

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSIONS CASE NO. 10 OF 2019**

REPUBLIC

VERSUS

- 1. ELIAS s/o MWAITAMBILA**
- 2. BARAKA s/o DANIEL**
- 3. EDSON s/o MBUKWA**
- 4. LEONARD s/o MKISI**

JUDGMENT

Dated: 29th March, 2022

KARAYEMAHA, J

On 18/01/2008 Lyamba bar situated at Tunduma Township within Momba District in Songwe Region was invaded by the armed robbers. Prior gaining ingress inside halls of the bar, they short Adam s/o Mkondya, a security guard who died on the spot. His death is confirmed by Exhibit P1 (RPME) but the doctor was not called to testify and elaborate its contents. However, it indicates that the cause of death was severe bleeding due to severe vessels involvement. PW1 and PW2 also told the court that the deceased died on the fateful date due to a gunshot.

The incident occurred around 21:00 hours. By that time according to Judith Haule (PW1) lights were on and could witness the accused who held the gun shooting the deceased. At the same time saw all customers and bar attendants running to hide. She also saw him and two robbers getting in the bar hall near the counter, talking to Diana. From there they entered the counter where she was. According to her she saw the accused person and another person she failed to identify. PW1 went on testifying that she keenly observed the accused and described his dresses to be a shirt pink in colour, blue jeans and a long black coat. He appeared to be thin and averagely tall. After collecting Tshs. 600,000/= and three mobile phones in 5 to 6 minutes, the bandits switched off all lights and took on their heels. On the same night PW1 was taken to Police Station where she gave her statement. Investigation was staged whereby the accused was arrested on 19/01/2008. PW1 was called on 21/01/2008 at Tunduma Police Station where she identified the accused person on an identification parade out of 8 people who were paraded. In view of Aden Kajela (PW2), the accused on being interrogated mentioned his companions. That information enabled the Police Investigators to arrest Baraka s/o Daniel, Edson s/o Mbukwa, Leonard s/o Mkisi, who before being acquitted on reason of having no case to answer were the 2nd, 3rd and 4th accused persons. All accused persons

were arrested and charged with murder. The indictment was that on 18/01/2008 Tunduma Township within Momba District in Songwe Region, they murdered Adam s/o Mkondya.

They all denied the charge. As hinted hereinabove the 2nd, 3rd and 4th accused persons were acquitted at the closure of the prosecution case on the reason that they had no case to answer. The accused person on being found to have the case to answer testified as DW1 and distanced himself from the accusations. It was his defence that he was a business man selling fish. On 18/01/ 2008 he was from Lake Rukwa heading to Vwawa transporting fish with an intention of selling them at Tunduma. On 19/01/2008 went to sell fish at Tunduma. After doing business, he returned to Vwawa. On 20/01/2008 was arrested by police at Apex bar and taken to Vwawa Police Station. On the same day his house located at Ichenjezya area was searched and his properties such as TV, two decks, a bag of clothes, a wall watch and Tshs. 1,800,000/= were seized. He was told that he was searched because he was suspected of being in possession of the gun but it was not found therein. On the same day he was conveyed to Tunduma Police Station. On 21/01/2008 he was interrogated on several incidents of invading bars that happened at Tunduma. It was his further defence that he neither knew PW1 nor Lyamba bar. He denied going to Lyamba bar on

the night of 18/01/2008 and wondered why PW1 was connecting him with the invasion of the bar and death of the deceased that he was not involved in.

During the trial, I enjoyed the assistance of the able Mr. Patson Shigala, Mr. Aron Halioka and Ms. Ruth Musa Mwampunganga gentlemen and lady Assessors who sat with me. On summing up to them I told them that this case solely depends on the evidence of visual identification and credibility of PW1 against the defence of the accused person. All three of them entered a verdict of not guilty because the prosecution evidence was unreliable and failed to prove that the accused person killed the deceased.

It is upon the prosecution to prove the case beyond reasonable doubts not only that Adam Mkondya is dead but also that it is the accused person who has a hand in his death. Murder is proved when the death of one person is caused by another with malice aforethought. In this case injuries were caused by a bullet targeted on the forehead and pierced to the nape. The type of weapon and party of the body targeted prove malice aforethought on the part of the assailant. The issue calling for determination is whether or not the accused was the one who shot the deceased.

This case relies on evidence of visual identification. As the alleged incident occurred during nighttime it is crucial to determine if the accused person was properly identified at the scene of crime. Before taking any further step, I find it apposite to preface my discussion by restating the obvious principles guiding visual identification which have been emphasized in a litany of Court of Appeal decisions.

