons who were accused of killing Mbula Ngweso. The two persons happened to be Joseph Masolwa and Marco Mihayo. It was the testimony of the witness that OC-CID upon reading the witness statement and got information from his informer decided that the duo should be arrested.

S/Sgt. Majani told this Court that they effected the arrest of the accused at 0400hrs with the assistance of village leaders who took them to his house. The witness stated that at 07:30 hours the accused was interrogated by Det. Cpl. Edward. After that interrogation, the witness averred that he collected evidence, prepared a charge sheet and arraigned Joseph Masolwa before the court.

This Court was informed by S/Sgt. Majani that during the investigation of the case against Joseph Masolwa, there was a Task Force headed by Assistant Inspector Banda which was commissioned with a task of investigating killings involving use of machetes. When the Task Force came in Mbogwe District, it interrogated the accused who led



it to the place where he hid a machete that was used in killing Mbula Ngweso. The witness testified that he and members of the task force led by the accused went to a bush near Nyashimba Primary School. Thereat, witnessed by the teachers of that school and village leaders, a search was conducted and the said machete was recovered by the accused. PW1 told this court that the recovered machete had rust on one side and its handle was made of tyre rubber. The machete was admitted as Exh.PE1.

The witness continued to state that the accused was ordered not to touch the machete and the same was taken by police officers. Thereafter, Assistant Inspector Banda prepared certificate of seizure which was signed by him, independent witnesses and the accused. The certificate of seizure was admitted as Exh.PE2.

When cross examined, S/Sgt. Majani testified that the accused was arraigned before the Court on 25<sup>th</sup> August, 2017. He told this Court that upon arrival of the Task Force, the accused was removed from remand by removal order. The witness told the Court that the removal order was not submitted before the Court as the same was in the hands of prison authorities. He further evidenced that the search that led to the recovery of the machete was conducted almost a month after the accused made his cautioned statement.



In re-examination, the witness testified that the bush in which the machete was found is in a school area and it is 200 meters from the school. He reiterated his position that the removal order and other documents relating to removing the accused from to prison are kept by prison authorities.

**Zikangobeza Fabianus**, the Head Teacher of Nyashimba Primary School was PW2. He testified that on 20<sup>th</sup> September, 2017 police officers, in the company of the accused Joseph Masolwa, came to his work place and informed him that they wanted to conduct a search in his school premises on the account that there was a weapon hidden in the bushes. The witness stated that the police officers requested him to accompany them for the purpose of witnessing the search.

It was the testimony of PW2 that the accused Joseph Masolwa led the search party to the bush where the machete was hidden. Thereat, he was ordered by the police officers to show them the weapon. Upon receiving the order, the accused combed the bush with full of grasses and showed them the machete which had rust on one side and with a handle made of tyre rubber. Thereafter, according to this witness who identified the machete as the one retrieved in the search, told this Court that police officers took photographs and drew a sketchy map before recording their statements.





In cross examination, Zikangobeza Fabianus told this Court that it was the accused only who searched for the machete. He told this Court that police officers had the information on where the machete was hidden. He told this Court that the statement he made does not have the name of the accused. In re-examination, he reiterated his averments in examination in chief.

PW4 was **Mchunguzi Mujuni Silas**, a Magistrate who recorded extra-judicial statement of Joseph Masolwa which was not admitted as evidence for contravening the Chief Justice Guide's for Justices of the Peace. In his testimony, the witness told this Court that on 24<sup>th</sup> August, 2017 the accused was brought before him for the purpose of making his extra judicial statement. He examined his body and found him to be with no wounds and after informing him his rights he recorded the statement. According to this witness, the accused person who told him to have slept at Bukombe Police Station confessed to have killed Mbula Ngweso by cutting her with a machete. PW4 told this Court that the accused averred that he and his two fellows killed Mbula Ngweso after being hired by Mzee Bangili in consideration of Tshs.1,700,000/-. PW4 testified that the accused person told him that he was the one who cut Mbula Ngweso with a machete on 19<sup>th</sup> August,2017.





During cross examination, the witness testified that he recorded the extra-judicial statement of the accused in the presence of his court clerk. Prosecution did not re-examine its witness.

**Joel Biliyachunga** (PW5), Assistant Medical Officer testified that he was the one who examined the body of the deceased Mbula Ngweso. It was his testimony that his examination established the cause of death as severe bleeding occasioned by wounds on the deceased head and shoulders. Through his evidence, the Post Mort Mortem Report was admitted as Exh.PE3.

