

**THE UNITED REPUBLIC OF TANZANIA**  
**(JUDICIARY)**  
**THE HIGH COURT**  
**(MUSOMA SUB REGISTRY AT TARIME)**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SESSIONS CASE No. 184 OF 2022**  
**THE REPUBLIC v. PETER NTINGWA PETER**  
**JUDGMENT**

05.12.2023 & 12.12.2023

Mtulya, J.:

On 7<sup>th</sup> April 2021, at evening hours, **Mr. Peter Masero Mwita** (the deceased) was enjoying his drinks at **Chriss Pub** (the pub) located at Tarime Centre within Tarime District of Mara Region. When all was well and being pleased with the drinks, at around night hours, he called a ***Bodaboda Boy***, named **Mr. Ntera Ntongoli** (Mr. Ntera) to ferry him back home at Kibaga Street, and the call was well received by Mr. Ntera. Mr. Ntera had a motorcycle hence rushed to the pub and picked-up the deceased to his residence. This was sometimes 00:00 hours on the next day, 8<sup>th</sup> April 2021.

However, on their way from the pub to deceased's residence, at Kibaga Junction named Kibaga Garden, a bunch of persons appeared and asked Mr. Ntera to stop. Following the request, Mr. Ntera had stopped as he was also requested by the deceased to stop. Subsequent to the stop, the bunch of persons started to attack Mr. Ntera and deceased with clubs and escaped with the motorcycle registered SanLG MC459CRM. According to the

narrations of Mr, Ntera to Mr. Busungo and Tarime Police Station (the police), he was able to identify three (3) persons in a bundle of assailants.

The incident was then reported to police by Mr. Busungo and the deceased was rushed to Tarime District Hospital at Tarime (the hospital) for examination, but it was unfortunate in morning hours the deceased was pronounced dead. Before burying, the deceased body was examined on the source of death by **Dr. Masiaga Joseph Chacha** (Dr. Masiaga), and it was found that the death was unnatural. Being noted the death was unnatural, the police took up the matter for investigation under the authority of police officer, **PF.23164 Ass. Inspector Juma Umi Hamis** (Inspector Juma). In his investigation, Inspector Juma uncovered that Mr. Ntera had witnessed the attackers at Kibaga Junction hence had recorded him witness statement which cited **Mr. Peter Ntingwa Peter** (the accused) as one of the assailants against the deceased.

Subsequent to the investigation, the accused was brought in this court on 5<sup>th</sup> December 2023 to reply the information of murder of the deceased contrary to sections 196 and 197 of the **Penal Code [Cap. 20 R.E. 2022]** (the Penal Code). Upon reading the information of murder, the accused had denied any involvement in killing the deceased hence the Republic had marshalled a total of three (3) witnesses and two (2) exhibits to prove its case. In order

to show that the incident and death of the deceased had actually occurred, and the hospital and police participated in the saga, the Republic had called **Dr. Masiaga** (PW2) of the hospital and **Inspector Juma** (PW3).

According to PW2, on 10<sup>th</sup> April 2021, at around 14:00 hours, he examined the deceased's body and found to have several wounds on head, minor bruises on legs and his garments were whacked with blood. In his opinion, the death was caused by attacks of heavy blunt object and finally recorded Post-Mortem Report of the deceased, which was admitted as Exhibit P.1. Exhibit P.1 shows that the source of death was: *head injury with multiple swelling, bruises in lower limbs and bleeding.*

PW3 on his part had testified that he was CID on call in night hours of 8<sup>th</sup> April 2021 and around 01:00 hours, three (3) persons had showed up asking for police intervention and assistance on PF.3 and investigation. In his testimony, PW3 had mentioned the three (3) persons are who had approached the police on the indicated night hours, including the deceased and Mr. Busungo. According to PW3, the deceased was bleeding and in bad condition hence supplied them with PF.3 for examination and treatment at the hospital. In his investigation, PW3 testified to have uncovered that Mr. Ntera was riding the deceased back home in a motorcycle and witnessed the assailants attacking the deceased with clubs

hence called him for witness statement recording and finally recorded him a statement which cited the accused.

