

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA**

**SUMBAWANGA SUB-REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL SESSION CASE NO.05 OF 2022**

THE REPUBLIC

VERSUS

1.JOFREY s/o DOMINIKO @ KAPUFI

2.ELASTO s/o DOMINIKO @KAPUFI

Last order: 03 April 2024  
Judgment: 23 May 2024

**JUDGMENT**

**NANGELA, J.:**

The two accused persons stand charged with the offence of murder of Charles s/o Mwananzumi contrary to Section 196 and 197 of the Penal Code, Cap.16 R.E 2019. It is alleged the offence took place on the 10<sup>th</sup> of December 2020, at Sandulula Village within Sumbawanga District in Rukwa Region. On the 18<sup>th</sup> of March 2024, when the hearing of this case commenced, the accused persons pleaded not guilty to the information (charge Sheet).

Subsequently, the prosecution team, led by Ms. Safii Kashindye, assisted by Ms. Nyagawa, both learned State Attorneys, lined up six witnesses to support the prosecution case. For their part, having been addressed in terms of Section 293 (2) of the Criminal Procedure Code, Cap. 20 R.E. 2022, the accused persons, led by their learned advocate Mr.

Peter Kamyalile, elected to defend themselves under oath. They called no witnesses to support their case.

Before I proceed further, I find it more profitable if a short factual background to this case is set out. The accused persons are related family members from the Kapufi's clan of Sandulula Village, Sumbawanga District, Rukwa Region. On the other hand, the deceased, (Charles s/o Mwanazumi) was from the Mwananzumi's clan, living in a nearby Village of Kalole, Sumbawanga District Rukwa Region.

It has been alleged that, prior to the murder incident, the two clans had been in a long-standing dispute over a portion farmland situated at the Sandulula Village within Sumbawanga District, Rukwa Region.

Following the dispute, the deceased stopped cultivating the disputed land from the year 2016. In the alternative, he hired a shamba from Didas s/o Mirambo which he used to cultivate since then and was supposed to handover it to its owner in the year 2023. It is alleged that on 10<sup>th</sup> December 2020, the fateful date of his demise, the deceased was at the hired farmland together with his son Anneck Mwananzumi and Method s/o Mangulu. They had gone to do farming from around 7:00 am of that fateful date.

It is alleged that, while minding their business at that hired farmland, the two accused persons, in the company of their other fellows still at large, namely: Deus s/o Kapufi, Chrisant s/o Kapufi, Edward s/o Kapufi, Taus s/o Dominiko, John s/o Dominiko and, one Sangulo, (all not in court), armed with axes, machetes, slashers, iron bars and sticks,

arrived at the said farmland and viciously attacked the deceased.

In such savage attack, the attackers left the deceased severely injured on head, leg (thigh) and hand fingers while one Method s/o Mangulu, who was together with the deceased, received leg injuries. It was alleged that, after accomplished their savage attack, the accused and their company left the scene to unknown places. Close to the crime scene but a bit far off, however, there stood one Arnold s/o Nemes Mwananzumi who witnessed the attack.

It was Mr. Arnold Mwananzumi who came to the aid of the deceased and took him to Kaengesa Health Centre. Unfortunately, the deceased could not survive the attack. He succumbed to his death while receiving medical attention at Kaengesa Health Centre on the same evening of 10<sup>th</sup> December 2020. With such distressing developments, the incident was reported at Laela Police Station. An investigation process was thereby launched and a visit to the scene of crime was made a Police Officers, including one G.7156 D/CPL Ally drew up a sketch map.

Further investigative processes including carrying out an autopsy to establish the cause of death was done by Dr. Mwita s/o Daniel who established that the deceased had passed on due to severe head injury, head wounds, brain concussion and intracranial haemorrhage. Subsequently, on the 12<sup>th</sup> of December 2020, the first accused Jofrey s/o Peter Dominiko @Kapufi was arrested at Eden Ng'ambo within Sumbawanga Municipality in Rukwa Region.

Moreover, on the 29<sup>th</sup> of December 2020, the second accused, Elasto s/o Dominiko @ Kapufi was arrested at Sandulula Village by his fellow Villagers and was taken to Laela Police Station for further legal actions. The two accused individuals were charged with the murder of Charles s/o Mwananzumi, the offense which this judgment is all about. The prosecution side summoned six witnesses who testified as Pw-1 to Pw-6. I will provide a summary of their testimonies for the purpose of a better understanding of the evidence presented to the court.

The first witness to testify was Annek Mwanazumi (Pw-1) who is the deceased's son. Pw-1 recounted how his father was brutally attacked on the 10<sup>th</sup> of December 2020, an attack that caused his demise. He informed this Court that, on the material date, he was accompanied by his father (the deceased) in their "shamba" at Mchese area in the company of Mangulu. According to Pw-1, his father (the deceased) had hired the "shamba" from Mr. Didas. He informed this court that there had been a long pending dispute between his father (the deceased) and one Dominiko Kapufi and, that, the Kapufii's family had regarded his father as a troublemaker.

In his testimony, therefore, Pw-1 asserted that, while at the "hired shamba" a group of people, as many as 10 or so, arrived at carrying traditional weapons such as axes, arrows, slashers, and pangas (machettes) and began to savagely assault his father. According to Pw-1, he was only ten meters away from where his father was being attacked.

Pw-1 informed this court that, he was able to identify the first accused, Jofery s/o Kapufi, Deusi s/o Kapufi, Tausi s/o Kapufi, John s/o Kapufi, and Nesto s/o Kapufi, those being the only people he could remember.

