

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

**CRIMINAL SESSION NO 47 OF 2024
REPUBLIC**

VERSUS

SALEHE MANNA

JUDGMENT

28th February & 06th March, 2024

KAMUZORA, J.

The accused person Salehe Manna stands charged for murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2022]. The incident took place on 10th April, 2023 at Gulion area Magole, Dumila Division within Kilosa District in Morogoro Region. The facts reveal that Ngasana Magomba Magailo was murdered in a call for mob justice and the accused was allegedly identified as among the assailants who attacked the deceased and caused his death.

It was alleged that on the material date of the incident the deceased was riding on a motorcycle with another person whose name was not mentioned. They stopped at the centre (kijiweni) where motorcycles

(bodaboda) and tricycles (bajaji) park for business. The deceased encountered one Hassan who confronted him and asked if the deceased could run from him the way he did before. He threatened to call him a thief if at all he will try to run but the deceased started running and one Hassan and his fellow shouted that he was a thief. The motorcyclists, started chasing the deceased using motorcycles responding to the call that the deceased was a thief. Their move was also joined by the tricyclists and other civilians on foot and the deceased was apprehended and beaten to death. During investigation, the accused Salehe Manna was mentioned and arrested for participating in the deceased's murder hence aligned before this court.

The accused pleaded not guilty and in need to prove their case, the prosecution side led by Ms. Monica Matwe, Ms. Magreth Lyimo and Mr. Josberth Kitali, learned State Attorneys managed to parade five witnesses before this court; Kilinga Karaika, D/PCL Rashid, Dr. Yunfa Sovelo, Yohana Munji and ASP John. The prosecution also tendered two exhibits; a report on postmortem examination and a sketch map of the scene. For the defence side, the accused person under the representation of Mr. Mkilya Daudi, learned advocate defended himself on oath and one exhibit which is the statement of one of the prosecution witnesses (PW1) was admitted for the defence side.

From the evidence in record and final submissions from both sides, there is no dispute that Nganasa Magomba Magailo died. Such fact was supported by the testimony of PW2 Yunfa Sovelo, the medical doctor who examined the deceased's body, the report on postmortem examination and the testimony of PW4 Yohana Munji who is the relative of the deceased. While PW4 identified the deceased's body as that of Nganasa Magomba Magailo, PW2 examined the body of Nganasa Magomba Magailo and certified as to his death.

It is also not disputed that the deceased did not die a natural death. From PW2's testimony and a report on postmortem examination (exhibit PE1), the doctor observed that the deceased's body had ragged scalp wound on the right occipital part and exposed skull meaning, a deep cut wound on the right backside of the head, fractured skull and bruised wound on the right leg. To his observation, the wound in the head was caused by an object with rough surface. He also observed blood coming from the mouth, eyes and ears. To his concluding opinion, the cause of death was deep cut wound in the head and massive blood loss. The evidence by PW1, PW3 and PW5 reveals that the deceased was attacked by violent mob and that being the case, his death was triggered by injuries sustained out of beatings received from the mob. From that evidence, it cannot be said that the deceased died a natural death rather, he was

murdered. The question that remains is whether the accused is guilty for the murder. In determining that question, the following issues need to be resolved;

- 1. Whether the accused person was identified as among people who attacked the deceased.*
- 2. Whether the accused inflicted injury to the deceased resulting to his death.*
- 3. Whether the accused acted with malice aforethought.*

Before I deliberate on the issues above, I would like to put it clear that, with due respect, I do not agree with the submission advanced by the defence counsel that the prosecution case lies on circumstantial evidence. It is clear that among the prosecution witnesses who testified in court, PW1 was allegedly an eye witness who witnessed the whole incident and for that reason, he gave direct evidence of the incident. Thus, the cited cases of **Bahati Makeja Vs. Republic**, Criminal Appeal No. 118 of 2006 (unreported) and **Safari Antony @ Mtelemko and another Vs. Republic**, Criminal Appeal No. 404 of 2021, CAT at Tabora page 45 and 46 (unreported) are irrelevant in the matter at hand.

