

IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
SITTING AT NJOMBE
CRIMINAL SESSIONS CASE NO. 69 OF 2023
REPUBLIC
VERSUS
EMILIAN S/O ERICK WILA
JUDGMENT

6th & 11th December, 2023

KARAYEMAHA, J.

The accused, **Emilian Erick Wila**, is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2022] (hereinafter the Penal Code). He is alleged to have murdered Faustine Paulo Mlwilo on 10th December, 2021 at Njelela village within Ludewa District and Njombe Region. He has pleaded not guilty.

It is contended by the Republic, and controverted by the accused, that, on the date aforementioned the accused who was at Mtumamo when the deceased and his two sons, namely, Kastory Faustine Mlwilo and Wiston Faustine Mlwilo (PW1) went to their farm killed the deceased with an axe by cutting on his head at about 21:00hrs. It is alleged



further that the deceased and his two sons went with a motorcycle with registration number MC 843 AKY, make Kinglion, red in colour.

I am convinced that it is true Faustine Paulo Mlwilo is dead and his death was not natural but a violent one. I am persuaded to reach to this conclusion because of the evidence of four people: PW1 Renista Alex Ndimbo, the Village Executive Officer (hereinafter the VEO), who told the court that on 11th December, 2021 was informed about the death of the deceased by the Mwembetogwa hamlet chairman and witnessed the deceased dead body when she went to the scene of crime at Mtumamo. PW2, Wiston Mlwilo, who witnessed his father being struck by the accused and later was found dead. It was him and his brother Kastory who reported their father's death to the village leadership. PW3, Basil Mlwilo, who says that he went to Mtumamo and found his paternal uncle dead and saw a wound on his head.

PW5, Herman Mgunda, the doctor, conducted the post mortem and confirmed the deceased's death. Nevertheless, his oral evidence and exhibit PE2 satisfies me that the post mortem examination was performed on 11th November, 2021 almost a month before Faustine Paulo Mlwilo was dead. While it is his evidence that he went to the scene of crime with PW6 on 12th December, 2021 the former says they



went to the scene of crime on 11th December, 2021. Although, I don't think that the contradiction erases the fact that the deceased was murdered, and even if exhibit PE2 is expunged from the record, still this contradiction taints overwhelmingly the prosecution case.

The alleged events at the farm in Mtumamo on the material day before the deceased was murdered are testified to by one person, PW2 the deceased's child. He went to the farm on 9th December, 2021 with the deceased and Kastory Mlwilo his brother. When they arrived, the accused was in David's farm which neighboured the deceased's farm. According to him when they got at the farm, they first prepared the place to sleep. Thereafter, they spread the canvas, cut logs and trees and kindled fire on logs they cut. Thereafter the two children went fishing on the river near their farm. PW2 said that on return they cooked supper, ate and slept peacefully.

PW2 narrated further that on 10th December, 2021 they woke up and worked in the farm. In the evening they took supper and went to sleep. The deceased remained seated. While asleep, he heard something striking out of the canvas. Alas! It was the accused striking his father's head using an axe. The accused then approached PW2 and Kastory and threatened them saying "*nyie watoto mnasubiria nini?*".



After kicking their legs, the accused told them that "*baba yenu sijamuua mimi amenituma Rudiger.*" On that note, he ordered them to disappear and indeed they fled to the forest.

The evidence on how the accused was identified at the scene of crime comes from PW2. He said that it was night when he was asleep in the canvas and heard something striking. After uncovering himself from the canvas and with the help of the burning fire, he saw the accused cutting his father with an axe. According to him, the two were at a distance of almost five steps and the light was brighter enough to see properly. The accused then went to where PW2 was and stood at a distance of one meter to threaten him and Kastory and there were two meters to the burning fire. PW2 also testified that the accused was familiar to him because he had seen him at football pitch praying football twice and at "Kijiweni" Njelela.

