

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL SESSION NO. 13 OF 2022

REPUBLIC

VERSUS

- 1. GILBERT S/O TABSON NJAU@ LETII**
- 2. JOSEPH S/O MATHIAS MMBANDO @ KALIPII @ BABUU**
- 3. INNOCENT S/O LIBERATI LYIMO @ OKOCHA**

JUDGMENT

23rd & 30th June, 2023.

A.P.KILIMI, J.:

On the last day in his home, was on 5th April, 2021. Mr. Paulo Minza, a night watchman at the school of Paulo Albert, left his home by telling his wife Redemta Paulo Minza not to open the door because he guesses they may be invaded. In the midnight of that day, Sister Mariana Charles Mgonja, a member of Secular Institute Women congregation (SWI) who live in the compound of said school, wherein their convent is situated, she heard a knock to her door, she saw their General Mother Sister Yohana Mallya who told her and sister Veridiana that they have been invaded, all came out led by watchman named as Peter and started raising alarm, blowing whistles and ring the bell, when approached a building under construction, they saw

Paul Minza laying down while bleeding, being having severe pain, they help him to sit, then while complaining of pain, he mentioned the culprits to be Letii, Kalipii and Rey.

They, then reported the matter at police, police officers attended the scene of the crime, they took the victim to Faraja Hospital Himo, Later, the victim was referred to KCMC Hospital for further check-up and treatment, but unfortunately on 10/4/2021 Paulo Minza passed away.

Police officers did intensive investigation, after completion, the prosecution charged **Gilbert s/o Tabson Njau@ Letii, Joseph s/o Mathias Mmbando @ Kalipii@ Babuu** and **Innocent s/o Liberati Lyimo@ Okocha** before this Court with an information of murder contrary to sections 196 and 197 of the Penal Code Cap 16 [R.E 2019]. Wherein the prosecution alleged that both accused persons, on 06th April, 2021 at Kilema Pofu area, Moshi District within Kilimanjaro Region, did murdered one **Paulo s/o Minza**.

Both accused persons pleaded not guilty. To prove their case, the prosecution summoned five witnesses and tendered three documentary

exhibits. While both accused persons defended themselves led by defence counsels.

The prosecution started by Redemta Paulo Minza (PW1) the wife of the deceased, who said on 6/4/2021 she was informed by Sister Helena a teacher at Paulo Albert School, in the night the bandits invaded their school, and Paulo Minza was wounded and admitted to Faraja Hospital. She then went to the said Hospital, she saw her husband having wounds on his head, he was able to tell her that he was invaded by 12 people, and he identified four of them, he mentioned to her names; Kalipi, Rey, Stivin and Okocha Letii. PW1 further said that, she knew Kalipii is the son of ten cell leader, Okocha stay a bit far, Letii is near their home, is a tenant of Balozi, Rey is the grandson of Balozi, and they live vey near.

Sister Mariana Charles Mgonja (PW2) said in the fateful night being asleep at their convent which is within the said school, mother Yohana Mallya awakened them with sister veridian and told they are invaded, they came out and started to raise alarm. She further said, at their place, there enough light, luminating from solar and electricity, when she saw the victim was having signed of paralyse one side of his body, because it was not working properly.

ASP Richard Oloade Nicolao (PW4), testified that being the Head of Investigation Department at Himo Police Station by then, on 6/4/2021 he received a report of invading of the school of Paulo Albert at Kilema road that two watchmen where invaded by more than 10 bandits having local weapons and injured them. PW4 further said Officer Commanding Station of Himo Station ASP Rogers went to attend the scene at about 00:45 hrs, who reported back the victim was sent to Faraja Hospital. He later sent WP 2361D/SGT Rose, to go at Faraja Hospital to write the statement of the victim, upon read the taken statement, he discovered the victim mentioned three street (alias) names to be Kalipi, Okocha and Letii.

