

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL SESSION NO. 18 OF 2022

REPUBLIC

VERSUS

KELVIN S/O JULIUS MWIRE @ POCHI

JUDGMENT

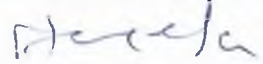
Date of last order: 27/09/2023

Date of Judgment: 5/10/2023

MWASEBA, J.

The accused person, Kelvin s/o Julius Mwire @ Pochi stands charged with the offence of murder contrary to **Section 196 of the Penal Code**, Cap 16 R.E. 2002 [Now R.E 2022]. The allegations against him are to the effect that on 29th day of March, 2021 at Kaloleni area within the City, District and Region of Arusha, the accused person murdered one Abubakari S/o Iddi Ikaji.

When the information was read over and explained to the accused person, he patently pleaded not guilty to the charge. In proving their case, the prosecution summoned four witnesses and tendered three exhibits. On the other hand, the defence side presented only one



witness, the accused person himself and did not tender any exhibit before this court.

Throughout the determination of this case Ms. Amina Kiango, Ms. Neema Mbwana, Ms. Jackline Mosha, Mr. Philbert Msuya, Mr. Stanslaus Hallawe and Ms. Helena Sanga all learned State Attorneys appeared for the Republic. On defence side, the accused was represented by Mr. Mitego Methusela, Learned Counsel.

PW1, John Shaban Kisue who is a militiaman and a watchman testified in court that, on 29/03/2021 at 20hrs he was at his work place at Chinese Company close to Kaloleni Police station. Being in his guard sentry box he heard a sound of a motorcycle outside. He peeped through the window and saw a rider disembarking a woman there. Suddenly, he heard some commotion and when he peeped out, he saw three people armed with long double-edged knife, machete and iron attacking the rider. PW1 stated that he saw one of the attackers stabbing the rider with an iron at his fore head. The victim fell down then the attackers absconded with a motorcycle. He clarified further that the distance from the window of the sentry box to the crime scene was about 10 meters. And at the crime scene there was enough light sourced from solar energy. He added that the road lights were big and

bright and also houses security lights were bright enough. So, he managed to identify them. PW1 went out to see how he can assist the victim but the bandits already absconded from the crime scene as it took almost 10 minutes to accomplish their mission. He called the OCCID Gwakisa and notified him about the incident. After receiving the information, they rushed to the crime scene. PW1 told the OCCID that he identified the bandits one by face and another one by name of Kochii as he knew him before as a troublemaker.

On 7/4/2021 at 3pm PW1 was called at the police station that he should go and identify the bandits as two people were arrested in relation to the said crime. After reaching at the gate, he was welcomed by a police officer who told him that there was identification parade so he had to go behind the police building. He went there and found a line of 15 people. He was asked to point out the person he identified at the crime scene by touching his shoulder. PW1 insisted that he knew Kochii by face because in the street he is a trouble maker. After passing at the front of the line and the back he managed to identify the 6th person who is the accused in dock to be the one he identified at the crime scene.

On cross examination he stated that he knows well the accused by the name of Pochii, by face and through several incidents. He said the police



officers have been stating that "*Pochii ameharibu tena.*" That means he has committed the offence again. He said he saw well the incident on the material date but he does not remember the clothes the attackers wore. But at his head, the accused did not wear anything. He stated further that when the assailants robbed off the deceased's motorcycle but the helmet remained at the crime scene.

PW2, Arbogast Methew Kilulumo who is a police officer stated that on 7/4/2021 at 09 hrs while at central police in Arusha he was assigned to conduct identification parade to Kelvin Julius @Pochii and Emmanuel Joseph @Buba. He prepared 13 people who resembles the accused persons. Thereafter he notified the accused persons about their rights including to call their relatives or lawyers to witness the identification parade and to position themselves wherever they wanted in the line. They chose not to call their relatives and the accused Kelvin positioned himself between the 5th and the 7th person in the line. Thereafter the witness, namely John Kisuke was called to identify the person that he saw committing this offence on 29/03/2021. The witness after passing at the front and back of the line he managed to identify the 6th person in the line who was Kelvin Julius Mwire. Thereafter PW2 filled the



identification parade information in the PF 186. The same was admitted in court as Exhibit P1.

Doctor Emmanuel Masanje Manyonyi (PW3) testified in court that he examined the deceased's body and noticed that he had a wound at the left side of his fore head. The wound was deep and it broke the frontal bone. He said due to his expertise, the said wound was caused by a heavy swift object which was used to stab him and mashed the bone up to the brain. His observation was that the cause of death was the wound at the head of the deceased. He finally filled the postmortem report which was admitted in court as exhibit 2.

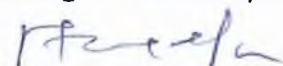
PW4, D/Sgt Sued testified that on 30/3/2021 he was assigned to investigate the case file of the accused namely Emmanuel Joseph who was charged with stealing motorcycle. During interrogation he asked him if he also committed the present offence. The accused person denied but he mentioned Nyokaa and Kuchii to be involved in committing the offence in this case. Thereafter he took the police officers to Ngaramtoni at the bar and showed them said Kuchii. Thereafter the next day PW4 and other police officers went to arrest Kuchii early in the morning at his home. On initial interrogation, Kuchii admitted to have robbed of the motorcycle at Kaloleni area and took it

to Rombo in Kilimanjaro. He further pointed the accused in dock to be the person he referred to the court as Kuchii.