Mr. Ntera was summoned to appear and testify in the present case as prosecution witness number one (PW1). According to him, on 8<sup>th</sup> April 2021, he was cell-phoned by the deceased at night hours to ride him back home at Kibaga from the pub, but at Kibaga Junction, they were stopped and attacked by a bunch of persons. In his testimony, PW1 had testified to have identified two (2) persons from the attackers, namely: the accused and Mr. Mwita Isaya, who had attacked the deceased on neck and head.

Regarding identification of the accused at night hours, PW1 testified that: first, his motorcycle had headlight which could light up to three quarters (3/4) of the size of football pitch; second, the accused was in four (4) meters from where the motorcycle was lighting; third, he knows the accused for more than five (5) years; fourth, he lives with the accused in the same street called Tagota at Tarime District; fifth, the attacking incident took more than twenty (20) minutes; sixth, the accused had red sweater and his usual rasta on head; and finally, the accused had married a wife in the same house with PW1's brother hence he knows the accused very well.

During producing his evidence, PW1 stated that there was a third person cited by the deceased in the name of Kisanta and two (2) other persons who had emerged from potatoes terraces, but could not be identified. PW1 testified further that he was riding a motorcycle named SanLG numbered MC459CRM, which was taken away by the attackers hence shouted *yowe* species of noises to invite assistance, without appearance of any person.

Following the silence of the neighbours, PW1 stated that he went to Busungo's residence and raised him for help and later to Makini's residence where they took *Bodaboda* to police. In the *Bodaboda*, according to PW1, three (3) persons were on the trip to police, namely: the deceased, Mr. Busungo and Mr. Makini. PW1 testified further that after the incident at the crime scene, he followed the deceased at the hospital and saw him receiving treatment, but in the morning hours he was pronounced expired. Finally, PW1 testified that in the three (3) cited persons, he only saw the accused in the dock and correctly identified him from the dock.

However, during cross examination, PW1 had testified that he was able to identify two (2) persons in the three (3) cited persons in his testimony and mentioned the accused's name as Peter Mshono in witness statement, he knew the accused in three (3) years; and did not switch-off the motorcycle's head light. In a move

to discredit PW1, Mr. Magweyega for the defence side had prayed, under section 154 of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act), to have PW1 witness statement for reading and displaying areas of contradictions in number of persons identified, years of knowing the accused and head lights of the motorcycle. Finally, PW1 prayed to admit his previous statement recorded at the police on 8<sup>th</sup> April 2021 at 07:45 hours before PW3 and it was admitted as Exhibit D.1. Exhibit D.1, in brief, shows that:

*Mimi naishi Mtaa wa Nyamisangula, lakini nyumbani kwetu kabisa ni Mtaa wa Tagota. Naishi peke yangu na najishughulisha na kusafirisha abiria kwa pikipiki ya PETER MASERO MWITA kwa Mkataba wa kurejesha Tshs. 10,000/= kila siku kwa muda wa miezi 12...Elimu yangu ni darasa la saba na nilipata katika shule ya msingi Tagota. Nakumbuka mnamo tarehe 7/4/2021 majira ya saa 06:00hrs niliamka na nilikuwa nashughulika na kazi za nyumbani Pikipiki yangu ambayo huwa naendesha yenye namba za usajili MC459CRM aina ya SUNLG nilimpatia rafiki yangu ili aifanyie kazi. Ilipofika majira ya saa 14:20hrs baada ya kumaliza kazi zangu nilichukua pikipiki hiyo...Niliendelea na kazi kama kawaida hadi ilipofika majira ya saa 22:00hrs ambapo niliondoka kwenda maeneo ya mjini kati na nilifanya kazi mpaka majira ya saa 00:00hrs tarehe 08/4/2021....nilipigiwa simu na PETER MASERO MWITA kuwa niende maeneo ya Criss Pub nikamchukue ili nimpeleke nyumbani kwake Kibaga. Baada ya kuambiwa hivyo moja kwa moja nilielekea Criss Pub...*

