

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MUSOMA)**

AT TARIME

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 55 OF 2022

THE REPUBLIC

Versus

ANTHONY MCHUMA MNIKO

JUDGMENT

03.10.2022 & 05.10.2022

Mtulya, J.:

The present case is short and clear. It displays the practice of section 3 (2) (a) of the **Evidence Act [Cap. 6 R. E. 2022]** (the Evidence Act) in criminal cases. The enactment provides, in brief, that:

A fact is said to be proved, in criminal cases, when the court is satisfied by the prosecution beyond reasonable doubt that the fact exists.

It is fortunate that the cited section has been appreciated by our superior court in judicial hierarchy, the **Court of Appeal** (the Court) in a bunch of precedents (see: **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Said Matula v. Republic** [1995] TLR 3; **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005 and **Amos Alexander @ Marwa v. Republic**, Criminal Appeal No. 513 of 2019). In criminal cases, the burden of proof

is on the prosecution side. The standard of proof required in proving criminal cases, on the other hand, is beyond reasonable doubt. Where the onus shifts to the accused, it is on a balance of probabilities.

Regarding murder cases, two (2) precedents in **Said Hemed v. Republic** (supra) and **Mohamed Said Matula v. Republic** (supra) are very important in connection to the present case. The precedent in **Said Hemed v. Republic** (supra), the full court of the Court had rendered down a guiding principle at page 120, that:

*...the standard of proof applicable in a criminal case of this nature [murder] is one **beyond all reasonable doubt and that where the evidence burden shifts onto the accused it is sufficiently discharged by the accused by merely adducing evidence that casts a reasonable doubt in the prosecution case; and where the appellant had put up a plea of provocation, the onus upon him was no more than to create in the mind of the court a reasonable doubt as to the truth of his story....Where the onus shifts to the accused it is on a balance or probabilities.***

(Emphasis supplied).

The principle was further supported in the case of **Mohamed Said Matula v. Republic** (supra) where the full Court, in brief, stated that:

Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused. The onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.

(Emphasis supplied).

Regarding credibility and reliability of witnesses who testify in courts, the standard practice requires that every witness to be credible and reliable hence be trusted, unless there are good materials to fault him (see: **Goodluck Kyando v. Republic** [2006] TLR 363). However, when a witness delays to mention suspects at earliest opportunity possible, it raises doubt on his credibility and reliability (see: **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. The most cited text from the cited precedent shows that:

...the ability of a witness name a suspect at the earliest opportunity is in all important assurance of his reliability, in the same ways as un-explained

delay or complete failure to do so should put a prudent court to inquiry.

(Emphasis supplied)

The practice has been cherished by this court without any reservations in a bundle of precedents (see: **Republic v. Baraka Mkali**, Criminal Session Case No. 133 of 2016; **Republic v. Muhiri Nyankaira Nyankaira**, Criminal Sessions Case No. 78 of 2021; **Republic v. Agiri Okeyo Opon @ Toyo**, Criminal Session Case No. 129 of 2022).

In the present case, the defence side submitted during the final submissions, that the prosecution has failed to prove its case beyond doubt against **Mr. Anthony Mchuma Mniko** (the accused) for murder of **Mr. Justine Mchuma Mniko** (the deceased) contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Code). The reason brought by the defence is that witness Ms. Maria Andrea Jacob @ Vivian @ Mjalu (Ms. Mjalu) as displayed in witness statement (Exhibit P.2) and witness Police Officer H.4031 D/C Khalid (PW2), who brought Exhibit P.2 in this court cannot be trusted as they are not reliable and credible witnesses.

In first place, I must make it clear from the beginning that the instant case has several materials and complaints. However, I will avoid going into details of each and every complaint raised by the parties, as the course will not occasion any harm to the parties. In the course of determining the main issue, I will be mentioning and determining some aspects.