The sixth witness was **E.9348 Det. Sgt Edward Katemi**. It was his evidence that on 23<sup>rd</sup> August, 2017 he interrogated the accused Joseph Masolwa who was arrested in connection with murder. In the course of interrogation, he recorded the accused's cautioned statement under section 57 and 58 of the Criminal Procedure Act, Cap.20 as that statement contained both questions and answers and narrations of the accused. PW6 averred that the accused confessed to him to have killed Mbula Ngweso after being hired by Mzee Bangili in consideration of Tshs.1,700,000/-. He prayed the Court to admit the cautioned statement which was admitted as Exh.PE4 after a trial within trial following its repudiation.



When cross examined, the witness told this Court that the Task Force of which he was a member did not remove the accused from prison. He testified to be present when police officers went to the scene of crime with the accused for the purpose of drawing a sketchy map. The witness told this Court that the deceased's relatives saw the accused when police officers took him to the deceased's home. The witness testified that he was not part of the team that went with the accused to a place where the machete was hidden.

The last witness for Prosecution was **E. 7161 Det. Sgt Yusuph** (PW7). This witness told the Court that he was the one who drew a sketch map of the scene of crime on 20<sup>th</sup> August, 2017. He tendered the sketchy map which was admitted as Exh.PE5.

In cross examination, PW7 stated that the sketchy map he drew does not show the solar bulb. In re-examination, the witness insisted that there was no solar bulb at the scene of crime as depicted in the sketchy map he drew.

After hearing the evidence as adduced by the witnesses for Prosecution and the admitted Exhibits, I was of the view that there was a prima facie case against the accused. In view of that, the Defence was invited to defend the case.



In his sworn evidence, the accused Joseph Masolwa (DW) vehemently denied to have a hand in the killing of Mbula Ngweso. He told this Court that he was arrested on 22<sup>nd</sup> August, 2022 around 0400hrs at his home in Nyashimba Village. The arresting party comprised of six policemen under the command of S/Sgt. Majani who cared to introduce himself to him. After the arrest, he was taken to Masumbwe Police Station where he was locked up.

The witness testified that upon sunrise, he was interrogated by S/Sgt. Majani who recorded his statement. In that interrogation, the witness told the Court that he denied to participate in killing of Mbula Ngweso. DW told this Court that he remained in police custody until on 25<sup>th</sup> August, 2017 when he was arraigned in Bukombe District Court.

From Bukombe District Court, the witness testified that he was taken back to Masumbwe Police Station where he was locked up. He stated that on 20<sup>th</sup> September, 2017 around 10:00hrs he was forcibly taken from his cell by the police officer who later recognized him as Afande Edward (PW6) to the interrogation room. In that room, he found other police officers whereby Afande Edward demanded him to confess that he participated in killing Mbula Ngweso. Joseph Masolwa stated that he denied to know anything with regard to the murder of Mbula Ngweso. Afande Edward told him "*utajua*" meaning "you will know".



Having uttered that, Afande Edward, according to the witness, he handcuffed his arms and legs. Thereafter, it was testified that Afande Edward, with the assistance of his colleagues, passed a hoe handle between his legs and put him hanging between two tables. While he was in that posture, DW told this Court that he was attacked severely by police officers who forced him to admit that he killed Mbula Ngweso.

It was his evidence that after going through that, he was lied down and Afande Edward took his pistol and put its muzzle on his head while saying "*nikumwage ubongo?*" literally meaning "should I blow your brain?". Joseph Masolwa averred that it was at that point when other police officers intervened and requested Afande Edward to leave him alone. Thereafter, Afande Edward took him to the lockup.

DW continued to testify that at 1200hrs on the same day, Afande Edward took him from the cell and ordered him to board a car whereby in which there were other three police officers. According to his testimony, the car directed to a place which was unknown to him. After a while a car was stopped and three police officers alighted from it leaving him with one police officer. It was his testimony that the three officers walked for a while and ordered the driver to drive the car behind them. Joseph Masolwa narrated that after following them for a while, the driver was ordered to stop and he was required to alight from it.



Thereat, he found the said police officers beside the road where also there was a machete. The witness averred that he was ordered to stand near the machete whereby police officers took photographs of him with a machete.