On 10/4/2021 he got a report that victim Paul Minza have died being at KCMC Hospital. On 12/4/2021, he ordered again police officer WP 2361D/Sgt Rosemary to go at KCMC to attended post mortem of the deceased, she did that job, and she came with the said post mortem report. The investigation started, on 30/4/2021, he got information from secret informer and managed to arrest two accused persons that is Letii and Kalipii. After interrogation, he knew their real names, accused person known as Kalipii told them is real name is Joseph Mbando and Letii told them is called Gilbert Njau. Later on, 20/5/2021 he succeeded to arrest accused person

known as Okocha, also when interrogated he said that Okocha is street name (alias), but is real name is Innocent Lyimo. Then PW4 tendered the statement of WP 2361D/Sgt Rosemary a retired officer who was not found, the same was admitted and marked PE1, he also tendered the statement of the deceased and post mortem report which were admitted and marked PE2 and PE3 respectively.

Verdiana Justine Shayo (PW5) also is a sister at the said congregation, said on 6/4/2021 at night hours, she was asleep with others sisters, she mentioned Sister Maliya, Mariana and Catherine. She was awakened by Sister Maliya telling them, they have been invaded, they both wake up and raise alarm, blow whistle, also rang the bell. Then she saw watchman Peter who told them to come out the culprit have gone. Upon coming out she and other sister saw watchman Paulo Minza laying upward on the corridor, they managed to see him because electricity light was on every corner. She saw victim severely injured and who told them to help, while Peter watchman was injured at the head and had a small wound. PW5 further said Paulo Minza said to them, he was injured by Letii, Kalipii and Rey. It is when her fellow sister Maliya called Police, came and took the victim.

In defence case, first accused Gilbert Tabuson Njau (DW1) defended that, on 5/4/2021, he was having building activities at Kilema Pofu area, in that work he was accompanied with Liberati Temu, Wilson and Gregory, he returned home at 18:00 hours, he did not go anywhere but stayed at Home with his family, next day of 6/4/2021 he went to his work, when he returned in the evening, he was told by his wife that there was invasion at school of Paulo albert, and one Paulo Minza with his fellow watchman was injured. He continued with his job, after three days, he heard his neighbour Paulo Minza has passed away. It was on 29/4/2021 being at his home at 07:00hrs Police officers came and arrested him and his co-tenant.

When cross examined by Mr. Peter Utafu, learned State Attorney, DW3 said he knew the watchman Paulo Minza for seven years, he was staying with his wife called Pendo Mringo, now deceased. Also said he did not tender any proof of her death.

Joseph Mathias Mbando (DW2) charged as second accused stated that he is doing transport business using motorcycle (bodaboda), on the night dated of 5/6/2021 he was at his home, it was on 6/4/2021 he woke up early in the morning, he knew the incident after he carried a passenger named as Aurelia whom he sent at Faraja Hospital, is Aurelia informed him Paulo Minza,

was injured in that incident happen on 5/4/2021 night. On 10/4/2021 he got news that Paulo Minza has passed away. He further said he was arrested on 29/5/2021 being at his home with co-tenant Gilbert Njau, and both were sent to Himo Police station. In cross examination he said, he and deceased know each other for three years.

Innocent Liberati Lyimo (DW3) and third accused told this court that, on 5/4/2021 he was at Mgagao, Same District, tilling the land by tractors, he returned at Kilema Pofu on 5/5/2021 , he was arrested 19/5/2021 being at his home, and sent at Himo Police station, slept therein one day, next day he was sent to District Court, where he was arraigned for the offence of Murder, and joined with accused persons whom he did not know them before. He also said he did not know Paulo Minza (deceased). Upon cross examined by Mr. Peter Utafu, learned State Attorney, DW3 said he did not tell the court or show document on how he reached Mgagao, Same District.

After closure of the defence case, opted to make their final submissions. Accused persons' final submissions were made by Mr. Deogratias Matata Peter learned counsel on behalf of all defence counsels, while the prosecution side final submissions were made by Ms. Edith Msenga learned State Attorney.

