

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

AT CHATO

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 16 OF 2021

THE REPUBLIC-----PROSECUTION.

VERSUS

CHARLES S/O TANO @MADIRISHA----- 1st ACCUSED.

TUNGI S/O MAGEJIWA----- 2nd ACCUSED.

JUDGMENT

Date of Last Order: 02.03.2023

Date of Judgment: 08.03.2023

M. MNYUKWA, J.

The accused persons, CHARLES S/O TANO@MADIRISHA and TUNGI S/O MAGEJIWA stand charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE: 2019] now [RE: 2022]. The prosecution alleged that on the 22nd day of February 2019 at



Bwanga Village in Chato District and Geita Region the accused persons CHARLES S/O TANO @MADIRISHA and TUNGI S/O MAGEJIWA did murder one TABU S/O KINGI. Both the accused persons denied the accusation. At the trial, the prosecution called a total of 7 witnesses and the accused persons defended the case themselves without calling witnesses.

During the trial, the prosecution side thus the Republic was represented by Mr. Clemence Mango, learned Senior State Attorney while Mr. Costantine Ramadhan, learned Advocate represented the 1st accused person and Mr. Innocent Kaijage represented the 2nd accused person.

I thank the counsels for their time and efforts in the finalization of this case. To prove their case, the prosecution lined up a total of 7 witnesses and the defence manned by two witnesses.

Inspector Thomas Alex Mbowe (PW1) testified that he is a police officer in the investigation unit at Geita and before he worked as OC-CID in Chato. On 23.08.2019 he conducted the identification parade of the 2nd accused person, Tungi s/o Magejiwa at Lubambagwe police station. He stated that after he had followed the procedures he set a parade, nine (a) people identical to the accused lined up and the witness, one Ester d/o Wiliam identified the accused person by touching him the shoulder when



she was passing in front of the line up and at the back. He testified further that the statement of the witness was taken including the statements of the two persons who stood in the right side and left side of the accused when he was identified. He testified further that he prepared an identification parade register, the police form No. 186 and the participants signed including the 2nd accused person. The identification parade register was admitted as exhibit P1.

When cross-examined, he testified that he conducted the identification parade as provided for under PGO No. 232. He states that persons who were selected resemble the accused in terms of age height and appearance

Ester Wiliam (PW2) testified that she is the deceased wife who lived at Matabe Chato. On 22.02.2019, at around 4.00hrs, he heard *Mwano* and then people went to their house and started demolishing their house. PW2 testified further that they got out and found a number of people who started beating her husband and took him at the back of the house and continued beating and burnt him till he died. She went on that after killing the deceased they entered inside the house and took a motorcycle outside and burnt it together with the house and left. She identified a person who



is called Golani. She pointed at the 1st accused who she claims to identify by the aid of the solar light and the distance is about 42 steps by walking. In her evidence, PW2 testified also to see the 2nd accused in the scene of crime and recognized him by his face though he was not recalling his name and she added that, after the incidence, the 2nd accused escaped.

She testified further that, she was able to identify the 1st accused for he was the worker of his husband herding his cattle and she saw him beating the deceased with the stick. She went on that, people beat the deceased from 4.00 to 5.00 am, burnt him and left the scene. The next day 24.02.2019 at around 12.00hrs police went to the scene and interviewed her and on 23.08.2019 she was called by the police and identified the 2nd accused person on the identification parade.

When cross-examined, she testified further that, when her statement was taken at the police station, she mentioned to have identified Mateso Kashirima and Philipo Mayila at the scene of crime and that people were many carrying touches as it was night and dark and that she could not estimate the number. There was a solar bulb in front of the house and they took the deceased from his house to a distance of 42 walking steps. She stated that after the incident neighbours came but she



could not recall to mention the persons who invaded her house to whom she identified at the scene for she was confused and she insisted to have identified the 2nd accused person on the scene of crime and at the police during the identification parade.

Mashiku Bujinwa (PW3) testified that he lives at Nyakayondwa and he knows both the accused persons since the 1st accused was working for the deceased and he knows the 2nd accused, Tungi Magejiwa as they lived in one village. He testified that, on 22.02.2019 he received a call from his wife over the incident of the murder of the deceased and he went to the scene from Katoro at around 13.00hrs and reported the incident to the police station and he was told by the wife of the deceased that she identified the 1st accused and other persons by face. He stated that police came and examined the body of the deceased and allow them to bury the body. He stated further that on February 2020, the 1st accused person was arrested at Matabe. On 17.08.2019, the 2nd accused was arrested at Nyawilimilwa.

When cross-examined, PW3 testified further that, he wrote his statement at the police station and he mentioned other persons to whom he was told by the deceased's wife that she identified Mateso



Tano@Shirima, Philipo Maira and Elias Selel. He denied having testified that PW2 identified only one person and stated that he reached at the scene of crime late and he met other people at the scene.