Reverting to the issues, the evaluation will start with the first issue on whether the accused was identified at the scene. In proving that issue, the prosecution case lies entirely on testimony of PW1, Kilinga Kalaita Palikulisye, an allegedly eye witness. He testified that, on the material

date of incident, on 10/04/2023 during afternoon hours he was at Dumila at the motorcycle garage servicing his motorcycle. While there, he saw the motorcyclists (bodaboda) whom he did not know his name and he was carrying Nganasa Magomba (the deceased) on the motorcycle. That, they stopped at the centre where motorcycle and tricycle park for business (kijiwe cha bodaboda na bajaji). PW1 heard the deceased arguing with the tricycle (Bajaji) rider by the name of Hassan and he heard Hassan asking the deceased if he could run the way he did before. That, he threatened to call the deceased a thief and ride a tricycle over him if he will try to run, *"na leo utanikimbia kama siku ile? ukijaribu kukimbia nitakuitia mwizi na nitakugonga na bajaji"*. That, the deceased decided to run away from that place but Hassan started shouting *"mwizi, mwizi"* intending to show that Nganasa was a thief. The motorcycle and tricycle riders and other civilians on feet started chasing Nganasa.

PW1 further testified that he knew Salehe Manna prior to the incident for more than two years as a person doing bodaboda work and he used to hire his motorcycle. He claimed that on the material date of incident he saw the accused Salehe Manna joining the race chasing the deceased using his motorcycle. That, PW1 decided to ride his motorcycle and followed the mob who went after the deceased intending to serve him. That, he found the deceased Nganasa already attacked and he was

laying down at Gulioni area. He saw people including the accused attacking the deceased using stones and after he had fallen down, Salehe and other motorcyclists were riding motorcycles over the deceased's body. That, Salehe was riding the motorcycle over the deceased's body from the legs to the head.

PW1 added that he stood like 5 feet from the scene thus he was able to identify the accused because the incident took place during afternoon hours and the accused was wearing a shirt with draft prints. That, he decided to run to the police station at Dumila to report but he was informed that a report was already made and the police went to the scene. That, he went back at the scene and saw police officers taking Nganasa to St. Joseph Hospital and he followed them. Shortly after their arrival, they were informed that Nganasa passed away and the deceased's body was release for burial on the next day. PW1 claimed to have assisted the police in identifying the accused Salehe Manna and he was arrested.

The accused came up with a general defence that he was not at the scene of crime on the date of incident. He denied working as bodaboda and knowing PW1 as his customer. From the accused's testimony, there is no sound defence and as well pointed out by Ms. Monica Matwe, learned State Attorney in her submission, the accused raised a defence of alibi which actually did not meet the legal requirement. His defence of alibi is

then considered an afterthought as it was so held in the case of **Mwiteka Godfrey Mwandemele Vs Republic**, Criminal Appeal No. 388 of 2021, CAT at DSM (unreported), cited by the prosecution side in their final submission.

However, this court is mindful of the prosecution's duty to prove their case in the required standard irrespective of whether there is sound defence or not. I will therefore assess the evidence by PW1 if it surfaces to conclude that there was proper identification of the accused at the scene. This goes with the question on whether the circumstance surrounding the incident could favour clear and correct identification of the accused.

There is no doubt that the incident took place during afternoon hours but the defence counsel Mr. Mkilya Daudi claimed in his final submission argued that there was controversial version of stories of the eye witness, Kilinga Kalaita (PW1). This entails a scrutiny of the statement of PW1 at the police station (exhibit DE1) and his testimony before this court.

First, there is an issue on the distance from PW1 to the scene of crime if it could allow clear vision of the accused. In his statement at the police station, PW1 claimed that he was standing 20 meters away from the scene thus was able to identify the accused but in his testimony before

this court he claimed that he stood 5 feet from the scene. During cross examination he added that he stood like 5 to 6 feet but changed later and claimed that the distance was between 5 to 20 meters.

I agree with the submission by the learned state attorney that a witnesses cannot be correct all the time and sometimes simple errors can be made. However, I do not agree that the uncertainty in the distance to which the witness observed the incident could considered minor in the circumstance of this case. It must be noted that, the incident itself involved a crowd of people in a paranoid situation where everyone was trying to witness the thief being beaten. In my view, 5 feet cannot be equated to 20 metres and in any case, a person standing at 20 metres cannot have the same vision/image as the person standing at 5 feet. It must be noted that an incident involved a crowd of people in chaos situation where others were busy attacking the thief and others busy witnessing the incident. It becomes necessary therefore for a person claiming to have seen the attackers to explain clearly the distance which could favour clear and unmistakable identification. In my view therefore, the uncertainty in the distance to which the witness observed the incident leave doubts on whether his position could allow clear vision and proper identification of the people attacking the deceased.

