

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY
AT MOSHI**

CRIMINAL SESSION CASE NO. 75 OF 2022

**REPUBLIC
VERSUS
ANDREA S/O ALOYCE TARIMO**

JUDGMENT

16/02/2024 & 26/02/2024

SIMFUKWE, J.

The accused person ANDREA ALOYCE TARIMO stand charged with the offence of Murder contrary to **section 196 of the Penal Code, Cap 16 R.E 2022**. The accused is alleged to have murdered one Blass s/o John Assenga on 07/05/2022 at Mweka area, Kibosho village, within Moshi District in Kilimanjaro Region. The accused person pleaded not guilty to the charge.

In proving the charge against the accused person, the prosecution paraded a total of six witnesses; Ms Paskalina Stanley Mchome **(PW1)**, Mrs Emma Blass Assenga **(PW2)**, Dr. Patrick Amsi **(PW3)** Mr. William Blass Assenga **(PW4)**, ASP Anthony Peter Sempanga **(PW5)** and E. 8872 D/SGT Issa **(PW6)**. Also, the prosecution tendered two exhibits, a Post-

Mortem Examination Report prepared by PW3 (**Exhibit P1**) and sketch map of the scene of crime (**exhibit P2**).

In his defence, the accused person relied on the defence of alibi and called one witness Salustian Aloyce Mushi (DW2).

PW1 Paskalina Stanley Mchome testified that she is a resident of Mweka where she engages herself with farming and selling mbege (chaga local brew).

On 30/4/2022 at about 19:00 hrs in the evening she was at home with her children, continuing with her business of selling mbege. While there, one Mariki Assenga passed there and PW1 was with her customers: Andrea Aloyce Tarimo, Nila Joseph, Hendry Joseph and Maximillian Mushi. Hendry Joseph welcomed Mariki Assenga to have some drink. Hendry Joseph complained that his drink was finished. Hendry took PW1's stool knocked it down and it broke. PW1 told him to pay her broken stool. He said that he would pay.

Then, Mariki went out crying. When he reached home, his father asked him why he was crying. He told his father that he was beaten. His father Bilasi Assenga went out with a machete, his mother went out with a sword, Mariki John Bilasi Assenga came out with a sword. All of them headed to PW1's homestead. PW1 identified them through a small tradition lamp (kibatali) which she was using. That kibatali could light to the extent of enabling her to return changes to her customers. They were a distance of about three steps from her. Also, PW1 knew them as her close neighbours. Bilasi Assenga asked who had assaulted his son, Mariki replied that it was Hendry Joseph. Bilasi Asenga did cut Hendry with a Machete on his head. Hendry fell down bleeding. They sought assistance

from those who were around and took him to the nearby nurse. The nurse said that she could not attend him and advised them to take him to hospital.

Then, they went to the ten-cell leader and asked him to carry the victim on a motorcycle, so that he could be taken to the central police station. At the central Police Station, he was referred to Mawenzi Hospital. The information was communicated to his parents. Meanwhile, Emma Bilasi Assenga and Bilasi John Assenga, went to Hendry Joseph's Family to apologize that they had injured their son. The parents of Hendry refused the apology.

On 7/5/2022 in the evening PW1 was selling mbege at her homestead. While there, Andrea Aloyce Tarimo, Hendry Joseph Lyami, Nila Joseph Lyami and Maximillian Hilary Mushi were also sitting there. As they were drinking at about 19:00hrs, Andrea Joseph Tarimo and Hendry Joseph Lyami were alleged to have said that they must kill Bilasi John Assenga. PW1 told them that they should leave as that was not a place to talk such things. They were four of them: Andrea Aloyce Tarimo, Nila Joseph Lyami, Maximil Hilary Mushi and Hendry Joseph Lyami. Nila Joseph Lyami had a panga inside his trouser, Andrea was carrying a club, Hendry Joseph Lyami had an iron rod (nondo) and Maximil Hilary Mushi had a club. PW1 said that she managed to identify them through their voices as they were her customers and there was light from her kibatali which had a bright light to the extent of enabling her to see people and return changes. She said they were standing three steps from her.