The issue which is complained by the defence as it raises doubt in this case is the delay of the key witness Ms. Mjalu in mentioning the accused at the earliest available opportunity. In other ways, this court is invited to determine whether the delay to mention the accused vitiates her credibility and reliability. The main issue in the end is whether the accused had killed the deceased immediately after his departure from home residence of **Mr. Amos Anthony Mchuma** (DW2) at Kitagasembe Village within Tarime District in Mara Region on 12th day of July 2020.

The only available evidence which points a finger to the accused is that of Ms. Mjalu, who cannot be found hence her evidence in police statement was admitted in the case as Exhibit P.2 through section 34B of the Evidence Act. According to the defence, the evidence cannot be relied to convict the accused without corroboration as per section 34B (6) of the Evidence Act and that Ms. Mjalu had delayed to mention the accused at the

earliest available opportunity, whereas the Republic thinks that there is no need of such support of other evidence and that the delay has explanation on the record.

In order to persuade this court, both sides have marshalled learned minds in Mr. Nimrod Byamungu, learned State Attorney for the Republic whereas Ms. Pilly Otaigo, learned counsel appeared for the defence side. According to Mr. Byamungu the statement of Ms. Mjalu in Exhibit P.2 is competent like any other witness giving evidence in court and may ground conviction without any support of other evidence. In order to bolster his argument, Mr. Byamungu cited the authority of **Omari Mohamed China & Three Others v. Republic**, Criminal Appeal No. 230 of 2004, decided on 31st January 2006. The Court in the case, stated that:

...it is our considered view that it [witness statement] is competent evidence capable of grounding a conviction without necessarily being corroborated.

Mr. Byamungu contended further that even if this court insists on the need of corroboration, the evidence of DW1 can support the move as it explains the whole episode of the 12th July 2020 and stated he went at the scene of the crime with Ms. Mjalu, who is the author of Exhibit P.2. On the delay of Ms.

Mjalu to mention the accused from 12th July 2020 to 21st September 2020, Mr. Byamungu submitted that Ms. Mjalu was threatened by knife attack in several occasions by the accused that if she mentions him, she will be murdered by use of knife attacks. Regarding two (2) days delay to mention the accused during police custody from 19th September 2020, when she was arrested to 21st September 2020, when Ms. Mjalu recorded Exhibit P.2, Mr. Byamungu contended that the delay cannot amount to torture or called prolonged stay in police custody to distort prosecution case. According to Mr. Byamungu, even if it is said there is prolonged stay to amount into torture, the alleged torture will be very remote.

Ms. Otaigo on ther hand thinks that the prosecution has not established its case as per precedent in **Hassan Juma Kanenyera & Others v. Republic** [1992] TLR 100 as there are various faults in the statement of Ms. Mjalu. According to Ms. Otaigo, the prosecution has heavily relied on the evidence of Ms. Mjalu, which have three (3) errors, namely: first, it did not comply with section 34B (6) on the need of corroboration; second, she did not mentioned the accused person at the earliest available opportunity to comply with the directives of the Court in the precedent of **Marwa Wangiti Mwita & Another v. Republic**

(supra); and finally, she remained silent in police custody for two (2) days without mentioning the accused and no plausible materials were registered by the prosecution. According to Ms. Otaigo, this witness Ms. Mjalu is not credible and reliable to render conviction of murder to the accused.

Ms. Otaigo submitted further that the allegation produced by the prosecution that Ms. Mjalu was vulnerable to the accused in several occasions with knife has no merit as Ms. Mjalu had already informed Rhobi Mwita of the narration of killing of the deceased by the accused, and all were arrested by the police on the same day. However, neither Rhobi Mwita nor her statement was brought in court to corroborate the statement of Ms. Mjalu.

Ms. Otaigo claimed further that witness PW3 who had brought Exhibit P.2 in this court cannot be trusted as he registered lies in this court testifying that the suspects, including Ms. Mjalu were arrested and released from police custody on the same day, 21st September 2020. Ms. Otaigo complained that PW3 came to this court but, remained silent on why they arrested and stayed with the accused for more than a month from 17th December 2020, when the police arrested the accused, to 11th January 2021, the charge was preferred against him.

