

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

**SITTING AT SHINYANGA**

**CRIMINAL SESSIONS CASE NO. 81 OF 2020**

**THE REPUBLIC**

**VERSUS**

**MASUMBUKO S/O SAID MANYANDA**

**JUDGEMENT**

*23<sup>rd</sup> November & 2<sup>nd</sup> December, 2022*

**NDUNGURU, J:**

The accused person one Masumbuko s/o Said Manyanda (herein referred as accused person) is facing information for murder contrary to Section 196 and 197 of the Penal Code (Cap 16 R.E 2002). It is alleged by the prosecution that on 7<sup>th</sup> day of August 2019 at Nyambura village within Kahama District in Shinyanga Region, the accused murdered on Hamis s/o Kadilana.

The facts giving rise to this trial albeit in brief is as follows: That on 07<sup>th</sup> day of August at night hours the deceased was at his home attending the sleep with his wife one Shija Mkera. While asleep they were awoken by a sound of the door being pushed by unknown persons. Suddenly they

were invaded by the bandits who had "panga". That deceased picked a torch and showing to the direction of the invaders. That the bandits started assaulting the deceased using a panga. That as the torch was showed to the direction of the invaders, the wife of the deceased managed to identify the accused person.

That the accused and his companion disappeared from the scene. That the wife of the deceased raised an alarm popularly 'mwano' one neighbor responded to it. That the wife of the deceased mentioned the accused person to be one of the bandits to her neighbor. The matter was reported to the police who visited the locus in quo. The accused was arrested and arraigned for murder.

During plea taking the accused person pleaded not guilty to the charge. following his plea of not guilty, preliminary hearing was conducted. The accused admitted his names only that he is Masumbuko s/o Said Manyanda.

On the date the case was tabled for hearing, Ms. Ajuaye Zegeli, the Principal State Attorney assisted by Rose Kimaro the learned State Attorney appeared for the Republic while the accused person enjoyed the service of Mr. Shaban Mvungi learned Defence counsel.

In discharging the duty **shouldered** that is proving the charge laid against the accused person, prosecution marshalled three witnesses and tendered one documentary evidence to wit; the Report on Post Mortem Examination. The said document was tendered and admitted as exhibit "P1" during preliminary hearing.

Shija Mkera testified as PW1. Her testimony was to the effect that she is living at Nyambula village. The deceased is her husband. Her husband died on 07/08/2019. She went on telling that on the fateful date at about 24:00 hours at midnight while at home sleeping with he husband they were invaded by three people. She said the invaders having broken the door and entered therein, her woke up and shone the torch. PW1 said she managed to identify one of the invaded. That she identified Masumbuko Said the one who was a nephew of the deceased. PW1 told the court when the bandits entered two of them had torch on their hands and Masumbuko was one of them. That the deceased had a torch as well. PW1 told the court the two had held torch stood at the door of the room. Then Masumbuko (accused) started wounding by cutting the deceased. She said, the deceased fell down crying "mjomba wangu unaniua". "Mjomba wangu Masumbuko unaniua".

PW1 went on testifying that, she was told to cover up herself with the bed sheet that as she covered herself. Masumbuko went on cutting the deceased. That as she tried to ask them to stop, they told her to keep quite. While cutting/wounding the deceased, the panga lost direction/escaped and wounded her on her leg. PW1 told the court that her husband died on the spot.

PW1 went on saying the bandits commanded her to give them money as she denied to have money the accused took her phone and picked out the battery and the sim card. He started searching the money in the clothes of the deceased. PW1 said he told the accused that the money was kept in another room. During all the time the other two stood at the door while their were shone direct at the bed room. PW1 said the accused told him to go ahead of him to the room where the money was. As she entered the room the accused stood at the door. She took the money (45,000/-) and gave it to him. Having given him the money she was told to sleep not to shout.