Back to the moment PW2 and Kastory were scared. PW2 said how the accused scared them and after he had left, they went to hide in the forest. He adds also that in the morning they went to Njelela village to report. On their way they met their maternal aunt going to the farm and told her that the deceased was killed. Now reacting on the incident, PW2, Kastory and maternal aunt reported to Tumaini Mkalawa, the



hamlet chairman, and PW2 mentioned the accused as the one responsible. He says also that Tumaini Mkalawa spread the news of the murder incident. He corroborates PW1 that after news of the murder had spread, people gathered and went to the scene of crime. It appears that all who went there saw the deceased dead body including PW3. They were at the same time ordered not to approach the body. It was also at that time PW2 could not see his father's motorcycle with registration number MC 843 AKY, make Kinglion, red in colour. This is exhibit PE1.

Two policemen, PW6, G5231 D/CPL Liswele, and Ass. Insp. Fadhili Mgeni, OCS of Lugalawa police station, went to the scene of the alleged crime. They went there together with PW5, the doctor, and, according to PW6, before getting there they became aware that there was murder incident in Njelela village. PW6 says that when they got in the farm at Mtumamo, they saw the deceased's body which laid facing upwards. They also saw the canvas, logs/firewood and burning fire which on his estimates were at a distance of 3 meters. PW6 was led by PW1 to draw the sketch map of the scene of crime, exhibit PE5.

PW6 went on to tell the court that on 13th December, 2021 while at police station he received the accused person at 14:00hrs with a



motorcycle registration number MC 843 AKY, make Kinglion, red in colour taken thereat by PW3 and Method Mgala, PW4. He was told that it was the accused who murdered the deceased person. He locked him in the police lock up. Later he recorded the accused person's cautioned statement, exhibit PE3. The contents of this document were read out in court. This is a longish statement in which the accused tells the story of his employment in David France's farm as a casual labour. Since he was residing thereat, he was trapping fish but he discovered that the deceased was stealing them. On asking why was he stealing his fish, the deceased became furious. At 21:00hrs on 10th December, 2021 he went to the deceased's farm from his hut and found him sleeping under the canvas with his children. The first thing the accused did was to take the deceased's mobile phone make ITEL. In the due course the deceased woke up and followed him. After a walk of three steps, perhaps from the canvas, the accused stood and struck the deceased with an axe on his head twice. One of the deceased's children witnessed the event. He ordered them to go back to sleep and walked away. After a distance he returned and told them that Rudiger sent him to kill their father. After that he took the deceased's motorcycle, exhibit PE1. Sometimes later on 13th December, 2021 at about 10:00hrs he was arrested with it by



Method Mgaya and Selevester Mlwilo, taken to Mavanda Village and at about 16:00hrs was handed over to Lugalawa police station.

PW6 went on to tell this court that on 14th December, 2021 the accused showed him and PW1 the axe he used to commit the crime. According to PW6's estimates the axe was in the bush within the range of 10 meters from the scene of crime. Apart from being seized. The axe was not tendered in court. PW6 went on telling the court that on 15th December, 2021 at about 16:00hrs went to the deceased's house and requested for the motorcycle blue card from Winifrida Mwinuka the widow and was given the same. He tendered it as exhibit PE4. Cross checking it he discovered that its particulars tallied with exhibit PE1. PW6 the investigator says that the card shows that the motorcycle belongs to Kinglion Investment Company limited. Although he agreed that the card bears no deceased's name, he is convinced that one can possess the motorcycle with a registration card bearing a different name.