According to Ms. Otaigo, the prosecution and PW3 were well aware of Ms. Mjalu's statement on the accused since 21st September 2020, but delayed until 11th January 2020 without any plausible explanations in the case. To Ms. Otaigo, murder cases are not part of the pre-bargain cases hence any delay to produce accused persons in court must be supported by reasons.

On my side, I will not be detained on the subject as there is currently in place a decision of the Court of Appeal rendered down on 3rd July 2020, which set the standard practice of our courts in the application of section 34B of the Act. The Court at page 21 and 32 of the precedent in **William Onyango Nganyi @ Dadii & Five Other**, Criminal Appeal No. 9 of 2016, when resolving an appeal from this court at Moshi Registry regarding the conviction of the second appellant on armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2019], it observed that:

...the second appellant, whose conviction was based on exhibits P.28 and P.29 which were statements of one, Gadiel Sifael which were tendered under the provisions of section 34B of the Tanzania Evidence Act [Cap 6 R.E. 2002], because he was not procured to appear and testify in court. In the said statements, it was indicated

*that the witness identified the second appellant... Starting with the second appellant, his conviction for the charged offence by the trial court was based on the evidence of visual identification which came from one Gadiel Sifael. **This witness never appeared in court to testify, instead, the statements which he had given at the Police Station were tendered as exhibit P.28 and P.29 by PW23 and PW24 in terms of section 34B of the TEA. From what could be discerned from the record, we are fully in agreement with Mr. Komanya that the statement of a person who never appeared in court to testify, so as to be cross-examined by the accused and his demeanour assessed by the trial court; could not without corroboration, ground conviction against him. We are thus at one with Mr. Komanya that in this case there is no independent evidence to corroborate the said statement and hence, the second appellant's conviction was unsafe...***

(Emphasis supplied).

From the practice of this court and the Court where there are two (2) contradicting decisions of the Court on the same subject, the current one overrides the previous precedent. There is a bunch of precedents in favour of the position (see:

Harcopar (O.M.) S.A v. Harbert Marwa and Family & Three Others, Civil Application No. 94 of 2013; **Elikana Kafero v. Republic**, Criminal Appeal No. 56 of 2017 and **Republic v. Samson Lameck**, Criminal Sessions Case No. 51 of 2016; **Republic v. Baraka Mkali**, Criminal Sessions Case No. 133 of 2016; and **Republic v. Agiri Okeyo Opon @ Toyo & Another**, Criminal Sessions Case No. 129 of 202).

It is therefore obvious that evidence admitted under section 34B of the Evidence Act ought to be corroborated by an independent witness to render conviction to the accused persons. I am quietly aware that Mr. Byamungu submitted that even if this court insists on the need of corroboration, the evidence of DW1 can support the move as it explains the whole episode of the 12th July 2020 and stated that he went at the scene of the crime with Ms. Mjaluo, who is the author of Exhibit P.2. However, the narrations of corroboration of Ms. Mjaluo's statement with that of the accused move to the extent of the presence of the accused at the residential house of **Mr. Amos Anthony Mchuma** (DW2). Facts on what transpired after the departure from DW2's residence are not corroborated by any other witness.

I am aware of the testimonies produced by DW2 and **Mr. Daniel Alex Muhiri** (PW2) which show that the dual, the accused and Ms. Mjalu, were at the vicinity of the compound and knocked three (3) doors of three (3) different houses in search of a garden area to cherish and exchange love pleasure.

I need not go into details or detained on identification of the voice of the accused as it was testified by PW2. There is a multiple of precedents regulating the subject (see: **Barton Mnyalunje v. Republic**, Criminal Appeal No. 140 of 1999; **Nuhu Selemani v. Republic** [1984] TLR 93). Practices have shown that voices of individuals are susceptible to mistaken identity. It is highly unsafe to land conviction on evidences of identification by voice, unless there has been corroboration from other credible evidence (see: **Bakari & Seven Others v. Republic** [1989] TLR 134).

