

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

SITTING AT MPANDA

(CRIMINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 41 OF 2020

REPUBLIC

VERSUS

SEIF ^S/o MGELWA.....1ST ACCUSED

GILIAD ELIHURUMA @ KAWICHE.....2ND ACCUSED

JUDGEMENT

Date of last order: 28.11.2022

Date of Judgement: 03.01.2023

MRISHA, J.

The accused persons Seif s/o Mgelwa and Giliad Elihuruma@ Kawiche were arraigned before this for one count of Murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition 2019[The Penal Code]. The prosecution side alleged that on 2nd day of December, 2019 at Urwila Village within Mpanda District in Katavi Region the said accused persons murdered one Jafet s/o Zenobi @ Kamandu. They pleaded not

guilty to the offence of murder, thus plea of not guilty was entered against them, hence full trial.

During the trial of this case, Mr. Abel Mwandalama, the learned Principal State Attorney represented the Republic; whereas, the accused persons were represented by Mr. Patrick Mwakyusa, the learned Advocate.

In their efforts to prove the case against the accused persons, the prosecution brought a total of four (4) witnesses namely, Baraka Credo Lusambo, who testified as prosecution witness No. 1 (PW1), Dr. Jafari Kwama Kitambwa as PW2, A/Inspector Conrad Nchimbi as PW3 and G. 1471 D/C Ferik as PW4. The prosecution also tendered Sketch Map during preliminary hearing as Exhibit P1, Post Mortem Report as Exhibit P2 and Statement of Husna as Exhibit P3.

Upon the closure of the prosecution case, defence case was opened after it was found that the accused persons had a case to answer. In disproving the prosecution allegations levelled against them, the first accused person testified as DW1 and second accused as DW2. They neither called a witness to testify on their favour nor did they tender any exhibit. The evidence for the prosecution is as follows;

PW1, Baraka Credo Lusambo, resident of Urwila Village, Mpanda District, testified that on 02/12/2019 he received information from one lady called Dorotea that his relative one Japhet Zenobi was beaten. He

told the reason why Japhet Zonobi was beaten, that Japhet was found with a married woman doing sexual intercourse. After being informed so, he closed his business for safety and took a motor bike and went to the scene of crime, he went to the Executive Ward Officer's office where Japhet Zonobi was taken. While there he saw many people and one of the who had was holding stick, used it to beat Japhet Zonobi (the deceased), another person was doing the same. It was around 17:00 hours when the incidence happened.

He identified some of persons who were beating the deceased person by their name one Julius, Seif and Giriadi. Julius was beating the deceased person with a stick and Seif was slapping the deceased on his face while Giriad was holding him. He tried to please them not to continue beating him, then immediately the Police officer came and those persons disappeared. He took his relative to police station and police office issued them a PF3. He took him to the Dispensary called Urwila, the deceased was in bad condition; he was unable to speak. The doctor examined his relative and advised him to transfer the patient to the Mpanda Referral Hospital for further treatment. The police officer Nchimbi, him and driver went together to Mpanda Referral Hospital.

On 04/12/2019 at the morning hours his young brother (the deceased) died. On 05/12/2019 the deceased body was examined by a doctor and they were permitted to bury the deceased body. Three persons

he mentioned worked at the Chinese Company and they are drivers employed by that company. The Company dealt with Road Construction. That Julius is not in the Court, but Seif and Giliadi were present in Court. **PW1** identified the 1st and 2nd accused persons in the dock.

When cross examined by Mr. Patrick Mwakyusa, Learned Advocate, **PW1** replied that he contracted marriage seven years ago. He did his business at Uruila which is 100 meters from the main road to his place of business. That the lady called Doroth told him that his young brother was beaten by people. She also told him that the deceased was beaten at the Executive Ward office. He saw the persons beating his young brother along the road. He did not know where the young brother was caught. It was 250 meters from his place of work to the scene of crime. The office of Ward Executive and Village Executive working in the same place; it is a government office.

