

**IN THE HIGH COURT OF TANZANIA
(GEITA SUB REGISTRY)
AT GEITA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 80 OF 2024**

REPUBLIC

VERSUS

JOHN PHILIPO LUGWISHA

JUDGMENT

Last order 16/4/2024

Date of Judgment 25/4/2024

MWAKAPEJE, J.:

John Philipo Lugwisha is accused of murdering Anastazia Katwiga contrary to Sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. It is alleged that the incident occurred on 03rd March 2021 at about 20:40hrs at Butobela Village in Chato District of Geita Region. The accused pleaded not guilty to the charge.

In proving the charge, the prosecution paraded three witnesses and tendered the Postmortem Examination Report and a sketch map of the crime scene, which were admitted as exhibits P1 and P2, respectively. In short, Daudi Makoye (PW1) stated that on the material date at about 20:40hrs, he (PW1), Anastazia Katwiga (the deceased who was PW1's mother), Kamuli Shinje and Maximilian Kakula were watching TV at the deceased's house. PW1 retired to his own house to sleep but was later awakened by a knock on his door from the accused and two others seeking shelter for the night. PW1 recognised that it was the accused with the assistance of the moonlight.

Despite their proximity to their own homes (the family of the accused and that of PW1), PW1 found it odd and consulted his mother, who advised him to take them to a ten-cell leader. As they set off, the accused requested water, allowing PW1 to recognise him clearly in the solar light at the doorpost of his mother's house. However, PW1 noticed only the accused accompanying him, and when he inquired why others

were not with them, the accused responded that they might be hungry and could be eating groundnuts under the mango tree. At about 20 paces from his mother's house, PW1 said to have heard cries for help from his mother, saying she was dying.

The accused forcibly silenced PW1 when he tried to go and offer help and injured his left eye in a struggle. The accused and his companions then threatened PW1 into silence and ransacked their house, stealing the TV. PW1 attributed the deteriorating relationship between his family and the accused to previous disputes over trespassing cattle and threats made by the accused to PW1's family. Additionally, PW1 claimed that the accused confessed to him about his involvement in the murder of PW1's mother. He added that it was at the police station where he disclosed having seen the accused with two other culprits who were unknown to him at their home.

PW2, Inspector William Mbena, testified that he received a phone call from the Butobela Village Chairman, Juma Sonda, about the death

incident. Together with other police officers, he went to the scene of the crime. They found the deceased body lying in her house. He was informed by PW1 that it was the accused person (their neighbour) and two others who killed the deceased.

According to PW2, the accused was not at the scene when he and his colleagues arrived. He instructed the village Chairman to look for him. PW2 took PW1 and Kamuli Shinje, who were injured, to the police station for further interrogation. He testified further that, the next day, they went back to the scene with a medical practitioner for an autopsy. On 5th March 2021, he received a call from the village chairman informing him about the presence of the accused at the funeral, and he went and arrested him with other police officers.

PW3, D/SGT Nimrod testified that on 3rd March 2021, at night hours, He received two persons who were injured and issued them with a PF3 for treatment. The following day, he was assigned a police case file for investigation. He visited the scene and saw a dead body lying on the floor

with wound cuts. He drew a sketch map with the assistance of PW1. After an autopsy, the post-mortem report revealed that the death of the deceased was due to severe bleeding followed by being cut with a sharp object on a posterior neck, and was handed to him. He recorded the statement of the accused person, who denied having committed the offence.

In his defence, the accused person (DW1) testified that on 3rd March 2021, at night, while at his house, he heard screams from his neighbour. In attendance, he found many people at the scene saying the woman was cut by machetes to death. While there, the police officers arrived, saw the body and left. When the police came the following day, they allowed them as the community to proceed with the burial process. Neighbours, including him and others, remained there, participating in the mourning of the death of their neighbour.

On the third day, he was arrested while participating in preparing a meal for mourners. After the arrest, he was informed at the police station

that he was accused of killing Anastazia Katwiga, which he denied having committed. He further stated that in the past, they had a quarrel with his neighbour Makoye Kakulilo (PW1's father) when his (the accused) cows fed on the latter's farm. Still, the same was settled after he compensated them, and they lived a peaceful life as neighbours.