Second, there is an issue on whether the accused was prior known to PW1. In their submission, the prosecution side insisted that their witness PW1 was able to name the suspect at the earliest time possible as he was prior known by him. As well submitted by Mr. Josberth Kitale, learned State Attorney referring the case of **Majaliwa Gervas Vs. Republic**, Criminal Appeal no. 608 of 2020 CAT at Bukoba, pg. 14 Tanzlii, there is no need for giving prior description of the accused who is prior known to the identifying witness. It only surfaces for a witness to name the suspect as early as possible. I am aware of the decision in **Jumapili Msyete Vs Republic**, Criminal Appeal No. 110 of 2014, CAT at Mbeya, (unreported) also cited by the prosecution side that evidence of recognition is more reliable than identification by a stranger. It is true that PW1 testified that the accused person was not a stranger to him as he knew him for the past two years before the date of incident.

However, there is a contradictory story of the same witness at the police station visa vis his testimony before this court. The evidence reveals that the incident took place on 10th April, 2023 and PW1 recorded his statement on 12th April, 2023 (exhibit DE1) and according to PW3, the additional statement for PW1 was recorded on 13th April, 2023 although not dated. From PW3's testimony, he was phoned by Kilinga Karaita 13th April, 2023 who informed him that he saw one of the assailants. PW3 went

there and arrested the accused. It is on the same day PW1 recorded his additional statement and mentioned the accused's name meaning that he became aware of the accused's name after his arrest. In their final submission the prosecution side agreed that PW1 named the accused on 13th April, 2023 in his additional statement that was recorded two days after the commission of the crime. The prosecution also agreed that PW1 never mentioned the accused's name when recording his first statement at the police station on 12th April, 2023.

While I agree with the prosecution's submission based on the holding in the case of **Cyprian Mtungilei Vs. Republic**, Criminal Appeal No. 244 of 2021, CAT at Bukoba, (unreported) that the ability to name the accused at earliest stage is an assurance to the reliability of evidence, I did find if such principle is applicable to the matter at hand as it was not well demonstrated. I say so because, if PW1 actually knew the accused prior to the incident, it was expected for him to mention his name or describe his appearance on the date he reported at the police station or the date he recorded his first statement and that could have led the police in arresting the accused person. But he mentioned the accused's name after he was arrested meaning, he never knew the accused's name before his arrest. His first statement shows he did not know the assailants by their names, but he could identify their faces. He however, gave no

description of any of the assailants in his first statement. The fact that PW1 mentioned the accused's name when recording his additional statement makes this court to draw an inference that the accused was not prior known to PW1.

In his statement at the police station, PW1 claimed that he could recognise some of attackers by their faces and not by their names. In his evidence before this court, he claimed that he had known the accused for more than two years as he used to hire his motorcycle for his trips. This contradicts his additional statement where he stated that he recognised the accused because they used to meet at Kijiweni.

Again, in his evidence PW3 claimed that PW1 described to him the accused Salehe Manna and mentioned the clothes he was wearing, a shirt with draft prints. That fact could be seen in additional statement which PW3 admitted it was not certified by him as a police officer who recorded the statement. In other words, it did not meet the legal requirement under section 10 (3C) of the Criminal Procedure Act, [Cap 20 R.E 2022]. The said provision read: -

*"10 (3C) The police officer recording the statement shall append below each statement recorded by him the following certificate: —
"I....., hereby declare that I have faithfully and accurately recorded the statement of the abovenamed.....".*

Reading from Exhibit DE1, the police officer who recorded the statement of PW1 certified the first statement within the meaning of the law but there is no such certification in the additional statement allegedly recorded a day later. The consequence will be to disregard the additional statement.

Again, when testifying in court, PW3 also claimed that PW1 went at the police station together with another person by the name of Edward Kakulwa who also claimed to have seen the assailants. He prepared identification parade but Edward was unable to identify the accused as among the assailants. The evidence of PW3 reveals that Edward informed him that he was together with PW1 at all time and they were riding in the same motorcycle. That, they all saw the attackers at the scene and they left the scene together going to report to the police station after being threatened by the attackers at the scene. But Edward was unable to identify the accused during identification parade.