That when the deceased was caught, he was sent to the Government Office. The Government office is a safe place. He found his young brother worn a boxer (pant). That the stick he mentioned is not before the Court. The police station is near to the scene of crime, when the police arrived at the scene of crime the persons who were beating the deceased disappeared. The police office did not arrest them; they took his young brother to the Police station and was given PF3. They went to the Dispensary with Militia; Militia was called by a Police officer. Deceased

died on 04/12/2019. He knew the accused persons because they are drivers of Chinese vehicle, and he knew their names too. He did not know the clothes the accused persons worn. He informed the court that the accused resides at Uruila but he did not know the place they live. He did not know all the drivers working at the Chinese Company. He did not know which car the 2nd accused drives but he drives a big Car, Lorry and he wrote a statement at the Police Station. He was not there at the time the deceased was caught but he knows he was taken the office of Ward Executive.

When re-examined by Mr. Abel Mwandalama P/State Attorney, he stated that he did not measure the distance of the areas. There was no safety when his young brother was beaten at the place. At the time he reached the scene of crime there was no any leader of Village Executive, Ward Executive or even a police officer.

PW2: Dr. Jafari Kwama, Kitambwa, resident of Kasulu, Kigoma Region, testified that on 05/12/2019 said he was at the department of OPD – Out Patient Department (idara ya wazee). He was called by his immediate boss and was instructed to go at the mortuary to conduct examination. He went to mortuary to conduct Post-Mortem Examination. He met police officer one Nchimbi and he gave him form, he was instructed to conduct examination. He conducted Post Mortem Examination and filled the form and he submitted to the police officer

Nchimbi. He could identify the form by looking for his hand writing, his registration number, his signature and official stamp. **PW2** tendered post mortem report and it was admitted in court as Exhibit **P2**. **PW2** told the court that the deceased person was male, and his body was covered with bruises. **PW2** opined that the cause of the death was due to brain injury/traumatic brain injury. **PW2** told the court that the deceased had severe head injury.

When cross examined by Mr. Patrick Mwakyusa, Learned Advocate he replied that he was instructed to go to mortuary and conduct Post Mortem Examination. Deceased person was injured with blunt object. He did not remember the clothes the deceased person worn. He did examination of the body from head to toe and also, he opened the head of the deceased person. He told the court that deceased died because of brain injury. The head of the deceased had wound and bruises. He saw the brain was fractured. He said stick can cause brain injury.

When re-examined by Mr. Abel Mwandalama Principal State Attorney, **PW2** stated that speed of the stick can cause injury to the body where the external forces is high.

PW3 Assistant Inspector Conrad Nchimbi testified that on 02/12/2019 at the evening, he received the information from the police officer at Urwila Police Post. The report was about the person called Japhet Zenodi who was beaten, he asked the police if the person was able

to talk and he was told that he was not able to do so. He instructed them to issue a **PF3**, and he was informed later that the person was sent to Urwila Dispensary for medical treatment. He instructed police officer to arrest the persons who committed the offence. He was informed that the victim was beaten when he was found with a wife of another person.

That he was also informed that the suspects were not known because they were many. He was informed about the condition of victim and the doctor suggested to transfer the victim to the Regional Hospital. He also instructed the Police officer to find the suspect and those who were at the scene of crime. Police found the Lady called Husna Juma and her husband called Jackson Julius. He went to the Urwila Dispensary and found the victim with head injury and his condition was bad.

That they took the victim and transferred him to the Referral Hospital. They were with Celishasi Moslina, Husna Juma and Julius Jackson and Baraka, the relative of the victim. The deceased body had head injury, and his body had multiple abrasions. The victim was admitted at the Referral Hospital and started getting treatment; he left the victim with his relative Baraka.

That they returned to the Katumba Police Station for interrogation of the witness. Husna Juma said nothing, and Julius Jackson was crying; immediately, Julius Jackson asked for toilet the police officer opened the door of vehicle and Julius Jackson pushed the police officer and ran away

at around 23:00 hours. Husna Juma remained in the vehicle and he asked why her husband ran away and she responded by saying he was among the persons who were beating the victim together with two friends. She was worried to say much because her husband would beat her. She mentioned the names of her husband's friends who were beating the victim, as Seif Mgelwa and Elibariki Elihuruma. She said used to have sexual relation with the deceased. On the fateful day she said they were at the room of her neighbor making love.

PW3 told the court that on 03/12/2019 at around 03:00 hours he arrested two accused persons who were interrogated at Katumba Police Station by Coplo Celishasi and D/C Ferick. He received statement of Husna Juma which mentioned the three persons who beat the deceased person. Regarding Julius Jackson, he opened the file on the offence of escape from the lawful custody of Police. On 04/12/2019 he was informed that the victim died when he was getting treatment at the Katavi Referral Hospital. He also drew a sketch map which was tendered and admitted in court during preliminary hearing as Exhibit P1.

