

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT LINDI

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 02 OF 2019

REPUBLIC

VERSUS

1. ANZIGAR HERMAN DIONES

2. DIONES HERMAN MILUMBA

Hearing date on: 20/3/2020

Judgment date on: 30/3/2020

JUDGMENT

NGWEMBE, J:

In this court, two accused persons namely; **Anzigar Herman Diones and Diones Herman Milumba** stand charged for the offence of murder contrary to section 196 of the Penal Code, Cap 16 R. E 2002. The two are alleged to have formed common intention and took necessary steps to murder the deceased **Teofan Gabriel Mkane @ Likule** on 23rd April, 2015 at the village of Nangunde in Nachingwea District within Lindi Region.

When the information was read over to the accused persons, they pleaded not guilty, hence the prosecution came up full armed with seven (7) prosecution witnesses and used three exhibits, two of them were admitted in court during Plea taking and Preliminary Hearing, that is, Sketch map and Post Mortem Report marked collectively as exhibits P1 and the caution statement of Diones Herman Milumba admitted in court during trial marked exhibit P2.

In a nutshell, the ordeal began with death of **Henrich Diones Milumba**, young brother of the two accused persons on 21st March, 2015. The two accused persons are blood brothers with the deceased Henrich Diones Milumba, who suffered acute blood shortage (Anemia), while attending treatment at Mnero Mission Hospital, unfortunate he died on 21 April, 2015. The burial ceremony, took place on 23rd April 2015. But before burial, some parts of the deceased body, that is, nose and upper mouth, were removed. Accordingly, they suspected one Teofan Gabriel Mkane to be behind removal of those parts. The reason for that suspect is that, when they came home from the hospital with the deceased body, and according to their tradition (Wamwera), the elder brother in their clan should take care or provide security of the deceased body. As such, Teofan Gabriel Mkane was among the elder brothers of their clan, hence appointed to take care the deceased body, Henrich Herman Milumba. Upon removal of the deceased parts, the accused persons and another who is at large, suspected him to be behind removal of those nose and upper mouth of the deceased body.

On 23rd April, 2015, soon after burial ceremony, it is alleged the two accused persons jointly with others, who are at large, inquired more from Teofan Mkane on what exactly happened to the deceased nose and upper mouth. Following that inquiry, Teofan Gabriel Mkane met his death by being beaten and burnt to fire.

Having summarized the back ground of the ordeal, let now proceed to narrate just briefly the evidences adduced in court. On the prosecution side, the first witness was Edward Konrad Malunga, identified as a Christian of 68 years old, residing at Nangunde Village in Nachingwea District with Lindi Region. That on 21/4/2015 he and Teofan Gabriel Mkane (deceased), were assigned to wash a deceased body (Henrich Herman Milumba) for a period of three days, that is, on 21st, 22nd and 23rd of April 2015. They dutifully performed that assignment. However, on the second day, that is, on 22nd April, 2015, they observed a nose and upper mouth of the deceased body were removed. They notified some elders including, Otoman Mkane and Varelian Mikunda. That those parts were eaten by house rates. In the evening of the same date they removed the deceased body from inner room to near the entry door. In the following morning that is, on 23rd April, 2015 they arranged for burial ceremony. That at around 11:00 a.m. the dead body was taken to the grave yard for burial.

Soon after burial, he and Teofan Gabriel Mkane @ Likule were summoned by Anzigar Herman, Diones Herman and Joseph Herman Milumba at the rear part of the deceased parents' house. Almost the whole house and outside ground was full of people mourning the deceased Henrich Herman Milumba. They discussed the absence of nose and upper mouth of the deceased.

Thereafter, he was ordered to leave that meeting, which he complied with, leaving behind Mr. Teofan Gabriel Mkane. Immediate after his departure, he heard Teofan crying for help, hearing that cries, he went straight home to hide himself. He never came back to the scene of crime.

He added that, the two accused persons are well known to him for they are children of his uncle and are living in the same village. The two accused persons were among those who summoned him in that inquiry meeting.

In cross examination, he mentioned the names of those who attended that private meeting as Edward Kondrad, Joseph Herman Milumba, Anzigar Herman Milumba, Dioness Herman Milumba and Likule Mkane. When he left, he could not know who was doing what to whom and that he did not know who did what to Teofan Mkane and for what reason, if any, even the reason for the death of Teofan Mkane was not known to him.

The second prosecution witness (**PW2**) is Anthony Teofan Mkane of 42 years old, Christian living at Nangude village with Nachingwea District in Lindi region. He mentioned the name of his parents as Teofan Gabriel Mkane, and Maria Vincent. He testified that his is an eye witness of the killing of his father Teofan on 23/4/2015. That his father Teofan Mkane was among many villagers who attended the burial ceremony of Henrich Herman. Soon after burial his father and others who participated in washing the deceased body, were summoned with the accused persons to inquire more on the absence of the deceased parts (nose and mouth). He mentioned those who attended such inquiry as Diones Herman, Anzigar Herman and Joseph Herman, Teofan Gabriel and Edward Konrad. He was

close to the meeting about five (5) steps, watching what was happening in that private meeting.