In the present case, there is also complaint on gaps of the delay in mentioning accused by Ms. Mjalu. It is unfortunate that the gaps are at three (3) levels and only (1) which received a reply from the prosecution, and even the reply itself is not up the standards required by the law. The three (3) levels are, *viz.* first, after the killing of the deceased; second, after meeting Rhobi Mwita and informed her of the attacks and killing of the

deceased; and finally, after arrest of Ms. Mjaluho and brought into Sirari Police custody.

The first delay was explained by the prosecution. It was caused by threats of knife attacks from the accused directed to Ms. Mjaluho. This is a surprise and difficult to appreciate as there is accountability machinery from hamlet level to regional level in all hamlets and villages of this country. Let alone the police stations established in each ward area of jurisdiction of Tarime/Rorya Special Police Zone.

The second delay was not explained and even Rhobi Mwita was not asked why she remain with that crucial clue on the killer of the deceased. Similarly, there are no materials registered in the present case to show why Ms. Mjaluho declined to mention the accused immediately after her arrest by DW3 and when she was in safe police custody as a free agent. It is unfortunate case that in her statement, Ms. Mjaluho whispered the information of the killer to Rhobi Mwita before their arrest. However, the police did not interpret as important clue and did not want to summon Rhobi Mwita to testify whether she also received knife threats from the accused.

It is this delay and failure to bring Rhobi Mwita in this court which leaves a lot of questions unanswered. The unanswered

questions are what we call doubts. I think, in my considered opinion, the present case has some doubts on the delay and indicated precedents show that delays may vitiate the credibility and reliability of the witnesses.

On the other hand, the defence had produced materials relating to plans to have sexual pleasure and plans were executed save for the noises raised by DW2. The narrations were supported by DW2 and prosecution witnesses, Ms. Mjalu and DW2. Ms. Mjalu admitted in her statement that:

Athony Mchuma, ambaye ni mpenzi wangu akaniomba tukafanye naye mapenzi, ndipo nilikubali. Tukaongozana naye hadi kwenye nyumba ya marehemu Justine Mchuma. Aligonga na marehemu...alijibu kwamba anaumwa. Hivyo Athony Mchuma asukume dirisha ili waongee kwa dirishani. Ndipo Anthony Mchuma alisukuma dirisha ambalo lilikuwa limerudishiwa tu na akamuomba marehemu amuachie chumba alicholala ili tufanyie mapenzi mle ndani. Marehemu Justine alikataa kumpa chumba, baada ya kukataliwa chumba, Anthony Mchuma aliniambia kwamba twende kwenye nyumba ya baba yake ambayo inapatikana kwenye eneo hilo

hilo...tulienda. Ilikuwa kama hatua kumi tu. Ndipo Anthony alipogonga mlango wa nyumba hiyo...Mtoto wa Dada yake, Mniko Wambura alifungua mlango na tuliingia ndani...Athony aliwaamsha watoto wawili waliokuwa wamelala chumbani akawaambia wakalale sebuleni kwani anaye mgeni. Watoto wakalala sebuleni na mimi na Anthony Mchuma tukaingia chumbani kwao...Mara ghafla akatokea Amos Anthony, ambaye ni mtoto wa Anthony, kutoka chumba kingine na akamuuliza baba yake kwamba kwa nini anamfanyia mama yake dharau za kufanya mapenzi na mimi...aliongeza kwamba anaenda kumwambia mama yake ili aje pale atuone tukifanya mapenzi. Baada ya kusema hivyo, alitoka mlango wa mbele akatufungia kwa nje kisha akakimbia. Mimi niliogopa, Nikamwambia Anthony kuwa anifungulie nikimbie ili nisije kukutwa na mke wake mle ndani. Anthony alinifungulia mlango wa uani. Ndipo nikatoka nje.

This is the narration of Ms. Mjaluo and received support of PW2 and DW2. However, after that escape in fear of reprisal from the accused's wife. The narration immediately change its course from love affairs to seeing the deceased outside his home

residence open-chested and in underpants and the accused came and killed him for the reasons of monies emanated from land and trees sale. This abrupt shift of the narration leave a lot of questions, such as: is it possible in a situation where Ms. Mjaluvo to stop within ten (1) meters after the threat of DW2? Was it possible for her to stop outside the deceased's house and rightly identify the deceased in the said attire at night hours in village area without any materials on intensity of light? To stay and witness the killing motivated for want of monies from land and trees sale?