When cross examined by Mr. Patrick Mwakyusa, Learned Advocate, he replied that he was in charge of the Katumba Police Station, and he admitted that there was road construction. He investigated and drew a sketch map. He was informed through phone that at around 4:00 hours that there was incident, that Japhet Zenobi was beaten. **PW3** told the

court that Jackson Julius was arrested as a suspect and Husna Juma was arrested as a witness. Julius Jackson and Husna were treated as a witness before oral interrogation was conducted by the police officer. They were treated as witness in the case of grievous harm before the death of the deceased. They were four at the time they took the victim to the Katavi Referral Hospital.

It was **PW3** further testimony that when they reached at Majengo area at Mpanda, Julius Japhet said he had stomach pain and he wanted to use toilet. They went to Urwila with Husna because Husna mentioned the names of the two accused persons when in the Car. Immediately after he mentioned the names of accused persons, he changed his mind and went to Urwila to arrest the persons. He and Coplo Celishasi went and arrested the two accused persons. He arrested without warrant but as a police officer he has mandate to arrest without warrant.

That the 1st accused person was arrested at Urwila Center. They are living in the same house but in different rooms. He did not measure the distance from one room to another room. The two accused were living in different wings. After arresting the accused persons, they sent them to Katumba Police Station and Husna was sent to Katumba Police station. He assigned D/C Felix to record the statement of the Husna. He was directed by Fabiano Sementa at the time he drew a sketch map. He was not there at the time of the offence committed. Fabiano Sementa was not

there at the time of commission of offence. There is only one house near the crime scene. The door faced is in front of the house, the house does not have back door. What he drew was based on the guidance of the chairman Fabiano Sementa. The police post of Urwila connected to Uruila village Office. He was informed of the incidence at around 17:00 hours.

When re-examined by Mr. Abel Mwandalama - P/ State Attorney, he stated that as a police officer, he is allowed to investigate, to draw sketch map and arrest the accused persons. He stated that one of the circumstances the police office may arrest accused person without warrant of arrest is when the accused person wants to escape.

Further, he stated that there is no law requiring a police officer to be accompanied by the village leaders at the time of arrest. Husna Juma was there at the time he drew a sketch map, she showed the broken door, and where she ran (in the room), and also the place where the deceased person was beaten.

PW4 G.1471 D/C Ferik, a police officer, working at the investigation department at Mpanda Police Station, testified that he was instructed by his superior to take statement of the two accused persons Seif Mgelwa, Giliad Elihuruma and Husna. Husna is a wife of Julius. He was instructed to interrogate Husna because she was found with a husband of another man. He was told by Husna that she had sexual relationship with another person. That they arranged to have sex with her friend in one of the

rooms. Husna heard a person knocking the door and they broke the door and entered inside the room and she saw her husband holding a stick with two friends Seif Mgelwa and Giliad Elihuruma. She saw her husband beating the deceased and the two friends came to stop Julius not to beat the deceased. After finished recording the statement of Husna, he read it over and Husna signed the statement. **PW4** tendered statement of Husna Juma which was admitted in court as an Exhibit **P3** without being objected by the defence. **PW4** identified the two persons and mentioned their name, one Seif Mgelwa and Giliad Elihuruma.

When cross examined by Mr. Patrick Mwakyusa, Learned Advocate, he replied that Husna Juma narrated to him that her husband entered in the room holding a stick. Husna's husband beat the deceased on the head. Seif Mgelwa and Giliad Elihuruma intervened Julius who continued to beat the deceased. Julius and his wife Husna were taken to Police. He interrogated Husna at Police Station. He interrogated Husna in order to know the source of commission of the offence. He wanted to know who participated commit the offence. Seif Mgelwa was not mentioned in the statement. Deceased was also living at the house Husna Juma rented. The house has two doors, front door and back door. The statement was not signed by Husna Juma. **PW4** said it was not stated in the statement that Husna Juma was present at the time 1st and 2nd were arrested. He

was not informed by Husna Juma she participated at the time of drawing sketch map.

