

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DAR ES SALAAM
AT KINONDONI**

CRIMINAL SESSION CASE NO. 147 OF 2022

REPUBLIC

VESRUS

- 1. DEOGRATIOUS TALISISI MKETO ACCUSED.**
- 2. ALEX TALISISI MKETO.....ACCUSED.**
- 3. ISSA HAMIDU MSUKO..... ACCUSED.**
- 4. FIDELIS BONIFACE PIUS AMULYA..... ACCUSED.**

JUDGMENT

MKWIZU, J:

The accused persons are charged of murder C/S 196 and 197 of the Penal Code, Cap. 16.R.E 2019, for allegedly murdering one Rajabu Magimba on the 8/8/2021 at Ngunguti area within Mkuranga District in Coast Region On the fateful date, at around 00.00hrs PW2, Mwanahamisi Amani Omari was asleep. She heard an alarm of a person crying outside the house saying "nakufa!!". She opened the door and went outside where she noticed that the alarm was coming from her neighbour Abdalah Mshamo Mangaya. She at five meters saw three guys, one identified as Fidelis and her neighbour holding a club beating Mzee Magimba on the head while others controlling the victim.

PW1 went further to explain that she then saw Mzee Mangaya coming out of the house inquiring from the accused on what was happening before he was warned to get inside his house else, they will beat him. Shortly,

stated PW2, she saw the accused drugging the victim. She raised an alarm calling his brother Hamisi Sebastian Mkwya and his neighbour Abdala Mangaya to get out. While still there, she saw one of the accused, Deo coming, warning her to get inside the house but Hamis and Mangaya was able to arrest him and forced him to lead them to where they had left the victim. And it is at this time this accused introduced himself as Deo.

Information of the incident was relayed to the police and shortly after their arrival, there came two men wearing coats asking them to free their colleague, Deo but they were arrested by the police, joined with Deo and conveyed to the police station. This witness was able to identify Deo as the person arrested at the scene and 2nd and 3rd accused persons as the one arrested on the road after the assault incident.

PW3 is ABDALLAH MSHAMU MANAYA a resident of Mkuranga Ngunguti A. Like PW2, this witness was on the material date and time was asleep when he heard a noise of people quarrelling outside his house. He cautiously opened the wooden door leaving the grill door closed and saw four people, three of them attacking one person. Having opened the door, the accused stopped beating their fellow. They instead enraged and threatening to beat him as well. He daringly got out asking them why they are beating their fellow just to be told that the victim was caught committing adultery with the accused's wife. Pw4, said, he then directed the accused to stop beating the man instead they should take him to the police and left the scene. And that he managed to identify three accused as Deo, Fide and Alex as persons he knew even before the incident through the electricity light from the electricity bulb on the front of his house at a distance of three paces where stood observing the accused

for like five minutes. According to this witness, Fidelis had a stick while the other two were beating the deceased using fist and kicks.

While inside the house he heard the alarm from PW2 and rushed outside where he found one of the accused called Deo coming from the direction, they had taken the victim to. Assisted by the drugging marks and accused Deo they went to where the victim was left and found him in a critical condition. They arrested Deo and called the police. Just before the arrival of the police there came other two people Issa and Alex whom he first saw at the scene attacking the deceased and they arrested them and handed them to the police.

On his party, PW4 HAMIS SEBASTIAN BONIFACE said on 8/8/2021 at 00.000 he was awakened by a voice outside the house saying "mchome kisu". While preparing to get out, he heard his sister Mwanahamis Aman Omary (PW2) calling him to get out for there are people outside the house intending to kill. He rushed outside and found no body. Together with Mr Mangaya (PW3) they followed the drugging marks and blood stains. On the way they met a man wearing a red t-shirt coming from the alleyway (kichochoro). The man was identified by Mr Mangaya and PW2 as one of the attackers. He held the man and told him to show them where they had left the deceased. The man introduced to them as Deo and though reluctantly he led them where they had left the deceased. He notified the police and managed to arrest two other guys who came with intention to rescuer Deo, and all were taken to the police station. The evidence on the arrest of the accused persons was supported by PW5, PF16157 SSP LWITIKO ADAM MWASANDUBE the police officer who responded to the PW4's call on the material date.

According to PW6, the victim was rushed to Mkuranga hospital and then to Muhimbili National Hospital and died on 9/8/2021. Postmortem examination conducted by PW1 on 11/8/2021 and the report (exhibit P1) revealed the cause of death as a blood clot in the deceased brain. This witness visited the scene on 16/8/2021. He drew a sketch map plan of the crime scene (exhibit P2) and recorded the witness's statement including that of PW2 and PW3. On 23/5/2022 he learnt of the arrest of the fourth accused who was held at Maturubai Police station for a traffic case and joined him in this case. He also interrogated the 4th accused who told him that he caught the deceased having an affair with his mother. They fought and he was overpowered. He raised an alarm that culminated into the rest of the accused joining the fight to assist him against the deceased hence their arrest.

