

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL SESSION CASE NO. 06 OF 2023

THE REPUBLIC

VERSUS

RAJABU ROBINSON @ MGEVESA

JUDGMENT

Date of Last Order: 06.03.2024

Date of Judgment: 19.03.2024

A.E. Mwipopo, J.

Imani Ngusi and Angelina Ngimba were sleeping at their home at Ilogombwe Village within Mufindi District in Iringa region on the 01st day of October 2022. Around 01:00 hours, two people break into their room armed with a gun and machete. Imani Ngusi was shot by a bullet, and Angelina Ngimba was attacked with a machete. Tanzania shillings six hundred and twenty thousand, and a mobile phone, the property of Imani Ngusi, was stolen. The bandits left. On their way, the bandits cut with a machete in the hand and shot in the leg Laniko Ubamba. Angelina Ngimba and Laniko

Ubamba said they identified Rajabu Robinson @ Mgevesa as responsible for the robbery. Imani Ngusi, Angelina Ngimba and Laniko Ubamba were taken to hospital for treatment. Imani Ngusi died on the 02nd day of October 2022 while undergoing treatment at Iringa Region Referral Hospital. Rajabu Robinson @ Mgevesa, the accused, was arrested at the Mlimba area in Morogoro Region on the 04th day of October 2022, around 18:00 hours, and was brought to Mafinga Police Station on the 05th day of October 2022. The accused was charged before this Court for murdering Imani Ngusi. The prosecution brought six witnesses and three exhibits to prove the offence against the accused person. The accused person testified on oath and called one witness in his defence. He did not tender any exhibit.

The evidence adduced by prosecution witnesses reveals that on the 01st day of October 2022, around 01:00 hours, at Ilogombwe Village within Mufindi District in Iringa region, there was an armed robbery incident in the house of Imani Ngusi and Angelina Ngimba. Imani Ngusi and Angelina Ngimba were husband and wife. Imani Ngusi was shot in the chest by a bullet, Angelina Ngimba was cut with the machete, and Laniko Ubamba was shot in the leg and cut with the machete in the hand. Tanzania shillings six hundred and twenty thousand and one mobile phone Infinix Hot 10 make

the property of Imani Ngusi were stolen. Jerry Lugalala (PW1), who was residing with Imani Ngusi and Angelina Ngimba, testified that on the 01st day of October 2022, around 01:00 hours, while sleeping in one of the houses in the compound of Imani Ngusi's residence, he heard someone calling for help and bullet sound was coming from the main house where Imani Ngusi and Angela Ngimba were staying. He tried to go out, but the house's main door was locked from outside. After a few minutes, Leticia Kisilo opened the door. He went out and met Angelina Ngimba, who told him robbers invaded them. Angelina Ngimba had some injuries in the face. PW1 entered the house where Angelina Ngimba and Imani Ngusi were living, and he saw Imani Ngusi injured in the chest, hand and face.

PW1 said he went near the gate opening of the fence of the house and saw their neighbour Laniko Ubamba injured in his hand and leg. Angelina Ngimba and Laniko Ubamba told PW1 that the person who attacked them was Rajabu Mgevesa and another person whom they did not recognize. Angelina Ngimba, Imani Ngusi, and Laniko Ubamba were taken to the hospital by Kisito's car. PW1 reported the incident to the village chairman and the police station. On the 02nd day of October 2022, PW2 got information that Imani Ngusi died while continuing with treatment at the Iringa Region

Referral Hospital. PW1 said he knew Rajabu Mgevesa, whom Angelina Ngimba and Laniko Ubamba mentioned since he has been in the village for almost two months. PW1 said he heard that Rajabu Mgevesa is a resident of Chogo village. PW1 identified the accused person in the dock as Rajabu Mgevesa.

In cross-examination, PW1 said he knew the sound he heard was a gunshot sound from movies he had been watching. He said he did not see the robbers. Angelina Ngimba and Longino Ubamba told him that it was Rajabu Mgevese who attacked them during the incident.

