

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MUSOMA**

CRIMINAL SESSION NO. 189 OF 2013

THE REPUBLIC

VERSUS

1. NDARO SUMUNI MABUSE @ AMIRI @ RONALDO

2. MSIBA MAREGERI @ MBOROGOMA

3. ABEID KAZIMILI @ FIDELIS MGEWA

JUDGMENT

16th January, 2023

MDEMU, J.:

Ndaro Sumuni Mabuse@ Amiri@ Ronaldo, Msiba Maregeri@ Mborogoma and Abeid Kazimili @Fidelis Mgewa referred to as the 1st, 2nd and 3rd accused persons respectively, stand charged jointly and together with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16. According to the particulars of offence in the information of murder, on the 21st of December 2012 at Kwibala Village within Butiama District, the three accused persons murdered one Tabu Makanya. They all pleaded not guilty to the charge. On 13th of March 2014, preliminary hearing was conducted, in which, postmortem examination

report was tendered as exhibit P1. That means, from the outset, it is not disputed that Tabu Makanya died unnatural death following multiple cut wounds sustained. The trial therefore has to be mounted to establish who was behind that brutal, willfully and unlawful killing.

To prove the charge of murder booked to the three accused persons, the prosecution called seven witnesses and tendered three exhibits to wit; identification parade register (P2), sketch plan (P3) and caution statement of the second accused person (P4). As stated above, exhibit (P1) postmortem examination report was tendered during preliminary hearing on 13th of March, 2014.

According to the prosecution's case, PW1 Nyaisinde Marubira, PW2 Mwanjera Marubira and the deceased, in the night of 21st December, 2012, at about 23.30 hours while at home sleeping, were invaded by bandits after breaking the main door twice. The said bandits then gained access in the room of PW2 first where she was with other three children namely; Julius Masasi (12 years), Peter Samson (7 years) and Maria Magesa (6 years). In the seating room, there was a hurricane hanging from the cupboard. The bandits who were four in number, inquired to PW2 to be given money and a cellular phone. PW2 said to have none. They then proceeded to the other

room where PW1 and the deceased were sleeping. PW2 followed them from behind.

The bandits then demanded money from the deceased, who had just waked up from the bed. The first accused Ndalo Sumuni then did cut the deceased using a "panga". PW1 was ordered to cover herself with a bed sheet, but by then, she had already identified the first accused by the aid of "Koroboi" light as a village mate operated "bodaboda" of his brother one Masanyi and a good footballer nicknamed "Ronaldo". On the day, the first accused was in black trousers and black jacket. PW1 also identified one Chagenge Nyakubondya who is at large.

While the first accused and one Chegenge were in the deceased room, two other bandits got outside. PW2 was then pressed at the door wall to the deceased room by one Chegenge, while the first accused hacked the deceased using a panga. After that, he chopped off the deceased head. PW2 went on to state that, the first accused requested a bag from one Chegenge, then did put the chopped head and off they went.

PW2 stated to have identified the second accused at the *locus in quo* being a fisherman in the village and through the aid of hurricane, the second accused was identified to be a little bit fat and had black trousers and jacket.

She also identified the 3rd accused being a little bit fat with unusual movement in one leg and that, he is a business man dealing with fish and on that day, was in black trousers and a black jacket.

PW1 and PW2 then raised an alarm. Neighbours such as a brother, one Makanya Masonye, Joseph Mathayo, Kilemba Marubira and others responded. They then followed the direction of murderers and shortly, found a bag containing a chopped head identified to be of the deceased. Kilemba Marubira carried that bag and they all returned to the crime scene. PW2 continued to testify that, on 12th of January, 2013 identified the second accused person in the identification parade standing in the 7th position and also identified the 3rd accused person in the same parade in the 11th position.

PW3, ASP Nelson Sumari conducted identification parade on 12th of January, 2013. He was assisted by D/CPL Adamu, and D/CPL Clement. It is in evidence that, PW2 in that parade identified the second accused person who was in 7th position and the 3rd accused in the 11th position. PW3 then filled the identification Parade Register (PF186), (exhibit P.2.)