It is my considered opinion therefore that, if the distance they stood could favour proper identification, it was expected for Edward to also point at the accused person as among the assailants. Mind you that, the accused was allegedly involved in unusual act of riding the motorcycle on top of the deceased thus, could easily be noticed by everyone at the scene. Similarly, if PW1 knew the accused and his name before the

incident, it was expected for him to have mentioned that name to Edward whom they were together at all time during the incident. The circumstance of the case at hand leaves doubts on whether PW1 saw and identified the accused at the scene of crime.

This takes me to the second issue on whether the accused inflicted injury to the deceased resulting to his death. Again, the evidence by PW1 is relevant in determining this issue. PW1 claimed that he saw the accused riding the motorcycle to the scene, attacking and riding the motorcycle on top of the deceased from his legs to the head. As well submitted by the defence counsel, the fact that Salehe left with the motorcycle chasing the deceased and that he was riding the motorcycle over the body of the deceased was raised before this court but was not reflected in PW1's first statement at the police station.

The prosecution side agreed that Exhibit DE1 did not contain the fact that PW1 saw the accused riding the motorcycle on top of the deceased. They however claimed that PW1 explained that those questions were not asked by the police when making statement at the police station. That, cannot stand as an excuse because it is believed that what he saw is what he recorded. Again, while I agree that sometimes a witness can forget some facts, I do not agree that important facts which proves elements of offence can be easily forgotten. Riding a motorcycle on top

of the deceased was crucial element of the offence for it reflects on who inflicted dangerous injuries to the deceased which resulted to his death. It was therefore expected for the witness to state clearly in his statement that he saw the accused whom he knew, riding a motorcycle on top of the deceased. Thus, the prosecution argument that the witnesses cleared such fact by stating that such question was not asked by police is unfounded.

It is also in evidence that PW5, ASP John Kisuda, was among the police officers who attended the scene of crime and rescued the deceased from the scene as he was still alive but hardly breathing. PW5 stayed at the scene with CPL Daniel trying to get information on people responsible for the attack but the civilian did not cooperate or tell him the names of the attackers. In his evidence, PW1 was in attendance when the deceased was moved from the scene and he saw the police officers there but never bothered to tell them on that day if the accused whom he knew as Salehe Manna was responsible for attacking the deceased. He waited until two days has passed before he went to record his statement at the police station and still did not mention his name but did so when recording additional statement on the day the accused was arrested. Such circumstance leaves a lot to desire.

As well submitted by the defence counsel, the principle in the case of **Waziri Aman Vs. Republic**, 1980, TLR, 280 is clear. An accused person can only be convicted on evidence of identification if the court is satisfied that such evidence is water tight and lead to no possibility of error. Upon scrutinising the evidence on conditions favouring correct identification, this court is of the view that there is no satisfactory evidence convincing this court to hold that PW1 could not commit error in identifying the assailants. As well pointed above, PW1 was the only prosecution eye witness but he was unable to describe the distance between the place he was standing to the scene of crime. He never described or mentioned accused's name on the earliest time possible. His fellow Edward Kapulwa was unable to identify the accused when the identification parade was conducted. I therefore agree with the submission by the defence counsel that there was no proof that PW1 named the accused and properly identified him from many assailants.


Even if we assume that PW1 knew the accused prior the incident, there is no evidence proving that the situation at the scene of crime could favour proper identification. In **Hekima Madawa Mbunda and another Vs. Republic**, Criminal Appeal No 166 of 2019, CAT at Iringa (unreported) cited by the defence counsel, it was made clear that a recognizing witness can sometimes make a mistake or deliberately lie. In

this case, there is no name or description of suspect made to the police that led to the accused's arrest. It cannot therefore be said that there was identification by recognition as so alleged by the prosecuting attorney in her submission.

The determination that there was no clear and proper identification of the accused, defeat the third issue on whether the accused acted with malice aforethought. Since there is no water tight evidence proving that PW1 participated in attacking and riding the motorcycle on the vital parts of the deceased's body with intention of causing his death, it cannot be said that the element of acting with malice aforethought was proved in this case.

Therefore, with due respect, I do not agree with the submission by the learned State Attorney that all elements of murder were proved. The evidence of PW1 who is an eye witness leaves number of doubts which principally, need to be resolved in favour of the accused person. In concluding, the prosecution side to have failed to prove their case beyond reasonable doubt to warrant the accused's conviction. In that regard, I find the accused person Salehe Manna not guilty of murder and proceed to acquit him from the charges.

DATED at **MOROGORO** this 06th Day of March, 2024,


D.C. KAMUZORA
JUDGE