In defence final submission, Mr. Deogratias Matata prayed this court to draw attention on six aspects, first is failure to call material witness. In this he submitted that, the alleged event which led to the death of Paul Minza was witnessed in the first place by Peter Boniface Lyimo a co-worker. In accordance to the facts of the case, Peter Boniface Lyimo was the only eye witness to the event which led to this case, and he was also assaulted by the same people who caused the death of the deceased. He further submitted, it is questionable as to why the prosecution did not call him as witness, then prayed this court to draw an inference adverse to the prosecution case because the failure to call the only eye witness to the events which lead to the demise of the deceased.

Second, in respect to identification of the accused persons. He submitted that, there are several factors which render the identification of the Accused to be doubtful. Firstly, it is alleged that it was the deceased who identified the Accused persons to be the persons who attacked him. This is according to the Exhibit P2 which is the statement of the deceased which was recorded by a person who was not called to testify before the Court. Thus, fact that the person who recorded the statement of the deceased did not testify before Court, the Defence was not able to cross-examine her

especially on conditions which the statement was recorded, since Exhibit P2 is silent on several issues which were necessary for visual identification to be considered proper, it is silent on the length of the time which the accused observed the culprits, silent on the distance at which he observed them, and the condition in which the observation occurred. To buttress his point, he has referred the case of **Samwel Thomas vs. Republic** Criminal Appeal No 23 of 2011 (Unreported), He further submitted since the standards set by the **Waziri Amani's** Case we're not adhered to, This Court need to hold that the accused were not identified by the deceased.

Third is names of the accused. The counsel for defence submitted that, it is alleged the deceased identified the Accused using their street names. All the Accused persons denied their alleged alias names. It was the prosecution case that the accused persons confessed as to the aliases during their interrogation, but the said statements were not tendered as exhibits. Also, during the cross-examination of defence witnesses, the prosecution did not make any efforts to inquire as to the alleged nicknames. He submitted further none of the prosecution witness could identify the accused persons in their original name and their alleged aliases. PWI stated that she only saw the real name of the first Accused in the summons. He then prayed this court

to hold that the prosecution did not prove that the Accused persons are also known by their nicknames.

Fourth the counsel for defence argued in respect to the conditions which the statement of the deceased was recorded. He submitted that, the statement of the deceased was recorded by WP2362 D/Sgt Rosemary who did not testify before the Court, her statement which was admitted as Exhibit P1 is silent on the conditions of the deceased during the recording of the statement. PW1 who is the widow of the deceased stated that the deceased was able to talk, but his head was swollen and he couldn't move his right hand and right leg. Also, in accordance with the Post - Mortem Report which was admitted as Exhibit P3, the deceased suffered a serious head injury. Since the condition of the deceased during the taking of his statement is unclear, the counsel invited this court under section 122 of the Evidence Act CAP 6 R.E. 2022, to presume the fact that the deceased condition was bad not to allow him to give accurate account of the incident, reading the statement, and signing the statement. Thus, urged this court to afford no evidentiary weight to Exhibit P2.

He further submitted in respect to hearsay that, the prosecution witnesses have testified that the deceased said the attackers were LETII, KALIPII, OKOCHA, RIZIKI, and REY. PW2 said the deceased said three names, LETII, KALIPII sand REY. PWI said the deceased named KALIPII, RAY, STEVEN and OKOCHA. This is all hearsay and doubtful and all doubts should be resolved in favour of the accused. The only witness of the crime is Peter Boniface Lyimo who did not testify before the court. The Counsel for defence concluded that the fact that the statement of the deceased was not corroborated because there was no any independent witness before the Court and the failure of the prosecution to bring the only eye witness who was available, the prosecution case was not proved beyond reasonable doubt.

On part of the prosecution, Ms. Edithi Msenga learned state attorney submitted that, the Accused persons had malice aforethought to kill one Paul Edward Minza by inflicting serious bodily injuries on him, as it was explained in the Post mortem Report admitted as PE3, and as testified by PW1, PW2, PW3, and PW5. Due to such an attack targeted on delicate parts of the body i.e. on the head, the chances of survival of one Paul Edward Minza were not there. Through the Prosecution evidence thereof, it is evident that the

Accused people had malice aforethought. To fortify her view, she has invited this court to consider the case of **Ally Zayumba Shenyau vs. Republic**, Criminal Appeal no. 27/1993 [unreported] in which the Court cited the case of **Republic vs. Thomas Enjau Oguruto and Another** [1945] 12 EACA 42.