na kuanza safari kuelekea Kibaga na Mwenyekiti alikuwa amekunywa pombe lakini alikuwa katika hali ya kawaida sana. Tulipofika njia panda ya Matenki ya maji Kibaga Garden... walijitokeza watu watatu mbele. Nilipotaka kuendelea na safari ili niongeze speed PETER MASERO MWITA akaniambia nisimame, nilisimamisha pikipiki na nilikuwa sijazima taa ambapo wale watu watatu walitusogelea na walikuwa makoti meusi mmoja alikuwa na rasta kichwani. Tukiwa tumesimama ndipo watu wawili waliokuwa kwenye shamba la viazi wakaja na kufanya kuwa jumla kuwa watano. Hata hivyo, kupitia ule mwanga wa taa ya pikipiki niliweza kuwatambua watu watatu kwa sura na majina yao ambao ni KISANTA MARWA MAGWI @STEVEN, PETER @ MSHONO na MWITA ISAYA MAGIGE na wawili sikuweza kuwatambua. KISANTA MARWA MAGWI baada ya kunikaribia aliniamuru nizime taa ya pikipiki akiwa ameshika rungu mkononi, nilikataa na kumuuliza tatizo ni nini? Ndipo alinipiga kwa rungu kwenye bega la kushoto, ambapo PETER MASERO MWITA ambaye alikuwa amekaa tu kwenye pikipiki akamtaja kwa jina "Kisanta" kwa nini unataka kumuua huyu dogo? Wakaniacha mimi na kuanza kumshambulia Mwenyekiti PETER MASERO kwa kumpiga na marungu. Ghafila mmoja akanipiga na rungu mgongoni na kuniamuru nishuke kwenye pikipiki...ambapo nilimuona PETER MSHONO anampiga rungu kichwani PETER MASERO MWITA. Baada ya kuona kuwa nawaangalia MWITA ISAYA MAGIGE akanikanyaga shingoni. Baada ya muda kidogo nilimsikia mwenyekiti PETER MASERO akilalamika akiwa anamtaja KISANTA MARWA MAGWI @ STEVEN



*"Kisanta kwanini unaniua" na muda huo alikuwa yuko chini amelala. Baada ya muda alisikia pikipiki ikiwa inainuliwa na waliisukuma kuelekea barabara ya Rhebu. Watu hao watatu niliweza kuwafahamu vizuri kwa sababu nafahamiana nao kwa muda wa zaidi ya miaka mitatu kwani nilikuwa nafanya kazi pamoja ya uchimbaji wa dhahabu katika mgodi wa Kibaga ambao ni KISANTA S/O MARWA MAGWI na PETER PETER @ MSHONO, MWITA S/O ISAYA MAGIGE NA PETER S/O PETER MSHONO yeye na kaka yangu wameoa mji mmoja na tunaishi mtaa mmoja. Pia PETER MASERO alimtambua vizuri KISANTA kupitia mwanga wa taa ya pikipiki kabla sijaizima. Wote waliondoka ndipo niliamka na kukimbia kupiga yowe kuomba msaada kuelekea nyumbani kwa BUSINGO GABRIEL nikapiga kelele na kusema kuwa Mwenyekiti PETER MASERO anauawa, ndipo BUSINGO GABRIEL alitoka na kwenda naye hadi eneo la tukio na kumkuta PETER MASERO akiwa na hali mbaya na alikuwa anavuja damu mdomoji na puani na alikuwa haongei alikuwa anakoroma tu. Tuliondoka na Busongo hadi nyumbani kwa MAKINI MWITA ambaye tuligonga nyumbani kwake na kumueleza kilichomkuta Mwenyekiti alitoa pikipiki yake tukaelekea eneo la tukio ambapo MAKINI MWITA na BUSONGO GABRIEL wakambeba Mwenyekiti kwenye pikipiki kuelekea Hospitali ya Wilaya Tarime na mimi na watu wengine ambao walikuja kuitikia yowe tukaenda hospitali kwa miguu. Baada ya kumfikisha hospitali tulikaa kwa muda lakini ilipofika majira ya saa 06:00 hrs PETER MASERO, MWITA alifariki dunia akiwa anaendelea na matibabu Hospitali ya Wilaya*