Angelina Ngimba (PW3) testified that she married Imani Ngusi and has three children. She lives in their house with Jerry Lugalala (PW1), her niece, and her mother-in-law, Enea Ubamba. PW3 lived with Imani Ngusi for seven years, from 2015 to 2022. They have two houses in the same compound. In one house, PW3 lives with his husband and mother-in-law, and PW1 lives in the second house. Imani Ngusi was a businessman selling timber at Ilogombe village.

PW3 said on the 01st day of October 2022, around 01:00 hours, while sleeping with her husband, they were invaded by two robbers. She was able

to identify Rajabu Mgevesa among the robbers. Her husband asked Rajabu Mgevesa what he wanted. The person in the company of Rajabu Mgevesa shot PW3's husband with a bullet after he asked the question. Rajabu Mgevesa and his company attacked PW3's husband and PW3 with machetes. They stopped attacking them and started to search for money. They took 620,000/= shillings from the trousers of Imani Ngusi and the Infinix Hot 10 mobile phone belonging to her husband. Rajabu Mgevesa and his company left. PW3 went out of the house and called for help. Their neighbours, namely Enea Ubamba and Jerry Lugalala, came. People gathered. PW3 told them that she identified Rajabu Mgevesa as one of the robbers. PW3's husband was in bad condition. They found a motor vehicle of Ovan Kisitu who took Imani Ngusi, PW3 and Langino Ubamba to the hospital. Imani Ngusi died on the 02nd day of October, 2022, at Iringa Region Referral Hospital while undergoing treatment.

PW3 said she identified Rajabu Mgevesa during the incident as the electric light in their room was switched on. The size of their room was 5 meters by 4 meters, and the electric light illuminated the whole room. Rajabu Mgevesa was at a distance of 2 meters from where PW3 was standing. Rajabu Mgevesa was wearing blue jeans trousers, and a big black jacket.

PW3 said Rajabu Mgevesa was working in timber limbering activities in Ilogombwe Village. She had known him for three months. She said Rajabu Mgevesa is a resident of Chogo village. PW3 identified the accused person in the dock as Rajabu Mgevesa.

In cross-examination, PW3 said she knew that a bullet shot Imani Ngusi as she saw a gun shooting on television. It was the first time she saw the gun during the incident. She was frightened after seeing the gun.

Laniko Ubamba (PW4) testified that on the 01st day of October 2022, while sleeping in his house, he heard someone calling for help from the neighbouring house. The voice was coming from the house of Imani Ngusi. He woke up and went to where the voices were coming from. At the gate of the house of Imani Ngusi, PW4 met with Rajabu. He asked Rajabu what had happened. Instead of answering, Rajabu attacked PW4 with a machete in the right arm. Another person emerged and shot PW4 with gun bullets in the left foot around the thigh. PW4 did not identify the person who shot him. He fell to the ground after being shot.

PW4 said the distance from his house to Imani Ngusi's house is 15 meters. He knew Rajabu as he was working in timber limbering activities at

Ilogombe village, and they were playing football together. He identified Rajabu as there was an electric light in the area he was passing, and Rajab was 2 meters from where he was standing. Rajabu was wearing a black jacket and blue trousers. The electric light was bright, which illuminated the distance of 10 meters. He has known Rajabu for almost one year. PW4 said he was taken to hospital immediately after the incident. After treatment, they put an Iron bar in his leg. PW4 stated that he could not play football or do hard work. PW4 identified the accused in the dock as Rajabu.

In cross-examination, PW4 said that in the evening before the incident, he was playing football with Rajabu, and they had a quarrel that did not end. The last time he saw Rajabu was on the day of the incident.

