IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL SESSIONS NO. 86 OF 2022

REPUBLIC

VERSUS

1. **ABDULHAMID S/O MAARIFA @KISHIGA**
2. **YUSUPH S/O HAMIM MATAMA @ABUU HAIRAT**
3. **SIRAJI S/O MOHAMED LUMILA**
4. **KHALID S/O YASSIN SADICK**

JUDGMENT

Date of Last Order: 03/08/2023

Date of Judgment:28/08/2023

Kamana, J:

On 11th February, 2013, a decade ago, Reverend Mathayo Kachira (the deceased) brutally joined his ancestors. Moments before his death, Buresere area situated in Chato District within Geita Region was in bedlam. The crux of such pandemonium was what was alleged to be a row over the right to slaughter animals between Christians and Muslims.

Facts had it that on the material date, some Christian residents of Buseresere slaughtered animals and offered the meat for sale in a butchery owned by one of them which, for that purpose, was nicknamed

Wakristo Butchery. The act was not welcomed by some Muslims who took it as offensive to their belief. Armed with machetes and other weapons, the aggrieved Muslims invaded the said butchery with a view to stopping the offensive act against their faith. In that course, one Obadia, the meat seller, was severely attacked by raging young Muslims. To save his life, Obadia took to his heels through an alley that was close to the butchery.

The assailants ran after him but he was much speedier. In the course of pursuing him in the alley, the assailants met Reverend Kachira who was heading from where they were coming. Unhesitatingly, the assailants caught Reverend Kachira and started to employ their machetes on him while dragging him to the demolished building. Soon thereafter, the Reverend was pronounced dead. The death seized him while receiving emergency treatment at Geita District Hospital where he was taken after the assail.

Following that death, an investigation was mounted. A few months later, Khalid Yassin Sadick, the fourth accused, was apprehended. Two years later, on 13th May, 2015, Abdulhamid Maarifa @Kishiga, Yusufu Hamim Matama @Abuu Hairat and Siraji Mohamed Lumila, the first, second and third accused respectively were arrested.

Both were charged with the offence of murdering Reverend Kachira contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE.2002].

Almost seven years later, the accused were arraigned in this Court for trial. When the information as to the offence was read, both entered a plea of not guilty which necessitated the trial.

When the matter was called on for hearing, the prosecution enjoyed the services of Messrs. Castuce Ndamugoba, Ofmedy Mtenga and Felix Kwetukia, both learned senior state attorneys and Ms. Nayrah Chamba, learned state attorney. Messrs. Masoud Mwanaupanga, Alhaj Majogoro, Ally Zaidi and Abdallah Kessy appeared respectively for the first, second, third and fourth accused.

Before I embark on determining the case, I think it is relevant at this point, albeit briefly, to revisit the cardinal principles that guide the Court in determining criminal cases.

One, the burden of proof is always on the prosecution as is required to prove beyond a reasonable doubt every ingredient that creates an offence. This position has been accentuated in multitudinous cases including the case of **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 25 of 2007 (Unreported) where the Court of Appeal had this to state:

'Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt.'

See: Woodmington v. DPP [1935] AC 462; **Jonas Boniphas Massawe v. Republic**, Criminal Appeal No. 52 of 2020 (Unreported); **Pascal Yoya Maganga v. Republic**, Criminal Appeal No. 248 of 2017 (Unreported); and **Julius Mbwilo v. Republic**, Criminal Appeal No. 351 of 2009 (Unreported). This burden, unless otherwise provided by the law, never shifts to the accused. **See: Amos S/O Alexander @Marwa v. Republic**, Criminal Appeal No. 523 of 2019 (Unreported). Undeniably, this is not the kind of case in which the burden of proof shifts to the accused.

Two, as I stated, the standard of proof is beyond a reasonable doubt. This entails that the prosecution must prove each ingredient of the offence without a scintilla of a reasonable doubt. By reasonable doubt, the courts do not mean that the standard of proof should not be tainted with a shadow of doubt. In this regard, before convicting an accused, courts are required to consider the whole evidence from both parties to conclude that there is no reasonable doubt that the accused is innocent despite the existence of shadows of doubt. In the case of

Anthony Kinanila and Another v. Republic, Criminal Appeal No.83 of 2021 (Unreported), the Court of Appeal quoted with the approval a passage from the case of **Miller v. Minister of Pensions** [1947] 2 All E.R. 372 where Lord Denning stated that:

> *'The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice.'*

Three, for the murder case, the prosecution is under the obligation to prove beyond reasonable doubt the following:

(a) That there is a person who is dead.