DW2, Meza Kilyabujingi testified that on 03 March 2021 at about 20:00hrs, there were screams in their village from the house of Makoye Kakulilo. Arriving there, he found many people gathering, including the accused person. DW2 stated further that he stayed there for some time with other villagers until the police officers came. On the morning of the next day, at the funeral home, the accused was assigned some duties. Later in the afternoon, the police came in the company of the Doctor, and when they were about to leave, they allowed them to bury the body of the deceased. He averred that he heard the news three days later that DW1 was arrested. In addition, he stated that he had seen the accused

at the mourning house with the help of a solar light, and as villagers, they knew one another.

There is no doubt that the accused person herein is charged with the offence of murder, contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E 2022. To prove their case, it is undisputed that the prosecution has to establish three essential elements pertaining to the charge of murder. Firstly, they must demonstrate that the death of the victim was unnatural, i.e., it occurred due to external factors that are not part of the normal ageing process or disease progression. Secondly, they need to prove beyond reasonable doubt that it was indeed the accused who caused said death. Lastly, it must be established that malice aforethought motivated the accused person when committing the act.

Beginning with the first element, the prosecution has substantiated, through the post-mortem report, which revealed that the death of the deceased was due to severe bleeding followed by being cut with a sharp object on a posterior neck, that the deceased, Anastazia Katwiga, passed

away on 03rd March 2021 at approximately 20:40 hours. It is evident that her demise was not of natural causes but rather resulted from inflicted wounds across various parts of her body. There is no contention regarding the unnatural nature of her death. Prior to sustaining these wounds, the deceased was alive, as attested by PW1, who testified that before retiring to bed, he, along with the deceased and others, were watching TV. Subsequently, he exited the premises, leaving the deceased and two others watching television.

The discovery of the deceased's body, bearing multiple lacerations, submerged in a pool of blood, was corroborated by PW1, who also heard the deceased screaming for her life. Furthermore, both the accused and his witness confirmed that the deceased had expired due to these inflicted wounds. These details unequivocally dispel any doubts regarding the naturalness of the death. Therefore, it is my concurrence that the demise of the deceased was indeed unnatural, thus satisfying the establishment of the first element beyond a reasonable doubt.

To establish the second element, the crucial testimony of PW1 asserts that it was the accused person, accompanied by two other unidentified persons not standing trial, who perpetrated the killing of the deceased. PW1 recounts this based on the accused person physically restraining him as he attempted to aid his distressed mother, who cried out for help during the assault. Moreover, the two assailants joined forces with the accused, wielding a blood-stained machete, and subdued PW1 by menacingly threatening to replicate the fate of his mother. This testimony prompts a pivotal inquiry into whether the accused indeed murdered the deceased. However, it is imperative to acknowledge that the veracity of this entire testimony hinges upon PW1's identification evidence, which attracted the arrest and charge of the accused person.

This tragic event occurred at night at about 20:40hrs. Accordingly, it has been established that visual identification, especially at night, is the weakest evidence, and courts are too cautious about imposing convictions

based on this evidence. In the prominent case of **Waziri Amani v Republic** (1980) TLR 280, it was stated that:

*"The evidence of visual identification is the weakest and most unreliable. As such, **courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight.**" [Emphasis supplied]*

Visual identification has been a critical topic in our jurisdiction. Other than the case of Waziri Amani, the same was deliberated in the cases of **Raymond Francis v. R.** (1994) TLR. 100; **Augustino Mihayo v. R.** (1993) TLR. 117; **Marwa Wangiti Mwita and Another vs Republic** (Criminal Appeal 6 of 1995) [2000] TZCA 23 (12 June 2000); and **Shamir John V R.**, Criminal Appeal No. 166 of 2004, to mention a few.

To clear the possibility of mistaken identity, the Court of Appeal in several cases, including the cases of **Sostenes Nyazagiro @ Nyarushasi** (Criminal Appeal 276 of 2014) [2015] TZCA 134 (9 December 2015); **Samson Samwel vs Republic** (Criminal Appeal 253 of 2017) [2021] TZCA 422 (27 August 2021); and **Chacha Jeremiah**

Murimi & Others vs Republic (Criminal Appeal 551 of 2015) [2019]

TZCA 52 (4 April 2019), has stipulated various factors to be considered in deciding whether the witness correctly identified the accused person.

Expressly, in the case of **Chacha Jeremiah Murimi & Others vs Republic**, it was clearly stated that:

"To guard against that possibility the court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. 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 witnesses 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 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?"