It was his testimony that from there he was taken to the deceased's family where he was introduced as a person who killed their relative. On 24<sup>th</sup> September, 2017 he was taken to the justice of the peace where he denied to have killed Mbula Ngweso. The accused in his testimony denied that the cautioned statement (Exh.PE5) is his. He further denied to have seen at any time Kashindye Joseph (PW3) before she came to this Court to testify.

When re-examined, DW testified that he did not know the deceased Mbula Ngweso or her family. He reiterated his evidence in chief.

Both parties were afforded the opportunity to make their final submissions. Mr. Lutehanga, learned Counsel for the accused submitted that the Prosecution has considerably failed to prove its case beyond reasonable doubts. He contended that the evidence of Kashindye Joseph (PW3) was tainted with full of doubts so far as the visual identification is concerned in a number of ways. One, the learned Counsel contended that the three minutes which were alleged to be spent by the assailant



in killing Mbula Ngweso is too short for a person with fright to identify the assailant.

Two, it was the learned Counsel's views that PW3 described the assailant as a person with dreadlocks all over his head and he wore a hooded coat. In such circumstances, it was not possible for PW3 to recognize the assailant. Three, Mr. Lutehanga contended that the evidence of PW3 that there was a solar bulb on the door is defeated by the evidence of PW7 who drew the sketchy map and testified that the solar bulb was inexistent. He stressed that according to the sketchy map and his drawer there was no solar bulb at the scene of crime. Four, it was the submission of learned Counsel for the accused that if Joseph Masolwa was identified at the scene of crime, for what reason police officers took him to the deceased's family and introduced him. He prayed this Court to refer to the case of **Waziri Amani v. Republic**, [1980] T.L.R. 250.

Ms. Alex, learned Senior State Attorney submitted that the Prosecution managed to prove its case beyond reasonable doubt. Firstly, it was her contention that PW3 managed to identify Joseph Masolwa as the assailant due to the existence of bright solar light and a light from the torch held by her young brother. Secondly, the learned Senior State Attorney submitted that the incident as evidenced by PW3 took three





minutes which were sufficient for her to identify the accused taking into consideration that the assailant passed behind her and she was one step from her grandmother with nothing between them to obscure her vision.

Thirdly, the learned Senior State Attorney was of the view that since PW3 testified to have known accused as they were living in the same village, it was obvious that he recognized him. She stressed that it was untenable for villagers not to know each other. She fortified her position by referring this Court to the case of **Chacha Jeremiah Marimi v. Republic**, Criminal Appeal No. 551 of 2015 where it was stressed that recognition is the best evidence as compared to identification of a stranger. In substantiating her position, the learned State Attorney contended that PW3 mentioned Joseph Masolwa as the assailant to her relatives and police officers.

It is trite a law, that for a person to be convicted of murder, the Prosecution is under the duty to prove cumulatively beyond reasonable doubt that:

1. There is a person who is dead.
2. The death of that person is unnatural.
3. The death of the person was premeditated in the sense that there was a malice aforethought attributed to the accused.





4. There is credible and cogent evidence that the accused is a perpetrator of the alleged killing.

**See: Anthony Kinanila and Another v. Republic**, Criminal Appeal No. 83 of 2021.

It is not in dispute that Mbula Ngweso is no more. The evidence of Kashindye Joseph (PW3) who eye witnessed the killing of her grandmother as collaborated by the evidence of Joel Biliyachunga (PW5) who examined Mbula Ngweso's body and filled an autopsy report (Exh.PE3) and the evidence of Det.Sgt. Yusuph (PW7) who drew the sketch map of the scene of crime prove beyond reasonable doubt that Mbula Ngweso is dead. This fact was also not disputed by the Defence.

It is further undisputed that the cause of death in relation to Mbula Ngweso was unlawful as it was not justified under any law. According to Kashindye Joseph (PW3), the late Mbula Ngweso met her death while sitting at her home when assailants invaded and killed her in cold blood. This piece of evidence was supported by Exh.PE3 (Post Mortem Report) which established the cause of death as severe bleeding. Again, this was not materially challenged by the Defence.