(b) That the death of that person is unnatural.

(c) That the death of the person was premeditated in the sense that there was malice aforethought attributed to the accused.

(d) That there is credible and cogent evidence that the accused is a perpetrator of the alleged killing.

See: Anthony Kinanila and Another v. Republic (Supra).

Having elucidated the said principles, it is worth noting that the prosecution under sections 188(1) (a), (b), (c), (d) and (2) and 392A(1) of the Criminal Procedure Act, Cap. 20 [RE.2019] was granted by this Court order to protect its witnesses. Hence, its witness will be referred to in this judgment through code names.

As to whether there is a person who is dead, the Prosecution fielded P4 (PW1), a medical specialist. This witness testified that on 11th February, 2013 while on duty at Geita District Hospital, he received Reverend Kachira who was in bad shape. When he started to examine him, the witness found Reverend Kachira had already passed away.

PW1 testified further that on 12th February, 2013, police officers came and requested him to examine the deceased's body to establish the cause of death. After such examination, the witness told the Court that he found the cause of death to be severe bleeding and haemorrhagic shock. The witness tendered the Post Mortem Report that was admitted as Exh.PE1.

Despite cross-examinations by defence counsel which aimed at establishing procedural irregularities in conducting an autopsy, I am satisfied that PW1 is the credible witness who proved beyond a reasonable doubt that Reverend Kachira is no more. Given that, I am convinced that the prosecution has proved beyond a reasonable doubt that Reverend Kachira has passed away.

On the question of whether Reverend Kachira's death was unnatural, I think it is relevant to intimate the cherished principle that death, unless natural or sanctioned by the law, is unlawful. Without much emphasis, the evidence of PW1 coupled with Exh.PE1 is sufficient to establish that Reverend Kachira's death was unnatural. From his evidence, PW1 testified that the cause of death was severe bleeding and haemorrhagic shock which was occasioned by multiple wounds. The witness testified to having seen three deep cut wounds on the deceased's head; one deep cut wound on his neck that damaged the left carotid artery; and a fractured left hand.

When I went through the defence's evidence, I found nothing suggesting that the injuries were lawfully caused. That being the case, it is my conviction that the cause of Reverend Kachira's death was

unnatural. Given that, I hold that the prosecution has proved beyond a reasonable doubt that Reverend Kachira's death was not natural.

Whether Reverend Kachira's death was premeditated by whoever caused his death, I wish to reproduce the contents of section 200 of the Penal Code, Cap. 16 as follows:

> *'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 to 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 to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
>
> *(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.'*

Further, the then East African Court of Appeal had the opportunity to consider what constitutes malice aforethought in the case of **Republic vs. Tubere s/o Ochen** [1945] 12 EACA 63 where it stated:

> *'That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured, and the conduct of the Accused before, during, and after the attack.'*

Similarly, the Court of Appeal of Tanzania in the case of **Mark Kisimiri v. Republic**, Criminal Appeal No.39 of 2017 (Unreported) quoted with approval its observation in the case of **Enock Kipera v. Republic**, Criminal Appeal No. 150 of 1994 (Unreported) by stating:

> *'...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained by various factors including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing.'*

In his evidence, PW1 testified about what caused the death of Reverend Kachira. According to PW1, the deceased body had multiple

deep cut wounds on his head and neck. Further, one of his arms was fractured. This evidence was supported by the Post Mortem Report (Exh.PE1).

In this regard, I am of the considered view that by using the sharp object to inflict multiple blows to the deceased's head, neck and arm to the extent of causing wounds as evidenced by PW1 and Exh.PE1, the assailant intended to cause Reverend Kachira's death. It goes without saying that the extent of injuries caused to the deceased suggests that the assailant applied excessive force in inflicting blows on sensitive parts of the deceased's body. The Defence did not adduce any evidence to challenge the contents of the Post Mortem Report. In that case, it is my holding that the assailant had malice aforethought to kill the deceased when inflicting the blows. In other words, the Prosecution has proved beyond reasonable doubt the third ingredient.

