

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 94 OF 2018

THE REPUBLIC

VERSUS

ATHUMANI HAMIS ZIAGALA

JUDGMENT

28th February and 8th March, 2022

KISANYA, J:

The accused person namely, Athumani Hamis Ziagala together with Muhisini Nyamgalama and Shukuru George Issa (henceforth "two others") were indicted for an offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, RE 2002]. It was alleged that, on the 13th day of October, 2017 at Soko la Maziwa within Kigamboni District in Dar es Salaam Region, the accused person and two others murdered one, Nyarenda Selemani Matei (henceforth "the deceased").

The accused person and two others denied having committed the offence. To prove its case, the prosecution marshaled a total of five (5) witnesses and tendered one documentary evidence namely, the Report on Post-Mortem Examination (Exhibit P1).

In a nutshell, the factual background leading to the arraignment of the accused person and two others is not complicated. On the 13th day of October, 2017, the deceased and three others, including PW2 Emmanuel Peter Wanchoke attended a form four graduation ceremony at Kisota Secondary School, whereby one of them was a grandaunt.

As the graduation ceremony was over, the deceased and his colleagues proceeded back home at 1600 hours. On their way back home, they met a group of people who attacked them. The deceased and his colleagues ran on different directions. The people who ran after the deceased raised an alarm that implied that the deceased was a thief. They also attacked him by using a hammer, stones, fists and kicks which were directed on different parts of his body. PW1 Adam Ambele Kyando identified two of them. He named them as Noah and Salehe. At the same time, different people responded to the thief's alarm that had been raised by the deceased's assailant and started to attack him. It was PW1's evidence that the accused person is among the persons who attacked the deceased and that, the former used fists and kicks.

The mob continued to attack the deceased until when he fell into the road's ditch at Soko la Maziwa area. Later, he was taken to the hospital by his brother one, Wakati Selemani Matei (PW3). He met his demise on 14/10/2021

at Muhimbili National Hospital. The autopsy conducted by PW5 Agela Mwakimonga revealed the deceased's death was caused by "severe traumatic brain injury" as shown in Exhibit P1. The accused person and two others were arrested and arraigned for the offence of murder.

It is noteworthy that, after hearing the prosecution case, Muhsini Nyamgalama and Shukuru George Issa were acquitted because they were not found with a case to answer.

In his defence, the accused person distanced himself from the offence preferred against him. Although he admitted having been at the scene, he denied having participated in beating or attacking the deceased.

During the trial, the prosecution was represented by Ms. Clara Charwe, learned Senior State Attorney and Ms. Grace, learned State Attorney. On the other hand, the accused person enjoyed the legal service of Mr. Alex Mushumbusi learned advocate. In terms of the law, the Court was aided by three assessors, namely, Mrs. Jenevila Lema, Mrs. Pierance Yohana and Mrs. Mwadawa Selemani—who were present during the trial. I thank them for performing their duties properly.

After hearing the defence case, the learned counsel made their respective final submissions for and against the charge preferred against the accused

person. Generally, the defence counsel's submission was to the effect that the prosecution had not proved its case beyond all reasonable doubts. In her reply to the submission, Ms. Clara was firm that the prosecution had proved the charge laid against the accused person.

Thereafter, I summed up the case to the distinguished assessors by guiding them on the nature of offence and evidence adduced in this case. I also guided them on the elements of the offence of murder and law governing visual identification, credibility of witness and contradictory evidence. When invited to give their opinion, all assessors held the view that the accused person had no malice aforethought. Consequently, they arrived at unanimous opinion that the accused person is guilty of a lesser offence of manslaughter and not murder.

Having considered the evidence adduced by each side, final submissions by the learned counsel for the parties and the opinion issued by the assessors, I am of the view that the main issue is whether the prosecution has proved its case beyond all reasonable doubts.

The law is settled that in murder cases, the prosecution is required to prove the elements of murder, as well as the identity of the accused person as the murderer. (See **Philimon Jumanne Agala @J4 vs R**, Criminal Appeal No. 187 of 2015, CAT at Mwanza (unreported)). Therefore, apart from proving that

there is a person who died unnatural death, it must be established that the accused person is the one who murdered the deceased and that he had malice aforethought.

In this case, the murder of the deceased was duly proved by evidence of PW2, PW3, PW4, PW5 and Exhibit. P1. Also, their evidence on what lead to the deceased's death was not challenged by the defence. In fact, the accused person admitted that he was present when the deceased was being attacked by a mob.

Regarding the identity of the accused person as the murderer, it is apparent that the prosecution's case is based on the visual identification evidence of PW1. It is trite law that great care or caution should be taken into account before relying on the identification evidence. Visual identification evidence cannot be acted upon by the court unless all possibilities of mistaken identity are eliminated, and the court is convinced that such evidence is watertight. There is a plethora of authorities on that position, one of them being the case of **Chokera Mwita vs R**, Criminal Appeal No. 17 of 2010 (unreported) in which the Court of Appeal held that:

"In short, the law on visual identification is well settled. Before relying on it, the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the

court is satisfied that the evidence before it is absolutely watertight "[Emphasis added].