With regard to malice aforethought, section 200 of the Penal Code, Cap.16 stipulates:

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*'Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances—*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.'*

The then East African Court of Appeal had the opportunity to consider what constitutes malice aforethought in the case of **Republic vs. Tubere s/o Ochen** [1945] 12 EACA 63 where it stated:

*'That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured, and the*



*conduct of the Accused before, during, and after the attack.'*

Similarly, the Court of Appeal of Tanzania in the case of **Mark Kisimiri v. Republic**, Criminal Appeal No.39 of 2017 quoted with approval its observation in the case of **Enock Kipera v. Republic**, Criminal Appeal No. 150 of 1994 by stating:

*'...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained by various factors including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing.'*

According to Kashindye Joseph (PW3), the assailant used machete to inflict blows on the head and other parts of Mbula Ngweso's body. This evidence is supported by autopsy report (Exh.PE3) which evidenced that the deceased's body had multiple cut wounds on the head, both upper limbs and left lower limb. This evidence proves beyond reasonable doubt that the assailant by using a lethal weapon that is machete to inflict blows on Mbula Ngweso's head, which is a sensitive organ, and other parts of her body, he intended to cause death or grievous bodily harm. This means that the attacker had a malice aforethought to kill



Mbula Ngweso or cause grievous harm to her as envisaged under section 200 of the Penal Code, Cap. 16 and in the above cited cases.

The last question for determination of this Court is whether there was credible and cogent evidence that proves beyond reasonable doubt that the accused Joseph Masolwa was responsible for killing Mbula Ngweso. In determining this issue, I thought it pertinent to start with the evidence of Kashindye Joseph (PW3), the only eye witness.

In analyzing the evidence of PW3, I start with revisiting the guiding principles regarding reliability and credibility of a witness. Amongst the cardinal principles is that a witness must be trusted unless there is cogent reason to question his credibility. This position was taken by the Court of Appeal in the case of **Goodluck Kyando v. Republic**, [2006] TLR 365 where it was observed:

*'It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.'*

The criteria for not disbelieving a witness have been restated in different occasions to include incoherence of the evidence adduced by the witness and when the testimony of the witness is tested to testimonies of other witnesses including the accused. This position was



enunciated in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 where the Court of Appeal stated:

*'The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person.'*

In her evidence in chief, PW3 told this Court that the assailant was Joseph Masolwa, the accused. It was her testification that she managed to identify him amongst the three assailants due to the bright solar light which came from a bulb set on the door of their house. PW3 testified that she knows the accused as he lives in the same village she used to live. It was her evidence that the assailants spent three minutes to execute murder of Mbula Ngweso. The witness averred that he mentioned Joseph Masolwa as an attacker to her mother and *wananzengo* immediately after the incident.

When cross examined, PW3 maintained that he saw Joseph Masolwa cutting Mbula Ngweso with a machete since there was a bright solar light. She testified that she was distant from her grandmother and the accused had dreadlocks all over his head and he wore a hooded jacket that hid his face. She stated that in their village there was only



one person with dreadlocks who was Joseph Masolwa. It was her testimony that without the assistance of the police officers who brought Joseph Masolwa at their residence and introduced him as the killer of Mbula Ngweso, she could not know who the killer of their grandmother is. She told this Court that she mentioned Joseph Masolwa as a culprit for the first time when she made her statement to police.

In re-examination, the witness reiterated her position that she identified the accused since there was a bright solar light. She added that there was also a torch light from the torch held by his young brother. The witness averred that she informed his fathers and police officers that Joseph Masolwa was the one who killed Mbula Ngweso.

With this kind of evidence as adduced by PW3 and mindful of the fact that as a trial Court, this Court is bound to test the credibility of the witness as per the decision of the Court of Appeal in the case of **Shabani Daudi v. Republic** (Supra), I critically evaluated the said evidence as reflected in the following paragraphs.

While I agree that Kashindye Joseph (PW3) witnessed the murderous act against Mbula Ngweso, her grandmother, it is my finding that this witness is not credible so far as her testimony with regard to who killed Mbula Ngweso is concerned. I hold so for the following reasons.





**One**, this witness testified that there was a bright solar light that enabled her to identify Joseph Masolwa as a perpetrator of the killing of Mbula Ngweso. The same witness testified that, apart from the bright solar light from the bulb set on the door, there was also a torch light that also helped her to identify the accused. I asked myself if there was a bright solar light, how come her younger brother used torch light in such circumstances? It is my conviction that there was no bright solar light as claimed by the witness since if the solar light was present, there was no need for her younger brother to use torch light.