As regards whether there is cogent evidence that points to the accused as the murderers so far as the death of the deceased is concerned, I wish to start with the evidence adduced by PW1, the medical specialist. Without much ado, his evidence had nothing to do with who killed the deceased. He only testified as to the fact that Reverend Kachira passed away unnaturally.

Another piece of evidence was adduced by P6(PW2), a police officer who drew the four sketchy maps which were collectively admitted as Exh.PE2. I see no relevance in his evidence so far as to who killed Reverend Kachira is concerned. He only evidenced on the sketchy maps where Reverend Kachira was killed; where the *Wakristo* Butchery was; where the animals were slaughtered by Christians; and the combination of the three sketches.

Concerning the evidence of P10 (PW3), during his evidence-in-chief, he recounted how he went to the butchery and found some Muslims attacking Obadia. The witness narrated that the assailants left Obadia upon seeing him. PW3 testified further that in his endeavour to restrain more destruction, he went to various petrol stations at Katoro and Buseresere where he pleaded with operators not to sell the fuel that he thought would be used to set the town ablaze. P10 told the Court that while in such endeavour, he was informed by an unknown caller that Reverend Kachira was grievously assaulted. Responding to that information, the witness evidenced that he went to the scene of the crime and found Reverend Kachira in bad condition.

When cross-examined by Mr. Mwanaupanga, learned counsel for the first accused, PW3 testified to having found the assailants at the

scene of the crime when he went there after receiving the information that Reverend Kachira had been assaulted. When further pressed by Mr. Majogoro, learned counsel for the second accused, PW3 evidenced that he saw the persons who assailed Reverend Kachira but in his statement recorded by police he did not commit himself that he had seen the assailants as he was afraid of reprisals in case the statement falls into the wrong hands.

During the re-examination by Mr. Kwetukia, learned senior state attorney, PW3 testified that the assailants were the second and fourth accused and other persons. He testified that he saw with his naked eyes the two accused and other people walking from the scene of the crime. The witness reiterated his story that he did not state in his statement that he had seen the accused as he was afraid of jeopardizing his safety.

Having gone through PW3's evidence, I believe that the witness was not at the scene of the crime when the assailants were attacking Reverend Kachira and hence he did not see them. I hold so for the following reasons.

One, when Obadia took a flight to save his life from his assailants, PW3 testified that it was at that moment when he engaged himself in visiting various petrol stations at Katoro and Buseresere to beseech them

not to sell fuel. From facts gathered from Obadia's statement, Reverend Kachira was caught by the assailants in an alley where he was severely assaulted. This means that when Reverend Kachira was caught and attacked, PW3 was not at the scene of the crime as he was shuttling from one petrol station to another at Katoro and Buseresere.

Two, in his evidence-in-chief, PW3 testified to having been informed about the attack on Reverend Kachira while he was in his engagement with petrol stations operators. In that case, it is untenable in my mind for a person who was informed about the attack to testify that he saw the assailants walking from the scene of the crime.

Three, if PW3 saw the accused, definitely he would have testified as such in his evidence-in-chief. The witness did not mention any accused's name in his evidence in chief. Likewise, he did the same during cross-examination. He only came up with his story of seeing the second and fourth accused with other people walking from the scene of the crime during re-examination. In my opinion, failure to testify on material facts during evidence-in-chief puts such evidence in shambles.

Four, if PW3 saw the accused specifically the second and fourth accused at the scene of the crime to the extent of mentioning their names during re-examination, the competent prosecutors like those who

prosecuted this case would have led him to mention their names during examination in chief. Likewise, the prosecutors would have led the witness to identify them on the dock, at least, to convince the Court that the witness was not economical with the truth.

Five, in his previous statement (Exh.DE1) that was recorded by police on 18th March, 2014, more than a year from the material date, the witness was recorded to state the following:

> *'**Mimi binafsi sikushuhudia** wakati Mchungaji MATHAYO S/O KACHIKA akishambuliwa na hivyo sijui nani alimjeruhi. **Hata hivyo watu wanasema** kuwa waliomuua ni KHALID YASIN, YUSUPH S/0 HAMIMU na wengine ambao ni Waislamu wenzao.' (Emphasis added).*

When the witness's evidence during the trial differs materially from his previous statement, such a witness cannot be taken to be credible. With this material discrepancy demonstrated by the witness coupled with other reasons I have put forward hereinabove, I am convinced the witness deserves no credibility. I further consider his testimony that he was afraid to mention the accused when recording his statement to police as a cook-up story. Given that, his evidence is discarded.