When re-examined by Mr. Gregory Muhangwa, Learned State Attorney PW4 stated that he recorded the statement of Husna Juma. He was not present at the scene of crime. All pages of the statement were signed by Husna Juma. According to the statement of Husna Juma, **PW4** stated, all persons entered in the said the room and beat the deceased.

The court having found that the prosecution had sufficiently established a case against accused persons to require them to make their defence, called the accused persons who opted to defend themselves and they elected to testify under oath. The summary of their evidence is as hereunder;

DW1, Seif Mgelwa, resident of Urwila, Mpanda District, Katavi Region, working at the China Company (CRCG) testified that on 03/12/2019 he was arrested by police officer of Uruila. He was arrested at his place at around 09:00 hours. He resides at Uruila Kanisani. He knows Giliad Elihuruma, a second accused in this case. He informed the court that the 2nd accused resides at Urwila Center. Four police officers came to arrest him. He remembered one police officer by the name of Nchimbi. That, being arrested, he was taken to the car where he met the second accused, the lady called Husna Juma and the driver who were in the car.

He was then taken to Katumba Police Station and was put under custody. Husna Juma was also in custody and he went to the interrogation room. His statement was recorded by police officer called Ferik and was returned to the custody. After two days they were transferred to Mpanda Police Station. They were kept to the room three of them. He did not know Husna Juma before he was arrested. They were sent to Court and charged with the offence of murder. He did not know the accused person before his death. He was not living with Julius and Giliad Elihuruma at the same house. Giliad Elihuruma resides at Urwila Center. **DW1** informed the court that before this matter, he did not know Giliad Elihuruma, even his work. He did not participate in beating the deceased. On 02/12/2019 he was at work, and he started his duty around 08:00 hours up to 17:00 hours. He worked at Ikondamoyo Village, from Ikondamoyo to Urwila there are 9 kilometers. He parked his truck at Ikondamoyo camp. After parking the truck, he got a lift of a Motor bike, it was 3 kilometers left to reach Ikondamoyo Village. He reached his home at around 18:00 hours. He did not participate in beating the deceased and cause his death.

When cross examined by Mr. Dickson Makolo, Learned Advocate he replied that he resides at Urwila before this case. He had been there for 3 months before he was arrested. The leader of the area of Urwila knows him. He knows the leader called Bukuku Luhoza, he did not call them to

testify. His wife came to see him when he was arrested by Police, she was not in Katavi. Husna Juma was worried to make statement in front of them. He did not cross examine such prosecution witness on the offence he was charged with. He was not living together with the second accused. They worked together with the second accused as are drivers. He did not beat the deceased person. He was not at the scene of crime. He was employed by CRCJ. The 2nd accused could prove that he was at work when offence was committed.

When cross examined by Mr. Gregory Muhangwa, Learned State Attorney he replied that he was residing at Uruila before getting a job, and he knew the 2nd accused person after being arrested. That he was not working with the second accused. He knows the name of deceased, his name is Japhet. He did not know a person claimed was beaten. On 02/12/2019 he was at work and he returned home in the evening. He did not bring log book as the book was kept at the Company.

When re-examined by Mr. Patrick Mwakyusa, Learned Advocate he stated that he was told by police to assist the investigation. He was not informed of the offence he committed. He mentioned his witness one Giliad Elihuruma, the second accused.

DW2, Giliad Elihuruma Kawiche, resident of Uruila village, Mpanda District, operator of machine at CRSG Company testified that on 02/12/2019 there was incident which happened at Uruila village, the

incident was about a woman who was found with another man. Julius found her wife with another man, Japhet was one found with the woman of Julius. He knew Julius, as they were living at the same house. Julius was wearing reflector every day and went to the China Company called CRSG.

That, he informed the court that there are two houses in the same compound, one big house the owner is living with his family and the small rear one a servant quarter (house). In the small house there are three rooms, one room lives Julius. **DW2** said he was living in one room and third room was occupied by a person he did not know his name. The 1st accused person was not living in the same house. On 02/12/2019 he was at the grocery; the building contained a guest house called Mombasa, he was drinking, it was between 02:00 hours and 03:00 hours. When he was at grocery, he heard someone said *'help him; he would kill him'*. It was around 9 to 10 meters from the place he sat, to the incident. He went to the scene and he found Julius holding a stick. He reached the place where the incident happened and hold Julius not to continue beating the deceased person and adviced him to take the person to the police. They started going to the police with the person founded with Julius wife and other persons. The person who was found with Julius wife walked to the police post. He saw the prosecution witness called Baraka Lusambo (**PW1**) at the witness box; he did not see him at the scene of crime. He

surrendered the person who was found with the woman, Julius and Husna Juma to the police officer. He left and went to the village.