Pw1 went further telling the court that having entered the room heard the voice of his neighbor one Lazaro calling outside. She responded and told him that they are invaded and his husband is wounded to death. PW1 said he told Lazaro among the bandits she managed to



identify, is Masumbuko. The witness said Lazaro left the scene went to raise alarm (mwano). The witness told the court she also ran away while crying and went back. When the people had gathered, it is when she came to her senses and noted to have been wounded by panga. PW1 told the court that the matter was reported to the police and the police arrived and took her to Kahama Government Hospital for treatment. PW1 told the court that she knows Masumbuko very well as he has lived at the same compound almost twenty five (25) years. His mother also lived there. That Masumbuko and the deceased lived in harmony/peacefully.

In cross examination, PW1 told the court that the event happened at 00:00 hours (midnight). That it was Lazaro who mentioned the time. That when invaded they were asleep. They were awoken by the bang of the door. At the compound there were two houses. One she used to sleep with the deceased and the other was for children. The second house had only children on the date. Shija Kadilana is her sister in law. On the event date she had slept in another room in the house they slept. Shija Kadilana got out when the event was already over/completed. That she got out when DW1 with the deceased were taken to the hospital.

When Lazaro arrived at the scene met invaders had already left/disappeared. The event took a very short time (on her words muda

mdogo saana). That at home they used a torch only as a source of light. They had a torch in this room and another torch was in the room of Shija d/o Kadilana.

PW1 went further saying the torches used by bandits had very strong light. The torches were shone/directed to them. That the torch his husband/deceased had was using small batteries. Masumbuko had a torch and panga. That she had never testified on the way the bandits dressed. That there existed conflict between Masumbuko and deceased for division of farms left by his father which were used by deceased. That the misunderstanding had existed for almost two years before inversion had occurred. PW1 said she was told to cover herself after the deceased had been cut at the first time. That she raised an alarm when Lazaro had arrived. She did not shout before Lazaro had arrived as she thought the bandits were still outside.

In re examination, PW1 told the court that Lazaro came having heard an alarm. She uncovered when the accused asked for money. That Masumbuko was claiming for division of the farms which were used by the deceased. She identified broke and entered the room. When demanded money the two who stood at the door switched off their torches.

SHIJA TABU, testified as PW2. His testimony was that he is living at Nyambula village in Kahama District. The witness told the court that on 07/08/2019 at about 23:00 hours while sleeping heard alarm (mwano). He woke up and went to direction where the alarm was heard. It was heard from his neighbor one Hamis Kadilana (deceased). He said at the scene found his neighbor had been invaded. Hamis was wounded with a panga, the sister of Hamis one Shija and the wife of Hamis both were wounded. That while at the scene they started tracing the footmarks (nyayo) PW2 said they followed the footmarks up to Nhulu village where the footmarks cornered leading to Ngogwa village direct to the house of the accused.

The witness said at they awoke the accused as he got out wearing the shoes with the same footmarks which they followed up to his home. PW2 went on telling the court that Masumbuko having got out his lower part of the pair of trousers had blood stains. He further told the court that the accused was interrogated on his involvement in the commission of crime, he denied. They kept him under arrest and informed the councilor who reported to police who went to the deceased.

In cross examination, PW2 told the court that the cutting happened during dry season. He is not a footstep marks investigation expert. That



he arrived at the scene at night. The place has no electricity they used torch. At the scene he never heard anything related to Masumbuko/accused. The footmarks (nyayo) were traced in the path. The people used to pass on the said path. The blood stain on the trouser were discernible. That Masumbuko was interrogated on the blood stains but did not respond. At the scene he met Lazro already arrived. He does not remember whether there was a leader at the scene. He knew the home of Masumbuko at Ngogwa village.

PW3 was Juma Shabani. The substance of his testimony was that; he is living at Ngogwa at Kahama said the deceased on Hamis Kadilana is his son. That on 07/08/2019 night he got information from Shaban Juma that Hamis has been invaded. Further that Shija d/o Kadilana, the sister of Hamis and Shija Mkera, the wife of Hamis have been wounded. He went at their home and found them to have already been taken to the hospital. PW3 said he visited them at Kahama District Hospital. That Shija Kadilana had was cut (chopped off) while Shija Mkera was wounded on leg. PW3 told the court that Shija Mkera told him to had identified the accused being among the invaders. He said the deceased was claiming from the deceased the division of farms left by his grandfather as inheritance of his mother is also dead. the farms are in the hands of



Hamis. It is Hamis who was cultivating those farms. That Masumbuko (accused) had once told him about inheritance of those farms.