In the cause, Edward Konrad was ordered to leave the meeting. Upon his departure, the three brothers took hand hoes (Ngwamba) and spade (chepe) which were used to dig grave, started beating his father Teofan Mkane almost to death. The accused persons threatened anyone to come close to where they were beating his father.

At a certain point, Teofan Mkane managed to run away towards his house, but they continued beating him in his head and other parts of his body. Further, testified that he saw Anzigar Herman going to the nearby shop, purchased Petrol of half a liter, poured in the body of his father (Teofan), and consequently burnt him. The accused persons were known to him as they are living in the same village. His father Teofan died, while undergoing treatment at Mnero Mission Hospital at around 6: 00 pm on the same eventful date of 23/4/2015.

Moreover, testified that on 27/7/2015, he managed to arrest Diones Herman at Mbondo village and on 9/1/2018 again he participated in arresting Anzigar Herman at Kipara village and transported him to Nachingwea Police Station on the same date at around 11:00 p.m.

In cross examination, he admitted that where they were mourning for the death of Henrich Herman and during burial there were village leaders including the Village Executive Officer (VEO) called Abeid and village militiamen (Mgambo wa kijiji). All witnessed the killing of his father Teofan Mkane but they did not provide assistance.

Mr. Simon Laizer was the third prosecution witness (**PW3**), by virtue of his position as a Resident Magistrate sitting in primary court, he acted as a Justice of the Peace, recorded the extra judicial statement of the 1st accused person, however, the statement was not admitted in court.

DR. Matayo Lawrence Mnelamwana (PW4) of 56 years old, testified that being an Assistant Medical Officer of Nachingwea District Hospital with experience of 32 years on 24/4/2015 examined a deceased body at Mnero Mission Hospital, such body was of Teofan Gabriel Mkane.

He observed that the deceased head had wounds, which caused loss of blood. The source of death was acute bleeding. The Post Mortem Report was admitted and was read loudly in court in language known to everyone.

Mohamed Abdallah Nivako (PW5) as a Ward Executive Officer of Ugawaji Ward in Nachingwea within Lindi region testified on the confession statement of the second accused person. The statement was however, not admitted in court because, the recording faulted certain crucial ingredients constituting an acceptable confession statement.

E.1808 Corporal Rogato (PW6) of 53 years, working at Nachingwea Police Station and an investigator, recorded the caution statement of Diones Herman Milumbe within four (4) hours as required by law. Further testified that on 25/4/2015 he was assigned a file to investigate a murder case. The deceased was identified as Teofan Gabriel Mkane whose death occurred at Nangunde village on 23/4/2015.

That on 24/4/2015 he was among Police Officers together with OCCID who went to Nangunde village where the homicide occurred. They passed,

through Mnero Mission Hospital where the medical Doctor conducted a medical examination of the deceased body, then went to Nangunde for investigation and drawing sketch map and recording statements of witnesses including Anthony Teofan. He mentioned the accused persons as Diones Herman Milumba, Anzigar Herman Diones and Joseph Herman Milumba. Soon after the event, they fled the village to unknown place. However, on 27/7/2015 he was informed by Anthony Teofan Mkane, that one accused called Diones was arrest at Mbondo village about 55 kilometers away from Nachingwea township.

Upon receipt of that information, he went to Mbondo village where he arrived around midnight and found the accused under custody of the ward. He therefore, rearrested the accused and took him to Nachingwea Police station where they arrived on 28/7/2015 at around 2.00 a.m. (midnight). Further testified that he was assigned to record the suspect's caution statement, which assignment he dutifully performed by recording the accused caution statement from 5:50 a.m. to 6: 35 a.m. The statement was admitted and loudly read in court in Kiswahili language.

The last prosecution witness was Ignas Mbunda (**PW7**) of 48 years old and identified as true elder brother of the two accused persons, living at Nangunde village. He testified that they were borne eleven (11) to his mother, but two of them died, nine (9) are still alive. From his father they are two, namely; Ignas Barnaba Mbunda and Stephen Barnaba Victory. He mentioned others as: Telesia, Sabina, Anzigar, Diones, Herman, Joseph, Veronica. The two accused Anzigar and Diones are his young brothers from the same mother but different fathers.

He narrated the burial ceremony of his brother Henrich on 23/4/2015. After burial they came back home to the deceased parents for mourning. The two accused and Joseph, took the deceased Likule behind the house for inquiry on the absence of the deceased nose and upper mouth. Likule was among those who washed the deceased body. Those three people started beating Likule. Likule raised an alarm for help, he tried to help him, but the 2nd accused (Diones) took a hand hoe and tried to beat him, fortunate he managed to run away, out of the place. The two accused persons continued beating Teofan Likule on his head.