D. 6122 D/Sgt Obeid testified as PW4. He investigated the case and, in the course, he went to the *locus in quo* on 22nd of December, 2012, where he met the OCS of Mugango police station one CPL Wilson who informed

him that, among the murderers, the 1st accused and Chegege Nyakubondya are among of them. He then interrogated PW1 and PW2 who told him to have identified two murderers by names, that is the first accused and one Chegege and two other by face as residents of Mugango.

He also drew a sketch plan (exhibit P3.) and arrested the first accused at Mugango centre. During interrogation, the 1st Accused confessed and named Juma Mwanajeshi, Hamis Muhoja, Abeid Kazimili, Musiba Muregeri and Wandwi Magulu as his companion. He testified further that, Wandwi Magulu, a conselor of Mugango gave the accused persons a deal for the reward of Tshs. 1,500,000/= to chop the head of the deceased for fishing businesses. He testified further that, on 8th of January, 2013, the second and third accused persons were arrested at Mugango village and referred to Musoma Police Station.

The another witness was D. 6298 D/Sgt Rabel (PW5) who recorded the caution statement of the first accused person on 23rd of December 2012. The caution statement was rejected in evidence for being taken out of time and also was involuntary. Another witness was PW6, E. 938 D/CPL. Peter who recorded the caution statement of the second accused person on 8th of January, 2013. The statement was admitted in evidence as exhibit P4. The

last prosecution witness was PW7 one E. 2636 D/CPL Deusdedit. He recorded the caution statement of the 3rd accused person on 8th of January, 2013. The statement was rejected in evidence for non-compliance of the provisions of section 57(3) of the **Criminal Procedure Act, Cap. 20**. This was all from the prosecution case.

Following closure of the prosecution case on 22nd of August, 2019, the Court found all the three accused persons to have a case to answer. They were then addressed in terms of section 293 (2) of the **Criminal Procedure Act, Cap. 20** and opted to defend themselves, save for the 3rd accused person who also elected to call one more witness.

It was the evidence of the first accused (DW1) that, he was arrested on 22nd of December, 2012 at Kwibala village, Mugango by Athumani and Anord, policemen from Mugango Police Station and not PW4. He maintained to have not committed the instant murder and that, PW1 and PW2 just mentioned him for no apparent reason and they also lied to be her school mates. He thus stated that, the case is fabricated against him because even PW1 and PW2 have contradicted themselves regarding source of light aided their visual identification. One said was from hurricane and the other said

was from "Kibatari". He concluded his evidence that, on the fateful day at 23.30 hours, he was at home sleeping.

Musiba Muregere Mborogoma testified as DW2. His was that, he was arrested on 8th of January, 2013 and taken to police at Musoma. While on the way, he was beaten using a club and taken to Bunda Police Station while his face got covered with a piece of cloth. He testified further to have recorded his caution statement at Musoma Central Police in which he was tortured and forced to confess and also forced to name others of which he denied to do so. He concluded that, he is connected because he refused to sell fish to the deceased family. He thus stated that, the statement admitted as exhibit P4 should not be considered in evidence.

The last witness for the defence was DW3, Abeid Kazimili@Fideli Mgewa who testified to have received information on the murder of the deceased on 22nd of December, 2012 and went straight to the *locus in quo*. He attended the burial ceremony and that, all through to his arrest on 8th of January, 2013, was at the village. He is known to PW1 and PW2 and he also knows the deceased. He testified to have been identified at the identification parade not that he committed the offence, but rather for being known to PW2. He stated to have no unusual movement (kuchechemea). He thus

denied to participate in commission of the offence and also that, exhibit P4 as per DW2 was extracted through torture. He concluded to have not been identified at the *locus in quo*.

Parties also had an opportunity to make their final submissions. For the 1st Accused person, Mr. Philipo, learned Advocate submitted that, in all the 7 prosecution witnesses and 4 exhibits tendered, the prosecution case was not proved. On visual identification particularly, though PW1 and PW2 described the source of light to be hurricane in the seating room and "Kibatari" in the bed room; they have not described intensity of that light. He cited the case of **Hassan Side vs. R. Criminal Appeal No. 264 of 2015** (unreported) insisting the need to describe both source and intensity of light. He submitted further that, it is not correct that PW1 and PW2 failed to report to immediate persons fearing to be killed by the accused. They did not even tell their brother who also rushed to the *locus in quo*. It was impossible also to identify a person from the back as claimed by PW2.