I am further fortified in this regard by the evidence of Det. Sgt. Yusuph (PW7) who testified that at the scene of crime there was no solar bulb and the same testification is reflected in Exh. PE5 (sketchy map) which does not show the existence of the solar bulb in the scene of crime. Ms. Alex, the learned Senior State Attorney argued that the evidence of PW7 with regard to nonexistence of solar bulb should be ignored as he was not present at the scene of crime. With due respect to the Ms. Alex, I do not agree with her argument. This is due to the fact that the sketchy map was drawn within sixteen hours since the incident took place. If there was a bulb at the scene of crime, surely, PW7 would have seen it and reflected the same in the sketchy map.





**Two**, PW3 in her evidence gave different accounts as to whom she firstly mentioned Joseph Masolwa as a person who killed her grandmother. She testified that she firstly mentioned the accused as the culprit to her mother and *wananzengo* who gathered at Mbula Ngweso's home. The witness testified further that she mentioned Joseph Masolwa as responsible for killing Mbula Ngweso to her fathers and police. She also evidenced that she mentioned Joseph Masolwa for the first time to the police when she made her statement. In the same testification, she stated that the police officers are the ones who informed them that Joseph Masolwa is the one who killed Mbula Ngweso.

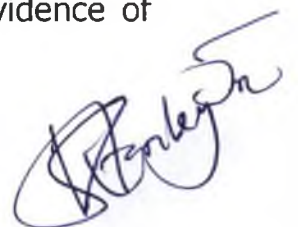
By giving different accounts as to the source of light and to whom she firstly mentioned Joseph Masolwa, I hold a firm view that this witness is not coherent in her evidence so far as identification of the accused is concerned. In that case, I will accord no weight to the evidence of PW3 as far as identification of the accused is concerned. I hold so on the account that identification of the assailant is an issue which goes to the root of the case at hand.

Assuming that I did not evaluate the evidence of PW3 in line of her credibility, the question for determination would be whether her evidence if tested against the principles governing visual identification would have been relied upon. It is trite a law in this jurisdiction that



evidence of visual identification is the weakest one as it is prone to mistaken identification. **See: Waziri Amani's case** (Supra). In that case, it is unexpected of this Court to rely on PW3's evidence which is shaky in relation to the source of light and which has been contradicted with the testimony of PW7 and Exh.PE5. Further, it is dangerous to rely on her evidence taking into consideration that she testified to the effect that the assailant had dreadlocks all over his head and he wore a hooded jacket that hid his face. In those circumstances, there is a likelihood that the witness was not in a position to identify the assailant who hid his face with hooded jacket. Further, this Court asked itself as to how the witness saw the dreadlocks whilst the assailant wore a hooded jacket. Definitely, her assertion that the culprit had dreadlocks and that in the village the only person with dreadlocks was Joseph Masolwa amounts to a mere suspicion of which I am not prepared to take into consideration.

As hinted hereinabove, in her submission, the learned Senior State Attorney argued that PW3 recognised the accused and in view of that she mentioned him as a culprit to her relatives and police officers. In substantiating her argument, she referred this Court to the case of **Chacha Jeremiah Murimi** (Supra). Much as I agree with the observation of the Court of Appeal in the cited case that evidence of



recognition may be reliable as compared to identification of a stranger, I do not agree that the observation of the Court of Appeal is applicable to the instant case. In the cited case as opposed to this case, the source of light was not in doubt as it was moon. In this case, the source of light is subject of different accounts of PW3 as she stated it to be a bright solar light only and sometimes a bright solar light and a torchlight. Further, there is evidence that there was no solar light bulb at all as per PW7. In the cited case, PW1 gave only one account as to whom he firstly mentioned the accused whilst in this case PW3 is not precisely as to whom she firstly mentioned the accused. With these factors, I am not prepared to hold that PW3 recognised or identified her village mate as a culprit.

If I assume that what has been stated by PW3 in her evidence in chief that she related firstly to her mother and later to *wananzengo* is true, why Prosecution did not field PW3's mother to testify on that? If that is a true account of what she did on the fateful day, why police officers took the accused to the deceased's family and introduced Joseph Masolwa to them as a murderer of their grandmother? If I take this assumption as true, why PW3 remarked that in the absence of the police intervention, they could not be able to know the murderer of their grandmother?