However, when asked further if he was able to mark their faces, Pw-1 told this Court that:

**"Kwa kweli, muda ule ambapo Baba yangu anajeruhiwa sikubainika kuwa "marki" sura kwa sababu nilikuwa kwenye hali ya kumwokoza Baba yangu."**

Pw-1 informed this court that, when his father was being attacked by his assailants, the attackers cut him on the head and on his thigh. He testified further, that, when Arnold Mwananzumi came to their aid, the attackers chased him away. It was Pw-1's testimony that, after they attackers had left the scene, the deceased was taken to Kaengesa Health Center where he later succumbed to his death.

During cross-examination, Pw-1 informed this court that although he did not take note of the faces of his father's assailants, but it was his father (the deceased) who informed him that the 1<sup>st</sup> accused, and his relatives were his attackers. He told the court that Mr. Arnold Mwananzumia who came to offer help was about 20 meters from where the attack was taking place. He also told the court that he did not see the two accused persons who are in court killing his father.

The second witness who testified before this court is Pw-2, Arnold Nemes Mwananzumi. According to his

testimony, he comes from Kalole Village, Sandulula Ward and that, the deceased was his young brother. Pw-2 informed the court that, on the 10<sup>th</sup> of December 2020, the day when the deceased died, he (Pw-2) was working in his farm at "Vinyimbo area" while the deceased was working in his farm at "Chizya area", about 50 meters from where Pw-2 was. According to him, the two farmlands were separated by a river.

Pw-2 informed the court that the farm in which the deceased was on the material date was owned by Didas Milambo. He informed this court that at around 7.00 a.m. there was a dispute as he heard a group of people saying "Mkamateni, Mshike" and saw numerous people attacking his young brother. Pw-2 affirmed that; he was able to identify five of them as he shouted at them trying to rescue his brother, but because the attackers were many, he could not do much to assist other than shouting, but none came to the rescue.

According to Pw-2, those he managed to identify were Jofrey Petro Kapufi (the first accused), Erasto Dominiko Kapufi, Deus Kapufi, John Kapufi and Chrisant Dominiko Kapufi who was observing what the others were doing. He also identified one, Sangulo. He told the court that, on the material day, the second accused was armed with an axe which he used to cut the deceased's head and, on the hand, while the first accused was armed with arrows.

Pw-2 informed this court that, the attackers took approximately ten or so minutes and that, when he was

observing them, he was on the other side of the river that divides the Chezya and Mchese areas. It was also Pw-2's testimony that the attackers inflicted severe injuries on the deceased's head, hand, and leg, and that afterwards they rushed to Sandulula Village.

According to Pw-2, he had a prior knowledge of the accused and the rest of Kapufi family members, who he knew for a long time since their families had a long pending dispute over a farmland that Pw-2's father had been granted the right to use. Pw-2 informed this court that the Kapufi's family is also related to his clan of Mwananzumi, only that they reside in two separate villages but knew each other well.

Pw-2 did also assert that he was the one who took the deceased to Kaengesa Health Centre where he later passed away. He informed the court that the entire incident was reported to the Kaengesa Police Post and later to Sumbawanga Police Station. According to Pw-2, the first accused was arrested at Eden Ng'ambo where he was pretending to be sick, and the second accused was arrested at his farmland while the rest of the assailants are still in large numbers.

During his cross-examination, Pw-2 informed this court that he was standing approximately 50 meters on the other side of the river and the attackers were more than 20 that is why he could not aid the deceased who when they attackers were attacking him. He also informed this court that Annek Mwananzumi (Pw-1) was about 20 meters away from the

scene of crime and that, he (Pw-2) was able to see the attackers and did identify some of them.

The third witness for the prosecution was Dr. Mwitwa who testified as Pw-3. In his testimony, he explained how he conducted a postmortem to establish the cause of Charles Mwananzumi's death. According to Pw-3, the deceased's external body had two large injuries on the back of the head and on the fingers of the left hand, which injuries, in his opinion, had been caused by a sharp instrument such as a "Panga or Sime". He noted, as well that, the deceased had suffered brain concussion and, that, internal haemorrhage had occurred into his brain.

According to Pw-3, he prepared a postmortem report which he tendered in court as exhibit. The same was admitted as **Exh.P-1**. Although during cross-examination he said that he did not see an injury caused by an axe, he did state that it all depends how the axe was used. He clarified, during re-examination, however, that, an axe is also a sharp instrument.

The fourth prosecution witness was E.8778 DSGT. January. His testimony was to the effect that on 12<sup>th</sup> December 2020 he was involved, together with the Rukwa RCO, in arresting the 1<sup>st</sup> accused at Eden Ng'ambo. He was able to identify the first accused in court. Pw-4 informed this court that, after the first accused's arrest, he informed the police that there had indeed been a land dispute between his (the first accused's) family and the deceased's family as the latter's family was not surrendering the land and so, the first



accused's family decided to remove the deceased from the land by force.

According to Pw-4, the first accused informed the Police that he and others had beaten up the deceased using a stick and, recognizing that he was weakened, they returned to their village. During his cross-examination, Pw-4 told this court that, the accused did not say that he attacked the deceased using an axe. He stated, however, that the first accused had informed him that the deceased had invaded the accused's farmland.

The fifth witness for the prosecution was Mr. Victor Mwakalebela, who testified as Pw-5. His testimony was to the effect that, in the year 2020 he was the Ward Executive Officer (WEO) at Sandulula Ward in Sumbawanga District. He informed this court that, at 8:00 am, on the 10<sup>th</sup> of December 2020, he received information from Kalole Village Executive Officer (VEO) that, a person had been attacked while in his "shamba" (farmland). According to Pw-5, upon receiving such information, he informed the Police at Mpui Police Post and the latter communicated with Laela Police Station. He informed this court that, later, together with the Police, he went to the scene of crime.