Another witness fielded by the prosecution was P1(PW4). So far as linking the accused with the death of Reverend Kachira is concerned, this witness was not useful to the prosecution. He stated categorically that he was informed about the attack on Reverend Kachira and his ultimate death by a person he did not remember. The witness testified to having gone to the butchery where he saw some Muslims in white clothes with machetes. He evidenced that he saw Obadia being assaulted by the said Muslims whom he recognized their faces.

As I stated earlier, this evidence so far as to who caused the death of Reverend Kachira's death is concerned is irrelevant. I hold so on the reason that this witness did not see who assaulted Reverend Kachira. Further, despite stating that he recognized the faces of the rioting Muslims, the investigators did not think it relevant to mount an identification parade when the accused were arrested. In my opinion, if PW4 had identified the accused as present during the riot, such identification would serve, at least, the purpose of outweighing the defence of alibi as advanced by the four accused.

P7(PW5) was another witness brought by the prosecution. His line of evidence was about the arrest of the accused and how he recorded the cautioned statement of Yusufu Hamim Matama @Abuu Hairat, the

second accused. The witness testified that in early May, 2015, while in the Police Headquarters, they received information that the suspects who fled from Buseresere had returned. Upon receiving such information, the witness evidenced that he and his colleagues were dispatched to Geita to arrest the suspects. According to this witness, at 0430hrs of 12th May, 2015 at Buseresere, they arrested the second accused who was at his home. PW5 testified that upon being questioned about other suspects, the second accused took them to Siraji Mohamed Lumila's house where they arrested him around 0500hrs of the same day. Based on the information received from the second accused, the witness testified that they arrested Abdulhamid Maarifa @Kishiga, the first accused at Geita Police Station. It was the testimony of this witness that the second accused tipped them off that the first accused would come to Geita Police Station for his issues.

PW5 continued to testify that he was the one who recorded the cautioned statement of the second accused. In his testimony, the witness stated that the second accused confessed to having a hand in killing Reverend Kachira in the company of the first, third and fourth accused. The cautioned statement though both retracted and repudiated by the second accused was admitted as Exh.PE3 after a trial within trial.

Another witness was P8 (PW6). This witness like PW5 was from the Police Headquarters and was dispatched to Geita on a mission of arresting the suspects. He testified that he participated in the arrest of the second accused which led to the arrest of the third and first accused. PW6 testified to have recorded the cautioned statement of Siraji Mohamed Lumila, the third accused. According to this witness, the third accused confessed to killing Reverend Kachira in the company of Abdulhamid Maarifa, the first accused, Yusufu Hamim Matama, the second accused, Farouk Mohamed, Abdallah Hamad and Hamis. The cautioned statement, despite being retracted by the third accused, was admitted as Exh.PE4.

P9 (PW7) also was from the Police Headquarters and participated in the arrest of the first, second and third accused. The witness evidenced that he recorded the cautioned statement of Abdulhamid Maarifa @Kishiga, the first accused. As per the witness, the first accused admitted to having killed Reverend Kachira by cutting his head with a machete. PW7 testified further that the first accused stated that the second accused fractured the deceased's arm whilst the fourth accused cut the deceased's neck. The cautioned statement, though repudiated, was admitted as Exh.PE5 after a trial within trial.

Generally, the best witness in a criminal trial is an accused person who voluntarily confesses to having committed the offence of which he is charged. This position is not foreign in our jurisdiction as it was restated in multitudinous cases including the case of **Ally Mohamed Mkupa v. Republic**, Criminal Appeal No. 2 of 2008 (Unreported) where the Court of Appeal had this to say:

> *'...the very best evidence is of a person who confesses freely and voluntarily to have committed the offence in any criminal trial that is an accused person who confesses his guilty.'*

In the case at hand, the three cautioned statements were admitted despite being retracted and repudiated by the accused persons. Despite that fact, I am of the considered opinion that by being admitted, this Court is not precluded from weighing the substance of such statements. This is due to the fact that the process of trial within trial is meant to determine the admissibility of evidence and not the weight of such evidence.