E 4265 D/ Surgent Jishosa (PW4) testified that he is a police officer working at Bwanga police station. On 18.09.2018 he recorded the statement of the 2nd accused person and when he wanted to tender it as an exhibit the defence objected for the reason that it was not listed as an exhibit to be tendered nor read over during the committal proceedings. Therefore, the same was not admitted.

He went on that the accused narrated the story that he was involved in the murder incident of Tabu s/o Kingi who was suspected of stealing the cattle.

Assistant Inspector Mwampamba (PW5) testified that he is a police officer working at Bukombe. In 2019 he was stationed at Bwanga Police station as a detective constable in a criminal investigation unit and on 23.02.2019 he was given a case file for investigation regarding the death of Tabu s/o Kingi. He stated that he went to the scene of crime and draw a sketch map and he was told that there was a big number of people at the scene of the crime. He further stated that, on 20.03.2019 the accused



person was arrested and sent to the police and he recorded his statement which he prays the court to admit as an exhibit whereas the defence objected for the reason that it is neither listed nor read out during the committal proceedings and after hearing the arguments for and against from both parties, the court could not admit it as part of evidence.

When cross-examined, he testified that, he went to the scene of crime on 24.02.2019 and the neighbours were already at the scene of crime and the 1st accused person was arrested on 04.03.2019. He went on that Golani is the famous name of the 1st accused and when the charge sheet is prepared the famous name is also included. He denied having been involved in the identification parade.

Dr. Deogratius Gaudence Mariba (PW6) testified that he is a medical doctor who started working at Bwanga Health Centre as a medical doctor in charge. On 23.02.2019 at around 5.00 he was informed on the incident of Murder at Ipalamasa village and accompanied with police officers went to the scene and examined the body of the deceased. He was informed that the body was of one Tabu s/o Kingi and after his investigation, he found that the cause of the death was due to excessive bleeding and suffocation. He prepared a post mortem examination report (PMR) and



wrote his statement in the police station. He prays to tender the PMR as an exhibit and the defence side did not object and the PMR of the deceased, Tabu s/o Kingi was admitted as exhibit P2.

Nyerembe Bwire Jeta (PW7) testified that he is the Ward Executive Officer (WEO) of Nyarutembo ward within Chato and in 2019 he was WEO at Bwanga ward. He testified that on 21.03.2019 around 10.00hrs, he wrote the extrajudicial statement of the 1st accused person Charles Tano @ Madirisha who he identified at the dock. PW7 prays the court to admit the extra-judicial statement as part of the evidence but the defence counsel objected. After hearing the arguments from both parties, the extrajudicial statement could not be cleared for admission and therefore not admitted.

When cross-examined, he testified that the accused informed him that he was arrested on 20.03.2019 and not 04.03.2019 and the crime scene is in the jurisdiction of Bukombe district.

The prosecution case was marked closed and in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 R.E. 2019], this Court ruled that the prosecution had managed to establish a prima facie case against the accused persons, Charles s/o Tano @Madirisha (the 1st



accused person) and Tungi s/o Magejiwa (the 2nd accused person) who were addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA, Cap 20, R.E 2019 whereas the accused persons chose to defend on oath without calling witnesses.

Charles Tano @Madirisha testified that on 22.02.2019 he was in his home the whole night with his family. On 04.03.2019 at around 18.00 hrs he was arrested by three militiamen and locked in the office and on 05.03.2019 he was sent to Bwanga police station. He stated that he was beaten and forced to admit the offence but he denied and on 06.03.2019 he was sent to Chato police station and stayed there for more than one month and was sent to court charged of murder. He went on that, he was never sent to the justice of peace and he does not know PW7. He testified further that he never went to the scene of crime.

When he was cross-examined he testified that he did not respond to the witnesses as he was represented by his lawyer. He maintained that he was arrested on 04.03.2019.

Tungi Magejiwa (DW2) testified that, he was arrested on 07.08.2019 while in his house and sent to Nyawimilwa police station, Buseresere, Bwanga and finally was transferred to Chato police station



where he stayed for a week. He went on that, he did not involve in the incidence of murder of Tabu s/o Kingi. He denied attending the identification parade and knowing PW3 Mashiku Bujigwa before and that he only saw him when he come to this court and testify.

When cross-examined, he testified that he was arrested on 07.08.2019 and on the alleged day of the murder incident that i on 22.02.2019 he slept in his house. He went on that he was never involved in the identification parade and he did not sign in the identification parade register.