Regarding to the dying declaration, she submitted that, accused persons are famously known through their street names i.e., Letii; Kalipii @ babuu and Okocha respectively. The same was also proved by PW1 the wife of the deceased who is neighbour to accused and new them over five years. The Accused persons, during their defence also acknowledged to have known the deceased for over three (3) years. She further submitted, Customarily, names represent human beings and such names can either be official names or nicknames. One can be identified by both, or either of the two. Through Exhibit PE2, the deceased identified the accused persons through their nicknames. After such revelation, the Investigation team martialled a search of persons with similar names from Kilema Pofo area and managed to arrest the accused persons, the accused lived at area, and the arrest was affected to persons from that area and not anywhere else.

In regard to whether there was a favourable environment for an identification of the accused persons at the crime scene. The learned State Attorney submitted that, through exhibit PE2, the deceased knew the accused prior to the attack, that is why he mentioned them by their nicknames. He clearly stated that the lights were on and its intensity was enough for recognition. She further said such statement was buttressed by the testimonies of PW2 and PW5, who testified on the presence, position and intensity of the lights at the crime scene, to bolster her assertion referred the case of **Waziri Amani vs. Republic** (1980) TLR 250

She also submitted that the deceased named the accused persons to PW2 and PW5 at the earliest possible moment. This proves reliability and assurance of the identifier; thus, the possibility of mistaken identity is fully eliminated. She invited me to refer the case of **Marwa Wangiti Mwita & Another vs. Republic** (2002) TLR 39.

In regard to the defence of Alibi raised by accused persons in their defence. The learned State attorney contended that, such defence was incomplete and unprocedural, she invited me to refer Section 194(4), (5), (6) of the Criminal Procedure Act [Cap 20 R.E 2022]. Insisting that this court

was not furnished with any notice to such effect throughout the conduct of the trial. Moreover, the accused persons even did not parade witnesses or tender any exhibit to prove their absence at the crime scene on that fateful night.

Having considered the above evidence and submissions of both prosecution and defence, the major issue is whether the three accused persons mentioned above are guilty of murder of the deceased Paul Minza. According to the evidence tendered I have seen and I hold so that the following material facts are not disputed: that, the deceased in fact, died. Her body was medically examined and the cause of his death was severe head injury, this is as per post mortem report, exhibit 'P3'.

Now the remaining sub issues to be answered by the evidence tendered is whether, all three accused persons killed Paul Minza (deceased), second whether they did so with malice aforethought.

To answer the above, the prosecution bears the burden of proving the above against accused persons and the standard of proof thereof, is beyond reasonable doubt, this is the spirit underlined under Section 3(2) (a) of the Evidence Act, Cap. 6 R.E 2019 and the holding by the Court of Appeal of Tanzania (the CAT) in the case of **Hemed vs. Republic** [1987] TLR 117.

The law further guides that, an accused persons bears no duty to prove their innocence. Their duty is only to raise reasonable doubts in the mind of the court.

Furthermore, it is a trite law, upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence. (See the case of **Mohamed Matula vs. Republic** [1995] T.L.R 3.

According to the prosecution, they have tendered the evidence of eyewitness, who was the deceased, they have done this by tendering statement of the deceased which was admitted by this court as exhibit 'P2', therefore this is the testimony of the eye witness. In view of the above, I persuaded to ask important questions in this matter, whether the three accused persons were identified at the scene of the crime injuring the deceased.