In cross examination he admitted to use local brews called "Masimbi" and "Kangala" in his life. At the inquiry meeting, he neither saw Edward Konrad nor Anthony Teofan Mkane. That he was the only person who went to help Teofan when he heard him crying, the rest did not bother.

Further testified that soon after burial, there were many people in the deceased parent's house, including village leaders (VEO), militiamen and many more. That due to multitude of people he could not notice if the cry or alarm was of whom until he arrived to the scene of crime when he saw Teofan being beaten in his head. Seeing that danger, he decided to run away and hide in his house.

Upon closing the prosecuting case, the court with assistance of court assessors, revisited the whole prosecution evidences and found the accused persons having a case to answer. Hence, the court dutifully discharged its statutory duties provided for under section 293 of the Criminal Procedure Act Cap 20 R.E. 2002. Explained to the accused persons their rights, including rights to defend or not to say a word, to defend on

oath or affirmation or otherwise and the right to call witnesses and tender exhibits, if any. Since the accused persons were represented by learned counsel, the defence counsel Mr. Stephen Lekey after consultations with his clients, informed this court that they intend to have only two defence witnesses and would testify under oath. Their evidences are summarized briefly hereunder.

The first defense witness (**DW1**) was Anzigar Herman Diones of 30 years' old who testified that, his mother is Antonila Gayo and his father is Herman Milumba. They were born ten children to their father, but to his mother are twelve. Two of them have died and eight remaining ten (10) of them. He mentioned their names as: Telesia Heman, Veronica Herman, Diones Herman, Sabina Herman, Anzigar Herman, Rosalia Herman, Venant Herman, Joseph Herman and the deceased were Henrich Herman and Ifigeria Herman. At the same time notified this court that his mother had two other children to another father namely: Ignas Mbunda and Stephen Mbunda forming a total of twelve children from his mother.

He narrated the ordeal of sickness of his brother Henrich Herman and the whole process up to Mnero Mission Hospital for treatment. That he was discovered to be suffering from anemia (shortage of blood). Whereby he donated blood with his relatives and the sick somehow recovered, but within short time again he had no blood. While on treatment, he died. Jointly with his relatives, returned the deceased body to Nangunde village for burial ceremony.

Upon arrival at home, the elders appointed Teofan Gabriel Mkane to take care for the deceased body as security guard, while he and his brothers

went to Mr. Valerian Mwigunda to prepare coffin for burial. On 22/4/2015 the coffin was prepared and on the following day, that is, on 23/4/2015 they participated in burial ceremony of Henrich Herman Diones.

That according to Wamwera tradition, the elder brother is appointed to take care for the dead body, since Teofan was one of the elder brother in their clan, was appointed to provide security of the deceased body. However, the deceased parts (nose and upper mouth) were removed.

He denied to beat the deceased Teofan and denied even to go close to the scene of crime. Since there were many people including big number of young boys mourning for the death of their young boy Henrich, it was not ease to notice who did what.

On the same date at about 8:00 pm, he heard that Teofan Mkane is dead, that information was through a phone call from Valerian John. However, he did not attend the burial ceremony of Teofan Mkane because he was nursing his sick wife called Maria Stephen Malimbichi. She suffered for the period of one year and six months before her death, he added.

In cross examination, he admitted that he had no conflict with Teofan, but other people knew that Teofan was the one removed the deceased parts. That he saw a group of young boys following Teofan when he was going to his house, but he did not know what happened there for he never participated. He added that the last day to meet with his brother Joseph was 9/1/2018, the day he was arrested.

The last defence witness (**DW2**) is Diones Herman Milumba of 36 years old of Christian faith. Testified that his mother is Antonila Gayo and they are

twelve (12) children, while two of them died remaining ten (10) namely: Ignas Barnaba Mbunda, Stephene Barnaba Mbunda, Telesia Herman Milumba, Ifigenia Herman Milumba, Diones Herman Milumba, Anzigar Herman Milumba, Veronica Herman Milumba, Joseph Herman Milumba, Rosalia Herman Milumba, Henrich Herman Milumba, and Venati Herman Milumba.

He distinguished that in their birth, they don't have Herman as disclosed by PW7 – Ignas Barnabas Mbunda. The deceased are only two namely; Henrich Herman Milumba and Ifigenia Herman Milumba. He narrated the sickness of his brother Henrich until his demise. That he mentioned Edward Konrad, Antony Mtwara, Mezea Mpunga and Teofan as elders who washed the deceased body for three days before burial and Teofan was also assigned to take care of the deceased body.

In the morning of 22/4/2015, he went with his brother to prepare coffin to a carpenter. It was completed at around 5:00 p.m. with a cost of Tzs 40,000/=. When they turned home, they were told by elders that, nose and upper mouth of the deceased body were removed. He investigated the body and found indeed those parts were removed by sharp instrument. Upon inquiry to the elders, he was told to leave it to the elders.