The deceased body was examined by Dr. Richard Nikodem Kipyee (PW2) at the mortuary of Iringa Region Referral Hospital on the 02nd day of October, 2022. PW2 said deceased relatives, namely Herode and Angelina, identified the body to be that of Imani Ngusi. He was informed that the deceased was brought to the hospital for treatment after he was shot by a bullet in the chest. In his examination, PW2 found that the deceased had a bullet wound in the chest, cut wounds in both hands and two broken bones. The cause of the deceased death was suffocation caused by the increased

amount of blood and air in the lungs secondary to the bullet wound. PW2 filled the report on post-mortem examination (exhibit P1), which shows that the cause of death is severe pneumohemothorax caused by the penetrating chest injury secondary to gunshot. The summary of the report indicates that the deceased body had no sign of life, and multiple bullet particles were found in the chest, intestine and liver. The deceased ribs were fractured, and the left ulna radius was fractured.

A/Inspector Chagunge Zaza (PW5) is the police officer who arrested the accused person. PW5 testified that on the 01st day of October 2022, he was in Mufindi District, and he received information from OC CID Mufindi that in Ilogombe village, Kibengu Ward in Mufindi District, there was an incident of armed robbery and one of the robbers namely Rajabu Robinson @ Mgevesa was identified. During the incident, 620,000/= shillings were stolen and shotgun bullets and a machete injured Imani Ngusi, Angelina Ngimba and another person. On the 02nd day of October, 2022, PW5 received information that Imani Ngusi died while continuing with treatment at Iringa Regional Referral Hospital. PW5 got information from a secret informer that Rajabu Robinson @ Mgevesa was usually seen in the Mlimba area in the Morogoro Region. They decided to travel to Mlimba to look for Rajabu

Robinson @ Mgevesa. Regional Crimes Officer Iringa Region (RCO) ordered PW5 and other police officers to go to Mlimba to look for Rajabu Robinson @ Mgevesa.

The journey started on the 04th day of October, 2022, around 13:00 hours, using the RCO's car. They travelled by following a road from Kinyanambo C in Mafinga Township to Kihansi Hydro Electric Power Plant in Morogoro, which is a rough road. They arrived at Mlimba around 17:00 hours. PW5 and other police officers arrested Rajabu Robinson @ Mgevesa, playing football at the Mgungwe Primary School football pitch around 18:00 hours. They informed Rajabu Robinson @ Mgevesa that he is a suspect in a murder offence. They took him from the football pitch to the police car. They interviewed Rajabu Robinson @ Mgevesa while in the car about the incident, and he told them that he bought shotgun bullets from Mzee Kiluvila and got a locally made gun from Anderson Widege, who manufactures local guns known as Vipalu which uses shotgun bullets. PW5 said Rajabu Robinson @ Mgevesa said both persons were residing in Mgungwe Hamlet in the Mlimba area. Police officers went to Mzee Kiluvila and Anderson Windege's house but did not find them. It was around 03:45 hours on the 05th day of October 2022 when they completed looking for Anderson Windege and Mzee Kiluvila.

PW5 said they started the journey back to Mafinga around 04:15 on the 05th day of October, 2022. They arrived at Mafinga Township around 09:45 hours on 05th day of October, 2022. They handed Rajabu Robinson @ Mgevesa to Mafinga Police Station and informed the OC CID Mufindi that they had arrested Rajabu Robinson @ Mgevesa. PW5 identified the accused person in the dock as Rajabu Robinson @ Mgevesa.

In cross-examination, PW5 said that there is a police station in the Mlimba area. However, they did not record the statement of Rajabu Robinson @ Mgevesa as the investigation was going on in Mafinga, and the investigation file was opened at Mafinga Police Station.