After the testimonies from both the prosecution and defence, PW6 evidence and exhibit P2 the post-mortem report proved that the death of the deceased person namely Tabu s/o Kingi, was not disputed by either party and his death was unnatural. I am now placed to determine *whether it was Charles Tano @Madirisha the 1st accused person and Tungi Magejiwa the 2nd accused who killed the deceased Tabu s/o Kingi.*

The prosecution side as required by law to prove the case against the accused persons and the standard as stated under section 3(2)(a) of the Law of Evidence, Act Cap 6 RE 2019 (now RE 2022) is beyond a reasonable doubt. (See also **Jonas Nkize v R**, 1992 TLR 214). As it is



provided for under Section 110 and Section 112 of the Evidence Act, Cap 6 [RE: 2002], now [RE: 2022], the accused is not placed with a duty to prove his innocence but to raise doubts on the prosecution evidence. In **Joseph John Makune v R** [1986] TLR 44 the Court of Appeal held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

Since the charge against the accused persons is that of murder the prosecution must prove the act of killing and connect the act of killing with the evil intention of the dourer (malice aforethought) as provided for under Section 196 of the Penal Code, Cap. 16 [RE: 2019] now RE: 2022 which provides that: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".

In proving the act of killing, it is undisputed that Tabu s/o Kingi is dead and based on the evidence of PW6 and exhibit P2, the deceased was



beaten and burnt whereas, the assailants did it with malice aforethought and there is no disagreement that the assailant contemplated and intend to kill. To that point, it is my findings that whoever beat and burnt the deceased did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2019] now [RE: 2022].

I now proceed to determine whether the prosecution managed to prove the case to the standard required that it was the accused persons Charles s/o Tano @ Madirisha, the 1st accused person and Tungi Magejiwa the 2nd accused who killed the deceased Tabu s/o Kingi.

First, in the records, there is evidence of eye witness. PW2 testified that she was on the scene of crime and witnessed the commission of the offence of murder and managed to identify the 1st accused as the assailant. DW1 denied committing or even being in the scene of crime. PW2 testified under oath that in the group of people (Mwano) at around 4.00 night, attacked them killing the deceased and burnt the house and that she was able to identify Golani, the 1st accused at a distance of 42 walking steps with the aid of the solar light powered by a single battery which was in front of the house.



As the law is settled that when the issue of visual identification arises, among the important aspects to be considered is the time the witness had the accused under observation, the distance at which the witness had the accused under observation if there was any light, then the source and intensity of such light and whether the witness knew the accused before.

The above principles has been clearly stated by the Court of Appeal in the case of **Waziri Aman vs Republic**, [1980] TLR 250 whereby among things, the court stated that:-

*"Evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and **the court is satisfied that the evidence before it is absolutely water tight.**(emphasis is mine in the bolded words)"*

As to what amounts to **water tight** the Court of Appeal clarified it in the case of **Sosthenes Myazagiro @ Nyarushashi vs Republic**, Criminal Appeal No. 276 of 2014 where it was pointed out that:-

"Water tight identification in our considered view, entails among other things the following: -



*How long the witness had the accused under observation?
What was the estimated distance between the two. If the
offence occurred at night, which kind of light existed.
Whether the accused was known to the witness before the
incident whether the witness had ample time to observe
and take note of the accused without obstruction such as
attacks, threats and the like which may have interrupted the
latter's concentration"*

Now, applying the above principles in our case at hand, PW2 who was the only witness who claimed to identify Galani, the 1st accused person and saw the 2nd accused did state that the incidence happened at night, the distance the accused stood was about 42 walking steps and the identification was by the solar light positioned in front of the house. In her evidence, PW2 further testified that, people took the deceased behind the house under a tree at a distance of 42 walking steps, beat him then burnt him to death.

Going back to the source of the light now that she used to identify the 1st accused and the second accused, her testimony contradicts for the same light which he used to identify the accused persons was placed at the front side of the house and the incident took place 42 steps on the



backside of the house which she claimed to identify the accused. PW2 could not describe the features that made her to identify the 1st accused from among many people who committed the murder.

In her testimony PW2 told the court that she rather recognized the accused who was known to her as he was the worker of her husband who was herding the deceased's cattle. It is a trite law that evidence of recognition is more reliable as it is stated in the case of **Hassan Juma Kanenyera vs Republic**, [1992] TLR. However even in recognition mistakes may be made as well hence need for assurance. In the case of **Issa Mgara @ Shuka vs Republic**, Criminal Appeal No. 37 of 2005 (unreported) it was held as follows:-

"Even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on the source of light and its intensity is of paramount importance. This is because even in recognition cases mistakes are often made"

In assurance of identification also description of the accused even if known to the identifying witness is important. The Court of Appeal stated in the Case of **Anael Sambo vs Republic, Criminal Appeal No. 274 of 2007** (unreported) as follows.



"The fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident, say his distinctive clothing, height, voice and the like".

In her evidence, PW2 did not testify as how he identified the accused persons as she did not describe even the attire worn by the accused persons on that day.