*Tarime. Ndipo nilipoondoka kwenda kituo cha polisi kutoa maelezo ya kina ya namna tukio lilivyotokea.*

This court after perusing the materials brought by the prosecution, specifically testimonies of PW1, PW2 and Exhibit P.1, had found the accused to have a case to reply. In replying the materials, the accused (DW1) had testified that he was away from Tarime when the incident had happened. In his testimony, DW1 had testified that he left Tarime for Dar Es Salaam by using **Falcon Executive Bus Ltd** (the bus) on 23<sup>rd</sup> March 2021 for masonry activities to appreciate the call of Mr. Shafii, his fellow mason. According to DW1, the move was witnessed by his wife **Regina Marwa Wambura** (Ms. Regina). After completion of the work in Dar Es Salaam, as per DW1 evidence, he left Dar Es Salaam for Mwanza on 8<sup>th</sup> April 2021 by using the same bus.

In order to substantiate his testimony, DW1 had produced two bus tickets issued on 20<sup>th</sup> March 2021 for a journey on 21<sup>st</sup> March 2021 serial numbered 722797 from Tarime to Dar Es Salaam and second one issued on 7<sup>th</sup> April 2021 for a trip of 8<sup>th</sup> April 2021 serial numbered 722476 from Dar Es Salaam to Mwanza. DW1 testified further that at his residence he was living with his wife **Regina** and two children, **Maria** aged nine (9) years and **Michael** aged seven (7) years and had good neighbours including **Mr. Robert**. In ending his testimony, DW1 stated that PW1 had recorded a name Peter

Mshono in his witness statement, but he is called Peter Ntingwa Peter, a distinct person altogether.

However, during cross examination, DW1 testified that: first, he cannot tell why the two bus tickets serial numbers are showing to have been issued at one and the same station of Tarime District; second, he cannot summon his friend Mr. Shafii to corroborate his testimony that they were together in Dar Es Salaam because he minds are own business; third, he cannot call his wife Regina because she has already expired; and finally, Maria, Michael and Robert are unaware of his trip to Dar Es Salaam and Mwanza on the indicated dates.

In the instant case, this court is invited to resolve an issue whether the accused has murdered the deceased contrary to section 196 and 197 of the Penal Code. According to section section 3 (2) (a) of the **Evidence Act [Cap. 6 R. E. 2022]** (the Evidence Act), the Republic is required to register materials to establish its case beyond reasonable doubt that the accused has killed the deceased. The enactment of section 3(2) (a) of the Evidence Act has already received pronouncements of the Court of Appeal (the Court) and there is a barrage of precedents on the subject (see: **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Said Matula v. Republic** [1995] TLR 3; **Horombo Elikaria v.**

**Republic**, Criminal Appeal No. 50 of 2005; **Republic v. Josephat Athman & Two Others**, Criminal Session Case No. 13 of 2023)

In establishing murder cases, the Republic is required by the law and practice to display four (4) essentials, namely: first, death of the deceased; second, the deceased had expired from unnatural cause; third, nexus between the death of the deceased and accused; finally, and malice aforethought (see: **Mohamed Said Matula v. Republic** (supra)).

In the instant case, the materials brought by the parties show that there is no any dispute whatsoever on the first two (2) indicated matters above, namely: first, death of the deceased; and second, unnatural death of the deceased. The parties are at horns as to who had killed the deceased with malice aforethought. Regarding the death of the deceased, PW1 has narrated in his testimony that the deceased had expired in morning hours of 8<sup>th</sup> April 2021 and PW2 had registered Exhibit P.1 to show that the death was unnatural as from the swelling and bruises displaying the accused was assaulted with heavy blunt object on the head, hands and legs.

To show that the two indicated issues are not disputed, the defence did not protest admission of Exhibit P.1, did not ask any

question relating to Exhibit P.1 and did not ask any question to all materials brought by PW2 in the case.