In his defence the accused made a sworn statement. His brief story from the dock indicates that he went to Njelela seeking for casual labour in farms from Mawengi village where he was born. He finally landed in David's farm on 10th February 2021 measuring almost 15 acres which

neighbourhood the deceased's farm. He worked there till 11th November, 2021 when David, his boss, was arrested. During that period, he was seeing males and females working in the deceased's farm but did not see the deceased. On 11th December, 2021 he was at Mtumamo in the farm when village leaders got there and said there was a murder incident. Amongst the leaders who were at the scene of crime were PW1, the Njelela VEO and Sam Kalawa (Hamlet Chairman). He says he was present when those leaders stopped people who gathered at the scene of crime including him not to approach the deceased's body. Sometimes later the police reached at the scene of crime and after completing their activities and handing over the deceased's body to relatives, they arrested Rudiger and David as prime suspects. On the same day he went to Njelela Village to inform David's relatives so that they could bail him at police station. He says that after David was arrested, he became penniless and started looking for temporal jobs. Finally, he got one of sorting stones purported to contain gold in the mines at Livangi. On 13th December, 2021 Mzee Luoga and two strangers arrested him. They told him that he murdered their relative. Shortly after, he was taken to Lugalawa police station using their motorcycle. The accused denies being arrested with exhibit PE1.




If I understood the accused correctly, and I think I did, when responding to cross-questions during his defence, I contemplate he is suggesting that his statement was not recorded and therefore not read over to him. This means therefore that he is repudiating the cautioned statement, exhibit PE3. The law is clearly settled in **Emmanuel Lohay and another v Republic**, Criminal Appeal No. 278 of 2010 (unreported) that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and during cross-examination or during defence. The Court of Appeal of Tanzania adopted a similar position in the case of **Sospiter Nyanza and another v Republic**, Criminal Appeal No. 289 of 2018 and later the recent decision in **Mashaka Juma @ Ntatula v Republic**, Criminal Appeal No. 140 of 2022 CAT-Shinyanga.

The rationale behind as enunciated in a long line of decided cases is that whenever an accused person raises objection to the admissibility of a confessional statement by repudiating it, the court is obliged to immediately stop the substantive proceedings and conduct a trial within trial/inquiry to determine whether the same was obtained from the accused voluntarily or not before proceeding any further with the matter. And this is done by giving parties the opportunity of calling



witnesses in proof of their respective assertions and delivering a ruling on the same after taking address from them. Therefore, if the concerned is raised during the defence, the trial court is denied a room, procedurally, to inquire into the truth of the objection and make a ruling. That being the case I fully associate myself with the authorities cited above to find and hold that the accused missed a boat. In a nutshell, therefore, I reject the accused's complaint.

Having ruled out that the deceased's death was unnatural meaning that he was killed, the issue for determination is who killed him. Well, the evidence points at the accused person. The prosecution is relying on the evidence of visual identification and the accused being in possession of exhibit PE1, the deceased's property.

I find it apt to start with the evidence of PW2. As evidence stands on record, he is a key and eye witness in this case. The principle to be cherished is that, eye witnesses frequently play a vital role in uncovering the truth about a crime. The evidence they provide can be critical in identifying, charging, and ultimately convicting suspected criminals. That is why it is absolutely essential that eyewitness' evidence be accurate and reliable. This principle will inevitably guide me in my journey to dispose of this case. 

Being an eye witness, PW2's evidence is expected to give an accurate account of what happened because it is a huge part of his evidence that is going to incriminate the accused person. It is certain from his evidence that he saw a person cutting the deceased and it was that assault that led to his unnatural death. Undisputedly, some aspects in his evidence tally with some contents in exhibit PE3 but some do differ miles away. Again, in my view he lacked connection of some events. Whereas his evidence resembles with statement in exhibit PE3 on arriving at Mtumamo in the farm and finding the accused in his hut, there is no evidence from him on whether the accused was in the farm on 10th December, 2021. Similarly, the witness says that there was brighter light from the burning fire only which assisted him to identify the accused but exhibit PE3 discloses that there was brighter light from the burning fire and the moon. PW2 says the deceased was not sleeping in the canvas, but exhibit PE3 states that he was in the canvas sleeping.