It was Pw-5's testimony that, even though nobody was found at the crime scene, he was able to witness numerous footprints at the crime scene, which was a shamba that had recently been ploughed. He informed the court that, later, the deceased's son (Pw-1) informed them of what had occurred

and generally that some people had attacked his father, Charles.

It was Pw-5's further testimony that there had been a long-standing dispute between the family of Kapufi and that of the deceased. According to Pw-5, he was aware of such a dispute because he was a leader of the area and did attend a meeting which was once chaired by the District Commissioner. He informed the court that, in that meeting, claims involving the family of Mzee Nemes Mwananzumi and that of Mzee Dominic Kapufi were discussed. He, however, informed the court that the land on which the deceased was attacked by his assailants was not the one in dispute.

The sixth witness was G.7156 D/CPL Ally. He testified as Pw-6. In his testimony he informed this court that he was the investigator of this case. According to Pw-6, after being informed of the deceased's attack, he did go to Sandulula Village at the "shamba" where the deceased was initially attacked by his assailants. According to Pw-6, he was able to notice many footprints at that "shamba" indicating that there had been a scuffling of some kind. Pw-6 informed the court that it was Pw-1 who led his team of investigators to the crime scene, and he did sketch a sketch-map of the crime scene.

Pw-6 further stated that he was informed that the deceased passed away while at Kaengesa Health Centre, where he (Pw-6) also went for further investigation. According to Pw-6, upon reaching Kaengesa Health Centre, he observed that the deceased's body had two large injuries

on the head and multiple injuries on the fingers of one of his fingers. He informed this court that during his investigation, he was informed that the suspects were Jofrey Peter Dominiko Kapufi, Elasto Dominiko Kapufi, Chrisant Kapufi, Florence Kapufi, Deus Kapufi and Taus Kapufi, who were all at large.

Pw-6 told this court further that, afterwards, in cooperation with the deceased's relatives, the first accused was arrested at Eden N'gambo, Sumbwanga Municipality on 12<sup>th</sup> December 2020. Moreover, Pw-6 informed this court that, the 2<sup>nd</sup> accused was also arrested on 29<sup>th</sup> December 2020. According to Pw-6, from his investigation, he concluded that the cause of the attack was the land dispute, as the deceased was the person who handled its proceedings at the District Land and Housing Tribunal (DLHT).

Pw-6 informed this court that, in his investigation, he did realize that the DLHT had granted ownership of he disputed land to Mzee Nemes Mwananzumi. He stated that three of those he had interrogated were Pw-1, Pw-2, and one Mangulu who were eyewitness. His investigation concluded that the accused were part of the defendants who committed the offense and that there was sufficient evidence to have them charged by the prosecutions' office.

During his cross-examination, Pw-6 asserted that the source of all the troubles was a land dispute between the family of Kapufi and that of Mwananzumi. Pw-6 informed this court that his knowledge of the involvement of the two accused in the incident was obtained from those he had

interrogated and after he had completed his thorough investigation. In a nutshell, that was the prosecution's case.

As I earlier stated, the accused individuals fended for themselves as they called no witnesses to their assistance. In his defence, the first accused testified as Dw-1. He denied any involvement in the commission of the alleged crime. He did admit, however, that before his arrest, there was a land dispute between the clan of Nemes Mwananzumi (the deceased's father) and (his grandfather) Mr. Dominiko Kapufi's clan and, that, later, while at Sandulula Village, he heard that Charles (the deceased) had died.

Dw-1 stated that his arrest, after the death of Charles Mwananzumi, was solely based on the existing land dispute. According to Dw-1, the arresters were searching for those who were members of Kapufi's family. He asserted that the relationship between the two clans was abysmal due to the land dispute. Dw-1 stated that on the 12<sup>th</sup> of December 2020, he had come to Sumbawanga Municipal for treatment and stayed at his uncle Manuel Pondamali, and that while there, he was arrested. He informed this court that Pw-2's statement about seeing him at the crime scene was a lie because he did not participate in the alleged offence.

During cross-examination, Dw-1 stated that he was, indeed, born in Sandulula Village and did know the deceased, Charles Mwananzumi for about five years. He admitted that on the 10<sup>th</sup> of December 2020, the date when the deceased passed, he was at home at Sandulula Village and did hear about the demise of the deceased, Charles Mwananzumi. He

said, however, that being a farmer, going to farm with an axe, panga (machete) or a hoe is common thing at the village. He informed the court that his Kapufi clan is a large group and there are many Kapufi clan members, but he did not know why he was the one arrested.

Dw-1 further stated during his cross-examination that he did not participate in the burial of the deceased due to the enmity that existed between the family of Kapufi and that of Mwananzumi. He stated, however, that he did not believe that there was land dispute between his family and that of the deceased because he never noticed one. When asked if he saw Pw-2 at the area of incident (scene of crime) his response was that he did not see him. Dw-1 asserted that when the incident (attack) took place, he was at home, but later he came to Sumbawanga, on the 12<sup>th</sup> of December 2020. He also admitted knowing the second accused (Elasto s/o Dominiko @Kapufi).

When asked if he had repented for what he did, Dw-1 informed the court that he has repented and asked God for mercy. He also admitted that the problem which brought him to the court was the murder case and not the land dispute. He further admitted that he did not tender any exhibit to show that he was sick when he came to Sumbawanga and stated that he went for traditional healing as his uncle is a traditional herbalist. When asked why he did not attend the burial of the deceased, Dw-1 told the court that it was due to the existing enmity.