The following morning of 23/4/2015, they went to prepare grave and they buried the deceased body at around 4:00 P.M. All people proceeded to the deceased parents for traditional contributions of money with a view of settling debts. Thus, he was assigned to settle those debts at Mnero Mission Hospital for Tzs. 86,000/=: Carpenter Tzs. 40,000/= and transportation costs from Mnero to Nangunde Tzs. 45,000/=. He settled

those debts on the same evening and came back home a bit late in the evening.

That he used motorcycle of Isaya Odinga to travel from the village to Mnero Mission Hospital. While he was on the way, he was told that Teofan was beaten by young people, taken to hospital, but around 8:00 p.m. in the evening he was again informed that Teofan dead. The deceased was buried on 24/4/2015, he participated in that burial ceremony of Teofan and indeed he collected even contributions from youth. However, immediate after burial one called Fidorine Octavian Mpunga was arrested as one who participated in beating the deceased to death. He left the village to his uncle at Mbondo village on Tuesday 27/4/2015 and he was arrested on 27/7/2015 at Mbondo village.

When was asked on the caution statement, recorded by Police, he responded that, the statement was made after serious torture by one police officer called Pauli, in the cause of torture he was injured his upper hand and rib, at the same time another police officer called Rogato recorded his caution statement under such torture from Pauli and Milanzi. He disputed the statement as his, instead such statement was of the first arrested person called Fidorine, but not his statement. The finger stamp was made by him under duress and torture.

Having summarized the testimonies of both parties, the learned counsels were afforded an opportunity to make their final submissions. Briefly, the learned State Attorney Yahya Gumbo in assistance of Mr. Godfrey Mramba, argued strongly, that the accused persons stand charged for killing Teofani Mkane on 23/4/2015, with malice aforethought at the village of Nangunde in Nachingwea District within Lindi Region. The prosecution

was armed with seven (7) witnesses and three exhibits, which established a prima facie case and proved it to the standard required. He referred this court to article 14 of the Constitution of United Republic of Tanzania, that every person has a right to life. Since Tanzania is one of the civilized countries in the world, should not allow anyone to take the law on his hands and whoever kills such act must meet with deterrent response.

Further, argued that the prosecution witnesses were reliable for they witnessed the event of killing the deceased Teofan Mkane. That the accused were properly identified and recognized by credible and reliable witnesses. According to the available evidence, Teofan Mkane was murdered on 23/4/2015. PW1 and PW2, PW4 and PW7 testified same. The evidence of PW4 proved that the deceased was murdered. PW2 & PW7 were eye witnesses of the event.

PW1 Edward Konrad was present when Teofan was summoned by the accused persons to be interrogated on the disappearance of nose and upper mouth of the deceased Henrich Herman, while PW2, witnessed the whole event done by the accused persons. Therefore, PW1, PW2 and PW7 evidenced the event taking place on a day light by the accused persons. Since both were relatives especially PW7, a brother of the accused persons, their identification and recognition were correct. Even the weapons held by Diones and Anzigar were properly identified, thus vitiating any mistaken identity. He referred this court to the case of **Criminal Appeal No.273 of 2017 Godfrey Ndimba and 2 others Vs. R.** the circumstances of this case is similar at page 6 of the judgement, the issue of identity prior to the incident and on the incidence proved proper identity of the accused.

Another important element is confession of one accused person before corporal Rogato (PW6) as per exhibit P2. Such confession was obtained legally as per section 27(1) of the Evidence Act. Thus, in criminal cases, the best evidence comes from the accused person. That the recording of that caution statement was made under section 57 instead of section 58, but the two may be used interchangeably. He referred this court to **Criminal Appeal No.5 of 2004 Ramadhan Salum Vs. R**, at page 7.

On “malice aforethought”, the State Attorney argued that section 200 of the Penal Code, provided circumstances which “malice aforethought” may be derived. Also referred this court to **Criminal Appeal No.46/2016 Charles Bode Vs R**, and in the case of **Enock Kipela Vs.R. at page 19**. The Court of Appeal provided seven (7) circumstances of the accused to prove malice aforethought. Submitted that the prosecution witnesses proved the common intention of the accused persons to kill the deceased Teofan Mkane.

On defence side, the learned advocate Stephen Lekey forcefully, submitted that upon hearing all witnesses, the court should find the accused not guilty to any offence and order an immediate release of the accused persons for the prosecution have failed to prove the case beyond reasonable doubt.

He rightly, pointed out a fundamental rule of criminal cases, that an accused person is not found guilty because of his weak defence, rather on strength of the prosecution evidences. Thus, raised two issues for determination: -

(1)Who killed Teofan Mkane.

(2)Why did he kill.

In the 1st issue, he argued that the prosecution failed to prove who killed Teofan. There were three eye witnesses PW1 and PW2 and PW7. However, all were not credible witnesses and did not witness who did what to whom. He justified his assertion by pointing to the testimonies of PW1 that ran away before the event as he testified in this court. PW1 only heard noise, while he was running away to hide in his house. PW2 likewise, testified in this court that he was telling lies, he did not see who killed his father. PW7 was counting contributions, thus heard voice and went to the scene of crime, but was ordered to go back and ended up hiding in his house.