He added that, PW1 and PW2 contradicted themselves on number of murderers as whereas PW1 said were four, PW2 said five. PW4 also did not state in his statement that he arrested the 1st accused person. As to PW3, the learned counsel submitted that, identification of the accused in the

parade was by the name only. In his view, this also casts doubts. He added that, the evidence of PW5 is weak because the caution statement of the first accused was rejected in evidence. He observed further that, the prosecution also failed to prove on how the first accused person sustained injuries in his leg. PW1 and PW2 also stated to have informed the police names of those identified but did not mention who were those persons. He thought therefore there is no evidence to corroborate the testimony of PW1 and PW2 on visual identification. To the learned counsel, the only evidence touching the first accused is the caution statement of the 2nd accused which, in terms of section 33 of the Evidence Act, Cap. 6, that evidence is unworthy. He prayed that the first accused be acquitted accordingly.

Mr. Mweya, Advocate for 2nd accused also submitted on the evidence of visual identification of PW1 and PW2 and that of the identification parade that the two witnesses have different account in; **one** PW1 testified that the murderers went straight to where she was with the deceased but PW2 stated that they went to the room where she was first. **Two**, PW2 stated that her mother was on bed while PW1 stated that the killing was down the bed and that the killer was identified when leaving the sitting room. He added also that, the manner the offence got committed would not allow PW2 to make

any meaningful identification. PW1 and PW2 stated to know the 2nd accused by face and name and that he was a fisherman and therefore the reason to name him because he refused to sell them fish.

As to identification parade, Mr.Mweya submitted that, as PW2 had already made the statement to police, his identity was no longer an issue . This was against the decision in **Boniphace Siwangwa vs. R. Criminal Appeal No. 421 of 2007** (unreported). He added that, there was no added value to the evidence of identification parade and also that the evidence of PW1 and PW2 is from one family. With regard to the caution statement of the 2nd accused, (P4,) the same was procured through tortured and therefore should be expunged in evidence. He thus prayed that, the second accused be acquitted.

Mr. Cosmas Tuthuru, learned advocate submitted for the 3rd accused person that the evidence touching the 3rd accused is that of identification parade and the caution statement of the 2nd accused person (P.4). He faulted the identification parade to have no evidential value because the accused, PW1 and PW2 live in one village. This was also the evidence of PW1 and PW2. He cited the case of **Siasa Benard Kasenga vs. R. Criminal Appeal No. 22 of 2010** (unreported) to cement his position. He added that, even

when PW2 identified the accused for the first time, yet procedures of identification parade were not followed because the officer who conducted the parade did not ask PW2 to state how she made the identification. The case of **Elias Mtaju Torokoko vs. R. Criminal Appeal No. 149 of 2012** (unreported) was cited to that effect. The identification parade register has no such information and should be disregarded, Mr. Tuthuru added.

With regard to exhibit P4 (caution statement of the second accused); Mr. Tuthuru submitted that, this alone cannot be used to convict the accused in absence of any other evidence as per section 33(2) of the Evidence Act, Cap.6. As to visual identification; PW1 and PW2 are members of the same family. Their evidence should not be trusted. He added that, Mr. Mathayo who responded to the alarm did not testify and the one who carried the deceased head one Kilemba did not also testify. He thus concluded that, the case of **Asia Idd vs. R [1989] TLR 174** is relevant as PW1 and PW2 has interest to save, hence their evidence needs corroboration. He also urged me to acquit the 3rd accused person.

Mr. Frank Nchanila, learned State Attorney submitting for the Republic stated that, the prosecution has proved both *actus reus* and *mensrea* by summoning PW1 – PW7. He submitted that, PW1 and PW2 identified the 1st

accused by names and face and is the one who did cut the deceased with a panga. The 2nd and 3rd accused persons got identified their faces but not names. They were from the same village.