The first accused, DEOGRATIOUS TALISIS MKETO, gave his sworn testimony in court denying all the accusations levelled against him by the prosecution. Recounting on what had happened on the material date, Dw1 said, on 8/8/2021 he received an invitation to attend confirmation ceremony at his sister Stela Talisis Mketto but before going there she passed by his elder sister Josephina Mketto also living at Mkuranga. He left Josephine's house at night leaving his other relatives behind heading to Stela Tulisis Mketto's home. On the way, he met a group of people who wanted to know his name, and where he was coming from. He calmly told them that he was coming from his sister Josephina heading to his sister Stella but was beaten on the process leading to him raising an alarm responded to by his brother Alex and his uncle Issa. Upon their arrival to where he was held, they introduced him to the gathering as their relative but instead they were arrested accused of assaulting the deceased. This

evidence was supported by DW2 ALEX TULISIS MKETO and DW3 ISSA HAMIDU MSUKO,

On the other hand, DW4 is one FIDELIS BONIFACE PIUS a bajaji rider at Mbagala Zakiem. He on 8/8/2021 at 22.00 hrs accompanied by his three friends left Mbagala Zakiem to Mkuranga attending his sister's (Grace Pius) conformation ceremony. According to him, they left Mbagala at 22.00 using a bajaji to Mkuranga Ngunguti. They stayed at Bar night to around 00.00 when they left to his mother's home. On the way they found a gathering of people on the road and were alerted to park the bajaji aside as there were three people on the road being beaten. He went to see what was happening and found his relatives 1st, 2nd and 3rd accused under arrest. He went home after the police had taken the suspect to police and notified his relatives including his uncle Edward Mkunda and his father Boniface Pius who together headed to Mkuranga Police where they were directed to go on the following date.

Speaking of his arrest, DW4 said he was arrested on 23/5/2022 at Mbagala Charambe by Auxiliary police, for a traffic case and taken to Maturubai Police station.

In their final submissions, the learned State Attorney banked on the identification evidence by PW2 and PW3, the arrest of the 1st accused immediately after the incident and the showing up of the 2nd and the 3rd accused to assist the 1st accused and failure by the defence to parade important witnesses stela Mketo and Josephine Mketo stating that the learned state attorney for the prosecution were of the view that the case has been established to the tilt.

Counsel for the third accused had a different view that the prosecution case is not proved to the required standard. His position was pinned on the weak identification evidence.

I have cautiously examined the evidence and all the exhibits tendered. There is no major evidence adduced disputing the complained death and the cause of death. PW1, DR. ADRELA ISACK NGAIZA, an anatomical pathology at the Muhimbili National Hospital explained to the court the entire procedure she went through in her autopsy examination. She found the deceased body with bruises on his face, body and head, gematrical swelling of the head, a wound on his knee and other parties of the leg. Internal examination revealed clots of blood on the head skin, a flatten Jaray, and congestion of vessel in the deceased brain and the brain haemorrhage that led to a conclusion that the cause of death was traumatic brain injury. These findings were supported by the Postmortem report made after the above examination admitted in court as exhibit P1 without objection from the defence. It is certain therefore that the deceased Rajabu Juma Magimba is dead, and his death is unnatural as stated by the prosecution witnesses.

The only major issue is as to who killed the deceased. The prosecution evidence pointing to the four listed accused persons as responsible is based on identification/ recognition evidence by the two eye witnesses (PW2 and Pw3), the arrest of the 1st, 2nd and 3rd accused immediately after the incident just close to the scene and the confession statement by the fourth accused.

The incident in this case was witnessed three witnesses. PW2 and Pw3 happened to witness the entire incident from the complained assault that

resulted to death to the arrest of the 1st, 2nd and 3rd accused persons. They also identified the culprits and gave a detailed account of what they heard and saw before the court. PW4 was involved in tracing the deceased (victim by then), the arrest of the 1st, 2nd and 3rd accused and the notification of the police of the incident. Certainly, these three prosecution witnesses are very crucial in this matter. The evidence of these key witnesses however is highly improbable and inconsistent denting the credibility of all prosecution evidence.

According to PW2's scouting, attackers were three in number, and she managed to identify them through the electricity light from Mzee Mangaya's house. She however identified only one accused by name of Fidelis as she was his neighbour saying he was holding a club beating the deceased while the other two were controlling the deceased. Her recorded evidence on this point is as follows:

"I saw three guys; one is called Fidelis..."

"These three guys were beating Mzee Magimba. I managed to identify them because Fidelis is our neighbour staying with his mother in our locality. This Fideli had on his hand a club beating Mzee Magimba on his head while others were controlling (walikuwa wanamthibiti mzee Magimba)"

PW2 was also categorical that she saw Deo for the first time and knew of his name after he had introduced himself and that she did not see him assaulting the deceased. Her recorded evidence goes that:

"I saw Deo for the first time on the material date. I did not see Deo beating the deceased..."