Similar position was also stated in the case of **Philimon Jumanne Agala @J4** (supra), where the Court of Appeal held that:

*"We have already sufficiently demonstrated that visual identification and/or recognition evidence should be cautiously acted upon as it is prone to fabrication or being based on honest mistakes. It has been repeatedly held that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying: See, for instance **Mengi Paulo Samwel Lahana & Another v.R.**, Criminal Appeal No. 222 of 2006 and **Nyakango Olala James v.R.**, Criminal Appeal No. 32 of 2010 (both unreported)."*

Furthermore, case law has developed factors affecting accuracy of the identifying witness. In terms of the decision of the Court of Appeal in **Philimon Jumanne Agala @J4** (supra), the said factors fall into the three categories as follows:

*"The first category pertains to the **eyewitness** and includes factors such as uncorrected visual defects, fatigue, injury, intoxication, presence of a bias, an exceptional mental condition such as an intellectual disability or extremely low intelligence, age (if the **eyewitness** is either a young child or elderly). The second category relates to the event witnessed and includes the*

*effects of stress or fright, limited visibility, distance, distraction, the presence of a weapon (weapon focus), disguises, whether the eyewitness was aware at the time that a crime was occurring. The third category pertains to the identification itself. This category includes such factors as the length of time between observation and identification, any instance in which the eyewitness failed to identify the suspect or gave an inconsistent description, the value of lineups compared to show-ups, the value of photo identifications, compared to in-person identifications, and any exposure of the **eyewitness** to influences such as news reports or interaction with other witnesses. It also includes potentially suggestive police conduct, such as the instructions given to the **eyewitness** by police, the composition of the lineup, the way in which the lineup was carried out, and the behaviours of the persons conducting the line-up:"*

In the light of the foregoing, the factors to be considered in resolving whether the accused person was identified are; (a) how long did the witness have the accused person under observation? At what distance? (b) What was the source and intensity of the light if it was at night? (c) Was the observation impeded in any way? (d) Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? (e) What interval has lapsed between the original observation and the subsequent identification to the police? (f) Was there any material discrepancy

between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? (g) Did the witness name or describe the accused to the next person he saw? (f) Did that/those other person/s give evidence to confirm it? (See also the cases of **Chacha Jeremia Mrimi and 3 Others vs R**, Criminal Appeal No. 53 of 2015 (unreported) and **Waziri Amani vs R** [1980] TLR 250).

As alluded earlier, PW1 is the sole witness who testified to have identified the accused person as among the persons who attacked the deceased. His evidence on the issue under consideration was to the effect that he stood at a distance of 5 to 7 meters at the time of identifying the accused person; the incident started at 1600 hours when there was enough sunlight; the incident took 45 minutes and thus able to identify the deceased's assailants; and that the accused person was known to him before the incident because he was his neighbour. It is clear that, the said factors may suggest that the conditions were favorable for PW1 to identify the accused person.

However, apart from the factors favoring or not favoring proper identification, the decisive factor is whether the identifying witness is credible and reliable as held in the case of **Rahim Isaka and Another vs R.**, Criminal Appeal No. 229 of 2010, CAT at Iringa (unreported) that:

*"Quite apart, in cases, such as the present, whose determination is essentially dependent on visual identification, it is not enough to merely look at the factors favouring or disfavouring an accurate identification. **Equally important and decisive is the credibility of the identifying witness.**"*(Emphasize supplied).

As far as credibility of witness is concerned, the general rule is to the effect that every witness is entitled to credence and that his or her evidence must be considered unless there are cogent reasons to the contrary. (See **Goodluck Kyando vs R.**, [2006] TLR 367). It is also settled law that credibility of a witness can be determined by assessing the coherence of the testimony of the witness and/or by considering the testimony of that witness and the evidence of other witness, including that of the accused person. This stance was taken in case of **Raphael Mhando vs R**, Criminal Appeal No. 54 of 2017(unreported). In that case, the Court of Appeal cited with approval its decision in **Shabani Daudi vs R.**, Criminal Appeal No. 28 of 2000(unreported) where it was held that:

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

occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.”

I am also persuaded by the decision of this Court (Tiganga, J) in the case of **R. vs Muruga s/o Isaro @ Ng'waina and Another**, Criminal Sessions Case No. 30 of 2017, HCT at Mwanza (unreported) that the credibility and reliability of witness may be effected by: (i) contradictions, discrepancies and the conflicting statement in the witnesses evidence, (ii) failure of the witness to mention the suspect at the earliest opportunity possible, (iii) to give evidence basing on suspicion, (iv) evidence based on hearsay, (v) witness testifying as accomplice and (vi) a witness with interest to serve.