Then, they left after about fifteen minutes. Bilasi John Assenga passed there on his way to the shop. Then, PW1 heard an insult and words "ua

hiyo". She went out from her homestead at high-speed heading to the place where she heard noise. She found Bilasi John Assenga surrounded by Nila Joseph Lyami who was had a panga, Andrea Aloyce Tarimo, Hendry Joseph Lyami, Maximil Mushi. They confronted Bilasi Assenga and assaulted him. Bilasi Assenga ran to the neighbour. Then, Nila Joseph Lyami cut/chopped Bilasi John Assenga with a panga. All that time they were raising alarms and seeking assistance. She explained that, they stood a distance of about fifteen steps. She managed to identify them by using a flash light of a torch which could enable one to see people. That incidence took about five minutes. She said that she knew them as her surrounding neighbours and they attended the same community church (Jumuiya moja). Also, they used to go at her place to drink. She had known them approximately for eight years.

Neighbours gathered at that place. They were asking themselves how to help Bilasi John Assenga who was bleeding.

By then, those people who had assaulted Bilasi John Assenga had already escaped and they could not be traced. They continued seeking assistance but they could not get it. They made a phone call to the police station. The doctor who was nearby went at the scene.

PW1 testified further that, while at the central Police Station, Andrea Aloyce Tarimo the accused herein was brought. She said that she had no grudges with her neighbours.

While being cross examined by the defence counsel, PW1 replied inter alia that the deceased was killed by Nila Joseph Lyami.

PW2 Mrs Emma Blass Assenga stated that, on 7/5/2022 at about 19:00hrs, they were from casual work with her husband. They passed at

Paskalina's place where she sells mbege. They found Andrea Nila and Hendry sitting there. They went home and PW2's husband said that he was going to the shop to buy sardines. When he left, PW2 saw Andrea and Hendry following him. She had no doubt. She could identify them because there was kibatali (small traditional lamp) and light from the sky. They were a distance of about ten steps. After a while, PW2 heard an alarm and a daughter of her neighbour by the name of Glory went to PW2 running and told PW2 that her husband was cut. She left while crying and headed to the place where her husband was found. She found her husband laying down while severely bleeding. She asked him who had cut him, he said that he was cut by Andrea, Nila and Hendry. PW2 ran while crying to her mother-in-law and went with her at the scene. When they reached at the scene, they found her husband died. They made a phone call to the police station and police officers went to take the body of the deceased.

PW2 stated further that, they continued with burial arrangements. They heard that some of the suspects had escaped and that Andrea was arrested. She said that, she did not see the suspects that night. PW2 knew the suspects even before as they were residents of the same village, they were her neighbours and attended the same community church (jumuiya). PW2 informed this court that she had no grudges with the suspects. She identified the accused Andrea Aloyce Tarimo.

PW3 Dr. Patrick Amsi testified among other things that he is a medical doctor. On May 2022 he was stationed at KCMC Hospital. He had a working experience of eleven years. He was working at Pathology Department at KCMC. His daily responsibilities included testing samples

from human bodies from tumours. Also, he examines bodies of died human beings for finding out sickness and causes of death.

On 12/5/2022 in the afternoon PW3 was in his office when he was informed that there was a police officer accompanied by relatives of the deceased who required a post mortem to be conducted to the body of the deceased. PW3 accompanied them to the mortuary at KCMC. The police officer gave PW3 a Post Mortem Form. The relatives of the deceased identified the body of the deceased. The relatives were Mark and William. After the identification of the body, relatives went outside the examination room. PW3 remained with the police officer. Then, he started examining the body of the deceased. He observed the general appearance of the body and discovered that it was a body of an adult male person of African origin. It was extra ordinary pale especially on eyes, showing loss of blood. Further examination showed that the deceased had wounds on the head which were caused by a sharp object. The wounds/injuries were on the left side of the face, head and chin. The injuries had affected internal fresh. There was another wound at the middle of the head which penetrated to the skull. Another wound was at the back side of the head. Another wound was on the index finger of the left hand.

From the examination, PW3 discovered further that the above noted wounds caused severe bleeding which was the cause of death of the deceased. Then, PW3 prepared a report indicating the cause of death. PW3 identified the report which he had prepared. He prayed to tender it as exhibit. It was admitted as exhibit P1.