While I am mindful of the principle that the best witness is the one who confesses his guilt, I am also aware of the settled general principle that courts should take into consideration the cautioned statements in convicting an accused if such a statement is corroborated by independent evidence. This cherished principle was accentuated in the

case of **Tuwamoi v. Uganda** [1967] E.A 84 where the defunct East African Court of Appeal stated:

> *'…. the court will only act on the confession statement if corroborated in material particulars by independent evidence...'*

This position brought me to a situation where I asked myself whether the prosecution had adduced any independent evidence to corroborate the cautioned statements of the three accused persons. None of the witnesses from PW1 to PW7 testified to have seen the accused killing Reverend Kachira. Further, since it is an established principle that evidence that needs corroboration cannot corroborate other evidence, I find that the three cautioned statements cannot corroborate each other. I hold so while fortified by the position taken by the Court of Appeal in the case of **Mashimba Dotto @Lukubanija v. Republic**, Criminal Appeal No. 317 of 2013 (Unreported) where the apex Court had this to state:

> *'…….it is trite law that evidence which itself requires corroboration cannot corroborate another.'*

The only available evidence which I have not discussed up to this point is the evidence of the eye witnesses which was adduced under section 34B of the Evidence Act, Cap. 6 [RE.2019] as the said witnesses are no longer under the sun. At this juncture, I hasten to hold that such

evidence is not independent to corroborate the cautioned statement for the reasons to be stated in the course of this judgment.

Since I have taken the position that there is no independent evidence to corroborate the cautioned statements of the first, second and third accused, I thought it prudent to analyze the whole circumstances of the case at hand to establish whether the conviction would be arrived at in the absence of independent evidence that corroborates the three cautioned statements. I did so while mindful of the position set by the defunct East African Court of Appeal in the Tuwamoi's case where it was held that conviction may be arrived at by the Court on the uncorroborated cautioned statements if only the Court is satisfied that what constitutes the cautioned statement is true. The defunct Court had this to state:

> *'But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot but be true...'*

Dispassionately, I have considered the circumstances of the case at hand in which the cautioned statements were repudiated. As per Tuwamoi's case, the circumstances of the case include the fact that the

cautioned statements were retracted or repudiated. In the said case, it was stated:

> *'…when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true.'*

The cautioned statements as alleged by the prosecution were recorded at Geita Police Station. Practice dictates that when the accused confesses to having committed the offence, such accused should be taken to the Justice of the Peace to record his extra judicial statement. The extra-judicial statement though not corroborative to the cautioned statement, serves the purpose of creating an environment that may convince the Court that what was stated in both the cautioned statement and the extra-judicial statement is true. This is because when an accused confesses to the Justice of the Peace, such confession in most circumstances is regarded to be true as it is taken that the confessor was a free agent before the Justice of the Peace. In other words, if the accused freely confesses to the police officer, such an accused is also expected to restate the confession to the Justice of the Peace. Otherwise, the allegation of involuntariness holds water.

In the absence of the extra-judicial statement and considering that the accused have repudiated their statements, I have nothing before me

to test the veracity of the cautioned statement. That being the case, I cannot safely hold that the cautioned statements speak the truth. In this regard, I am strengthened by the position of the Court of Appeal in the case of **Ndorosi Kudekei v. Republic**, Criminal Appeal No. 318 of 2016 (Unreported) where it was stated:

> *'…With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to having killed the deceased or not.'*

In the same spirit, while defending his case during the trial within trial and in the main case, Yusuf Hamim Matama, the second accused testified that after being arrested he was taken to Kasamwa Police Station before being transferred to Dar Es Salaam. This evidence suggests that the second accused was never taken to Geita Police Station though PW5 evidenced that he recorded the second accused's statement at Geita Police Station.

That being the case, I am of the considered opinion that the prosecution was under the obligation to tender, as part of their evidence, the Detention Register (PF.20) of Geita Police Station to prove that the second accused on the date when his cautioned statement was recorded was at the said station. Without such proof, I consider the

prosecution evidence shaky in that respect which also affects the veracity of the second accused's cautioned statement.

Having reached this point, I should put it clearly that when the cautioned statements are repudiated or retracted it is not safe to base the conviction on them unless there is independent and cogent evidence that supports them. Since I have already held that there is no independent evidence that corroborates the cautioned statements and their veracity is questionable, I will not consider them sufficient to convict the accused persons.

The last set of witnesses were P13 (PW8), P11 (PW9) and P12 (PW10). These witnesses were fielded by the prosecution to tender three witness statements under section 34B of the Evidence Act, Cap. 6.