"I knew Deo after he had introduced himself. He is not familiar to me. I only identified Fidelis by name."

Contrary to the above, PW3 who was allegedly at the scene on the material time at a very close range, (three paces) from where the accused persons were managed to identify Deo, Fide and Alex as the person who were assaulting the deceased. According to this witness Fideli had a stick while the other two were attacking the deceased with hands and legs.

In addition to that, PW2 said she saw three people at the scene and later there came other two people making a total number of 5 people. The 2nd and 3rd accused came later to rescue their colleague, Deo. Testifying on this point during cross examination PW2 said **"at the scene I saw three people and later there came other two people making a total number of 5 people."** She maintained that the three culprits at the scene had no coats while two accused, 2nd and 3rd accused persons came later wearing coats. PW3 on the other hand names the 2nd accused, Alex Talisisi Mketu and the 3rd accused, Issa Hamidu Msuko as among the persons who were at the scene assaulted the deceased. To make things worse, PW6, the investigator told the court that Pw2 had told him that she saw Issa, the third accused committing the crime. This is not a minor contradiction.

Another contradiction is on where and how the 1st accused was found and identified. According to PW4, he was awakened by a voice outside saying **"mchome kisu"**, followed by the alarm from his sister PW2. He went out but could not find any body. Accompanied by Pw3, they went to where the voice was coming from assisted by the drugging marks and blood stains. On the way, they met a person named Deo coming from the

alleyway (kichocho) and whom they held to show them where they had left the deceased. And that he used the torch light from his mobile phone to identify Deo. On his party PW3 said, he found the accused Deo outside his house before they arrested him.

Again, according to the prosecution witnesses, the identification of the culprit by PW2 and PW3 was aided by an electricity light at PW3's house. However, no description of the intensity of the light was made by the two identifying witnesses. PW3 mentioned the electricity bulb as the source of the light without more and the sketch map plan of the scene could not assist the court for lack of indication of any source of the light at the scene.

It is a long-settled jurisprudence to the effect that visual and aural identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, such as at night, is of the weakest kind and most unreliable. Such evidence should be approached with the utmost circumspection. No court should act on such evidence unless, all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence is absolutely watertight. See for instance **Shamir John v. R.**, Criminal Appeal No. 166 of 2009; **Kulwa Makwajape & 2 Others v. R.**, Criminal Appeal No. 35 of 2005 and **Mengi P.S. Luhana & Another v. R.**, Criminal Appeal No. 222 of 2006 to name just a few. It is certain that the incident was committed at the middle of the night between 00.00 to 2.00 hrs. There is no credible evidence adduced to justify identification evidence relied upon.

The credibility of the prosecution witnesses is further undermined by the fact that the sketch map alleged to have correctly drawn at the scene

places PW2 fifty (50) meters from the scene locating the deceased body in front of PW2 contrary to PW2's evidence who stated that her house was just located five meters from PW3's house.

The prosecution witnesses have also kept on mentioning Fidelis (4th accused) as one of the identified culprits at the scene. However, no description of whatever nature or even the naming of that accused was made to the police officers and or the villagers who had gathered in response to the alarm after the incident. In fact, the evidence has failed to trace the reason for the arrest of the 4th accused.

The prosecution has also relied on the confession statement by the 4th accused person recorded by Pw6 after his arrest on 23/5/2022 naming his co accused as his associate in the alleged assault and death. One would have expected the prosecution to tender the 4th accused's cautioned statement as evidence in court to support Pw6's version. This evidence though crucial was neither supported by any documentary evidence nor explanation as to why such crucial evidence was not brought for courts examination raising doubt that is to be resolved in the accused's favour.

It should be known that a mere presence of the 1st 2nd and 3rd accused around the scene at the material time doesn't necessarily confirm their participation in the alleged assault. The prosecution had a duty to prove their culpability to the required standard by adducing credible evidence connecting them with the offence. In this case, apart from the explained ailment in the prosecution case, the defence evidence has managed to raise reasonable doubt to the prosecution case. There is no doubt that all accused persons are relatives, they all alleged to have gathered at the village to attend confirmation ceremony of their relative's child and that

they were all arrested heading to the ceremony. The 4th accused Defence also tallied the explanation by the prosecution witness that he was arrested for a traffic case before he was joined in this case almost a year after the commission of the offence.

This is a criminal case where the prosecution bears the burden of proving the case beyond all reasonable doubt. The defence evidence coupled with the discrepancies in the prosecution case explained above raises doubt on the participation of the accused persons in the complained incident.

The Accused are thus found not guilty of the offence and hereby acquitted forthwith.

Order accordingly.

DATED AT DAR ES SALAAM, this 2nd DAY OF FEBRUARY 2024



E. Y. Mkwizu
E. Y. MKWIZU

JUDGE

2/02/2024

COURT: Right of Appeal explained

E. Y. Mkwizu
E. Y. MKWIZU

JUDGE