Moreso, this case relies on evidence of visual identification. As the alleged incident occurred during nighttime it is crucial to determine if the accused person was properly identified at the scene of crime. Before taking any further step, I find it apposite to preface my discussion by



restating the obvious principles guiding visual identification which have been emphasized in a litany of Court of Appeal decisions.

The law on the evidence of visual identification is well settled as Courts are warned not to act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water-tight. In that regard, this court must consider the following guidelines: **One**, the time the witness had the accused under observation; **two**, the distance at which he observed him; **three**, the conditions in which the observation occurred, for instance if it was day time or night time; **four**, whether there was good or poor lighting and **five**, whether the witness knew or had seen the accused before or not. See **Waziri Amani v. Republic** [1980] T.L.R 250, **Raymond Francis v Republic** [1994] T.L.R 100, **Chokera Mwita v Republic**, Criminal Appeal No. 17 of 2010 (Unreported) and **Baya Lusana v Republic**, Criminal Appeal No. 593 of 2017 (unreported). Similarly, the Court of Appeal of Tanzania drew an inspiration from the case of **Waziri Amani** (supra) in the case of **Chally Scania v Republic**, Criminal Appeal No. 69 of 2005 (unreported) having underscored the following:

"We think that where a witness is testifying about another in unfavourable circumstances like during the night, he



must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to mistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."

Generally, evidence on visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. See **Hassan Kanenyera and others v Republic** [1992] T.L.R 100,

In the present case PW2 was the only person who identified the accused person in the farm on the fateful night. Assessing the evidence, it is clear that there was good lightning, PW2 recognized the accused and there was a short distance between them. However, his evidence reveals one major disturbing feature. It relates to lateness to mention the accused to the authorities.

PW2 informed this court that on 11th December, 2021 in the morning, he went with Kastory, his brother, to report the murder incident to the hamlet chairman, namely, Tumaini Mkalawa. On their way they met their maternal mother going to the farm. Obviously, they told her about the death of their father but did not mention the



assaulter. It is not even clear if she asked them about that. Subsequently, they reported the incident to Tumaini Mkalawa and according to PW2 they mentioned the accused as the culprit. I am persuaded to believe that PW2 lied. My view is buttressed by the fact that Tumaini Mkalawa who reported the murder incident to PW1 neither told her in the phone who the murderer was nor did he do so when they were going to the scene of crime and even when they were there. It is also clear that when Tumaini Mkalawa, informed PW3 of the deceased's death, he did not mention the accused. On his part, PW2 did not tell PW1 and PW3 anything about the accused person. The two did not even tell the police that the accused was the assaulter. In short, until when the village leaders and the police officers were living the scene of crime, neither Tumaini Mkalawa nor PW2 had named the accused.

In his defence, the accused testified that he was at the scene of crime on 11th December, 2021 in the morning when the village leaders got there, even when the police officers arrived thereat. This piece of evidence was neither contradicted nor seriously cross-examined to test his credibility. What does this mean, if the accused was mentioned, apparently, David and Rudiger could not have been arrested in the first place. The totality of the evidence points out that they were arrested



linked with the murder of the deceased. PW6 knew about the accused person on before 13th December, 2021 when he was taken to police station, not before.

In a nutshell, therefore, I am satisfied, beyond any doubt, that PW2 did not properly identify the perpetrator on the night of 10th December, 2021 and has never mentioned or described him anywhere. If PW2 identified the accused at the scene of crime, he would have mentioned him promptly to exhibit his reliability. In principle, one of the key factors that has to be considered in determining whether the witness has properly identified the suspect in question is the naming or describing the accused to the next person he saw. It is now settled law that the ability of the witness to name the suspect at the earliest opportunity time gives assurance of the reliability of the witness. See **Marwa Wangiti Mwita v. Republic**, [2002] TLR 39 where it was stated:

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

In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the

credibility of the witness. The conditions for identification might appear ideal but that is not a guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in my view reassuring of the witnesses' reliability.