The position of the law on the basis of the powerful nature of eyewitness was stated by the Court of Appeal again in the case of **Salim s/o Adam @Kongo @ Magori vs. Republic**, in Criminal Appeal No. 199 of 2007, in this case the court referred earlier decision on cases of **Waziri Amani vs. Republic** (1980) T.L.R 250, **Hassan Juma Kanenyera vs. Republic** (1992) T.L.R 100, **Raymond Francis vs. Republic** (1991) T.L.R. 100, **Nhembo Ndalulwa vs. Republic**, Criminal Appeal, Criminal Appeal No. 33 of 2005, **Issa Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005, **Mathew Stephen @ Lawrence vs. Republic**, Criminal Appeal No.16 of 2007, **James Kisabo @ Mirango & Another vs. Republic**, Criminal Appeal No. 261 of 2006 (all unreported) to mention a few, and illustrated the salutary principles of law on eyewitness identification that:

"(a) Evidence of visual identification is of the weakest character and most reliable which should be acted upon cautiously when court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated; (b) In a case depending for its determination essentially on identification be of a single witness or more than witness. Such evidence must be watertight even if it

is evidence of recognition; and (c) In identification cases, witness must clearly state in their evidence conditions favoring a correct identification or recognition of the accused. "

Moreover, it is a trite law, 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. (See **Waziri Aman vs. Republic** (supra).

As to what amount to **water tight** the Court of Appeal clarified it in the case of **Sosthenes Myazangiro @ Nyarushashi vs. Republic** Criminal Appeal No. 276 of 2014 where it 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, threat and the

like which may have interrupted the latter's concentration"

According to the prosecution 'PE2' which is the only exhibit claimed by prosecution identifying accused persons did state the source of light was the electricity light came from bulbs fixed on buildings, it is clearly also that the deceased was not alone when he was attacked, he was with his fellow watchman named Peter Boniface Lyimo, and at the time bandits attacked them, they were both evaded rain in the unfinished building. Moreover, the deceased statement showed that he was attacked by many young men, more than ten people, on my view, such kind of attack may obstruct the deceased from properly identifying the accused persons, that is why the two exhibits mentioned above contradict each other, in 'P1' deceased mentioned three names, Letii, Kalipii and Okocha while in exhibit 'P2' the same deceased statement mentioned five accused persons being Letii, Kalipii, Riziki, Rey and Okocha.

Second, despite the deceased alleged to know the accused persons, in his statement he did not describe any accused between the three. It is a trite law in assurance of identification also descriptions of the accused persons

even if known to the identifying witness is important. The Court of Appeal stated in the case of **Anael Sambo v. 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".

Third, according to the circumstances the deceased was attacked shows, the situation of the incident itself was terrified and horrified. Basing on the above, I have noted that the invasion to the deceased of more than ten gangsters with big knife and clubs whom upon show up themselves, they started cutting him, to my view, it was abrupt and shocking to the deceased. Under those unfavorable and terrifying conditions, I am settled that, I cannot hold that the deceased identification those gangsters was without doubts.

Fourth, as alleged by the prosecution submissions, is the ability of the deceased to name the accused persons at the earliest possible moment. In this, I am forced to ask myself what is the earliest possible moment under the circumstances of this case, wherein the facts do not show the time used

to awaken sisters PW2 and PE5 in their convent, nonetheless, a person did so is Peter Boniphace Lyimo, a fellow watchman with the deceased, the statement reveals that they were together with the deceased on the same point at the time they were attacked. And for purpose of clarity of the circumstances said above, I wish to reiterate on words of the deceased as per exhibit PE2;

*"tulikuwa kazini na **mwenzangu aitwaye Peter Boniface Lyimo**. Tukiwa kazini tunaendelea kuzunguka kwenye maeneo **palinyesha mvua majira ya saa 00:20 hrs, hivyo tukajibanza kwenye nyumba moja ambayo haijaisha ili kujikinga na mvua**. Mara wakatokea **vijana wengi zaidi ya kumi na kuanza kutushambulia kwa mapanga na rungu**. Nilikatwa na panga kichwani na mwenzangu nae akawa anapiga kelele na filimbi, wakati huo wale vijana wakawa wanaendelea kunipiga na marungu sehemu za mgongoni nikiwa chini na damu zinanitoka kwa wingi, mara wakaniacha na kuondoka. Baada ya dakika chache mwenzangu alirudi akiwa na masista."*

[Emphasis supplied]

According to the above excerpt, in my view, the one who was at the best position to clear doubt about intensity of light and raining condition at the incident is his fellow watchman Peter Boniface Lyimo whom they were together at unfinished building where they went evading rain at the said moment.