When cross examined by Mr. Dickson Makolo, Learned State Attorney he replied that at the scene of crime he knew only Julius and his wife. He found Julius beating a person who was found with Husna Juma.

When re-examined by Mr. Patrick Mwakyusa, Learned Advocate he stated that he started working with the CRSG on 17/07/2019; he was moved to Urwila on 15/11/2019.

When defence case was closed, both the State Attorney and the learned advocates for the Republic and accused persons respectively were given audience to address the court on final submissions. They all opted to submit final written submissions.

The, learned counsel for the defence submitted that the prosecution failed to call a key witness one H. 3657 PC Aloyce who was Incharge of the Urwila Police Post. Mr. Mwakyusa submitted that the evidence produced by prosecution was very weak, feeble, contradictory and has no evidential value to prove the offence of murder. He argued that prosecution witness Bahati Lusambo (**PW1**) had nothing to offer as he lied openly that the accused person slapped the deceased while in presence of a police officer one PC Aloyce. He contended that the witness PC Aloyce was a crucial witness to call.

Further, Mr.Mwakyusa argued that witness A/Inspector Nchimbi (**PW3**) was incompetent and negligently as he caused one Julius to escape while under arrest. He was of the view that **PW3** evidence was full of contradictions and lies. He said the accused person lived in the same house with Julius and Husna, fact which was disputed by Husna in her statement and that Seif was not mentioned in the statement.

It was his submission that **PW3** stated that Seif's wife opened the gate while in actual fact she was residing in a different house which was some distance from the house occupied by Husna. Further Mr. Mwakyusa submitted that **PW3** lied when he stated that he arrested the first accused at the house occupied by Husna, while first accused was arrested during the night time and at a different place. He said **PW3** lied when he stated that Husna was present and participated during the drawing of the sketch map, while the sketch map itself provides only the name of Fabiano Sementa. **PW3** also did not show in his sketch map house where adultery was committed and it had no back door, the fact which was disproved by Husna in her statement. **PW3** further lied when he stated that he was accompanied by one police officer (driver), but during cross examination he stated to have been accompanied by three police officers. He argued that failure to call PC Aloyce who was paramount witness, adverse inference have to be drawn as per the case

of **Aziz Abdallah vs Republic** [1991] TLR 71. He urged the court reject the evidence of **PW3** for lacking evidential value.

Mr. Mwakyusa submitted that the statement recorded by **PW4** D/C Ferik was admitted contrary to the law, thus it has to be rejected on the reason that no reason was provided by the prosecution for failure to summon Husna, the omission of which is fatal. Further, Mr. Mwakyusa submitted that **PW4** did not enquire before taking statement as to whether Husna was able to read and write. In addition, he said **PW4** did not read statement to the maker and the maker did not sign on the statement. Mr. Mwakyusa in the alternative, urged this court to rely on the statement of Husna which demonstrates that the accused persons did not participate in inflicting punishment to the deceased, rather they tried to rescue the situation. Mr. Mwakyusa was of the view that a mere presence of the accused at the scene of crime does not necessarily make him a party to the offence. He fortified his position by citing case of **Msengi Mkumbo vs Republic** [1965] EACA 500.

Mr. Mwakyusa argued that murder case being a serious offence has to be proved beyond reasonable doubt as per the case of **Republic vs Kerstin Cameron** [2003] TLR 84. He submitted that evidence of the prosecution is too weak to prove their case.

As regard the cause of death, Mr. Mwakyusa submitted that the cause of death is vague. The report of **PW2** established two causes which

are severe head injury and traumatic brain injury which are two distinct causes. He challenged the assertion of **PW2** that clothing of the deceased was normal and he saw no blood. He also challenged the assertion that deceased body had a multiple abrasion which cannot cause death.

Mr. Mwakyusa submitted that accused persons are innocent. He said **DW1** has no any clue about the deceased death, and on the fateful date he was at Ikondamoyo his place of work until around 6:00 pm when he arrived at Urwila village. As regard **DW2** Mr. Mwakyusa submitted that he only rescued the deceased from punishment carried out by Julius. **DW2** attacked the evidence of **PW1** who stated that he saw **DW1** slapping the deceased. He prayed for the dismissal of the case as the accused persons are not responsible for death of the deceased.