Citing the case of **Chacha Jeremiah Murimi and 3 Others vs. R, Criminal Appeal No. 551 of 2015** (unreported) at page 17-18 of the judgment, the learned State Attorney submitted that, the testimony of PW1 and PW2 on visual identification has eliminated all possibilities of mistaken identity. They stated on how and the duration used to identify the three accused persons. PW1 before got covered with a bed sheet, did identify the 1st accused and PW2 told how she followed the accused from her room to the seating room and proceeded to the place where the deceased was and witnessed the deceased been assaulted and slaughtered.

While conceding that "Koroboi" and hurricane was the only source of light, the learned State Attorney observed that, there was no obstruction as per exhibit P3, PW1 and PW2 that impeded visual identification. PW1 and PW2 also testified that, the accused were known to them by names and face. The first accused also used to operate "bodaboda" of PW1 and PW2's brother. They also stated what the 2nd and 3rd accused persons were doing. They were not strangers. As to how often, they are all villagers in one village.

PW1 and PW2 also explained how the accused participated. In this, the principles in the case of **Waziri Aman vs. R.** (supra) has been met. The learned State Attorney added.

As to identification parade, it was his observation that, the offence was committed on 21st of December, 2012 and the parade was on 12th of January, 2013 which was almost 21 days after. That period to the learned State Attorney is not too long for mistaken identification at the parade. Equally, the requirement in PGO 232 (1)(2) and as in the case of **Juma Nyamakitana and Another vs. R. Criminal Appeal No. 133 of 2011** (unreported) has been complied. The officer in the instant case, who conducted the parade was an independent witness, that is, did not take part in investigation and or arresting the accused persons.

He added that, the evidence in exhibit P4 (caution statement of 2nd accused) is relevant in that, the second accused confessed and also named the 1st and 3rd accused persons to have taken part. He submitted further that, during defence, the 2nd accused stated to have been tortured. This evidence is an afterthought because it was not raised when the statement was tendered in Court. The law however requires the confession of co-accused to be corroborated for the same to ground conviction. Section 33 of

the Evidence Act, cap.6 and the case of **Bushiri Amiri vs. R. [1992] TLR 65** are relevant. Thus, the evidence in exhibit P4 has been corroborated by the evidence of PW1, PW2, PW3 and PW4.

The learned state attorney also submitted on the defence of *alibi* raised by all accused persons during their defence. He stated that, section 194(1) of the Criminal Procedure Act, Cap.20 have conditions that, if the defence is intended, then the notice be given. As it was not, he observed that, under section 194 (6) of Criminal Procedure Act, this Court should disregard such defence. He therefore concluded that, some discrepancies complained by the defence noted in the testimony of PW1 and PW2 has been resolved as in the case of **Mathias Bundala vs. R, Criminal Appeal 62 of 2004**, (unreported). He thus urged me to find all the three accused persons guilty and convict them accordingly.

I sat with three honorable Assessors in this trial. After summing up the evidence of both the prosecutions and defence and also submissions from the parties, they duly gave their opinion. The three assessors were of the opinion that, there is no evidence on record to connect all the three accused persons with the murder of Tabu Makanya. They then opined that, all the accused persons are not guilty of murder. I will come to this later.

This case, as per the evidence on record, rests on visual identification. In this, there is the evidence of Nyaisinde Marubira and Mwanjera Marubira, PW1 and PW2, respectively. There is also evidence of identification parade in which the evidence of PW2 and PW3 (ASP Nelson Sumari) who also brought in evidence identification parade register (P2) is called for consideration. There is also caution statement of the second accused person (P4) who confessed to have taken part and also named the other two accused persons.

As stated earlier, according to exhibit P1, (the postmortem examination report) the fact that Tabu Makanya is dead and that she died unnatural death, is not disputed. The issue for determination therefore is whether the three accused persons were properly identified by PW1 and PW2 in the night of 21st of December 2012 to have hacked Tabu Makanya to her demise.

In evidence, PW1 and PW2 who were with the deceased in that material night, testified to have identified the first accused by his name as Ndalo Sumuni and also described him as a good footballer in the village to the extent of being nicknamed as Ronaldo. They also described him that, previously he used to operate "bodaboda" of their brother. On the fateful

day, the first accused as per the evidence of PW2 who was also her former school mate, was in black trousers and black jacket. PW2 closely observed the first accused by the aid of light from hurricane hanging in the cupboard at the seating room. To the room where the deceased and PW1 were, also PW2 identified the first accused to be the one who hacked the deceased with a panga. PW1 also made that same identification to the first accused by the aid of light from "koroboi" placed in the room. The description of source of light by PW2 (hurricane) and PW1 (koroboi) have no any contradiction as testified by DW1, because the two sources of light were located in different locations. In this, PW2 identified by using light from hurricane in the seating room whereas PW1 used "koroboi" in the bed room.