During re-examination, Dw-1 informed this court that, the reason he was charged with the offence he is currently facing is because the Kapufi's were being sought after given the land dispute which existed between the family of Nemes Mwanazumi and that of Dominic Kapufi. When asked what he had repented for, Dw-1 clarified that, when he said he repented and asked for mercy he was referring to a manner of praying for the sins one has committed, but it was not for the sin of killing Charles. Regarding seeing Pw-2, he told the court that he had seen Pw-2 in the Police car after he was arrested. In short, that was the first accused's defence case.

Regarding the second accused (Elasto Dominiko @ Kapufi), his testimony was also brief. He testified as Dw-2. In his testimony, he informed this court that, he is a farmer and used to do farming at Sandulula Village. He denied committing the alleged offence he was charged with. Dw-2 informed this court that, before his arrest on the 29<sup>th</sup> of December 2020, there was a land dispute between his Kapufi's clan and that of Mwananzumi. He also admitted having heard about the demise of Charles s/o Mwananzumi (the deceased). However, he informed this court that he had no relationship with the deceased or Pw-2.

Dw-2 further stated that he did not attend the deceased's burial and, that, Pw-2 had named him because of the land dispute. He denied being seen at the crime scene stating that at that material time he was at Sandulula Village. During his cross examination, Dw-2 told this court that the land dispute was between their parents. He admitted being

known to Pw-2 and that he also knows him well. However, Dw-2 denied that Pw-2 saw him at the crime scene. Although Dw-2 admitted that his was at Sandulula Village on the 10<sup>th</sup> of December 2020, he told this court that he did not know who killed the deceased.

Upon further cross-examination, Dw-2 informed the court that if he were given chance, he would repent for what he committed. He also admitted that he was not in good terms with the deceased and, that, it was the land dispute that led to the demise of the deceased. During re-examination, Dw-2 clarified to the court that, the incident he was repentant about, was the death of Charles Mwananzumi. When asked why he was repentant, Dw-2 stated that it was because he was not the one who caused it and did not know who did it. He told the court that, Police started to arrest the members of Kapufi clan, and he was one of them who got arrested. So far, that was Dw-2's defence.

At the closure of the case for the defence, both the State Attorney for the prosecution and learned counsel for the accused persons prayed to file closing submissions. I granted the prayer, and the two parties duly filed their closing submission in court as per the court's order. Together with such closing submissions, I will also consider the testimonies of the witness, the documentary evidence availed to the court and the law, and thereafter I will render my verdict in this case.

One notable thing in the closing submissions filed by both parties is that, in principle, there is no dispute that

Charles s/o Mwananzumi is dead and that his death was a violent death. Their point of departure is who killed the deceased and whether the prosecution have been able to prove beyond reasonable doubt that it was the accused persons who committed such heinous act of murder of Charles Mwananzumi.

In his closing submission, Mr. Kamyalile has urged me to make a finding that the case against the two accused persons has not been proved to the required standards. According to him, the prosecution evidence is entirely one based on visual identification. He contended that Pw-1 was categorical that he did not identify the assailants, nor did he see the accused persons killing his father. Mr. Kamyalile submitted that the only key witness for the prosecution was Pw-2 who claimed to have identified the accused persons as the assailants. Mr. Kamyalile contended, however, that, Pw-2's testimony leaves a lot to desire regarding whether there was certainty in the identity of the accused persons.

In view of the above, it was Mr. Kamyalile's view that the evidence of Pw-2 is insufficient to warrant a conviction of the accused persons. To support his submission, he relied on the case of **Amani Waziri vs. Republic** [1980] T.L.R 250. He argued that, during cross-examination Pw-2 had failed to tell the distance he was at the time of identification, the time spent to identify the accused persons, the attire they had put on, how he identified them in the mid of more than 20 people and how he could have done so under such a traumatic situation.



Relying further on the case of **Yohana Kulwa @Mwigulu & 3 Others vs. The Republic**, (Consolidated Criminal Appeals No.192 of 2015 and 397 of 2016 (CAT) (Tabora), Mr. Kamyalile argued that shortcomings of the like nature, as the ones he had earlier pointed out, create doubts on the prosecution case thereby necessitating this case to be resolved in favour of the accused persons. In his effort to convince this court he urged it seek further inspiration from the wisdom of the court in the cases of **Wamalwa & Another vs. Republic**, [1999]2E.A. 358 and **Hakimu s/o Mfaume vs. Republic** [1984] T.L.R 201.

For the prosecution's side, Ms. Neema Nyagawa, learned State Attorney had a different opinion. Her views and urges were for this court to make a finding that the prosecution had proved its case against the accused person beyond reasonable doubts. She, consequently, called upon this court to proceed to convict and sentence them as per the law. To support her submission, Ms. Nyagawa contended that, what has been laid before this court, in proof of the fact that the two accused individuals were responsible for the murder of the deceased, was direct evidence of an eyewitness, as well as documentary evidence.

The eyewitness whom Ms. Nyagawa is relying on are Pw-1 and Pw-2. She admitted, however, that, although Pw-1 was about 20 meters from where the deceased was being attacked, he was not able to identify or mark any of the assailants owing to the shock in which had overwhelmed him as he witnessed his father's brutal attack by the assassins. In

view of that, the only eyewitness to bank on was Pw-2 who testified that he was about 50 meters when he heard the voices calling for help and, that, when he responded, he found that his relative Charles (the deceased) was being attacked. Ms. Nyagawa submitted, however, that, Pw-2 was able to identify some of the attackers, and that among them were the two accused persons.