It is a similarly settled principle to the effect that although relevant and admissible, eyewitness visual identification evidence is of the weakest character and most unreliable which should be acted upon cautiously after the court has first satisfied itself that the conditions were favourable for proper identification and all possibilities of mistaken identity have been eliminated. Based on the circumstances underpinning the incidence of the murder of Tabu s/o Kingi, all the possibilities of mistaken identity have not been eliminated for the evidence of PW2 on identification to be relied on.

In totality, the evidence of PW2 is not watertight to be used to rule out the accused persons were really identified in the scene of crime against a group of a large number of persons gathered to the *mwano*.



Thus, I find that it is unsafe to base a conviction on sheer visual identification of DW1 and DW2 unless it is coupled with other pieces of evidence.

Secondly, in order for the court to find the evidence reliable, the witness must the same be credible. The credibility of the witness can be measured in consideration of the coherence of the evidence adduced and when that testimony is considered in relation to other witnesses. This position was stated by the Court of Appeal in **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 which quoted with authority the cases of **Yasin Ramadhani Chang'a vs Republic** [1999] T.L.R. 489 and **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 that:-

*"Apart from demeanour.... the credibility of a witness can also be determined in other two ways that is, **one by assessing** the coherence of the testimony of the witness, and **two**, when the testimony of the witness is considered in relation to the evidence of other witnesses"*

In our case at hand, the prosecution case is built on the evidence of PW2, the eyewitness who testified on oath before this court in relation to the murder of the deceased. First, PW2 testified that he was able to



identify Gelani who claims to be the 1st accused Charles Tano @ Madirisha and the 2nd accused person. However, during the cross examination it was revealed that, PW2 wrote in her statement at police that she was also able to recognise Mateso s/o Kasherima and Philipo s/o Mayala as the persons who were in the scene. Secondly, the evidence of PW3 testified that when he reached on the scene of crime at around 13.00 hrs, PW2 told him that she identified Matesho Kashirima, the 1st accused, Philipo Mayila and Elias Sekei. These persons could not be mentioned by PW2 in court while giving her evidence. I find that the evidence of PW2 is neither coherent nor consistent and does not tally with the evidence of other prosecution witnesses.

Thirdly, the credibility of the witness is measured on the ability to name the suspect at the early time possible opportunity. The law is settled as stated in **Sadick s/o Hamis @Rushikana & 2 Others Republic**, Criminal Appeal No. 381 Cf 382 of 383 of 2017

"Failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."



(See **Marwa Wangiti Mwita and Another v. R**, [2002] T.L.R. 39 and **Joseph Mkumbwa & Another v. R**, Criminal Appeal No. 94 of 2007 (unreported)).

Conversely, in the present case, PW3 testified that he reached the scene of crime at round 13.00 hrs and he found people gathered including neighbours. It was his testimony that at that time, PW2 mentioned the accused persons but all the time from the time PW2 claims the incident of murder happened that from 4.00 hrs to the time PW3 reached the scene of crime he could not name any suspect. In that regard, I find that PW2 is not credible for this court to rely on her evidence in the determination of the fate of the accused persons over the charges of murder levied against them.

The other prosecution witnesses like PW1, PW4, PW5 and PW7 their evidence is not water tight to prove beyond reasonable doubt that the accused persons are the ones who committed the offence of murder to the deceased, Tabu Kingi.

In their defence, all the accused persons denied to be present in the scene of crime and therefore denied to be involved in the murdering of



the deceased, Tabu Kingi. Their evidence mainly centred on how they were arrested and sent to the police station and then to this court.

As I have earlier on indicated, it is the duty of the prosecution to prove the guilty of the accused beyond reasonable doubt, and that duty never shifts to the accused persons, and that the accused persons cannot be convicted on the weakness of his defence. The Court of Appeal in **Twinogore Mwambela v The Republic**, Criminal Appeal No 388 of 2018 observed that;

" In saying so, we are not shifting the burden of proof onto the appellant. Rather, we are alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Based on my findings above, I am satisfied that the prosecution's evidence is neither credible nor reliable for this court to base its conviction on the two accused persons Charles Tano @Madirisha the 1st accused person and Tungi Magejiwa the 2nd accused over the murder of Tabu s/o Kingi the deceased.

In the event, I find that the prosecution failed to discharge their duty as required by the law under section 3(2)(a) of the Law of Evidence,



Act Cap 6 RE 2019 (now RE 2022) and consequently, the accused persons are both acquitted. I order Charles Tano @Madirisha, the 1st accused person and Tungi Magejiwa the 2nd accused person to be released from prison forthwith unless otherwise are lawful held.

DATED at CHATO this 08th MARCH 2023.




M.MNYUKWA
JUDGE
08/03/2023

The right of Appeal in terms of Section 323 of the Criminal Procedure Act, Cap. 20 R.E 2019 is fully explained.


M.MNYUKWA
JUDGE
08/03/2023