Those witnesses PW2 and PW5, whom according to prosecution submissions said that witnessed the intensity of the light at the scene of crime, first, with respect were not at the scene of the crime at the time of commission of the crime, thus could not know what happened and it was under what circumstances than a fellow watchman whom was together at the live incident.

Second the fact as alleged by the prosecution that the deceased mentioned the names of the accused persons before PW2 and PW5, I think as reveals by their testimony before this court, it cannot be said that it was earliest opportunity while there are others two witnesses who might have been close to the deceased before PW2 and PW5 approached the deceased. To show the above I find convenient to quote the words of PW2 and PW5;

Sister Mariana Charles Mgonja (PW2) in examination in chief said;

*"On 6/4/2021 at night I was at the convent SIW (Secular Institute Women). That Institute is at Himo, at Darajani area, being there, we were invaded, **Mother Malya knocked to our room**, then we came out and started to raise alarm, and blow whistle, me and Sister Veridian came out, we were led by Watchman, called Peter, he was a watchman at our school Paulo albert situated at Himo"*

[Emphasis supplied]

Sister Verdiana Justine Shayo (PW5) also in examination in chief said;

*"In the night **we heard Sister Mallya telling us, we have been invaded**, we wake up and raise alarm and blow whistle, also we rang the bell, these were done by Sisters, then **we saw our watchman Peter who said "tokeni nyie wameshaondoka" that is when we open the door and came out**, when we were out, then we witness Daudi Minza"*

[Emphasis supplied]

In my view, I think Sister Mallya and watchman Peter was at the position of earliest opportunity to tell this court in respect to what happen to and said by the deceased than PW2 and PW5, therefore the fact that were not called to testified before this court, in my opinion create knowledge gap between the period the deceased was attacked and when deceased uttered words in front of PW2 and PW5 who came later. The said gab to my view creates questions which remained unanswered on part of the prosecution, hence causes this part remained unshaken. Not only that Peter Boniface Lyimo as the person being with the deceased at the time culprits invaded them, could have detailed the circumstances they were invaded and thus corroborate the statement of the deceased tendered in this court.

The gap I have stated above, cannot assure me that before the sisters PW2 and PW5 awakened and attended the deceased, nobody approached the deceased immediately after being invaded, I think the tenor and import of case **Marwa Wangiti Mwita & Another vs. Republic** (supra) were not complied with. However, the principle in the case of **Marwa Wangiti Mwita** (supra) observed two consequences of earliest opportunity and unexplained delay or failure to mention. In the wording of this case, it was observed that:

*"The ability of a witness to name a suspect at an **earliest opportunity** is an important assurance of his reliability, in the same way as **unexplained delay or complete failure to do so**, should put a prudent Court to an inquiry."*

[Emphasis supplied]

In view thereof, since those mentioned persons above was not brought by the prosecution, I think in my opinion, the general rule that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an adverse inference to the prosecution, should apply also in this case. (See for example; **Azizi Abdalah vs. Republic** [1991] TLR **71** and **Riziki Method @ Myumbo vs. Republic**, Criminal Appeal No. 80 of 2008 CAT (unreported).

It is similarly settled principle that visual identification evidence is of weakest character and most unreliable which should be acted upon cautiously after the court has first satisfied itself that the condition were favorable for proper identification and all possibilities of mistaken identity

have been eliminated. Based on the circumstances sustaining the incidence of assault of deceased person as stated above, I am settled all possibilities of mistaken identity have not been eliminated by the statement from the deceased only which is exhibit P2. Thus, am not ready to hold that the deceased was in favorable condition to identify the three accused persons.

I am aware that, it is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of an accused made under unfavorable conditions, but the rule does not prevent a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling nothing but the truth. **(See Hassan Juma Kanenyera and Others V. R)** [1992] TLR, 102.