The last prosecution witness is a police officer with No. G. 9673 D/CPL Samweli (PW6). PW6 testified that he is the investigator of the case and he visited the scene of the crime after the incident of armed robbery occurred at Ilogombwe Village on the 01st day of October 2022. PW6 drew a sketch map of the crime scene (exhibit P2) led by PW1. He said that on the 05th day of October 2022, around 09:50 hours, he was informed by OC CID Mufindi that the accused person, namely Rajabu Mgevese, who is connected with the killing of Imani Ngusi, was arrested, and he is Mafinga Police Station lock up. OC CID Mufindi ordered PW6 to record the cautioned statement of the

accused person. After preparing a room for the interview, PW6 took Rajabu Mgevesa from the police lockup to the interview room. PW6 introduced himself and informed Rajabu Mgevesa that he was accused of murdering Imani Ngusi. He informed the accused person that he wanted to record his statement and was at liberty not to say anything. PW6 told the accused person he may have as a witness relative, friend or advocate. Whatever he speaks during the interview will be recorded and may be used against him as evidence in Court. Rajabu Mgevesa said he understood what he was told and was ready to give his statement alone without the presence of any other person. Rajabu Mgevesa signed and put his thumbprint on the cautioned statement paper.

PW6 said he started to record Rajabu Mgevesa's statement from 10:05 to 11:10 hours. After recording the statement, he gave it to the suspect, Rajabu Mgevesa, to read it if it was recorded correctly. The suspect knows how to read and write. The suspect read the statement and said it was correct. Rajabu Mgevesa admitted in the statement to cause the death of Imani Ngusi. The suspect certified that the statement was correct, and PW6 also certified that the statement was correctly recorded. PW6 identified the accused person as Rajabu Robinson @ Mgevesa. PW6 tendered the

cautioned statement of Rajabu Robinson @ Mgevesa, which was admitted as exhibit P3. He said that after recording the accused person's statement, he returned him to the police lockup. PW6 said before the accused person was arrested, there was a robbery incident at Mafinga where Benito and Suma were killed in a shootout with the police officers.

In cross-examination, PW6 said he recorded the statements of all prosecution witnesses and the accused person. He said there were other police officers at Mafinga Police Station, but OC CID Mufindi ordered him to record the statements. He said that the law does not prohibit the investigator from recording all witness statements. He said that, at the crime scene, he had found two electric lights on. One electric light was switched on in each house at the crime scene. The names of the accused person in the information and the cautioned statement are different. In the information, the accused middle name is Robinson, and in the cautioned statement is Rabinson. The gun which was used at the scene of the crime is pump action. The pump action gun does not eject the bullet cover after shooting. The bullet cover must be removed. There is a possibility the shooter did put the bullet cover into his pocket after removing it from the gun. As a result, PW6

did not find any bullet cover at the crime scene. This was the end of the prosecution's case, and they closed it.

The Court found that the prosecution had made their case and that the accused had to defend himself. Rajabu Mgevesa (DW1), the accused person, denied to commit the offence. He denied working in timber lumbering in Ilogombe Village or knowing PW1, PW3, and PW4. DW1 testified that he resides in Chisamu village, Chisamu Ward, within Kilombero District. He is married to Ezra Kihwelo, and they have one child, Alexander, who is four years old. He was arrested on the 29th day of September, 2022, around 17:00 hours by three police officers, namely Tony, Changuge and Hamis while playing football at Chisamu Secondary School football ground. The police took him to the police car. Inside the police car, there were two police officers. One of them was an RCO. RCO asked DW1 to show them mzingu bullets. He answered he did not know Mzingu bullets. They asked him to show them a military officer selling bullets in this area. DW1 answered he knew none. They took him to Mlimba Police Station lock up.

DW1 said around 19:30 hours, the police officers took him from the police lockup to his house to search. They found his wife, Ezra Kihwelo, cooking outside the house. The Police officers searched, but they did not

find anything. They took a bag that contained receipts and a motorcycle, Fekon make, with registration No. MC 301 CZT, is his the property. They returned to Mlimba Police Station, where he was put in the police lockup lockup. Around 02:00 hours, police officers brought another person to the police lockup. He stayed in a police lockup on the 30th day of September 2022 and the 31st day of September 2022. On the 01st day of October 2022, around 06:00 hours, they took him from the police lockup together with the other person and boarded them in the car. They informed him they were going to Mafinga. They started the journey and arrived at Mafinga Township. They searched the house of that other person where they got a gun. The other person led police officers to the TRA office, where they got another gun inside a damaged car. They boarded the police car and went to the Mafinga police station, where they were put in the police lockup.