On the side of the prosecution, Mr. Gregory Muhangwa, Learned State Attorney submitted as regards the statement of Husna Juma, the notice was dully served and was never objected.

Further, Mr. Muhangwa submitted that **PW1** testified that he was informed by one Dorothea Lucas that the deceased was assaulted by the accused persons, he went to the scene of crime and witnessed the event of which is direct evidence.

Mr. Muhangwa submitted that the doctrine of common intention put all the accused persons at guilty due to their participation and presence

at the scene of crime. He fortified his position by citing the case of **Godfrey James Ihuya & Others vs Republic** [1980] TLR 197. Further he submitted that the accused persons participated in mob justice, thus they are guilty of murder as per the case of **Enock Kipela vs Republic**, Criminal Appeal No. 150 of 1994.

Further, Mr. Muhangwa submitted that the defence did not put any objection to the admissibility of the statement under section 34 B of the Evidence Act. He also attacked the accused persons' defence of alibi by arguing that the accused persons did not notify the prosecution of the intention to rely on such defence, as provided under section 194 (4) of the Criminal Procedure Code. He finally prayed for the court to find the duo accused persons guilty of murder as the case against them is proved.

The issues to be resolved before this court are as follows; first, whether or not the accused persons did cause the death of Jafet s/o Zenobi @ Kamandu; if the first issue is answered in the affirmative, the second issue to be resolved is whether they did so with malice aforethought. Along with answering the above two pertinent issues, three important legal issues need to be considered and determined in the present case, which are; burden and standard of proof in criminal cases, visual identification/recognition and defence of alibi.

In criminal litigations, the prosecution is duty bound to prove any case beyond reasonable doubt, as it was held in the case of **John s/o**

Makolobela, Kulwa s/o Makolobela and Eric s/o Juma @ Tanganyika versus Republic [2002] TLR 296, by the Court of Appeal that: -

"ii) A person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"

In murder cases akin to this one, to find the accused persons guilty the available evidence must prove not only the death but the link between the said death and the accused persons; the onus never shift away from the prosecution and no duty is cast on the accused persons to establish their innocence. The duty of the accused persons is only to cast a reasonable doubt.

In the instant case, it is not in dispute that Jafet Zenobi @ Kamandu is dead as per Exhibit **P2** post mortem examination report tendered by **PW2** Dr. Jafari Kwiamba Kitambwa The cause of death is a result of severe head injury (traumatic brain injury); therefore, the complaint by defence counsel that the report is confusing is not holding water. The evidence clearly shows that the deceased died an unnatural death.

The other issue to consider is who caused the assault which led to deceased's death.

First, is the issue of identification which I find to be crucial in this case. It is a trite law that identification of accused person is necessary where the offence is committed at night or day time. The law requires that identification evidence must be watertight to ground conviction; an identifying witness must give a detailed explanation as to how he identified the accused persons. In the case of **Republic versus Elia Sebwato [1960] E.A.**, the Court held that,

"Identification evidence must be watertight to sustain conviction and exclude possibilities of mistaken identity"

The Court of Appeal of Tanzania in the case of **Waziri Amani versus Republic [1980] TLR 250** provided guidelines with sufficient lucidity on the evidence of visual identification. The Court provided the following guidelines on visual identification at pg. 151 and 152 as follows;

"Evidence of visual identification is of weakest kind and most unreliable. No court should act on evidence of visual identification, unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

The Court of Appeal in this landmark case added at page 252 that;

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue, unless there is shown on record a careful and considered analysis of all circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity"

The same principles above apply even to cases of recognition evidence as in this case where the identifying witnesses claimed to have recognized the accused at the scene of crime.

In the instant case, as stated elsewhere, the offence was committed at day time. The prosecution, as per information, alleges that the accused persons did murder Jafet Zenobi @ Kamandu. Therefore, the prosecution has to prove the offence of murder against all such accused persons. Proof will depend on how they have led their witnesses to prove beyond reasonable doubt that no one else, accused persons murdered the deceased.