While I left these questions I posed here unanswered, I draw an inference against the Prosecution that it is not true that PW3 mentioned the accused to her mother or *wananzengo* as she testified. In that case, failure of witness to mention the accused at the earliest opportunity puts the evidence in question not reliable. Had witness told his mother and *wanazengo* immediately after the incident that Joseph Masolwa was the one who killed Mbula Ngweso, surely *wananzengo* would not have sat down without arresting him for almost three days until he was arrested by police officers. According to her, *wananzengo* did not go in the accused's house in search of him. This creates as doubt in my mind if PW3 really mentioned Joseph Masolwa at the earliest opportunity.

Having discarded the evidence of PW3, the remaining evidence that links the accused with the murder of Mbula Ngweso is his cautioned statement which was admitted as Exh.PE4. The cautioned statement, which was retracted as per section 27(3) of the Tanzania Evidence Act, Cap.6 for being involuntarily taken, was recorded by **E.9348 Det. Sgt Edward Katemi (PW6)**. According to **F.1251 S/Sgt. Majani Saasita (PW1)**, the accused was arrested on 23<sup>rd</sup> August, 2017 at 0400hrs and few hours later the cautioned statement was recorded by PW6. It was PW1's evidence that the accused was taken to the justice of the peace on 24<sup>th</sup> August, 2017 and arraigned in court on 25<sup>th</sup> August, 2017 when

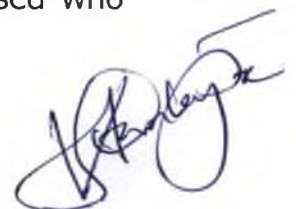


the charge of murder was read over to him before being remanded. This witness testified that the accused person was released after almost a month from prison at the instance of the said Task Force for the purpose of taking the accused to a place where he had hidden the machete he used to kill Mbula Ngweso.

In his evidence, PW6 testified to have recorded the statement of the accused on 23<sup>rd</sup> August, 2017. However, in his defence, the accused Joseph Masolwa contended that he met PW6 for the first time on 20<sup>th</sup> September, 2017 when he tortured and took him to a bush where he was forced to take a photograph with a machete which was tendered as Exh.PE1.

In the said cautioned statement, the accused is recorded to confess that he participated in the killing of Mbula Ngweso in the company of two persons. He is recorded to state that he did so after being hired by one mzee Bangili who was accusing Mbula Ngweso of witchcraft. According to Exh. PE4, the accused was recorded to state that he hid the machete he used to kill Mbula Ngweso at the bush which was near a primary school.

When dealing with the cautioned statement, I thought it imperative to highlight guiding principles in the due course. It is a principle of law that the best evidence is the one of the accused who



confessed the offence he is charged of. This position has been taken in a number of cases including the celebrated one of **Nyerere Nyegue v. Republic**, Criminal Appeal No. 67 of 2010 where the Court of Appeal stated:

*'..the best evidence in a criminal trial is a voluntary confession from the accused himself.'*

I also subscribe to that position that a voluntary confession of an accused is the best evidence. However, in my opinion, the observation of the court of appeal as far as voluntary confession is concerned should not be taken blindly without due regard to other factors. The Court of Appeal in a number of cases has set checks and balance for a voluntary confession to be taken as the best evidence. One of them is to take precautions before relying on a voluntary confession which has been repudiated or retracted. This position was enunciated in the case of **Hemed Abdallah v. Republic**, [1995] TLR 172 where the Court of Appeal stated:

*'Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a*





*conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado.'*

The cautioned statement (Exh.PE4) which the Prosecution relies in its bid to prove its case was repudiated by the accused. In that case, I am obliged to firstly look at the circumstances of this case with a view to satisfying myself that the said confession is true.

**One**, in the cautioned statement which was taken on 23<sup>rd</sup> August, 2017, the accused person was recorded to state that he hid the machete at the bush near the primary school. He stated:

*'Hata hivyo kabla ya kukamatwa hili panga langu nililolitemia katika kumuua MBULA D/O Ngweso ambapo ilikuwa tarehe tarehe 21/08/2017 Muda wa Saa 17:00 hrs katika maeneo ya shamba la shule ya msingi Nyashimba Jirani na barabara ya kutoka Nyashimba Kwenda Kijiji cha Mwabomba katika kichaka kidogo nikawa nimelificha panga hilo.'*

In this regard, I asked myself as to why Police took almost a month to take the accused to the bush in which the machete was hidden for the purpose of recovering of the same. According to certificate of seizure (Exh.PE2), the said machete was recovered on 20<sup>th</sup> September, 2017. Common sense dictates the possibility of something devious to be