In cross examination PW3 told the court, when he got information went direct to the scene and then to the hospital. The information that the deceased was invaded he got from the people who traced the footmarks. Juma Shaban was living nearby Hamis (deceased). Juma Shaban did not tell him that it was Masumbuko (accused) who committed the offence.

At the hospital he talked with Shija Mkera only. He said Shija Mkera told him that when the bandits entered the room, Hamis (deceased) showed a torch, which assisted her to identify Masumbuko. That the invaders were three. In his statement he stated the invaders were five (having referred) his statement under section 154 of TEA.

Masumbuko Said defended himself as DW1. His testimony was that on 07/08/2019 at about 04:00 pm he was at the home of Mabula Mcheka at Katendele village awaiting to watch football match. At about 20:00 hours he left the place went to his first wife one Fatuma. Having taken meal, he left going to his second wife one Veronica. He arrived at home at about 21:00 hours. He slept. That at about 06:00am people knocked the window. When he got out he met a crowd of people. They also called his

wife. They took her around the house and told her if she does not tell the truth will be killed. PW2 was one of those people. He said those people told him that he is suspected to have committed the crime happened at night. They told him to step on the ground in order to compare the foot marks seen at the scene. As he denied to have been involved in crime, they started beating him. The people informed the police who went to collect him and sent him to Kahama police station. That at the police he denied to have committed the offence. DW1 went on telling the court that he had no conflict with his nephew/the deceased. He sometimes but not often used to visit his nephew. He did not own bicycle. That the last time he went to Nyambura is when he attend the funeral of his uncle who died by thunder. DW1 told the court that PW1 named him because she was not happy on the good relation existed between the accused and his nephew (the deceased). He said the deceased used to borrow him "maksai" (bulls) for cultivation, something which was irritating her. He insisted to have not committed crime, said he left it for the court to look at.

In cross examination DW1 told the court that he borrowed maksai in 2018. At the police he was seriously beaten. The Sungusungu also beaten him. That when interrogated, he denied to have committed the

offence. PW2 was among the people who arrested him. He did not know that the properties of his grandmother were administered by the deceased. He is living at different village from PW3. Ngogwa is a ward there are some villager which constitute the ward called Ngongwa. DW1 told the court that he was arrested on 07/08/2019 and was sent to court on 13/08/2019. He was not aware of the funeral/inversion till when he was arrested. The prosecution witnesses know the time Hamis died. In re-examination DW1 told the court that those who arrested told him to step on the ground in order to compare footmarks (nyayo). That was the end of the prosecution and defence case.

The issue of determination at this point is whether the prosecution has proved the guilty of the accused to the standard required by law, that is beyond reasonable doubt. To land to such determination, the following sub issues are very key:

- (i) Whether the person one Hamis Kadilana alleged to have died is actually dead if yes;
- (ii) Whether the death was of unnatural causes, if in affirmative,
- (iii) Whether it is the accused person one Masumbuko Said who killed Hamis Kadilana who is subject to this trial, if in affirmative,



(iv) Whether his action was actuated with malice aforethought

For good landing to my destination. I will discuss and resolve the above raised sub-issues in the light of evidence available and the law applicable.

As to whether Hamis Kadilana is actually dead. The evidence of PW1 who was the wife of the deceased told the court the way the bandits broke into their room carried with panga and attacked the deceased who died at the spot. This piece of evidence has never been challenged. There is no any rival argument to that effect. But further the report on post mortem examination (Exhibit P1) indicates that the deceased person whom medical investigation was done upon is Hamis Kadilana of Nyambura.

According the above issue, is whether his death was of unnatural cause. The evidence available at my disposal in that the deceased was attacked with panga, and was wounded on several parts of his body to death. This was the evidence of PW1. Indeed, the post mortem examination report (Exhibit P1) indicates the cause of death was due to "Acute blood loose". The report (Exhibit P1) detailed that the deceased sustained multiple cut wounds on head 8 cm long depth to the skull



involved cerebral Arlay, huge cut wound on neck involving the big vessel etc. and this acute blood loose caused the death.