As to the second accused, PW2 identified the second accused person by his face as being a little bit fat, black and a fisherman in the village and on the day, at the crime scene, was in black trousers and black jacket. PW2 did also identify the second accused person in the identification parade on 12th of January, 2013. The third accused was also identified at the crime scene as being a business man and resident of Kwibala, short, black with unusual movement in one of his leg. On the material date, he was in black

trousers and black jacket. He was also identified at the identification parade by PW2 on 12th of January 2013.

With this evidence of visual identification by PW1 and PW2 who managed to describe the accused persons and aiders of visual identification, possibility of mistaken identity has been eliminated. All the three accused persons reside in the same area with PW1 and PW2 and they were in good terms thus, a need of fabricating a case against the three accused persons is farfetched. This evidence on visual identification by PW1 and PW2 met the benchmarks stated in **Waziri Aman vs. Republic [1980] TLR 250**. Specific to the first accused who was identified by name, the Court of Appeal in **Fadhili Gumbo *alias* Malota and 3 Others vs. Republic [2006] TLR 50** stated the following:

Where the witnesses were close to allow proper identification and were not contradicted that they knew the Appellants before the date of the incident, their identification by names cannot be faulted.

In a much more certainty to unmistakable identity made by PW2 to the second and third accused persons, the two accused persons got also identified at the identification parade. As it is, the evidence of identification

parade has no any independent probative value but that of corroboration to visual identification. In **Benson Kibaso Nyankonda *alias* Olembe Patroba Apiyo vs. Republic [1998] TLR 40**, it was observed that:

Identification parade proceedings are merely investigatory and extrajudicial in nature; their outcome has no independent probative value but can only corroborate the evidence given in court by the identifying witness.

In the instant case, the evidence of PW3 one ASP Nelson on identification parade indicates that, PW2 identified the 1st and 2nd accused persons in the identification parade conducted on 12th of January 2013. The identification parade register (P2) was tendered without objection, meaning that, the parade followed the required procedures. This evidence of identification parade therefore has corroborated the testimony on visual identification by PW2. Mr. Tuthuru observed that, the evidence of identification parade is of no value because PW2 is known to the 2nd and 3rd accused persons as they live in one village. He cited the case of **Siasa Bernard Kasenga vs. R, Criminal Appeal No.22 of 2010** (unreported) in which it was observed that:

As stated above, the witness and the Appellant were familiar to each other. If so, strictly speaking, there was no need for an identification parade. An identification parade is normally held or conducted where the suspect or person sought to be identified is not known to the witness.

Without prejudice to the above legal position, as stated, PW2 stated to have identified the 1st accused by name but the 2nd and 3rd accused by face as persons also living in the village. She did not know their names. In my view, under the circumstances, the identification parade was relevant.

Another set of evidence relevant is the confession of the second accused person. According to PW6. E. 938 D/CPL Peter, who recorded the caution statement of the second accused which got admitted in evidence as exhibit P4, the second accused, confessed involvement in the murder of the deceased. It is in this confession where DW2 also named the 1st accused, the 3rd accused persons, Hamisi Muhogo Mchungu, Juma Mwanajeshi, Chegenge Nyakubondya and Wandwi Maguru. In terms of section 33 of the Evidence Act, the confession of the 2nd accused is evidence against him and may also be used in respect of the 1st and 3rd accused persons. As stated

and also as in the case **Bushiri Amiri vs R. [1992] TLR 65** conviction of an accused person shall not solely base on the confession of a co accused.

In the current murder charge, apart from the confession of the second accused to name the 1st and 3rd accused persons, there is also the testimony of PW1 and PW2 on visual identification and also that of PW6 on identification parade. The evidence in the confession therefore is deployed to connect also the 1st and 3rd Accused persons.