Based on such an account, she urged this court to find that being an eyewitness, Pw-2's testimony should count positively, and conviction could sufficiently be based on it. To support her position, she relied on the cases of **Abas Konde vs. Republic**, Crim. Appeal No.472/2017 and **Alfred Kwezi @ Alphonse vs. Republic**, Crim. Appeal No.216 of 2021. She also relied on the case of **Ngaru Joseph and Another vs. Republic**, Criminal Appeal No.172 of 2019 (CAT) (Mbeya). I am grateful to both learned counsels for their submissions.

Essentially, it is a cardinal principle of law that he who alleges must prove. In proving an offence of the kind the accused persons are facing, the duty is cast upon the prosecution to prove its case beyond reasonable doubt, that being the standard of proof in criminal cases. Section 3 (2) of the Evidence Act, Cap. 6 R.E 2022 so provides and a host of cases such as the cases of Galus **Kitaya vs. The Republic**, Criminal Appeal No.196 of 2015 (CAT) (unreported) and **Said Hemed vs. Republic** [1987] TLR 117 are quite instructive on that.

Further still, as a matter of general legal requirement, such a burden of proof in criminal cases remains fixed and will never shift. In other words, in no way should an accused person assume any burden to prove his innocence, nor should he or she be convicted based on the weakness of his or her defence or his or her inability to defend himself, or because of any lies he or she might have stated before the court. See the case of **Selemani Makumba vs. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006).

In fact, the law is very clear, that an accused person is not required or expected to tell the absolute truth. What is crucial, though, is that, to win him an acquittal, it does suffice if an accused introduces a reasonable doubt into the mind of the court. See the case of **Juma Kilimo vs. Republic** (Criminal Appeal 70 of 2012) [2012] TZCA 51 (9 July 2012). It follows, therefore, that, an accused is to be convicted based on the strength of the evidence adduced by the prosecution and not otherwise. See **The Republic vs. Shalu Luwayi Kasema & 2 Others** (Criminal Session Case No. 35 of 2022) [2023] TZHC 17730 (18 May 2023).

Having stated the above principles, let me revert to the nitty-gritty of the matters at hand. As pointed out earlier, parties herein agree that the deceased is dead and died violently due to unlawful acts. The only disagreement is on who killed the deceased. While the prosecution press that it is the accused persons, the accused persons have utterly denied their involvement. The issue, therefore, is who are the

assailants? If it is said to be the accused persons, has the prosecution so established beyond reasonable doubt?

The prosecution side has rightly submitted that the only witness who is to be relied upon in proving the case against the accused persons is Pw-2. Moreover, as the defence counsel argued, the case entirely hinges on Pw-2's testimony, him being the eyewitness. While the prosecution side find Pw-2's evidence to be worth believing, the defence counsel has, however, tried to punch holes in Pw-2's testimony.

In his submission, Mr. Kamyalile argued that Pw-2 has been unable to establish at what distance he was at the time of the attack and in what attire were the assassins in, concluding, therefore, that, the identity of the assailants was not fully established. He relied on the case of **Wamalwa and Another vs. Republic** [1999] 2 E. A. 358 where the court was of the view that:

"The court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of the offence fleetingly and under stressful circumstances."

While the above case does apply to a situation regarding identity of an accused person where identification is at issue, I find that the circumstances under which the issue of identification arose in that case and the situation in the case at hand are quite different. **First**, in the above cited case, the incident took place during the night, at around 10.30 pm. In the case at hand, the attack on the deceased

Charles Mwanazumi took place in the morning at 7am, where there was plentiful light of the day.

**Second**, Pw-2 testified that where he was and where the attack on the deceased was taking place was 50 meters apart, and a river had separated them, meaning that he was on the other side of that river that separated the two points. In my view, with such a safe distance, the situation could not have been stressful on his part as it was in the **Wamalwa's case** (supra) where the robbers armed with a gun and in a shoot spree mood had ordered everybody to lay down. In view of those two distinctive features, I consider that case to be distinguishable to the case at hand in as far as the defence counsel's argument is concerned.

But was Pw-2 able to identify the attackers? In his testimony, Pw-2 told this court that he was able to identify some of the attackers. He named those he could identify as being Jofrey Petro Kapufi, (**the first accused**), Erasto Dominiko Kapufi (**the second accused**), Deus Kapufi, John Kapufi, Chrisant Dominiko Kapufi, and one Sangulo (these others being still at large). In his testimony Pw-2 stated further that, all these persons he had named, including the two accused persons, are persons he was acquainted with; hence, they were no strangers to him.

As I stated herein, Pw-2 was the sole eyewitness who managed to identify some of the assailants, given that, although Pw-1 was at the most proximate distance of 20 meters to the scene of crime, he could not do so as he was

overwhelmed by distress for seeing his father being attacked savagely.

In the case of **Abas Konde vs. Republic**, Criminal Appeal No.472 of 2017, the court was of the view that:

"an eyewitness is a crucial witness whose evidence being oral is direct as provided for under Section 62 (1) (a) of the Evidence Act..."

In law, conviction can still be based on the testimony of a single eyewitness. In the case of **Alfred Kwezi @ Alfonce vs. Republic**, Criminal Appeal No.216 of 2021, the court, relying on the Indian case of **Anil Phalen vs. State of Assam**, 1993 AIR 1462 was of the view that:

"conviction can be based on the testimony of a single eyewitness and there is no rule of law or evidence which says to the contrary provided that the sole eyewitness passed the test of reliability in basing the conviction on his testimony."