DW1 denied recording a statement at the Mafinga police station and said that he never signed any document at the Mafinga Police Station. On the 04th day of October 2022, the police officers took him and the person arrested at Mlimba to the justice of the peace at Mafinga Primary Court. DW1 told the justice of peace how he was arrested. They returned them to the police station. He stayed in the police station until on the 24th day of October

2022, when he was taken to Iringa District Central Police Station and was put in the lockup. He stayed in the lockup at Iringa District Central Police Station from the 24th day of October 2022 to the 22nd day of November 2022, when he was taken to Iringa District Court. The Magistrate said she could not open the case, and he was returned to the police station. On the following date, he was taken back to the Iringa District Court, where he was informed that he was charged with murder offence.

DW1 said PW3 and PW4 testified that he was wearing a black jacket and blue jeans trousers during the incident, but police officers did not find the clothes during a search at his house. Also, no machete or gun was found during the search. The police did not bring the gun or bullet cover as evidence here in Court. It was just a hearsay. He knows nothing about the case. The case is fabricated. The witnesses do not know him. He has never worked in timber lumbering activities. PW1, PW3 and PW4 did not say the name of his boss in timber lumbering activities.

In cross-examination, DW1 said that Robinson Mgevesa, Hamlet's Chairman, is his brother. He was in the lockup at Mlimba Police Station from the 29th day of September 2022, the 30th day of September 2022, and the 31st day of September 2022. The month of September does not have 31

days. DW1 said he had no conflict with RCO, Changuge, or Tony. When a cautioned statement was tendered, the objection raised was about the failure to follow procedures for recording the statement. He does not know PW3 or have any conflict with PW3. PW3 lied that he killed her husband. He does not know how PW4 knew that he is a football player.

The last defence witness, Ezra Kihwelu (DW2), testified that the accused person was her husband. They reside in Chisanu village and Ward within the Mlimba area in the Morogoro Region. They started to live together in 2018. DW2 said on the 29th day of September 2022, around 19:30 hours, police officers, accompanied by the accused person in handcuffs, arrived at their house. She asked what the problem was, and the police officers told her to call Hamlet's chairman. She went to call Hamlet's chairman. A few minutes later, she returned with the Hamlet Chairman, Robinson John Mgevesa. However, she found one police officer outside the house, and three police officers were inside her home with her husband. They were searching. The Hamlet chairman asked the reason for searching the house before he arrived. Police officers answered that they had called neighbours as witnesses of the search. The Hamlet chairman decided to leave as he said he had nothing to do in the area.

DW2 said her husband told her that police suspected he was committing crimes using a gun and bullets. Police officers told DW2 that they found nothing during the search. The police officers took DW2's husband, a bag with receipts and the motorcycle to Mlimba Police Post. DW2 said that on the 30th day of September 2022, she went to Mlimba Police Station with the Hamlet chairman and asked to see her husband. She was told to wait for the police car to return. The police car returned later on and left again. DW2 was informed later on that her husband was taken to Mafinga. After two days, DW2 went to Mafinga Police Station to see her husband. Police officers at reception told her she was not allowed to see him. She went to sleep. In the following day, she returned to Mlimba. She said she never heard anything bad concerning her husband before he was arrested. Her husband has no habit of going out at night or travelling.

In cross-examination, DW2 said that during the search, police officers entered the house with the accused person. The accused person was arrested on the 29th day of September 2022, and on the 30th day of September 2022, he was taken to Mafinga. On the 01st day of September 2022, she was at Mlimba, and her husband was at Mafinga Police Station. This was the end of the defence case.