Taking into account the testimony of PW1 and the findings contained in the medical report (Exhibit P1), it is common that the deceased did not die due to any malaice except acute blood loose due to cut wounds he sustained. To conclude, it is proved by the prosecution beyond reasonable doubt that Hamis Kadilana is actually dead and his death was not of natural cause. He encountered the most violent and animalic death.

The most pertinent and contentions issue to be determined is whether or not it is the accused person one Masumbuko s/o Said and nobody else responsible with the death of Hamis s/o Kadilana who is the subject in this trial. In tandem with it is, if it is held affirmative, whether his action was actuated with malice aforethought.

In this case, the weight of side is carried by prosecution the testimony of PW1 and PW2. PW1 is the wife of the deceased she was present at the scene at the time when the deceased was killed, and thus alleged to have identified the culprit. The testimony of PW2 is circumstantial one as he was not present at the scene when the offence was committed, he went later and but his investigative measures which

he took connected the accused with the crime, and creates an hypothesis which is leading to the irresistible conclusion that it was the accused person and no body else who committed the offence. He is trying to convince the court.

The testimony of PW1 is to the effect that the offence was committed at about 00:00 hours (midnight). That they were awoken from asleep by the sound of the door being pushed by the bandits. The facts that the offence was committed at night, the law of evidence is identification comes into play. The issue to be determined by the court now is whether PW1 properly identified the accused person.

In a number of occasions, the Court of Appeal of Tanzania and this court as well have reiterated the cardinal principle pertaining the evidence of visual identification. The principle is that the evidence of visual identification is the weakest and most unreliable and that courts should only act on it when satisfied that the possibilities of mistaken identify are eliminated. The principle was underscored by the Court of Appeal in the case of *Waziri Aman V.R*, [1980] TLR 250. The court's predecessor, the Court of Appeal had also restated the principle in *R. V. Eria Sebwato* [1960] EA 179 and *Mugo V.R* [1966] EA 124, see also *Raymond Francis V.R* [1994] TLR 100, *Issa Mgare @ Shuka V.R*, Criminal Appeal No. 37

of 2005 (unreported). In the light of this principle, the question whether the evidence in this case passes the test has seriously engaged mind. A quick glance through the evidence of PW1 will enable me to resolve the issue. The question is whether PW1 was able to identify the accused properly at the time of inversion. PW1 told the court that he was able to identify the accused from the light of the torch the deceased had shone and the torch light flashed by the bandits. The evidence of PW1 is that the bandit's torches were very strong compared to the one the deceased had. The torch the deceased had was using small batteries more, PW1 said as they were on bed the torches of the bandits were directed on bed where she and the deceased slept. It is inconceivable that PW1 was able to identify the bandit/accused when the bandits flashed the strong torch they had and PW1 and deceased. It is common knowledge that it is easier for the one holding or flashing the torch to identify the person against whom the torch flashed. It seems to me that with the torch light flashed at PW1, she was more likely dazzled by the light. She could therefore not identify the accused properly. See **Michael Godwin and Another V. R**, Criminal Appeal No. 66 of 2002 (CAT) (unreported)

The evidence of PW1 is to the effect that she knew the accused for almost 25 years ago that also assisted her to identify it is trite the fact the



identifying witness knew the accused before the incident does not assist the prosecution in anyway unless there is cogent evidence that at the time the accused was alleged to be in the room PW1 he was properly identified. The generalized assertion PW1 knew the accused is not enough. (see Michael Godwin's case supra). In this aspect the CAT in the case of **Swelu Maramoja V.R**, Criminal Appeal No. 43 of 1991 was of the position that, the witness knowing the accused does not necessary be sufficient as it does not eliminate mistaken identity.