The practice available in courts of records shows that failure to cross examine a witness on important materials displayed in his evidence or exhibits is regarded that the other party has accepted the contents of the same to be true and correct. There is a large bundle of precedents from the Court regulating the position (see: **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016; **Damian Ruhele v. Republic**, Criminal Appeal No.501 of 2007; **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010; **Mawazo Anyandwile Mwaikwaja v. DPP**, Criminal Appeal No. 455 of 2017; and **Siaba Mswaki v. Republic**, Criminal Appeal No. 401 of 2019).

On the question who had killed the deceased with malice aforethought, the parties have produced different materials. The prosecution had summoned the alleged eye witness PW1 whereas the defence had brought DW1. According to PW1, he witnessed the accused attacking the deceased with a club on head. The law regulating direct evidence is enacted in section 62 (1) (a) of the Evidence Act and provides that: *oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.* According to precedents available at the Court and this court, a witness must

show that he *had the opportunity to see what he claimed to have seen* (see: **Yohanis Msigwa v. Republic** [1990] TLR 148; **Republic v. Kamhanda Joseph Abel & Five Others**, Criminal Sessions Case No. 46 of 2018; **Republic v. John Mbatira @ Mtuke**, Criminal Sessions Case No. 181 of 2022; and **Republic v. Mroni Samo @ Ryoba**, Criminal Sessions Case No. 12 of 2023).

It is determined whether a witness had the opportunity to see what he claimed to have seen, a witness must be credible and reliable. According to the Court, a witness whose statements may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him (see: **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018 **Goodluck Kyando v. Republic** [2006] TLR 363; and **Republic v. Mroni Samo @ Ryoba** (supra).

In the present case, PW1 claimed to have seen the accused attacking the deceased with a club. The question before this court is therefore, whether PW1 had the opportunity to see what he claimed to have seen, and whether he is reliable and credible witness.

The law regulating opportunity of witnesses to see what they claimed to have seen, depends on circumstances of each case. If it is during night hours, like in the instant case, and the question of identification comes into question, the practice derived from the

Court requires seven (7) conditions be revealed in the record for the prosecution to substantiate its case, namely: first, light at the crime scene; second, source of light at the crime scene; third, intensity of the light at the crime scene; fourth, proximity of the accused and witness; fifth, descriptions of the accused or matter; sixth, mentioning of the accused or matter at the earliest possible; and finally, familiarity of the witness to the accused.

There is a large bunch of precedents on the subject and the practice is now settled (see: **Jamila Mfaume Makanyila @ Mama Warda v. Republic**, Criminal Appeal No. 383 of 2016; **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015; **Muhidini Mohamed Lila @ Emolo & 3 Others v. Republic**, Criminal Appeal No. 443 of 2015; **Issa Mgara v. Shuka v. Republic**, Criminal Appeal No. 37 of 2005; **Philipo Rukandiza v @ Kichwechembogo v. Republic**, Criminal Appeal No. 15 of 1994; **Waziri Amani v. Republic** [1980] TLR 250.

In the present case, the incident had occurred at night hours and PW1 had testified that he witnessed the accused by use of high intensity of a motorcycle headlight which could light up to three quarters (3/4) of the size of football pitch; second, the accused was in four (4) meters from where the motorcycle was lighting; third, he knows the accused for more than five (5) years; fourth, he lives with the accused in the same street called Tagota at Tarime District; fifth,

the attacking incident took more than twenty (20) minutes; sixth, the accused had red sweater and his usual rasta on head; and finally, the accused had married a wife in the same house with PW1's brother hence claimed to have known the accused very well.

According to the Court, the indicated circumstances produced by PW1 is more than identification of a person. It is recognition of a person. In the practice available at the Court, recognition of a person is more satisfactory, more assuring and more reliable than identification of a stranger (see: **Kenga Chea Thoya v. Republic**, Criminal Appeal No. 375 of 2006; **Nicholaus Jame Urrio v. Republic**, Criminal Appeal No. 244 of 2010; and **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017).