As far as the case at hand is concerned, and in relation to the testimony of Pw-2, the question to ask, however, is whether the testimony of Pw-2 does pass the tests of credibility and reliability. But before one venture on that, what does credibility and reliability test stand for? To respond to that question, the case of **Faryana vs. Chorny**, 1951 CanLII 252 (BC CA), may be of assistance. In that case, credibility was regarded as:

"(...) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has

seen and heard, as well as other factors, combine to produce what is called credibility...!"

In that same case, the court described the test to assess credibility and reliability, as follows:

"The credibility of ... witnesses ... cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness ... must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions... Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken."

In yet another case of **R. vs. Morrissey**, 1995 CanLII 3498 (ON CA), the Ontario Court of Appeal commented on the issue regarding credibility and reliability and stated that:

"Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a

witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable."

As it may be observed from the above cited cases, in essence, a witness's credibility and his reliability are two different things. Whereas credibility of a witness's testimony has something to do with his or her veracity, on the other hand, reliability of a witness's testimony is something to do with the exactness and truthfulness of such a testimony. In principle, therefore, the issue of accuracy or rather exactness of a witness's testimony will engage a consideration of such witness's ability to accurately observe, recall and recount events. But it is also worth noting that, if a witness lacks credibility on a particular issue, he will also be incapable of giving reliable testimony or evidence.

Equally is the fact that an otherwise credible witness may give unreliable evidence on an issue or a point which is being considered by the court. Such was an observation made by the Canadian Court in the case of **R. v.**



**Taylor**, 2010 ONCJ 396 (CanLII). In that case of **R vs. Taylor** (supra), His Lordship Justice Green, when commenting on credibility and reliability of a witness, made the following remarks:

"'Credibility' is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: Honest (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture cognitive, psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability."

From the foregoing, it follows that, the circumstances on the ground in each case which will determine the valid conclusions to be made regarding a witness's credibility and reliability of his/her testimony given that each case is to be assessed on its own merits. If the issue is whether the witness is telling the truth or not, his credibility is what is at stake, and this can be tested on cross-examination. But when reliability is what is being tested, the environmental factors surrounding the witness's testimony which may impair his or

her accuracy, perception, memory, and ultimate recitation of his/her encounter, will be among the factors to look at.

Matters regarding assessment of credibility and reliability of a witness's testimony do have guidance from within our jurisdiction as well. In the case of **Ngaru Joseph and Another** (supra), the Court of Appeal of Tanzania stated had the following to say:

"It is noteworthy that the assessment of credibility of witnesses, especially on the question of demeanour, is under the monopoly of the trial court. In the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363, the Court discussed the issue of credibility and stated as hereunder: "It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness".

Citing yet another decision of its own, in the case of **Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2000 (unreported), regarding the manner how credibility can be determined, the Court of Appeal was of the view that:

"The credibility of a witness can also be determined in two ways: **one**, when assessing the coherence of the testimony of that witness. **Two**, when the testimony of that witness is considered in relation with the evidence of

other witnesses,  
including that of the accused person."

From the foregoing discussion, and as earlier stated, the question that follows is whether the testimony of Pw-2 satisfies the credibility and reliability test. I have pointed out that in his submission, the learned counsel for the accused persons has argued that Pw-2's testimony is unreliable and insufficient to warrant conviction against the accused persons.

He contended that Pw-2's visual identification was very weak and below the standard set in **Amani Waziri's case** (supra). Essentially, in the **Amani Waziri's case** (supra) the court made it clear that, where a court is to rely on a testimony regarding visual identity of an accused, a cautionary approach is required. In that case, having laid down the principle, the Court of Appeal of Tanzania made the following observations, stating that:

"The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely watertight."

Looking at the observations made by the Court in that case of **Amani Waziri** (supra), it is clear, that, the court did not say that evidence of visual identification may not be relied upon by a trial court. What is vital is the need to assess the obtaining circumstances to establish as to whether the conditions which would favour reliability on such evidence exist. But in this present case before me, it is worth noting that, even though the learned counsel relied on the **Amani Waziri's** case to support his side of argument and discredited Pw-2's testimony, he has not considered the striking difference between that case and the present case.

For instance, and as I pointed out earlier herein above, the incident leading to the death of the deceased in the present case, took place at 7.00 am when there was sufficient daybreak sunlight. In the **Amani Waziri's case** (supra) the incident leading to the deceased's death took place at night. Such a marked difference would sufficiently make a choice to rely on the case of **Amani Waziri** (supra) unsuitable, because that fact alone creates a perceptible distinction between the two cases.

Perhaps one needs to reiterate what this court stated in the case of **Afriscan Construction Co. Ltd & Another vs. Afriscan Group (T) Ltd and 3 Ors**, Misc. Comm. Case No.182 of 2020 (unreported), that, a precedent is not to be followed blindly but that, as a matter of principle:

"Courts can only place a decisive reliance on its previous decisions, or a precedent having been satisfied or taken cognizance

of how the factual situation or the particular issue at hand fits in with situation of the decision it is being invited to rely on. Otherwise, **a little difference in facts or additional facts in a particular case** or in relation to a particular issue contemplated in that particular decision or precedent may make a lot of difference as regards the precedential value of such a decision to be relied upon." (Emphasis added).

Such a position aligns with what was laid down by the Court of Appeal of Tanzania in the case of **Tanzania Standard (Newspaper) Limited vs. The Honourable Minister for Labour, Employment & Youth and 2 Others**, Civil Appeal No.46 of 2016 (CAT) (DSM) (unreported), to the effect that "*every case must be decided on its own merits and circumstances.*"

In his submission, the learned counsel did also contend that Pw-2 was unable to state the distance at which he was at the time of identification of the assailants and the time he spent to identify them as well as how he could identify them amidst a group of more than 20 people while labouring under a traumatic and fleeting situation. Reliance was placed on the case of **Yohana Kulwa @Mwigulu** (supra) regarding a watertight identification.