On the basis of the evidence before me, I am of the firm view that visual identification by PW2 is seriously doubted.

Determination of visual identification aspect, brings me face to face with the evidence regarding the motorcycle, exhibit PE1, its missing from where it was first parked and the process of seizing it. I have considered the whole evidence on record and I am satisfied that exhibit PE1 was being used by the deceased during his life time and sometimes by PW3. Although exhibit PE4 (registration card) demonstrates that the owner is Kinglion Investment Company not the deceased, I still hold that exhibit PE1 was under the possession and control of the deceased by 10th December, 2021 when he was murdered. Thus, whoever stole it, took it from the deceased who by then was the rightful bearer.

It is, nevertheless, the prosecution's case that after the deceased's unnatural death, exhibit PE1 was taken by the murderer. A finger is pointed at the accused person. PW2's evidence will be our binocular on this aspect. He told this court when they arrived in the farm on 9th



December, 2021, they left it at the mountain and went to the valley where their farm was. On that day they checked and confirmed that it was at the place it was parked. PW2 truthfully testified adding that they did not check again on the whole day of 10th December, 2021. They only found it missing on 11th December, 2021 when they returned to the scene of crime with the village leaders after reporting the murder incident.

The distressing question is when was exhibit PE1 stolen? The uncorroborated answer is found in exhibit PE3. There is no oral evidence produced by the prosecution shedding light on this point and corroborating the contents of exhibit PE3. It is a common knowledge that the prosecution is duty bound to produce clear evidence showing that it was none other than the accused person who took the motorcycle after killing the deceased. Let us examine and analyse the whole evidence.

Whereas exhibit PE3 reveals that the accused took the key from the deceased and rode the motorcycle, PW3 testified that it was dragged. In this case, there is contradictory evidence on what exact action took place. I say so because, riding and dragging the motorcycle are two different terms meaning different actions. It appears to me that



while the former means sitting on and controlling the movements of the motorcycle, the latter means pulling the motorcycle along the surface usually on the ground forcefully, roughly, or with difficulty. Sometimes the two actions may take place in the same transactions depending on the prevailing circumstances. The motorcycle may be dragged and then ridden or may be ridden and then dragged. The picture I gather from PW3's evidence is that whoever stole exhibit PE1, drag it from its original place. This version contradicts exhibit PE3 in which the maker revealed that he rode it from the parking area. This, then, pigments the prosecution evidence.

The defence evidence is putting the prosecution on firm proof whether the accused was found with exhibit PE1. DW1 says that he was not arrested with it. He simply saw Mzee Luoga and two strangers while in the mines and then was arrested. The prosecution is banking on the evidence of PW3 and PW4 to prove that the accused was found with exhibit PE1.

I have carefully considered PW3's evidence and even tried to read it between the lines and give it a deduction interpretation, but I have not been able to clear doubts in my mind. He says he was informed by Tumaini Mkalawa on the motorcycle being seen in Mavanda. At any



range of imagination this is questionable. As evidence reveals, the seizing of exhibit PE1 started with Tumaini Mkalawa. According to PW3, it was him who informed and requested the Mavanga village leaders to investigate on a boy riding a motorcycle in their village. PW3 did not say whether Tumaini Mkalawa gave the particulars of exhibit PE1 and described that boy to Mavanda Village leaders. Those who reported back to Tumaini Mkalawa, are not said to have given him the particulars of the motorcycle rode by a boy they in fact did not know or even attempt to describe him. It is similarly not in PW3's evidence that he was prompted by the description of the motorcycle to travel to Mavanda village. What exercised my mind the most is the decision by PW3 not to report to police the new discovery.