He concluded that the prosecution failed to call eye witnesses who identified the accused at the scene of crime. He referred this court to the case of **Waziri Aman**. That virtual identification is very weak and unreliable and the court should not act on it unless all mistaken identities are eliminated, he added. Also he referred this court to the case of **Yohana Kurwa alias Mwiguru and others Vs. R. Criminal Appeal No.192 of 2015**. In this case the event occurred during daylight and witnesses knew the accused persons. The witnesses did not say, the distance they were from the scene of crime, failed to describe dressing code of the accused persons, they did not describe time spent in observing the accused persons.

Further argued that there was no prosecution witness who took initiative to report and mention the name of the accused on the eventful date to neither police nor village authorities. Police arrived in the afternoon on 24/4/2015

but the event occurred on 23/4/2015, no witness reported to the village leadership. Also corporal Rogato, failed to disclose exactly who told him that the accused persons were involved in killing the deceased.

There is no specific rule to determine truth and reliability of a witness. In the case of **Nyaku Boniface Vs R. Criminal Appeal No.434 of 2016 [CAT] Mwanza**; one of the credible witness is demeanor which is under the domain of the court itself, he submitted. In the case of **Rashidi Shaban Vs. R, Criminal Appeal No.310 of 2015** referred in the case of **Silas Sendayebuye Nsagabago Vs DPP Criminal Appeal No. 184 of 2017**, the court considered whether the evidence of a witness is consistent, his memory and the mental state of the witness. He linked up with the evidence of Ignas Mbunda (PW7), who failed even to remember the names of his young brothers borne from the same Mother, while he is the elder brother in that family. Failed even to mention names of the accused persons, such a witness how can he remember an incidence of 2015, he asked. Also disqualified the evidences of PW7 that if he cannot remember his family members not only by names, but even by numbers, how can he remember an incidence occurred in year 2015?

Further argued that PW2 on cross examination, admitted that he was purely a liar and whatever he said was purely lie. That the event occurred in a midst of multitude of people, PW1, PW2 and PW7 testified that not only there were village leaders, but there were village militiamen. In such circumstances, why only three young boys were mentioned as ones who killed Teofan Mkane without those leaders taking any immediate action to rescue or arrest those offenders on the sport?

On exhibit P2, the learned advocate counted it as irrelevant for it was recorded under duress and was done under section 57 of Criminal Procedure Act, instead of section 58 (1) (b) of CPA. He referred this court to the case of **Seko Samwel Vs. R, [2005] TLR 371 [CAT]** the court allowed the appeal because section 58 was not complied with. In this trial however, DW2 repudiated that statement due to coercion and torture. He also referred this court to the case of **Ndarahwa Chilanga and Another Vs. R, Criminal Appeal No.247 of 2008 (CAT) Mwanza.**

Failure to object before the document is admitted does not barred the accused to retract or repudiate it at trial. There is no law prohibiting it, since he repudiated, competent corroboration is required to enable it to be acted upon. In the case of **Mkubwa Said Omari Vs. SMZ [1992] TLR 365** and in the case of **Nibushuu alias Dominic and Another Vs R [1995] TLR 97 at page 103.** There is no evidence corroborating that statement, he rested his submission.

Having summarized the legal arguments of learned counsels, I have no doubt in my mind that in homicide cases like this one, there are fundamental, elements, which must be established and proved; that there must be a deceased person whose death was not natural; that the accused must be linked with the killing of the deceased person; that the killing must be actuated by "*malice aforethought*". In this case all these elements are established and proved save on whether the accused were the one who actuated the killing of Teofan Gabriel Mkane. This is a question of fact provable by evidences. May be it is important to discuss a bite more on the phrase "*Malice Aforethought*" It may be established by the circumstances leading to the death of the deceased. Among them are provided for under

section 200 of the Penal Code. Likewise, there are numerous precedents of this court and of the Court of Appeal in this issue including; in the case of **Elias Paul Vs. R, Criminal Appeal No. 7 of 2004** and in the case of **Enock Kipala Vs. R, Criminal Appeal No. 150 of 1994** where the Court of Appeal had this to say:-

"Usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be

ascertained from various facts, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing"

Therefore, intention of the killer may be established based on those circumstances. In respect of this trial, the first issue is answered in affirmative, that Teofan Mkane was killed on 23/4/2015. The most difficulty question for determination is who murdered Teofan Gabriel Mkane @ Likule? In answering this pertinent question, I find imperative to raise and answer some legal issues pertaining to this trial as a whole.

1. Whether the accused persons participated in killing the deceased;

2. If the answer is in affirmative, then whether the act of killing the deceased was actuated with malice aforethought; and
3. Whether the prosecution dutifully established and proved the offence of murder to the standard required by law, that is beyond reasonable doubt.