PW4 William Blass Assenga was the son of the deceased who was among the relatives who identified the body of the deceased on 12/5/2022 at KCMC Hospital.

PW5 ASP Anthony Peter Semanga testified that on 12/5/2022 at about 04:00hrs they received information from their informer that there was a suspect who was wanted in a murder case of one Blass John, who was seen returning to his homestead that night. PW5 requested a patrol motor vehicle and a police officer who was an investigator of that case file and headed to the homestead of that suspect. It was at Kibosho Mweka. After they had reached there, PW5 wanted to knock the door but the suspect opened the door as he wanted to get out. He was astonished on seeing them. Thus, PW5 had to introduce themselves. He told the suspect that they were police officers and they wanted to see him. He wanted to be stubborn, but calmed down on seeing armed police officers. PW5 introduced himself and informed the suspect that he was suspected with a murder case of one Blass John. He required him to inform a family member who was inside the house, he informed his wife. Then, they left with him to the police station.

PW5 testified further that they managed to arrest Andrea Aloyce due to the information they had received from their informer that the suspect together with two others: Nila Joseph and Hendry Joseph had assaulted Blass John. That information was also given by one Paskalina. The investigator of the case knew that area as he went there previously when he went to make follow up of the suspects but they escaped. Also, their informer was guiding them. PW5 identified the accused in the dock.

PW6 E. 8872 D/SGT Issa stated inter alia that on 8/5/2022 during working hours, at about 07:00hrs he arrived at his office as usual. He was assigned what to do by the head of the investigation department which included investigation of a case Moshi IR 3772, which concerned causing grievous harm. He went to KCMC Hospital to see the victim. He was informed that he had passed away. The victim was called Blass John. After being informed that the victim was died, PW6 went back to Moshi police station. The OCCID ordered Police officers who included Anthony Sempanga to go to the scene of crime at Kibosho Mweka. They arrived at the place where the deceased was injured and fell down. They called Glory Shedafa the neighbour of the place where the deceased had fallen. She explained how she heard noise and went out of her house. She said that she found the deceased fallen down and bleeding. The police officers drew the sketch map of the scene of crime while being led by Glory Shedafa.

Thereafter, they went back to the office and planned to start finding the suspects. They were informed by the informer that the suspect Andrea Aloyce Tarimo together with Nila Joseph were drinking alcohol known as mbege at the local bar of Paskalina Mchome. That, in their conversation they said that they could make sure that they teach a lesson to Blass John, as he had knocked Hendry Joseph with an iron rod. Then, they found Paskalina who recorded her statement to the effect that the suspects were at her place when they uttered those words.

On 12/5/2022 being led by Insp. Anthony Sepanga, they were informed by the informer that the suspect Andrea Aloyce was at his homestead. They headed to the homestead of Andrea Aloyce and found him at the door as he was about to leave. They introduced themselves and took the suspect to the police station for further interrogation while continuing to

find Nila and Hendry Joseph. They arraigned Andrea Aloyce before the court while alone, because Nila Joseph Lyami was not reachable to date. PW6 elaborated that Nila Joseph and Hendry Joseph are not reachable to date.

PW6 went on to explain that, according to the statement of Paskalina the suspects had planned to revenge the act of the deceased hitting Hendry Joseph with an iron rod. They found the suspect liable to be charged. PW6 identified the sketch map which he drew. He prayed to tender it as exhibit. It was admitted as exhibit P2.

Moreover, PW6 identified the accused person in the dock as the suspect he was testifying about.

Evidence tendered by the prosecution in support of the charge is to the effect that the death of the deceased Blass s/o John Assenga was unnatural; and that the cause of death was severe haemorrhage due to multiple cut wounds. Evidence of PW3 and Exhibit P1 is relevant.

DW1 Andrea Aloyce Tarimo (accused) after being sworn stated that on 02/5/2022 he was at Kahe. He was slashing maize farms as a casual worker. He was in the company of one youth called Salustian Aloyce Tarimo. He went back to his homestead on 09/05/2022 together with Salustian Aloyce Tarimo and Tumaini. They arrived at 20:00 hours.