The prosecution's evidence proved that Imani Ngusi, the deceased, is dead. The evidence of PW2 and the content of exhibit P1 reveals that the cause of the deceased death is severe pneumohemothorax secondary to penetrating chest injury from a gunshot. PW2 explained that there was too much blood and air in the deceased lungs caused by injuries of gun wounds in the deceased lungs. The death of the deceased was caused by the injuries he sustained. Thus, the deceased death was not natural.

The next question for determination of the case is whether the accused person is responsible for the deceased death and, if the answer is positive, whether the killing was done with malice aforethought. The prosecution has charged Rajabu Robinson @ Mgevesa for murdering Imani Ngusi. In a murder case, the prosecution has a duty to prove that the accused person is responsible for the unlawful killing of the deceased and the killing was done with malice aforethought. The prosecution must prove the case without doubt, and the duty never shifts. In the case of **Christian Kaale and Rwekiza Bernard vs. Republic [1992] TLR 302**, it was held that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt, and an accused ought to be convicted on the strength of the prosecution case.

In this case, the prosecution case rests on the evidence of eye witness, the evidence of the person who met with armed robbers immediately after the deceased was shot, the evidence of the conduct of the accused person after the incident, and the confession of the accused person in the cautioned statement (exhibit P3).

The evidence of visual identification is direct evidence. However, the same has to be taken with care. In the case of **Waziri Amani vs. Republic [1980] TLR 250**, the Court held that the evidence of visual identification is the weakest kind, and thus, before it is taken as a basis of conviction, it must be watertight. The Court of Appeal stated further 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 is absolutely watertight. In the case of **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza (unreported), the Court of Appeal, while discussing the possibility of mistaken identity in visual identification, provided some guidelines for eliminating the possibility of mistaken identity. The Court held that:

"The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source

and intensity of the light if it was at night? Was the observation 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? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."

According to the evidence on the record, the armed robbery incident occurred around 01:00 hours on the 1st day of October 2022. It was midnight. PW3 testified that during the incident, she was sleeping in their bedroom with her husband (the deceased) when two bandits broke the door and entered. PW3 said they usually sleep with the electric light switched on. They identified the accused person as the electric light illuminated the room, which was 5 meters by 4 meters in size. She said she knew Rajabu Mgevesa before the incident as he was doing timber lumbering activities in their village. She said she has known him for the past three months, and the accused person is a resident of Chogo Village. PW3 said the deceased asked the accused person, "Rajabu, what do you want?" and the person who was

with the accused person took the gun he was holding and shot the deceased in the chest. The accused person and the other robber attacked PW3 and the deceased with a machete. The distance between PW3 and the accused person was 2 meters.

The accused person and his fellow robber took the money from deceased's trousers and the deceased mobile phone. PW3 had sufficient time to identify the accused person despite the frightening circumstances. The accused person and his fellow robber left, and PW3 went outside of the house calling for help. PW3 informed PW1 and other people who gathered that the accused person and another person attacked them. The evidence of PW1, PW5 and PW6 support the evidence of P3 that he told PW1 and the other people gathered that the accused person was responsible for the incident. PW6, after arriving at the scene of the crime, was informed that the accused person had committed the crime. PW5, who was at Mafinga Township, was told in the morning by OC CID Mufindi that the person responsible for the armed robbery incident at Ilogombe Village was the accused person.

Naming the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness. Likewise, failure to mention the

suspect at the earliest possible opportunity may question the witness's credibility. The position was stated by the Court of Appeal in **Marwa Wangiti Mwita & Another vs. Republic [2002] TLR 39** and in **Nebson Tete vs. Republic**, Criminal Appeal No. 419 of 2013, Court of Appeal of Tanzania at Mbeya, (unreported). The act of PW3 to name the accused person to PW1 and the people who gathered is assurance that she identified him during the incident. Thus, I find that the evidence of PW3 on identification of the accused person was watertight, and all possibilities of mistaken identity were eliminated. The Court is fully satisfied that the evidence is absolutely watertight.