In testing the conditions set, it is trite law that courts are to subject visual identifications to scrutiny where the only evidence relied upon is visual identifications; see the case of **Masana Marwa versus The Republic**; Criminal Appeal No 229 of 2012. In the present case, it was

not disputed that PW1 and the accused are neighbours and have known one another for a long time since they lived in the same village. PW1 further stated that the ordeal lasted for about 20 minutes. He said to have identified the accused at the scene of the crime with the aid of the moonlight when responding to a knock at the door of his house and later, with the assistance of the bright solar light at the doorpost of the home of the deceased. And that he informed the police when his statement was being recorded that it was the accused, together with his colleagues, who murdered his mother.

Now, to start with light, we are told that there was moonlight; however, we were not told how intensity was the same. Further, PW1 informed this court that he identified the accused with the help of the solar bulb, which was bright. He, however, did not tell the distance between himself and the accused with the help of the moonlight and that of the solar light, despite its intensity. Further, PW1 did not tell the size of the area illuminated by the solar light to identify the accused clearly.

This makes me doubt his claims that he correctly identified the accused person. In the case of **Masana Marwa versus The Republic** (*Supra*), it was stressed that:

*It is not sufficient to make bare assertions that there was light at the scene of the crime. The witness must give sufficient details of **the intensity and size of the area illuminated**. [Emphasis Supplied]*

Furthermore, despite PW1's prior knowledge of the accused person, he did not provide a further description of the accused person at the scene to enable a person who encounters a suspect to relate to the description and take necessary action. It has been established under this aspect that it is not enough to state that one knows an accused; one has to describe the accused person at the scene, including his appearance, body posture, type of and colour of the clothes worn during the incident, to mention a few. In the case of **Godlisten Raymond & Another vs Republic** (Criminal Appeal 363 of 2014) [2015] TZCA 431 (9 June 2015), it was provided that:

*"It is now settled that when a court relies on visual identification, one of the important aspects to be considered is to give enough description of the culprit in terms of **body build, complexion, size, attire, or any other peculiar body** features to make the next*

person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime.” [Emphasis supplied]

Despite acquaintance with the accused, the failure by PW1 to state the distance between himself and the accused, the size of the area illuminated by the light, and the description of the accused at the scene renders the prevailing conditions unfavourable for him to identify the accused clearly. In the case of **Juma Salis @ Jonas vs Republic** (Criminal Appeal 263 of 2014) [2015] TZCA 281 (18 February 2015), it was stated that:

*“The question of familiarity will only hold if the conditions prevailing at the scene of crime were conducive for correct identification. If the conditions are not conducive for correct identification, then the question of familiarity does not arise at all. So when the familiarity especially during the night time is raised, the court must first satisfy itself whether the conditions prevailing are conducive for correct identification. **It is not enough to give a bare statement that the witness knew his assailant before the incident. The witness must explain the circumstances which enabled him to identify at the scene of the crime.**” [Emphasis supplied]*

As I delved deeper into the available evidence in this case, I questioned the credibility of PW1's testimony and whether it was the accused who, indeed, perpetrated the crime and was at the scene of the

crime on the material date. According to the PW1 account, his mother instructed him to send the visitors to a ten-cell leader. However, I could not help but ponder why he failed to tell his mother that he would not escort them, considering that one of the visitors, i.e. the accused person, was not only familiar to him but also hailed from the same village and lived nearby. Given their proximity and acquaintance, the accused person presumably knew where the ten-cell leader's house was. If indeed it was the accused, how could PW1 escort him to the place he knows of? To me, PW1 saw someone else apart from the accused, and his testimony about identifying the accused at the scene raises questions about his motive.

Besides, another striking question is why PW1 did not disclose that it was the accused person and his friends who perpetrated the murder of his mother to any individual among those who responded to assist at the scene. It was not until 0100 hrs, when he provided his statement at the police station, that he apprised the police of the accused's involvement in his mother's murder. This also raises an alarm as to his reliability. It is trite law that naming the accused at the earliest possible time boosts the reliability of a witness. In the case of **Jaribu Abdallah vs Republic** (2003) TLR 271, it was established that:

"In matters of identification, it is not enough to merely look at the factors favouring accurate identification; equally important is the

*credibility of the witness. The conditions for identification might appear ideal. But that is not guarantee against untruthful evidence. **The ability to the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor.***" [Emphasis supplied]