DW1 admitted that he knew Paskalina because she was his neighbour. From DW1's homestead to Paskalina there are four houses. From DW1's homestead to the homestead of the deceased there are ten houses. DW1 knew the deceased Blass because he was his uncle.

DW1 said that on 9/5/2022 when he went back to his homestead, police officers went to arrest him at night. Police officers found him asleep with his family at his homestead. He knew that they were police officers after they broke into his house and broke the door of his bedroom. They slapped him, telling him that they were law enforcement agents and he was not allowed to question them. He had a pant only, he begged them that he should be allowed to put on a trouser. His wife went with a trouser, they refused completely, he wore his clothes at the police station. At the police station he was taken to Mbaosiri, the punishment room where he was tortured.

Paskalina had told police officers that DW1 had participated in the murder of the deceased. DW1 contended that he had not met Paskalina for a long time as he used to leave early in the morning and come back late at night.

DW1 testified further that, on 6/5/2022 he was informed by one youth of Mabogini that there was someone who was murdered at Mweka but he did not know who was that person. He knew that it was Blass who was murdered when he reached at home after being informed by his wife.

Concerning the charges against him, the accused said that he would like to tell the court that he could not kill his uncle. He never had grudges with his uncle Blass since his birth. He was told about the involvement of Hendry in the murder case, when he was at the police station.

During cross examination, DW1 said among other things that he went back to Mweka by using a hiace. That, he paid his sons Tshs 40,000/= each.

DW2 Salustian Aloyce Mushi testified that he knew Andrea Aloyce as his sibling. On 02/5/2022 he was at Kahe doing casual works in farms in the company of Andrea.

While at Kahe on 09/5/2022 they went back home. When they reached at home, they heard that there was an incidence at their street. They heard that there was someone who was murdered, that is Blass Asenga. They went back home at night, at about 20:00 hours. On that night nothing happened.

DW2 testified further that on 07/5/2022 he was at Kahe together with Andrea. He met Andrea for the last time on 10/5/2022. When Andrea was being arrested, he was not there. He never heard that Andrea, Hendry and Blass had grudges. What DW2 remembered was that on 07/5/2022 he was at Kahe with Andrea and not Mweka. He said that, from Kahe to Mweka there is a distance, DW2 did not know the kilometres.

When he was cross examined by the learned State Attorney, he stated inter alia that they came back from Kahe to Mweka by using a bajaji. Also, he said that, he was paid Tshs 150,000/= by DW1.

Having considered evidence of both sides, I am of considered opinion that the following facts were not disputed by both parties during the trial:

- 1. That the deceased person died unnatural death on 07/05/2022.**
- 2. That the deceased and the accused person were neighbours.**

As a cardinal principle of criminal law, the onus of proof lies on the prosecution side. The standard of proof is beyond reasonable doubts.

Thus, the prosecution must establish through evidence the elements of murder which are; ***death, the involvement of the accused as the person who caused the death*** of the deceased and ***malice aforethought*** (evil intention) of the accused person. Also, as a general rule, the story of the accused person does not have to be believed by the Court, but only raise reasonable doubts on part of the prosecution. According to the evidence adduced by the prosecution, issues for determination are:

- 1. Whether the deceased was killed by the accused person or not.**
- 2. If the first issue is answered in the affirmative, whether the accused person killed the deceased with malice aforethought.**
- 3. Whether the offence of murder has been proved beyond reasonable doubts.**

Starting with the first issue, PW1 stated among other things that he heard the accused person together with Nila Joseph, Maximillian Hillary Mushi and Hendry Joseph planning to kill the deceased Blass John Assenga. When they left from her homestead, after a while PW1 heard noise. She said that when she made follow up, she found the accused and his fellows assaulting the deceased by using weapons. PW1 alleged that they stood a distance of fifteen steps and she managed to identify the assailants by using a flash light of a torch. The incidence took about five minutes.

PW2 said that she was told by her deceased husband that he was assaulted by Andrea, Nila and Hendry. When she was cross examined by the Defence counsel, PW2 said that PW1 Paskalina was not found at the

scene of crime. PW2 was re-examined by Mr. Mashurano, the learned State Attorney, she insisted that Paskalina (PW1) did not go to the scene of crime.