At least the cause could be refusal to offer his residence for sexual pleasure of the accused and Ms. Mjaluvo, it could have been appreciated. In any case, the accused testified in this court that he rushed to his home residence to calm down the fracas after the raptures and noises of his son at the house. Again, in the present case the prosecution declined to register materials of delay to prosecute the accused. In totality, facts of this case shows that it was a family of the deceased which was following up the case for want of justice of the deceased and the accused was in lead of the follow-ups leaving behind his three (3) brothers, namely: **Mr. Amon Mchuma Mniko (DW3), Mr. Richard Mchuma Mniko** and **Mr. Lucas Mchuma Mniko**.

It is unfortunate all the three (3) brother gave-up as they work in public service at Mpakani Village in Mara Region, Military Service in Dodoma, and teaching activities at Bunda District in Mara region, respectively. They had left behind complaint letter and the accused at the Regional Police Commissioner's offices at Tarime/Rorya (RPC's office), and that is where the accused was arrested and connected to the present case. Still, they delayed to prosecute him while in possession of Ms. Mjalu's statement and no explanations were brought by the prosecution.

In order to appreciate the present case from the materials registered by the parties, I will briefly display facts of the case, albeit, in brief: **Mr. Anthony Mchuma Mniko** (the accused) was arrested at the RPC's officers when he was following the case regarding the death of his young brother, **Mr. Justine Mchuma Mniko** (the deceased) and was connected to the murder of the deceased contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Code). The accused was arraigned in this court on 27th day of September 2022 to reply the information of the murder in **Criminal Sessions Case No. 55 of 2022** (the case). The offence is allegedly to have occurred on 12th day of July 2020 at the deceased's home residence of Kitagasembe Village within Tarime District in Mara Region.

In order to prove the case in favour of the prosecution, Mr. Byamungu had summoned three (3) witnesses and two (2) exhibits. The materials brought by the witnesses in brief show the following facts: **Dr. Rasul Rashid Daud** (PW1) briefly testified that he examined the body of the deceased on 15th July 2022 and found the death was caused by an attack of blunt object on the back of the neck to cause traumatic brain and spinal cord injuries. To substantiate his testimony, he produced postmortem examination report of the deceased which was admitted as an exhibit P.1.

Mr. Daniel Alex Muhiri (PW2) was marshalled to testify hearing of voices of the accused person on night hours of 12th July 2020, knocking his door and calling *Jomba Jomba*, but declined to open a door for him. According to PW2, the accused decided to move to the house of the deceased, which was not very far from his house, but was also closed hence he ended up in the house of DW2, which was opened. However, PW2 did not hear since then what transpired and did not witness the accused killing the deceased. According to him, he heard the news of the deceased's expiry from Christopher on 14th July 2020.

PW3 on his part testified to have investigated the case and visited the scene of the crime on 14th July 2020. PW3 testified

further that his investigation found out that the deceased died from unnatural death caused by an attack of blunt object at the neck and it the accused who is connected to the death of the deceased by the police statement of Ms. Mjalu recorded on 21st September 2020. Finally, PW3 produced Ms. Mjalu police statement which was admitted in the case as Exhibit P.2. The Exhibit points a finger to the accused as a killer of the deceased for the reason of money emanated from land and trees proceeds.

On the defence side, Ms. Otaigo also marshalled a total of three (3) witnesses to testify in the case without tendering any exhibits. **Mr. Amos Anthony Mchuma** (DW1) testified that on the fateful day, 12th July 2020, had plans with two individuals, namely: Ms. Mjalu and PW2 for different purposes. Ms. Mjalu for love and affection at night hours and PW2 to provide shelter in his residence for the dual to enjoy love and affection. According to DW1, the dual then appeared before PW2's house, but were not welcomed and proceeded further to the deceased's house unsuccessfully, hence knocked and entered to the DW2's residence.