I have also taken into account the evidence of DW1, DW2 and DW3. They have elected on the defence of *alibi*. As observed by the learned State Attorney, the provisions of section 194 of the **Criminal Procedure Act, Cap.20** has not been complied in that, they neither lodged the notice to court to rely on the *alibi* nor did they furnish particulars of the *alibi* to the prosecution before the case got closed. Notwithstanding, in **Marwa Wangiti Mwita and Anorther vs. Republic [2002] TLR 39**, it was observed that:

The absence of notice required by section 194 of the Criminal Procedure Act, 1985, does not mandate or authorize an outright rejection of an alibi, though it may affect the weight to be placed on it.

In their defences, the 1st and 3rd accused person who testified as DW1 and DW3 respectively stated to be at their respective homes each on the 21st of December, 2012 at 23.30 hours. The 2nd accused (DW2) stated that, at that material time, was in the lake for fishing purposes. Their *alibi*, much as was in violation of the provisions of section 194 of the **Criminal Procedure Act, Cap.20**, the same came during cross examination. All through their evidence in chief, they remained silent. There is no substance in this defence.

Other evidence in their defence is such that, the case has been fabricated as PW1 and PW2 named them because they live in the same village or that the second accused refused to sell fish to them. This kind of defence has no any substance. It is an afterthought. It was also submitted that PW1 and PW2 has interest to save because they are from the same family. With due respect to the counsels of the 2nd and 3rd accused persons, under the circumstances of this case, it was not expected someone else to be present at the crime scene in that material night to witness the incident. PW1 and PW2 are the only eye witnesses present at the crime scene. In my view, that should have been the reason as to why we have no law in place to discredit such evidence for a mere reason that, it emanates from one

family. In **Mustafa Ramadhani Kihyo vs. Republic [2006] TLR 323** it was observed that:

The evidence of the related witnesses is credible and there is no rule of law or practice which require the evidence of relatives to be discredited, unless of course, there is ground for doing so; in this case, we find no reason for discounting the evidence of the said related witnesses.

Banking on the above-named authority, PW1 and PW2 who are sisters identified, unmistakably, all the three accused persons. The accused persons also in their sworn evidence testified to have no any grudges with PW1 and PW2. Their evidence cannot therefore be discounted merely on the ground of being related. There is no reason for so doing.

As observed above, the three assessors found the three accused persons not guilty of the charge of murder. For reasons stated above, there is cogent evidence on visual identification of PW1 and PW2 supported by that of the identification parade by PW3 and exhibit P2, identification parade register. More so, the second accused confessed (P4) and also named other accused persons. With this evidence, and for want of evidence from the defence to create reasonable doubt, I depart from their opinion as the

prosecution case has been proved beyond reasonable doubt as required by law.

In view thereof, **Ndaro Sumuni Mabuse@Amiri@Ronaldo, Msiba Maregeri@Mborogoma** and **Abeid Kazimili@Fidelis Mgewa** are hereby found guilty of the offence of murder under the provisions of sections 196 and 197 of the Penal Code, Cap.16 and they are accordingly convicted.

Gerson J. Mdemu
JUDGE
16/01/2023

SENTENCE

The conviction on the offence of murder, in terms of the provisions of section 197 of the Penal Code, Cap. 16 has only one sentence, that is, death sentence, and accordingly, **Ndaro Sumuni Mabuse@Amiri@Ronaldo, Msiba Maregeri @Mborogoma** and **Abeid Kazimili@Fidelis Mgewa** are sentenced to suffer death sentence forthwith.

It is ordered accordingly.



Gerson J. Mdemu
JUDGE
16/01/2023

Right of appeal fully explained to all the three accused persons.



Gerson J. Mdemu
JUDGE
16/01/2023

Judgment delivered today the 16th of January, 2023 through virtual Court in presence of the three accused persons and Mr. Njau, Advocate who had the brief of Advocates Mr. Philipo, Mr. Mweya and Mr. Tuthuru for the 1st, 2nd, and 3rd accused persons respectively and Mr. Twahabu Yahaya Issa, State Attorney for the Republic. The parties were at the High Court of Tanzania at Musoma and the presiding Judge was at Dodoma High Court.



Gerson J. Mdemu
JUDGE
16/01/2023