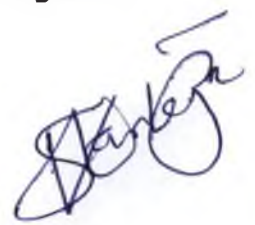


cooked against the accused. If it is true that Exh.PE5 was the true cautioned statement of the accused which was recorded on 23<sup>rd</sup> August, 2017, what made the investigators not to cause recovery of the said machete within a reasonable time? Since neither of Prosecution witnesses accounted for such inordinate delay, I do agree with the evidence of the accused that he met PW6 for the first time on 20<sup>th</sup> September, 2017 and on that day, he was tricked to sign the so called cautioned statement. In view of that I doubt the truthfulness of the contents of the cautioned statement.

**Two**, the cautioned statement shows that it was recorded from 07:30 hrs. However, the accused person is recorded to state the following:

*'Kwa hiyo basi kwenye saa 07:30hrs nikatolewa na askari aliyejitambulisha kwa jina la Afande Majani akaniuliza juu ya hilo tukio nami nikamua kumueleza ule ukweli.....'*

In view of the accused's statement that he was taken from the lockup by Afande Majani at 07:30hrs, it is clear in my mind that the cautioned statement was not recorded at 07:30hrs. This is due to the fact that it was impossible for the same accused to be interrogated by two police officers at the same time and report about one interrogation



to another officer at the very same time. In my opinion, this creates a doubt as to the truthfulness of the cautioned statement purportedly recorded by PW6.

From the above reasons, it is my conclusion that the cautioned statement of the accused was tainted with elements of untruthfulness. In that case, I cannot rely on it to convict the accused. In this respect, I am inspired by the decision of the Court of Appeal in the case of **Juma Magori @ Patrick and Four Others v. Republic**, Criminal Appeal No. 328 of 2014 in which it was stated:

*'...We take it to be trite law that for a confessional statement to be proof of commission of an offence by its maker, it must not only have been made freely and voluntarily but must also be nothing but true.'*

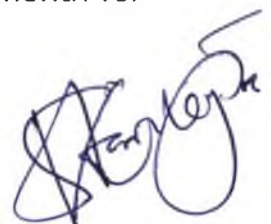
By the way, it is my conviction that PW6 is not a credible witness. In his evidence, he told this Court that he was present when police officers went to the scene of crime on 20<sup>th</sup> August, 2017 whereby the sketchy map was drawn. He stated that on that day, police officers including him went there with the accused person. The same witness during trial within trial averred that he arrived at Bukombe in the morning hours of 23<sup>rd</sup> August, 2017. I have failed to understand why a police officer of his experience is economical of truth while it is clear that



on 20<sup>th</sup> August 2017 the accused was not yet arrested and he was not in Bukombe, if I take his words to be true.

I do concur with the submission of the learned Senior State Attorney that a confession that leads to the recovery of the weapon proves that what was stated in the cautioned statement is true. However, as I stated hereinabove, the recovery of machete in this case is prone to fabrication as it took almost a month for the same to be recovered. Further, recovery of the machete was founded on the cautioned statement which is suspicious as to its truthfulness. I am aware that there was PW4, an independent witness, who testified to have seen the accused recovering the machete from the grasses. Much as I do consider PW4 as an independent witness, that does not erode the fact that the inordinate delay could be used to plant the said machete in that bush.

It is my considered view that if the Prosecution was sure of the fact that it was the accused who hid the said machete in that bush, how come it did not take the same to forensic investigation so far as the finger prints are concerned. Since the accused was the one who hid the machete, surely, he was the one who touched it for the last time and in that case his finger prints would be found on that machete. Failure to do so and taking into consideration the fact that it took almost a month for




the machete to be recovered, I take it not safe to convict the accused basing on that.

In view of the foregoing, it is my conviction that the Prosecution has failed to prove this case against the accused beyond reasonable doubt. I am alive with the principle that conviction cannot be attained on the weakness of the defence. This position was stipulated in the case of **Christian Kale and Another v. Republic** [1992] TLR 303, in which it was held that:

*'In criminal cases courts are barred from convicting on weaknesses of defence be it on alibi or otherwise.'*

Joseph Masolwa is hereby acquitted of murder case contrary to section 196 and 197 of the Penal Code, Cap. 16. It is ordered that he be set free with immediate effect unless otherwise held for another lawful cause.



  
**KS KAMANA**  
**JUDGE**  
**15/12/2022**