In answering these issues, I find suitable to begin with the last issue, which in principle lay down basic duty of the prosecution. As is a cardinal rule of practice, that the prosecution bears the burden to establish and prove criminality of the accused persons to the standard required by law, which standard is beyond reasonable doubt. Always the prosecution evidence must be cogent enough leaving no doubt to the criminal liability of the accused persons, linking them with murder of the deceased. The prosecution must produce credible and reliable witnesses whose evidences irresistibly point to none save only to the accused persons. This position was repeatedly stated in many precedents including, in the case of **Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007** (Unreported); **Nathaniel Alphonse Mapunda and Benjamini Alphonse Mapunda V. Republic [2006] T.L.R. 395** and in the case of **Yusuf Abdallah Ally Vs. R, Criminal Appeal No. 300 of 2009** (Unreported).

Always in criminal cases, there must be credible evidences linking the accused persons with the offence committed. When there are unshakable and credible evidence directing to none, but to the accused persons and in the absence of clear explanation from the accused persons to contradict or raise reasonable doubt, the court will obvious convict them and sentence

according to the seriousness of the offence committed and to the dictates of law.

Undoubtedly, murder is among the most serious offences in our society, when proved to the standard required attract punishment equal to the will of Almighty God (the Creator). Section 197 of the Penal Code provide only one sentence, that is, death by hanging. Therefore, its evidence and proof must be unshakably clear, leaving only remoteness possibilities or negligible errors, which may be neglected by any person confronted to decide on same. This position was also considered in the case of **Republic Vs. Matei [1971] H.C.D No. 451**). Unfortunate that duty is performed by the prosecutors who were not present or eye witnesses at the scene of crime. Thus, a watertight evidence from those who witnessed the event is required to convince the conscience of the court not to decide otherwise, but to convict the accused persons and sentence them according to the requirement of law.

On the other hand, it is a legal position, that the burden is not upon the accused to prove his innocence. All that an accused need to do is not more than to create in the minds of the court reasonable doubt as to the truth of the story. In the case of **Said Hemed Vs. R, [1987 TLR 117 (CAT)**, the court had similar position.

Without losing sight, always, an accused person cannot be convicted because of his weak defence, rather is on unshakable strong prosecution evidence proving the case beyond reasonable doubt. This position of law was rightly pronounced in the cases of **R Vs. Alistaliki Msumbuku [1967] H.C.D. No. 343**; and in the case of **Moshi Rajabu Vs. R,**

[1967] H.C.D. No. 384. It was further emphasized by former Chief Justice Georges in the case of **Fanuel s/o Kiula v. R. (1967) HCD at 369** where he said:-

"It is not necessary to accept the evidence of the accused in order to find him not guilty. All that an accused need to do is to raise a reasonable doubt as to his guilt".

Having that basic legal principles in mind, the question remains, whether these principles apply in this case at hand? To answer this question, I am sure the first issue raised above will likewise be answered. In answering the first issue, I must deeply analyze the evidences adduced in court in light of the above legal principles.

In this case, the prosecution, fully relied on PW1, PW2 and PW7 who seem, in one way or another, witnessed the alleged beating of the late Teofan Mkane. Though their testimonies started somewhere and ended somewhere without explaining the whole story from the beginning to the end, but are the ones witnessed what happened to the deceased Teofan Mkane. PW2 alleged to witness the ordeal of murder of his father from the beginning to the end. He explained that he was about five (5) steps from where his father was questioned and later beaten to death.

Admittedly, testified that there were many people gathered to mourn the death of Henrich Herman, including village leaders (VEO) and village militiamen. This piece of evidence is supported by PW1 & PW7. Applying the legal principle set forth in the case of **Goodluck Kyando (Supra)**, that every witness should be entrusted, believed with credible evidences, it

means the testimonies of Edward Konrad (PW1) should be credible and reliable, that upon being ordered to leave the inquiry meeting, he went straight to hide in his house, instead of reporting that evil to the village leaders and militiamen or to many people gathered in that house. Instead he went straight to hide in his house not knowing what happened to the deceased Teofan Gabriel Mkane.

Likewise, PW2 testified that he witnessed the killing of his father because he was just five (5) steps away from the inquiry meeting. He pointed the two accused persons and one Joseph Herman, who is yet to be arrested, participated in beating his father. However, in cross examination told this court that he was telling lies. That he did not witness when the accused started beating his father. This piece of evidence seems to be correct because, under normal circumstances, PW2 was expected to act reasonably by either, raising alarm for help or taking serious action to rescue his father or rash to inform the village militiamen on the evil being done to his father or to the Village Executive Officer and report such criminality to his father or to other village leaders or to the accused parents on what their sons are doing to their relative Teofan Mkane. Surprisingly, he took no action. If I may take his testimonies as true and reliable, it means PW2 was a spectator of the killing of his father. Since he watched the ordeal of killing his father from the beginning to the end, being only five (5) steps from the scene of crime without taking any action. Such inaction tells a lot because it is unusual, unacceptable and amounts to aiding or abetting the offenders. Thus, critically the evidence of PW2 leaves a lot to be desired, if at all, he was present, witnesses and what he told the court is true and should be considered as credible witness in this case.