The three witnesses testified that they recorded the statements of the witnesses who did not live to testify against the accused. PW8, PW9 and PW10 tendered the statements of P5, P2 and P that were admitted as Exh.PE 6, 7 and 8 respectively.

According to P5's witness statement, he was attacked by the assailants at the butchery. The statement avers that, in a bid to save his life, P5 ran through an alley where the assailants pursued him. When he

was running, he met Reverend Kachira who was heading where he was running from. His pursuers caught, pushed down, and assailed Reverend Kachira with a machete. P5 was recorded to state that the persons he saw attacking Reverend Kachira were Yusufu Matama, second accused, Siraji Mohamed, third accused, Khalid Yassin, fourth accused and Seleman Joseph @Andunje. From the said statement, Abdulhamid Maarifa, the first accused was not mentioned.

P2 in his statement was recorded to state that he saw Khalid Yassin, the fourth accused, Yusuph Hamim, the second accused, Andunje also known as Selemani Juma and Awadhi attacking the deceased in the demolished building. In his statement, P2 did not mention Abdulhamid Maarifa, the first accused and Siraji Mohamed, the third accused.

P's statement had it that he saw young Muslims attacking Reverend Kachira and he recognized some of them as Khalid Yassin, the fourth accused, Siraji Mohamed, the third accused, Yusufu Hamim Matama, the second accused, Awadh Juma and Andunje. In that statement, Abdulhamid Maarifa, the first accused was not mentioned.

Based on the statements, the prosecution invited the Court to convict the accused. It was the prosecution's submission that the witness statement once admitted is sufficient to ground conviction without being corroborated. The case of **Omari Mohamed China and 3 Others v. Republic**, Criminal Appeal No.230 of 2004 (Unreported) was cited to buttress that position.

On his part, Mr. Majogoro, learned counsel for the second accused, submitted that the Court should not give weight to the witness statements as the said witnesses were not cross-examined. In that case, he opined that such kind of evidence lacks evidential value.

Before I determine the weight of the admitted witness statements, I wish to state that cross-examination of the witness is a cardinal principle in the dispensation of criminal justice. The principle puts courts in a position of ascertaining whether what is testified by the witness contains the truth of the facts relevant to the case.

However, when the witness is not available as in this case, the prosecution may tender a witness statement under section 34B of the Evidence Act upon fulfilling the conditions set in that section. As I stated hereinabove, the admissibility of evidence does not amount to giving

weight to such evidence. Given that, a witness statement must undergo the test of reliability. It is not expected that the Court will rely on such evidence and proceed to convict the accused without considering whether such evidence is reliable.

In that regard, courts are required to consider the whole evidence to ascertain whether there is independent evidence that serves the counterbalancing role to erode the possibility of the defence being hampered by uncross-examined evidence. This entails that for the Court to consider the witness statement, there must be other independent evidence that substantially reflects the witness statement and was subjected to cross-examination.

In the case at hand, the prosecution advanced the three accused persons' three cautioned statements to secure conviction. As I have already held, the three cautioned statements cannot be relied upon to convict the accused. Further, the evidence of PW3 was concluded to be unreliable. In that case, there is no independent evidence that materially reflects the contents of the witness statements. Given that, I am of the view that it is unsafe to base conviction on uncross-examined evidence which is not supported by any independent evidence.

Concerning the case of **Omari Mohamed China and 3 Others v. Republic** (Supra), I wish to state that the case substantially differs from the circumstances of this case. In the cited case, the witness statement was not the sole and decisive factor in convicting the accused. There was other evidence which taken cumulatively with the witness statement, the conviction was arrived at safely.

This is opposite to the case at hand. As I have pointed out hereinabove, there is no independent evidence that could be supplemented by the witness statements following my holding in respect of the cautioned statements and the evidence of PW3. That being the case, the only remaining evidence is the witness statements. Given that, I believe it is unsafe to use witness statements as sole and decisive evidence to convict the accused.

By the way, Abdulhamid Maarifa, the first accused, was not mentioned in the witness statements as a person who participated in killing Reverend Kachira. He was only mentioned by P5 in connection with a brawl at the butchery. In that case, I asked myself as to why he was arrested for that offence. If he was arrested for participating in the murder for only being mentioned to be in the brawl at the butchery as per P5's statement, why the prosecution withdrew the charges against

Andunje who was mentioned in witness statements as an assailant and as per the evidence of Khalid Yassin, the fourth accused, was part of the accused persons in withdrawn charge. This also makes me doubt the authenticity of the witness statements as the prosecution itself sought the discharge of Andunje who was mentioned by the deceased witnesses whom it wanted the Court to believe.