This court has been following the move established by the Court without any reservations (see: **Republic v. Pete Msongo @ Patrick**, Criminal Sessions Case No. 179 of 2022 and **Republic v. Mroni Samo @ Ryoba** (supra). The practice in the Court also requires that a witness who mentions an accused at the earliest possible opportunity, he is to be considered the best witness and his reliability and credibility is assured (see: **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39; **Republic v. Nyataigo Mwita @ Makende**, Criminal Sessions Case No. 154 of 2022; and **Republic v. John Mbatira @ Mtuke** (supra).



In the instant case, PW1 had mentioned the accused at the police in morning hours of 07:45 on 8<sup>th</sup> April 2021 before PW3 for the incident that had occurred on night hours of 00:00 on the same date 8<sup>th</sup> April 2021. The question whether a span of six (6) hours is the earliest possible opportunity, depends in the circumstances of each case. In the present case, and at any rate, the time span taken by PW1 is the earliest possible. PW1 had testified that the deceased was attacked at 00:00 hours and the whole saga had taken about twenty minutes to complete. He then shouted a *yowe* type of noises without any help hence rushed to Mr. Busungo for assistance.

According to the testimony of PW1, after arrival of Mr. Busungo, they went further in the residence of Mr. Makini in search of motorcycle transport to ferry the deceased to hospital. Finally, PW1 testified that he went to hospital to check the deceased and found him receiving treatment, but was pronounced dead in morning hours around 06:00 on the same date 8<sup>th</sup> April 2021.

Therefore, to record witness statement on the same date at 07:45 hours, I think, in my opinion, PW1 had cited the accused at the earliest possible time. There is registration of plausible materials and sequence of events in the instant case showing that the six (6) hours delay from 00:00 hours to 07:45 hours as per requirement of the practice in **Onesmo Kashonele & Others v. Republic**, Criminal

Appeal No. 225 of 2012. The materials registered in the present case by PW1 may not be doubted.

I am aware that the defence had cited discrepancies in three (3) areas namely: first, PW1 had testified that he was able to identify two (2) persons in the three (3) cited persons during his testimony in this court and mentioned the accused's name as Peter Mshono in witness statement; second, he knew the accused in three (3) years; and finally, did not switch-off the motorcycle's head light. According to the defence, PW1 cannot be believed as he testified inconsistencies in this court from what he had recorded at police station,

The law regulating inconsistencies and contradictions of statements of witnesses is regulated by practices available in this court and the Court. The most cited paragraph in that regard is found in the decision of the Court in **Sahoba Benjuda v. Republic**, Criminal Appeal No. 96 of 1989, where the Court stated that:

*Contradiction in the evidence of a witness effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.*

The practice has been appreciated in a bundle of decisions of this court and the Court (see: **Kibwana Salehe v. Republic** (1968)

HCD 391; **Surdeyi v Republic (1971)** HCD 316); **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007). The question therefore is whether the contradictions cited by the defence go to the root of the case. This court was invited to resolve a murder case, and PW1 testified to have seen the accused attacking the deceased. Now, the court is invited to resolve whether the headlights of the motorcycle were at one point was switched off, whether PW1 identified two or three attackers at the crime scene and whether Mr. Peter Mshono is the same person as Mr. Peter Ntingwa Peter.

I am aware the record shows that PW1 recognized the accused at the crime scene and correctly identified him in this court during the hearing of the case. This court and the Court have already stated that evidence of recognition is more reliable and best evidence than that of identification. In my considered opinion, PW1 had recognized the accused and the indicated three (3) contradictions are minor. They do not move into the root of the question whether PW1 had correctly recognized the accused.