In my view, the learned counsel missed a point here as well. **First**, Pw-2 did state categorically at what distance he was when he identified the deceased's assailants. He stated, while being cross-examined, that he was about 50

meters away from the scene. He also stated that he was well acquainted with the accused persons. Essentially, much as Pw-2 stated that he was terrified, the place he was and distance from the point of incident did, in my view, provide him with measure of safety for manoeuvring, in case the attackers were to also to go after him. As such, his ability to observe the assailants, some of them being persons he was well acquainted with, was undeterred.

It must be noted that, in the case of **Waziri Amani** (supra) the Court emphasized that:

"The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so, was there moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not."

As I pointed out earlier hereabove, such conditions as regarding distance and time were stated by Pw-2 in his testimony. According to Pw-2 it was in the morning at 7.00 am or so when the accused and their company launched their attack and, that he was standing about 50 meters away. He also stated that he was acquainted with some of the assailants and, that, the attack took place for about ten minutes.

In applying the guideline in the **Waziri's case** (supra) (even if the incident therein took place at night as opposed to what was the situation in the present case), I am fully satisfied that there was proper identification of the accused person as there was not only sufficient light whose source and intensity was the morning sunlight but also other factors such as the prior knowledge of the accused persons. All these, in my view, were sufficient to account for why Pw-2's testimony should be considered reliable.

Furthermore, Pw-2 did also state the time which the attack lasted which means was also the time he used to observe the attackers. In view of all that, I do find that his identification of the two accused as persons among those who attacked the deceased was sufficiently watertight and, hence, meets the requisite criteria for reliability.

I am as well mindful of the fact that Pw-2 named the accused persons as among the assailants at the earliest possible time. It is trite in law that, the naming of a suspect at the earliest possible time lends assurance of reliability of such a witness and, hence, what he stated could be regarded as more credible compared to when the naming takes a considerable time. The case in point that supports that position is that of **Ngaru Joseph and Another** (supra). In that case the Court of Appeal, citing the case of **Marwa Wangiti Mwita vs. Republic** [2002] T.L.R 39, stated that:

"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."

Considering all that, it is my finding and conclusion that that the testimony of Pw-2 was credible and reliable, and this court is not prevented from basing conviction on it, given that Pw-2 was an eyewitness. While I am mindful of the established legal principle that it is not for the accused person to establish his innocence, I am also of the knowledge that the accused's role is only to create doubts in the prosecution case.

In their defence, the accused persons, (testifying as Dw-1 and Dw-2) though they denied that they never killed the deceased, it is on record, when Dw-1 was cross-examined, and asked whether he saw Pw-2 at the scene of crime, his response was that he did not see him there.

To me, Dw-1 (first accused) was indirectly admitting being at the scene of crime. When cross-examined further by the prosecution regarding whether he has repented for what he did, Dw-1 told this court that he had indeed repented and asked for God's mercy, although during re-examination Dw-1 clarified that his repentance was not for the sin of killing the deceased. Moreover, when Dw-2 was asked a similar question during cross-examination, his response was that, if given a chance what he would repent about is the incident he committed.

When asked during re-examination to clarify about him being repentant, Dw-2 stated that the incident he was repentant about for the year 2020 is the death incident of



Charles Mwanazumi. But he further added that he was "repent about it because [he] did not commit it" and was "charged of the offence due to the land dispute between the two clans". To me, Dw-2's statement is, by itself, self-defeating because, if he did not commit the offence, he would not be regretful for an incident for which he was innocent about.

I should also comment on the demeanour which Dw-2 exhibited before this court from the time of his examination in chief, cross-examination, and re-examination. In his article, titled: "**Demeanour Credibility: 49 Cath. U. L. Rev. 903 (2000)**", James P. Timothy wrote, and I quote:

"... Often the sincerity of the witness may be observed only from the way the witness sounds or looks....To fully judge the witness's testimony, the factfinder must see and hear the witness's demeanor. Under our common law system of litigation, the trier of fact uses the witness's demeanor to determine the truth of the testimony."

What one may gather from the above excerpts is that, as a matter of principle, it is only the court that saw and heard the accused person which can test and assess his or her demeanour. Put differently, it means that an assessment of demeanour, therefore, is a monopoly of the trial court as it depends upon direct observation of the witness. In this case, I did observe, and as the proceedings will show, that, during examination in chief, cross examination, and re-examination

of Dw-2, he was not forthcoming in responding to the questions put across. He was looking down and hesitant in responding to the questions and, sometimes, would lower his voice or remaining quiet when expected to speak.

Moreover, he would cast an eye to his fellow-co-accused whenever asked a question that seems to be incriminating. All these makes one to raise an inference that the witness was hiding the truth. As I stated earlier, however, an accused person is neither required nor expected to tell the absolute truth. But of crucial importance, though, is that, to win him an acquittal, it will suffice if such accused person introduces a reasonable doubt into the mind of the court.

But as far as the case at hand is concerned, considering the accused persons' testimonies offered in defences, it is my considered view that the same could not raise any serious doubts to the prosecution's case, especially to the testimony of Pw-2 who was the eyewitness. As it was stated in the case of **Goodluck Kyando vs. Republic**, [2006] TLR 363:

"Every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons not believing a witness.