The testimony of PW1, PW4, PW5, and PW6 and exhibit P3 support the evidence of PW3 on the identification of the accused person. PW1 testified that the accused was doing timber lumbering activities in Ilogombe Village, and after the incident, he disappeared. PW1 said the accused person was present in the village for three months. PW3 and PW4 stated the same. In his evidence, PW5 said they arrested the accused person in the Mlimba area on the 4th day of October 2022. This evidence supports that the accused person left Ilogombe Village after the incident. The accused person's conduct proves he is guilty of something, even though all witnesses testified that the

accused person was a resident of Chogo Village and was at Ilogombe Village for timber lumbering activities.

PW4, in his evidence, said that he went to the house of the deceased after he heard a person calling for help. At the gate of the fence of the deceased house, he met with the accused person with whom they were playing football together in the village. He asked him what happened, but the accused person attacked him with a machete in his hand. Suddenly, another person appeared and shot him in the leg. PW4 said he identified the accused person as an electric light in the fence near the gate illuminated the whole area. PW4 was attacked immediately after the robbery incident in the deceased house. PW4 informed PW1 and other people who gathered that he identified the accused person as the person who attacked him when they met at the gate of the deceased house while going to help them. The evidence of PW4 supports PW3's evidence that the accused person was one of the robbers during the incident.

PW6, in his testimony, said he recorded the cautioned statement of the accused person (exhibit P3). The defence side objected to the tendering of exhibit P3 on the grounds it was recorded after 4 hours had expired. The Court admitted it after reckoning the time of conducting activities in

connection with the investigation and the time of conveying the accused person to Mafinga Police Station. In the confession statement, the accused person admitted to participating in the armed robbery incident at Ilogombe Village and during the incident, they attacked the deceased, PW3 and PW4 with machetes. The accused person admitted that he was with Suma and it was Summa who shot the deceased and PW4. Exhibit P3 support the testimony of PW3 that it was the accused person and his company who attacked with machetes and shot the deceased with bullet, hence caused his death. The Court may convict the accused person by relying on confession where it is satisfied that the confession is nothing but the truth, even if the accused denies confessing. See. **Tuwamoi vs. Uganda (1967) E.A. 84** and **Hamis Athuman and Two Others vs. Republic [1993] TLR 110**. I'm satisfied that the confession of the accused person, as contained in exhibit P3, is the truth.

The accused person's defence is that he was not at the crime scene during the incident. He denied doing timber lumbering activities, knowing the Ilogombe Village, PW1, PW3 and PW4, or living at Chogo Village. He said he is a resident of Chisamu Village within Mlimba District in Morogoro Region. He relied on the defence of alibi. However, no notice was issued by the

defence side to rely on the defence of alibi contrary to section 194 (4) of the Criminal Procedure Act. In his defence, the accused person, who testified as DW1, said he was arrested by police officers on the 29th day of September 2022 while playing football at Chisamu Secondary School football ground. He was taken to Mlimba Police Station before they searched his house. After the search, they returned him to the police station, where he stayed until the 1st day of October 2022, when police officers took him to Mafinga. The accused person says that when the incident occurred around 01:00 hours on the 01st day of October 2022, he was in the police lockup at Mlimba Police Station.

DW2 supported DW1's evidence that he has been living with the accused since 2018 as husband and wife, and they have one child together, aged 4 years. DW2 said the accused person was not travelling and she never heard no bad things against him. She said the accused person was arrested on the 29th day of September 2022, and on the 30th day of September 2022, he was taken to Mafinga Police Station. DW2 is saying that when the incident occurred on the 01st day of October, 2022, the accused person was at Mafinga Police Station.