According to prosecution evidence all three witnesses did not witness an accused persons assaulting the deceased person on the material date. It was thus evidenced that PW1, PW2 and PW5 as testified above their evidence was indeed hearsay because all of them testified that they were told by the deceased person that the accused persons were identified at the scene of crime. Another evidence is exhibit P1 which statement of WP 2361 d/SGT Rosemary where she narrated how she recorded the statement from

deceased and accused persons. In her statement said accused person mention his assailant who are Letii, Kalipii and Okocha also the statement showed that all accused person admits their nick name as mention by deceased. I have considered this evidence, taking regard those statements of the accused persons were not tendered before this court to substantiate her assertions and for those of evidence PW1, PW2 and PW5 was heard under circumstances as stated above, I am of considered opinion both cannot stand unless corroborated, therefore, being having that status cannot corroborate the evidence of the deceased, since it also requires to be corroborated. I am saying this because, it is a settle law that the evidence which in itself requires corroboration cannot be used to corroborate another evidence. (See **Swelu Maramoja vs. Republic**, Criminal Appeal No. 43 of 1991 (unreported)).

The learned State Attorney invited me to consider that the statement of the deceased was dying declaration thus should base conviction, in my view even if it is so, in this case at hand it cannot be said that the dying declaration was authentic, because, the attack at issue against deceased as analyzed and evaluated above was made at unfavorable condition. To bolster my view, I am inspired by the view in the case of **Romanus Kabogo vs.**

Republic, Criminal Appeal no. 62 of 1998 and Hemsu Nzuunda and two others vs. Republic, Criminal Appeal No. 34 of 1995 the Court of Appeal of Tanzania held that: -

"As the general rule a court can act upon a dying declaration if it is satisfied that the declaration was made in the circumstances in which it was made give assurance to its accuracy and if is in fact true"

Nonetheless, according to the above stated circumstances when deceased was attacked, I am entitled to presume the facts at the scene of the crime by virtue of section 122 of the Evidence Act Cap.6 R.E. 2022 as right stated in defence submission, for the purpose of clarity this provision hereunder is reproduced;

"s.122. A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

In my view thereof, as per circumstances stated above, the facts that it was raining and attackers were in mobsters of more than ten persons were

obstruction on seeing may not be avoided. In my view, I have inferred the existence of unclear identification of the accused persons at the scene of the crime. (See the case of **Isaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015 CAT (unreported). Having analysed above, I decline with the prosecution submissions, and I therefore, find that, the dying declaration under the circumstances of this case, was uncorroborated and unauthentic, hence not reliable evidence on which this court can base a conviction.

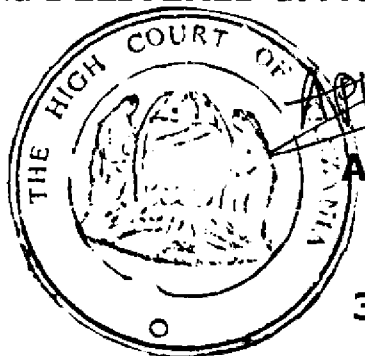
For the foregoing I have endeavors, in conclusion thereof, I am satisfied that in this matter at hand, having regarded the visual identification evidence by the deceased and the submissions from either side, I am inclined to agree with the defence submission, that the visual identification evidence was not watertight. Therefore, the issue raised on regard to identification, is answered not in affirmative. That all three accused persons were not identified that they were in mobsters who invaded and caused injuries to the Deceased.

On the basis of the above findings, I am satisfied that the prosecution has failed to prove beyond reasonable doubts that it is the three accused persons herein who killed the deceased Paulo Minza. I therefore find the

accused persons namely; Gilbert s/o Tabson Njau@ Letii, Joseph s/o Mathias Mmbando @ Kalipii@ Babuu and Innocent s/o Liberati Lyimo@ Okocha are not guilty for the offence charged of Murder contrary to section 196 of the Penal Code, (supra). Consequently, I acquit them forthwith under section 235 of the Criminal Procedure Act, Cap 20 R.E 2019; and subsequently I order their immediate release from custody, unless held lawfully for other cause.

It is so ordered.

DATED and **DELIVERED** at **MOSHI**, this 30th day of June, 2023.



A. P. KILIMI
JUDGE
30/6/2023

A handwritten signature is written over the seal and the text, with a long horizontal line extending to the right.