The law on the evidence of visual identification is well settled as Courts are 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, this 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 if 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 v. Republic* [1980] T.L.R 250, *Raymond Francis v Republic* [1994] T.L.R 100, *Chokera Mwita v Republic*, Criminal Appeal No. 17 of 2010 (Unreported) and *Baya Lusana v Republic*, Criminal Appeal No. 593 of 2017 (unreported). Similarly, the Court of Appeal of Tanzania drew an inspiration from the case of *Waziri Amani* (supra) in the case of *Chally*

Scania v 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."

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 v Republic*** [1992] T.L.R 100, ***Shamir John v Republic***, Criminal Appeal No. 166 of 2004 and ***Baya Lusana*** (supra) (unreported).

In the present case PW1 was the only person who identified the accused person at Lyamba bar among the bar attendants and customers who were present on fateful night. Her evidence reveals many features but the major ones are four (4).

The first feature concerns the incident of shooting. She said that she saw the accused person shooting the deceased. This assertion has made me think loudly. As per the circumstances of the bar premises that night, I think, it was very impossible to note and categorize the bandits from normal customers. In my considered opinion, bandits would not come with a gun carrying for everybody to see. Leaving that alone, it was not easy for PW1 to see the one who shot the deceased because she was busy attending customers. The counter where she was was full of customers who were drinking and ordering drinks. She did not say in her testimony at what time she stopped the services and concentrated on the outer part of the bar and see bandits who were going to invade the bar. If that was the case she would raise an alarm in the first place to arouse the attention of all people. Therefore, I find this assertion as an exaggeration.

The second feature revolves around what bandits did after shooting the deceased. PW1 told the Court that she saw 3 bandits matching to the hall near the counter. Although there were lamps in that hall which would facilitate seeing of the bandits, I doubt PW1's credibility. I say so, because after hearing the gun shot, every customer and bar attendants run to rescue their lives. PW1 said she could not run because the counter doors were closed and bandits were quick to get

there. From that testimony, it was not easy for her to soberly observe whatever they were doing. After all she did not say how she gathered strength to surpass the fear and shock. Although it is in evidence that she recognizes the sound of a gunshot having heard it when her husband was shot dead, PW1's evidence is lacking the statement that she, from that day, is not terrified by a gunshot and to her that is a normal thin. Similarly, her contention that they first interrogated Diana and then went to the counter was a lie. In the context of PW1's evidence bandits had no time waste.

The third feature regards the presence of the bandits in the counter. Basically, PW1 said it was in that room where she managed to closely observe the accused person. She said she looked at him so that he could have mercy on her. This in my view is a blatant lie. The accused person is said he was making orders and demanding money. He was in the meantime beating her on the back and cheek. This might have interrupted her concentration. It is worth to note at this juncture that someone had been killed. Whoever joked would suffer similar consequences. Therefore, even if lumps were on and had high intensity of light, PW1 could not easily observe the accused person and expose life to danger. Under fear of her life she cannot be said to have positively identified the bandits. In principle, however, horrifying a

situation is, there is a water shed mark and if that is reached then a victim overcomes his or her fear and measures up to the occasion. PW1, in the instant case, didn't get there. After the counter was broken, she had only one duty to perfume very quickly and that was giving the bandits money. According to her she didn't put up resistance. She had no many places to collect the money. She had it right in the counter kept in the basket and box. Mobile phones were also right there. In the totality of her evidence, PW1 could not surpass her fear because after getting the money, bandits did not spent more time. They run quickly out of the crime scene leaving all lights switched off. Indeed, the circumstances favouring unmistakable identification were not as easy.

The fourth feature regards identification parade. PW1 said that she identified the accused person on 21/01/2008 at the identification parade conducted by police at Tunduma Police Station. This contention is weak because it is not supported by any tangible evidence. PW1's testimony on this aspect needed corroboration.

In the totality of the evidence, the conditions, I hold, were unfavourable for a correct identification. PW1's identification evidence needed corroboration. There is plausible evidence to show that the

accused was a stranger to PW1 and conditions for positive identification were unfavourable.

In view of the pointed out doubts surrounding the prosecution case, I am not convinced that PW1 correctly identified the accused person as such the case against the accused person was not proved beyond reasonable doubt as required by law. This conclusion draws a concurrence with all gentlemen and lady assessors who were all of the settled opinion that the accused person was not guilty of the charged offence of murder. I am unflustered in my mind and completely convinced that the totality of the evidence adduced during this trial, leaves no doubt that there is no evidence linking the accused with the murder of the deceased. Consequently, I find the accused not guilty. He is henceforth acquitted.



Dated at Mbeya this 29th day of **March, 2022**

A handwritten signature in blue ink, appearing to be 'J.M. Karayemaha', written over a horizontal line.

J. M. KARAYEMAHA
JUDGE