In any case, practice at the Court shows that minor contradictions and discrepancies cannot be avoided when considering the time taken and level of education of a witness (see: **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 and **Chrizant John v. Republic**, Criminal

Appeal No. 313 of 2015). This court has been cherishing the move (see: **Republic v. John Mbatira @ Mtuke & Three Others**, Criminal Session Case No. 181 of 2022). In the present case, PW1 is a standard seven (7) leaver doing *Bodaboda* business of transporting passengers within Tarime District and the incident took place on 8<sup>th</sup> April 2021 and produced testimony on 5<sup>th</sup> December 2023. It is obvious that he cannot be discredited on account of minor discrepancies as indicated.

In the instant case, the defence had produced two (2) exhibits in Exhibit D.1 to display that PW1 has produced inconstancies and discrepancies evidences and Exhibit D.2 to display that the accused was not at Tarime when the incident of attacking the deceased had occurred. I have already resolved on discrepancies indicated by the defence. The question whether the accused was away or not is replied in two (2) ways: first, authenticity of the bus tickets; and second, failure to call material witnesses. According to the Court of failure to call material witness to corroborate party's evidence may move a court to draw an adverse inference against the party (see: **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115 of 2019; **Stanley James @ Mabesi v. Republic**, Criminal Appeal No. 115 of 2022; and **Republic v. Mroni Samo Ryoba** (supra).

In the present case, the accused had testified that his wife Regina had expired in May 2022 hence could not be summoned to testify whereas Maria, Michael and Robert are unaware of his trip to Dar Es Salaam on the indicated dates. Similarly. The Exhibit D.2 shows serial numbers 722, which suggests from one (1) station or similar ticket book, which cannot be easily found in one station. Even if it is assumed the tickets are from different stations or ticket book, the tickets show that accused had travelled and stayed in three (3) different regions of Mara, Dar Es Salaam and Mwanza between March and April 2021.

However, when the accused was arrested and associated with the instant case, he managed to get hold of bus tickets while in police custody, and for two (2) years in the same custody could not find a person in all the indicated three (3) regions to come and testify in a serious case against him. This is unfortunate part on the accused. The Court has already indicated that criminal justice system is not a football game, but a serious business of acquitting the innocent and convicting the guilty according to the law (see: **Hatibu Gandhi & Others v. Republic** [1996] TLR 12) and this court had echoed in **Republic v. John Mbatira @ Mtupe & Three Others** (supra).

The Court having said so, it did not mean to shift the onus away from the prosecution to the accused or requires accused

persons to establish their innocence (see: **Mohamed Said Matula v. Republic** (supra). The duty of the accused persons in criminal cases is to raise some doubts in prosecutions materials. Similarly, the law prohibits conviction to accused persons on basis that they are found to be liars (see: **Mushi Rajab v. Republic** (1967) HC 384) or weaknesses on part of his defense (see: **Christian Kale & Rwekaza Bernard v. Republic** (1992) TLR 302).

Similarly, section 143 of the Evidence Act and the precedent of **Yohanis Msigwa v. Republic** (supra) show that there is no particular number of witnesses required for the proof of any fact. However, in a situation where the prosecution had bought eye witness PW1 and the defence brought exhibit D.1 to corroborate the testimony of PW1, a claim that the accused was away from the crime scene without any other materials witnesses may not shake the prosecution materials (see: **Richard Matangule & Another v. Republic** [1992] TLR 5 and **Republic v. Juma Rhobi Monyeka**, Criminal Sessions Case No. 182 of 2022). In totality of the evidences brought in this court, the accused participated and attacked the deceased by use of club at night hours of 8<sup>th</sup> April 2021 at Kibaga Junction named Kibaga Garden.

In brief, the defence of *alibi* that was raised by the accused in the instant case does not introduce a reasonable doubt in the prosecution's case in view of the strong evidence of PW1. I am

persuaded and believed PW1 on the evidence of recognition of the accused at Kibaga Junction named Kibaga Garden. In this case, the defence of *alibi* dies a natural death (see: **Abdallah Hamisi Salim @ Simba v Republic**, Criminal Appeal No. 68 of 2008 and **Edgar Kayumba v. D.P.P.**, Criminal Appeal No. 498 of 2017). The defence was brought to deceive this court (see: **Edgar Kayumba v. D.P.P** (supra) and **Republic v. Keraryo Rhobi Busere & Another**, Criminal Sessions Case No. 31 of 2022).