However, before the enjoyment took its course, DW2 threatened to call DW1's wife to cause fracas and escape of the

dual. Finally, DW1 testified that he escaped from the scene of DW2's house to his home residence. Regarding the charge against him, DW2 testified that the charge was initiated to halt his efforts in following-up the charge against five (5) persons who were connected to the death of the deceased and he was detained at Tarime/Rorya Regional Crimes Offices.

The testimony of DW1 was corroborated by DW2, who briefly stated that DW1 appeared in his home residence at night hours and prayed for room to enjoy with a woman of his choice, but he threatened them to call DW1's wife and to show his case real, he went outside the house to cause panic to the dual. According to DW2, the dual then escaped each with its own way and has never seen DW1 killing the deceased.

Mr. Amon Mchuma Mniko (DW3), on the other hand appeared to testify on two (2) important matters, namely: first, arrest of the accused; and second, arrest of the five (5) suspects. In his testimony, DW1 testified that the accused was arrested at RCOs offices and cannot identify the reasons of arrest. Regarding, the five (5) suspects and reasons of arrest, DW3 stated that they arrested **Roza Joseph, Makuri Mwita, Masese @ Chekicheki, Marco Baru** and **Ms. Mjalu** on reasons of

love affairs and killing threats previously exchanged between the suspects and the deceased.

However, DW3 testified that the police had declined investigation and arrest of the suspects for reasons that they cannot arrest each and every person in the village hence it was DW3 and Four Polisi Jamii who arrested the suspects. Similarly, DW3 testified further that the police stayed with the suspects for three (3) to four (4) weeks and released them without any further subsequent developments leading to several inquiries from the family members, including DW3, **Mr. Richard Mchuma Mniko** and **Mr. Lucas Mchuma Mniko**. Finally, Richard and Lucas gave-up as they work in public service at Dodoma and Bunda respectively, although Lucas had left a letter of complaint to the police authorities.

After registration of materials and support of exhibits it was plain that both the prosecution and defence side are in agreement that the accused and Ms. Mjaluo wanted to have sexual pleasure at the house of DW2. However, the pleasure was terminated for reason of threat emanated from DW2 to call accused's wife to witness the drama. It is from the termination, where the narrations of the two (2) depart from each side. The prosecution under the police statement of Ms. Mjaluo admitted in

the case through section 34B of the Evidence Act as Exhibit P.2 points a finger to the accused. It shows that after the escape of the scene of pleasure, the accused went further to the deceased's house and killed him for want of money from land and trees sales. On the other hand, DW1 testified that after the scene of pleasure at DW2's residence, he departed for his home, and the evidence received corroboration from DW2, who was present at his residence.

Considered the materials produced in the instant case and Exhibit P.2, which is the only evidence pointing a finger to the accused, and noting that it is disregarded for reason of delay of Ms. Mjalu to mention the accused at the earliest available opportunity per precedent in **Marwa Wangiti Mwita & Another v. Republic** (supra), I am convinced that the prosecution has failed to established its case beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the **Evidence Act** and cited precedents in **Said Hemed v. Republic** (supra), **Mohamed Matula v. Republic** (supra), **Horombo Elikaria v. Republic** (supra) and **Amos Alexander @ Marwa v. Republic** (supra).

I therefore find the accused, **Mr. Anthony Mchuma Mniko** is not connected to the murder of the deceased, **Mr. Justine**

Mchuma Mniko that occurred on 12th day of July 2020 at the deceased's home residence of Kitagasembe Village within Tarime District in Mara Region, contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]**. In the end, I order his immediate release of the accused from custody unless he is held for other lawful cause.

It is so ordered.

Right of appeal explained to the parties.



F. H. Mtulya

Judge

05.10.2022

This judgment was pronounced in the open court in the presence of the accused, **Mr. Anthony Mchuma Mniko** and his learned Defence Attorney, **Ms. Pilly Otaigo** and in the presence of **Mr. Davis Julius**, learned State Attorney for the Republic.

F. H. Mtulya

Judge

05.10.2022