Ordinarily, good reasons for rejecting such a testimony would include a situation where the testimony is found to be improbable or implausible, or where it is materially contradicted by another witness or witnesses. See for that matter the case of **Mathias Bundala vs. Republic**, Crim. Appeal No. 62 of 2004 (unreported). In this present

case at hand, having assessed the credibility of Pw-2, I found nothing to controvert his testimony or render it improbable or implausible, not from Dw-1 or even Dw-2.

As I stated, both accused did admit that the deceased was dead, and his death was for an unnatural cause. With the uncontroverted testimony of Pw-2, it is clear, therefore, that, the accused persons were among those who took part in the attack which culminated into death of the deceased person.

Moreover, the testimony of Dw-2 offered in defence, does also reveal his own participation in the offence given that, when he was cross-examined by the prosecution regarding whether he has repented for what he did, Dw-2 told this court that he did so by asking for God's mercy for what had transpired, which was the killing of the deceased. From all such accounts, I am of the firm view that the accused persons did take part in the attack which ended up in the death of the deceased.

But a further lingering question worth responding to is whether they acted with malice aforethought. The answer to that is in the affirmative. Essentially, although the law does not offer an outright definition of malice aforethought, ordinarily it is referred to as the intention to kill which is the necessary "*mensrea*" for murder. In **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported), the Court of Appeal of Tanzania was of the view that malice aforethought in murder case may be established by looking at the size and kind of weapon used in the attack leading to

the death of the deceased, the parts so attacked and the number of blows or amount of force used to inflict the injury on the deceased, depending on each instance.

In the case at hand, it was the testimony of Pw-1 and Pw-3, as far as the kind of weapons which the attackers had, that, they were armed with axes, arrows, slashers, and pangas (machettes). Pw-2 testified that the attackers, among whom were the first and second accused persons, attacked the deceased on the head, the hand, and the leg. Pw-3's evidence does corroborate that testimony since he told this court that, having carried out the autopsy of the deceased, his findings (as per **Exh.P-1**) were that he was attacked by using a sharp instrument. The force used was also a considerable one since, as Pw-3 puts it, the deceased suffered brain concussion and internal haemorrhage into the brain.

It is also worth noting that, while commenting on malice aforethought, the Court of Appeal did state, in the in the case of **Obadia Kijalo vs. Republic**, Criminal Appeal No. 95/2007 CAT (unreported), that:

"malice aforethought may be demonstrated by looking at the motive for the offence and the conduct of the suspect immediately before and after the act or omission..."

In the case at hand, it was the testimony of Pw-1 and Pw-2 that there had been a long-standing land dispute between the deceased's family (clan) and the accused's

family (clan). Their testimony was supported by Pw-4, Pw-5, Dw-2 and Pw-6, the latter being an investigator of this case.

In principle, while I am in agreement with the counsel for the defence that previous quarrels should not be the basis for conviction and that, suspicion however strong it might be is not evidence upon which conviction should be mounted (see the case of **Hakimu s/o Mfaume vs. Republic** [1984] 201), it is also clear, as the case of **Obadia Kijalo vs. Republic** (supra) established, that, such previous conduct may establish the motive for the offence.

I am as well-aware of the fact that motive is not an ingredient for murder. However, as stated in **Obadia Kijalo vs. Republic** (supra) and in the case of **Stanley Anthony Mrema vs. Republic**, Criminal Appeal No. 180/2005 CAT (unreported), its presence helps to strengthen the prosecution case while its absence will tend to weaken it. In this present case, such a factor has potentially strengthened the prosecution's case.

All said and done, I am, therefore, convinced that, in this present case, the land dispute was a motivating factor which instigated the attack on the deceased which culminated into his demise. For that matter, coupled with the kind of weapons used, the brutal nature of the attack which, as Pw-1 had put it, even overwhelmed him with grief, and the parts of the body where the fatal blows were inflicted, all together establish sufficient malice aforethought to support conviction.

It is on that account I also find that, not only did the accused persons take part in the attack that led to the death of Charles s/o Mwananzumi (the deceased) but also that, they did so with malice aforethought and, had no lawful justification or excuse whatsoever warranting the killing of the deceased. In view of such a finding, this court does hereby conclude, based on the available evidence, that the two accused persons committed the offence which they stand charged and are hereby found guilty and convicted of murder of Charles s/o Mwananzumi contrary to section 196 of the Penal Code, Cap.16 R.E 2022.

### **SENTENCE**

It is well established in our jurisdiction, that, in a case of murder, once the accused is found guilty and convicted of such an offence, Section 197 of the Penal Code, Cap.16 R.E 2022 prescribes only one type of sentence, which is death by hanging of the person so convicted. Such a sentence is to be passed, as the Court of Appeal stated in the case of **Mbushuu alias Dominick Mnyaroge & Another vs. Republic** [1995] T.L.R 96, without any excuse recognized by law. Since this court has found and convicted the two accused persons (Jofrey s/o Peter Dominiko @Kapufi and Elasto s/o Dominiko @Kapufi), I hereby proceed to sentence them to suffer death by hanging as provided by section 197 of the Penal Code, Cap. 16 [RE 2022].

Any party, hereto, who feels aggrieved by the judgement and sentence of this court has a right to appeal to

the Court of Appeal as provided for under the laws of this country.

**It is so ordered,**

**DATED AT SUMBAWANGA ON THIS 23<sup>RD</sup> DAY OF MAY**

**2024**



.....  
DEO JOHN NANGELA

**JUDGE**

Right of Appealing to the Court of Appeal is fully explained and guaranteed.



.....  
DEO JOHN NANGELA

**JUDGE**

**23<sup>RD</sup> OF MAY 2024**