PW6 the investigator of this matter testified that they were led to the scene of crime by one Glory Shedafa the neighbour of the place where the deceased was found fallen down.

It may be noted that PW1 was the only prosecution witness who alleged that she saw the assailants assaulting the deceased. However, her evidence did not corroborate evidence of PW2 and PW6. It seems that she was among those who responded to the alarm immediately after the incidence.

Assuming that PW1 was among the eye witnesses, there is still another issue to be considered, did she properly identify the assailants? She said that she used a flash light of a torch and she stood fifteen steps away from the scene.

In the case of **Lucas Venance @ Bwandu v. R, Criminal Appeal No. 392 of 2018, TZCA**, [16 September 2021] at page 12 it was observed that:

*"Since it is undisputed that the incident in the instant case occurred at night around 19:00 hours, the evidence on how the assailants were seen and recognized at the scene is so decisive. In its ground-breaking decision in **Waziri Amani** {supra}, the Court cautioned, at pages 251 to 252, that the **evidence of visual identification is of the weakest kind and most unreliable and that it should not be acted upon "unless all possibilities of mistaken identity are eliminated and the court is fully***

satisfied that the evidence before it is absolutely watertight." Emphasis added

At page 15 of the same decision, the Court observed further that:

*"It is also likely that light emitted from the assailants' torches directly to the identifying witnesses could not have effectively aided them to see and recognize the assailants. As we held in **Mohamed Musero v. Republic [1993] TLR 290**, beams of torches from thieves tend to dazzle and impair the vision of the witnesses into whose eyes they are directed."*

In the case at hand, the incident is alleged to have occurred at about 19:00 hrs. The deceased is said to have run to the banana palms which obviously might have impeded the identifying witness(es). I am of considered opinion that possibility of mistaken identity in this case is very high. I also subscribe to the case of **Chacha Jeremia Murimi and 3 Others v. Republic, Criminal Appeal No. 551 of 2015 [2019] TZCA 52**, in which the Court of Appeal clearly elaborated factors to be considered before the court in order to rely on evidence of visual identification, that:

*".... the common factors are: How long did the witness have the accused under observation? **At what distance? What was the source and intensity of light if it was at night? Was the observer impeded in any way?** Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? Emphasis added*

I am aware that the accused is also implicated based on the words alleged to have been uttered by the accused and his fellows at the homestead of

PW1 prior to the incidence. However, based on the above contradiction between PW1's evidence and PW2's evidence as well as unfavourable conditions of identification, I am obliged to uphold the contradiction and unfavourable conditions of identification in favour of the accused person. This position was underscored in the case of **Idd Hamis v. R, Criminal Appeal No. 119 of 2022**, CAT at Dodoma [20 February 2024] at page 6 it was held that:

"Thus, where the prosecution testimony constitutes a mere aggregation of separate facts all of which are inconclusive and are as consistent with innocence as they are with guilt then, the probative value thereof is said to be missing. Such testimony, should be cast away and the benefit of the doubt should be construed in the accused's favour- 'Emphasis added

I am also mindful that in his defence the accused person contradicted with his witness DW2 in their endeavour to prove the defence of alibi. As already noted herein above, the accused cannot be convicted based on the weakness of his defence. The same was cemented in the case of **Idd Hamis** (supra) at page 6, second paragraph, that:

"This means, therefore, that weakness of the defence, however glaring it may be, cannot be the basis for conviction. Rather, it is the weight of the prosecution case which should hold the sway."

Since the first issue whether it is the accused who killed the deceased, has been resolved in the negative, the second issue which concerns malice aforethought suffers a natural death. The third issue is straight forward, that the prosecution has failed to prove its case beyond reasonable doubt.

On the strength of the above findings, I find the accused person Andrea Aloyce Tarimo not guilty of the offence of **Murder** contrary to **section 196 of the Penal Code**, (supra). I therefore acquit him under **section 235 (1) of the Criminal Procedure Act, Cap 20 R.E 2022**; and order his immediate release from custody, unless held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi, this 26th day of February 2024.



X

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE

26/02/2024