Even if time has passed since the occurrence of the event to the date of testimonies in court, yet such fundamental piece of evidences cannot easily be forgotten, especially an event which occurred to his father. I find difficulty to believe his testimonies in court. I would understand the action taken by PW7, when he heard cries, acted immediate to go to the scene of crime and tried to rescue the deceased.

Considering the evidence of PW7, likewise, testified that almost the whole village dwellers, including their leaders and militiamen were around the scene of crime, but did not take any action to rescue the deceased save himself who decided to go and rescue life of the deceased Teofan Gabriel Mkane. If I take, PW7 as truthful, credible and reliable witness, which I think so, it means there were prearranged killing of the deceased Teofan Mkane by the whole village, including their leaders and militiamen. Had they not prearranged that killing, they ought to have, first take an undertaking to rescue the deceased, arrest the suspects on the very scene of crime and or before or soon after the incidence and call police immediately. Instead, the whole multitude of people were paralyzed, became inactive and left the alleged murderers free to do whatever they wished, until they were arrested some months and years later on. Such inaction tells a lot in this case.

Moreover, it was expected that if village leaders, like VEO and militiamen were present on the scene of crime, under normal circumstances, it was expected to be witnesses in this court, testifying what exactly happened and what as leaders, did to rescue the deceased and to arrest the culprits. In their absence, such pertinent piece of evidence is missing. Of course,

the prosecution is free to choose who should be a witness of what fact. But it is a settled principle of law in our jurisdiction, that failure to call key witnesses, like VEO and any of the alleged militiamen who were present on the scene of crime, such choice has adverse inference if at all they were present. Their Lordships, Mapigano Ag J.A, Makame and Ramadhani JJA in the case of **Azizi Abdalah Vs. R, [1991] TLR 71** held:-

*“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 on 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*

Another serious issue for consideration is on proper identification of the accused persons in a circumstances of multitude of people. According to PW1, PW2 and PW7, the event occurred during daylight and in the presence of many people or in the presence of the whole villagers. Thus, vitiating mistaken identity. However, the question is how the two accused persons were singled out at the center of multitude of people?

Justice Kitusi in **Criminal Appeal No. 93 of 2016, Ng’ugo Said & 2 others Vs. R**, considered extensor on identification of persons in a group of angry moving people. He sought guidance from the decision of the Court of Appeal in the case of **Hamisi Shaban @ Hamisi (Ustadhi) Vs. Republic**, the Court of Appeal quoted with approval a Gambian Case of **Batch Samba Fye Vs. The State** (SC Criminal Appeal No. 2 of 2010) (unreported) held:-

"It is desirable to note that not all witnesses' Evidence and number of exhibits tendered, on the evaluation of evidence ... attract equal weight and or attention"

His lordship proceeded to hold that on the basis of the evidence available, the victims were manhandled and assaulted. What remains in dispute is who perpetrated the assault even if it be common assault. Although the incident took place in broad daylight the prosecution has not stated, how the victims managed to single the three appellants out of over fifty angry people, while being chased by over five motorcycles. His lordship concluded that the trial court did not address itself to the fact that the prosecution witnesses could not have singled out the appellants from a large group of an angry mob and while running. Lastly the appeal was allowed, quashed the conviction and ordered an immediate release of the appellants.

In similar vein, the Court of Appeal in the case of **Yohana Kurwa** (supra), provided seven guidelines on proper identification including; distance from the scene of crime to where the witness stood; time spent in observing the event, dresses of the accused when committing the crime etc.

Likewise, in the case of **Jaribu Abdallah Vs. R, [2003] TLR 271 and Marwa Wangiti Mwita & Another Vs. R, [2002] TLR 39** the court of appeal observed that:

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The condition for identification

might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor"

In this case, slightly differs with the cases above, because PW1 alleged to participate in that inquiry meeting, but left before the event and went to hide in his house. The reliability of PW2 is highly compromised due to his inaction when he saw evil being done to his father and did not say in court if at all he mentioned the suspects at the earliest possible time. Further PW2 testified that he was just five (5) steps away from the scene of crime, but did not describe the attire of the suspect and if there were other people going towards the scene of crime or were other people watching the crime being committed.

PW7 as elder brother of the accused persons, likewise, failed to explain clearly who dressed what and who was doing what to whom, when he attempted to rescue the deceased. Again instead of reporting the incidence to the available authorities, including village government authorities and police, or raising alar, he went to hide himself in his house. What does this mean in this case?