In the circumstances of the present case, PW1 named the accused after almost 5 hours at the police station. The contention that he feared the accused could have fled does not hold water since his father and other villagers who responded to the alarm were at the scene before the police came. It is trite law that failure by PW1 to name the known suspect at the earliest possible moment renders the testimony unreliable. See the cases of **Festo Mawata v Republic**, Criminal Appeal No. 229 of 2007; **Venance Nuba & another v Republic**, Criminal Appeal No. 425 of 2013; **Aziz Athmani @ Buyogera v Republic**, Criminal Appeal No. 222 of 1999; **Juma Shabani @ Juma v Republic**, Criminal Appeal No. 168 of 2004; and **John Balagumwa and Two others v Republic**, Criminal Appeal No. 5 of 2013 (**all unreported**). Specifically, in the case of **Festo Mawata v Republic**, it was stated that:

*"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has **never been taken lightly by the courts**. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."* [Emphasis supplied]

Additionally, PW2's testimony regarding his awareness of the accused's presence at the scene contradicts PW1's account. PW2 also stated that he made unsuccessful attempts to locate the accused at the deceased's residence on the night in question, delegating the task of searching for the accused to the Village Chairman. He asserted that the Village Chairman later informed him of the accused's whereabouts three days post-incident.

In my view, the testimony of the Village Chairman holds significant importance in this context to support the contention of PW2. Apart from that, it can be concluded that DW1 and DW2 stated nothing but the truth since they were not challenged about their presence at their neighbour's funeral. Therefore, PW2's contention that DW1 was escaped is baseless. To me, the failure to summon him as a critical witness undermines the strength of the evidence presented. When the prosecution neglects to call material witnesses without reasonable justification, it typically results in an adverse inference being drawn against their case. In the case of **Mashimba Dotto@ Lukubanija vs Republic** (Criminal Appeal 317 of 2013) [2014] TZCA 271 (22 October 2014), it was stated that:

*"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. **If***

such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.” [Emphasis supplied]

Similarly, it is crucial to note that only PW1 provided testimony regarding visual identification in this case. However, in PW1's testimony, it was mentioned that while they were watching TV, other individuals present at the deceased's house included Kamuli Shinje and Maximilian Kakula. It was noted that Kamuli Shinje sustained injuries and was subsequently hospitalised. Kamuli Shinje's testimony would have been pivotal in corroborating PW1's account and shedding light on the events that transpired in the fateful night, as was stipulated in the case of **Mashimba Dotto@ Lukubaniya vs Republic** (*Supra*). It is a rule practice that, in law, a solo witness's testimony of visual identification needs to be corroborated. See the case of **Shadrack Kuhaha vs Republic** (Criminal Appeal 139 of 2015) [2015] TZCA 443 (5 June 2015). Though this fact is not a principle of law, in the circumstances of this case, prudence required that PW1's testimony be corroborated.

Finally, I would like to address the significance of the dispute between the accused and PW1's father as a potential motive for the murder of the deceased. PW1 asserted a connection between his mother's death and a prior dispute his father had with the accused person in 2017.

According to PW1, following the accused's compensation payment to his father, threats of retaliation were made, prompting a report to the village authorities. Conversely, the accused maintained that the dispute was resolved following the compensation payment, and they resumed peaceful coexistence as neighbours. This fact was not disputed by the prosecution.

I find it perplexing that, if indeed the death was an act of revenge, the prosecution neglected to summon a key witness, Makoye Kakulilo or the village chairman, to testify regarding the escalating animosity between him and the accused, potentially shedding light on the motive behind the deceased's murder. Without corroboration of PW1's testimony, it is my humble opinion and with no doubt that the accused person was arrested based on suspicion, which, however grave, can not warrant a conviction. See the cases of **G. Ntinda v. Republic** Criminal Appeal No. 17 of 1991 (Unreported) (CAT); **Daniel Shayo vs Republic** (Criminal Appeal 234 of 2007) [2010] TZCA 120 (26 February 2010) and **Charles Mwinami vs The Republic** (Criminal Appeal No. 451 of 2021) [2024] TZCA 231 (22 March 2024) to mention a few.

Based on the above analysis, I find that the case against the accused person has not been proved beyond a reasonable doubt, and I hereby acquit him of the offence of murder contrary to sections 196 and 197 of

the Penal Code [CAP 16 R.E 2022]. I further order that the accused person be forthwith released from prison unless he is lawfully held.

It is so ordered.

DELIVERED at **GEITA** on this 25th day of April 2024.



G.V. MWAKAPEJE
JUDGE