Nevertheless, I have not been able to glean where Tumaini got an idea to pin-point Mavanda village and left out other neighbouring villages. I heard Mr. Credo Rugaju Senior State Attorney cross-examining DW1. The former pressed the latter trying to connect him with Mavanda village that he was going there with David to buy groceries. DW1 used much effort to refuse but at last he surrendered and said he was going with him for drinks. Therefore, I think there was an undisclosed reason behind Tumaini Mkalawa pin-pointing Mavanda



village, cross-examination dwelling on Mavanda village and PW3 going to Mavanda to seize exhibit PE1. Moreso, PW3 said Mavanda leaders mentioned a certain boy was seen with the motorcycle. None of the leaders was involved in the search, arresting and seizing the motorcycle. PW4 is not a village leader. Likewise, Mzee Luoga and Sylvester Mlwilo. Why did they sideline leaders in this mission? I have also considered whether the mission was of emergency nature but the scrutiny of the evidence does not bring forth a positive answer. The following question is why did they side line the police officers in this mission. All these questions are not answered by the evidence on record. A fair conclusion, therefore, is that there were dubious reasons and certainly was to incriminate the accused and make him a scapegoat.

PW3 in Mavanda Village. His evidence reveals that he got in that village on 12th December, 2021 at 21:00hrs and hosted by Sylvester Andreas Mlwilo. After sometime and after Sylvester had communicated with PW4, a militiaman, PW3 was told that the boy passed there with a motorcycle and went in the mines at Mavanda. In the same night they went to Mzee Luoga and got there around 1:30hrs at night. Astonishingly, Mzee Luoga simply said he saw the boy passing there with a motor cycle. A worth note point is that the year reckoned is year 2021 when motorcycles had spread everywhere in this country. It would

have been appreciated if Mzee Luoga and PW4 had disclosed that on 12th December, 2021 only one motorcycle was seen in Mavanda village the whole day. This piece of evidence is like an episode without a lesson to viewers. Hence, less value is attached to it.

The arresting incident. This was another drama. This took place on 13th December, 2021 in the morning hours according to PW3 and PW4. Prior going to where they put a barrier, PW3 and PW4 were assured that there was only one way leading in and off the mines. While at the barrier, they heard the motorcycle going their way. PW3 and PW4 hid themselves and shortly after they managed to arrest the accused person with exhibit PE1. I seriously doubt this piece of evidence. The same does not illuminate on where and why the two hid themselves and the distance they were so that it could be easily digested that it was simple for PW3 to see the features of the motorcycle clearly.

In consideration of all these, I reverted to what I said in the case of **Republic v. Omary Jaston Sambwiga**, Criminal Session Case No. 10 of 2019 (decided on 28th April, 2022) High Court – Mbeya that since murder attract death sentence, its investigation and prosecution need be done with great care and seriousness. My position was cuddled by a



decision in **Mashimba Dotto @ Lukubanija v Republic**, Criminal Appeal No. 317 of 2013 (unreported) which observed that:

"There is no dispute that murder is a very serious offence which upon conviction attracts the death penalty. That being the case, it is always expected that its investigation and eventual prosecution would always be done with great care and seriousness."

I still hold the same position. True to this disposition, it does not need extra-ordinary thinking to know that this case was poorly investigated. Stories are disjointed and some do not make sense. Certain stories are exaggerative and imaginary. The totality of all evidence destines me to the feeling that the accused is not responsible with the deceased's death.

In view of the pointed out doubts surrounding the prosecution case, I am not convinced that PW2 correctly identified the accused person and that exhibit PE1 was found in possession of the accused person warranting the invoking of the doctrine of recent possession as such the case against the accused person was not proved beyond reasonable doubt as required by law. I am unflustered in my mind and completely convinced that the totality of the evidence adduced during this trial, leaves no doubt that there is no evidence linking the accused



with the murder of the deceased. Consequently, I find the accused not guilty. He is henceforth acquitted.



A handwritten signature in blue ink, appearing to be "J.M. Karayemaha", is written above a horizontal line.

J.M. Karayemaha
Judge
11/12/2023