I have to state at the very outset, that this case falls squarely on the issue of identification by recognition. As regards recognition, the Court of Appeal in the case of **Shamir John versus Republic, Criminal Appeal No. 166 of 2004**, stated that;

"Recognition may be reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives or friends are sometimes made"

My duty now is to determine whether the accused persons are the ones who invaded in the house and assaulted the deceased which resulted to his untimely death later on.

PW1 claimed in his testimony to have properly recognized all the two accused persons being the persons who assaulted the deceased on the material date of 2/12/2019 at around 17:00 hours. Was the evidence of **PW1** absolutely watertight? The evidence of the prosecution witness (**PW1**) connotes that he connects the accused persons with the offence they stood charged for the following reasons, which I think to my view, cannot be ignored;

Firstly, **PW1** testified that the incident which resulted to the death of the deceased took place around 17:00 pm an evening hour. At this time around, and in a normal circumstance there is favorable conditions in which an identifying witness is able to make a good observation of the event as there is a clear visibility. **PW1** while testifying said while being there he saw one of the persons holding stick beating deceased along with other persons. **PW1** further said he identified some of persons beating the deceased person by their names who are Julius, Seif and Giliad. Further **PW1** testified that Julius hold a stick and was beating the deceased person, while Seif and Giliad were holding and slapping the deceased person. **PW1** testified that when police came those persons disappeared. **PW1** took his relative (deceased) to the Police station and later on to the Urwila Dispensary. That fact resolves the issue of distance upon which the identifying witness **PW1** observed the accused persons when they were assaulting the deceased.

Under such circumstances, it cannot be denied that the accused persons were close to the identifying witnesses **PW1** when they were assaulting the deceased. Therefore, **PW1** recognized the accused persons instantly.

Secondly; **PW1** testified that he is familiar with the accused persons as they were driving Chinese cars and he knows even their names. That means **PW1** knew the accused persons before the incident; he was not a stranger to the accused persons.

In the light of the above testimony of **PW1** as regards how he is familiar with the accused persons and their names, it appears that the identifying witness (**PW1**) who claimed to know and had seen the accused persons before the incident on the material date, is nothing but true. **PW1** had the accused persons under observation at the scene of crime before they disappeared. **PW1** testified to know the accused persons because they drive Chinese cars. **PW1** also mentioned the accused names in examination in chief, in addition it appears they are living in area of Uruila Village.

I am aware that that where an identifying witness is able to name the accused by his name during examination in chief, he is said to be a credible witness and can be relied by this court. As in the case of **Mussa Mustapha Kusa & Others versus Republic, Criminal Appeal No. 51 of 2010**, unreported, the Court held that;

"Where a witness mentions the name of the offender at an earliest opportunity it is an assurance that the identification made by the witness is not a mistaken one"

Thirdly, the prosecution side successfully led the evidence which proves that the witness **PW1** mentioned the accused names early as possible during examination in chief.

As discussed hereinabove, it is my finding that the evidence on identification by recognition do meet the test set in **Waziri Amani's** case to warrant conviction. The detailed explanation by prosecution witness **PW1** and the favorable circumstances surrounding the assaulting of the deceased which resulted to his death, one can say that such evidence had eliminated all possibilities of mistaken identity.

In that regard, I have no doubt whatsoever, that the accused persons were properly identified by **PW1** at the scene of crime. This court has no reason to fault his testimony as per the case of **Goodluck Kyando versus Republic** [2006] TLR 263.

As hinted hereinabove, the general rule in criminal prosecution is that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution. See **Jonas Nkize versus Republic** [1992] TLR 213.

It is my strong view that, the incident of assault resulted to the death of the deceased which took place under observation of witness **PW1**. The fact that the accused persons were the ones who assaulted the deceased before he met his untimely death and the fact that, they were positively recognized by **PW1**, makes this court find him to be reliable and credible witness. This available evidence by **PW1** as to the circumstances resulting to the death of the deceased draws an inference as to the guiltiness of the accused persons in the commission of offence and such circumstances have eliminated all possibilities of someone else to kill the deceased apart from the accused persons.

The general guidance with regard to evidence against accused persons is found in the decision of **Magendo Paul and Another versus Republic [1993] TLR 220** where the Court of Appeal at 223 held that;

"If the evidence is so strong against an accused person as to leave only remote possibility in his favour which can be easily be dismissed, the case is proved beyond reasonable doubt"

However, in their defence case all the defence witnesses, **DW1** and **DW2** denied to have been involved in the commission of the offence they are charged with. **DW1** appeared to have raised the defence of Alibi during his defence case that on 2/12/2019 he was at his working place at

Ikandamoyo Village, **DW1** further testified that he arrived at his place of work at 8:00 hours and later he left to his home at around 1700 hours.