More information and explanation were expected from police investigator PW6, unfortunate, to my considered view he failed to conduct any viable investigation and did not testify in court, how he investigated the incidence, how he came to know the accused that were the ones involved in killing the deceased? There is nothing like that. I would read the nature of questions asked by wise assessors to PW6 that intended to unearth

investigative information on the subject matter, which information was not forthcoming. In cross examination, PW6 was asked on the instruments used in the killing of the deceased, he mentioned hand hoe (Ngwamba) and spade, but in his investigation, failed to find them and produce in court. Thus, indicating poor investigation. Such inaction of police investigators contributes to rampant criminality in the society, leaving innocent citizens in serious risk from hard core criminals.

Therefore, lack of proper identification of the accused, together with poor investigation, obvious the court is put in a serious doubt on the involvement of the accused in such murder.

In this case, the prosecution relied on the caution statement of the second accused, which was admitted in court as exhibit P2. However, the statement was recorded under section 57 instead of section 58 of the Criminal Procedure Act, which the two sections provide distinct procedures of recording caution statements. Such caution statement ought to be recorded under section 58. Secondly, the statement was vehemently repudiated by the 2nd accused based on two reasons, that the statement was made under duress and torture from Police called Pauli and Milanzi. Also testified that the statement was of the first arrested person in the incidence called Fidorine. In the whole trial there is no one testified on the said Fidorine save the 2nd accused.

I am aware that caution statement which amount into confession may lead into conviction as was so decided in **Criminal Appeal No. 5 of 2004 Ramadhan Salum Vs. R**, the Court of Appeal supported the conviction meted by the trial court based on the accused confession. However, the

facts of that case and in this trial is distinguishable. In this trial the accused strongly repudiated his confession before police by raising quite strong reasons including duress, torture and involvement of Fidorine as first suspect in that killing, which same was not disclosed by prosecution. In the absence of voluntariness and true narration of how he was involved in such killing, such statement won't amount into a confession. In such circumstances an independent witness was required to corroborate it. I would therefore, conclude that the caution statement falls short of legal requirements to support the prosecution case.

Consideration of the defence evidence is only viable when the prosecution proves the case beyond reasonable doubt.

The court assessors, wisely considered in totality of the evidence adduced in court by both parties. Unanimously opined that the accused persons, did murder the deceased Teofan Gabriel Mkane. The Assessor Mohamed A. Nassoro conclusively opined that the two accused persons, were seen at the scene of crime and were properly identified by PW1 and PW2 to have participated in beating the deceased Teofan Mkane, thus are liable to murder. Bibie A. Nandonde opined that the two accused persons, participated in beating the deceased, hence liable to murder; and Zainabu Hamisi Manjambwa opined that the accused persons are liable to murder, due to the evidences of PW1, PW2 & PW7.

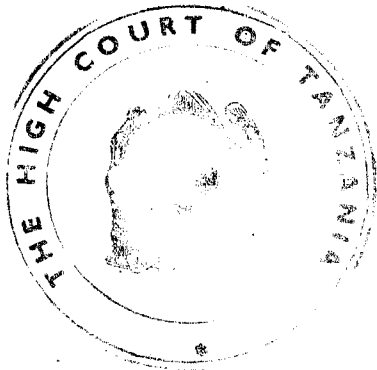
However, considering all the relevant factors testified in court by both parties and considering objectively the assessors' opinions, I have a dissenting views that, firstly, the case was not proved to the standard required, that is, beyond reasonable doubt; secondly, PW1, PW2 and PW7

were not per se eye witnesses and their inaction tells a lot in this case; thirdly, by way of repetition, the evidence proving murder case always must be unshakably clear, linking the accused persons with the offence committed. Any reasonable doubt always must be in favour of the accused persons. The reason for requiring that high degree of proof, is the consequences of it when same is proved to the standard required, that is death by hanging. To my considered view unfortunate this case was not one, which was proved to that standard as required by law.

I accordingly, find **Anzigar Herman Dionis and Diones Herman Milumba** not guilty of the offence of murder. Subsequently they are hereby acquitted and should be released from custody forthwith unless lawfully held.

It is so ordered.

DATED at LINDI this 30th day of March, 2020

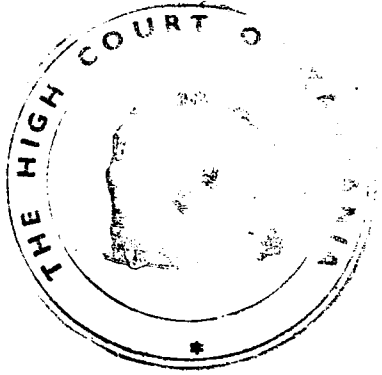


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P.J. NGWEMBE
JUDGE
30/3/2020

Judgement Delivered at Lindi on this 30th day of March, 2020 in the presence of Yahya Gumbo for the Republic and in the presence of Stephen Lekey for the two accused persons.

Right to appeal to the Court of Appeal explained.



A handwritten signature in black ink, appearing to be "P.J. Ngwembe", written over a horizontal line.

P.J. NGWEMBE

JUDGE

30/3/2020

ASSESSORS

1. MOHAMED A. NASSORO;
2. BIBIE NANDONDE; AND
3. ZAINABU HAMIS MANJAMBWA.