In their defence, both accused advanced the defence of alibi though they did not adhere to the provisions of section 194(4) of the Criminal Procedure Act, Cap.20 [RE.2019]. The section requires the accused to issue a notice to the prosecution and the court of his intention to rely on such defence.

In his defence, Abdulhamid Maarifa, the first accused, testified on 11th February, 2013 he was at Ibondo Village attending his farm. He evidenced that he was arrested on 15th May,2015 at Ibondo Village in connection with a phone he bought from an unknown person. According to the witness, he was taken to Geita Police Station before being taken to Dar es Salaam where he was questioned about where he got the phone. The witness testified that he was subjected to torture by police officers who wanted him to confess to knowing the owner of the

phone who was wanted for terrorism. The witness denied to have made a cautioned statement.

Yusuf Hamim Matama, the second accused, testified to having been arrested on 13th May, 2013 by police officers who took him to Kasamwa Police Station. From there, the witness evidenced that he was taken to Dar es Salaam where he was subjected to torture by police officers who pressurized him to confess that he had been involved in terrorism. The witness denied to have made a cautioned statement. Regarding his whereabouts on the material date, the witness testified that he was not at Buseresere but at Bulengahasi Village where he resided.

Siraji Mohamed Lumila, the third accused, evidenced that he was arrested on 12th May, 2015 at Runzewe. Therefrom, the witness testified that he was taken to Geita Police Station and then to Dar es Salaam where he was tortured by police officers who wanted him to confess that he was an illegal immigrant who associates himself with terrorist activities. The witness denied to have made a cautioned statement. Regarding the defence of alibi, the witness testified that on the material date, he was at his home at Runzewe.

Concerning Khalid Yassin, the fourth accused, he testified that on the material date, he was at Katoro Secondary School attending trial examinations and sports. He evidenced that he was arrested on 25th October, 2013 for causing grievous harm to his co-student. Following such arrest, the witness testified that he was taken to Chato Police Station where he spent some time before being arraigned in Chato District Court for the offence of murdering Reverend Kachira. He testified that the charge was dropped under section 91 of the Criminal Procedure Act, Cap.20. However, according to the witness, he was rearrested and charged with the rest of the accused who were not part of the withdrawn charge.

From the evidence of both accused, it goes without saying that they have denied having a hand in killing Reverend Kachira. Both of them categorically stated not to have been within the precincts of the scene of the crime.

Principally, an accused who intends to rely on an alibi, as I have stated, is required to comply with the provisions of section 194(4) of the Criminal Procedure Act, Cap.20 by issuing a notice to the prosecution. When the accused fails to issue the said notice, the Court, by virtue of section 194(6) has the discretion not to accord weight to the defence.

This position was elucidated in the case of **Hamisi Bakari Labani v. Republic**, Criminal Appeal No. 108 of 2012 (unreported) as follows:

> *'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 (section 194 (4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given 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, short of that the court may on its own discretion accord no weight to that defence.'*

In the case at hand, no accused furnished the prosecution or the Court with a notice of alibi. Further, neither of the accused supplied the prosecution with particulars of his alibi before the closing of the prosecution's case. Given that, such evidence will not be given weight by the Court.

Before I conclude, I wish to reiterate that the prosecution is under obligation to prove the case beyond a reasonable doubt. Further, it is a cardinal principle of criminal law that an accused should not be convicted on the weakness of his defence. This position was restated in the case **Twigonone Mwambela v. Republic**, Criminal Appeal No. 388 of 2018 where the Court of Appeal stated:

'.....an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.'

Fortified by that position, I am of the considered view that despite the weakness of the accused's defence, I am not prepared to convict the accused as the prosecution's case was weak and failed to prove the case against the accused beyond a reasonable doubt.

Abdulhamid Maarifa @Kishiga, Yusuf Hamim Matama @Abuu Hairat, Siraji Mohamed Lumila and Khalid Yassin Sadick are hereby acquitted of the offence of murder. I consequently order their immediate release from prison unless otherwise held for other lawful cause. It is so ordered. Right to Appeal Explained.

DATED at **MWANZA** this 28th day of August, 2023.

KS KAMANA

JUDGE