Reverting to the case at hand, Mr. Mushumbusi submitted that PW1 was not reliable on ground that he contradicted himself in respect of the distance at which he identified the accused person. In her reply, Ms. Clara admitted that at one point in time, PW1 testified that the distance was 5 meters and that he stated later that the distance was 7 meters. However, citing the case of **Deus Josias Kilala @Deo vs R**, Criminal Appeal No. 191 of 2018, CAT at DSM (unreported), the learned Senior State Attorney was of the firm view that the said contradiction is minor and that the same does not go the root of the case. The position in the above cited case is to the effect that a witness is not

expected to be right in restating every details due to the infirmity of human memory. In such a case, the court is enjoined to disregard or overlook the said contradiction. Given the fact that PW1 approximated the distance at which he identified the accused person attacking the deceased and as the incident occurred more than four years ago, I am of the view that the alleged contradiction is minor.

However, guided by the above position of law, I have observed that the credibility of PW1 is affected by the following factors:

First, PW1 told the Court that accused person was known to him before the incident because he was his neighbour. However, he did not demonstrate how the accused person was his neighbour. That aside, it is not disputed that the incident happened at Soko la Maziwa area within Kigamboni District. In his evidence in chief PW1 told the Court he lives at Mawenzi Street within Kigamboni District. However, upon being cross examined he stated that he was residing at Kisota area. On his part, the accused person testified that he resides at Soko la Maziwa area within Kigamboni. He was not cross-examined in respect of his residence. In that regard, if it is taken that the accused person resides at Soko la Maziwa, he is not PW1's neighbour. This is so when it is considered that the prosecution did not show the connection between Mawenzi Street or Kisota

where PW1 resides and Soko la Maziwa area where the accused person lives. That being the case, the manner in which PW1 had met the accused person before the incident is questionable.

Second, PW1 did not state at all whether he named the accused person immediately after the incident. Furthermore, although the investigator (PW4) testified that the accused person was named by the witnesses who were at the scene of crime, he was not in a position of telling the Court whether PW1 named the accused person. It is, therefore, my humble view that the prosecution has not proved that the identifying witness (PW1) named the accused person immediately after the commission of the offence.

Three, apart from adducing that he recognized the accused person, PW1 did not give the description of the accused person's attire, physique, complexion or any other distinct mark, if any. It is a legal requirement that the identifying witness must give details as to how he identified the assailant at the scene of crime to ensure that there is no mistake as to identity. See for instance, the case of **Mabula Makoye and Another vs R**, Criminal Appeal No. 227 of 2017 (unreported) where the Court of Appeal quoted its decision in **Boniface Siwinga vs R**, Criminal Appeal No. 421 of 2007 (unreported) that:

"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as in this case that conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."

Therefore, much as it is not clear whether the accused was not known to PW1 before the incident, the Court was expected to see evidence on how the accused was identified by PW1.

Three, PW1 gave no plausible explanation on his failure to report or prevent the commission the offence. It is in evidence that, he remained in his vehicle for forty five minutes, observing the deceased being attacked. He did not tell the Court whether he prevented the deceased's assailants from committing the offence or inform the nearby police station or local government's office. PW1's stated that he could not do so because he was alone in the vehicle. It is my considered view that such fact could not bar him to take the necessary action. This is so when it is considered that PW1 stated that he knew many people at Soko la Maziwa, including *boda boda* riders. He did not find it apt to inform them to assist and take the necessary measures against

the deceased's assailants. According to section 22 of the Penal Code, a person who abets another person in committing the offence is regarded as a principal offender. It is, therefore, my considered opinion, that PW1 had an interest to save. Ms. Clara's argument that the said factor is not sufficient to find PW1 not credible lacks merit.

From the above findings, it is clear that PW1 is not credible witness and that his evidence on visual identification was not sufficient to connect the accused person in the case at hand. In the absence of PW1's evidence, there remain no evidence to prove that the accused person attacked the deceased. I have considered further that, in terms of evidence given by PW1, many people responded to the thief's alarm. It is not known as why the witnesses whom the investigator (PW4) stated that they saw the accused person beating the deceased were not called to testify for the prosecution. In my view, the said failure is a serious omission. The witnesses referred to by PW1 could have given their evidence which connects the accused person to the case at hand. In that regard, it is clear that the omission to call other identifying witnesses weakened the prosecution's case.

I have stated earlier that, all three assessors opined that the accused person is guilty of the offence of manslaughter and not murder. Thus, their

opinion was based on the reason that the accused person attacked the deceased and that he had no intention of causing death. Having considered that PW1 who identified the accused person is not credible and since there is no other witness who testified to have seen the accused person attacking the deceased, I beg to differ with the distinguished assessors. It is my considered view that the prosecution has failed to prove that the deceased was murdered by the accused person.

In the final event, I find the accused person, Athuman Hamis Ziagala, not guilty of the offence of murder contrary to sections 196 and 197 of the Penal Code (supra). I, therefore, acquit him for the offence of murder laid against him, and order for his immediate release, unless he is held for some other lawful cause. It is so ordered.

DATED at DAR ES SALAAM this 8th day of March, 2022.



S.E. Kisanya
JUDGE
08/03/2022