I'm aware that the accused person had no duty to prove his innocence as was held in the case of **Said Hemed vs. Republic [1986] TLR 117**. What he has to do is to raise doubt on the prosecution's case. The defence evidence has failed to raise any doubt to the prosecution's case. There is a contradiction in the defence evidence on the date he was brought to Mafinga from Mlimba Police Station. I have seen PW1, PW3, PW4, PW5 and PW6 testifying. I'm satisfied that they are credible witnesses. There is no reason to doubt their evidence. The accused person said in his evidence that he does not know and has no conflict with PW1, PW3, PW4, PW5 and PW6. Although PW4 said in cross-examination that he had a conflict with the accused person, which occurred when they were playing football in the evening before the incident, which was not sorted, that is not the reason to doubt PW4's evidence. If there is any grudge between them, it means the accused person knows PW4 and has been to Ilogombe Village. The same defeats his evidence of not knowing PW4 and being in Ilogombe Village.

On the strength of the prosecution evidence, I'm satisfied that Rajabu Robinson @ Mgevesa, the accused person, is responsible for causing the death of Imani Ngusi during the armed robbery incident. Section 22 (1) (a), (b) and (c) of the Penal Code provides that every person who does the act

or makes the omission which constitutes the offence, every person who enables or aids another person to commit the offence, and every person who aids or abets another person in committing the offence are deemed to have taken part in committing the offence and are guilty of the offence. The accused person attacked the deceased with a machete, and his company shot the deceased in order to steal money and a mobile phone, the property of the deceased. It was the injuries caused by the accused and his company which caused the death of the deceased. The evidence available proved without doubt that the accused is responsible for the unlawful killing of the deceased.

The next question is whether the accused person killed the deceased with malice aforethought. Section 200 (a) and (c) of the Penal Code provides that malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not; and an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years. In the case of **Elias Paul vs. Republic**, Criminal Appeal No. 7 of 2014, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case, a stone was used and was hit on the head, chest and abdomen, which are vulnerable parts of a human body."

In the present case, the evidence available PW2 and the report on post-mortem examination (exhibit P1) proved that the deceased was shot by a bullet in the chest, which damaged his lungs and caused his death. The weapon used is a bullet from a gun, which is a dangerous weapon. The bullet was directed in the chest, which is a vital part of the human body. Also, the accused person and his company committed the offence of armed robbery, which attracts a minimum sentence of 30 years, when they caused the death of the deceased. In committing the offence of armed robbery, the accused killed the deceased with malice aforethought. The position was stated by the Court of Appeal in the case of **Fadhili Gumbo and Another vs. Republic [2006] TLR 50**, where it was held that:-

"If death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice aforethought is deemed to be established In terms of section 200 (c) of the Penal Code, Chapter 16."

All this evidence proves without doubt that the accused person had malice aforethought. I'm satisfied that the accused person killed the deceased with malice aforethought.

Therefore, I find that the prosecution's evidence has proved all elements of murder offence. I convict Rajabu Robinson @ Mgevesa of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. It is ordered accordingly.

Dated at Iringa this 19th day of March, 2024.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

A.E. MWIPOPO
JUDGE

PREVIOUS CONVICTION AND AGGRAVATING FACTORS

State Attorney: We have no record of previous criminal convictions of the accused person. However, the murder offence attracts the punishment of death by hanging under section 197 of the Penal Code. We pray for the Court to punish the accused person accordingly.

MITIGATION

Defence Counsel: There is no available mitigation to the accused person which could reduce the sentence of death by hanging after conviction for murder offence contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2022. We leave the punishment to the Court.

SENTENCE

The counsel for the accused person said in the mitigation that there is no available mitigation to the accused person which could reduce the sentence of death by hanging after conviction for murder offence contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2022. I agree that no mitigation is available to the accused person, who is an adult male. For

that reason and by virtue of section 26(1) and section 197 of the Penal Code, Cap. 16 R.E. 2022, and section 322 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022, I hereby sentence Rajabu Robinson @ Mgevesa to suffer death by hanging. It is so ordered accordingly. Right of appeal thoroughly explained.



A.E. MWIPOPO

JUDGE

19/03/2024

The judgment was delivered in open Court today in the presence of the State Attorneys for the Republic, the accused person, and the defence counsel for the accused person.



A.E. MWIPOPO

JUDGE

19/03/2024