PW1 told the court that when her neighbor one Lazaro had arrived at the scene he mentioned to him the accused person that is Masumbuko was among the bandit and had identified him. I am aware that the naming of the accused at the earliest opportunity gives assurance and reliability of identification. See **Marwa Wangiti Mwita and Another V.R**, Criminal Appeal No. 6 of 1995, (unreported), **Samwel Msinga V.R**, Criminal Appeal No. 143 of 2005 (CAT) (unreported) and **Fadhili Gumbu @ Malota and three others V. Republic** [2006] TLR 50. In the instant case it is very unfortunate that the said Lazaro whom the accused was mentioned to never appeared in court to testify. But again, if it was true, PW1 told the court that when police arrived at the scene asked his name and was taken to the hospital. Why could she tell the police to had



identified the accused person. Not only that why didn't she mention before PW2 who also arrived at the scene after Lazaro had arrived. PW2 told the court that at the scene nothing was heard about the accused.

As regards the time in which PW1 was under observation, the witness tried as much as she could to elongate the time the event took by telling the court that having wounded the deceased, the accused started demanding money. That he started searching money in the clothes of the deceased, got to another room with her to collect money (45,000) where she had kept entered the room and took the baby to him, then left. But when cross examined on how long the event persisted in her words she said **"muda mdogo sana"**

In this case where the question of identification is paramount, equally important and decisive is the credibility of the identifying witness. This is in particular when the identification is by single witness. See **Rahim Isaka and Another V. The Republic**, Criminal Appeal No. 229 of 2010 <sup>CAT</sup> (SC) unreported. As regards the importance of credibility of the identifying witness the CAT in **Jaribu Abdalla V.R**, Criminal Appeal No. 220 of 1994 held:

*"..... In matters of identification, it is not enough merely to look at the factors favoring accurate*

*identification. Equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence."*

Every witness is entitled to credence and his evidence be acceptable as credible unless where there is a good and cogent reason for the court not believing the witness. See **Goodluck Nyando** V.R, [2006] TLR 363. Good and cogent reason could be where in the eyes of the court the evidence appears to be improbable, implausible or where there are material contradictions. **See Aloyce Maridadi V. Republic**, Criminal Appeal No. 208 of 2016 CAT (unreported).

To say a little on the evidence of PW1. In his evidence PW1 never testified the way the bandits dressed. It is was true that the accused was among the bandits and knowing that he is known to the place, he would have tried to cover his identity. Further, in her testimony in <sup>C</sup>thief PW1 told the court that the accused and deceased lived peacefully, but the existence of misunderstanding regarding division of the farms was revealed during cross examination.

In his testimony PW1 never testified on the presence of her sister in law one Shija Kadilana who also got injured wounded as they slept in the same house but different rooms. The fact which arose during cross

examination, where she said the two accused stood at the door all the time, and that Shija Kadilana got out of the room she was after the bandits had left. The evidence of PW2 and PW3 is that Shija Kadelana was also injured that her hand was chopped off. The question is who wounded her while according to PW1, the bandits were only three, two stood at the door all the time while the accused was busy wounding the deceased and searching and demanding the money. Taking all that into account I am inclined to hold and I do hold that PW1 is not a credible witness and her testimony is not worthy of credence and it does not deserve.

At hand, I am left with the testimony of PW2 and PW3. To my view the testimony left can no rescue the situation. PW2's evidence so to say is the evidence which led to the arrest of the accused. It is his assertion that having arrived at the scene in the course of establishing who might have committed the offence they started (people who gathered) tracing the foot marks from then to Ngogwa village to the home of the accused. The trace was done at that particular time by the aid of the torch they had. That the foot marks were traced in the path which many people used. Under commonsense I find it is quite impossible. PW2 was trying to lie the court. There might be something else which the witness has not disclosed which led them to arrest the accused.



The evidence of PW3 as well cannot serve the purpose as what he actually witnessed was to see the PW1 and Shija Kadilana being injured. As regards the Masumbuko being the culprit he just heard.

Having so said and done, I find the prosecution has failed to satisfy the court beyond reasonable doubt that he is the one who killed the deceased. This is due to the fact that the identification was tainted with shadow of doubts and there is no any other cogent and tangible evidence to connect the accused and the charge laid against him.


In the premises, I acquit the accused the accused person for the offence charged.



It is so ordered.

  
**D.B. Ndunguru**  
**Judge**  
**01/12/2022**

**COURT:** Right of appeal explained.

  
**D.B. Ndunguru**  
**Judge**  
**01/12/2022**