The next question to be replied in this case is: *whether there was malice aforethought during the attacks against the deceased*. The circumstances to assist this court in determining malice aforethought in criminal cases of murder species are enacted under section 200 of the Penal Code. The enactment had received interpretation of the Court in 1994 in the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, where the Court stated, in brief, that:

*usually an attacker will not declare his intention to cause death or grievous bodily harm. The intention of accused must be ascertained from various factors, including the following: the type of the weapon used in the attack; the amount of force applied in assaulting; the part of the body where the blow was directed; the number of blows; and the kind of injuries inflicted.*



In the present case, the materials produced by PW1 and PW2 shows that the accused attacked at sensitive part of the body head and in multiple blows by use of the club. Exhibit P.1 displays that: *head injury with multiple swelling, bruises in lower limbs and bleeding*. The facts from PW1, PW2 and Exhibit P.1 show that the accused had malice aforethought.

In the circumstances of the present case, I am satisfied that the prosecution has proved its case beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the Evidence Act and precedent in **Said Hemed v. Republic** (supra), that the accused murdered the deceased. Having said so, I find the accused guilty to the charged offence of murder against the deceased contrary to sections 196 and 197 of the Penal Code.

Accordingly ordered.



F. H. Mtulya

**Judge**

12.12.2023

This judgment was pronounced in open court in the presence of the accused, **Mr. Peter Ntingwa Peter** and his Defence Attorney **Mr. Leonard Magwayega** and in the presence of **Ms. Damary Nyange**, learned State Attorney for the Republic.

F. H. Mtulya

**Judge**

12.12.2023

## **ANTECEDENTS**

**Nyange:** My Lord, we have no previous record of the accused. However, we pray for serious sentence in accordance to the Penal Code. My Lord, this court may consider the following: first, the evidence shows that the accused attacked the deceased on head, which is a vulnerable part of the body; second, he used club to attack the deceased; third, he killed human person; fourth, this nation has lost manpower. The deceased was young in his thirties; and fifth, the penalty may produce lesson to other criminals in this State. My Lord, that is all for the Republic.

F. H. Mtulya

**Judge**

12.12.2023

## **MITIGATIONS**

**Magwayega:** My Lord, in my view, the mitigations at this juncture is nothing. My Lord, whatever we say will not assist. My Lord, the only sentence for persons found guilty of murder is hanging to death. My Lord, even if I mitigate the sentence shall not change. In that case, I leave the matter to the court.

F. H. Mtulya

**Judge**

12.12.2023

**Accused:** My Lord, I heard that Shafii cannot be obtained and my wife has expired. I pray this court to know that I did not commit the offence. My Lord, after the death of my wife, my sons and daughters are in difficult situations. My Lord, I said during my testimony that since my arrest I could not access Mr. Shafii. My Lord, I pray lenience of your court. That is all my Lord.

F. H. Mtulya

**Judge**

12.12.2023

**SENTENCE**

**Court:** I have heard mitigations and antecedents produced by both parties in this case. However, the law in this State was enacted in section 196 of the Penal Code followed by section 197 of the same Code with a penalty of hanging to death without any other options. Having said so, I sentenced the accused to death by hanging in accordance to section 197 of the **Penal Code [Cap 16 R.E 2022]**.

It is so ordered.



F. H. Mtulya

**Judge**

12.12.2023

Right of Appeal explained to the parties.

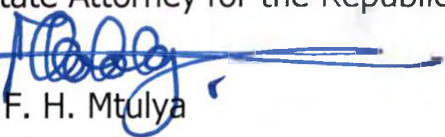
F. H. Mtulya

**Judge**

12.12.2023

This Sentencing Oder was pronounced in open court in the presence of the accused, **Mr. Peter Ntingwa Peter** and his Defence Attorney **Mr. Leonard Magwayega** and in the presence of **Ms. Damary Nyange**, learned State Attorney for the Republic.



  
F. H. Mtulya

**Judge**

12.12.2023