On defence the accused person (DW1) testified that he was arrested on 31/3/2021 at Ngaramtoni area and was taken Guantatum police station where he stayed for five days being in torture. Thereafter they took him to Engutoto police station where he stayed for more than one month. Being there, he was tortured by police officers so that he mentions people who committed the current offence. They had a prize that they used to tighten his thumb and middle fingers of his left hand to compel him to mention the suspects. DW1 showed his fingers in court; the thumb had no nail at all and the middle finger has bent randomly. He explained further that when the alleged identification parade was conducted, he was at Engutoto police station. He denied the name of Pochii and said that, even in court he denied to have the said name. He was of the view that this is a mere fabricated case.

After having heard the evidence from both parties, the pertinent issue for determination is whether the prosecution has proved its case beyond all reasonable doubt.

In proving this offence PW4, the investigator, stated that when he was interrogating Emmanuel Joseph in the case of stealing a motorcycle, he



asked him if he also committed the case at hand. The said Emmanuel Joseph denied to have committed this offence but he mentioned Nyokaa and Kuchii. Further to that, Emmanuel Joseph took the police officers to Ngaramtoni and showed them the said Kuchii. After having the said information, the police officers managed to arrest the accused person herein.

I am mindful of the requirement of the law as per **Section 143 of the Evidence Act**, Cap 6, R.E 2022 that, there is no a specific number of witnesses that is required to be summoned before the court to prove on a particular fact. In the case of **Bakari Hamis Ling'ambe v. Republic**, Criminal Appeal No.161 of 2014 (unreported), the Court held that:

"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanour."

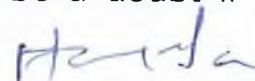
Looking at the above legal position, it is the prosecution that enjoys the discretion to choose which witness to call. In **Abdallah Kondo v. Republic**, Criminal Appeal No.322 of 2015 (unreported), the Court stated that: -



"...it is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to establish the responsibility of the appellant in the commission of the offence..."

In the Current case, the one who named the accused person to PW4 in relation to the commission of the offence is one Emmanuel Joseph. It is unfortunate that the said Emmanuel who could have assisted this court on how did he know that it was the accused herein who committed the offence, was not summoned before this court to testify for the prosecution. In my considered view, failure to bring the said witness weakened the prosecution evidence due to the fact that what PW4 testified amounted to hearsay evidence and not direct evidence as required under the law.

Again, when PW4 was adducing his evidence, he stated that Emmanuel Joseph mentioned one Nyokaa and Kuchii as the assailants. Among the two, they managed to arrest Kuchii. However, this is not among the names of the accused as appears in the chargesheet. More so, as per the accused's defence he denied to be known on the mentioned names. Even during the plea taking, the accused denied the alias name of Pochii. In my considered view, this remains to be a doubt if the said



Kuchii or Pochii is the accused person in this case as the prosecution did not clear the said dispute.

Turning to the evidence of PW1, an eye witness in this case, he told the court that he identified the accused at the crime scene. Further to that, PW1 identified the accused person during the identification parade that was conducted at the police station. He further clarified before this court that at the crime scene there was enough light sourced from solar energy and the distance from his guard sentry box to the crime scene was about 10 meters. So, he managed to identify the suspects. However, when the police officers went to the crime scene, PW1 gave the descriptions of one of the suspects namely Kuchii/Pochii as a trouble maker. The names have been used by the witness in his evidence interchangeably. Unfortunately, the above descriptions of the suspects given by PW1, did not assist the police officers to the apprehension of the suspects. The police officers were assisted by Emmanuel Joseph to mention the suspects who is not part of the prosecution witnesses as I have discussed above.

Concerning the identification parade that was prepared for PW1 to identify the suspects, it has been strongly disputed by the accused person that he was not among the participants as he was at Engutoto

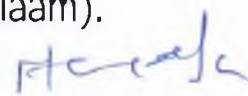


police station by then. This dispute was to be cleared by the prosecution by conducting a meaningful identification parade. For the identification parade to be meaningful, the witness must give prior description of the accused person on physical appearance, clothes worn by the suspect and any other peculiar mark or identity as it was stated in the case of **REX v. Mohamed bin Allui** (1942) 19 EACA 72. This principle was further insisted by the Court of Appeal in the case of **Emilian Aidan Fungo @ Alex and Another v. Republic**, Criminal Case No. 278 of 2009 (unreported) where it stated as hereunder:

"It is trite law that for any identification to be of any value, the identifying witness (es) must have earlier given a detailed description of the suspect before being taken to the identification parade."

See also the case of **Flano Alphonse Masalu, @ Singu v. Republic**, Criminal Appeal No. 366 of 2018 (unreported)

In the case at hand, PW1's identification did not meet the above requirements by giving the prior descriptions of the assailant and failure to do so, it vitiates the evidence of identification parade as it was stated in the case of **Paul Thomas Komba and Another v. The Republic**, Criminal Appeal No. 177 of 2018 (CAT at Dar es salaam).



It is settled that the onus of proving the case lies on the prosecution. This was clearly stated in the case of **Mohamed Said Matula v. Republic**, (1995) TLR No. 3 whereby the Court of Appeal had this to say:

"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."

Guided by the above legal position and considering all the factors surrounding this case, I am of the firm view that the prosecution side failed to prove that it was the accused person who murdered the deceased Abubakari S/O Iddi Ikaji.

Consequently, I find Kelvin Julius Mwire not guilty of the offence of murder. He is hereby acquitted and should be immediately released from custody unless lawfully held under a valid cause.

It is so ordered.

DATED at **ARUSHA** this 5th day of October, 2023.


N.R. MWASEBA

JUDGE