While **DW2** testified that on 2/12/2019 he was at the grocery drinking. That such grocery had a guest house called Mombasa. While there drinking he heard someone saying *'help him; he will kill him'*. He informed the court that the place he sat and the place of incident was around 9 to 10 meters, and he went to the scene of crime where he found Julius holding a stick and he told him not to beat the person. He then took the person (now the deceased) to the police station.

As regards defence of alibi as raised by **DW1**, the law on this subject is well settled. First, the law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case; that is provided under section 194 (4) of the Criminal Procedure Act, Cap 20 RE 2022[The CPA]. If the said notice issued at that early stage, the said person is under obligation, then to furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case; as provided under section 194 (5) of the CPA. Should the accused person raise the alibi much later than what is required under subsections (4) and (5) above, as it was done in this case, the court may, in its discretion, accord no weight of any kind to the defence. This is provided under section 194 (6), Cap 20.

The defence (DW1) evidence failed to cast reasonable doubt to the prosecution case. However, the accused persons cannot be convicted basing on weakness of their defence. Their conviction should always be emanated on the strength of evidence adduced by credible and reliable witnesses of the prosecution.

Also, before going further, I would like to comment on the issue of witness statement of Husna Juma. I have noted that there were rival arguments on that part between the prosecution and the defence side. On their side the Prosecution argued that it complied with the legal requirement available under section 34B of the Evidence Act because they properly issued a notice of their intention to use such statement.

However, Mr. Mwakyusa was of different view cementing that the procedure was not complied. On my part I agree with the defence side because no efforts were taken by the prosecution side to procure such witness.

Having found that **PW1** and other prosecution witnesses that is **PW3** who drew sketch map of the scene of crime (Exhibit **P1**), and **PW4** are reliable and credible witnesses, I find that the prosecution has successfully proved this case to the standard required by the law. Therefore, basing on the above grounds, this court answer the above second issue in the affirmative.

The remaining necessary issue to be considered by this court is whether the accused persons in the instant case killed the deceased with malice aforethought; within the meaning of section 200 of the Penal Code, Cap 16 RE 2019.

Under section 200 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- a. An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not.*
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. An intent by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit an offence.*

It is cardinal principle of law in murder cases that conviction cannot stand, unless the prosecution has successfully established both the overt act (*actus reus*) and malice aforethought (*mens rea*).

In the case of **Moses Michael Tall versus Republic [1994] TLR 195**, the Apex Court in this country had discussed situation a which may constitute malice aforethought. In this case it was stated that;

(i) Malice aforethought may be inferred from the amount of force which an offender employs in inflicting fatal injury;

From the exhibit P2, which is post-mortem report which was produced and admitted in court] the death of the deceased was due to severe head injury (traumatic brain injury). The conclusion I get from foregoing cause of death, great force was used by the accused persons in assaulting the deceased resulted to his fatal head injury.

From the facts and the evidence of the prosecution which clearly point the accused persons as the persons who killed the deceased, I am of the strong opinion that the element of malice aforethought, *mens rea* has been established to the satisfaction of this court.

I thus enter a verdict of guilty and proceeded to find that the offence of murder against both two accused persons has sufficiently been proved according to the requirement of the law. Therefore, I find all the accused

persons guilty of the offence of Murder contrary to section 196 of the **Penal Code**, and I hereby convict them forthwith.


A. A. MRISHA

JUDGE

03.01.2023

SENTENCE

There is only one punishment for the offence of Murder once it is proved. My hands are tied by the law and I have to pronounce the sentence. I sentence the accused persons **Seif s/o Mgelwa** and **Giliad Elihuruma @ Kawiche** to suffer death by hanging as provided under sections 26(1) and 197 of the Penal Code Cap 16 R.E 2019.

It is so ordered.




A. A. MRISHA

JUDGE

03.01.2023

Right of Appeal is fully explained.




A. A. MRISHA

JUDGE

03.01.2023

Dated at MPANDA this 3rd Day of January, 2023.


A. A. MRISHA

JUDGE

03.01.2023

